CONDENSED REPORTS

OF DECISIONS

IN THE SUPREME COURT OF OHIO.

CONTAINING

ALL THE CASES DECIDED BY THE COURT IN BANK FROM ITS ORGANIZATION TO DECEMBER TERM, 1831, WITH CASES DECIDED UPON THE CIRCUIT AND ORDERED TO BE REPORTED BY THE JUDGES; AND INCLUDING ALL THE DECISIONS IN THE FOUR FIRST VOLUMES OF HAMMOND'S REPORTS, OMITTING ONLY THE ARGUMENTS OF COUNSEL.

WITH

A NEW AND MORE COMPLETE INDEX TO THE WHOLE.

EDITED

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COLUMBUS:

PUBLISHED BY ISAAC N. WHITING.

1832.

NAMES OF CASES.

RULES

OF PRACTICE IN BANK.

ADOPTED DECEMBER TERM,

1823.

1st. When a question shall arise, in the Supreme Court of a county, which shall be reserved for decision at the session to be holden by all the judges, at Columbus, a memorandum thereof shall be made on the minutes, and an entry shall also be made that the suit is continued for consideration and decision at Columbus.

2d. In all cases, thus reserved and continued, the court shall direct what papers on file shall be copied, and what original papers shall be sent to Columbus, if either party make application for such direction; but if no such application be made, the original papers shall be sent.

3d. At any time, after the first day of November, the clerk shall deliver the papers of the cause, sealed up, to the counsel of either party, who may first apply for the same; taking his written receipt and agreement to deliver such papers to the court, sitting at Columbus.

4th. When judgment is rendered, or an order or decree made in a cause, by the court, sitting at Columbus, the clerk of the Supreme Court of Franklin county, shall enter such judgment, order or decree on the minutes, and shall make a transcript thereof, under the seal of the Supreme Court, which transcript, with the papers brought up in the cause, shall be delivered, sealed up, to the attorney of the party, who shall apply for the same, taking his written receipt, and agreement to deliver the whole to the clerk of the Supreme Court, from whence the suit was brought.

5th. The personal application of the counsel, for papers in the cause, shall not be necessary, if he send his written order, and receipt and agreement required by the foregoing rules.

6th. The clerk of the Supreme Court of the proper county, upon receiving back the transcript and papers, shall deliver up the receipt given for the same, and shall immediately copy into his minutes of the proceedings of the Supreme Court, the transcript aforesaid, and all subsequent proceedings in the cause shall be the same as if the judgment, order or decree had been entered during the sitting of the court in the proper county.

7th. Where the question reserved may have been argued in the proper county, the court will nevertheless receive written arguments from either party, in all cases where notice is given to the opposite party, that a written argument will be presented.

8th. All arguments shall be opened and concluded in a regular and proper order. The counsel having the affirmative, shall furnish to the opposite counsel, a note of the points made, and authorities cited, with an abstract of the argument; after receiving which, a like note of points and authorities, with an abstract of the argument in answer, shall be furnished to the affirmative counsel. The counsel, having the affirmative, shall furnish the opposite counsel with the notes and abstract aforesaid, at least ten days before the sitting of the court, in all cases where the question shall have been reserved twenty days before the commencement of the said session.

9th. Where, after the examination of written arguments, the court are not satisfied, they will direct an argument at bar upon any particular point. In no other case shall an argument at bar be heard.

10th. When any suit, continued for consideration and decision at Columbus, upon a question reserved, shall not be brought up to said court by either party, it shall stand continued to the next term of the Supreme Court, in the proper county, and shall be proceeded in at such next term as other causes continued to that term.

11th. If the order made in any cause by the court at Columbus, be not final, but leave the cause to be further proceeded in before final judgment, it shall stand for such further proceedings to be had at the next term in the proper county, and shall be prepared for trial in the same manner with other causes.

12th. The clerk's and sheriff's fees for services performed in attendance upon the session of the court at Columbus, shall be the same as for similar services performed at the sitting of the court in the county, to be taxed in the same manner in the bill of costs, and shall be paid on delivery of the papers, by the person obtaining the same.

RULES,

Of Practice on the Circuit.—Adopted December Term, 1823.

1st. In all chancery cases set for hearing, upon bill and answer, or upon bill, answer, replication and testimony, the complainant's counsel shall prepare a brief, containing an abstract of the case with the points and authorities relied on, to be presented to the court on the first day of the term, at the opening thereof; and if such brief be not prepared and presented, the cause may be either dismissed or continued at the costs of the complainant or his counsel, as the court may direct.

2d. In all cases in chancery set for hearing, upon any plea or demurrer, the party pleading or demurring shall prepare or present the brief; and if such brief be not prepared and presented as aforesaid, the plea or demurrer may be overruled at the costs of the counsel, for the party pleading or demurring, and the cause shall be finally heard, or continued, at the discretion of the court.

3d. In all cases at law, to be determined by the court, upon writ of error demurrer, or plea of nul tiel record, the counsel for the party holding the affirmative, shall prepare and present to the court, on the first day of the term, a brief containing the points and authorities relied on.

4th. Unless the law shall otherwise direct, all depositions may be opened in the clerk's office, by the clerk, at the request of either party, or his counsel.—The clerk shall endorse upon the depositions upon what day and at whose request they were opened, and they shall remain on file for the inspection of either party.

5th. No exceptions to depositions for other causes than the competency of the witness, or the competency or relevancy of the testimony, shall be heard, unless the same be made in writing, and notice thereof given to the opposite counsel, before the cause is called for trial.

6th. No exceptions to depositions which were read on the trial, in the court of Common Pleas, for other causes than the competency of the witness, or the competency or relevancy of the testimony, shall be heard in this court, unless the same was made on trial in that court, and noted in writing.

7th. Where depositions are in court prior to the continuance of a cause, no exceptions shall be taken to such depositions, unless the same be filed with the depositions in the Clerk's Office; or notice thereof in writing given to the adverse party or his counsel, within six months from such continuance, except for incompetency or irrelevancy.

8th. A notice to take depositions on a day in term time, shall not be considered a reasonable notice.

9th. In all cases, in which both parties have attended, and examined and cross-examined a witness, they shall be considered as having a joint interest to the deposition, and either party shall be at liberty to use it on trial.

10th. In the trial of causes, but one counsel on each side shall be permitted to examine a witness; and no witness, once dismissed from the stand, shall again be called, until the other testimony is gone through, except at the request of a juror, or by the order of the court.

11th. When application is made to the court, or a judge in vacation, for the allowance of a writ of error, the party applying shall present to the court or judge a certified copy of the record, and an assignment of errors, which copy and assignment shall be returned to the court with the writ of error.

RULE IN BANK,

Adopted December Term,

1827.

It is ordered that in all cases reserved for consideration and decision at the Special Session more than thirty days before the first day of the session, it shall be the duty of the party holding the affirmative, to cause the record, exhibits, and depositions, if any, and a transcript of the points relied on, to be filed with the clerk at Columbus on the day preceding the first day of the session, on the penalty of the payment of all the costs that may have accrued from the commencement of the suit.

RULE IN BANK.

ADOPTED DECEMBER TERM,

1831.

That in all cases where oral arguments are heard in this Court, the Counsel holding the affirmative, shall before the arguments are commenced, furnish each of the judges with an abstract of the case, and a brief of the points and authorities relied upon; printed or written in a legible hand; and the opposing counsel shall furnish like briefs of the points and authorities relied upon on the negative.

RULES

IN BANK, ON THE CIRCUIT, AND FOR THE COMMON PLEAS.

ADOPTED DECEMBER TERM,

1831.

1. *Ordered*, That when application is made for admission to the Bar, the applicant shall furnish the Court with the certificate of his moral character and legal qualifications, and with written evidence that the person applying is twenty one years of age, and a citizen of the United States.

2. That no Attorney or Counsellor of this Court, or any Clerk of the Court or Sheriff, shall be received as bail or security in any cause in Court.

3. That hereafter the Clerks of the Courts of Common Pleas and of the Supreme Court, shall in their cost books, minute in separate columns, the costs occasioned by each party to the suit.

4. No papers or records filed in Court, or in the Clerk's office, shall be taken therefrom unless by leave of the court, and each party may have a copy of his adversaries pleading, the expense of which may be taxed in the bill of costs.

5. No deposition taken in a Chancery suit, shall be read at the hearing, unless taken at least ten days before the commencement of the Term, or by consent, except those directed to be taken by the court.

6. In all cases reserved for decision at the Court in Bank, the counsel holding the affirmative in the matter to be heard, shall, before the cause is called on, furnish each member of the Court with an abstract of the case, containing the substance of the pleadings, facts and documents on which the parties rely and the points of law and facts intended to be presented in the argument; which abstract shall be legibly written or printed.

7. In all cases where any person is admitted to defend in ejectment, in place of the casual ejector, he shall be required to confess the lease, entry, and ouster, to admit himself in possession of so much of the premises as he defends for, defining the extent and boundaries of that possession, and to plead not guilty, all which shall be reduced to writing and signed by counsel, whereupon the issue shall be considered as made up, without any charge of the declaration.

8. Where counsel claim the privilege of making oral arguments in any cause in Bank, they shall file with the papers in the cause, notice of such intention, or the cause will be considered as submitted upon written arguments.

9. The last clause of the Ninth Rule heretofore published is rescinded.

DECISIONS

OF THE SUPREME COURT OF OHIO,

UPON THE CIRCUIT.

JUDGES McLEAN AND HITCHCOCK.

1821.

LESSEE OF MOORE *v.* VANCE.

It is a well settled rule that when a law enacts a thing to be done different from the same thing required *by* a *former* law, the first thereby becomes repealed without any direct expression of such intention by the law-making power.

The ordinance of Congress of 1787 requiring deeds to be attested by two witnesses, was virtually repealed by the law of 1798.

From the 1, August 1798 to 1 June 1805, subscribing witnesses were unnecessary, if the deed were acknowledged by the grantor.

An acknowledgment, taken by a Judge of the Territory, while absent from the territory, but within the United States, is good.

This was an action of ejectment brought to recover three hundred acres of land, in the county of Franklin.

The plaintiff exhibited in evidence the copy of a patent from the United States to Jonathan Dayton, bearing date in 1800; a power of attorney from Dayton to E. Bonham, dated March 4, 1806, authorizing the sale of three hundred acres of land to the lessor of the plaintiff, which is the same in controversy; and a deed from Dayton, by his attorney, to Moore, dated 9th April, 1806.

The defendant offered in evidence a letter of attorney from Jonathan Dayton to himself, dated August 3d, 1802, empowering him to sell four thousand acres, of which the land in controversy is part; a deed from Dayton, by his attorney, Joseph Vance, to his brother Alexander Vance, for four hundred acres, dated the 2d June, 1803, duly acknowledged and recorded in Franklin county, but *without attesting witnesses.* To the last deed the counsel for plaintiff objected; but the objection was overruled and the deed admitted in evidence. The defendant then exhibited a deed from Alexander Vance to himself for the land in dispute, which was dated in 1813, and duly executed, acknowledged, and recorded. The plaintiff then offered to prove that J. C. Symmes, the judge of the territory before whom the acknowledgment of the letter of attorney from Dayton to Vance purported to have been taken, was at the time out of the Territory, and therefore had no authority to act in his official capacity; but the

court being of opinion that such proof would not avail the plaintiff, overruled the testimony. The plaintiff also offered testimony to establish fraud between Joseph and Alexander Vance, and that the deed was executed to the latter in trust for the former.

The court suffered the plaintiff to prove the declaration of Alexander Vance while he held title to the premises, to show the nature of his claim, and in what right he held the land. The jury returned a verdict for defendant.

The plaintiff moved for a new trial, principally on two grounds.

1. The court erred in admitting the deed from Dayton by his attorney Joseph Vance to Alexander, inasmuch as there were no subscribing witnesses.

2. The court excluded the evidence offered by the plaintiff to show that J. C. Symmes took the acknowledgment of the letter of attorney from Dayton to Vance, without his jurisdiction.

J. R. and O. Parish and Irvin, in support of the motion.

Opinion of the Court by Judge HITCHCOCK.

The plaintiff's counsel insist upon a new trial upon two grounds.

1. That the deed from Dayton to Alexander Vance having no attesting witnesses, was not valid to pass the land under the then existing laws of the territory, and ought not to have been admitted in evidence.

2. That the court rejected evidence tending to show that the letter of attorney from Dayton to Joseph Vance was acknowledged by a judge of the territory north west of the river Ohio without his jurisdiction.

If the counsel for the plaintiff be correct upon either ground, a new trial must be granted.

When the question was first presented, the court entertained strong doubts of the validity of the deed from Dayton to Alexander Vance. The first question presented to us is, whether the ordinance of Congress of 1787 was virtually repealed by the adopted law of 1795 and of the territorial legislature of 1802. It is very clear from the ordinance, that two witnesses are required to a deed for the conveyance of lands, and three to a will, and that these provisions remained in force until the governor and judges adopted a law upon the subject from one of the "original states." In 1795 the governor and judges of the territory adopted the law of Pennsylvania, passed in 1775, upon the subject of the "execution, proof, acknowledgment, and record of deeds." The statute is entitled "A law establishing a Recorder's Office;" but the eighth section expressly provides for the execution of deeds within the territory.

The first section enacts "that there shall be a recorder's office."

The second declares the effect of the word "grant," &c.

The third punishes the forgery of acknowledgments, &c.

The fourth and fifth provide for entering satisfaction of mortgages, and a penalty against the mortgagor who shall neglect to comply with the act.

The sixth and seventh point out how recorders shall be appointed, &c.

The eighth, which is the material one under consideration, enacts "that all deeds and conveyances which shall be made within this territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may

be in any wise effected, in law or equity, shall be acknowledged by one of the grantors or bargainers, or proved by one or more of the subscribing witnesses to such a deed, before one of the judges of the General Court, or before one of the justices of the Court of Common Pleas, where the lands conveyed do lie, and shall be recorded in the recorder's office where such lands or hereditaments are lying and being, within twelve months after the execution of such deeds or conveyances," &c.

From the moment this law was adopted and published, the force of the ordinance ceased, and the law became itself the rule as to the execution acknowledgment, and proof of deeds conveying lands in the territory. Had this law remained silent as to the execution, proof, and acknowledgment, of deeds, and only established a recorder's office and regulated his duties, a deed would have been void without an attestation by two witnesses; but it is a well settled rule that when a law enacts a thing to be done different from the same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention by the law-making power. It surely was never intended that the ordinance of 1787, and the statute under consideration should have a concurrent efficacy. Upon general principles of universal law an old statute gives place to a new one. (1 *Blac. C.* 89.) But it is scarcely necessary to enter into a minute discussion of the provisions of the law of 1795, as the territorial act of 1802 repealed all laws and acts coming within its purview.—*The third section of this* act differs little from the eighth section of that of 1795, except its terms are more broad and comprehensive. The latter clause in the third section is in these words: "and all deeds and conveyances, which shall be made and executed within this territory, for the conveyance of any lands, tenements, or hereditaments situate within the same, whereby such lands, tenements, or hereditaments shall be conveyed, affected, or incumbered, shall be acknowledged or proved and recorded."

It will be difficult, if not impossible, to express an alternative in more unequivocal terms. We are of opinion that both proof and acknowledgment of a deed, to make it a valid conveyance, are not necessary, and that by the *terms* of the act, *either* would be sufficient to admit the deed to record. The general terms of the statute by the repeal of the law of 1795, either left the proof to the common law, the *jus gentium*. or the repealing clause did not extend to the mode prescribed by the former act. If the latter construction be correct, which is not admitted, the proof must be made by "one or more of the subscribing witnesses." The court is inclined to consider the eighth section of the law of 1795 as coming within the purview of the act of 1802. It is, however, not deemed necessary to settle the construction of this part of the statute, as the subject is not directly before the court.

If to give the deed validity no proof by subscribing witnesses was necessary, it would seem naturally to follow that the act under consideration intended to dispense with their attestation; for it would be an idle and empty form to require an attestation without also requiring proof. It cannot be denied, that an exemplification of a deed, legally executed and admitted to record, is good evidence in all cases; nor does the plaintiff press very strongly the proposition that under the laws of the territory of 1802, a deed could not be admitted to record until it was proved by one or more of the subscribing witnesses, *and* acknowl-

edged. The language of the act is too clear to be misunderstood. Now admitting that at any time after the publication of the law of 1795 until the year 1805, in order to admit a domestic deed to record, it was only necessary to have it acknowledged by the grantor before the proper officer without any proof; and also that an exemplification from the records was good evidence for the grantor: it would seem to be a plain consequence that an attestation would be form without substance, a ceremony without utility. The appearance of names could never lessen the danger of perjury; nor would they be any protection against fraudulent or clandestine conveyances. Following the construction of the court, the statutes have guarded with sufficient vigilance, real estate in the territory. To the ordinary evidence of contract, the signature and seal of the party and persons that may be present at its execution, is super-added the certificate of a sworn officer of the territory, that the grantor acknowledged in his presence the instrument to be his deed.

But it is said, in order to give validity to deeds of conveyance, almost every State in the Union requires the act to be done in the presence of witnesses, who must attest their execution. It will be admitted that every sovereignty has a right to prescribe rules to regulate the transfer of property with respect to real estates, the object of the statutes seems to be, to give solemnity and notoriety to the transaction, and to preserve the evidence of it. This is evident from the ceremonies observed at the feodal investiture down to the present mode of requiring attestation and acknowledgement. At first our ancestors deemed feodal donations sufficiently formal and notorious by livery of seisin without deed (1 *Cocke on Litt.* 490. 2 *Fonb.* 33.) The next mode for conveying lands, was by deed sealed and delivered. Neither signature nor subscribing witnesses were required until the reign of Edward IV. After that time, the parties began to write their names over or near the seal. (2 *Bla.* 308, note.) In the reign of Henry VIII. they are signed by the parties; but in the next reign the practice commenced for witnesses to subscribe their names. When the law-makers in this country speak of a deed it must be taken in a technical sense, as understood at common law; that is, a writing sealed and delivered by the parties. Should the Legislature merely declare that lands should pass by deed, the court would have no hesitation in saying, that neither attestation nor acknowledgment would be necessary. To preserve the evidence of the transaction, and give it solemnity, the Legislature might require attestation and acknowledgment, or they might dispense with one or either of them.

It appears to the court, on carefully comparing the laws of 1795 and 1802, with the ordinance of Congress, of 1787, that the former virtually repealed the latter, so far as respects the execution, proof, and acknowledgement of deeds; that an acknowledgement before the proper officer superseded the necessity of calling attesting witnessess, and that the deed under consideration was legally admitted to record, and operated as notice to the lessor of the plaintiff, who purchased subsequently and therefore took nothing by his deed.

If doubts existed as to the construction, we should pause before we should make a decision against a practice which is admitted to be uniform from the publication of the law of 1795, until altered by an act of the general assembly of this State in 1805. It would create irremediable mischief to disturb the

settled custom of the territory as to the evidence of title; nor would the court do it, unless it was manifestly founded upon an erroneous construction of the laws in force. The provisions of a statute ought to receive such reasonable construction, if the words and subject matter will admit of it, as that the existing rights of the public or of individuals be not infringed. (2 *Mass. R.* 146.) It is also a rule that they be so construed that no man who is innocent shall be endamaged. (1 *Inst.* 611.) These liberal maxims seem fully recognized by the Supreme Court of the United States, in the case of *McKeen v. Delancy's lessee.* Chief Justice Marshall, in delivering the opinion of the court says, "In construing the statute of a State on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which had long been established in the state." The court are, therefore of opinion that upon the first point the plaintiff is not entitled to a new trial.

2. But the counsel of the plaintiff insist that the court erred in rejecting testimony tending to show that the officer before whom the letter of attorney from Dayton to J. Vance, purported to be acknowledged, was out of the territory at the time, and that the acknowledgment is consequently void; and they rely upon the case of *Jackson ex dem. Wyckoff* v. *Humphreys*, 1 *John.* R. 498. It might well be questioned whether the testimony, if admitted, would have availed the plaintiff; but it is the province of the jury to decide upon the effect of testimony—of the court the question of competency.

The principal reason which appears to have governed the court in that decision was, that the oath administered in Canada, by an officer of that state, was extra-judicial and void, and the witness could not be indicted for perjury, in case he swore false. This reason is not applicable to the case under consideration. Judge Symmes was not entirely in a foreign jurisdiction. He was an officer of the United States; and it might admit of doubt, whether, if the fact assumed had been conclusively proved, the act of acknowledgement would not have been completely valid. It does not, however, seem necessarily to follow that because the witness could not be indicted for perjury, that therefore the oath was of no validity; for it is clear from the case cited from 8 *East.* 322, that although the witness could not be indicted for perjury he could be made answerable for a misdemeanor, and therefore the oath was neither "extra-judicial," nor "void." This court pays great respect to the cases adjudged by the Supreme Court of New-York; but when by chance we find one against the current of authorities, we must pause before we adopt it as settled law. We find by two subsequent adjudications of the same court, the case of *Jackson* v. *Humphreys* substantially overruled, and we are rather inclined to adopt the latter decisions. The court think the last adjudged cases are more liberal and consonant to reason; for it would be strange indeed for a court to give more credit to a foreign officer and an alien, than one of our own citizens, clothed with authority by our own laws. It would require no ordinary effort to reconcile these decisions.

Independent of this, that was matter of proof in which might be involved a serious question under the criminal laws of New-York; here no such question can possibly arise. It is presumed that a judge taking the acknowledgment of a deed for fraudulent purposes or knowing it to be forged, within his particular jurisdiction, or another state, would, in either case, subject himself

to the same punishment; and it is equally certain that one who by fraudulent devices or forgery should procure an acknowledgment, whether *in or out of the territory*, would be equally liable to punishment.

There appears some force in the remark, that a judge empowered to take the acknowledgment of deeds rather acts as a general commissioner of the law, than in a judicial capacity; and that this is an authority which accompanies his person and is not limited and confined to juridical jurisdiction. Be this as it may we are inclined to the opinion that one of the judges of the United States empowered by law to take the acknowledgment of deeds conveying lands, may, in any part of the Union, take such acknowledgments, not to affect lands in a foreign jurisdiction, but in the territory over which his powers extend.

Let judgment be entered on the verdict.

HUTCHESON v. THE HEIRS OF McNUTT.

JUDGES PEASE AND BURNETT.

1823.

A covenant to convey a part of certain lands, "the other party being at one half the expense of procuring the title,"—the payment of the expenses is a condition precedent, and after a lapse of years, the expenses not having been paid according to agreement, equity will not decree a specific performance against the covenantor.

A person who demands a specific performance, must show that he has been in no default, unless he can account for it by special circumstances.

The complainant sets out in his bill, that in December, 1799, James McNutt, since deceased, executed an instrumsnt of writing under his hand and seal, in the following words: "Be it remembered that I, James McNutt, of Madison county, and state of Kentucky, do covenant and agree with John Hutcheson, of the county of Monroe, and state of Virginia, to make over and convey to the said Hutcheson, his heirs or assigns, the one half of the land that I shall obtain in virtue of my contract with Charles Arbuckle, heir at law of Matthias Arbuckle, deceased, on a military warrant for four thousand acres, obtained by the said Hutcheson for the Representatives of Matthew Arbuckle, dec'd. on the said Hutcheson being at one half the expense, in land or otherwise, for procuring a title for the four thousand acres, for which agreement I bind myself, and heirs, firmly by these presents. Sealed with my seal, and dated this 23d day of December, 1799." The bill also states, that in July, 1800, the said James McNutt caused the said warrant to be located on four tracts, of one thousand acres each, on Darby creek. That afterwards, to wit, in October, 1801, the said Arbuckle and McNutt made a division of the said tracts of land, in pursuance of their contract, by which the said McNutt received two tracts, containing together, fifteen hundred and fifty acres as his share. That afterwards in July, 1806, the complainant, by his agent, called on McNutt, requested a conveyance of half the said land, and offered to pay him the one half of any necessary expenses he had been at. That McNutt hath obtained patents for the said land, in his own name, and hath refused to convey the moiety thereof to the complainant.

The bill also charges, that in July, 1801, the said James McNutt passed his obligation to the complainant, to make him a clear and sufficient deed to two hundred acres of land, in the North Western Territory, in that part laid off for the officers and soldiers of the Virginia line—that the land should be of the second quality—that the title should be made as soon as grants could be obtained, but that this contract was on the express condition, that if the warrant of James Thompson for 2666 66-100 acres, which had been assigned by the complainant to Henry Banks, should be completely put in the possession of, and secured to the said Thompson, the contract was to be binding, otherwise to be void. The bill further states, that the said warrant was obtained from H. Banks, and put into the possession of McNutt, and that grants had been obtained for the land. That the said James McNutt died in 1809, and that the defendants are his heirs at law. The complainant prays for a specific performance, and for general relief.

The defendants, by their answer, admit that their father James McNutt executed the contracts of December, 1799, and July, 1801; that the lands were located, divided, and partitioned, as is stated in the bill; but they allege that under the contract of 1799, the complainant did not advance the moiety of the expenses, and that under the contract of 1801, he did not procure the warrant of Thompson, and secure the same, as he was bound to do.

It appears from the testimony and exhibits, that in October, 1801, McNutt wrote to the complainant, advising him of what he had done—stating the amount of his expenses in procuring the title to Arbuckle's land, and complaining that the warrant of Thompson had not been obtained. That in September, 1802, he wrote to complainant, stating an estimate of his expenses—that there would be five hundred and fifty acres coming to complainant when he paid the half of the expenses, and urging him to send him money, as he was in need. It appears that the complainant took no notice of these communications, but suffered the matter to sleep till 1806, when he sent his son to demand a conveyance, and tender a moiety of the expenses. That McNutt at that time refused to receive the money, or make the conveyance. That all the expenses of locating and procuring a title to the land, on Arbuckle's warrant, had been advanced by McNutt. That he had also paid the taxes from 1800 to 1806: and it does not appear that complainant has at any time paid to McNutt, or to any other person, a single cent on account of this land. It also appears that on the division betweeen Arbuckle and McNutt, in October, 1801, the former gave the latter fifty acres and fifty dollars for the choice of tracts. That the complainant did not sign either of the contracts, or enter into any other obligation binding him to a performance. It also appears, that the warrant mentioned in the contract of 1801, was obtained by the exertions and at the expense of Thompson and McNutt. That the complainant refunded to Thompson the money expended by him. That McNutt in 1802 recognized the claim on this contract, soliciting a remuneration for his trouble and expense. That the warrants mentioned in this contract have been located, and the lands patented.

The claim of the complainant to a specifick execution of these several contracts, will be considered separately.

The first question presented on the contract of December 1799, is, whether the payment of a moiety of the expenses be not a condition precedent.

McNutt covenanted to convey to Hutcheson the one half of the lands, "on the said Hutcheson being at one half of the expense." It is said that the participle, doing, performing, &c. prefixed to a covenant, renders it a mutual covenant; (2 *H. Black.* 1315,) but when the covenant goes to the whole consideration, on both sides, (as it does in the case before us,) it is a condition precedent. (1 *Fonb.* 382.) This contract was not signed by both parties, so as to give mutual remedies. It is the contract of McNutt alone. Should the defendants therefore execute the conveyance before the payment of the money, they are left without recourse; but not so with the complainant, who, by paying his money in pursuance of the contract, perfects his right to call for a conveyance. Equity will always respect the intention of the parties, rather than the literal meaning of their words. The design in this case must have been, that the complainant should pay the money, as the meritorious cause of the conveyance; otherwise, as the complainant is under no promise or contract to pay, the defendants might be required to part from the land without the possibility of receiving the money. (1 *Stra.* 571.) The case of *Pordage v. Cole* (1 *Saund.* 320.) is in confirmation of this doctrine; for although the plaintiff, in that case, had judgment, it was on the ground that both parties had sealed the contract, and had mutual remedies against each other; but the court observed that it might have been otherwise, if the speciality had been the words of the defendant only, and not the words of both parties, by way of agreement. A time also had been fixed for payment, which is a circumstance entitled to weight, and is stated, in a note to that authority, as the principal ground of the judgment. A reference to the natural order of the transactions, as to time, which from the substance of this contract, will show that the payment must be a condition precedent. When the contract was made, the warrant had not been located: the fee of the land was in Government, and consequently it was necessary that an entry and a survey should be made, and a patent obtained. These preparatory steps were to be taken before the complainant could have a right to demand a deed; but these steps could not be taken without incurring the expense which the complainant was to pay. This payment, then, was necessary to precede the conveyance, and until the complainant saw proper to meet it, he voluntarily by his own laches, rendered it impossible for McNutt to execute a conveyance, as then McNutt could not pass a title until he obtained a patent, and as the patent could not be obtained without the payment of the expense, that payment was unavoidably to precede the conveyance, and must be a condition precedent.

In the case of *Jones v. Barkley*, (*Doug.* 691.) it is said by Lord Mansfield, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedence must depend on the order of time, in which the intent of the transaction requires their performance,

The application of this rule to the case in hand, is manifest. The expense of procuring the title must, in the nature of things, arise, before the title is secured; and until this be done, McNutt can be under no obligation to convey.

The case of *Thorp v. Thorp*, (12 *Mod.* 455.) *Duke of St. Albans v. Shore*,

(*H. Black.* 270.) and *Goodison v. Nunn*, (4 *Term* 761.) throw much light on this question, and will be found to support the principle contended for. In the last case Lord Mansfield says, the determinations in the old cases, on this subject, outrage common sense, and that he is glad to find that they have been overruled; that it would be absurd to say the purchaser might enforce a conveyance without payment, and compel the sellor to have recourse to him, who perhaps might be an insolvent person.

Another question arising on this contract is, whether Hutcheson was not bound to advance his part of the expenses as they accrued, and whether, by neglecting to do so, he has not put it out of his power to perform the condition on his part. The nature of the transaction itself appears to be decisive on this point. McNutt, by his contract with Arbuckle, was to have a moiety of the land that should be obtained on a certain warrant: he was to locate the warrant, obtain the patent, and defray the half of the expense. He then entered into the contract we are now considering, by which he agreed to convey half the land he might receive on his former contract, to Hutcheson, provided he would be at half the expense of procuring a title. No part of this expense was to go into the pocket of McNutt. It was to be paid out to others, and it forms the whole consideration of the contract. The only benefit which McNutt could receive from this arrangement, was to be relieved from the inconvenience of raising the money, that would be required to meet the expense, and for this, and this alone, he agreed to give up half the land.

It appears that the whole expense was less than one hundred dollars, which bore no comparison to the value of the property; consequently McNutt stipulated for no consideration that can be considered as a price for the land. He agreed to give it to the complainant without receiving a cent for his own use. The only possible benefit, therefore, that McNutt could receive from the arrangement, was the aid of Hutcheson, in advancing the money that would be necessary in securing the title. If, therefore, he can be left to provide the whole amount of this expense, he may lose the only advantage that could have induced him to enter into the contract; he may be left to encounter all the difficulty and inconvenience which he seems to have been desirous of getting rid of, and to be relieved from which, formed the only motive that could have induced him to make the contract. The true consideration, then, must have been the convenience of this advance, to secure which it was necessary to furnish the money as the expenses arose; for by leaving McNutt to make the advance, he must suffer the very evil from which the contract was intended to relieve him; and having once suffered it, he has lost the only benefit which he intended to secure. Had it been perfectly convenient for McNutt to make the advance, he would be chargeable with gross folly for stipulating as he has done, and equally so, if he intended nothing more than to have the expenses refunded at some future day, as it might be convenient to Hutcheson.

From this view of the subject we are driven to the conclusion, that the consideration of this engagement was, not that Hutcheson should merely be accountable for these expenses, but that he should meet them as they might arise, so as to save McNutt from the inconvenience of an advance. The time of payment, therefore, is of the essence of the contract, and cannot be dispensed with; for we have seen that the consideration does not consist principally in

the amount to be paid, which is admitted to be a mere trifle, in comparison with the value of the property, but in the time of payment.

Inasmuch, therefore, as the complainant did not advance the money, as he was bound to do, in consequence of which, McNutt has been compelled to make the advance, and has thereby incurred all the inconvenience, from which the contract was designed to relieve him, it has become impossible, in the nature of things, for the complainant to perform the condition or render to the defendants a satisfaction.

It is also a circumstance entitled to much weight, that this contract is not mutual. It is obligatory on McNutt; but not on Hutcheson. He was under no obligation to pay the money or accept the land, but was at liberty to claim or abandon it at his pleasure. There ought, therefore, to be some period fixed for the determination of his will, otherwise he might keep the defendants in suspense indefinitely, and prevent them from improving or disposing of the property. It would be inconvenient and unequal for one party to be thus bound, while the other was at perfect liberty; and yet this consequence results unavoidably from any other construction than that which has been given, for if the complainant were not bound to make his election by advancing the money when the expenses accrued, there is no time fixed by the contract for the payment, and he may keep the defendants in suspense during his pleasure. This is the unavoidable consequence of an admission that the condition, on the part of Hutcheson, can be performed after the expenses have been incurred and paid by McNutt. This view of the subject leads us to the same conclusion that the payment is a condition precedent, and must be made at the time contemplated by the parties, and that if it be not so made, the money cannot be afterwards paid, so as to save the condition.

In the case of *Parkhurst vs. Van Cortland*, (1 *John. Ch. Rep*, 282.) Chancellor Kent recognizes the doctrine, that a court of equity will never decree performance where the remedy is not mutual, or one party is only bound by the agreement. This distinguished judge lays down the same principle in the case of *Benedict vs. Lynch*, (*Ib.* 373.) *and refers to* 2. *Vern.* 415, 1 *Schoal and Lefroy* 13, *Bunb* 111, 5 *Esp.* 240, 11 *Vesey* 592, as settling the point.

Another view may be taken of this contract, calculated to strengthen the conclusion already drawn.

McNutt covenants to convey to Hutcheson, "on the said Hutcheson being at half the expense." How can he be at half the expense, unless he pays the money as the expense accrues? Paying a particular claim is one thing, and refunding the amount to him who may have paid it, is another. Suppose McNutt had been destitute of money, and the person to whom the expenses were to accrue, refused to give credit, in consequence of which the title could not be perfected, —would the complainant, in that case, have a right to exact performance from McNutt; or recover damages for his inability to perform? The answer must be in the negative, and only one reason can be given in support of it, viz: that Hutcheson having refused to perform the condition, on the performance of which McNutt had covenanted to convey, and having thereby rendered a performance impossible, would have forfeited his right to the contract and released McNutt from the obligation of his covenant. If this consequence would result

from the inability of McNutt to meet the expenses, and the consequent loss of the land, it must be difficult to assign a reason why Hutcheson should be saved from the legal consequence of his laches, because McNutt or some other person was compelled to perform the condition in his stead. If the advance of this money was so much of an object to McNutt, as to induce him to make the contract in the first instance, we may presume that the same object might induce him, or that necessity might compel him to give a similar advantage to some other person, for the purpose of securing the land. Suppose this to have been the case, on what principle of justice or equity could Hutcheson, by offering to refund, exact the remaining moiety of the land. So far as his rights are involved, it certainly makes no difference whether the land was lost to all the parties, for want of money to secure the title, or whether necessity required McNutt, on the failure of Hutcheson, to make a similar contract with seme other person, or to suffer the inconvenience of raising the money himself. In either case he must have lost the entire consideration of his contract, and must necessarily be discharged from its obligation. Admitting then, as the fact is, that McNutt advanced the whole expense, and thereby secured the title, Hutcheson can claim no merit on that account—his right is as completely lost as it would have been had the whole land been forfeited to Arbuckle by his failure. The merits of another cannot be transferred to him; his claim must be supported by his own performance or fall by his laches.

The next question that arises is, whether this be a case that will authorise a court of chancery to relieve the complainant from the forfeiture incurred by his default.

It is said that in all cases of penalty, or forfeiture, equity will relieve, if compensation can be made, and the default be only in time. The true ground of relief in such cases, is to be found in the intention of the parties. Where, from the nature of the agreement, the penalty is only intended as a security that the consideration shall be performed, a court of equity may relieve, for notwithstanding they do so, they give the party that which he stipulated to receive, and therefore no injury is done; but where the relief would destroy the substance of the contract, as if the thing stipulated be a collateral act, relief cannot be granted, for no precise value can be affixed to such an act. In the case before us, the condition was the performance of an act to third persons, and the inconvenience resulting from the non-performance cannot be determined, and of course there is no criterion for fixing a compensation. The disappointment might have forced McNutt to a sacrifice, equal to the then value of the land. Many cases are found in the books, in which parties have been relieved from the consequences of not performing their covenants at the precise time stipulated; but they are cases in which performance could be done in conformity with the undertaking, and the parties sustain no injury thereby, and even in these cases the rule on which relief is granted has been very much narrowed. (*Newland on contracts*, 242. 4 *Bro.* 494. 4. *Ves.* 667, 686. 5 *Ves.* 720, 818. 13 *Ves.* 224.)

The true doctrine appears to be, that a person who demands a specific performance, must show that he has been in no default, unless he can acconnt for it by special circumstances; and if through his own negligence he cannot perform the whole on his side, he cannot compel the other side to a perform-

ance. because such performance would not be mutual. And for the same reason, when a man has trifled, or shown a backwardness on his part, equity will not decree a specific performance in his favor, especially if circumstances are altered. (1 *Fonb.* 384.) In the case before us there has been a gross default unaccounted for. The complainant has trifled, the condition cannot now be performed, and circumstances are materially altered. The truth of this will appear by a simple reference to dates, and to the change that has taken place, in the circumstances and value of the property. The contract was made in 1799—the expenses were incurred in 1800. The complainant took no step, but remained wholly inactive till 1806, although informed of the amount of the expenses as early as 1802; and the land has increased in value, probably ten fold.

But may we not arrive at a satisfactory solution of this question by attending to the nature and extent of the condition on the part of Hutcheson. He was to be at half the expense of procuring the title. The term expense, as used in this contract, ought not to be limited to the money disbursed, but should embrace the time, attention and labor, required to accomplish the object, for as these things were necessary, and are of value, they ought to be classed under the head of expenses. The title could not be secured without them, and in point of value they no doubt exceeded the amount of money paid. Hutcheson performed none of these acts, nor did he procure any other person to perform them. It is at this time impossible for him to perform them, and it is equally impossible to assess their value. How then can he be entitled to relief.

Having disposed of the questions that arise on the contract, we come to those that are presented by the testimony. And first, do the letters of McNutt wave the laches of the complainant, and entitle him to the prayer of his bill.

In the letter of October, 1801, he states the division of the land between Arbuckle and himself, describes the quality of it, and informs complainant that he has paid the fees and taxes, amounting to nearly forty dollars. In the letter of September, 1802, he informs the complainant that he had sent the receipts for the surveying and office fees, and for one year's tax. That there would be five hundred and fifty acres coming to the complainant, when he should pay his part of the expense; he makes an estimate of the expense, and in the close he expresses a hope that the complainant will send him some money, as he is in want.

From these letters it appears that in October, 1801, complainant was informed of the expense—that in September, 1802, the same information was repeated, coupled with a request to send the money, and an admission that on doing so there would be five hundred and fifty acres coming to him.

As these letters were written after the warrant had been located, and the laches of the complainant had taken place, it becomes necessary to enquire, what impression they ought to make on the case. In the first place, it is more than probable that McNutt was ignorant of the true and legal construction of his contract, and that the admission was made under a mistake, arising from an ignorance of his right. We should be warranted in drawing this conclusion, from the tenor of the letters, and from the after conversation with the witness, J. Hutcheson. But if it were to be admitted, that the letters were written with a full knowledge of the true construction of the contract, and that it

was the express intention of the writer to waive the laches, and to convey the land on the receipt of the money, it would not vary the case, because the letter called for an immediate payment, and held out no offer of further credit. It was therefore the duty of Hutcheson to pay the money without further delay, and particularly so, as at the date of these letters it had been advanced more than two years. In 5 *Ves.* 720, Lord Kenyon is represented as saying that, "a party cannot call on a court of equity for a specifick performance, unless he has shown himself ready, desirous, prompt and eager;" but it appears that Hutcheson took no notice of these letters till July, 1806, when he sent his son to demand the deed. This vexatious and unreasonable delay is wholly unaccounted for, and manifests a disposition to trifle with the subject, to a degree that cannot be countenanced. The complainant seems to have consulted nothing but his own convenience; he has shown a backwardness that cannot be overlooked. When these circumstances are connected with the fact, that the complainant was never bound, either by the contract or the letter, but was at liberty to claim or disclaim, at his pleasure, it seems impossible to resist the conclusion, that he has forfeited any right that might have been set up under the letter. If he could lie still from that time till the year 1806, what limit are we to fix to his negligence? Holding in his hand the right to accept or reject the contract at his pleasure, and knowing that McNutt was in great need of the money, he withholds his election, keeping the other party in suspense, *till he finds* the land had risen in value fifteen hundred dollars, or more, then he comes forward and demands a conveyance for the trifling consideration of thirty or forty dollars. At this time the property, in the hands of the present holder, is estimated at many thousand dollars. The claim is certainly unreasonable, and one that no court of equity can, or ought to sustain.

The claim of the complainant to a specifick performance on the contract, without the letters, or on the letter considered as a waiver of laches and a revival of the contract, will be fully met and rebutted by the doctrine in *Benedict v. Lynch.* (1 *John Ch. Rep.* 372.) In that case the learned Chancellor lays it down as an acknowledged rule in courts of chancery, that when the party who applies for a specifick performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specifick performance. He adds, that in the case before him the purchaser had paid nothing, but suffered defaults to accumulate from year to year, as if he had forgotten that he was under any obligation to pay, and that if the land had not risen in value, there was no reason to believe that the plaintiff would ever have attempted to raise the money. In that case the last instalment was not due when the plaintiff tendered the whole purchase money and filed his bill, yet the Chancellor declared there was a gross negligence on the part of the plaintiff, that took away his claim to assistance.

In the case before this court, the default is much more striking—is wholly unaccounted for, and has not been acquiesced in; for should the letter of 1802 be considered as a waiver of the former laches, it was on the condition of

immediate payment, and no inference can be drawn from it in favor of a delay, yet the plaintiff rested till 1806, and thereby incurred a greater default than had taken place before the letter was written, or than existed in the case just referred to.

Another question arising from the testimony is, whether the act of the complainant, in taking the warrant out of the office and enclosing it to McNutt, can vary the case. It certainly cannot, because in the first place it was done before the contract was made, and formed no part of the consideration; and secondly, because it was attended with no expense, and the labor was so inconsiderable that no pecuniary value can be affixed to it.

The next and last question which the evidence presents on this branch of the case, is, whether the complainant can claim any thing in consequence of the payment of the fifty dollars by Arbuckle for the privilege of his choice of tracts.

It will be recollected that this transaction took place in October, 1801, more than a year after the forfeiture of the contract, and almost a year before the letter of Sept. 1802, was written. A moment's reflection, therefore, will show that it cannot affect the case.

It is not necessary to notice the conversation, in January, 1806, between the witness, Isaac Hutcheson, and McNutt, as it amounts to nothing more than a proposition for a compromise, without acknowledging any right in the complainant or any obligation on McNutt. On the contrary, it denies the existence of such a right. A man may offer to buy peace on any terms, and shall not afterwards be held to his proposition if it be rejected at the time.

On the whole it appears manifestly that the complainant is not entitled to a specific performance of the contract of Dec. 1799, and that that contract ought to be delivered up and cancelled.

Our attention will now be directed to the contract made in July, 1801. We have seen that this contract was for the conveyance of two hundred acres of land, on this express condition, that a certain warrant therein described should be put in the possession of, and secured to James Thompson or his heirs; but if this should not be done, that the contract should be void and of no effect. The complainant alleges in his bill, that the warrant was procured by him, and put into the possession of Thompson; but from his own testimony it appears that the allegation is not literally true. As evidence to this point, he has relied on the letters of McNutt and Stewart, which state very clearly that the warrant was obtained by the labor, and at the expense of McNutt and Thompson, and that the complainant paid the bill of Thompson's expenses after the warrant had been obtained. The same fact is clearly deduced from the deposition of Stewart, also relied on by the complainant. If his right, therefore, to a performance of this contract, were to depend entirely on his own performance of the condition, he would unquestionably fail; but as McNutt and Thompson have both acquiesced in the failure, and have called on the plaintiff for the money expended by Thompson, and as in consequence of this acquiescence and demand he paid the money in 1802, and by so doing actually performed what the parties consented to receive as a substitute for a literal performance, it would seem from the doctrine in the cases above referred to,

that neither McNutt nor his heirs can now avail themselves of a technical breach. It is a circumstance of weight, that there was neither backwardness nor delay on the part of Hutcheson after the proposition of 1802, but that he promptly paid the money which the parties had agreed to accept as a commutation for a literal performance.

The defendants have offered the deposition of Henry Banks, to whom the warrant had been assigned, by Hutcheson, and in whose hands it was when this contract was entered into. The object of this testimony was to shew, that although Thompson has been put in possession of the warrant, it has not been secured to him or his heirs, agreeably to the letter of contract. The witness states that the warrant in question was sent by him to Cuthbert Banks, of Lexington, by whom it was handed over to Thompson, on an agreement that he should have it located, without prejudice to the claims of the witness, and that whatever right, if any, the witness might have acquired, by the assignment of Hutcheson, should be secured to him. It does not appear that Hutcheson had an interest in the warrant, or an authority to sell it, and it would seem from the deposition, that Mr. Banks did not place much confidence in the goodness of his title, for one of the reasons which induced him to send the warrant to C. Banks, was to procure an assignment from Thompson, who, it appears, refused to make an assignment, and denied the power of Hutcheson to sell. But it is not necessary here to investigate, or settle the right of Henry Banks, nor would it be proper to do so. It is enough to know, that Thompson was put in possession of the warrant—that he, or his assignees, are in the peaceable enjoyment of the land, and that no claim has been set up against it, or against him or his heirs, on account of it for more than twenty years. Nothing, therefore, can be gathered from this testimony that can destroy the right of the complainant, under the contract of 1801. But as it is a rule recognized in all courts of equity, that he who asks for equity shall do equity, and as in consequence of the negligence of the complainant, McNutt has been put to trouble and cost, for which he has received no remuneration, it is both just and reasonable that the amount of this claim should be ascertained and paid before the defendants are required to execute a conveyance. As the contract calls for no particular tract of land, but for two hundred acres of second rate land, within the tract set apart for the officers and soldiers of the Virginia line, or continental establishment, the defendants are at liberty to designate any tract, of the quality described, within that district, of which their father, James McNutt, died seized, and to which it is in their power to make such a conveyance as is required by the contract; but if there be no such land within their power, and assets have come to their hands sufficient for the purpose, let them procure the land, or pay to the complainant the value.

A reference ought to be made to the master commissioner, to ascertain and report the value of the trouble and cost of McNutt, to be paid by the complainant, and whether the defendants can make a good title to two hundred acres of land, such as is described in the contract; and if not, and assets have come to their hands, sufficient for the purpose, what sum they ought to pay as the value thereof, and all further directions stayed till the coming in of the report.

LESSEE OF PATRICK v. OOSTEROUT.

JUDGES McLEAN AND BURNETT.

1822.

A sale of real estate, upon execution, without appraisement, is void.

[*Contra*, 3 *Hammond*, 137. *Lessee of Allen* v. *Parish*.]

The lessee of the plaintiff claimed under a sheriff's deed. In the year 1815, Norman Patrick obtained a judgment in the court of common pleas, against Oosterout, and took out execution, which was levied on one hundred acres of land belonging to the defendant. The sheriff returned an appraisement which did not identify the land in any other manner than by stating the same to be "one hundred acres of land where G. Oosterout lived." It did not appear by the appraisement that the freeholders were sworn.

Two questions were submitted to the court: *First*, Is it necessary under a sheriff's deed to exhibit the appraisement? *Second*, Is the return of the appraisement sufficient?

L. and C. Cowles, for plaintiff. *Swan*, for defendant.

Opinion of the Court.

The question presented in this case is an important one, as it may involve property to a large amount; but we are not at liberty to dispense with a legislative provision, whatever may be the consequence of enforcing it. It is our duty to enquire what the law is in this, as in every other case, and having ascertained it, we cannot turn to the right hand or to the left. The inconvenience or hardship of the case we cannot remedy, however we may regret it. The defendant's counsel have placed the question on its true ground, that a man cannot be legally deprived of his estate unless the provisions of the law by which it is taken, are substantially pursued. The objection to the plaintiff's title is, that the appraisers were not sworn. It is contended that this was a necessary step in the proceedings, and that it ought to have been returned by the officer.

The statute puts it beyond all doubt that the "inquest shall return on oath or affirmation to the sheriff," &c. The officer cannot be said to have caused an appraisment to be made unless the oath has been administered and a certificate of the fact accompanies the return. From the statute it would seem that the ministerial act of the sheriff ceases, so far as it respects the appraisers, when he has assembled them. It does not appear to be any part of his duty, by the law under consideration, to swear or affirm the inquisitors, or to cause it to be done. It would be a fair construction of the law, that the appraisers themselves should take an oath before some judicial officer, and whether the same should be certified by the person who administered it or by the appraisers, this court would deem immaterial. Such seems to have been the decision in the case of *Artherton v. Jones*, cited at the bar. The court there, in

speaking of the mode of making return of the appraisment, as it regards the oath of the inquest, says: "It is true, he may return it, [the justice's certificate,] but we think he may also return it in substance." "That he has done in this case, and such a course is warranted here both by precedent and practice." We accord with the opinion expressed by the court of New Hampshire. The court ought not to require evidence of every minute circumstance, from the execution to the sheriff's deed; but they cannot dispense with the substantial requisitions of the statute. Amongst these undoubtedly the oath of the appraisers is not the least important. The duties of the appraisers are not merely ministerial: they have the stamp and character of judicial proceedings, and those too of vital importance to the community. The appraisement of real property, in a state like ours, before it can be subjected to sale for the discharge of debts, is highly beneficial, not only for the security of debtors, but of creditors also. This is not a question of policy merely: it is one however upon which the court may, and in some cases must, exercise a sound discretion. But in the absence of testimony we are now called upon to presume that the appraisers made their return upon oath. Might not the court, with equally legal propriety, dispense with the appraisement altogether? Might we not as well presume, on the exhibition of a sheriff's deed, that there has been a judgment and an execution? Under our statute a sale, without any appraisment, would be clearly void. The authority to transfer the fee by operation of law, is a mere statutory provision. This authority, in Ohio, is limited and conditional. 1. The estate must be appraised on oath.— 2. It must sell for two-thirds of the appraised value. These are conditions which must appear to the court to have been complied with before they have any authority to ratify a sale.

It is insisted that the party injured is not without remedy. It is said he may sue the sheriff and recover all that has been lost by the officer's negligence or misfeasance. With this question we have no concern in the present case, but admitting an action would lie against the sheriff because the appraisers did not make their return on oath, the remedy would be frequently inadequate. The court however are of opinion that the sheriff has no controul over the apprais. ers. He appoints them indeed; but it is not his duty to swear them or cause it to be done, nor does there appear to be any authority given him by law to coerce them into a performance of duty. But be this as it may, a power limited and conditional must be carefully pursued. Some things may be presumed in favor of a purchaser; but he must see that the authority under which he purchases has been substantially pursued. The vendor must have authority to sell, or the purchaser takes nothing.

It is not necessary in this particular case to decide whether this defect in the return of the appraisement might be supplied by parol evidence. The counsel for the plaintiff suggested at last term, that he would endeavor to procure such testimony. None such has been offered, and we are informed that none exists. Hard as the case may appear on the part of the purchaser who has paid his money, the law constrains us to say he can take nothing by his purchase.— We are of opinion that the appraisment constitutes an essential part of the proceedings in the sale of lands under an execution, and unless the appraisers are sworn, the appraisment is void.

Let the judgment be entered upon the verdict.

BUTTLES v. CARLTON, ET AL.

JUDGES McLEAN AND BURNETT.

1822.

The prison bounds as established by the Court of Common Pleas in pursuance of the Statute, are to be considered as an extension of the four walls of the prison and while the prisoner is within these limits, he is to every legal intent a prisoner, and as such entitled to support under 12th Sec. of the act for the relief of insolvent debtors.

The Plaintiff in Execution is not bound to furnish lodgings to the defendant while within the limits, though he makes oath that he is unable to support himself.

It was an action of debt upon a prison rules bond, and came before the court upon a case stated as follows: The defendant Carlton was in custody upon a *ca. sa.* at the suit of the plaintiff, and executed the bond upon which the suit was brought, for remaining in custody within the rules of the prison—and upon its being approved of by two justices, as required by law, Carlton was admittad the prison rules. Being thus within the prison rules, he made affidavit that he was unable to support himself in prison, a copy of which was served upon the plaintiff's agent. Carlton claimed that the plaintiff was bound to supply him, not only with provision, but with lodgings also. The agent proffered to furnish meat and drink; the prisoner insisted upon a bed also, which he frequently called for and was refused. Considering that the refusal of a bed was a refusal to furnish *support* according to the statute, Carlton went out of the prison rules? And the action is brought to charge him and his securities.

Opinion of Judge BURNET.

Two questions have been submitted in the argument of this case. First, was the defendant, Carlton, entitled to support after he was relieved from close confinement, and admitted to the privilege of the bounds? Secondly, if entitled to support, was he to be furnished with bedding at the expense of the plaintiff?

On the first question we are of opinion that the prison bounds, established by the Court of Common Pleas in pursuance of the statute, are to be considered as an extension of the four walls of the prison, and that while the prisoner is within these limits, he is to every legal intent a prisoner, and as such entitled to claim the support given by the 12th section of the act for the relief of insolvent debtors.

It is true that the bond is in the name of the plaintiff, but it is delivered to the Sheriff, and the condition of it is, "that the prisoner shall continue safely in the custody of the jailer, within the limits of the prison bounds." This language, we apprehend, cannot be mistaken. It represents the obligor as a prisoner, in the custody of the jailer, within the limits; and if a prisoner, he may take the oath prescribed, and thereby charge the plaintiff with his support. The language of the law is, "that when a person imprisoned for debt,

either on mesne process, or on *capias ad satisfaciendum*, shall be unable to support himself in prison, and having made oath to that effect" &c. "the plaintiff shall stand chargeable," &c. The only enquiry then is, was the defendant, Carlton, imprisoned for debt? If he was, he was entitled to support; and if that support was not afforded, he had a right to leave the prison bounds, or in the language of the law, "to be immediately set at liberty." We are clearly of opinion, that he was a person imprisoned for debt within the meaning of the statute, and that he had a right to take the oath. This is the only inference to be drawn from the statute, or from the bond, by which he is to continue safely a prisoner in the custody of the jailer. While he so continues, he must, *ex vi termini*, be imprisoned, and consequently be entitled to claim the support allowed by the statute.

It is certainly natural to suppose, that a person enjoying the privileges of the limits would, in ordinary cases, be able to provide for his own support; but this is not always the case, as where poverty is connected with sickness, or other personal disability. The construction contended for would leave such persons to perish, or procure subsistence from the hand of charity. Such could not have been the intention of the legislature: it must have been their design to provide for persons so circumstanced, whether on the limits or in close confinement.

On the second question, we are of opinion that the plaintiff was not bound to furnish the defendant with lodgings. This conclusion seems to follow from the determination of the former question. As that pre-supposes him to be a prisoner, in the custody of the jailer, he must be entitled to his lodgings within the prison. This privilege the jailer cannot deny him, as the prison is provided at the expense of the county, for the reception and accommodation of all persons committed by legal authority. As a person in custody on final process, after he has obtained the privilege of the limits, is bound to continue a true prisoner in the custody of the jailer, it would seem to follow that he does not lose the right of lodging within the jail. On the contrary, the spirit of the provision would rather require that all persons within the limits should return at night to the prison, as their common lodging place, though we do not mean to say that the practice which has heretofore prevailed in this respect should be altered. In many cases it is an indulgence of great value, to permit persons on the limits to lodge without the prison, and the feelings of humanity must suppress every desire to deny, or curtail that indulgence. All we mean to say is, that they have a right to repair to the jail, as their common lodging place. The case in hand requires us to go no further, and we feel no disposition to do so.

In the formation of these statutes, the rights of creditors have not been overlooked, nor can the court disregard them in any construction which it may be necessary for them to give. The words of the statute, subjecting the creditor to the support of his debtor, are, "he shall stand chargeable with his support." In construing these words, we are not disposed to go beyond their import, and most certainly they cannot require the plaintiff to provide that which has been already provided. The county has furnished lodgings; it was not therefore necessary for the plaintiff to provide them, and we cannot believe that the legislature intended to impose on him an unnecessary burden. In construing these words we must look to the situation of the prisoner, and to the wants and

privations that attend it. Food and lodging seem to be embraced in the term *support*, and we should have no hesitation in saying, that they were both chargeable on the plaintiff, had neither of them been provided by law; but as lodging has been provided, it would be implicating the prudence of the legislature, and imposing an unnecessary burden on the plaintiff to give that construc. to the term. What the law has provided, the plaintiff cannot be required to provide.

It is the opinion of the court, that the plaintiff was bound only to make an arrangement with the jailer to furnish the plaintiff regularly with his food, and having done so in this instance, he provided all the support he was chargeable with by the statute; consequently, the defendant left his prison bounds in his own wrong, and the plaintiff must be entitiled to judgment.

BANK OF MOUNT PLEASANT v. POLLOCK.

JUDGES PEASE AND SHERMAN.

1823.

Special Bail are not liable, where the principal dies after the return of the *ca. sa. non est*, and before the return of the first *sci. fa.* executed, or second *nihil.*

The Bail are discharged by the death of the principal. The English rule, that if the principal die after the return of the *ca. sa. non est*, the bail are charged, has not been adopted by the legislature, and the court have no authority to insert it by interpolation.

The plaintiffs in this case had obtained a judgment against Joseph Mc Kaughey, in the common pleas of Belmont county. They sued out a capias ad satisfaciendum, upon which the sheriff returned not found. They then sued out a scirie facias against Robert Pollock, which was returned nihil; and a second scirie facias, was sued out, and returned executed. Robert Pollock appeared at the return of the second scire facias, and pleaded, that after the return of the *ca. sa.* "not found," and before the return of the first *sci. fa.* "nihil," Joseph Mc. Kaughey departed this life. To this plea the plaintiffs demurred. Robert Pollock deceased before the demurrer was argued, and his administrators appeared and were made defendants.

The cause was argued in the common pleas of Belmont by *Beebe* for the plaintiffs, and *Hammond* for the defendants. Judgment was given upon the demurer for the defendants, and the plaintiffs appealed to the supreme court.

It was again argued in the Supreme Court, at October, 1823, before Judges Pease and Sherman, by the same counsel. The court was asked by Mr. Beebe, on the part of the plaintiffs, to reserve the case for decision at Columbus, but they were of opinion that it was unnecessary.

By the COURT.

Our statute declares that the bail shall be discharged by surrendering the principal upon the return of the first scire facias "*executed*," or the second "*nihil.*" This is the rule of the English courts. It is however one principle of this rule, as established in England, that if the principal die after the return of the *ca. sa. non est*, the bail is charged. It is maintained for the plaintiffs,

that as the legislature has adopted, in substance, the English rule as to the period at which a surrender shall discharge the bail, they have adopted that rule in all its parts—so that if the principal die after the return of the *ca. sa. non est*, the bail cannot be exonerated. The court are of a different opinion. The statute gives to special bail the absolute right to be discharged, upon the surrender of the principal, at either of the periods specified. The death of the principal cannot prejudice this right. The bail do not undertake for the life of the principal; but for his surrender if alive. They are discharged by his death. The limitation of the English rule is not adopted by the legislature, and the court have no authority to insert it by interpretation.

Judgment for the defendant.

ORR *v.* BANK UNITED STATES, ET AL.

BEFORE ALL THE JUDGES.

1821.

A corporation cannot be sued in an action of assault and battery, nor can a corporation be joined in such action with other defendants. In case of such joinder the defendants may demurr.

King and *Atkinson*, for plaintiff.

Opinion of the court by Judge BURNET, delivered Dec. term, 1822.

This is an action for an assault and battery, and false imprisonment. The declaration is filed in the common form, charging the defendants jointly with the commission of the trespass, as though they were all natural persons. The defendants have demurred generally. On the argument two principal questions were raised and discussed.

1. Whether a corporation aggregate is liable to be sued by its corporate name, in an action of trespass for an assault and battery, and false imprisonment.

2. Whether, if they be not so liable, the defendants, Creighton and Dunn, can take advantage of the joinder on this demurrer.

On the first question, *Chitty* has been cited (1 *vol.* 66) where he says, corporations may be sued in that character, in many instances, for damages arising from neglect of duty imposed on them by particular statutes, but they cannot in general, be sued in that character, in trespass, or replevin. The action must be brought against each person by name, who commits the tort.

In 8 *East.* 230, Lawrence, justice, says, trespass does not lie against a corporation. Thorp, justice, says, trespass does not lie against a corporation aggregate by its corporate name, for a capias and exigent do not lie against it, (22 *Ass.* 67.) A corporation cannot beat nor be beaten, nor commit treason, or felony, nor be outlawed, &c. (21 *Edw.* 4, 7, 12, 27, 67.) They cannot be assoigned, (1 *Bac. ab.* 507.) nor outlawed, (10 *Co.* 32.) nor attached, (*Ray*, 152.) no replevin lies against them by the name of their corporations, (*Brownl.* 175.) They cannot be declared against in custody. (6 *Mod.* 188.) They are not indictable, though the particular members are. (12 *Mod.* 559.) They cannot sue as a common informer. (2 *Stra.* 1241.) For torts they must be sued individually. (*Salk.* 192.) Trespass does not lie against a corporation, but against its members. (4 *Com. franchise F.* 19.

A corporation cannot commit a trespass but by their writing under their seal. (*Vin. Ab. Cap. K.* 22.) Trespass does not lie against commonalty, but shall be against the persons, by their proper names, for capias and exigent lie not against commonalty. (*Ib. P.* 2) Trespass does not lie against a corporation, viz. by the name of corporation, but against the persons who did it, by their proper names, for capias and exigent do not lie. (*Ib.* 2, 15.) As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them, for a capias and exigent do not go. (2 *Sell.* 149. 2 *Imp.* 675. *Bro. Corp.* 43.) A corporation can neither maintain, nor be made defendant to an action of battery, or such like personal injuries, for a corporation can neither beat, nor be beaten, in its body politic. (1 *Blac. Com.* 503.) It appears also that the civil law ordains (in conformity with this rule) that for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. Wooddison, in his lecture on corporations, (1 *vol.* 494.) is very clear and explicit on the subject. He says, "it is incident to all bodies politic, to sue and be sued, by their name of incorporation, but it is manifest that this must be restricted to particular actions; thus corporations can neither be plaintiffs nor defendants in actions of assault and battery."

The case in 12 *John.* 227, cited by the plaintiff, shows that the law in relation to the liability of corporations, is so changed by the course of modern decisions, that they are now held responsible on promises, express, or implied, and that assumpsit may be maintained against them on such promises. But because the law has been changed in relation to contracts, it does not follow that it is also changed in relation to torts, so as to render a corporation liable, generally, to actions of trespass, or for other torts, by persons not belonging to the body corporate, at least without showing that they were done by an authority from them, granted in pursuance of their charter, In short, the only question decided in that case was, that a corporation may make a valid contract, not under seal; and this point being settled, there was no incongruity or falsity apparent in the declaration, and therefore the court very properly decided that they would not stop and enquire, in that stage of the proceedings, whether the contract was made in such manner, or by such persons as to be binding on the defendants. The objection in that case was taken on the broad ground that assumpsits will not lie under any circumstances, against a corporation, but the court having shown, very clearly that the position was not tenable, overruled the demurrer without further enquiry: and it may be remarked, that the reasoning of the court is confined exclusively to matters of contract. The same observation may be made respecting the case of the *Bank of Columbia v. Patterson*, (cited from 7 *Cran*, 299.) which was an action of assumpsit for work and labor. Various questions arose in the progress of that cause; none of them; however, having a direct bearing on the case now before the court. The point most analogous was, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorised agents, are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie.

The case of *Dunn. v. the Rector, &c. of St. Andrew's church*, (14 *John.*

118.) was also assumpsit for work and labor. The only question agitated was, whether an action of assumpsit on an implied promise, can be maintained against a corporation, which was decided affirmatively, on the authority of the two cases just considered.

Much reliance has been placed, by the plaintiff, on the case of *Riddle v. the proprietors of the locks and canals on Merrimack river.* (7 *Mass. Rep.* 169.) This was an action on the case, for not sufficiently opening and keeping in repair a certain canal, by reason of which the raft of the plaintiff grounded, in attempting to pass it, and was damaged. A verdict was rendered for the plaintiff, and a motion for a new trial having been overruled, a motion was made in arrest of judgment, on the ground that at common law no action lies against a corporation for a tort, because among other reasons, judgment in such an action is entered with a capiatur, which would be absurd against a corporation. The court in giving their opinion on this point, seem to admit the doctrine in 21 *Edw.* 4, 12, 27, 67, that a corporation cannot be beaten, nor beat, nor commit treason, or felony, nor be imprisoned for a disseisin with force, nor be outlawed, and they add that these principles result from the nature of an aggregate corporation. But in remarking on the opinion of Thorp, justice, in 22 *Ass. pl.* 67, in which he says that trespass does not lie against a corporation aggregate by its corporate name, they express doubts. Thorp's opinion they say, has been overruled, as to certain trespasses, and *refering* to some of the authorities in 16 *East.* from which they say it is very clear that some actions of trespass might at common law be maintained if against aggregate corporations, they conclude that as in these cases no capiatur could be entered, the omission of this entry could be no objection to actions on the case. This conscise statement is sufficient to show that the question now in hand did not necessarily arise. The point determined was, that trespass on the case would lie, and that judgment in such an action might be entered without a capiatur, and for this purpose only, the authorities relating to trespass and other torts were referred to. But it cannot escape the most careless observer that neither the case decided, nor those referred to, support the position now contended for, that assault and battery can be sustained against a corporation aggregate. Thorp's opinion was questioned only as to certain trespasses, and the court went no farther than to say, that some actions of trespass might be maintained, from which the conclusion naturally follows that, generally, that action cannot be maintained, and they admit that a corporation aggregate, from its nature, can neither beat nor be beaten, which seems to be decisive of the question we are considering. It was urged by the plaintiff that the reason on which the law, under consideration, was originally founded, had ceased to exist, and that therefore the law itself has ceased, in conformity with the maxim, *Cessat raito, cessat etiam lex.* But however true this maxim may be, in the general, it is subject to exceptions. There are many principles of common law, settled on reasons that have ceased, and many more on reasons that have not only ceased, but are now forgotten, that are still in full force: as for example, it is law at the present day that debt and trespass cannot be joined, although the reason of this law no longer exists, which was, that in debt the process was summons, on which a fine was paid to the king, in proportion to the sum demanded, but in trespass the process was a capias, and the court set a fine in proportion to the offence.

It is not, however, admitted that all the reasons, or that the most weighty reasons of the law question, have ceased, for although the distinction of process is done away by our statute, yet it remains a truth that a corporation aggregate, as such, cannot commit the act charged in this declaration, as they have no personal existence, and can neither beat nor be beaten. An action for an assault and battery, committed on a corporation aggregate, in their corporate character would be a novelty in judicial proceedings; and yet it appears to be as contrary to reason and common sense, that they should be the agents in such a trespass, as it is that they should be the objects of it. It is a fact entitled to some weight, that among the multitude of adjudged cases relating to corporations, from the Year books to the present day, not one can be found that decides the principle as it is contended for by the plaintiff. Although it forms no objection to an action that such an one has never before been brought, yet the fact affords strong presumptive evidence that the law is against it.

On the whole, whatever exceptions may exist to the rule, that actions of trespass generally do not lie against corporations, it is evident that the action now under consideration cannot be one of those exceptions, and therefore that it cannot be sustained against the bank.

The second question is, whether the defendants, Creighton and Dunn, can avail themselves of the demurrer, admitting that the corporation could not have joined in the tort, and that the action cannot be sustained against them.

The law as laid down in 1 *Chitty*, 74, seems to be well established, that if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur, and if a verdict be taken against all, the judgment may be arrested or reversed on error. In other cases, says Chitty, where in point of law several persons may be jointly guilty of the same offence, the joinder of more persons than were liable &c. constitutes no objection; one of them may be acquitted, and a verdict taken against the others. It was alleged in argument, that the concluding part of this authority limits the application of the preceding part, to torts of which only one person can be guilty, but there does not appear to be any necessity for such a limitation. On the contrary, to give effect to the whole passage, the concluding part must be taken with the qualification evidently imposed by the preceding part of it, and naturally implied by the terms used in it. The meaning of the passage seems to be, that in cases, where in point of law, all the defendants named in the writ may be jointly guilty of the offence charged, it is no objection that some of them are not guilty, for these may be acquitted, and a verdict taken against the others. This construction will give to the whole passage its proper effect, and remove the apparent discrepancy, produced by the opposite interpretation. It appears also to be required by other authorities applicable to the subject. For example, whatever proves the writ false, at the time of suing it out, shall abate it entirely, and if the falsity appear on the record, advantage may be taken of it by motion, or on demurrer. (1 *Bac. Abr.* 11, *n.*) As if the writ issue against two persons, and one of them be dead before it be taken out, or if there be no such person as one of them, *in rerum natura*, or if in a *precipe quod reddat*, against two, one of them have the whole tenancy in himself, the writ shall abate at common

law, though in the last case it is now saved by *St.* 25, *Ed.* 3. The question then occurs, in the case before us. Was not the writ false at the time it was taken out, and does not this appear from the declaration? It charges an assault and battery to have been jointly committed by a corporation and individuals, when in point of law a corporation cannot commit a battery, either separately or jointly with others. It therefore charges the defendants with the commission of a joint act, which in contemplation of law they could not have jointly committed, and must of course be false.

It appears to be immaterial whether the objection to the joinder arise from the nature of the act, or from the character of the agent. Verbal slander cannot be jointly committed by two, or more, therefore two defendants cannot be joined in that writ. A corporation cannot commit an assault and battery, that tort therefore cannot be jointly committed by a corporation and others, consequently a writ that charges two or more persons with verbal slander, or that charges individuals with a battery, committed jointly with a corporation, cannot be good, and for the same reason, because it presents a case in either instance in which the tort complained of cannot be jointly committed by the defendants who are jointly charged. The writ would be false by the doctrine cited from *Bacon*, and the joinder would be bad on the authority of *Chitty*.

By what course of reasoning, or by what analogy are we justified in limiting the operation of the principle to the nature of the tort, excluding the character of the agent. The reason of the law unquestionably is, that the declaration charges an act impossible in itself—it is false, and certainly it is not the less false, because the impossibility of the joinder arises from the physical inability of one of the defendants to participate in the act. The rule is, that several persons cannot be made defendants jointly, when the tort cannot in point of law, be joint. In the case before us, it is impossible that all the defendants have joined in the tort; as to them therefore it cannot be joint, and this impossibility is as striking and as operative as if it had arisen from the nature of the tort. It was admitted in argument, that a declaration charging two persons with verbal slander, is bad, on demurrer. There can be but one reason for this, which is, that the defendants could not, under any circumstances, jointly commit the act charged. And may it not be confidently asserted, that in the case under consideration, the defendants could not, under any circumstances, jointly commit the injury charged against them. On what foundation then can we maintain the distinction that has been contended for.

It is true that in the case in 2 *Saund.* 117, cited by *Chitty*, in support of his doctrine, was a case of slander; but it is believed if that case had been the one now before the court, instead of the case of slander, it might have been argued with equal plausibility, that the doctrine in Chitty would not embrace the case of slander.

On this branch of the subject the plaintiff has relied on the cases cited in *Yarborough v. the Bank of England*, (16 *East*, 10.) These however, go no farther than to show that there have been instances of trespass against corporations in which individuals were joined; but it does not appear that the question was raised in either of them, whether the action could be supported.

In one of them the objection was to the process, in the other to the joinder, and in neither was the objection sustained. *Broke* 34, is introduced as saying "the better opinion was, that the writ was good." Yet the same author (*pl.* 43.) tells us, that trespass does not lie against corporations. It may also be observed that if the defendants admitted (as it appears they did, without putting the question to the court) that trespass could be sustained against a corporation; they waved the principal objection to the joinder, to wit, the falsity of the writ, depending on the fact that one of the defendants could not, in point of law, commit the act, and therefore that the others could not have committed it jointly with him.

But in deciding the case before the court, it is not intended, nor is it necessary to assume the principle, that trespass will not lie in any case against a corporation, or that individuals may not be joined in the same writ with a corporation for a tort which they may jointly commit. The doctrine is intended to be carried no farther than to actions of assault and battery. The case of *Yarborough* was trover, and Lord Ellenborough, in giving his opinion, says, that the defendants, as a corporation, can do no act but through the instrumentality of others, and that they cannot, as a corporation, be subject to the process in trespass, because the remedies which attach on living persons, cannot be applied to bodies merely politic and of an impersonal nature, but that wherever they may competently do or order an act by their common seal, they are liable to the consequences of such an act; and to support his position and illustrate his meaning, he cites several actions against corporations for false returns. It may be added, that we should not naturally expect in a case like this, to find a decision of the question on which the case in hand depends, and it may be safely assumed, that the question is not settled, either by the principal case or by the authorities cited. The plaintiff has also contended, that the fundamental principles and settled maxims of the law ought always to be kept in view, one of which is, that every right must have a remedy, and every injury ought to be redressed. This is admitted, but it does not follow, that the party complaining must have a choice of remedies, nor does the doctrine now advanced interfere with this acknowledged maxim; for although it be alleged that a corporation, as such, cannot be made a defendant in an action of assault and battery, it is admitted that every individual who counselled, procured or aided in the commission of the trespass, is liable. It is true, in this case as in every other, that the individuals held responsible may be insolvent; but the law is not chargeable with this evil, nor should it be condemned beeause it does not multiply remedies for the purpose of guarding against it. It was also urged that this demurrer cannot be supported, unless the case be made an exception to this general rule or maxim, and that before this be done, it ought to be shown clearly that it is an exception and that it comes within the reason on which exceptions are founded. The case, however, is not considered as forming an exception, for the sustaining of the demurrer does not deprive the plaintiff of a remedy, but merely decides that he has sought one which the law does not give him. The rule requires nothing more than that each right should have a remedy, or one remedy. It cannot then be violated, by a decision that the plaintiff has had recourse to an improper remedy, unless it be also a fact that law has provided no other,

But this is not the case. A remedy exists, which has been pointed out, and to which the party injured may have recourse.

The plaintiff might have entered a *nolli prosequi* as to the bank, and proceeded against the other defendants, but he has thought proper to insist on his right to sustain the action against all the defendants, and must now submit to the censequence of the demurrer, which must be sustained.

DECISIONS IN BANK.

1823.

LUCKY *v.* BRANDON ET AL.

A debtor imprisoned within the jail limits, may go into private houses, or labor on private ground within such limits, without being guilty of an escape.

The prison limits may be defined by mathematical lines or by artificial monuments.

It is agreed between the parties in this cause, that James Brandon, after giving the bond as mentioned in the declaration of the plaintiff, and before the sheriff liberated him, to wit: between the 27th August and 20th September, 1819, went off of the public grounds and streets in the town of Canton, and frequently wrought by days together on private property; that he was often in Tuscarawas street as far as the centre thereof during the period aforesaid. It is further agreed that the affidavit writ hereto attached was made by said Brandon before James Williams Esq. a justice of the peace, on the 26th August, 1819, as certified by said justice; that notice of such affidavit and oath was given to the counsel of Lucky within a short period thereafter, who furnished money on his own account to the amount of ten dollars, to support said Brandon in prison, which was expended for that purpose at the rate prescribed by law; and that when that was so expended, the counsel refused to furnish any more funds for that purpose, but did not, on the part of his client, permit or authorise the discharge of said Brandon, nor did he, in any wise on behalf of his client, refuse to support the said Brandon. And that Lucky the plaintiff, never had notice of said oath or affidavit until after the discharge and enlargement of the said Brandon. And that Lucky, the plaintiff, lived in Wayne county, 22 miles from Canton, and his counsel lived at Steubenville, Jefferson county, 58 miles from Canton.

The affidavit referred to was made by Brandon, and alledged that he had not the means of supporting himself in prison.

The certificate of prison rules was as follows:

The court affix the following as the jail bounds for Stark county:

South of the jail to Tuscarrawas street inclusive.

West of the jail to Poplar street inclusive.

North of the jail as far as the in lots of the town of Canton extend.

East of the jail as far as Walnut street in Canton inclusive.

GOODENOW *for plaintiff.* HARRIS *for defendant.*

By the COURT.

The first point made is, that the plaintiff ought to have personal notice that a debtor in prison has made oath that he is unable to support himself, be-

fore the prisoner can be discharged. Where the residence of the plaintiff, or his atttorney is known, this notice ought to be given, and it ought to be given in a reasonable manner, so as to produce effect. Whether it were most reasonable to give it to the party, or to the attorney, must depend upon the circumstances of each particular case.

A creditor cannot be said to neglect or refuse to support the prisoner, when he has no knowledge that such support is required of him. This notice therefore cannot be dispensed with unless it is impossible to give it, as where the residence both of plaintiff and attorney, or other agent, cannot be ascertained; which can seldom happen. In this case the notice was given to the attorney. The attorney acted upon it, and furnished support for a time. This was an acceptance of notice, and it is too late for the plaintiff to object the want of it.

The second point made is, that the prison bounds cannot be extended over private property, so as to authorise the prisoner to enter private houses, or labor on private grounds within the condition of his bond. The court cannot adopt the reasoning by which it is attempted to sustain this position; and the rejection does not include the proposition that the prisoner acquires a right to go where he pleases upon private property, without the consent of the owner. The prisoner acquires within the limits of the prison bounds no other right than that enjoyed by every other citizen, to associate where admitted, and to labor where employed. The public assumes no other control over the property or persons within the bounds, than over the property and persons of other citizens. Within the bonnds prescribed, the rights of the prisoner are the same that he would enjoy were he not imprisoned. This is what the law intended to confer, and the practice under it has been uniform in adopting this interpretation.

It was not the object of the law to permit air and exercise only. It intended to afford an opportunity to labour; to employ himself if he could, for the support of himself and family. Any other construction would make him a mere idle saunterer in the streets, exposed to the temptation of vicious indulgence, and setting an evil example to others.

The statute directs that bounds may be laid off and assigned around and adjoining the prison so that these bounds shall not extend more than four hundred yards in any direction, from the jail. A subsequent law extends the prison bounds to the corporation limits of the town in which the jail is situate, or if the town be not incorporated, then to the limits of the recorded town plat. According to the plaintiff's argument, the prisoner may range within these limitts any where upon the public ground, and the public streets and alleys; but he can go no where else. He must retire to the jail to sleep, to eat, and to perform all the offices of nature, or these must be attended to in the public streets. Such a construction was never thought of by our legislators: it therefore could not have been intended by them. The court have not looked into the authorities cited by the plaintiff on this point; they could not adopt them if they sustain his position. The question stands too clear upon principle and sound practical good sense, to be decided against these, in deference to any authority.

The third point is, that the rules assigned by the Court of Common Pleas, are not defined by metes and bounds, and therefore do not so exist as to

warrant the prisoner going at large. If this point is well taken it cannot entitle the plaintiff to recover upon the prison bounds bond. If no bounds were assigned, the bond was taken without authority, and against law. The sheriff might be liable for an escape, but the bond could not be sustained. The point however, is not well taken. The assignment of limits, or bounds, is clear and certain. These bounds are mathematical lines, not vissible actual monuments. It never was intended that the bounds around the jail, extending in each direction four hundred yards, should be wholly enclosed by actual vissible monuments. Upon the plaintiff's argument these must be continuous around the whole area of the limits. If monuments be set up at certain points, and the line between described only mathematically, it would not be sufficient. The space between the monuments would not be designated with that certainty which is contended for. This consequence of the argument would seem sufficient to show that it is not tenable.

It is lastly contended for the plaintiff, that Tuscarawas street is not included within the bounds as assigned by the court. These bounds are extended "south of the jail to Tuscarawas street *inclusive*." This term includes Tuscarawas street, and establishes the southern line of that street, as the southern limits of the bounds. The bounds further extend west of the jail to Poplar street, inclusive. East of the jail as far as Walnut street in Canton, inclusive. Tuscarawas street, from its intersection with Poplar street, west, and Walnut street, east, *is thus* clearly included within the bounds. The prisoner was not out of the bounds when upon Tuscarawas street, any where between its intersection and with Poplar Walnut street. The case agreed does not show that he was on that street, east or west of this intersection. It does not therefore show him out of the bounds.

Judgment must be for the defendant.

GOODENOW *v.* TAPPAN.

Where the defendant pleads in Abatement a misnomer of the plaintiff, the plaintiff may reply, that he is known as well by the one name as the other.

Words spoken in discharge of official duty are not actionable, otherwise, if spoken, wantonly and maliciously under pretence of official duty.

The intention with which words are spoken is to be left to the jury.

This case came before the court upon a motion in arrest of judgment, reserved in Jefferson county, and certified to this court for determination. As two important points were ruled in the previous proceedings, and as the cause is of importance to the two respectable gentlemen who are parties, and who are now both members of the profession, a brief history of the case is here presented.

The declaration was as follows:

1*st Count.* "For that whereas the said Goodenow is a good citizen, and has always maintained a good character from his youth to the present time, and for divers years has been an attorney and counsellor at law of the several courts of judicature of the the State of Ohio: yet the said Tappan, well knowing the premises, but contriving and maliciously intending to injure the said Goodenow in his good name and professional character; and to bring him into

public scandal and disgrace, and to destroy his practice as a lawyer, and to harass, and oppress, and impoverish him, hertofore *to wit:* on the 31st day of December, in the year of our Lord one thousand eight hundred and sixteen, at the county of Jefferson aforesaid, in a certain discourse which he the said Tappan then and there had, of and concerning the said Goodenow, and of and concerning his said profession and standing as an attorney and counsellor at law, as aforesaid in the presence and hearing of divers good and worthy citizens of this state; then and there, in the presence and hearing of those citizens, falsely and maliciously spoke and published of and concerning the said Goodenow, and of, and concerning his said profession and standing as an attorney and counsellor as aforesaid, these false, scandalous, malicious and defamatory, words following, that is to say: "He" (meaning the said Goodenow) "fled his country to escape from justice, and now disguises himself" (again meaning the said Goodenow,) "under a borrowed name—he" (again meaning the said Goodenow) "is unfit to be trusted."

2d Count. Same inducement as in the first. Words charged—"He is of infamous character—he broke jail in New England and fled from justice."

3d Count. Same inducement as in the first. Words charged—"He is a d——d rascal, and an immoral and base man, and unless ignorance of the law makes a lawyer he is no lawyer—he is an ambidexter and a disgrace to his profession."

4th Count. "And whereas also the said Goodenow is a good citizen and of upright character, and as such has always conducted himself from his childhood to the present time; and now is, and for divers years has been, an attorney and counsellor at law of the courts of judicature in this state: and whereas also before the committing of the several grievances by the said Tappan, as hereinafter mentioned, a certain appointment was pending, in the power and disposal of the court of Common Pleas of the county of Jefferson, to the office of prosecuting attorney of the state of Ohio for said county; and whereas the said Goodenow was proposed and considered of as a candidate for said appointment: nevertheless; the said Tappan, well knowing the premises, but contriving and wickedly and maliciously intending as aforesaid, heretofore: *to wit:* on the first day of January in the year of our Lord one thousand eight hundred and seventeen, at the county of Jefferson aforesaid, in a certain other discourse which he the said Tappan then and there had and held with divers other good and worthy citizens of this state, of and concerning the said Goodenow, and of and concerning his profession and character as an attorney and counsellor at law as aforesaid and of and concerning the appointment of prosecuting attorney as aforeseaid, then and there, *to wit*, on the day and year last aforesaid, falsely and malicously spoke and published of and concerning his said profession and charcater as an atttorney and counsellor at law as aforesaid, and of and concerning the apppointment aforesaid, and in the presence and hearing of the said last mentioned citizens, these other false, opprobrious, malicious and defamatory words following, that is to say: "He" (meaning the said Goodenow) "is a man of immoral character. He" (again meaning the said Goodenow) "broke jail in his own country, and fled from justice."

5th Count. Same inducement and colloquium as in the fourth. Words charged—"He is destitute of character—he broke jail in New England, and fled to escape the lash of the law, and now wears a borrowed name."

6th Count. Same inducement and colloquium as in the fourth count. Words charged—"It won't do to appoint such a man—he is of bad character —a man that broke jail and fled from justice is unfit for any office."

7th Count. Without any inducement. Words charged: "He is a runaway—he broke out of jail in New-England and fled from justice."

The defendant by consent of the plaintiff obtained leave to plead at the same time, both in abatement and in bar, as many several pleas as he might deem necessary for his defence, without the pleas in bar being considered a waiver of the pleas in abatement.

He then pleaded in abatement that said "Goodenow is named and called by the name of Milton Goodenow, and by the name of Milton Goodenow from the time of his baptism hitherto hath always been called and known, without that he now is, or at the time of suing out the said writ was, or ever before had been called or known by the name of John Milton Goodenow," &c. and verified the plea by affidavit as the statute required. He also pleaded the general issue upon which issue was joined.

To the plea in abatement the plaintiff replied that "the said John Milton Goodenow, long before, and at the time of suing out the said writ, and of filing his said declaration, was and still is called and known as well by the name of John Milton Godenow, as by the name of Milton Goodenow," &c. To this replication the defendant demurred.

The question upon the demurrer was argued in Jefferson county, at the October term of the Supreme Court, 1819, before Judges Pease and McLean, —when the demurrer was overruled, and the cause continued to be tried upon the issue.

A trial was had at November term, 1822, before judges Pease and Hitchcock, and a struck jury. The testimony to prove the speaking of the words, was as follows:

Alexander Sutherland Esq.—At the F. and M. Bank, in Steubenville, in the winter of 1817, after Mr. Goodenow had been elected a justice of the peace the second time, there was a conversation between judge Tappan, Thomas Scott, the Cashier of the bank, and witness. Judge Tappan began boring witness, for having supported the plaintiff for the office of justice of the peace, he having, as witness understood, opposed said Goodenow's election: Tappan said "where he came from, it required the best men to be elected to office—but here it made no odds." Witness then observed—"some time since *a lawyer* could not have been elected:" upon which the defendant replied "As to Goodenow's law knowledge, God knows' that ought to be no objection to him." Witness further stated, that plaintiff had always been been known in his practice as a lawyer by the name of John M.

On his cross-examination, he stated, that plaintiff had been elected a justice, and the election set aside on Mr. Wright's remonstrance, on account of the votes not having been opened agreeably to law, and a new election ordered.

Samuel McElroy, Esq. late an associate judge.—Before the appointment of Mr. Hallock, prosecuting attorney, but whether while the office was vacant, or before it became so, witness could not recollect which, in a conversation with judge Tappan concerning the appointment of a prosecuting attorney—

there being several candidates, and among others, the plaintiff was spoken of—he said, that Goodenow had left his own country privately, that he was not a law character, and that his christian name was not John M. but Milton. This conversation was at defendant's house, and considered by witness as private and confidential, and had not before the present moment been divulged.

Thomas Turner's deposition.—That a short time after judge Moores' return rom the Legislature in the month of February, he, with judge Moores and James Moores, jun. were at judge Tappan's, James Moores, jr. having an intention for offering for the Clerk's office. Judge Tappan asked judge Moores who he thought a proper person for a states' attorney: judge Moores observed he knew of no person but Goodenow. Judge Tappan said—"Goodenow won't do—he is an immoral character—he broke jail for debt or otherwise—ran away and changed his name."

Col. James Moores, jr.—Witness's father, Thomas Turner, and himself, were at judge Tappan's in February, 1817, when the subject of appointing a prosecuting attorney was introduced. Judge Tappan said—"It won't do to appoint Goodenow—he is an immoral character—he broke jail—fled his country and changed his name."

James Moores sen. Esq. associate judge.—The third or fourth of February, 1817, he was in Steubenville, with his son, and son-in-law Turner; his son, having some intention of applying for the office of clerk of the courts, which was then vacant, asked him to walk down to Judge Tappan's: he went with his son and son-in-law; and after some little conversation, judge Tappan turned himself full in the face of the witness, and said—"It won't do to appoint Goodenow prosecuting attorney"—witness asked, why? he replied—"He is an immoral character (or an immoral man)—he broke jail and fled his country, (or fled from justice) changed his name and now wears a fictitious one." On the day before, defendant had been conversing with witness about the appointment of a prosecuting attorney, when the defendant spoke in favor of Mr. Hallock—said he was a better draftsman, &c.; and stated to witness that judge Anderson was agreed to Hallock's appointment: to which witness replied, if that was the case his assent was not necessary, for the defendant and the other judges would overrule him. Defendant replied, he wanted no overruling about it. At that time witness was in favor of Goodenow's appointment; but when, on the next day, the judge made the charges before stated, he gave Goodenow up. Witness stated further, that the plaintiff had always been known, in his practice at the bar, by name of John M. and none other.

On his cross-examination, witness said he had, sometime in the fall season of 1816, conversed with the plaintiff about the office of prosecuting attorney, and asked him if be would accept it if it became vacant. He said he would, but not to the prejudice of Mr. Wright, the then incumbent.

The Plea in abatement, and the affidavit attached to it, and the certificate of Plaintiff's admission by the Supreme Court to practice as an attorney and counsellor at law, were then read.

A number of depositions taken in New England, were read, by which it was most clearly established that the plaintiff was baptised by the name of John Milton Goodenow, but had generally transacted business and been known by the name of Milton Goodenow only. It also was placed beyond all doubt, that he

had always sustained a fair character, though he had been unfortunate in trade, and that he left New England publicly, and brought with him to this country most respectable testimonials, of the rectitude of his moral principles, of his integrity, intelligence, and ability.

On the part of the defendant, *John C. Wright, esq.* and *William Lowry, esq.* were introduced, with sundry documents, to prove that plaintiff had borne the name of *Milton Goodenow*, before and after his coming to Steubenville to reside. The plaintiff's counsel conceded, and wished it to be understood, that they did not deny that the plaintiff had generally used the Christian name of *Milton* only, before and after he came to Steubenville, which was in September, 1812, until he was admitted to the bar in August, 1813.—Mr. Wright also stated that the plaintiff brought letters of introduction from his brother, and perhaps from others, to him, when he came to Steubenville—that he then used the name of *Milton* only; that he read law with him awhile; and that he gave him a certificate of good moral character, by the name of *John Milton Goodenow*, upon which he was admitted to an examination before the Supreme Court. Witness further stated, that when plaintiff first came to Steubenville he invited him into his family, where he resided for some time, and his conduct was fair and honorable.

The case was opened to the jury by Mr. Root, for the plaintiff—but the counsel for the defendant declined arguing the cause to that tribunal. They moved the court to instruct the jury that the plaintiff was not entitled to recover on the words proven, because—

1. The words were not *in themselves actionable.*

2. That if intended to be made so, by reference to the professional character of the plaintiff, they would not support an action because they related to a time *anterior* to the plaintiff 's admission to the bar.

3. That, if the words were spoken, as he contended they were, in *confidence*, they were not actionable, *without express malice* were proven: and,

4. That, if spoken by the defendant in discharge of his *official duty* as president judge, he was *protected by the law*, and no action would lie.

This motion was argued by *Mr. Wright* for the defendant, and *Mr. Doddridge* for the plaintiff—and when the argument on the motion was closed, *Mr. Silliman* proposed to conclude the case by an argument for the plaintiff to the jury: but it was objected to by the defendant; and ruled by the court, that the practice had long been settled—that where the counsel for the plaintiff had made an argument to the jury, (the testimony being closed,) to which the defendant's counsel declined to reply, he is not permitted to address the jury a second time.

The COURT instructed the jury upon the law governing the action, and—"that words, although not actionable in themselves, may become so when spoken of a man in his professional or official character, if they impute to him dishonesty, want of skill, or any other matter that renders him unfit for the profession or occupation which he fills—That malice is the *gist* of the action; and that malice is implied from the untruth of the charge; but that this implied malice may be done away by circumstances: that it is necessary for public good that judicial officers, as well as others in whom an appointing power is lodged, should be protected in a free and unrestrained communication on the qualifications of candidates before them; but this should be exercised

in good faith, and ought not to be used as a cloak to cover malicious or wanton attacks upon those who may offer themselves for public employment. If, in the case submitted, the jury should be of opinion that the words were spoken in the discharge of the defendant's official duty, as presiding judge of the court before whom the plaintiff was a candidate for an office which was in the power of that court to bestow, and that the words were spoken in confidence, and without malice, they would then be stripped of that malice which constitutes the legal character of slanderous words, and the defendant would be entitled to a verdict: But this was a question of fact to be left to the jury to decide; and if they should not find the situation of the parties, and the circumstances under which the words were spoken—the time, manner and place of speaking—such as to divest them of their natural malicious import, the defendant would not stand excused."

The jury found the defendant *guilty*, and assessed the plaintiff's damages at *six hundred dollars*.

The defendant filed reasons for a new trial, and also in arrest of judgment. The reason for a new trial was as follows:—

The verdict is against the law and evidence in this, that the only evidence upon which the verdict could be rested, is evidence of consultations and conversations held by the defendant to and with judges M'Elory and Moores, his associate judges of the court of common pleas of Jefferson county, of and concerning the appointment of a prosecuting attorney for said county, for which office the plaintiff was a candidate, and that by the law of the land no action of slander will lay, or can be sustained upon, and for words so spoken in the discharge of an official duty.

In arrest of judgment it was alledged that the *third*, *fourth*, *fifth*, and *sixth* counts in the declaration were not actionable.

The motion for a new trial was argued for the defendant by Hallock, and the defendant himself—and by Silliman for the plaintiff.

Mr. *Silliman*, for the plaintiff. *Hammond* in support of the motion.

The COURT were unanimously of opinion that the seventh count was bad. Judges PEASE and HITCHCOCK were of opinion that all the other six counts were good. Judges BURNET and SHERMAN were of a different opinion as to some of the counts. The court therefore being equally divided on the motion in arrest, it failed; and the cause was certified back to Jefferson county, that examination might be had as to the abandonment of the seventh count. If the fact of abandonment is made out, judgment to be entered for the plaintiff on the verdict—otherwise judgment arrested.

Note by the Reporter.—The proceedings of the trial of this cause are abstracted from minutes of the trial published by the plaintiff. The account of the argument upon the motion for a new trial is taken from a copy of the defendant's brief, as furnished by himself.

In charging the jury the court are made to say, "that the words although not actionable in themselves, may become so when spoken of a man in his professional or official character, if they impute to him dishonesty, want of skill, or *any other matter that renders him unfit for the profession or occupation which he fills.*

It is possible that these latter terms may be understood by the profession to embrace much more than the judges intended. To prevent any misconceptions on this point, the Reporter subjoins, from his own notes, the following case decided at Dayton, June term, 1823, by Judges Pease and Burnet.

ASPINWALL v. WILLIAMS, ET AL.

In order to constitute a partnership, a communion of profit and loss between the parties is essential, and this is the true criterion, to determine, whether persons are parties or not.

Articles of agreement, for constituting a partnership, assigning to each party the performance of certain things to put the business into operation, constitutes a partnership immediately, and not from the commencement of the business itself.

When no name is adopted in the articles of co-partnership, and a contract is made by one partner on the joint account, a note given by such partner, in the name of himself and Co., is binding on all.

This cause was tried before the Supreme Court of Hamilton county, at May term, 1823, and a verdict rendered for the defendant. A motion was made for a new trial and reserved for decision upon a case stated, at the special session in Columbus.

The substance of the case is as follows: On the 31st of July, 1818, the defendants entered into contract, of which they made a memorandum in writing, in the following words:

"MEMORANDUM of an agreement made and entered into this thirty-first day of July, one thousand eight hundred and eighteen, between Jacob Williams, of Mill-creek township, Hamilton county, and State of Ohio, on the first part, and Benjamin Gardner, jun., and William Chase, of Newport, State of Rhode-Island, on the second part, witnesseth, that the said Jacob Williams, Benjamin Gardner, jun. and William Chase, do agree to erect and build a distillery for the *distillation of grain*, jointly to share and share alike the cost of said establishment, to be erected on the ground of said Williams, near where he now resides. Now the conditions of this agreement are such, that the said Williams does, for himself, his heirs, and assigns, agree to lease for the occupation of said establishment, a certain lot of ground, not to exceed more than two, or be less than one and one half acres of land, through which there is a running stream of water, for the sole use of said establishment, or those interested therein; this lease to continue for the full term and time of fifteen years, to commence from the time of signing these instruments: and for his part doth further covenant and agree to erect the necessary buildings in order to go into the operation, to commence thereon immediately: the said Gardner and Chase, do on their part agree to provide the stills and worms of said establishment. It is further understood that a store of goods shall be established, to be furnished by said Gardner and Chase; and after the establishment shall be completed, the goods and stills on the spot, an equal proportionate of the amount paid by each shall take place, and a full adjustment be made. The whole establishment, goods, &c. &c. is to be equally owned by us three. The said Gardner to manage all things appertaining to the distillery inwards, and the said Chase all that concerns the out-door business of the

ANONYMOUS.

The action was brought for saying of the plaintiff, "he cannot get business any more:—he is so steady drunk that he cannot do business any more. The people will not employ him." The declaration contained the proper averments that the plaintiff was a physician, and obtained his living by the pursuit of his profession, and that the words were spoken of the plaintiff's professional conduct, capacity, business, &c.

Upon the trial of the cause, the speaking of the words being fully proven, the counsel for the defendant urged to the jury that the words were not actionable, because they did not touch the professional skill and capacity of the plaintiff, nor his professional integrity—that if it were actionable to say of a physician that he was drunk, or steady drunk, every individual ought to have

establishment; the said Williams to be consulted in all things, and his advice always to have due weight. Further, we, the said Jacob Williams, Benjamin Gardner, jun. and William Chase, do by these presents bind ourselves, our heirs, and assigns, for the full and faithful performance of the above obligations; and should either of the parties feel disposed to sell or dispose of their interest therein, the remaining parties shall have the offer to buy out; and after the expiration of the lease, it shall be at the option of the said Williams to continue, or sell out; and that a settlement of all accounts shall take place quarterly, or half yearly. Respecting the purchase of grain it is understood, that whatever purchases each of the parties may make, it is to be binding on all the parties, or that what sales of whiskey or gin each one may effect, the other parties are to comply with."

Received five hundred dollars, in full for all damages, *costs and debts*, and especially for all damage on or respecting this article.

JACOB WILLIAMS.

After the making of this contract, the defendant, Chase, proceeded to New York with letters from merchants in Cincinnati, stating the character and responsibility of the defendant, Williams, upon the credit of which the plaintiff sold him a quantity of merchandise, and took a note for the amount executed by Chase in the name of Williams, Chase & Co. Upon this note the action is brought. It was admitted that Williams knew nothing of Chase carrying letters recommending his credit, to New York. It was also admitted that none of the goods came to the use of Williams, and that the business of distilling was never commenced between the parties.

HAMMOND *for Plaintiff.* CORRY *for Defendant.*

Opinion of the Court by Judge BURNET.

The question to be decided is, was there a partnership at the date of the note, so as to render Williams liable to this action.

On the part of Williams it is contended, that these articles do not show a partnership, at the time the note was given, but only a project for a partnership, to be consummated at a future day.

an action for the same words, which would be subverting the foundation upon which actions for words now rested, and opening a new and most mischievous source of litigation.

The counsel for the plaintiff resisted these arguments and inferences with great labor and ability; but the court coincided substantially with the defendant's counsel in the points made by them, and charged the jury that the words were not actionable. The defendant had a verdict. The plaintiff's counsel moved for a new trial, but did not argue or press the motion.

The following case decided by Judges Pease and Brown, at Belmont, 1818, may also serve to show something of the opinions of the Judges in respect to the action for words.

BARRET v. JARVIS.

The declaration in this case charged that the defendant, with the intent of causing the plaintiff to be considered a mulatto and a relation of negroes, and thereby to cause him and his family to be excluded from the society of white people, and denied the right of suffrage, spoke of the plaintiff and his daughter Polly, to one Z. M. these words: "I understand that you are going to marry Barrett's daughter; I am sorry you should for they are akin to negroes." The defendant pleaded two pleas: first, that he spoke the words as a report, and named his author at the time; second, a justification. Upon both these pleas issues were joined. A verdict was found for the plaintiff, 75 dollars damages. A motion was made in arrest of judgment, upon the general ground that the words were not actionable. The Court of Common Pleas, consisting of Judge Tappan and his associates, arrested the judgment. A writ of error was brought by the plaintiff to the Supreme Court, and the judgment of arrest was affirmed.

For the plaintiff it is insisted, that the contract created a complete partnership from the moment it was signed, and that the stipulations as to what each partner shall do, are nothing more than a distribution of the services to be performed by each, for, and on account of the joint concern.

In deciding the question submitted, it is necessary to ascertain what constitutes a partnership in the view of the law. Having done so, we may determine the true construction of this contract, and whether it did or did not create a partnership between the parties, from the time of its execution.

A partnership has been defined to be "a contract of an association, by which two or more, contribute money, goods, or labor, to the end that the profits may be ratably divided between them." This definition, as far as it goes, is said to be unexceptionable; but it is incomplete, as to third persons, between whom and the parties the question most frequently arises. In this respect, it is observed that he who shares in the profits, ought to bear his proportion of the losses, because by taking the profits he takes the fund on which the creditor relies for payment. In order to constitute a partnership so as to make a person liable as a partner, there must be some agreement between him and the ostensible person, to share in the profits, or he must have permitted the ostensible person to use his credit, and to hold him out as one jointly answerable with himself. (1 *Com. on Cont.* 286. *Doug.* 371.)

In order to constitute a partnership, a communion of profit and loss between the parties *is* essential, and this is the true criterion to judge by, when the question is, whether persons are parties or not. (1 *Blac.* 43, 48.) Where one takes a moiety of the profits, he shall, by operation of law, be made liable for losses. (2 *H. Blac.* 247.) But where an agreement was made for the purchase of goods, in the name of one, for the benefit of several, but the agreement did not extend to a joint sale of the goods, a majority of the court held that it was not a partnership, but had the agreement extended to the sale as well as the purchase, all would have been liable, though but one was known in the purchase. (1 *H. Blac.* 37.) Though in point of fact, parties are not partners, yet if one so represent himself, and by that means gets credit for the other, both shall be liable. (1 *Esp. Rep.* 29.) In the case of *Waugh v. Carver and Giesler*, (2 *H. Blac.* 235) it was admitted that the parties to the contract did not intend to become partners, or to carry on trade at the risk of each other, or to become liable for each other's losses, but yet it was determined that as to third persons they were partners, because it appeared from certain parts of the agreement that they intended to share the profits. This case was decided principally on the authority of *Grace v. Smith* (2 *Blac. Rep.* 998) in which it was settled that every man who takes a share of the profits, ought, by operation of law, to bear his share of the loss. Let these principles be applied to the case before us, and there does not appear to be any room for serious doubt. It might have been the intention of the parties to the agreement that each person should pay for the articles, or goods, he purchased; but the expectation of partners is not to affect the legal rights of their creditors. The question is not simply, what the parties intended by the contract, but whether third persons had not a right to rely on their joint credit. To determine this we must refer to the agreement itself. The first provision is, that the three parties to the contract, do agree to erect and build a distillery jointly, to share and share alike the cost of said establish-

ment. The defendant, Williams, is to lease a certain lot for the use of the establishment, to continue for the term of fifteen years, and to commence from the time of signing the said instruments. He agrees on his part to erect the necessary buildings—Gardner and Chase agree on their part, to provide the stills and worms for said establishment. A store of goods shall be established, to be furnished by Gardner and Chase. After the establishment shall be complete, the goods and stills on the spot, the whole establishment, goods, &c. to be equally owned by the three partners. From this it appears that the parties were all equally interested in the establishment. They were to be joint owners of the goods, which were to be sold at their store, for their common benefit. They were consequently to participate in the profits.

Again—It would seem that the term, establishment, as used in the agreement, was intended to embrace the whole concern of the parties, and to include the store, as well as the distillery. If this inference be correct, no doubt can remain, as the first article in the contract provides, that the parties shall share and share alike the cost of the establishment. The cost of an establishment must include all money expended, and all debts contracted in the completion of it, which would, in this case, include the debt on which the suit is brought. The mind seems to be irresistibly led to this conclusion from the consequences that a different construction would produce on the parties themselves. Admit for a moment that the defendant's construction is to be sustained, and what is the conseqence? Williams, on his part, is to furnish the ground and to erect the buildings, at the joint cost of all the parties. Chase and Gardner, on their parts, are to furnish the stills, worms and goods at their own individual cost; and when all are furnished, each is to be an equal owner of the whole. The injustice of such a construction, must be apparent.

But if it be admitted that the store was not considered as a part of the establishment, but merely as an appendage, the same conclusion seems to follow, for as the principal establishment was by express stipulation to be erected at the joint cost of all the parties, the appendage to the establishment must be provided on the same terms. Justice requires it—the common sense of mankind requires it.

Had it been the intention of the parties to provide for a partnership, to commence at a future day after each of the parties had furnished his portion of the stock, the contract would have contained some stipulation as to the amount to be furnished by each, and that it should be on his own credit, so that each might bring into the common stock an equal portion of it. But nothing is said on this subject. Each party is left to his own discretion. The building may cost much or little—the assortment of goods may be small or extensive—yet each is to be equally interested in, and an equal owner of the whole.

In forming an establishment of this kind, various duties and services were to be performed, and it was natural to distribute these among the parties with reference to their different capacities; hence we find that Williams was to have the building erected, and the other partners were to lay in the goods. This consideration will sufficiently account for this part of the arrangement, without searching for any other cause, and when in connection with this it is considered that all the disbursements and engagements of Williams, in performing his part of the contract, were to be at the joint cost of the concern, it seems to remove all doubt as to the understanding of the parties themselves on this point.

But some stress has been laid on the clause, that "an equal proportionate of the amount paid by each shall take place, and a full adjustment be made." What we are to understand by an equal proportionate in this case cannot be easily told, as that term is never used in any sense in which it can be understandingly applied in the connection in which we here find it. The meaning of it may be ascertained by determining what the intelligible parts of the contract require it should be. It is certain that a partnership is provided for—that a distillery is to be established—that the parties are to share and share alike the cost of the establishment—that a store of goods is to be furnished—that the parties are to perform different services in getting the establishment into operation—and that they are to be joint and equal owners of it. These provisions would seem to require another, that each party should render an account of his purchases and payments, in order to ascertain the whole amount of capital, the sum advanced by each, and the debt contracted on the credit of the company, by which their situation would be known, and their accounts could be correctly stated and adjusted. But in such a provision we cannot see any thing inconsistent with the commencement of a partnership, from the date of the contract.

Great reliance is placed on the case of *Saville v. Robertson*, which the defendants consider as establishing the construction for which they contend. Independent of the fact, that the court were divided in that case, we cannot but view it as operating rather against the construction they contend for, inasmuch as the *leading facts* on which a majority of the court found their opinion, do not exist in this agreement, and in the absence of those facts it can scarcely be doubted, that the whole court would have concurred with Ashhurst; but let us examine the case, and compare it with the one before us. In Saville's case, each individual was to have an interest in the cargo equal to the amount of goods he might furnish. In this case, each party was to have an equal interest in the whole establishment. In that case the contract extended to a single voyage only, at the expiration of which each party was to receive back the amount of cargo he had furnished. In this case the contract was to continue fifteen years, and the interest of the parties was not governed by the amount furnished by each. In that case it was expressly stipulated, that the parties should not be liable for the engagements of each other. In this case it is as expressly stipulated that the parties shall share and share alike the cost of the establishment. In that case the copper for which the suit was brought was purchased on the individual credit of Pearce, who did not take the name of any other person into market, nor did the seller look to the responsibility of any other. In the case before us, Chase took the names of all the parties into market, and the goods were purchased on the responsibility of the defendant, Williams. In that case it was stated what should be done on the joint credit of the company, and what on the credit of the members individually: it was provided that one should not be bound by the contracts of another, and no confidence had been created, nor any credit obtained in consequence of the association. But in this case there is no such provision. Williams was held out as a partner; his name was carried into market, and the fact of his being a member of the company procured for it all its credit. Connect with these circumstances the facts, that the parties were to share the cost of the establishment—that Williams was to be an equal owner of the goods which were to be sold for their joint

account, and that they were all interested in the profits, and it would seem that no doubts can remain. It would certainly be a novel case if Williams was to furnish his part of the stock at the joint cost of all the parties—Gardner and Chase to furnish their part at their own individual cost, and then each partner should be an equal owner of the whole. Such a construction cannot be admitted.

There are other circumstances in the case from which inferences might be drawn; as for example, the language of the article is in the present time—the parties do agree to erect, &c.—the law shall commence from the time of signing the instruments, and the receipt on the back of the article recognizes a liability for debts as well as for cost, but we have not thought it necessary to dwell on these facts.

We do not discover any serious difficulty in the form of executing the note. The agreement being silent on that subject, the fair presumption arising from all the circumstances is, that the form adopted by Chase, was the one agreed on by the parties.

We are clearly of opinion that the partnership commenced from the time of signing the articles, and that the plaintiff had a right to look to the credit of all the parties. A new trial, therefore, must be granted.

McARTHTUR v. PORTER, ET AL.

Where the vendor of a tract of land, having a lien for the purchase money, obtains a judgment against the administrator of the vendee, upon which the land is sold for a sum sufficient to pay the whole amount, the lien does not pass to the purchaser of the land, so as to enable him to set it up against the dower estate of the widow of the original vendee; but such lien is extinguished by the sale on execution.

The substance of the case made in the bill and answers, is this: In May 1797, George Porter, being then unmarried, purchased of Nicholas Taliaferro, part of an entry for land standing in the name of Talliaferro, and gave his bond for the purchase money, reciting that it was given for the purchase money of the land, and specifying that the land was to be held as a security until the bond was taken up. Porter obtained an assignment of the entry and warrant from Talliaferro, had a survey executed, and in August, 1797, obtained a patent in his own name. In April, 1798, he married the defendant, Sarah. In September, 1801, George Porter deceased, and administration upon his estate was granted to Peter Porter. The bond given to Talliaferro not being paid, suit was brought on it against the administrator in the general court of the territory, and at October term 1802, Judgment was rendered and execution awarded. The writ of execution commanded the sheriff to make the debt, charges and costs, of the goods and chattels remaining in the hands of the administrator, and for want of such goods and chattels, to make the same of the lands and tenements. Upon this writ the sheriff returned that there were no goods, and a levy upon four hundred and fifty-two acres of land, condemned to be sold by a jury of twelve men, and not sold for want of bidders. There were, in fact, no goods. Upon a subsequent execution the land was sold by the Sheriff to the complainant for the sum of 1521 dollars. The money was paid to the sheriff, and on the 19th December, 1803, the sheriff

made the complainant a deed. The judgment was satisfied, and the balance of the money paid over to the administrator, and the complainant obtained possession of the land.

The defendant, Sarah, prosecuted her writ of dower against complainant, and recovered judgment for one-third of the premises, and for damages at the rate of thirty-five dollars per year from September, 1802. The bill prayed a perpetual injunction, upon the ground that the bond for the purchase money, under which it was sold upon execution, attached as an equitable lien upon it, which was paramount to the widow's dower, so that the sale by the sheriff divested her right in equity.

The bill also claimed that the complainant ought to be considered in equity as the holder of the bond of Talliaferro and the lien connected with it, and that the widow could set up no claim for dower until such lien was discharged; and that after so much of the land was sold as would discharge the lien, she should be endowed of the remainder only.

And it claimed further, that the widow ought only to be endowed of the value of the land and of the improvements as they were at the death of her husband, not as they were when her recovery was had.

And if the court sustained the recovery of dower, it claimed of Talliaferro, who was made a defendant, that he should refund of the amount received pro rata, and asked a decree to that effect.

The cause was argued at great length by SCOTT and GRIMKE for the complainant, and by BRUSH and EWING for the defendants.

By the COURT.

The view taken of this cause by a majority of the judges, renders it unnecessary to decide upon the validity of the sheriff's sale—the existence of the equitable lien relied upon—or the power of the territorial courts, as courts of law merely, to enforce such equitable lien. Admitting every one of these points to be decided as the complainant contends for, still he has presented no case that entitles him to the relief sought.

George Porter, the deceased, acquired, by his patent, an estate of inheritance in the lands in question. The defendant, Sarah, by her marriage with George Porter, acquired the right of being endowed in these lands, if she survived her husband. Upon his death this right invested her with a complete, perfect, legal estate. If an equitable lien existed upon the lands for purchase money, it belonged to Talliaferro, and to no one else. As to all the world beside, her right was clear and unquestionable at law. At the sheriff's sale the complainant did not purchase any right or interest that belonged to Talliaferro. He purchased the estate of which George Porter died, seized, and nothing more. George Porter held this estate subject to his wife's claim for dower. In his life time he could not, by any act of his own discharge the estate of this claim. The sheriff could sell nothing more than what George Porter himself could have sold. The land, therefore, was sold by the sheriff and purchased by the complainant subject to this charge of dower. The prosecution of this bill, and the arguments in support of it, seem to involve this admision. If the

complainant acquired the widow's dower by the purchase at sheriff's sale, it would have availed him as a defence to the action at law. This suit would not be necessary. Where nothing but a legal right was sold, how could he acquire an interest to be set up and established in equity? The land was sold as assets in the hands of the administrator for the payment of the debt due of the purchase money. It sold for a sum sufficient, and the proceeds were applied in discharge of that debt. By this payment, the lien for purchase money, whatever its character or effect might be, became extinct. It never passed from Talliaferro, but perished in his hands.

Had the estate of Porter, which was assets in the hands of his administrator, proved insufficient to pay the debt, it would then have been necessary for Talliaferro to have enforced his lien against the widow's dower estate. This could only be done by making the widow a party. Could she have been legally divested of the freehold vested in her by the death of her husband, upon the mere suggestion of an equitable lien, of which she might be totally ignorant without giving her a day in court to defend her right or redeem her land? Such a principle would be most arbitrary and unjust: it is only by the application of such a principle that the complainants claim can be sustained.

It may be asked how the territorial courts, having no chancery jurisdiction could have proceeded against the widow? It may be answered that if they could not proceed at all, the consequence would be rather that the widow should hold her estate than that she should loose it, without hearing or judgment. But if every thing that was assets in the hands of the administrator, had been exhausted and the debt not satisfied, a proper process might have been devised to subject the widow's dower, determining in the first place, that it was liable, and in the next place, directing how it should be sold. A scire facias setting forth the whole matter, and calling upon the widow to show cause why her dower estate should not be subjected, might have been a proper course. Such a proceeding would have carried with it some semblance of justice, which is not the character of the doctrine contended for by the complainant.

Adopt this doctrine, and what is the consequence? The equitable lien is a secret circumstance known only to the creditor and debtor—other persons have no opportunity to obtain a knowledge of it. It does not appear upon the records of the court, or in the registry of deeds, nor in the terms of sale. The bidders never hear of it. They bid for the estate subject to the dower incumbrance, and offer a price accordingly. If it be afterwards discovered that the judgment creditor held a secret equitable lien, the purchaser may claim it as his own, and call upon a court of equity to set it up for him, in destruction of the widow's right—thus acquiring, through the aid of a court of chancery, a valuable interest in the estate, which was not contemplated at the time of purchase, and for which he paid not one cent of consideration.

Such, in the opinon of the court, is the claim of the complainant. He seeks, without the payment of a cent of money, or the performance of a single beneficial act to the estate by way of consideration, under pretence of an equitable lien, which, if it ever existed, he never owned, and which was long since extinguished;—to wrest from the widow a valuable legal estate, vested in her by the death of her husband in absolute right, without her ever being

made a party to the proceedings that thus annihilates her rights. An attempt of this kind ought not to receive the countenance, much less the aid of a court of chancery.

It is the opinion of a majority of the court, that as the complainant purchased the estate in question, subject to the widow's dower, her recovery leaves him in full possession of all that he purchased. As he has lost nothing, he can claim nothing of Talliaferro or of others. His bill must be dismissed, with costs.

Judge BURNET's *dissenting opinion.*

Having dissented from the opinion of the court, given in this cause, I feel it my duty to state the view which I have taken of the subject, and which has led my mind to the conclusion that the decree ought to have been in favor of the complainant. In order to do this intelligibly, it will be necessary to state the leading facts in the case. In May 1797, George Porter since deceased, purchased the land in question from Nicholas Talliaferro, and gave his bond for the purchase money. The condition of the bond specified that it was given on account of the condition of the land, and that the land should be held as a security until the bond was taken up. In August of the same year, Porter obtained a patent and in April 1789, intermarried with the defendant, Sarah Porter.

In 1801, he died intestate, seized of the premises, leaving the said Sarah, his widow, and W. I. Porter, his only child and heir at law. Peter Porter took letters of administration on the estate of George Porter. Talliaferro instituted a suit against the administrator for the balance of the purchase money not paid, and obtained a judgment in October, 1802, before the General Court of the Territory, for $1125 16. On this judgment execution issued, and there being no goods and chattles, in the hands of the administrator, the sheriff returned *nulla bona*, and that he lived on the land in question, being a part of the tract purchased of the plaintiff. The complainant became the purchaser at the sheriff's sale, and obtained his deed in due form of law.

When the judgment was obtained, and when the execution was levied, there was no court of chancery within the territory. Sarah Porter has since set up a claim of dower, and obtained a judgment at law against the complainant, against which he prays to be relieved.

Many points are presented in the record, and have been discussed in the argument, but it appears to me, the case may be settled by the examination and decisions of two questions. *First.* Did McArthur acquire a legal title to the land in dispute, by his purchase at the sheriff's sale. *Second.* Was Talliaferro vested with such an equitable lien on the premises as will enable the complainant to hold them, free from the claim of the widow's dower, he having purchased at the sale for the satisfaction of the debt, which is alleged to have been a lien.

In deciding the first question, it will be necessary to look at the statute of 1795, which was in force when the action against Porter was commenced, and which is substantially the same as that of 1802. This statute was adopted from the Pennsylvania code, in which we find two statutes on the same subject, one passed in the year 1700, which was supplied by the other, passed in the year

1704. The governor and judges, who it will be recollected, constituted the territorial legislature, under the first grade of government, adopted the latter act, the first section of which is in these words. "To the end that no creditors may be defrauded of debts justly due to them, from persons who have sufficient real, if not personal estate, to satisfy the same, all lands, tenements, and hereditaments, *whatsoever*, where no sufficient personal estate can be found, shall be liable to be seized and sold on judgment and execution obtained." This section is literally transcribed from the law of Pennsylvania, under which it has been uniformly decided, that lands are liable to be sold on judgments and executions against executors and administrators, without the interference of the orphans' court, and without any previous proceedings against the heir. It was natural for the courts of the territory to adopt the rule of construction which had been settled in Pennsylvania, as the statutes were the same, and as their construction appeared to be reasonable, beneficial, and in strict conformity with the letter of the law. Accordingly we find that the General Court of the Territory in construing our statute of 1795, decided in accordance with the rule established in Pennsylvania, that lands were liable to be taken and sold on judgment and execution, against executors and administrators, in the same manner as in other cases—and such was the uniform practice under the territorial government. As the statute of 1802 did not make any substantial variation in the law, in this respect, the construction just adopted was continued, and the General Court were in the constant habit of allowing and sustaining such executions and levies, nor do I recollect of hearing the soundness of their construction questioned, till after the establishment of the state government. That construction had been given to the law before I commenced practice in 1796, and in the western part of the territory its correctness was not questioned.

But it was contended at the bar that the decisions in Pennsylvania were founded on the law of the year 1700, which subjected "all lands of debtors, to sale on judgment against them, their heirs, executors, or administrators."—It appears to me that the defendants cannot strengthen themselves by taking this ground, for two reasons. *First.* Because if the law of 1704 materially altered that of 1700, it must, so far, have repealed it, for if they contain different provisions, the former must give place to the latter—both cannot stand. *Leges posteriores priores abrogant. Secondly.* Because it appears easy of demonstration, that the two laws are substantially the same. The first subjects all lands of debtors to sale, on judgments against them, their heirs, executors, or administrators. By the second, "all lands, tenements, and hereditaments, *whatsoever*, are liable to be seized and sold, on judgments and executions obtained." The additional words, heirs, &c. in the first act, cannot under this provision, be more extensive than we find it in the second. The only difference seems to be that the latter statute, from which ours was copied, subjects all lands to sale on judgment and execution obtained, without designating any case, not even judgments against debtors themselves, while that of 1700 enumerates the cases. Had the latter statute authorised the sale of the debtors' land or judgments against *him*, without further provision, the case might have been different; for then it would have been a fair inference, that having mentioned one description of cases, they meant to exclude all

others; but having specified no case, and having made the provision broad enough to embrace every description of cases, they might well omit the words, heirs, executors, or administrators, as surplussage. Had it been their intention to give the statute a more limited operation than that of 1700, they would have selected such terms as were calculated to answer their purpose, they would have enumerated the cases which they intended to embrace, or would have excepted those designed to be excluded. But they have done neither. As they have omitted those words of the first case, which relate to the debtor himself, as well as those relating to his representatives, the conclusion seems to be inevitable, that they were considered as surplussage, and that the provision, couched in the general terms of the latter law, was the same in its effects, as the more special one in the former law. If it had been the intention of the legislature, by changing the language of the first act, to give the construction contended for by the defendant's counsel, they would have retained the general phraseology of the first law, omitting the words, heirs, executors, and administrators, but as if for the purpose of excluding that construction, they have not only omitted those words, but have varied those preceding them, so as to render the second act more general and comprehensive than the first. The correctness of this remark, will be apparent to every person who will attend to the effect that would have been produced on the first act by the simple omission of the words heirs, executors and administrators, and then advert to the further effect that has been produced by the alteration of the words in the preceding part of the section. But be this as it may, the courts of Pennsylvania have decided either that the two laws are essentially the same, or that the law of 1704, of which ours is a transcript, authorises the sale of real estate, on judgments against administrators, because their decisions have been made subsequent to the passage of that law, which must have repealed the former, as far as it was inconsistent with it.

The first section of the act of 1802, under which Talliaferro's judgment was obtained, is in the following words: "The better to enable creditors to recover their just debts, all lands, tenements, and real estate shall be liable to be levied upon and sold by execution to be issued on judgments, which may hereafter be recovered in any court of record within the territory, for the debt, damage, and cost due and owing on such judgment." This language is as general as words can make it. It embraces without exception all creditors all debts, all real estate, and all judgments, and it requires nothing but the judgment and execution to authorise the levy and the sale. There is nothing in the act that excludes judgments against administrators, or that requires any step to be taken, after judgment, and beyond execution, in order to justify a levy and sale. If land may be taken and sold by execution on any judgmant, it may certainly be taken on a judgment against an administrator, as the law makes no distinction. An application to the Orphans' Court, or a *scire facias* against the tertenants, is not required, nor is it believed that any important benefit would result from it, to countervail the delay and expense that would certainly follow. It would have been easy to shape the law so as to have made but one or the other necessary. The law subjecting real estate to execution for debt, and the law for the settlement of intestate estates have no reference to

each other. They are distinct statutes, intended for different purposes. The former authorises a sale by execution where there is a judgment, without the agency of the Orphans' Court. The latter authorises a sale by the Orphans' Court, on the application of the administrator, without the agency of the creditor. The one puts it in the power of the creditor to effect a sale where the administrator does not choose to act. The other enables the administrator to proceed and settle the estate where the creditor does not see proper to act. The remedies appear to be concurrent and independent; neither seems to require or exclude the other. In the one case the court before which the judgment is obtained will protect the rights of all persons concerned. In the other, the Orphans' Court which grants the order of sale, will perform the same office. As I cannot perceive any particular advantage that would be gained by requiring the judgment creditor to apply through the administrator to the Orphans' Court for an ordor of sale, and as such a course is not required by the letter of the statute, there appears to be no sufficient reason to induce a court to require it. The difference that exists in the nature and extent of the lien which creditors have in this country and in England on the lands of their debtors, is sufficiently striking to show that many of the formalities that are considered necessary in that country, are not so in reality in this. In England the personal estate is the fund for the payment of debts, and for that purpose it goes as assets into the hands of the administrator, while the real estate descends immediately to the heirs, unincumbered with any lien that will justify the creditor in meddling with it, without a previous judgment against the heir. But not so in this country; here lands are assets to the same extent as chattels, and the only difference is, that the personal property must be exhausted before the real estate is resorted to. In England the liability of land to the claim of creditors, is partial and limited. Here it is general and extends to the whole interest of the debtor. There was not therefore any thing incongruous or improper in the principle recognized by the legislature, and adopted by the court in the construction of this statute. At all events it must be conceded that the phraseology of the law admitted of the construction given to it, without violating any principle of common law that had been recognized or adopted in the territory, although other judges equally learned might have been disposed to give it a different construction. It will also be admitted that the general court of the territory had a right to settle the construction of statutes, and that their decisions should be considered as the law of the land. In 1 *Blac. Com.* 69, it is said to be "an established rule to abide by former decisions where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judges' opinion, as also because the law in that case being solemnly declared, what was before uncertain and probably indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to altar or vary from, according to his private sentiments." The only exceptions to this rule are where the former decision is evidently contrary to reason or the divine law. The Supreme Court of the United States have recognized this rule, and have uniformly adhered to the construction given by the superior courts of the several states to their own statutes. In the case of *Telfair v. Steads, Ex'r.* (2 *Cran.* 418,) that court adopted the construction given by the courts of Georgia

to statute 5 *George II.*, by which construction lands were made chargeable for debts in the Colonies without making the heir a party. In the case of *McKeen v. Delancy, lessee*, (5 *Cran.* 32.) although the Supreme Court of the United States considered the construction given to an act of Pennsylvania, by the Supreme Court of that state, to be incorrect, or such an one as they would not have given had the question been presented for the first time, yet they adhered to the construction given by the state courts, observing that in constructing the statutes of a state on which land titles depended, infinite mischief would ensue should they observe a different rule from *that* established in the state. The same doctrine is held in *Higginson v. Mein* and *Pollard, &c. v. Dwight, &c.* (4 *Cran.* 418, 429.) In 2 *Blac. Rep.* 264, it is said, where an error is established and has taken root, upon which any rule of property depended, it ought to be adhered to by the judges, till the legislature think proper to alter it, lest the new determination should have a retrospect and shake many questions already settled.

It would be highly improper for this court to disregard the construction given by the general court of the territory, to the statute in question, for many reasons—1. The statute was adopted by them, and by their authority received its obligatory effect in the territory: they must, therefore, have known what they intended by the law. 2. The same construction had been previously given in the state of Pennsylvania, to a statute substantially the same. 3. By disturbing that construction much mischief would ensue, and many titles would be put in jeopardy. And lastly, as the statute has long since been repealed, there appears to be no necessity to alter or vary the rule, should it even be admitted to have been an improper one.

On the whole, I am led to the conclusion, that the staute authorized the levy and sale which were made in this case, and that the complainant, by his purchase, has acquired a legal title to the premises in question. On this point, however, I believe there is no material difference in the opinion of the court, though I am not authorized to say there is a perfect coincidence.

The next enquiry is, whether Taliaferro held such an equitable lien on the premises as will enable the complainants, by virtue of his purchase, to hold them free from the claim of dower? In considering this question, we are naturally led to enquire, whether Taliaferro held a lien—whether that lien is superior to the widow's dower—and whether the complainant, as a purchaser under the sheriff, is entitled to the benefits of it, to the exclusion of the right of dower?

The rule seems to be well settled, that the vendor has a lien on the premises for the purchase money, unless he agree to relinquish it and rely on other security. Proof of such agreement must come from the purchasee; for in the absence of such proof, the lien is considered as existing. The death of the vendee does not affect the lien, nor is it destroyed by giving an obligation for the purchase money, or by the payment of a part of it, and it exists in favor of an assignee. (See 3 *Eq. Ca.* 682. 1. *Vern.* 267. 3. *Alk.* 277. 2 *Ves.* 622. 1 *John. Ch. Rep.* 308, and other cases there cited.) So far from there being any agreement on the part of Taliaferro to abandon his lien, it appears from the condition of the bond, that he relied on it, and that Porter understood and agreed that the land should be bound till the bond was discharged. The exis-

tence of the lien being ascertained, we are to enquire whether it excluded the widow's dower? We find that the purchase was made in 1797, and the marriage took place in 1798—consequently the lien existed before there was any pretence to the claim of dower. The right having once vested, it was not in the power of the vendee to alter or abridge it by any act of his own, so long as the purchase money remained unpaid. Such a power would be altogether inconsistent with the nature of the right, and would destroy the value of the security. A lien held at the will of him on whose land it attaches and whose estate it encumbers, would be a novelty in legal proceedings. It would form a species of security as useless as it is unknown. In fact, the idea of such a power is inconsistent with the existence of the lien, and amounts to a declaration that the lien was never in being. The law, by making this provision in favor of the vendor, intended to give him a beneficial security, and if so, the permanency of that security must be placed beyond the control of the vendee.

In principle, there is no difference between a privilege to destroy the right in part, or to abolish it entirely. We can prescribe no limit to the exercise of such a discretion. But it is apparent that the vendor had a right to hold the entire estate in security. The law gave him an equitable mortgage, and it must protect it. I, therefore, conclude, that as the lien extended to the whole of the land, it was not in the power of the vendee, by any transaction or contract of his own, to relieve a third or any portion of it from the operation of that lien; and whatever might be the decision as to the widow's claim, when prosecuted in a court of law, in this court it must yield to the prior equitable claim of the vendor. The doctrine of notice, it is conceived, does not apply to a case circumstanced like the present. The widow does not stand on the ground of a purchaser, for a valuable consideration without notice. She comes as a participator in the rights of her husband, as they stood at the time of her marriage; and as far as those rights were encumbered, she must be affected by the encumbrance. Her claim is legal, not conventional: it would therefore be doing violence to the laws—it would raise it above itself, to give it the double operation of divesting the widow of a settled right, for the arbitrary purpose of vesting it in another. On the same principle, a legal mortgage would give way; but I believe that the law, in settling the rights of the widow, has had a scrupulous regard to the rights of others. Hence we find many cases in which her claim yields to the superior equitable claim of others; as, for example, if her husband exchanges land with another person, she cannot be endowed of both tracts, although her husband was seized of an estate of inheritance in both during coverture, because it would be unjust and would operate injuriously on the rights of others. And for the same reason, if her husband, being seized in common with another person, make partition, and that the person be evicted for want of title, she shall not have her dower in that part of the land which his co-tenant may recover *pro rata*. (2 *Bac. Dower, B.* 4. *F. N. B.* 150.) So, if her husband were seized of a joint estate and died, she shall not be endowed on account of the survivorship, for the survivor claims from the grantor, which is prior to her title of dower. So when a vendee, at the time of receiving his deed, executes a mortgage to the vendor to secure his purchase money, the wife of the vendee is not entitled to

dower; for although her husband was seized, it was but for a moment, and it would be inequitable to support the claim in opposition to the clear understanding of the parties, by which the deed and mortgage are to be considered as parts of the same contract and treated as though they had been embraced in one instrument of writing. (2 *Co.* 77. 15 *John.* 459. 4 *Mass.* 560.

In *Winn v. Williams*, (5 *Ves.* 130.) the master of the rolls decided, that a purchaser or mortgagee might protect himself against a claim of dower by taking in a mortgage executed before the marriage, "although the consequence will be, utterly defeating the right of dower."

The decisions by the courts of different states, on this point, have not been uniform. In Massachusetts it has been settled, that a widow is not dowable of an equity of redemption generally. (10 *Mass.* 364.)

In Pennsylvania, the widow is dowable of land mortgaged before marriage, but the right is subject to the mortgage. (2 *Searg. and Ra.* 554.) But a sale on a *levari facias*, on a mortgage, will bar the right of dower, though the mortgage were executed during coverture. (*Scott v. Crosdale*, 2 *Dall.* 127. 4 *Dall.* 301, *note.*)

In New Jersey, dower cannot be claimed of land mortgaged before coverture. (1 *South. Rep.* 260.)

In Connecticut, Maryland and New York, a widow may be endowed of an equity of redemption. (1 *Conn. Rep.* 550. 7 *John.* 282.)

In North Carolina, it has been decided, that a widow is entitled to dower only of such lands as the husband died seized of, and consequently that an alienation by the husband alone, during coverture, is a bar to dower. (1 *Hayw.* 243.)

In Virginia, a mortgage by the husband during coverture, does not bar dower, unless the wife join. (2 *Munf.* 527.)

In South Carolina, the court said (in *Wells v. Martin*,) the right to dower had a preference to mortgages or any other incumbrances made or suffered by the husband in his lifetime. (2 *Bay.* 22.) But the Reporter, in a note to *Bogie v. Rutte, &c.* (1 *Bay.* 312.) says, that it has been repeatedly determined in the courts of that state, that "widows of mortgagors were not entitled to dower."

In Kentucky, the widow may be endowed of any beneficial interest of which her husband was seized during coverture. In the case of *Winn, &c. v. Elliott's widow, &c.* (*Hard.* 488.) which was a bill in equity to bar the widow of her dower, the husband had, during the marriage, a beneficial interest: he had acquired the legal title, and he died seized in law, whereby, said the court, the wife's right to dower became complete at law, and they decided that her claim should not be ousted by an equity against the husband *derived during the coverture*, and from the husband: nor should it be defeated by showing a title not derived paramount the husband's, but under it; nor *by an equity that did not commence previous to the wife's*, but subsequent thereto.

In Ohio, it is admitted that the widow is dowable of lands mortgaged or aliened by the husband during coverture, if she do not join in the mortgage a deed of conveyance. And it has been decided, in the case of *Ewing v. Stansbury*, that she shall be endowed with reference to the value of the premises at the time of the alienation.

But it is confidently believed, that no court in the United States has decided, that a widow is dowable of an equity of redemption, where the mortgage was

executed before coverture, without the qualification that her right is subject to the mortgage. In the case of *Collins v. Torrey*, (7 *John.* 283.) the court say: "The plain and necessary rule is, to allow her the dower, which she must take, as the heir or the purchaser takes the estate, subject to the mortgage."

It only remains now to enquire, whether the complainant, in consequence of his purchase, is entitled to the benefit of this lien? We have seen already, that the lien continues in favor of an assignee; but whether the complainant be considered in that light or not, as a purchaser at a sale legally made to raise the purchase money for the benefit of Taliaferro, he must be entitled to the same consideration that Taliaferro would have been entitled to had *he* became the purchaser—otherwise the value of the lien would be measurably lost. It was immaterial to Porter who purchased. If the land were bound for its price, to the exclusion of the title to dower, it must remain so in the hands of the complainant; for if the right of dower did not attach prior to the right of sale, it certainly could not be created by the sale. If there had been a court of chancery in the territory, and if Taliaferro had filed his bill and obtained a decree for a sale, the estate in the hands of the purchaser could not have been liable to the widow's claim. But as there was no such court, and the vender was under the necessity of proceeding in a court of laws, it would be unreasonable to say that he shall lose his security, which would be the case, in part at least, were the purchaser to take the property subject to dower, as with that incumbrance it could not be expected to command its value.

This case, in principle, may be likened to a procedure on a legal mortgage, by *scire facias*, under our statute. If the mortgage be executed before the marriage of the mortgagor, the claim of dower yields to the lien of the mortgage, and the purchaser at the sheriff's sale, will hold the premises, to the exclusion of that claim, because the lien is prior and superior to it.

In the case of *Garson v. Green*, (1 *John. Ch. Rep.*) the decree was against the widow and heirs at law, for a sale of the premises without any reservation. It, therefore, seems to have been considered by the chancellor, that the right of dower did not exist, and that the purchaser would take the premises free of this incumbrance.

From the view that has been taken of the subject, it appears to me that Taliaferro had a lien on the land which must be treated as an equitable mortgage, and which secures the land for the payment of the purchase money, to the exclusion of subsequent encumbrances, and consequently that the right of dower, in this case, was subject to the lien, and cannot be set up till the debt is satisfied.

The objection that the proceedings were had in a court of law, seems to be obviated by the fact that there was no court of equity in the territory, and that under such circumstances courts of law will give the same relief as courts of equity, provided the forms of their proceeding will admit it. They cannot enforce a specific performance, or compel a disclosure by the parties themselves, but wherever an equitable right can be presented, investigated, and decided, in a form of action used by them, they will not hesitate to do it, and will enforce their decisions by any form of execution known to the law, and calculated to accomplish the object. Such was the fact in the case before us.

Is it objected, that the widow was not a party in the proceedings at law, and therefore has not had a day in court? Neither is she made a party in proceeding

on a mortgage, by *scire facias*, under our statute, although her rights are affected in the same manner and to the same extent. But she is now a party, and the merits of her claim are fully before us. If those merits have not been decided, and if, as has been urged, the proceedings at law have not concluded her, because the lien was not legal, but equitable, it would seem that the parties, being now before a tribunal of sufficient power, a final disposition may be made of the cause, by which the objection that the widow has not had a day in court would be removed. Should it be admitted, that after the proceedings in the suit at law, and the subsequent establishment of a court of chancery, the widow might enforce her claim to dower, at common law, against the complainant, and that his defence, being an equitable one, could not there be heard, the admission would not affect the question, unless by shewing that the remedy in the territorial court, for the want of full chancery power, was not complete, and that the aid of this court was necessary to perfect it. The admission would not affect the existence of the lien, or its operation on the claim of the widow, it would only show that a court of law would not continue to protect an equitable right, after the establishment of a court of equity, and that this bill was necessary to quiet the complainant and relieve him from the claim at law. If the proceedings in the territorial court did not completely silence the widow's claim at law, the only resource for relief was to a court of chancery.

Should it be admitted in the broadest terms, that the proceedings in the General Court, have had no bearing on the equitable lien of Taliaferro, or on the legal claim to dower, it would follow that the lien is yet to be enforced, and this is certainly the proper tribunal to do it. To render a mortgage operative, it is not necessary for the mortgagee to become the purchaser of the mortgaged premises. Should a third person purchase, at a sale to satisfy the mortgage, it must operate to protect him against after incumbrances, to the same extent that it would have done the mortgagee, had he been the purchaser, otherwise the mortgage would be of but little use. I do not therefore see the propriety of the conclusion, that because Taliaferro was not himself the purchaser, the lien has been discharged, and the complainant must be liable to an incumbrance that Taliaferro might have avoided had he purchased himself. If the lien existed, the whole object of it was to enable the vendor to have the land sold for the payment of the purchase money, free from subsequent incumbrances, and I consider it a matter of perfect indifference, by whom the premises were purchased. If in this case the claim of dower is to be sustained because the mortgaged premises have been purchased at the suit of the mortgagee, and purchased by a stranger, at a price sufficient to satisfy the debt for which they were bound, on the same principle the claim of dower must be good in every case where a third person purchases under a judgment by *scire facias* on a mortgage, for a sum sufficient to pay the debt.

Whether McArthur relied on the lien or not, is a matter not known to the court, nor do I consider it material, as a man may be ignorant of his rights without forfeiting them.

On the whole it appears to me that the equity of the case is with the complainant.

Assumpsit will lie upon a note in writing, whether negotiable or not, without setting out the consideration or original contract.

A principle once established, and continued by common consent, and with general approbation ought to be received as the law of the land.

The term "*currency*" means current, unless the parties by the positive term of the contract attach to it a different meaning.

This was an action of assumpsit upon a promissory note in the following words: "four months after date I promise to pay John S. Dugan or order seventy-five dollars for value received, payable in the currency of this place, if the said Dugan does not take it out in store goods at the same rate. Zanesville, August 17th, 1820."

The declaration alledges that the defendant made his certain note in writing, commonly called a promissory note, and delivered the same to the plaintiff, by which he promised to pay, reciting the note substantially; it then proceeds as follows: "And the plaintiff avers and says that the defendant did not, four months after the date of said promissory note, pay to him or order seventy-five dollars in money current in Zanesville, nor did he the plaintiff take out that sum in store goods at the same rate, by reason whereof the defendant became liable to pay to the plaintiff the said sum of seventy-five dollars in lawful money, and being so made liable to the defendant, then and there afterwards, to wit: upon the first day of January, 1821, at the county aforesaid, undertook and faithfully promised to pay the plaintiff the said sum of seventy-five dollars, when thereto afterwards he should be requested." General issue pleaded, and verdict for the plaintiff. The Court of Common Pleas arrested the judgment; to reverse which the writ of error was brought; general error assigned.

S. W. Culbertson, for plaintiff in error. Goodard and Adams contra.

By the COURT.

It is not necessary to decide whether the note in this case is or is not negotiable, or to adopt or reject the principles of the cases cited on either side; for if it were not negotiable within the rules of decision, we should nevertheless consider it a promissory note, importing in itself a consideration.

From the first settlement of the state, it has been an universal practice among all classes of citizens, in making contracts, for the party who has received a consideration, according to the terms of agreement, to execute a written promise to pay a sum of money or other property for value received. Although the writing thus executed may want words of negotiability, or may contain conditions that destroy its negotiable character, the promissee rests in security upon this written contract, as evidence of his claim, and preserves no other proof of the transaction upon which it was founded. By common consent, actions have always been brought and sustained upon such instruments without setting forth or proving the consideration. Were the court now to establish a different doctrine, great mischief might ensue: numerous judgments would virtually be declared erroneous—existing contracts might be seriously affected, and a rule would be established contrary to the common understanding and

usage of the country. A door would be open for controversy, whether the the note were any evidence of debt, or whether the whole original contract must be made out in proof by the plaintiff? This is required neither by justice nor by common sense. A principle once established and continued by common consent, and with general approbation, ought to be received as the law of the land. It should not, but for very weighty reasons indeed, be departed from or overruled. In this case we are of opinion that no such reasons exist.

The objection to the manner in which the breach is assigned, is not well founded. The term "currency" in a contract must be taken to mean *current money*, unless there be something in the contract itself to require a different interpretation. The case in *9th Johnson* is considered clear on this point.

Judgment reversed.

CAMPBELL *v.* HAMPSON.

The Sheriff has no authority to provide a Jail, or to imprison a debtor in any other place than the public jail.

No action lies against the sheriff for imprisoning a debtor in the same room with criminals, if the county jail contain but one apartment.

This case was certified from the Supreme Court of Muskingum county. It was an action of trespass, and was tried by a jury upon the plea of not guilty, who found a verdict for the defendant. The plaintiff moved to have the verdict set aside as against law. A statement of facts was made and agreed to by the parties; and the motion for a new trial referred for decision to this court.

The facts stated are as follows:

The plaintiff was arrested by the defendant on the 26th day of September, 1822, by virtue of a *capias ad respondendum* issued from the Court of Common Pleas of Muskingum county, in favor of John S. Dugan, in an action on the case, and was in the lawful custody of the defendant as a debtor. The jail of the county of Muskingum contains but one apartment, which is used, and heretofore has been used, for the imprisonment of convicts, persons charged with crimes, and debtors, this being the only room or building appropriated by the commissioners for that purpose. And it also appeared in evidence that the sheriff had represented to the commissioners, the situation of the jail, and requested them to make provision for the separate confinement of debtors. The defendant, on said 26th day of September, by virtue of said writ, took said plaintiff to said jail, and there imprisoned him in said apartment, which then contained two insane persons, one person charged with rape, and one with bigamy. The jail was described as a filthy and loathsome apartment, and the plaintiff protested against being confined there, and claimed decent and comfortable lodgings. The keeper of the jail treated the plaintiff with all humanity and gave him every accommodation, and kept the room as clean and comfortable as the nature of the place would admit. On the 28th day of September the plaintiff procured bail and was discharged.

Goddard and Spangler, for plaintiff.

By the COURT.

At the common law it was unlawful to confine a person in custody for debt in the same prison with those imprisoned for crimes, unless the debtor assented to it. If a debtor were thus imprisoned, he had his action for the wrong against the sheriff.

Our statute directing the erection of jails, provides that the jail shall contain not less than two apartments, one of which shall be apropriated to the reception of debtors; the other shall be used for the safe keeping of persons charged with or convicted of crimes. This provision is clearly predicated upon the principle that the unfortunate debtor is not be associated with the unprincipled and profligate felon. And the court have no doubt but thus to associate a debtor, is a wrong for which he may have an action for redress—the difficulty is, against whom shall such action be brought?

The fact, that this action is sustained, in England, against the sheriff, does not warrant us in sustaining it here. He has with us no authority to provide a jail, or to imprison a debtor in any other place than the public jail. It is the duty of the commissioners to erect and provide a jail. If this duty be performed—if there be a public jail with separate apartments, and the sheriff shall in such case confine a debtor among criminals against his consent, no doubt he would be subject to this action. But the facts agreed present a very different case. Here was a jail with but one apartment, and that contained persons charged with criminal offences. The sheriff had legally arrested the plaintiff—he could not give bail, and it was the duty of the sheriff to confine him in the public jail. Had he imprisoned him elsewhere, it would have been illegal. The plaintiff, in the action, might have considered it an escape—the defendant a tresspass. Where the sheriff acted in strict obedience to his writ, and in the performance of his duty, he shall not be subjected to an action. The plaintiff has sustained an injury from others, and must seek redress against the wrong doers—not against the innocent sheriff.

The motion for a new trial is overruled.

REES v. SMITH.

An objection to the jurisdiction of the Chancellor comes too late, after a defendant has answered and contested the merits.

A punctilious performance of the *minutia* of a contract, is not always required in Equity.

When a vendee files a bill for specific performance, and it appears that the vendor has sold the same land to a subsequent *bona fide* purchaser, for a valuable consideration without notice, Equity will retain the cause, and under the general prayer for relief will decree the value of the land to the complainant.

The bill was brought by the assignee of the vendor of a tract of land, against the purchaser, to obtain a decree for the balance of the purchase money, or a rescinding of the contract. The facts were these: Ludwick Wolfley, James Hunter, John Hunter, Morris Rees, Solomon Rees, Thomas Rees and Noah Zane were proprietors in unequal proportions of sec. 11, T. 14, R. 19, situate in Fairfield county. The land having been entered at the Chillicothe land office, an agreement was made between the parties that the patent should issue

to Zane, who gave a bond to each of the others to convey him his share of the land when the patent was obtained.

In June, 1810, before the patent issued, Solomon Rees sold his tract of land to the defendant, Smith, as eighty acres, at eleven dollars and fifty cents per acre. Thirty dollars to be paid in hand: four hundred and thirty in September following, and the residue in three equal annual instalments. The title to be made in September when the payment was made, and if not then made, Rees to give security for the title to be made in a reasonable time. Possession to be given to Smith in the ensuing October, if required. The agreement was reduced to writing and executed by both the parties.

Upon this contract Smith paid forty dollars at the time of execution: two hundred and fifty dollars on the 27th of October, 1810, and one hundred and thirty in November following; and was put in possession of the land. Rees not having obtained a deed from Zane, in October, 1810, executed a bond to Smith for the title, with Thomas Rees and Jesse Rees as security, conditioned for making a title so soon as a regular survey could be made. Upon this bond the Reeses endorsed an order to Zane to make the title to Smith. The bond and order was presented to Zane, who endorsed upon the bond a promise and an engagement to make the deed to Smith.

After this a survey of the section was made, when it was found not to contain the full quantity. The proprietors all agreed to apportion the loss among themselves, allowing to Smith his full quantity of eighty acres.

In August, 1812, Zane, Smith, and all the proprietors, met for the purpose of executing and receiving deeds. By the consent of all concerned, Zane conveyed to Ludwick Wolfley, James Hunter, John Hunter, and Morris Rees, their several tracts of the land by metes and bounds. At the same time he executed a deed to Smith for the eighty acres purchased of Solomon Rees, the descriptive terms of which are as follows—"being part of Sec. 11, T. 14, R. 19, containing 80 acres, the line to run on the south boundary of the said eighty acres so as to include the two small fields south of the road, and to run the line as near the said fields as may be practicable, so that the line including said fields may be a straight line—thence to run east and west for the basis of the said eighty acres. The body of said eighty acres lying north of the run near Solomon Rees's dwelling house." Smith received this deed, and gave up to Zane the bond executed by the three Reeses, and upon which Zane had endorsed his agreement to convey to Smith. At the same time Zane executed to the heirs of Thomas Rees a deed for all the residue of the section, reserving for himself fifty-five acres, eighty-six poles in the north east corner.

These deeds Zane took with him to Virginia to complete them by adding his wife's relinquishment of dower. When these deeds were returned, Smith took the one for him to his attorney, who advised him that it was too vague and uncertain in description to be valid: upon which Smith refused to accept it, and left it in the attorney's hands.

The balance of the purchase money remaining unpaid, in February, 1813, Solomon Rees assigned Smith's covenant to the complainant, and, Smith refusing to pay, the complainant brought suit at law upon the covenant. Smith defended the suit and resisted a recovery, upon the ground that Solomon Rees, not having

executed the deed in September, according to the terms of the covenant, could not recover at law—and upon that ground obtained a verdict; after which this suit in equity was commenced.

Smith put in his answer without making or stating any objection to the jurisdiction of the court, and in his answer suggested that he was defendant in another suit in chancery, between other parties, in which the boundaries of the land were drawn in question, and praying that proceedings might be staid until that suit was determined. An order was accordingly made to stay the proceedings, and they were staid until the suit in question was decided, which settled the boundaries, as Smith, in his answer in that case, had claimed. This cause was then proceeded in to final hearing in the Common Pleas of Fairfield county, when a decree was made that the defendant should pay the balance of purchase money with interest. From this decree the defendant appealed to the Supreme Court, and the whole case was reserved for decision in this court.

Ewing, for Plaintiff.

Opinion of the Court by Judge BURNET.

Two questions are presented in this case. 1. Has the court jurisdiction? 2. Has the contract been performed on the part of Rees, so as to entitle him to the relief prayed for?

As to the first enquiry, it is manifest that the subject matter of the contract comes properly within the province of a court of chancery. The defendant might have sustained a bill for specific performance, or to rescind; and it is contended with some force, that this right must be so far reciprocal as to authorise the vendor to sustain a bill where the covenants on his part have been substantially, though not literally, performed, and the party claiming a strict performance, is in the full and secure enjoyment of the thing contended for. A punctilious performance of the *minutiæ* of a contract, is not always required in equity, though the want of it may present a difficulty in a court of law. If the conditions have been substantially performed, and the benefits of the contract fully secured to the opposite party, equity has considered it sufficient: But in this case the defendant, by answering and putting the merits in issue, has submitted to the jurisdiction, and the court, at this stage of the proceedings, may go on and decide as the equity of the case may require. He has not only acquiesced, but has obtained a stay of proceedings till the fate of another bill should be known, to which he was a defendant, and by which he might lose a part of the premises purchased of the complainant. The existence of that suit, and the possibility of a recovery, were relied on as an important part of his defence. The court so considered it, and he was indulged with a delay. That suit has been decided in his favor, and now, for the first time, an exception is taken to the jurisdiction of this court. To indulge the defendant in this course, would seem to be trifling with justice. It has been repeatedly decided, that an objection to the jurisdiction of chancery comes too late, after a defendant has answered and contested the merits. If he do not demur to the relief, the court will decree for the complainant on the hearing. (*Gilbert's History and Practice of Chan-*

cery, 219.) In the case of *Ludlow v. Simond*, (2 *New York Cases of Error, page* 56.) this doctrine is asserted and supported, both by reason and precedent.

The 26th section of the act directing the mode of proceeding in chancery, is also relied on. That section provides, "That after answer filed and no plea in abatement to the jurisdiction of the court, no objection, for want of jurisdiction, shall ever after be made, nor shall the court ever hereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in cases of controversy respecting land lying out of the jurisdiction of such court." Without undertaking to decide how far this section will control or affect the provision contained in the second section of the same act, by which the chancery powers of this court are created and limited, we may safely say, that in a case circumstanced like the present, it may be relied on with propriety and effect.

On the part of the defendant it is urged, that the complainant's remedy, if any exist, is at law; but we cannot shut our eyes on the fact, that the remedy at law has been extinguished by a judgment rendered against the complainant by a court of competent jurisdiction, on the ground alleged by the defendant, that Solomon Rees had not complied with his contract. The defendant having succeeded on that ground, now attempts to defeat the application here, by maintaining the converse of the proposition. The words of the statute defining the jurisdiction of courts of chancery, relate to the time of filing the bill. If the complainant has not then a complete and adequate remedy at law, it would seem that the legislature intended to afford him the aid of chancery; nor does there appear to be any thing in the statute making it necessary to enquire whether at any former period a legal remedy did or did not exist. It is one of the peculiar provinces of equity to grant relief in cases of fraud and accident, and it is worthy of enquiry, whether both of these circumstances are not to be found in the present case. The defendant admits that, in the trial at law, he denied the existence of a legal remedy, and having succeeded in that defence, obtained a judgment. He now attempts to defeat the application on the equity side of this court, by advancing the converse of that proposition. Although he admits that the facts remain as they were, he contends that there was a remedy at law, and that this court cannot therefore grant relief. The accidental circumstance, that the plaintiff's remedy at law has been destroyed by the practice of the defendant, ought rather to strengthen than to weaken his claim to the aid of this court.

As the statute admits the jurisdiction of courts of chancery, in cases where there is not an adequate remedy at law, it is difficult to perceive how that jurisdiction should be affected by showing that a legal remedy once existed, which has since been lost, without the fault or laches of the defendant. It is alleged, and such appears to be the fact, that the plaintiff in the court below being an assignee, had no knowledge of the bond and security given by Solomon Rees to the defendant in October, 1810, or of the order on Zane for a deed, or of his acceptance of that order, which circumstance seems to account for his failure in the suit at law.

Circumstanced as this case now is, it must be admitted that the remedy at law, to say the least of it, is both doubtful and difficult, which has been generally considered as a sufficient ground for chancery to retain a cause.

In order to determine the second enquiry, it is necessary to attend more particularly to the facts. By the contract of June, 1810, Solomon Rees was bound to deliver possession of land in October, and to make the title deed in September, or to give satisfactory security that the same should be made in a reasonable time. It is admitted that the possession was delivered, and that in October a bond was given, with security, to Smith, for the execution of the deed. At the time of the contract Smith knew that the fee of the entire section of which the land in question was a part, was in Noah Zane, in trust for Rees and the other proprietors. On the breach of the bond, Rees drew an order on Zane in favor of Smith for the deed, which order Zane accepted, and bound himself to execute the deed. Some time after, Zane, Smith, and the other proprietors met, and agreed on the manner in which deeds should be executed by Zane to each of the claimants, of which meeting and agreement the complainant appears to have had no knowledge. In pursuance of this agreement, Zane executed and delivered deeds to each of the parties for their respective shares. At the time Smith received his deed, or at the time it was executed, he gave up to Zane the bond and security given by Solomon Rees, together with the order on Zane and his acceptance. By the execution and delivery of these deeds, the whole of the land was disposed of, and from thenceforth it became impossible for the complainant to procure, or for Zane to execute to the defendant any other deed than the one which had been executed. By the agreement and the deeds executed as above, all the boundaries of the defendant's tract were fixed and certain, except the northern line, which has since been determined and settled by a decree of this court, according to the claims and pretensions of the defendant, who is and has been, since that decree, in the quiet and peaceable possession of the land. The description of the land, as contained in the deed to Smith, appears to be confused and uncertain; but that uncertainty may be removed by reference to the other deeds executed at the same time, and to the decree before mentioned.

The defendant alleges that when he agreed to the execution and delivery of the deeds, and when he accepted his own, it was with a mental reservation, that if his counsel did not approve of it, he would not retain it or consider it a discharge of the contract; which determination, however, was unknown to Zane or the other parties concerned, till after the delivery of all the deeds, by which it became impossible for the complainant to procure for him any other.

From this state of the case, it appears that the complainant has failed to show a literal performance of the contract, though he has performed it substantially, and in the way assented to by the defendant. The bond and security was to have been given in September, but it was not furnished till October, when it was received without objection, accompanied with an order on Zane for a deed, in pursuance of which order a deed was executed and delivered, and the bond and accepted order given up to be cancelled. This would not have been done, had not the defendant considered the bond as executed in time, and the execution and delivery of the deed as a discharge of its condition. Having thus received the security, and availed himself of it, a court of chancery will not lend a willing ear to a mere technical informality. Another objection is to the description of the land as set forth in the deed. This defect may be attended with some inconvenience on the ground of uncertainty, but it may be obviated and rendered

certain by a reference to the deeds and decrees before stated; and in addition to this consideration, we cannot but perceive that the difficulty has been produced by the defendant's own conduct, and that it cannot now be remedied either by the complainant or by Noah Zane. He saw the deed and agreed to accept it, and at the same time consented that the deeds to the other proprietors should be delivered, one of which conveyed to the heirs of Thomas Rees all the residue of the section not included in the previous deeds. The fee of the whole section having thus passed out of Zane, with the exception of his own tract, lying remote from the one in question, should the deed to the defendant be given up, as contended for, the title to his portion of the tract must vest in the heirs of Thomas Rees. This difficulty having been produced by the act of the defendant, without the agency or even the knowledge of complainant, it should not now be charged to his account, or made a pretext for withholding from him the consideration, which, it is admitted, he would have been entitled to, had the covenants on his part been literally performed. In equity, a substantial performance may be good, whatever objections it might be liable to in a court of law, and we are all of opinion that such a performance has been made out in the present case, and that so far as this performance has deviated from the letter of the covenants, the deviation is to be ascribed to the defendant himself.

We consider it no objection to the decree in this case, that it is for the payment of money only. Such decrees are frequent. The case of *Turner v. Dayton and others*, decided at the last term, in Champain, is in point. The bill was filed for a specific performance. The allegations of the bill were sustained, but Dayton having sold the land to his codefendants, who had purchased for a valuable consideration without notice, a specific performance could not be decreed. The court, however, having become legally possessed of the case, refused to turn the plaintiff round, retained the cause, and under the general prayer for relief, decreed to the complainant the value of the land, which was admitted to be the sum for which it had been sold, and which was then in the hands of the defendant, Dayton. It is true, that in that case the court were influenced, in some measure, by the consideration that the complainant might affirm the sale and hold the vendor liable to account as a receiver.

As to the first objection, we are of opinion that, independent of all other considerations, the doubt and difficulty that would attend an application on the common law side of the court, would justify us in retaining the bill. Such circumstances are entitled to much consideration, and many cases are to be found in which they have been deemed sufficient to support the jurisdiction of a court of equity; (See *New York Cases in Error*, page 54, and the cases there cited.) but when taken in connection with other matters existing in this case, they seem to place the question in a very clear point of light, as to the second objection. It would be unjust and inequitable to permit the defendant, Smith, to hold and enjoy the land, and also to retain the consideration which was to have been paid for it. The title having been conveyed to him by the trustee, on the order of Rees, the complainant has effectually and forever lost the land, and we cannot discover any outstanding title or claim that can affect or in any shape trouble the defendant. It would be equally unjust to permit him to take an exception to the form of the deed, when that form was the result of an agreement between himself and the trustee, entered into without the knowledge of

complainant, and by which he has effectually put it out of the complainant's power to remedy the defect.

Upon the whole, we cannot discover any valid objection to the decree prayed for in this case. Decreed accordingly.

KEY v. VATTIER.

A contract with an attorney that he shall prosecute suits for the recovery of property, and receive part of the property recovered as a compensation for his services, and that no compromise shall be made, except he join in it, is illegal and void.

This was an action of covenant reserved and certified for decision from the Supreme Court in Hamilton county.

The case stated in the declaration is as follows:—"By a certain indenture made between the plaintiff and one James W. Gazlay, of the one part, and Charles Vattier of the other part, the plaintiff and said Gazlay, on their part, did covenant and agree with the defendant among other things to use their best skill and abilities as the attorneys of the defendant to recover and obtain from one James Findlay and one Nicholas Longworth, the possession of certain property in said indenture mentioned, in the name and for the use of the defendant," &c. specifying a great variety of real and personal property, "all of which, as is alleged in said indenture, had been unjustly taken from the possession of the defendant by said James Findlay and Nicholas Longworth, and other agents, and who then held the same, &c. In consideration whereof the defendant did then and there, by said indenture, covenant to and with said plaintiff and said Gazlay, that whenever the possession of the aforesaid property should be recovered, or when any part thereof should be recovered, he, the defendant, would forthwith convey and deliver to the plaintiff and said Gazlay, in severalty, the one equal moiety thereof, to each the one equal fourth part of all or any part of the aforesaid property so to be recovered, and that he would give to each severally good and sufficient title to the same, such as he, the defendant, should have himself. And the defendant by said indenture did further agree with the said plaintiff and Gazlay, that if any compromise should be effected, the same should be the joint act and consultation of the parties to said indenture."

The declaration proceeded to aver that the plaintiff and Gazlay prosecuted a suit, which was referred by consent of the plaintiff, Gazlay, and the defendant, to arbitration. That the arbitrators awarded a sum of money and certain specified property to the defendant, who had obtained possession of it. That he had been required to convey one fourth part to the plaintiff, which he refused, &c. assigning the breach in the usual form.

To this declaration the defendant demurred generally, and the plaintiff joined in demurrer. The Court of Common Pleas gave judgment for the defendant, and the plaintiff appealed to the Supreme Court.

Este in support of the demurrer. *Gilford* and *Hammond*, contra.

Opinion of the Court by Judge BURNET.

This action is brought on articles of agreement, executed in October, 1816, between the defendant, Charles Vattier, of the first part, and James W. Gazlay

and Marshal Key, attorneys at law, of the second part. The contract, after, reciting that the said Vattier had been formerly in possession of, and then claimed title to sundry tracts of land, and also to sundry notes, bonds, bills, goods, chattles, and monies, to a large amount, which had been unjustly taken from his possession, provides that the said Vattier, with a view to have the said property recovered, and in consideration of the covenants on the part of the said Gazlay and Key, constitutes them his attornies, with power, in his name, to sue for the property, &c., and to take all legal means to recover the same, and that when the same or any part thereof be recovered, the said Vattier shall convey to them an equal moiety, and deliver to them, in severalty, each, one quarter or fourth part, with such title as he may have. The plaintiff and Gazlay covenant to use their best skill to recover possession of the property, and to save and keep Vattier harmless of and from all costs and charges, in consequence of their prosecution of the same, and if any compromise should be effected, Vattier stipulated that it should be the joint act and consultation of the parties; and the parties bound themselves in the penal sum of one hundred thousand dollars. The defendant demurred generally to the declaration.

The court are now to decide, whether this contract amounts to champerty and maintainance, and if it does, whether an action can be sustained on it in the courts of this state.

The first question seems to admit of no doubt. The object of the contract was, by action or actions in the name of Vattier, to recover property in the possession of third persons, who held it by claim of title. The plaintiff and Gazlay covenant, as attornies at law, to institute and carry on the suits. They are bound to defray the cost, and as a consideration for their services, they are to receive an equal moiety of whatever may be recovered; and Vattier engages not to settle or compromise the claims without their consent.

Champerty is a bargain with plaintiff or defendant to have part of the land or other things sued for, if the party that undertakes it prevail therein, whereupon the champertor is to carry on the party's suit, at his own expense. (1 *Inst.* 368. 4 *Blac. Com.* 135. 5 *Com. title Maintainance A. Jac. L. D. title Champerty.*) Every champerty implies maintainance. (2 *Inst.* 208.) Maintainance is an offence that bears a near relation to barretry, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. It is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. (4 *Blac. Com.* 134. *Haw. P. C.* 249. *Do. St.* 203.) The punishment by common law, is fine and imprisonment. (1 *Haw. P. C.* 255.)

The contract in this chase shows that the plaintiff was to intermeddle in the suits of Vattier, by assisting him with his services, and by the payment of cost, which comes most unquestionably within the definition of maintainance. In addition to this, the plaintiff and his partner, in consideration of that intermeddling, are to receive a moiety of the land, or whatever else may be recovered. These facts most unequivocally constitute the offence of champerty.

The next enquiry is, can this action be sustained? In this state we have no general statute prohibiting or punishing champerty, and the common law, in relation to the punishment of crimes and misdemeanors, is not in force. But

although this be the case, it by no means follows, that they may be lawfully and innocently practised, or that the aid of the state tribunals may be had, to sanction and enforce them. The contract between these parties, is against public justice, and such engagements have always been considered as injurious to the peace and happiness of the community. The nature and moral tendency of actions cannot be effected by the manner in which the law treats them. If they be, in their nature, injurious, they must be considered offences, whether the state has thought it necessary to punish them or not. Human legislatures act in subordination to the great Lawgiver. They cannot change the nature of actions, or make them intrinsically right or wrong. There are many misdemeanors in this state, for which no punishment has been provided, probably because the legislature have supposed that the influence of public opinion would be sufficient to suppress them. In such cases as the one now before us, they might naturally believe that public opinion, aided by the want of a legal remedy to enforce contracts, would afford all the remedy required. However this may be, it is believed that by omitting to provide a punishment in all cases of champerty and maintainance, they neither intended to afford them their sanction, nor to open their courts for their protection and encouragement. Every author that treats on the subject, tells us they are against the common law. (*Wood's Inst.* 413. 2 *Inst.* 208. 4 *Blac.* 135 *Com. Cont.* 173.)

By the common law, persons guilty of maintainance may be indicted, fined, and imprisoned, or compelled to make restitution by action; and a court of record may commit a man for an act of maintainance done in the face of the court. (1 *Inst.* 368. *Jac. L. D. title maintainance.*) That a court of common law should be required to enforce a contract against the common law, and for which it provides a punishment, would be mysterious; and it would be still more so, that while they are enforcing such a contract, by sustaining an action on it, they should also sustain an action against the plaintiff in that cause, and compel him to make restitution to the party injured by that contract, and that too on the ground of its illegality. The inconsistency of such a course is still more strikingly illustrated by the concluding part of the authorities last cited, by which it appears, that a plaintiff in a suit like the present one, may be committed by the court for a contempt, by attempting, in their presence, to perform the services that constitute the consideration of the contract on which he sues. Or, in other words, that a transaction, so palpably illegal as to be punishable, if attempted in a court of justice, may, when performed, become a sufficient consideration to support an action. To render a contract legal, the subject matter of it must be not only physically, but morally possible. An agreement cannot possess an intrinsical, obligatory form, or sustain an action, in a court of justice, unless the subject matter of it be a thing about which the parties have a legal right to stipulate at their pleasure. An agreement, therefore, to do a thing in itself unlawful, must be void; for it would be absurd, that an obligation which derives its sanction from the law, should create a necessity of doing an act which the law prohibits. Let these principles be applied to the case before us. The plaintiff covenants to maintain the defendant in sundry suits at law, in consideration of which the defendant agrees to give him the moiety of whatever may be recovered. This covenant on the part of the plaintiff, is a condition precedent, and must be performed, to entitle him to his

action. In other words, the law requires him to prove that he has done an illegal act, as a legal consideration to sustain his action; for if the action be sustained, the plaintiff must aver and prove that he has maintained the defendant, which is an offence at common law.

Two reasons are assigned, by Powell on contracts, why an act undertaken against law, is void. First, because when the object of a contract is against a man's duty, it may be presumed that he did not give it his free assent. Second, because the law, by forbidding the act, takes from the contractor the power of obliging himself to do it; and from the opposite party the power of requiring it to be done. In the case before us, the consideration must be done in order to sustain the suit. If the suit can be sustained, the defendant must have the power of requiring the performance of the consideration, which is illegal.

There are a variety of cases which shew, by analogy, that this action cannot be sustained. Marriage brokage bonds are void, because they are against the public welfare. Contracts are void if their consideration be illegal, or unconscientious. (*Esp. Dig.* 88, 94, *Coup.* 793.) A bond given to a Sheriff to continue a true prisoner, is void at common law; because it may be used for the purposes of oppression or extortion. A bond to an alien enemy is said to be void, because it is against public policy. All contracts against any rule, or maxim of law, are said to be void, and the very case now under consideration, to wit: an agreement for unlawful maintainance, is given as an example of a contract which is void, because it militates against the public welfare. (*Pow.* 173.) Contracts like the one before us are said to be the most odious species of maintainance; should they be sustained, they will probably become frequent. The prospect of obtaining a large amount of property as a consideration for professional services, and the risk of an inconsiderable bill of cost, form a strong temptation to speculate in law suits. It may induce men to purchase the right of instituting suits on trifling pretences, for the purpose of forcing defendants to injurious and ruinous compromises, as the most effectual means of purchasing peace. Suits may be brought in succession against an individual, until his patience is exhausted, and he is reduced to the terms of his oppressor. The ignorant and the weak will be constantly liable to be practised on; unreasonable portions of their just demands may be obtained on the representation of difficulties and risks that have no real existence. The injunction of sacred writ which gave rise to the imparlance, and which invites us to agree with our adversary, will be impeded in its operation. The parties originally interested, and who but from the merits of their claims will be prohibited from settling them, and forced to continue their legal warfare till the expectations of some greedy champertor are fully satisfied.

Such practices are oppressive on the parties immediately concerned. They have an injurious effect on the community at large; they are against the policy of the law, and ought to be suppressed.

The counsel who argued this cause have manifested their usual ingenuity, and it is due to them, as well as to the case itself that we deliberately examine the grounds they have taken. It is assumed by them as an admitted point, that champerty and maintainance are not offences in Ohio. If by this we are to understand merely that they are not generally punished by indictment, the

position will be granted; but it cannot be admitted that they are not offences in the eye of the law. The authorities before cited shew that they are. Offences do not become innocent when the law forbears to punish them; the moral character of actions remains the same, whatever may be the punishment provided for them.

It is admitted that the legislative and judicial departments are distinct. It is the province of the one to prescribe, and of the other to enforce the law, and neither has the right to exercise the powers of the other. We also admit that the right of making contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained; but it must be restrained when contracts are attempted against public law, general policy, or public justice. It is also alleged, that such contracts were never considered as *mala in se*. This will depend on determining whether they be perfectly indifferent in themselves, or whether they involve any degree of public mischief or private injury. If the latter, they must belong to the class of actions denominated *mala in se*, as this appears to be the distinction recognized by the best writers on criminal law. These writers tell us that maintainance is an *offence against public justice*; that it perverts the remedial process of the law into an engine of oppression; it keeps up strife and contention. The Roman law denominated it the *crimen falsi*, and the common law punishes it by fine and imprisonment. It cannot, therefore, be indifferent in itself, and it must be attended with public mischief, as well as private injury.

That such contracts have been frequent proves nothing of use to the plaintiff. We cannot resort to the maxim *communis error facit jus;* it has no application to a case like this. But we apprehend that such contracts have been less frequent than the gentlemen imagine. By this contract, counsel stipulate, as a compensation for their services, that they shall receive a moiety of all they may recover. They are to indemnify the plaintiff against costs, and he is bound not to settle or compromise without their consent. If such contracts have been common, we have yet to learn the fact. It is to be hoped, however, the counsel have been misinformed; but if not, it is certainly time the law should give a check to such a practice.

We have been carried back to the origin of laws against maintainance and champerty. They have been traced to the violence of the feudal system and the despotism of rapacious conquerors. This may, in part, be true. Some of the finest principles and rules of the common law, took their rise under the same system, and grew out of a state of things that has ceased to exist, and some of them from circumstances that have long been forgotten; but this is no argument against their policy or their obligatory effect. It was admitted in argument, that if such a contract be attended with injury to an individual, it is void, but not otherwise. Without stopping to point out the actual existence of such injury, we remark, that the law does not usually wait to ascertain the consequences of actions in every particular case, in order to determine their character. Experience enables us to judge of the natural tendency of any particular class of actions, and when that teaches that they are generally unnecessary, mischievous and impolitic, the law will fix their character and determine them to be against public policy, without waiting to measure the quantum of injury resulting from each particular case. This precaution, however, has been

required by the legislature, in a case like the present, when it is to be punished by indictment. The fact of the injury renders the act indictable—in the absence of the injury, the matter is left as it was at common law.

The existence of a distinct class of men, whose profession it is to prosecute and defend the controversies of others, is also urged as a reason against the doctrine on which the defence in this case is predicated; but we do not discover the force of the inference attempted to be drawn from this fact. It is admitted on all hands, that in England, in New-York, in Virginia, and in other States, the contract before us, would not only be void, but would be punishable by indictment—yet we find the same class of professional men existing in those states, constantly employed in prosecuting and defending for their clients. The nature of their employment, and the character of their engagements, are not found to be incompatible with the doctrine in question, nor can we see why such incompatibility should be found in the state of Ohio. The rule contended for may prevent professional men from oppressing the unfortunate, and extorting unconscionable fees from the weak and the timid. It may prevent them from stirring up suits, and prosecuting claims which have neither law nor equity to support them, depending for success on the loss of testimony, the treachery of memory, or what has been denominated the glorious uncertainty of the law. It may prevent them from carrying on one suit after another, against the same person, for the purpose of hunting him down, and driving him to sue for peace on any terms; but it cannot interfere with the fair and legitimate practice of the profession, as the experience of Great Britain, New-York and other states testifies.

It is not uncommon for counsel, in the zeal of argument to resort to extreme cases as a test of principle. This has been done in the case before us. The imagination has been put on the stretch to get up a case, in which the rule might prevent the prosecution of a meritorious claim. But if such a case exist the plaintiff can take nothing from the fact, nor can we admit the propriety or safety of such a course of reasoning. A case may be supposed in which great good would result to the community, from permitting a private citizen to take the life of a culprit running at large, but such a case furnishes no argument against the policy of punishing murder. A man may be reduced to the alternative of starving or stealing, yet the gentleman would not urge this as a reason for repealing the statute against larceny. A debt justly, and honestly due, may be lost by the statute of limitation, yet a knowledge of the fact has not led to a change of the policy on which those statutes are founded. It may therefore safely be admitted that the rule in question may operate injuriously on some particular individual, as such an admission will neither contradict the existence of the rule, nor shake the policy on which it is founded. Experience teaches us, however, that such cases are extremely rare, if they ever exist. An oppressed citizen, with merits on his side, will seldom want an advocate. A large proportion of the members of the bar have humanity enough to redeem the profession from the imputation which such a case would cast on the whole corps; and we know of none whose benevolence would with greater certainty lead them to expouse such a cause, than the gentlemen who urge the possibility of its existence.

The argument drawn from the practice in common life, of stipulating a

reward for labor, or enterprise, in proportion to its success, if carried to its full extent will destroy its own effect. It necessarily leads to the removal of every obstruction to the practice of the law, as a profession and condemns the statute regulating the admission and practice of attornies. The same policy which permits men in their ordinary business to stipulate for contingent rewards, throws open every branch of useful industry; but this is not the case in affairs of legal controversy. The practice of the law, cannot be pursued as a business, at the pleasure of any individual. The right must be acquired in a particular way, and when acquired, must be pursued according to certain rules, or it will be forfeited. Why, it may be asked, do these impediments exist when they are not to be found in the ordinary pursuits of life. The answer is at hand: Public policy requires them—the peace and quiet of the community require them—legislatures, and the safety of parties litigant require them.—We find then, a rule existing in the administration of justice, and in matters of legal controversy, the propriety of which every man acknowledges, but which has no existence, and would be unjust in the ordinary pursuits of men. If this distinction be correct, as it certainly is, what keeps us back from the conclusion that a similar difference may exist, as to the right of making contracts of a particular description. On this head it may be sufficient to say that the whole history of judicial proceedings, teaches that there is a difference in the effects produced on society by contracts for contingent rewards, made by attornies with their clients, and those made by other men in their common business, and that this difference is sufficient to require a different rule. Were it otherwise the discovery would have been made long before now. It would not have been left to the ingenuity of counsel concerned in this cause, to bring it to light. The experience of ages, in countries and states where the principle has been recognized and acted on, would have discovered its fallacy, and it would have been exploded.

Great stress is laid on the supposed fact, that the legislature of Ohio have forborn to legislate on this subject. That they have not said to their courts in a case like this, thus far shalt thou go and no farther, and here shall thy power cease. For a moment admit the position, and what will it lead to? Neither more nor less, than that they were satisfied with the common law, as it stood, which declared the contract void, and did not think it necessary to superadd in all cases, a punishment, by way of indictment. As it had been decided that the common law, although in force in this state in all civil cases, could not be resorted to for the punishment of crimes and misdemeanors, the legislature have provided that a certain species of barretry may be punished by indictment. The fair inference to be drawn from the fact is, that they did not believe it necessary to punish that offence generally by fine and imprisonment, but are willing to trust to the remedy which the common law applied, and which their courts could in part enforce. They might very naturally suppose that the invalidity of the contract, coupled with the power which their courts possessed of punishing acts of champerty done in their presence, as contempts of their authority, would be sufficient to suppress the mischief. But will the gentlemen agree to adopt this course of reasoning, in all cases? If we are to look to the statute book as the depository of all the law which we are at liberty to apply, in the administration of justice, what solitary case can be conducted, on legal

principles, to a final judgment. Where are we to find the rules of evidence, and those by which contracts are to be construed and enforced. Where is our guide in the application of remedies to particular cases? There is a remedy by the act of the party injured—a remedy by the act of all the parties concerned—a remedy by operation of law—and a remedy by civil suit, in courts of justice. If these can be applied no farther than they are to be found in our statute book—if that alone is the depository of our powers, and the manual of our practice, we should soon find the wheels of justice stopped, and injuries without number would go unredressed. There must be rules of law not to be found in that book, and courts of justice must have the power of enforcing them, whether they have been formally recognized by the legislature or not. The want of such a recognition, is not of itself a proof of their non-existence. But some inference may be drawn, as to the understanding of the legislature, from the terms they have used in the twelfth section of the act which has been quoted. They do not declare it an offence, to excite law-suits, nor do they prohibit it by express bonds. They merely define the punishment that shall be administered, on a conviction by indictment, taking it for granted that the act was in itself illegal. If they had considered the section as creating a new offence, it is probable they would have used the language which is common on such occasions. But without laying any stress on this circumstance, we may safely infer, that the existence of the law is no proof of a legislative opinion that such contracts as the one before us, were not void at common law.

We admit it to be the policy of our government, that property, illegally withheld from the rightful owner, should be restored. For this purpose courts of justice are established and laws ordained, and if it could be shown that champerty and maintainance were necessary to the due administration of justice, we might be induced to believe that they ought to be encouraged. Our earliest impressions, however, have been, that they are not only not necessary, but are highly pernicious. These impressions continue, and have been strengthened by observation and experience. It is probable that this doctrine at times, may have been carried too far, and that courts of justice, in their zeal to suppress the mischief, have, in some cases, exceeded their proper bounds. It is also possible that contracts exist, of a doubtful character, to which the rule would be applied with some difficulty, as in some of the cases put by the counsel; but a similar inconvenience may attend the application of any other legal principle to certain cases. This, however, would not afford a just ground to deny its existence, nor would it justify a refusal to apply it to cases clearly within its operation. It is unnecessary now to say, whether all or any of the cases put by counsel, for the purpose of illustrating the injustice of the rule, would or would not be affected by it. Most probably some of them would not. It is our duty to decide the particular case in hand, and to leave others to be settled when they may be presented for adjudication. We cannot, however, forbear to remark, that some of the cases put, and others of a similar cast, are said not to be law, and cannot mislead. It is laid down, not to be maintainance for a man to give another friendly advice, or to render him acts of neighborly kindness, in relation to his law suits, and that to be blameworthy, he must be guilty of a *contentious, over-busy intermeddling.*

Whatever may be the effect of the sale and transfer of real estate, not in the

possession of the vendor, it is admitted that our laws allow the sale of choses in action, and equity will aid in protecting and securing the right of the purchaser; but the analogy betwoen these cases and the one under consideration, is too remote to be readily perceived. It is also admitted, that as there is no law prohibiting the sale of a chose in action, so neither is there any regulating the consideration, or the mode of paying it, which is left to the will of the parties. It may be payable in money, property or personal services, but notwithstanding this admission, we affirm that modes of payment might be stipulated that would be illegal, and that could not be enforced in a court of justice. Instances of this kind will readily occur to every person of reflection. This fact proves, that notwithstanding it is a general rule that men may stipulate for such consideration as they choose, yet the rule has its exceptions, and the case now before us may safely be considered as one of them.

Whatever may have been the merits of the claim set up by Vattier—whatever power he might have had to sell that claim—and although he had an unquestionable right to purchase the professional services of the plaintiff in the prosecution of that claim,—yet we cannot see the absurdity of saying, that the claim could not be stipulated as the consideration of the service, or the service as the consideration of the claim. To admit this as an absurdity, would be to destroy all distinctions, and to admit that the legality of a transaction is in no case to be affected by a reference to its consequences. The sale of a claim may be perfectly innocent—the purchase of professional services may be unexceptionable, and yet the purchase of those services, by the transfer of the claim, in the prosecution of which they are to be employed, may be highly pernicious, and attended with such injurious effects on society, as to render it expedient to prohibit such a contract. Experience teaches that such consequences usually attend such contracts. Hence the propriety of the restriction in question, while you permit the sale of the claim, or the purchase of the services, as distinct transactions.

We do not admit the conclusions of counsel, that the consequences which these contracts may have on society, cannot enter into the argument—that they are only to be urged before the legislature, and cannot be listened to or regarded by the court. This proposition at once begs the question, by supposing that there is no rule of law on the subject. Were this the case, we admit that the legislature alone could remedy the evil, as the court has no power to introduce a new law, but when a rule of new law does exist, applicable to the case, and sufficiently broad to embrace it, it is the province of the court to apply it.—They are the tribunal to whom the appeal is to be made, and by whom it must be decided. The legislature may say what the law shall be—the court must say what it is.

But we are told, that to declare this contract not to be void on the face of it, does not include the consequence that all agreements of this nature are to be void on the face of it, does not include the consequence that all agreements of this nature are to be held obligatory. The proposition is admitted, and although counsel might wish to limit the exception to such contracts as come within the scope of the twelfth section above referred to, yet the court believe it to be much more extensive, and to embrace this case, whatever may have been its actual effect on the parties claiming the property in contest.

Judgment, therefore, must be entered for the defendant on the demurrer, which we consider clearly supported.

The stipulation in the contract, on which the opinion and judgment of the court are chiefly predicated, and to which they have directed it to be confined, is that which prevents Vattier from compromising and settling the matters in controversy, without the concurrence and consent of the other contracting parties. This point being considered sufficient, the court forbear to give an opinion on any other. As the provision, on the subject of cost, is not set out in the declaration, and the defendant has demurred without oyer, that feature in the contract has not been considered.

NORTON *v.* HART.

The plaintiff, in action of trespass on real estate, where the damages laid in the declaration exceed one hundred dollars, is entitled to full costs, without regard to the amount recovered.

Action of trespass with force and arms, for breaking and entering plaintiff's close, digging up stone, laying on timber, &c., commenced in the Common Pleas of Portage county. Damages laid four hundred dollars. Verdict and judgment in the Common Pleas, and an appeal to the Supreme Court. Verdict in the Supreme Court for Plaintiff—damages twenty-five cents. The plaintiff claimed judgment for the damages and costs. At the suggestion of the defendant's counsel, the question was reserved to be decided here.

J. Sloan for defendant.

By the COURT.

By the 52d section of the act defining the duties of justices of the peace and constables, in criminal and civil cases, passed February 16th, 1820, it is provided, "That if any person or persons shall commence or prosecute any suit for any debt or demand by this act made cognizable before any justice of the peace, in any other court than is authorised and directed by this act, and shall obtain a verdict therein for debt or damages, which, without costs, shall not amount to one hundred dollars or more, he, she, or they, so prosecuting, shall not recover any costs in such suits, any law to the contrary notwithstanding."

In order to a correct decision of the question reserved, it is only necessary to ascertain whether, in the case before the court, a justice of the peace could have held jurisdiction.

By the 5th section of the before recited statute, the jurisdiction of justices of the peace is extended under the restrictions and limitations provided in the same act, to any sum not exceeding one hundred dollars. In the 49th section it is provided, in effect, "that this jurisdiction shall not extend to actions of trespass with force and arms, for assault and battery, for malicious prosecution," &c. nor to actions "where the title of lands is called in question."—These provisions were contained in the justices' law previous to the year 1816, and in construing the several statutes on the subject, it was held, that a justice of the peace had no jurisdiction in actions of trespass upon real property. To remedy this evil, the legislature, on the 17th February, 1816, passed an act extending the jurisdiction of justices of the peace to actions of the latter description, where the damages demanded should not exceed the sum made cognizable before a

justice, or, in other words, where the damages demanded should not exceed one hundred dollars.

This provision is retained in the law of 16th February, 1820, first recited; by the 30th section of which it is enacted, "That the jurisdiction of justices of the peace shall extend to actions of trespass on real estate, in cases where the damages demanded for such trespass shall not exceed the sum made cognizable by a justice of the peace in other cases." By the terms of this section it would seem that the sum *demanded* is the test by which the jurisdiction is to be ascertained. If the plaintiff demanded damages to a greater amount than one hundred dollars, the justice has no jurisdiction. The plaintiff may be mistaken with respect to the actual damage he has sustained. There is no certain rule by which this damage can be ascertained. If a suit be commenced upon a note or bond, the instrument itself will afford some certain rule by which we can ascertain the extent of injury sustained by the plaintiff. In trespass upon real property or upon the person, it is different. (See *Wilson v. Daniel*, 3 *Dallas* 401. *Hancock v. Barten*, 1 *Serg't. and Raw.* 269.)

In the case before the court, the damages demanded were four hundred dollars. This exceeded the jurisdiction of a justice of the peace. The suit was well commenced in the Court of Common Pleas, and the plaintiff is entitled to costs. If the intention of the legislature were different—if they intended that in actions of trespass on real property, commenced in the court of Common Pleas, no costs should be taxed unless the plaintiff recovered one hundred dollars or more, they have not expressed that intention, and it remains for that body, and not for the courts, to apply the remedy.

MARTIN'S CASE.

An application by the defendant in ejectment, after a recovery against him, for the appointment of Commissioners to value his improvements, under the occupying claimant law, in a separate proceeding, in which the party prevailing is entitled to costs. Where the application is made by the defendant, and a judgment is given in his favor, the court will order the lessor of the plaintiff to pay the costs of the proceedings.

George P. Cotton prosecuted ejectments against Samuel G. Martin, which were finally tried in the Supreme Court of Clinton county. Martin set up title in himself, but Cotton recovered. Application was then made by Martin for the appointment of commissioners to value his improvements, under the provisions of the law for the relief of occupying claimants of land. This application was sustained. The commissioners reported in his favor, and the proper orders were made for securing to him the advantages allowed by law. A question arose who should be held chargeable with the cost that accrued upon the application for, and proceedings of the commissioners, and the decision of this question was reserved and referred to this court

Dunlevy for *Martin.*

By the COURT.

As the commissioners may be appointed upon the application of either party, it may be considered as a separate proceeding, in which the party prevailing is

entitled to his costs. In this case the application having been made by the defendant, in whose favor judgment has been rendered upon it, the court are of opinion that the costs must follow that judgment, and that an order be entered on George T. Cotton, lessor of the plaintiff, to pay the costs in question.

REEDY *v.* BURGERT

A judgment upon a scire facias on a mortgage, extinguishes a bond, note, or other evidence of the original debt.

The action of assumpsit, debt, or covenant, the action of ejectment and a bill in chancery, are all covenant remedies, and any one or more of them may be persued at the same time. But when the statutory remedy by *scire facias* is resorted to, assumpsit, &c. will not lie for the amount due.

Covenant was brought upon a writing under seal, for the payment of money. The declaration was in the usual form. The defendant pleaded in bar that the note was given for a sum of money, the payment of which was secured by a mortgage upon lands, and that the plaintiff had prosecuted a *scire facias* upon the mortgage, under the statute, and obtained a judgment thereon. To this plea the plaintiff demurred. The case was certified from the Supreme Court of Stark county, to be decided upon the point presented by the demurrer.

LATHROP, *in support of the demurrer.*

By the COURT.

The counsel for the plaintiff seems to suppose that the action of assumpsit, debt or covenant; the action of ejectment to take possession of the mortgaged premises; and the bill in chancery to foreclose the equity of redemption, were all concurrent remedies at the common law; and because more than one of these remedies might be pursued at the same time, that the statute remedy, by *scire facias*, may be pursued with them. But this is a mistake. The action of assumpsit debt, or covenant, is resorted to for recovery of the money due on the obligation. The action of ejectment is not a *concurrent*, but an auxiliary remedy; and the bill in chancery is of the same character. The ejectment is used to get possession of the landed security—the bill in chancery to remove incumbrances from it.

The object of giving *scire facias* was to enable the mortgagee to resort at once, in one action, to the recovery of his debt, and the subjecting his landed security to the satisfaction of it. This proceeding enables the mortgagee to obtain judgment for his debt, and execution against the mortgaged premises, at the same time, upon which execution the premises are sold, discharged of the equity of redemption, which, without such proceeding, could not be levied upon and sold upon execution on a judgment at law. This was creating, by statute, a new and more summary remedy, to which the party might resort, without affecting his right to pursue the pre-existing remedies. It gave a choice of remedies, but did not confer a right to pursue them all at the same time.

By the first section of the *scire facias* law it is provided, that "it shall be lawful for the defendant to come in and plead payment or satisfaction for all, or any part of the money demanded by the plaintiff, or *any other legal plea* in bar, or avoidance of the deed or money therein demanded as the case may require; and thereon the parties shall proceed to issue and trial as in other cases."

When judgment is rendered the second section directs that execution shall issue, upon which the mortgaged premises shall be taken and sold as other lands. The third section provides that if the mortgaged premises shall not sell for a sum sufficient to satisfy the judgment, "then the residue of said judgment so remaining unsatisfied, shall be deemed and taken to be a debt of record," upon which the plaintiff may sue out a *scire facias*, and proceed to judgment and execution thereon, as in other cases.

These provisions shew that it was the intention of the legislature that the *scire facias* should be prosecuted, defended, and tried, upon the whole merits of the plaintiff's claim, and that the judgment rendered should be final and conclusive between the parties. That judgment ascertains the true amount of the debt due, and constitutes it a debt of record, in virtue of express terms of the statute. It results necessarily from this conclusion, that a bond or note, or other evidence of debt, being the foundation upon which this judgment is predicated, must be merged in the judgment; and no other action can be sustained for the debt unless founded upon the record.

Some absurdity, and much inconvenience and injustice might be the consequence of a different doctrine. If the plaintiff should be dissatisfied with the amount recovered on the *scire facias*, he might resort to his action for the original debt. All the facts investigated and determined on the trial of the *scire facias*, would be open for second investigation. A recovery might be had for a different amount; two different verdicts and judgments might exist at the same time, for the same debt, and another suit would become necessary to prevent a double satisfaction.

It is objected that if this action cannot be sustained, it deprives the plaintiff of the advantage of requiring special bail. The answer is, that the statutory remedy by *scire facias* proceeds against the land, a security which the plaintiff himself agreed to accept. An additional security upon the debtor's person ought not therefore to be required—and the plaintiff elected to take this remedy as it is given. Had he wished to add a claim upon the defendant's person in addition, he could have elected to take his common law remedy, and brought his action for the debt.

In respect to the two judgments for the same debt, this case is alleged to stand upon the same footing of separate judgments against the maker and endorsers of a promissory note. But the resemblance does not hold: in that case the judgments are against different persons, upon separate and different contracts. Here, if two judgments could be had, they would be against the same person, upon the same contract.

A majority of the court are of opinion that the defendant have judgment.

Judge SHERMAN dissented.

KERR ET AL. *v.* MACK.

An entry in the Virginia Military District vague and uncertain at the time it is made, cannot be sustained, in consequence of its calls having obtained subsequent notoriety.

This case came before the court upon a bill of review, and was reserved for decision here, in Adams county. The material facts were as follow:

Robert Mack prosecuted his bill in equity against Kerr and others, to obtain from them the legal title to three hundred acres of land, alleged to be covered by his elder entry No. 4834, but for which the defendants had obtained a patent upon a junior entry. Mack's entry was made February 3rd, 1806, and is in these words:

Robert Mack enters 750 acres of land on the waters of Eagle and Brush Creeks, beginning at the north west corner of Thomas Blackwell's survey, No. 2060, running south 23 west, with Blackwell's line to his south west corner, thence with another of his lines south 67, east 110 poles, thence south to the line of Charles Morgan's survey, thence with Morgan's line west to his north west corner, thence south 200 poles, thence north 67 west, and from the beginning north 67 west, so far that a line south 23 west, will include the quantity. This entry was surveyed February 5, and recorded February 25, 1807.

Thomas Blackwell's survey, 2060, called for in Mack's entry, calls to lie on the waters of the west fork of Brush Creek, to begin at an elm and two ashes, south west corner to his former survey No. 1043, and south east corner to his other survey No. 2059. Was made April 2d, 1792—recorded May 10, 1792.

There is no evidence that Blackwell's survey 1043, called for in the above survey, ever existed. His survey No. 2059, calls to lie on the waters of the west fork of Brush Creek, beginning at a mulberry and two sugar trees, north west corner to his survey No. 1043, south west to Robert Morrow No. 1306, and south east to Abraham Buford No. 398, running with Buford's line. Executed March 30th, and recorded May 9th, 1792.

There is no proof that the surveys of Morrow or Buford, called for in this entry, ever existed.

The entry under which the defendants claimed, was made 23d day of March, 1806. and called to lie on the waters of Brush and Eagle creeks, beginning at an ash and two elms, westerly corner to Thomas Blackwell's survey No. 2060, running with his line and course thereof, north 23 east 385 poles, thence west 200 poles, thence south 400 poles, thence east and from the beginning south 67 east, for quantity. This entry was surveyed and carried into grant before that of the complainant.

The bill charged that the defendant, Kerr, who made the entry and survey, had full notice of Mack's entry when the latter entry was made. Kerr, in his answer, admits that before making the entry, he saw Mack's entry on the books of Anderson, but alleges that the calls were so vague and uncertain that he did not know where it was intended to lie, and insists that it was void for uncertainty.

The Supreme Court, consisting of Judges McLean and decreed in favor of Mack, to reverse which decree this bill of review is prosecuted.

Brush and Scott for complainants.

Opinion of the Court by Judge BURNET.

The evidence does not show that the surveys of Blackwell and Morgan had acquired notoriety at the time Mack's entry was made. It is admitted by Kerr that he had seen the entry of Mack on the books of the surveyor before he made the entry No. 4962, but from its vague and uncertain calls he did not know where it was intended to lie. On this fact the complainant Mack chiefly relied as sufficient to support his claim. The question, therefore, presented for decision is, whether an entry, vague and uncertain at the time of its inception, can be supported by evidence that its calls had acquired notoriety or had become known to a subsequent locator prior to the date of his conflicting entry.

The great difficulty in settling titles within the Virginia military district, arises from the expressions in the statute, which directs the mode of making locations. They must be made so specially and precisely that others may locate the adjoining residuum with certainty. The indefinite import of these expressions has opened a wide door for judicial construction, and has led to the establishment of a variety of rules, which approach very near to legislation, but which seems to have been necessary to sustain a large portion of the early entries. These rules have been gradually introduced and so modified from time to time as to produce the least inconvenience with the greatest degree of justice to contending parties, and to place the title of real property, acquired under the laws of Virginia, on as secure ground as the loose mode of appropriation would well admit.

An entry, to be special and precise, should be made in such words as will point it out to third persons, and distinguish it with clearness from all others. If such language be not used, a subsequent locator cannot take the residuum with certainty; but what words or descriptions will be sufficient for the purpose, must be decided by the court, and should be determined by general rules, established for the government of all cases to which they can apply. These rules should not be lightly disturbed or deviated from, because they may appear to operate severely in particular cases. It is better to have an imperfect rule than to be without any. If a rule be often departed from, it ceases to be such, and each case is left to be decided by the impression which some imaginary distinction, or peculiar circumstance of apparent hardship may make on the mind of the judge. Such a course would be arbitrary—it would expose litigants to the effects of partiality and prejudice, which may, unperceived, influence the mind of the most upright; and it might induce the unsuccessful claimant to ascribe his loss rather to the feelings of the court than the decision of the law. It is important in the administration of justice that the unfortunate party should go out of court with an impression that his case has been determined agreeably to known and established principles, although he may believe they have operated unjustly in his particular case. The cause we are now determining is one which pleads as strongly for a relaxation of the rule as any other we can well imagine. There is an apparent want of equity on the side of the complainant, calculated to induce a prejudice against his title. At first view it would seem to be unjust and inconsistent with our earliest im-

pressions of right and wrong, to permit a person with aknowledge of a prior entry intended to appropriate a tract of land, to locate the same tract, and to dispossess the occupant, because his location was not made so specially and precisely as to afford notice at the time it was made. Bnt when we consider that the first location was not made agreeably to law, in consequence of which the locator acquired no legal right, and reflect on the importance of adhering rigidly to the forms prescribed for the acquisition of property, and the uncertainy that would result from a contrary course, the propriety of conforming to the rule becomes apparent. The courts of Kentucky, which are more conversant with the land laws of Virginia, and have a deeper interest in the correct exposition and application of their principles than any other tribunals in the country, have, by a course of decisions, settled the principle that notoriety must be co-existent with the entry, and that no after acquired notoriety can aid it. In *M'Clenahan v. Berry, Hugh.* 177, the court say that the place called for in the locations of the appellee, had not that notoriety *when the locations were made* which the land law and the reason of the case required, and as none of the other calls were precise and unequivocal, he had not made out a legal or equitable right to recover. In *Key v. Matson,* (*Hard.* 73) this principle was departed from. It is there said, that an entry cannot be supported, unless it call for some object which was notorious, or *became notorious before the conflicting entry was made.* But in the case of *Smith v. Smith,* (*Hard.* 191) the doctrine of *McClenahan v. Berry* was assumed, and the principle recognized in *Key v. Matson* was overruled. The complainant failed because it was not shown that the objects called for had acquired any notoriety *previous to the date of his entry.*

The same doctrine is supported in *Craig v. Baker,* (*Hard.* 287) and it is worthy of remark that this case is referred to by the reporter in a note to *Key v. Matson,* as deciding that the objects called for must be notorious at the date of the entry calling for them, and consequently as overruling the authority of that case.

Couchman v. Thomas, (*Hard.* 270) goes on the same principle. The complainant's entry was made in 1782—the calls were not calculated, *at that time* to apprise the holder of another warrant that the land in controversy was appropriated. The objects described had not notoriety by themselves, or in conjunction with any of the other calls in the entries, *at the date thereof. Speed v. Lewis,* (*Hard.* 476) is also in point. There being no proof, in that case, that the objects called for in Speed's entry, were generally known *at the time it was made;* the conclusion, said the court, must be that his entry cannot be sustained.

Judge *Bibb,* in the introduction to the first volume of his reports, page 20, says that notoriety must be coextensive with the entry. As the cases above cited had been decided, and reported before the introduction was written, the judge might with safety have relied on their authority for the support of his position, but he has gone into a course of reasoning on the point, which seems to sustain him independent of the authority of adjudged cases.

In *Mosby v. Garland,* (1 *Bibb,* 86) the court were of opinion that an entry should be taken as it would have been understood, *on the day it was made.*

In *Galloway v. Neal,* (1 *Bibb,* 140) the question turned on the notoriety of a survey, called for in an entry. The record exhibited no evidence of the notoriety

of that survey, *at, or before the entry.* The certificate of survey contained no description which could be reasonably calculated on, to inform other holders of warrants where it was situate. The court decided in that case, that if the holder of a warrant adopts a survey, made on another warrant, as the basis of a location, he must prove the notoriety of the survey *at that period*, otherwise his location cannot be supported; and because the complainant had not made out that the survey in question had been generally known to those conversant in that neighborhood, *at the date of his entry*, his location was not supported.

In *Woolley v. Bruce*, (2 *Bibb*, 106) it was decided, that "the complainant's entry must rest on its sufficiency, *at the time it was made*, and the *then* notoriety of the objects called for. If they were *then* insufficient to enable a subsequent locator, by using reasonable diligence, to find them, it must be taken to be insufficient—*No after acquired notoriety can aid it.* It must possess the intrinsic qualities of good entry at the time it is made, and not rely on mere contingencies, that may, or may not happen."

In *Bowman v. Mellon*, (2 *Bibb*, 155) the notoriety of the object called for, was required to exist, *before the date of the entry* in question. The same principle is supported in *Carson v. Harway*, (3 *Bibb*, 160) *Devour v. Johnston*, (*Ib.* 411) *Hanley v. Hardin*, (4 *Bibb*, 576) *Woolfscale v. Meriweather*, (*Ib.* 138) *Galloway v. Webb*, (1 *Marshal*, 129) *Howard v. Todd*, (*Ib.* 277) *Haws v. Marshal*, (2 *Marshal*, 415).

In *Craig v. Pelham*, (*Pr. Dec.* 287) it was decided, that although the subsequent locator had *notice in fact*, of the land intended to be secured, it was insufficient, and that if the entry was not special in itself, the proprietor could not hold under it.

In *Wilson v. Mason*, (1 *Cran.* 100) complete notice had been obtained of the elder claim, before the subsequent entry was made, but the court decided that titles must rest on general principles. Therefore the junior entry of *Wilson*, who was charged with actual notice, was sustained, against the prior survey of *Mason*, because the survey was not supported by a legal entry.

This doctrine is reasonable, as well as conformable to the statute; for although the certainty required, is designed principally for the convenience and safety of subsequent locators, yet it is required absolutely, and cannot be dispensed with.

The validity of an entry should not depend on the fact whether a subsequent locator has been misled, or whether he is liable to be misled, it ought therefore to be so special, precise, and certain, that a stranger may proceed immediately to locate the adjoining residuum, without the danger of interference. The statute which gives the right to appropriate land, points out the mode in which it shall be done, and it is necessary to pursue that mode, in order to make a valid appropriation. The properties of a valid entry are designated, and the court are not at liberty to disregard them. An entry must be special, precise, and certain. If either of these requisites can be dispensed with, they may all be disregarded, and every locator be at liberty to make his entry, as convenience or caprice may dictate; but the law certainly intended to guard against the confusion and uncertainty that would result from such a course. If an entry does not contain such calls as will enable a diligent enquirer to locate it, it is void, because not made in conformity with the statute.

There seems to be an inconsistency in saying that an entry, which is evidently void when made, shall become valid by the lapse of time. This would be to test the validity of a title, by matter extrinsic, when the statute requires such matter to be contained in the record of the entry. It would also very much increase the danger resulting from the use of parol testimony. The courts of Kentucky have given a very liberal construction to the land laws of Virginia, and have gone as far to support vague and doubtful entries, as was in any degree consistent with the intention of the legislature or the safety of the parties interested. The door to the admission of parol evidence is already open to a very dangerous extent. To open it wider would be increasing the danger of supporting vague locations, to the prejudice of the careful and vigilant locator. An unprincipled, or mistaken witness may be brought to testify that an entry, void for want of notoriety at its date, had acquired general notoriety, or had become known to a subsequent locator, prior to his entry. In such case the court would be required not only to set aside the junior entry made in conformity to the statute, but to support the prior entry, although null and void in itself—or, in other words, it would decide that an entry, void at its creation, may be rendered valid by the accidental circumstance that a subsequent valid entry has been made on the same land.

The commonwealth of Virginia, in their cession to the general government, reserved so much of the land between the Scioto and the Little Miami rivers as should be necessary for the satisfaction of a particular description of warrants. Congress accepted the cession of the entire territory subject to that reservation, and as Virginia retained the right to prescribe, and has prescribed by statute the manner in which the lands shall be entered and appropriated, the general government, to whom the title was conveyed in trust, cannot be required to convey to a person who has not entitled himself to a conveyance by a compliance with the statute.

A defective entry, being an attempt to appropriate the land contrary to the statute, cannot authorise the locator to demand a title, nor justify the government in granting one. The confirmation, therefore, of a junior valid entry cannot be considered as an act injurious to the claimant of a defective senior entry, because the latter, independent of the rights of the former, could not be entitled to a patent, nor could the government grant it without a breach of trust. In other words, an attempt to appropriate any part of this land contrary to law, creates no right, nor can it prevent a subsequent locator from making a legal appropriation of the same land. Until a legal entry be made, the land must be considered as unincumbered, and although a defective entry may have been made, it must be as liable to be taken by a subsequent legal entry, as if such defective entry had not been made, or had been made on a description of warrant not recognized in the act of cession.

In *Wilson v. Macon*, the Supreme Court say that "the legislature of Virginia, when bringing her lands into market, had *undoubtedly* a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers, for the purpose of particularizing the general title acquired by obtaining a land warrant, and that the court was by no means satisfied of its power to substitute any equivalent act for that required by the law." The state of Virginia, with equal certainty, had a right to prescribe the terms and dictate the mode

of locating her military warrants, which are evidences of purchase. Such a measure was necessary for the safety and convenience of those concerned, as well as to insure an equitable distribution of the good lands. But it is enough to say that the legislature had a right to prescribe, and that she did prescribe the mode in which all entries should be made, and that no other power can dispense with it or substitute an equivalent.

It will be noted, that the mode of entering and locating the warrants in question was declared by statute in 1779. The law for ceding the territory north west of the river Ohio, did not pass till 1783, and when it did pass, it was on condition that congress should hold the lands between the Scioto and Little Miami, subject to the claim of the holders of Virginia military warrants, for which purpose it had been previously set apart.

It seems to follow, from these premises, that the holders of military warrants are vested with certain rights, which are ascertained by the statute, and should be regarded by the government, which is to be viewed in the light of a trustee. One of those rights is, that until the land be legally appropriated, any holder of a warrant may locate and secure it—consequently, a conveyance to a locator, who has not entitled himself to a patent by conforming to the statute, would be an abridgement of that right and a breach of trust.

It is also contended, that if an entry, defective in its origin for want of notoriety, become known to a subsequent locator before his entry is made, that circumstance ought to operate as notice in ordinary cases, and charge the second locator with the equity of the first claim. This, however, is only presenting the same question in a different form, and does not, in the least degree, free it from the difficulty and inconsistency before noticed. The cases of *Wilson v. Mason* and *Craig v. Pelham*, before cited, maintain the contrary doctrine. In both cases it is decided, that *actual notice* is not sufficient. In the former case, the Supreme Court of the United States say, "that land cannot be lawfully appropriated without an entry—that notice of an illegal act cannot make it valid—that a survey not founded on an entry, (by which we understand a legal entry,) is a void act, and constitutes no title whatever, and that consequently the land so surveyed remains vacant, and liable to be appropriated by any person holding a land warrant." It would be difficult to point out the difference between a survey made without an entry, as was Mason's, and a survey made on an illegal entry, as was the defendant's; because an illegal entry is as no entry. The land, therefore, in either case, must remain vacant, and liable to be appropriated.

The doctrine of notice, however, it is believed, has never been applied to cases under the land laws of Virginia, when the parties claim under distinct entries. In every such case, each claimant must rest on the validity of his own title, and if the elder entry be so defective as to be pronounced illegal, which must be the case if the junior is sustained, those defects will vitiate that entry independent of any influence arising from the junior entry. Each entry must stand or fall on its own merits, and the knowledge of the last location can neither aid nor injure the first location; if that be illegal it is rendered so by its own defects, which can neither be increased nor diminished by any thing connected with an adverse entry, or with him who holds it.

If a person in possession of land has purchased it for a valuable considera-

tion from one having no right or title whatever, and a third person, with a knowledge of the facts, afterwards purchases the same land from the real owner, his knowledge shall not affect him, because it cannot aid the defective title of his adversary. In like manner, if a person contract for the purchase of real estate, by parol, contrary to the form of the statute, and afterwards another person, with full notice of such notice makes a legal contract for the same land, his purchase shall not affect him, nor aid the first purchaser. For the same reason, the notice of Kerr can neither affect him nor aid the illegal title of his adversary. The doctrine of notice applies strictly to cases in which a person contracts for a title with notice of a prior legal contract for the same title, and not to persons who claim under different titles, one of which must necessarily be void, as is the fact in the case before us. Upon the whole, we are clearly of opinion that the decree is erroneous and must be set aside.

GARDENER *v.* WOODYEAR.

A bond for the prosecution of a writ of error is good, though the terms required by the statute are not precisely followed. A substantial compliance is only requisite. The court will not aid a party to avoid the obligation of such a bond, by adopting strained and rigid maxims of construction.

This was an action of debt upon a bond. The declaration was in the usual form; the defendants craved oyer and demurred. The condition of the bond is as follows: "whereas Thomas Woodyear hath this day obtained our writs of error and supersedeas to a judgment of the court of Common Pleas for Ross county, obtained by John Gardener plaintiff, against the said Thomas Woodyear defendant, April term, 1819. Now if the said Thomas Woodyear will prosecute our said writs to effect, and abide the judgment of the court thereupon had, then the above obligation to be void, otherwise to remain in full force and virtue."

The Court of Common Pleas of Ross county gave judgment on the demurrer for the plaintiff, but assessed his damages to only fifteen dollars, a sum sufficient to pay the costs on the writ of error. The plaintiff appealed to the Supreme Court, and the question arising on the demurrer was reserved for decision here.

Atkinson and Leonard in support of the demurrer.

Bond for the plaintiff.

By the COURT.

The bond in this case was taken under the 95th section of the judicial act, which directs that it shall be taken "in double the amount of the judgment obtained or decree rendered, conditioned for the payment of the condemnation money and costs, in case the judgment of the Common Pleas should be affirmed in whole or in part." This direction is not pursued in terms, the words used being, "that he will prosecute the said writs to effect, and abide the judgment of the court thereupon had." The defendants insist that the condition not being in conformity with the statute, the bond is inoperative, that it never was operative, and that the writ of error might have been quashed.

The principal point of the defendants' argument is, that the stipulation contained in the condition, is different, and more disadvantageous to them than that required by law. By the latter they are to pay the judgment and costs, *if the judgment be affirmed.* By the bond they forfeit the obligation, if for *any cause* the party should fail to prosecute his writ to effect.

The 9th section of the judiciary act of 1803, regulating appeals from the Commmon Pleas to the Supreme Court, directed that bond should be given *"for prosecuting his appeal to effect."* The 7th section of the act of 1805, on the same subject, contains the same provision; and the 9th section of the same act, directs that, on writs of *certiorari* and *habeas corpus cum causa*, the condition of the bond shall be, *"that he will prosecute the same to effect, and abide the judgment of the court thereupon had."*

The 11th section of the judiciary act of 1806, in relation to writs of error, *certiorari*, &c., directs that bonds shall be taken, conditioned, *"that he will prosecute the same to effect, and abide the judgment of the court thereupon had."*— Section 13, of the act of 1808, makes the same provision.

In the revision of 1810, this phraseology was changed, and that introduced which is contained in the present laws. From 1803 to 1810, the courts uniformly decided that the undertaking to *prosecute the writ to effect, and abide the judgment of the court thereon had*, subjected the parties in the bond to the payment of the amount of the judgment and costs. The change of language in 1810, was adopted to express, in more explicit terms, the same thing which the courts had adjudged the other terms to express.

The bond in question contains precisely the very terms required by the earlier statutes in such cases, and which were interpreted by the courts to subject the obligors to the same liability imposed by the existing law, and to no other. This interpretation was adopted from a clear conviction that such was the effect which the legislature intended the terms used should have. Because the legislature have now adopted more explicit terms, the court cannot be warranted in deciding that the same terms, used for the same purpose, meant one thing in 1810, and another thing in 1820. It is, therefore, the opinion of the court, that the condition is, in substance, the same as if it had contained the express terms now required by the statute.

Upon an examination of the cases cited, as far as the authorities are within reach of the court, it is found that, taken altogether, the courts of other states have gone much further to support the statutory bonds, than it is necessary to go in this case. Where the bond has been held inoperative, the circumstances were materially different from those which arise here. There is no case where a bond, fairly and regularly executed, and comprising, substantially, all the requisites of the statute, has been adjudged void because it departed, in some one or more particulars, from the exact words used in the statute authorising it to be taken. It has been the uniform object of our courts, to support bonds executed under the provisions of law, where, by a reasonable interpretation, such bonds can be made to meet the intention for which they were required and taken. Where the party has had all the advantages of making the bond, the court cannot aid him to avoid its obligations, by adopting strained and rigid maxims of construction.

Judgment must be given for the plaintiff.

SMITH *v.* GODDARD.

A contract to pay in current bank notes, is a contract to pay in money, if bank notes be not tendered at the day.

An action of assumpsit was brought in the Common Pleas of Green county, upon a promissory note in the following words:

"I promise to pay Abbott Goddard, or order, at Xenia, two hundred dollars, in current bank notes, such as are passing in the common course of business, on or before the first day of June, 1822—value received this 25th March, 1820."

The defendant pleaded non assumpsit. Upon the trial the plaintiff gave the note in evidence to the jury; and the defendant then offered evidence to prove, that at the time the note was given, the circulating medium of the country consisted of bank notes, passing at a discount of from twenty-five to thirty-three and a third per cent., and of a few bank notes passing at par with specie. That on the first of June, 1822, depreciated bank notes had ceased to circulate, and that no bank notes were in circulation but those which passed current at the amount called for, as specie. To this evidence the plaintiff objected, and it was rejected by the court of Common Pleas. The defendant excepted to this opinion, and a writ of error was allowed. The question was reserved by the Supreme Court in Green county, for decision here.

B. COLLET *for the plaintiff in error.* J. ALEXANDER, *contra.*

Judgment affirmed. For the grounds of the decision, see the opinion of the court in the following case.

MORRIS *v.* EDWARDS.

A contract to pay in current bank notes of the city of Cincinnati, is a contract to pay money, if the notes be neither paid or tendered at the time.

For certain purposes, and in fact for every purpose, in the ordinary transaction of business, bank notes, ever have been and still are considered as money, though they are not a lawful tender.

A contract to pay in current bank notes is not ambiguous and cannot be explained by parol testimony.

Public history, not of the state at large, but of a particular town or city, will not be taken notice of *ex officio* by the court.

Morris brought an action in the Supreme Court of Hamilton county, upon a note in writing, in the following words:

"*On the first day of February, in the year* 1822, *I promise to pay James C. Morris, or order, (in current bank notes of the city of Cincinnati,) two thousand dollars, with interest, for value received. December* 25, 1819."

The case was put to trial on the general issue. The defendant offered evidence, that at the time of making the contract and executing the note, business was done in Cincinnati upon a depreciated circulating medium, consisting chiefly of the notes of the banks of Cincinnati and vicinity—that the value of property

was estimated by the numerical value of these notes, and that when payment was stipulated to be made in current bank notes, property was put at a higher price than it would have been if the contract was for specie—that the difference between the numerical value and the specie value of current bank notes, when this contract was made, was thirty-three and one-third per cent.—that at the time the note became payable, there was no depreciated bank paper in circulation in Cincinnati, nothing being current but specie, or bank notes of specie value. This evidence was offered for the purpose of showing that the plaintiff ought not to recover the full sum of two thousand dollars, but two-thirds of that sum, with interest. The question, as to the admissibility of this evidence for the purpose proposed, was reserved for the decision of this court.

Wade and *Hayward* for plaintiff. *Hammond* and *Este*, for defendant.

Opinion of the Court by Judge HITCHCOCK.

This case presents two questions to the consideration of the court.

1st. Whether the sum of two thousand dollars, mentioned in the contract, with the interest due thereon, shall be recovered?

2d. If, in the opinion of the court, this sum cannot be recovered, whether the damages are to be ascertained by proof of the value of "current bank notes of the city of Cincinnati," on the day the contract was entered into, or on the day when the payment fell due?

That the first question may be correctly decided, it is necessary to ascertain what character is to be attached to bank notes. If they are considered as money, then this contract is a contract for money; if not, it is a contract for the payment of a certain sum in specific articles. By the term money, we generally understand that which is the lawful currency of the country—that which may be tendered, and must be received in discharge of a subsisting debt. With this understanding of the term, it cannot be contended that bank notes are, in themselves considered, money. They are not a lawful tender. No person is bound to receive them in discharge of a debt, unless in pursuance of a previous contract. But for certain purposes, and in fact for every purpose, in the ordinary transaction of business, bank notes, it is believed, ever have been and still are considered as money. They do not come under the denomination of goods, wares and merchandise. Evidence of the receipt of bank notes, will support an action for money had and received. The delivery and receipt of them, in discharge of a debt, will be considered as payment of so much money, not as accord and satisfaction. By the universal consent of mankind, when they pass from one to another, they pass as money. In the course of business, they are charged and credited as cash, as money. They have been estimated as money, not only by men of business, but by courts of justice.—Lord Mansfield, in speaking of bank notes, says, "they are not esteemed as goods, securities nor documents of debt; but are located as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes." "They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself.—(1 *Bur.* 457.) The Supreme Court of the state of New York, say that bank notes are considered

as money—that a note for a certain sum payable in bank paper, is a note for money, and of course a promissory note within their statute. (9 *John.*) This court, in the case of *Smith v. Housten*, submitted in Licking county, in the year 1820, in giving a construction to the "Act to prohibit the issuing and circulating of unauthorised bank paper," after a consultation of all the judges, decided that bank notes must be considered as money. (14 *Statutes*, 10.) The statute law of this state, entitled "An act making certain instruments of writing negotiable," provides, "that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order," &c. shall be negotiable by endorsement thereon, &c. (*vol.* 18, *page* 163.) In giving a construction to this statute, we hold that a note drawn for a sum certain, payable in bank paper, is negotiable. This opinion can be justified upon no other ground than by considering bank notes as money.

Apply these principles to the case under consideration, and what will be the result? Edwards, for a valuable consideration, promises to pay Morris or order, on a certain day, two thousand dollars, with interest annually. The payment is to be made "in current bank notes of the city of Cincinnati." Such are the terms of the contract. When the day of payment arrives, there is no offer to pay—there is no tender of bank notes. Had the note been transferred, by endorsement, to a third person, that third person, as endorsee, might have maintained an action against Edwards as maker of a promissory note. We should not have hesitated to render a judgment in favor of the endorsee. And why? Because the note would have been considered as a note for money. If it be a note for money, as I think it must be considered, both upon principle and authority, there can, I apprehend, be no doubt that the plaintiff is entitled to a judgment for the full amount of two thousand dollars, with the interest.

But suppose we take another view of the case, and consider bank notes, not as money, but as specific articles,—will this lead to a different conclusion? Or will the plaintiff be compelled to receive a sum less than that named in the note? Where a contract is entered into for the payment of one hundred bushels of wheat, at a certain time, and the wheat is not delivered, the rule of damages will be the value of the wheat when it should have been delivered. If, however, the contract be for the payment of one hundred dollars, *in* wheat, or of one hundred bushels of wheat at one dollar per bushel, and payment be not made, it will not be doubted but that a plaintiff seeking to recover damages upon such contract for its violation, would be entitled to one hundred dollars. It would at once be said that the damages were liquidated or agreed upon by the parties. In the case under consideration, Edwards promises to pay two thousand dollars "*in* current bank notes of the city of Cincinnati." This promise is not performed—the bank notes are not paid. What must be the rule of damages? I would suppose, if bank notes are considered in the same light, and as possessing the same character as other specific articles, we must say at once, that the parties had fixed the rule of damages, and that the plaintiff must recover the amount named in the contract. I am sensible that it has been urged in argument, that in the contract under consideration, the word *in* must be interpreted to mean *of*, and that this contract should be considered the same as if it had been for the payment of two thousand dollars *of* current bank notes. Is there

any thing, however, in the contract itself, that would justify this interpretation, or justify the court in changing the meaning of words? It appears to me that there is not, unless we attach a character to bank notes different, in some respects at least, from that which we attach to specific articles.

Counsel for the defendant insist, that whether we consider bank notes as money, and this contract a money contract, or whether we consider it as a contract for a certain sum payable in specific articles, injustice is done to him, inasmuch as such could not have been the intention of the contracting parties. In interpreting contracts, the great object always is to arrive at the intention; and if in giving the construction to the contract, before the court, which I am disposed to give, injustice is done to either party, I sincerely regret it. The law, however, has fixed and established certain rules, by which all contracts are to be interpreted; and it would be dangerous to depart from these rules to accommodate a particular case or class of cases. No principle can be better settled than this, that in the interpretation of contracts, the words or terms made use of, taken in connection with the subject matter, are the only things which can be looked to. You shall collect the meaning of parties by their words: every contract must be interpreted by itself. Resort cannot be had to parol or extrinsic evidence, except where there is an ambiguity not apparent upon the face of the contract. If there is an apparent ambiguity, even this cannot be explained. The contract before the court is very explicit. If the parties had intended this as a promise to pay two thousand dollars of bank notes numerically, it could have been easily expressed. If they intended, that in the event of the failure of the defendant to pay the bank notes, he should be discharged by the payment of a less sum in money or specie, this intention could with equal ease have been expressed.—As neither is expressed, I must infer that such was not the intention, and am of opinion that parol evidence cannot be received by way of explanation to lead to a different conclusion. In fact, the effect of such testimony, if received, would not be to explain this contract, but to prove one materially variant in its terms and conditions.—Counsel for the defendant do not deny that it would be improper to receive this species of evidence.

It is contended, however, that this contract was predicated upon a particular state of business in the country where it was made, to which the terms of the note refer, and that the amount which the defendant is bound to pay must be determined by giving to the terms used in the note an interpretation connected with the history of the times in which it was made.

The contract was made in Cincinnati, and bears date in the year 1819. It is said in substance that in the course of that year the paper of the banks of that place had depreciated—that there was a difference between its real and numerical value—that this depreciated paper was the principal circulating medium of exchange—that it was in common parlance denominated "currency," or "current bank paper," to distinguish it from that description of bank paper whose real and numerical value was the same—that the term "current," which, when applied to money, has been understood to mean that which is lawful, and when applied to bank paper that which is equal to specie, was here understood to mean paper which was depreciated—that contracts similar to this were made with the understanding that they should be discharged with this depreciated

paper, which is denominated *currency*, or in specie of equivalent value, and in fact that the character of bank notes was changed; that they were no longer considered as money, but similar to any other specifick article, and that a promise to pay two thousand dollars *in* this kind of property or paper, was understood to be a promise to pay that amount of it according to its numerical value. And it is further contended, that the court are bound to know these facts as matters of public history and apply them in the construction of the contract under consideration. The argument raised upon this state of facts is entitled to great consideration, and if the case was a new one would undoubtedly have much influence. But before we adopt the principle contended for, it may be well to examine a little as to consequences. These facts cannot be proved by parol, because they would lead to a construction of the contract different from what its terms justify; yet the court are bound to know them as matters of public history. Public history, not of the state at large, but of a particular town or city. It is to be recollected that contracts similar to the one before the court have been frequently made in this state, especially since the year 1812. Makers of notes have promised to pay certain sums "in current bank notes," in "eastern or western bank notes or paper," in the notes of a particular bank or of the banks of a particular place. Almost every variety of expression has been adopted that could be thought of. This mode of transacting business grew out of the state of the circulating medium, and was adopted sometimes for the accommodation of the creditor, but more generally for the accommodation of the debtor. These promises have not always been complied with, and suits have been brought to compel judgment. Judgments have been recovered and enforced by execution. This court have in cases of default without hesitation assessed the damages without the intervention of a jury, and in every instance previous to the year 1822, it is believed the rule of damages has been the sum named in the contract, together with the interest. This has been the practice, not in one particular county, but throughout the state. So far as a uniform course of decision, when any particular subject can settle the law upon that subject, it would seem that the rule of law, or the law itself, applicable to this subject, was well settled. It must be recollected also, that this court in giving construction to contracts cannot interpret the same terms or words made use of in contracts to mean one thing in one part of the state, and a different thing in another. The rule of law must be uniform with the whole body of the people. The same words used in a grant would convey an estate of inheritance in the county of Trumbull or Hamilton; and it will not be contended that if by general consent the inhabitants of the county of Trumbull should attach a meaning to those terms which in a grant convey an estate of inheritance, different from that which the law attaches, that the court would be justified in changing the interpretation of those terms to meet the feelings, wishes, or general consent of the people in that particular section of country. In interpretiug contracts, the law of the place where the contract is made is to govern. But in what does the law of Cincinnati and its vicinity differ from the law in Cleaveland or Steubenville. Previous to the year 1819 it is not contended that there was any difference as to the principles applicable to the cases similar to the one before the court. We are called upon however, to know certain facts which have transpired since that period, as matters of public

history which must go to change these principles in that particular section of country, so far that a rule of law is to prevail different from that which prevails in other parts of the state. If this be correct, may not the same innovation be made by every town or village in the state? and may we not be left in this predicament, that agreements containing precisely the same terms, and relating to the same subject matter, must be construed to mean different things, according to the understanding of the people in the various counties, or even towns in which they shall be executed. It does appear to me that this is carrying the rule that the *lex loci* must govern to an unreasonable length. True the citizens of Cincinnati, as well as the citizens of any other incorporated town or village, may, according to their acts of incorporation, establish rules for their own internal regulations: but can they contravene the general law of the land? can they change the law of contracts?

As was before observed, if this were a new case, and of the first impression, the argument of the defendant would undoubtedly have great weight. But I conceive that the law on the subject has been long settled: that the rules for the interpretation of this species of contract were well understood previous to the year 1819; and that the circumstance, that a fictitious medium of exchange was then thrown upon a particular section of our country, cannot change these rules. It is better that a temporary or partial inconvenience should be sustained, than that the general and well established principles of law should be violated or even changed.

But we may well enquire, whether these facts constitute such matters of history that courts are bound to take notice of them. Certain facts, which are properly matters of history, have been long since transacted, and of which no person can give testimony, may be proved by ancient history of the times in which they were transacted. (*Neale v. Fry, cited Salkeld* 281.) But a particular custom cannot be thus proved. The reason why public history is admitted as evidence, seems to be, that the facts necessary to be established are properly subjects of history, and because of the extreme difficulty, or utter impossibility, of establishing those facts by any other testimony. But the facts which the court are called upon to know in the present case, are such as have recently transpired, and must be in the knowledge of those persons who were in business at the time.

It is urged in argument, that if in the present case we allow the plaintiff to recover any more than the specifick value of two thousand dollars of depreciated bank paper, at the time the contract was made,—injustice will be done, because he will receive a greater value than the consideration which he gave. This argument is raised upon the supposition, that property at the time was estimated to be worth a greater nominal amount, in proportion as the paper of the banks had depreciated. But if this consideration is to influence the court, the argument may be urged with equal force, in estimating the damages in another class of contracts. *Property contracts* are as well known and understood in different parts of the state, as *currency contracts* can be in any particular section. The owner of any specifick article of property, is willing to sell that property for a certain sum in money, or he will sell it for a sum twenty-five or thirty per cent. greater, and receive his pay in property of the same or a different description. The purchaser, consulting what he conceives to be his

interest, agrees to take the property offered for sale, at the advanced price, and pay in specific articles. The bargain is completed and the vendee contracts to pay the vendor a certain sum in these specific articles. This contract is not complied with. The articles are not delivered, nor even tendered, at the time when due. Suit is commenced and judgment recovered. The damages uniformly assessed are, the amount specified in the contract, without reference to the specifick or money value of the property transferred, which was the consideration of the contract. The defendant is compelled to pay twenty-five or thirty per cent. more than the amount for which he could in the first instance have obtained the property which he purchased. Is not his case hard, yet he can obtain no relief. If he complains he will be told, "you might have contracted differently: if it was understood, that in the event of your failure to deliver the specifick articles you was to pay a less sum in money, it should have been so expressed; as it is not, you have by your contract agreed upon the amount you must pay;—true you had your election to pay this amount in property, but as you have not complied with your contract, you must pay it in money."

If these principles are correct when applied to *property contracts*, they must be equally so when applied to *currency contracts*. The loss which a defendant in either case sustains, is not attributable to the law, but to his own neglect, to his carelessness in not performing, or perhaps in some instances, to his misfortune in not being able to perform, his engagements. Upon the whole, whether I consider the note in suit as a note for money, on the principle that bank notes have been and still are considered as money, or whether I consider it a note for a certain sum, payable in specific articles,—I must come to this conclusion, that the plaintiff is entitled to judgment for the amount named in the note, together with the interest which remains unpaid.

Entertaining this opinion, it seems unnecessary to examine the second question raised in the case, that is, whether, admitting that the plaintiff is not entitled to recover the full amount of two thousand dollars, but merely the specific value of two thousand dollars of "current bank paper of the city of Cincinnati," the damages shall be ascertained by proof of the value of that paper when the contract was made, or when the payment became due. If the same character is attached to bank notes as it is attached to other specific articles, the same rules of law must be applied in interpreting a contract which by its terms is to be discharged by the payment of this paper, as if it were to be discharged by the delivery of any other articles of property. It will not do to treat it as money for one purpose, and as property of a different description for another. In cases of contracts for the delivery of specific articles, one hundred bushels of wheat, for instance, to be delivered on a certain day: the law has said that the rule of damages shall be, not the value of the wheat on the day the contract was made, but on the day the wheat should have been delivered. If bank notes are considered as specific property, why should not the same rule be applied to them? I am aware that it is said, when property is sold and payment is to be made in bank notes, either at the time of sale, or at a future day, reference will be had to the value of those notes on the day of sale, and not to the value which may be attached to them at a future period. This is undoubtedly true, but the same reference is had to the value of wheat, or of any specific article, at the time of contracting, provided the payment is to be made in wheat or such

other specific articles. It is however to the contracting parties that the value of the article may be increased or diminished, and they contract possessing this knowledge. Still no change of value in the property can change the rule of damages, and if it were necessary in the present case to express an opinion on this question, I should say, that the value of the "current bank notes" named in the contract, on the day of payment, must be the rule by which a court would be governed in assessing damages.

Opinion of Judge PEASE.

I concur generally in the opinion expressed by Judge *Hitchcock*. But the case may be viewed in two aspects in which it is not presented, both of which I conceive of some importance.

Although the bank notes that formed, at one time, the circulating medium of Cincinnati and other sections of the state, were *depreciated* in *market*, the *legal obligation*, on the part of the banks that issued them, to pay their full numerical value, *was not depreciated*. In this respect the case differs materially from a contract to pay or deliver other articles of personal property. When such is the contract, the party, who is to receive the property, if he receive it, can get no more for it in money, than it will bring in market; and when not delivered, if he bring a suit, he can recover a judgment for no greater sum than its market value at the time it should have been delivered. This market value is the rule of damages. Where the creditor receives of his debtor bank notes, he need not, unless he prefers it, resort to their market value for any purpose. He is not obliged to accept of law or of justice, as either may be dealt out to him at a broker's shop. He may resort to a court of justice, and there he can obtain judgment against the bank that issued the notes, for their numerical amount, without regard to their *market* value. The ability of the bank to pay, has nothing to do with the sum for which judgment must be rendered.

Market price is a proper rule of damages, in those cases where, if the article be received, it can by no possible means, be converted into money, except through the medium of the market. But where the law will convert it into a judgment for a certain amount, that amount ought to be the rule of damages, when the article is not delivered. The *market price* has no bearing on the subject. The sum specified on the face of the notes, determines the amount for which judgment must be rendered against the bank.

There is, I conceive, no analogy between the case of depreciated bank notes, and the depreciated continental currency. The continental bills were issued by the Government, against which payment could not be coerced by judicial process. An effective judgment could not be obtained against any one for their numerical value. In this respect, there is a strong and marked distinction between the two cases. But this is not all.

In some, if not in all the states, the continental bills were made by law a legal tender in payment of debts, and in discharge of contracts. When these laws were repealed, the debtors were deprived of the means of paying their debts in a currency which was abundant, and which was legal and current for all purposes when the debts were contracted. These contracts might be considered as made upon the faith reposed in the public law, that they could be discharged in continental bills; and when the right to do this was taken away by law, a strong

case was presented for originating some equitable mode of affording relief to the debtor, and doing justice to all parties. Yet I know of no case, where the courts interfered upon general principles. It was not until legislative recommendations, or positive laws, suggested a course, that a scale of depreciation was adopted.

Our laws never made bank notes a legal tender, and have never changed their legal character. The debtors have no such thing to complain of. They know the hazard in speculating, with the intention of making payment in depreciated bank notes. If the course of events, or their own negligence, in not complying with their contracts, has made their speculation a bad one, their case, in the view of justice, calls for no extraordinary interference of the courts to aid them at the expense of the creditor.

Judge SHERMAN *concurred.*

Judge BURNET dissented. As I cannot concur in the opinion of the court, given in this case, I will state my own view of the subject, which will show the reasons of my dissent.

The action is brought on a promissory note, dated December 25, 1819, in the following words: "On the first day of February, in the year 1822, I promise to pay James C. Morris or order, *in current bank notes of the city of Cincinnati*, two thousand dollars, with interest payable annually, for value received." By an endorsement on the note, it appears that the interest has been paid till the first of February, 1821.

The defendant proposes to prove that at the time this note was given, and when it become payable, the notes of all the banks of the city of Cincinnati, were depreciated in value, and were received at a discount in exchange for specie, or in payment of specie debts, and that it was the intention of the parties, inferable from the common use and practice of the neighborhood, in similar cases, and from the circumstances attending this particular case, as well as from the import of the words used in the contract,—that the plaintiff should receive the *nominal* sum stated in the note in the depreciated currency described, or the specie value of so much of that currency. He also proposes to prove that the note was given for a part of the consideration of a tract of land, and that it was the universal custom of the Miami country, at that time, in all contracts of a simlar nature, to stipulate for a price, in reference to the value of current paper; and where the purchaser would agree to pay in specie, that a deduction was always made from the price, equal to the depreciation of the paper, and that this particular contract was made in reference to, and in conformity with, that custom: that the actual value of currency, at the date of these contracts: was generally referred to, and not its probable value, when the payment might become due; and that, at the date of this note, the depreciation of current bank notes of the city of Cincinnati, was thirty three and one-third per cent.

The plaintiff objects to the whole of this testimony. He insists that "the legal effect of the note, is to pay the sum of two thousand specie dollars, with interest; that the expression "current bank notes of the city of Cincinnati," in legal import, means the notes of such banks as pay their notes in specie, on demand, and not those that circulate at a depreciated value." It is also con-

tended that there is not such a latent ambiguity in this note, as requires any parol proof, or other evidence, to explain or ascertain its true meaning; that if any ambiguity does exist, it is a patent one, and must receive a construction, exclusively, from the language made use of in the instrument.

The reverse of these propositions is insisted on by the defendant, who contends that the recovery ought not to be for the full amount of the note in specie, but for an amount to be ascertained by a reference to the value of "current bank notes of the city of Cincinnati," either at the date of the note, or on the day on which it became payable.

It is difficult to ascertain by what course of reasoning a promise to pay bank notes of a particular description, can have the legal effect of a promise to pay specie. With equal propriety it might be contended that an engagement to deliver flour, was, in law, a promise to pay specie; for, in either case, if the thing contracted for be not delivered or paid, and a recovery be had on the contract, the judgment must be rendered for specie, and not for the specific article. It does not, however, follow that the plaintiff has a right to demand specie, or that the defendant is bound to pay it. The reverse of the proposition is true; such a right or such a liability does not exist. The legal effect of a promise, (in the sense in which the plaintiff uses that phrase,) is the liability created by it, or that which the party to whom it is made, has a right to demand. In this case, the promise is for bank notes—the right of the plaintiff is to demand bank notes, and the legal effect of the promise must be to pay or deliver them.

It is equally difficult to see the correctness of the construction given to the expression *current bank notes of the city of Cincinnati.* The description given of them, does not present the idea of their being paid, on demand, in specie. The contract is silent on that head, and to supply the omission would materially change its obligation: it would require the defendant to do that which the terms of his contract do not embrace. The description contains but two requisites,—the notes must be current, and of the banks of the city of Cincinnati. Notes are current when they pass freely in the common transactions of business, either at their par value or at any other value, ascribed to them by common consent; and if they so pass, they are current, whatever may be their value in reference to a specie standard, or whatever may be the manner in which the banks redeem them.

If the paper of one bank passes freely at its face, or at par, and the paper of another passes as freely at a discount of ten or twenty per cent., they are in fact equally current, though not of equal value; and it may happen that a majority of the community would prefer the depreciated paper to that which is passing at par; and a difference may exist, in reference to this quality, in favor of those that pass at a discount—they may be the most current. It cannot be admitted, that the contract calls for such notes as were redeemed in specie on demand, unless it be taken for granted that, at the date of the contract, the notes of no bank in the city, which were not redeemed in specie on demand, were current; but with this admission, it would be true, not because the notes were so redeemed, but because no other description of notes were current. The fact, however, was otherwise. The notes of all the banks of the city were depreciated, and none of them were paid in specie on demand. It would, therefore,

follow, from the plaintiff's construction, that there were no bank notes in existence of the description called for, and that it was impossible to perform the contract. In support of this construction, it seems to be taken for granted, that the term *current* has a reference to the value of the paper, when, in fact, it relates only to the manner in which it circulates. Depreciated paper may circulate freely at its value, and pass as currently as any other, and if it does, it answers the requirements of the contract, which the court cannot extend by requiring any thing not included within the terms of it. If we can say the notes shall not only be current, but current at par, we may require them to be current at a premium or advance.

It is further contended, that if any ambiguity exists on the face of the note it is patent, and must be explained exclusively by the language used in the instrument.

The defendant does not allege that the contract is ambiguous, nor is it necessary for him to do so; the words "current bank notes of the city of Cincinnati," are as expressive of their own meaning as "barrels of superfine flour," or "bushels of wheat;" they are definite and admit of but one construction. They necessarily include the notes of every bank of the city that were passing freely in the common business of the day, and they exclude notes of every other description. No other interpretation can be given to the terms, nor is parol testimony necessary to explain them—they speak their own meaning. It is true, that the value of those notes has not been uniform, and it is a question of fact to be decided by testimony what was their value, at any particular period, but this does not arise from any ambiguity apparent on the contract, but from matter wholly extrinsic. If a contract were made for a hundred barrrels of flour, or a thousand bushels of wheat, it could not be said to be ambiguous, although in an action for non delivery it would be necessary to prove the value of the article, for which purpose parol testimony would be received without objection. This is our daily practice; and there does not appear to be more difficulty or impropriety in proving the value of a bank note, than of a barrel of flour. The one is worth what it will command in market, the other is worth what it passes for by common consent.

The objection to parol testimony in this case on the supposition that it is an attempt partially to affect the consideration of the note, is more specious than solid. It is not an attempt to reduce the amount of the demand, by shewing that it is greater than the value of the consideration received, but to shew the real demand, which is the value of the thing demandable, in order to ascertain what sum may be recovered for the non delivery of it. If a reference should be had to the consideration, it would not be for the purpose of reducing the demand, but of shewing what it originally was; it would be presumptive testimony of the value of the paper at the time of the contract.

If A be possessed of property that he values at six hundred dollars in specie, and proposes to sell it either at that price in specie, or at nine hundred dollars in currency, which is estimated to be of the same value, and B makes the purchase and gives his note for nine hundred dollars in current bank notes, and it becomes a question how much specie A ought to receive for the non payment of the bank notes, B may prove these facts for the purpose of shewing the value of the

notes which was the true consideration of the purchase, and the real sum intended to be paid.

It will be admitted that all contracts are to be construed agreeably to the understanding and intention of the parties, to be collected from their language. The language of the note before us seems to be clear and intelligible; it is a promise to pay a given sum in a particular description of currency, and it binds the defendant to pay as much of that currency as will, at the face of it, amount to the sum required, which was two thousand dollars. A tender, therefore, of that amount of the current bank notes of the city of Cincinnati, would have been good, whatever may have been the value of those notes compared with specie.

When a contract is made to pay a given sum in bank notes, it obligates the party to pay as many of those notes as at the face of them will amount to the sum required, without reference to their value. There is, therefore, a difference between a promise to pay a given sum in produce, and a promise to pay it in bank notes; in the one case the quantity of produce is indefinite and must depend on its value, which is fixed and certain; in the other the amount is fixed and is ascertained by the sums impressed on the face of the notes, but their value is uncertain. The case before us has a strong resemblance to a contract for the delivery of a certain quantity of produce, as a hundred barrels of flour or a thousand bushels of wheat, in which case if the property be not delivered, the rule of damage is its cash value; for the same reason the rule of damage in this case ought to be the specie value of the notes. As in the former case, judgment cannot be given for the property, but is given for the value, so in this case we cannot give judgment for the bank notes, but must give it for their value, to be ascertained as in other cases.

But if this construction does not clearly result from the terms of the note—if any ambiguity is found to exist, it is a latent one, and the difficulty will vanish, and the intention of the parties become manifest by a reference to the nature and value of current bank notes, at the date of the contract, and to the general custom and understanding of the country in relation to contracts payable in such notes.

The notes of chartered banks were issued by legal authority. Each note had its amount, or the sum for which it was issued and passed impressed on its face, and when any given sum of bank notes was spoken of, as for example a hundred dollars, the expression had a fixed, definite meaning, which was uniform and universal. Every body who heard it understood it to mean so many notes as would amount to one hundred dollars, each note being counted at the sum, or the number of dollars impressed on its face, and it may safely be affirmed that no other meaning was ever affixed to a promise couched in such language. These facts form a part of the general history of the country. It is also a matter of history, that in 1819, and for a long time before and after, specie was out of circulation, and that current bank notes were the circulating medium of the country, notwithstanding they were much depreciated below the value of specie. Property of every description had risen considerably in value, but had risen still more in price in consequence of the quantity and depreciated quality of the circulating medium. Every thing offered for sale was offered at a price fixed on by a reference to the value of bank paper, and whenever an

offer was made to pay in specie, which rarely happened, a discount was made proportionate to the estimated depreciation. This practice was universal, and continued till efforts were made to put down the paper, when it became common to set a specie and currency price, and to offer the purchaser his choice, which practice continued till by common consent specie prices were generally fixed; this, however, did not take place till long after the date of the contract before us. When that was made, depreciated currency was the circulating medium, and the price of every thing was regulated and fixed with a reference to its value, which was known to be far below that of specie. Hence it is that the defendant in this case has promised to pay in current bank paper; if he had undertaken to pay in specie it would have been so expressed, and the amount of the note would have been proportionably reduced. It must therefore have been the understanding of the parties, that two thousand dollars in current bank notes, without reference to their value, should be paid, and not the value of two thousand specie dollars in current paper, as is contended for by the counsel. The common usage and universal understanding of the country condemn this construction; not a solitary case can be cited in which it has prevailed. If this were not the case, why were these words inserted in this note? Why was it not drawn generally without designating currency? It undoubtedly would have been so drawn if the plaintiff's construction were correct. The court cannot alter contracts, or give them a construction contrary to the legal and manifest intent of the parties. Such a power is denied to the legislatures of the states, and ought not to be possessed by any tribunal.

In this case the defendendant has promised to pay a certain amount of current bank paper, which he has not done. By the law of contracts he is liable to render the value of that paper and nothing more; but we are called upon to say that he shall pay as many dollars in specie as he has bound himself to pay in paper, without enquiring into its value. This would certainly be changing the nature and obligation of the contract. We might with the same propriety say that a person who has promised two thousand bushels of wheat; shall pay two thousand dollars without reference to the value of wheat. At the date of this contract, there was about the same difference between the value of a paper and a specie dollar, as between a bushel of wheat and a specie dollar.

There appears to be a strong analogy between this contract and contracts which were made during the revolutionary war, when continental money was in circulation, on which the rule of decision seems to have been, that the plaintiff should recover the value of the currency, agreeably to the scale of depreciation at the date of the contract. The principal distinction seems to be, that in one case the depreciation was fixed by law, while in the other it depended on public opinion. In the case of *Wheaton v. Morris*, (1 *Dall.* 124,) the contract was on a sale of tobacco, in March, 1777, when the scale of depreciation was at the rate of five for one. The bond was in the penal sum of twelve thousand pounds, *lawful current money of Pennsylvania*, payable in September, 1782, when continental money had sunk and was out of circulation, and the only current money of the state was gold and silver. No payment or tender had been made. The only evidence given was the contract—the bond, the price of tobacco, and that one of the defendants had offered to pay the value of the to-

bacco and interest. The court charged the jury, that lawful current money, when the contract was made, was the money emitted under the authority of Congress, that the bond should be taken, as relating to that species of money, and left it to them, on an equitable and conscientious interpretation of the agreement, to reduce the sum, according to the scale of depreciation, or to find the specie value of the property, with interest from the day of sale.

From the short note of *Lee v. Beddes*, (1 *Dall.* 175,) it appears that the same principle was there recognized, that current lawful money meant such money as was current at the time of the contract, which in that case was continental money, and the court refused to receive testimony to prove that other money was intended.

In the case of *Bond v. Haas*, (2 *Dall.* 133,) the contract was for the payment of two hundred and fifty pounds, current money of Pennsylvania, dated in August, 1777, payable in one year. At the date of the contract, continental money was depreciated, and was at three for one. The plaintiff insisted that the whole sum should be paid in specie, and offered parol proof that such was the understanding of the parties. The testimony was rejected on the ground that it did not explain the contract, but would be in effect altering it, and increasing the value of the money. It seems to follow as a corollary from this case, that if a contract calls for current money, and it is ascertained that the words current money, meant current bank notes, the contract is to be discharged in those notes; and in an action for non payment, the plaintiff can only recover their value; but if the promise, instead of being couched in words which are understood to mean current bank notes, expressly calls for them by name, the rule of decision must be much more applicable. It seems also to follow, that if a promise be to pay a given sum, in a particular currency, and that currency be depreciated at the time, proof cannot be received, that the whole sum was to be paid in specie, or currency not depreciated, because such proof would be, in effect, altering the contract and increasing the value of the money by requiring something of greater value than that which was stipulated. In short it follows, that the true measure of damage, in all such cases, is the value of the notes or currency mentioned in the contract.

In the case of *McMinns v. Owens* (2 *Dall.* 173,) the covenant was dated in January, 1779, and required the defendant to pay two hundred and fifty pounds immediately, and two hundred and fifty pounds in annual instalments. The contract contained no description of the kind of money. The principal question was, whether it should be reduced by the scale of depreciation, or paid in gold and silver. The court admitted testimony to prove, that at the time of the contract it was agreed, that the instalments should be paid in whatever money was current, at the time they became due, on the ground that as there were two kinds of money in circulation, (paper and specie) and the parties had not distinguished which they meant, there was a latent ambiguity. They distinguished it from the former cases, in which the contracts specified current money, which was understood to be paper money.

The doctrine established by this case, is, that if a contract be for a given sum without describing the kind of money or currency, and there are two or more kinds of money or currency, varying in value, either party may prove which was intended; but if the contract designates the currency, such evidence is in-

admissable, because the plaintiff must receive the kind of money or currency designated, or its value.

In *Kaef v. Whitner*, cited by Shippen, justice, the cause was sent to Auditors, after a judgment by default, to ascertain the value or kind of money. Such a course would not have been pursued, if the court had recognized the rule which is set up in this case, because, whether the currency was described or not, or whatever might have been its value, judgment would have been given for the sum named in the contract, which must have superseded the necessity of such a reference; but as the reference was made, the inference is irresistible, that the amount of the recovery depended on the kind and value of the currency stated in the contract.

In *Pleasants v. Pemberton*, (2 *Dall.* 196.) a receipt had been given in evidence, for four thousand continental dollars, dated February, 1780, while continental money was a tender, but depreciated fifty for one. Parol proof was offered, that at the time of payment it had been agreed that the value of continental money should be adjusted afterwards, and credit given accordingly. The testimony was opposed on the ground that it went to invalidate the receipt, and add to it a condition which would take off forty-nine-fiftieths of its operation. The Chief Justice admitted the testimony, observing that it did not contradict the writing or deny any thing contained in it, although it reduced the credit from four thousand dollars, the nominal sum mentioned in the receipt, to about eighty dollars, the true value of that sum.

It is true, that in these cases the recovery was graduated by a scale of depreciation established by the legislature, which the court was bound to observe; but that fact does not alter the principle or affect the equity of the rule. The only difference produced by it, is, that in those cases a rule of damage or of recovery was fixed by statute for the government of every case, which here is to be ascertained by testimony, under the direction of the court, in each particular case. The legislature of Pennsylvania did not establish a scale of depreciation, because it was necessary to enable their courts to construe contracts according to the intention of the parties, and to determine the meaning of terms by the usage of the country, but for the purpose of producing uniformity throughout the state. If no such law had been passed, the courts would have adopted the same rule of evidence and a similar standard of damage, and would have resorted to parol proof of the usage of the neighborhood, in place of the scale of depreciation. The statute, therefore, merely anticipated the courts, by providing an uniform rule, which was varied from time to time, and which dispensed with the necessity of parol proof. Nor should it be forgotten, that the money in question was issued by Congress, and received its sanction from them, not from the state. The legislature, therefore, could not exercise any power, in relation to its value, in the construction of contracts, that the courts could not have done without their sanction. This conclusion will be manifest from a careful attention to the cases of *McMinns v. Owens* and *Wheaton v. Morris*, before cited. In the former, the contract contained no description of money, and therefore did not point to the scale of depreciation, and yet parol testimony was admitted to show the understanding of the parties. In the latter case, the court authorised the jury to lay aside the scale of depreciation, and find the value of the property at the time of the contract, which the statute

did not authorise, and which can only be justified on common law principles.

But whether the case before us be considered on precedent or on principle, we are brought to the same conclusion. It is manifest that the claim to the extent set up, is against conscience, and, if sustained, will be a palpable fraud on the defendant. Assumpsit is an equitable action. It is declared, by lord Mansfield, to be as broad as a bill in chancery; and it is said to be a general description of all cases in which it lies, that the defendant is bound by the ties of natural justice and equity, to render what the plaintiff has a legal right to demand. Great latitude is therefore given to defendants, who are permitted to avail themselves of every thing which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand or any part of it. Although this doctrine might have been applied, by lord Mansfield, most strongly to his favorite count for money had and received, yet a large portion of the same liberality is applied to the action of assumpsit generally, and especially if there be a money count to which, as in this case, all the plaintiff's testimony may be applied.

It is believed no person will contend that, on equitable principles, a party should recover more than he asked or expected by his contract, or more than he knew the defendant calculated to pay or intended to promise. Equity and good conscience forbid such recoveries, but they cannot be avoided, if testimony like that now in question be rejected, and the plaintiff's construction of the note prevail.

On no principle of equity or common honesty, can a man receive that which was never claimed or expected by him, or intended to be promised to him, and every sound maxim in morals and every just conclusion of reason, which constitute the essence both of equity and law, justify any safe course calculated to prevent such unrighteous results. The plaintiff shows a promise for two thousand dollars of current bank notes of Cincinnati, and demands for them the same sum in specie. It is matter of public history, known to the court, the parties, and the community at large, that these notes, when promised, were greatly depreciated, and if the allegations of the defendant be true, (and for the purpose of deciding on the admissibility of the evidence, we must presume them true,) the demand is for six or seven hundred dollars more than the value of the bank notes, or of the property for which they were to be paid. The defendant contends that he ought not to pay more than the value of the notes promised, and, to protect himself against a further claim, offers to prove these facts, and also what was the understanding of the parties and the real design of the contract, or, in other words, how much, in equity and good conscience, the plaintiff ought to recover.

The authority of adjudged cases, as far as they are applicable, seem to favor the admission of the testimony. They allow proof of the intention of the parties, when it does not change or contradict the contract. They permit parol testimony to explain latent ambiguities, and to prove the value of articles, for the non-delivery of which damages are sought.

It appears to me, that the main question, in this case, is one that is recognized in the practice of almost every term. When stripped of the apparent novelty and mystery that has been thrown about it, it resolves itself into this simple enquiry: May the parties resort to the common understanding and practice of

the neighborhood or state in which a contract is made, to ascertain the correct meaning of any particular phrase about which they differ? and may the history of that district or state be referred to for the same purpose?—This, in substance, is what the defendant claims. A promise is made to pay a given amount in a particular description of depreciated paper. The parties differ as to the legal import, or (what is the same thing,) as to the true meaning of the terms they have used, and as one mean of solving the difficulty, it is proposed to resort to the general practice and understanding of those who have been in the constant habit of making similar contracts in the same neighborhood.

The case of *Kimball v. Noble*, decided in this court, was on an engagement to transport certain property from New Orleans to Cincinnati, and to deliver it in good order, *the dangers of the river only excepted.* The boat on her passage took fire accidentally, and was consumed with her cargo. The court having determined that the common law, in relation to carriers, which renders them liable for all losses not occasioned by the act of God, or the public enemy, had not been adopted in this state, permitted the defendant to prove, what was generally understood among those engaged in the river trade, by the phrase *dangers of the river*, and on the explanation given by the witnesses the defendant had a verdict.

"When words used in a contract have different significations in different places, they will take effect as they are understood where they are spoken." (1 *Pow. on cont.* 376.) And in the same book, 407, "if money is to be paid by reason of a contract, the terms shall be understood and accepted according to their import, where it is to be received; that is, it shall be paid in currency there." In 1 *Forb.* 419, "words should be expounded fairly, in the common sense that the words bore, *in the place and at the time*" *they were used.* It will be observed, that the author is treating here of such rules as belong to the municipal law, in cases where chancery follows the law. If these passages have any meaning, they establish the right of giving parol testimony, to prove the signification of words used in a contract, in the place where the contract is made, and to show the *currency of that place*, by which I understand, *its value* in comparison with any other description of currency. But of what use is such testimony, unless it be to ascertain the rule of damage, or the amount to be recovered? I cannot discover any other object for which it can be required. If it be not to ascertain the value, or amount of the currency spoken of, when reduced or raised to the kind of money or currency in which the court is to render its judgment, it would be wholly irrelevant.

In *Cole v. Wendel*, (8 *John. Rep.* 116,) parol evidence was admitted to explain a written contract, by showing whether five per cent. advance, stipulated to be paid, was to be calculated on the sum paid in on each share only, or on the nominal amount of the shares. In 8 *Term Rep.* 379, parol testimony was admitted, to explain an agreement that appeared to be equivocal on the face of it.

In *McInstry v. Pearsell*, (3 *John. Rep.* 319,) it was determined that a receipt was open to that kind of explanation, not directly contradictory to, but consistent with it, and that parol testimony was necessary, as far as the receipt itself was equivocal.

In *Noble v. Kerrsway*, (*Doug.* 510,) which was an action on a policy of insu-

rance, on a voyage to the coast of Labrador, it was objected by the defendant, that there had been an unnecessary delay in unlading the cargo, in consequence of which he was not liable by the terms of the policy. Lord Mansfield permitted the plaintiff to prove *the custom of the same trade* at Newfoundland, to show the true import of the policy, and the consequent liability of the defendant; and on a motion for a new trial, the court held that the testimony was properly admitted.

In 1 *Cains' R.* 43, we find that *contracts may be explained by commercial usage*, if the usage be proved to have existed a sufficient length of time, to become generally known, and to warrant a presumption that the contract was made in reference to it.

The case of *Parr v. Anderson*, (6 *East*, 202,) was on a policy of insurance. The difficulty arose on the construction of certain words used in the policy. The court held it material to ascertain, as a question of fact, in what manner, *the parties to contracts, containing the same form of words, had acted on them in former instances; and whether they had obtained in use and practice any, and what known and definite import;* and for that purpose they ordered a second trial.

In the case of *Flowers v. Sproule*, (2 *Marshal*, 58,) Judge Rowan in delivering the opinion of the court, when speaking on the construction of contracts says, the question should be determined by reference to the intention of the parties, and that intention should be ascertained, as well from the subject matter of the contract, the conduct of the parties relative thereto, and other extraneous circumstances, as from the face and import of the writing.

In the case of *Doe v. Burt*, (1 *Term Rep.* 701,) the plaintiff was permitted to give parol evidence of facts, relating to the premises described in a lease, for the purpose of proving the intention of the partles; and on a motion for a new trial, the court were unanimously of opinion, that the testimony was properly admitted. They observed, that the objection was against the justice of the case, and that it might be necessary to put a different construction on leases made in different places.

In the case of *Scott v. Bourdillion.* (5 *Boss. and Pull.* 213,) evidence of usage was admitted, to show that rice was not corn, within the meaning of the memorandum.

In the case of *Sleight v. Rhinelander*, (1 *John. Rep.* 192, 2 *John. Rep.* 531,) parol evidence was admitted to explain what was a sea letter, as used in the warranty.

In the case of *Coit v. The Commercial Insurance Company*, the question was, whether usage was admissible to control the ordinary and popular sense of a term, used in a contract. The court say, "the law has been too long settled to be now questioned; that if any terms in a policy, have, by the known usage of trade; or *by use and practice*, as between assurers and assured, *acquired an appropriate sense, they shall be construed according to that sense and meaning.*" This is not only the modern rule, as to mercantile instruments in general, but it appears to have been the established practice, as far back as the time of Ch. T. Rolle, and of lord Holt, and although lord Eldon regretted the rule, yet he admitted that it was too late to question its force. To reject this testimony now, would produce the greatest injustice, for the contract must have been made and

understood at the time by the parties, in reference to this mercantile and practical meaning of the terms employed." (See 7. *John. Rep.* 390, and the cases there cited.)

The case of *Cutter, administratrix, v. Powell,* (6 *Term. Rep.* 320,) was assumpsit for work and labor done by the intestate. The defendant had given a note to the intestate, promising to pay him a certaim sum, provided he proceeded, continued, and did his duty, as second mate, from Kingston to the port of Liverpool. The intestate died before the ship reached Liverpool, and the question was, whether the plaintiff could recover. Lord Kenyon was of opinion that she could not, by the terms of the contract; but observed, that if the court were assured that those notes were in universal use, and that the commercial world had received and acted on them in a different sense, he would give up his own opinion. Mr. Justice Lawrence said, if we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract; but if the plaintiff could have proved *any usage,* that persons in the situation of this mate, are entitled to wages in proportion to the time they serve, the plaintiff might have recovered according to that usage.

These authorities seem to authorise the defendant to show, that in the general estimation and understanding of that part of the country in which this note was given, as well as by the express intention of the parties themselves, the terms made use of import a promise to pay two thousand numerical dollars of the paper described, or its equivalent in specie, and not so much of the paper as shall be worth two thousand specie dollars, and in default of such payment, an equal amount in specie.

The general rules laid down by elementary writers, for the construction of contracts, seem to lead to the same result. One of these rules is, "that any thing which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made." Another rule is, that "usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses, although they are not expressed. A third rule is, "that however general the testimony be, in which an agreement is conceived, it only comprises those things respecting which, it appears, the contracting parties proposed to contract, and not others which they never thought of." In the case before us, it is absolutely certain, that the thing about which the parties proposed to contract, and did contract, was a depreciated paper currency. A fourth rule is, "that we ought to examine what was the common intention of the contracting parties, rather than the grammatical sense of the terms." (For these rules, see 2 *Com. on Con.* 533.)

In this case, the common intention, that is, the intention of both parties, was the payment of two thousand numerical dollars of a depreciated currency, and not the payment of that sum in specie, whatever may be the grammatical sense of the terms they have used. It is a plain inference from these rules, that the law always regards the intention of the parties, and will apply these words to that which, in common presumption, may be supposed to be their intent; for if it were otherwise, the law would consist in form, rather than in substance—the intention of parties would yield to grammatical construction, and contracts would be expounded and enforced in a way altogether variant from their original design.

A term or a phrase which has received a judicial interpretation, must be construed according to that interpretation, and cannot be varied by reference to the usage of any particular place, or kind of business. As for example, this court, in the case of *Kimball v. Noble*, having settled the meaning of the phrase, *dangers of the river*, when used in a contract for the freight of goods, by parol testimony of the understanding and usage of men engaged in that business, a party would not now, in a similar case, be permitted to question the interpretation, by proving a different usage. So, in the construction of deeds and wills, terms which have been decided to convey a particular estate, cannot be varied in their meaning by testimony of usage or common understanding; but as, in the case before us, there has been no judicial interpretation of the terms used in this note, the door for admitting parol testimony is open, nor could it lead, as has been observed, to the establishment of different rules of decision, for different parts of the country. The rule would be uniform, though the effect of its application might be variant. Where the currency called for, was equal in value to the description of money for which the judgment of the court must be rendered, the necessity of the evidence would be superseded, or, if admitted would produce no effect; but for all cases of depreciated currency, one rule would establish the measure of damage, as it does in property contracts. The idea, therefore, that different rules will be necessary, because the value of currency may vary at a different places or at different periods, is not well founded.

I think I am correct in saying, that no judicial decision has been made affecting the case before us. That many judgments have been rendered on similar notes, is true, and probably the paper mentioned in some of them, might have been depreciated at the date of the note; but I do not know of any case in which the question was raised and decided by the court, except the cases which came before judge McLean and myself, in 1822, where the testimony was admitted; but as it was understood that some of our brethren entertained a different opinion, the decision was not considered as settling the law.

According to my apprehension, the plain and obvious import of the terms used in this note, would naturally lead to the same conclusion which the defendant proposes to confirm by the testimony offered, and that the principal use of the testimony is to show that the pretensions of the plaintiff are as consistent with the general understanding and usage of the country in similar cases, as it is with the literal meaning of language used in the note.

I will here notice an argument which ought to have been considered in an earlier part of this opinion. It is said, that if the money had been paid when it became due, the plaintiff, instead of passing it off at its depreciated value, might have prosecuted the banks and compelled them to pay the nominal sum in specie. This is neither more nor less than an attempt to charge the defendant with the imaginary loss of a good bargain. It cannot be presumed, that the object of the plaintiff in selling his property, was to speculate in bank paper; but if it were, the result of the speculation, to say the least of it, was extremely doubtful. Had the paper been paid on the day, it is far more probable, from the failure of some of the banks and the known inability of others, that it would have perished in his hands, than that he could have realized the nominal amount in specie; but be this as it may, the law does not extend its

views beyond the contract, it does not take into consideration the probable result of subsequent arrangements, which may be prosperous or disastrous.—It does not regard the profitable use a plaintiff might make of his money, as forming any part of the basis on which the rule of damage is founded. Hence the endorsee receives from his endorser, the consideration paid, and no more, although it be less than the amount of the note or bill.

In this, as in other cases, the use to which the money might have been applied, and the result of the application, are not known to the court, nor is it regarded by the law.

The effect of such a principle, when reduced to practice, will be seen in a moment. If it be admitted at all, it must extend to property contracts, and lead to an enquiry into the profits that might possibly have resulted from a sale of the property contracted for, had it been delivered agreeably to contract. I cannot perceive any difference, in principle, between the probable advantage that might have resulted from the possession of the bank paper, in this case, and that which might result from the delivery of property or even the punctual payment of money, in any other. In either case a good bargain or speculation might be lost.

The principle adopted by my brethren, necessarily leads to this inconvenience, that wherever a state is so unfortunate as to have its circulating medium consist of depreciated paper, as was the case with us when the note in question was given, and is now the case in at least one of our sister states, no contract can be made, with safety, predicated on the value of that medium. Experience teaches, that the price of property is in proportion to the quantity and value of the circulating medium. When that is abundant and greatly depreciated, property acquires a factitious value, which purchasers, however, may be willing and can afford to pay in the currency in which they are dealing; but it would be ruin to purchase on credit, for should accident or misfortune prevent a punctual payment, or should the paper entirely sink, or by other means be withdrawn from circulation, although this change may have reduced the price of property fifty or an hundred per cent., they must nevertheless pay the nominal sum in specie, equally regardless of the understanding of the parties and of the terms used in the contract. To such a rule of decision I cannot yield my assent, however unpleasant it may be to differ from my brethren.

If the testimony had been admitted, it would have been necessary to determine the period to which it should apply. The rule as to property contracts, that damages shall be assessed with reference to the time of delivery, was arbitrary, and was adopted as much from the necessity of having some rule on the subject, as from the equity of that particular rule.

The class to which the case before us belongs, has a strong resemblance to property contracts, but there are some points of difference that deserve consideration, and seem to require a variation, in the rule. In property contracts, the parties are in the habit of estimating the probable value of the article, at the time it is to be delivered, and govern themselves accordingly; but in the sale of property for current bank paper, they consider it as a species of money, and determine on the sum to be paid by a reference to its depreciation, compared with specie, at the time of the contract. If the price was set in specie and the payment agreed to be made in currency, an additional sum was charged

equal to the depreciation; but when the price was set in currency, and the payment agreed to be in specie, a discount was made, equal to the difference in value, and these calculations were generally made with reference to the state of things, at the time of the contract. They do not appear to have been considered as wagering contracts, nor does it seem to be good policy to place them on that footing. Property contracts are so considered, and great injustice is frequently done by unexpected changes in price, but not to the same extent, as would be the case, in contracts like the present; because the variation in price can rarely be as great or as sudden. Equity seems to require, that the value should be taken, at the date of the contract; because on that principle the seller will receive, and the purchaser will pay, the precise value, originally designed. If at the date of a currency contract, the paper designated was passing at a discount of thirty per cent. the payee would gladly have received specie at a proportionate advance, and such was every day's practice. Currency contracts were invariably made, with reference to the value of currency, at the time of the contract; and if at a subsequent period, the payee should recover either more or less than that value, injustice would be done, and the original intent of the parties would be frustrated.

It is believed, that the application of the existing rule to cases like the present, would have an unhappy effect on public morals; it would put it in the power of some, to demand money for which they had given no value, and of others to withhold money for which they had received value. It would give a legal sanction to injustice, and weaken the obligation of the moral sense; it would produce an effect on society similar to that produced by lotteries and games of chance; it would, in short, habituate men to acts of injustice and extortion.

In the case of Wharton, the court left it discretionary with the jury, to reduce the nominal amount by the scale of depreciation, or to find the value of the property and interest, on the day of sale, which was the date of the contract. The jury elected the latter, by which they must have given the same amount as would have been stipulated for, if the contract, in the first place, had been for specie. This was certainly equitable, and seems to be the rule which justice requires in the present case. It is also worthy of remark, that in that case, the counsel for the plaintiff put the case on the ground of a fair and lawful wager, depending on the appreciation or depreciation of the money on the day of payment. They contended, that as paper money had entirely sunk, and was out of circulation, on the day of payment, they had a right to receive the nominal amount in the currency of that day, which was specie. The court, however, did not view it in the light of a wagering contract, and directed that the recovery should be for the value of the money described, or of the property sold, at the time of the contract.

Before I dismiss the subject, it is proper to state, that owing to circumstances not within the control of the court, I have not had an opportunity of perusing the opinion in this case; the consequence of which may be, the omission of some points that ought to have been considered.

Judgment for the plaintiff, for two thousand dollars, with interest.

Note by the Reporter.—See the case of *Hunt v. Rousmanier's administrator*, 8 *Wheat* 174. In this case the Supreme Court of the United States decide, that where a party, through *mistake*

TAYLOR ET AL. *v.* GALLOWAY ET AL.

JUDGES PEASE AND BURNET.

1822.

A power given by will to executors to sell real estate, may be executed by one executor, if one only accept the office under the will.

A power to *sell* does not authorise a barter or exchange, but a sale for cash only.

This was a bill in chancery, prosecuted in the Common Pleas of Greene county, and carried into the Supreme Court by appeal, where it was decided, at May term, 1822, by judges PEASE and BURNET. The case, so far as it involved the points decided, is stated fully in the opinion of the court by judge Burnet, and need not be repeated.

Opinion of the court by Judge BURNET.

The decree that ought to be rendered in this case, may be determined by the solution of two questions.

1st. Was the acting executor, James Williams, authorised to sell the land, without the concurrence of William Edmonds, who was named in the will as a co-executor?

2d. If he was, has he made such a sale to the complainant, Taylor, as is authorised by the will?

The authority given by the will, is in the following words: "*All the rest of my estate I leave to be sold, as my executors, hereafter named, shall think best; and the moneys arising from such sale, I give unto my infant daughter, Susanna Eliza Green, to her and her heirs forever.*"

William Edmonds and James Williams were constituted executors. Williams obtained probat, and undertook the duties of executor alone. Edmonds, who did not join in the probat, was afterwards appointed guardian to the infant children.

The contract entered into by Williams, the acting executor, with the complainant, Taylor, authorised the latter to change the locations, to redeem such parts of the land as had been sold for taxes, and to do whatever might be necessary to secure the property and perfect the title; in consideration of which, Taylor was to have an equal moiety of the land.

The first question that arises, is, was Williams alone authorised to sell the land?

It is manifest that the will gives to the executors a naked power, not coupled with an interest. If land be devised to executors to be sold, or if it be devised to be sold by executors for the payment of debts, in either case the power is said to be coupled with an interest, and the survivor may execute the trust,

and *ignorance of law*, executes a writing which does not carry into effect the contract and the intention of the parties, parol evidence may be received to establish the fact, and the true contract and real intention of the parties enforced in equity: and this, where no fraud is alleged, nor no mistake in a matter of fact, but a mistake in point of law only—the legal effect and operation of the writing not being such as the parties intended.

because the act of God shall not prejudice; but if one of the executors refuse to act, (the devise being to them by name,) the other, it would seem, at common law, cannot sell, because it is a joint confidence and must be jointly exercised. This principle has been changed by 21 H. 8, which authorises a sale by those who consent to act. (*Swinb. Wills*, 406, 7, 8.)

If land be devised to be sold by executors, this is a naked authority, not coupled with an interest, and cannot be executed by a survivor. (*Swinb. on Wills*, 407.) If the devise be, that the land be sold by the executors, not naming them, although the power be not coupled with an interest, it seems that it shall survive; because the power being to the executors generally, those who execute the will are legally the executors, and therefore may execute all the powers given to the executors, as such. (*Co. Lit.* 112, 113. *Cro. Eliz.* 26.)

But if a devise be, that A and B, who are constituted executors, sell the land, although they may legally sell without taking on themselves the duty of executing the will, yet if one should die, the survivor cannot act, because the power must be pursued strictly, and it being given to two jointly, it is determined by the death of one of them. The case of *Bonefant*, (*Cro. Eliz.* 80.) contains a different principle, but that case does not seem to be supported by the authorities.

In the case before us, the devise is, that the executors may sell. Williams, therefore, having proved the will, and taken on himself, the office of executor, was thereby vested with all the power given to the executors as such, and consequently had a right to make the sale.

But the most important question is, whether the contract made with the complainant, Taylor, be such a sale as was contemplated or authorised by the will.

The manifest design of the testator, was to convert the whole of his estate into money, for the benefit of his infant daughter. The trustees are not authorised to exchange or incumber the land or to dispose of any part of it, to perfect a title to the residue. The power is to sell, and the sale must be for money.

It may be said, that the contract with Taylor was a sale, and that he is a purchaser for a valuable consideration. This is technically true, as it would have been if the executor had conveyed to him a moiety of the land as a reward for effecting the sale of the other moiety. But it is presumed, that such a sale would not be valid, as it would defeat the object of the testator.

The power must be strictly pursued: and must be executed according to the manifest intent of the testator.

If the trustee could incumber the estate, by granting an equitable claim to an undivided moiety, for the purpose of procuring a removal of the entries and a completion of the title to the residue, he might, on the same principle, exchange it for land in Virginia, and give a moiety of it to the agent who should negotiate the exchange.

The trust delegated by the will is personal, and cannot be transferred. As Williams voluntarily took on himself the office of trustee, it was his duty to execute the trust in person, and to do every thing that might enable him to do so. He certainly had no right to give away any part of the land, to procure a third

person to perform services that he was bound to perform himself. If such a discretion exists it is impossible to say how far it extends or by what rule it shall be limited. It would vest in the trustee the same power, and the same control over the property, that the testator had in his life. This difficulty can be obviated only by holding the executor to a strict execution of the power, which was in the present case, to sell the land for money, and at a fair price. As the contract on which the bill is founded, was not such a sale, we feel bound to say, that it was not authorised by the will, and that it vested no right in the complainant. The circumstance, that the guardian joined in the contract, cannot alter the case, as he certainly had no power to sell the real estate of his ward.

It being ascertained that the complainant acquired no title, either legal or equitable, to the land in question, by the contract, under which he claims, it is unnecessary to look into the title of the defendants.

Bill dismissed.

ANONYMOUS.

BEFORE ALL THE JUDGES.

A bill in equity to foreclose will be sustained notwithstanding the statuary remedy by *scirie facias*.

Upon such bill the mortgaged premises must be valued and the court will direct a sale, and not a foreclosure, if two thirds of the valuation amounts to more than the debt, and such sale will be directed on the same principles as upon executions at law.

A writ of error was allowed by Judge M'Lean to remove the record of a final decree, rendered by the court of Common Pleas in Huron county, on a bill to forclose an equity of redemption. The principal errors assigned were: 1st. That such a bill could not be sustained, because there was an adequate remedy at law, under the act providing for the recovery of money secured by mortgage.—2d. That the court below had directed the mortgaged premises to be sold without valuation.

The cause having been argued by the counsel, in Huron county, was taken under advisement, and submitted to the court in Trumbull, county, at the term in 1821, all the judges being present.

After mature consideration, the following points were unanimously decided: 1st. That the court may sustain bills of this description, notwithstanding the statute allowing proceedings by scirie facias. 2d. That in every such case the laws of the state require that the mortgaged premises be appraised, and that they be not sold at less than two-thirds of the appraised value.

For the regulation of the practice in similar cases, the court established the following rule,—that no final decree be entered on a bill to foreclose an equity of redemption or to effect a sale of mortgaged premises, until the court shall have caused an appraisment to be made agreeably to the provision of the act rugulating judgments and executions; and that if, on the return, of the appraisement it shall appear that the premises, at two-thirds of the valuation, do not exceed the sum due on the mortgage, the court may decree a foreclosure; but if the mortgaged premises, estimated at two-thirds of the appraisement, shall exceed the

amount due on the mortgage, and a decree be rendered for the complainant, a sale shall be directed on the principles of the act regulating judgments and executions.

SMITH v. PARSONS.

JUDGES PEASE, HITCHCOCK, AND BURNET.

1822.

The insolvent laws of a sister state discharging debtors from the debt, upon surrendering up all their property, are valid as to contracts made between citizens of the same state and within its jurisdiction after the law was enacted and while in force.

This cause was decided by Judge Pease, Hitchcock, and Burnet, in Ross county, Nov. 1822. The whole case is fully stated in the opinion of the court, by Judge Burnet.

Opinion of the Court by Judge BURNET.

This cause is presented for the opinion of the court on the following agreed case.

"The suit is brought on promissory notes, executed by defendant when a resident and citizen of the state of Maryland. The defendant pleads his discharge under the bankrupt law of that state. At the time the notes were executed, both plaintiff and defendant were citizens of Maryland. The bankrupt laws were enacted prior to the execution of the notes. The defendant is a regular certificated bankrupt, or insolvent, under the laws of Maryland, which are a full discharge of all debts returned. This debt was returned. All defendant's property was duly assigned to trustees in Maryland."

Before an attempt is made to investigate the principles presented by this case, it is necessary to state, that this court recognizes the constitutional right of the Supreme Court of the United States, to expound the Constitution, and to settle its import, wherever a doubt arises; and that it is our duty, implicitly to receive their construction as a rule of decision, in all cases in which it applies. That tribunal having decided, that a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution; and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law; our enquiry may be limited to the single question—Whether the law of Maryland did or did not, in the sense of the constitution, impair the obligation of the contract on which the present suit is founded.

This case is clearly distinguishable from that of *Sturges v. Crowninshield*, and cannot be considered as determined by it. In that case, the notes were given prior to the passage of the law. In this case, the law was in force at the time the notes were executed. By that case it was decided, that a legislative act cannot affect a contract made before its execution, so as to discharge a party from its obligation, which would have been the consequence had the plea been sustained. In this case it is to be decided whether a law in force at the time of

the execution of a contract, can operate on that contract, so as to relieve a party from the performance of its stipulations. The case of *McMillan v. McNeil*, is confidently relied on as settling this question; but that case appears to be as clearly distinguishable from this, as the case of *Sturges v. Crowninshield*, as will appear by a comparison of facts. In that case the parties were both residents of the State of South Carolina, where the cause of action arose. There was no bankrupt law in force in that state. The defendant, Mr. McMillan, removed to Louisiana, where he obtained the benefit of the *cessio bonorum*.—He had also obtained a certificate under the bankrupt law of England; and, being sued in the District Court for the District of Louisiana, pleaded those certificates in bar of the action. The contract was made under the laws of one state; the discharge was obtained under the laws of a different state. The law of South Carolina governed the contract—the laws of Great Britain and of Louisiana were relied on to discharge it. In the present case, the parties were residents of Maryland; the contract was made, and the certificate was obtained, under a law of that state, in force before and at the date of the contract. From this comparison, it appears that the cases are distinguishable in several important facts. Yet if it were clearly discernable, that the Supreme Court intended to to embrace within the scope of their opinion, a case situate precisely like the present, this court would receive it as their guide; they would not feel themselves at liberty to investigate its correctness, or to question its authority, but would at once render judgment in favor of the plaintiff. But such does not appear, from the opinion delivered by the Chief Justice, to have been their intention. He decides "that the case was not distinguishable in principle from the preceding case of *Sturges v. Crowninshield;* that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle." The reason is not stated, but we can be at no loss to discover it. A law of Louisiana, or a statute of Great Britain, could have no influence on a contract made in Charleston, under the laws of South Carolina. The parties cannot be presumed to have had a knowledge of their existence; much less to have agreed, that they should form a rule for the construction and government of their contract. They could not, therefore, under any circumstances, affect it, or the rights of the parties under it: and consequently, it made no difference whether they were passed before or after the contract, for in neither case would they influence it. Well then might it be said, that the circumstance of the law having been passed before the debt was contracted, made no difference. This is understood as applying strictly to the case then before the court; and being so applied, who can question its correctness? If the law, under no circumstances could bear on the contract, the fact of its prior existence could give it no other or greater force than would be ascribed to it, had it been enacted after the date of the contracts; and consequently, the distinguishing fact relied on in this case, could not in that case make a difference in the application of the principle.

From this view of the subject, the question presented in the case before us seems to be open, and the court at liberty to examine and decide what effect the bankrupt law of Maryland has on the notes on which the present suit is brought.

As was observed in the argument, contracts are either expressed or implied, or part expressed and part implied. A provision created by law for the government or construction of all contracts made under it, need not be recited or expressly referred to in a contract; it will be considered as implied, and have the same force and effect as if it were set out. Should a contract contain a clause, declaring it null and void on the happening of a particular event, as the insolvency of either party, would such a clause be void, or would it be considered as impairing the obligation of the contract? If not, would the same provision in a law, made applicable to all subsequent contracts, so as to form a part of them, be considered as impairing their obligation? It is believed not.—Many cases might be cited in which the law forms a material part of the contract, although neither recited nor referred to; as when one person engages to labor for another, without a promise or stipulation of payment. If payment be refused and suit be brought, courts do not hesitate to say that by the law in force when the engagement was made, the laborer was entitled to the value of his labor—that the contract must be construed by the law—that the law must be taken as forming a part of the contract—and therefore that the plaintiff shall recover. In such a case, the obligation to pay is entirely created by the law, and the recovery is had on the ground that the law forms a part of the contract; for on no other principle would the defendant be held liable.

Although a state legislature cannot pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect, and the mode of their discharge, and every contract is supposed to be made with reference to those laws. Thus if a contract be made for the payment of money, without designating the time of payment; the law says it shall be payable on demand. If it fixes the day of payment, but is silent on the subject of interest, interest shall attach from the day the money becomes due. In these, and in many other cases, the obligation is created by law. In other instances it is discharged by law; as, if a contract be, in whole or in part, contrary to a statute, it is void *in toto*. If the condition of a bond becomes impossible, by the act of God, by the act of the party, or by operation of law, the bond is void. If a contract be founded in usury, or given for a gambling consideration, or for a consideration *malum in se*, or if it be contrary to good policy, it is void. In all these cases, the intention of the parties is controlled and restrained by the law; yet it is not considered that the contracts are unconstitutionally impaired. On the same principles, may not the bankrupt law of Maryland be considered as controlling the obligation of the contract on which the present suit is founded?

It is admitted that the states have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money. Should such a law enact that a lender may receive from a borrower six per cent. interest and no more, and should an after contract contain an express promise to pay ten per cent., such a contract although voluntarily made for the payment of a specific sum, would be void in part, and, in many of the states, the obligation of the contract would be entirely destroyed, and the obligor released from the payment of both principal and interest. Independent of statute law, every person has the same right to contract for ten per cent. interest, that he has for the payment of the principal sum; and if the law limiting interest at six per cent., can absolve him

from the payment of the excess, and even of the principal itself, is not the obligation of the contract as clearly affected, as it is in the case before us? It is admitted that such a law, applied to contracts made prior to its enactment, would be unconstitutional; but not so when applied to subsequent contracts.— Why, it may be asked, does this distinction exist? and why is not this class of laws considered void on constitutional grounds? They evidently affect contracts voluntarily made on subjects about which the parties had a right to contract. One reason only can be assigned. The legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it. If an obligor be entirely discharged from a contract, by the operation of a statute against usury, and the constitution be not violated, it would be difficult to assign a reason why that instrument should be violated by a bankrupt law acting prospectively and pointing out a state of things, on the happening of which a contract shall cease to have effect, or shall be considered as discharged. If, however, an attempt should be made to give these laws a retrospective effect, the constitutional objection would arise in all its force; for although the legislature may regulate contracts to be made in future, it cannot disturb those previously made, or unsettle rights previously vested; and this is the distinction that ought to determine the character of the law of Maryland. On any other view of the question, the power of the states to legislate on the subject of contracts, will be materially impaired; for if it be admitted that a bankrupt law, operating on an after made contract in the manner prescribed and as was understood by the parties, be unconstitutional, or if contracts be not made with reference to existing laws, so as to imply an assent to their provisions, it must follow that statutes of limitation, statutes against usury, gambling, sale of offices, frauds and perjuries, and the like, must be void, because they impair the obligation of contracts not prohibited by the constitution, and which would have been legally binding had not those statutes been made.

It cannot be said that bankrupt laws go further than the statute just mentioned. They require all contracts to contain, by implication at least, a condition that they shall be discharged on the happening of a particular contingency, which would not have affected the contract had there been no statute on the subject. The Supreme Court of the United States decided, that the states may legislate on the subject of contracts. They originally possessed that power, and have conferred it on the general government only in part. They, therefore, possess a concurrent power, and may exercise it as freely as the general government. They may pass a bankrupt law, with this qualification, that so far as it conflicts with an act of Congress to establish a uniform system of bankruptcy, it must yield. But the general government having no law on the subject, there appears to be no restraint on the states. By a power derived from the people, Congress may establish an uniform system of bankruptcy throughout the United States. The states, by a power also derived from the

people, may pass bankrupt laws, (qualified as above,) operating within their respective territories. These powers being received from the same source, and differing only in the extent and limits of their operation, would be considered, at first view, as conferring on each, equal rights; and it is the opinion of some intelligent jurists, that when Congress have no law on the subject, the states may legislate to the same extent that Congress have a right to do. But as we only claim for the states the power of discharging, by the operation of their bankrupt laws, contracts entered into subsequently to their passage, and within the state in which the law has effect, and admit that if those laws were applied to pre-existing contracts, or to contracts made in a different state, they would impair their obligation. It is not within our province to examine that opinion.

It is asked if a law releasing a contracting party from the performance of his stipulation, be not a law impairing the obligation of contracts, what is the definition of such a law? It may be answered, when a law by which the parties to a contract are not bound, or which cannot be considered as forming a part of the contract, or as creating a rule for its construction is applied in its discharge, it may be said to impair its obligation in the sense of the constitution.

It was contended by counsel, that, although the contract between these parties was made with a knowledge of the law of Maryland, it was also made with a knowledge that the law was unconstitutional, and that the contract could not be affected by it. This is drawing a conclusion from premises that take for granted, the point in controversy. It is arguing from the contract to the law, and determining the validity of the latter by the apparent intention of the former. When the law in question was enacted, it interfered with no contract, every contract then in existence being placed beyond its operation. As to them, therefore, it was unobjectionable. It had no operation on them prohibited by the constitution. Consequently, persons then about to contract could not know the law as one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts, and pointing out a mode by which they might be discharged. If the law, at its inception, had no improper bearing on contracts, and was free from constitutional objections, the parties to an after contract could not change its nature, and convert it into an unconstitutional act. This would be enabling them to give a new character to an existing statute, and virtually to contract away the power of the legislature. Contracts cannot change the character of laws; they are subordinate to them. Instead of determining the validity of this statute by reference to the alledged intention of the parties to the notes in question, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the notes, by a reference to the statute. The statute must be tested by the constitution applied to it at the moment it took effect, and with reference to the operation it then might have on rights vested by existing contracts, and if it be found then free from constitutional objection, parties about to contract cannot know it to be unconstitutional.

In the case of Melon *v.* Fitzjames, (1 *Bos. Bul.* 142) in which it was determined that a contract made in France should be construed by the laws of that country, and that the defendant was not bound by the mere words of the contract, but might shew how it would be considered in France. Judstice

Rooke says, "*if the law of France has said that a person shall not be liable on such a contract, it is the same as if the law of France had been inserted in the contract.*" The plain import of this language is, that contracts must be expounded according to the laws in force at the time they were made; and that the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed a part of the contract.

On the whole, from the view now taken of the subject, we are led to conclude, that the case before us differs materially from the cases of Sturges *v.* Crowninshield, and McMillen *v.* McNeil, and that it cannot be considered as settled by their authority—that this court, therefore, must decide according to their own construction of the constitution. That the statute of Maryland, being confined in its operation to after contracts made within that state, does not interfere with the constitution, and that the defendant was, by the operation of that statute, discharged from the payment of the notes on which the present suit is founded.

LESSEE OF LINDSLEY *v.* COATS.

IN BANK, 1823.

A conveyance of real estate by *exchange* is invalid.
The ancient common law conveyances, as such, have never been adopted in this state.
Before the statute of frauds, title to real estate could not be acquired by parol.

This was an action of ejectment, tried before the Supreme Court, in Athens county, 1823, upon an appeal by the defendant from a verdict and judgment rendered against him in the Common Pleas.

The facts of the case were these. The defendant, and one Timothy Wilkins, under whom the lessor of the plaintiff derived title, were owners of leases for ninety-nine years renewable forever, of part of the college lands, in Athens county. In the year 1807, the defendant, Coats, and Timothy Wilkins, agreed by parol to exchange the lands they owned, and each gave up to the other possession according to the agreement. Coats had remained in possession of the premises thus obtained by exchange, which are the same for which the suit is brought, ever since. It was part of the contract, that deeds should be executed between them, but it was never done.—Upon the trial, in the Supreme Court sitting in Athens county, the plaintiff relied upon the legal title. The defendant gave evidence of the contract of exchange, and the possession acquired under it. The court, judges Pease and Sherman, charged the jury that the agreement by parol, and the possession acquired under it, could not be set up at law to defeat the legal title of the plaintiff. A verdict was found for the plaintiff. The defendant moved for a new trial, upon the ground of Jurisdiction, and this motion was reserved for decision by all the judges.

Ewing in support of the motion.

By the COURT.

The lessor of the plaintiff produced a regular title to the lands in controversy, from the University at Athens, under whom the same was held.

The defendant gave evidence, that in the year 1807, (anterior to the enactment of the statute of frauds,) an agreement by parol, was entered into by him

and one Timothy Wilkins, the then owner of the lands in dispute; and through whom the plaintiff deduces title to exchange the same for lands of the defendant, also held under the University, situate in the same county; and that each party to the contract went into possession of the lands so obtained by exchange. The court instructed the jury, that the parol exchange accompanied with possession did not vest in the defendant the legal estate in the land. A new trial is sought for, on the ground that this direction was incorrect. It is contended by the defendant, that at common law, a parol exchange of lands situate in the same county, accompanied with possession, transfers the legal estate without livery of seizin; and that at the time when this exchange was made, there was no statute law of the state requiring contract of or concerning lands to be in writing.

By the common law, a parol exchange of lands situate in the same county, was good, provided each party went into possession of the lands acquired by such exchange; but if the lands were situate in different counties, or either party died before going into possession, such parol exchange was void. (*Shep. Touch.* 294. *Lit. Sec.* 51, 52, and 62.) Nor was livery of seizin necessary to perfect such exchange; for each had already corporal possession of his land.

This was one of the ancient common law modes of transferring real estate, adopted at a time when writing was practised or understood, but by few individuals.

It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as those principles are adapted to our circumstances, state of society, and form of government. In no instance have the ancient common law modes of conveyance, as such, been adopted in this state; and long anterior to the settlement of this country, they had given way to the comparatively modern mode of assurance by deeds of lease and release, bargain and sale, &c.—There is nothing in our circumstances or state of society, that would seem to require the adoption of a principle so pregnant with mischief as that the title to real estate might rest in and be evidenced by parol only.

The policy of all our laws respecting lands, is opposed to such a principle. Without attempting to enumerate the different acts of the legislature applicable to this subject, it may be said, that from the first organization of the government to the present time, it has been the policy of our laws that the title to real estate should be matter of record, subject to the inspection of every individual interested. The uniform custom of giving and receiving deeds upon all sales and transfers of real estate, has been in accordance with this policy; and this is believed to be the first instance in which an attempt has been made to sustain a legal title to lands resting only in a parol contract.

The policy of law, the custom of our country, the danger of perjury, and the many inconveniences that must necessarily result from the establishment of the principle contended for by the defendant, would, in the absence of all legislative provision upon the subject, require us to declare, that the exchange claimed by the defendant, did not transfer to him the legal title to the land in controversy; and that no contract evidenced only by parol, though accompanied with possession or livery of seizin, would vest in the purchaser, a legal estate in, or legal title to lands.

The court, however, do not deem it necessary to determine this cause upon the principles of the common law, as applicable to our circumstances and state of society; as we are of opinion, that at the time when the exchange relied on in this case took place, there were statutory provisions in force, regulating the conveyance of real estate.

The ordinance for the government of the territory of the United States, north west of the river Ohio, passed July 13, 1787, after providing that the governor and judges shall adopt such laws of the original states as they may deem best suited to the circumstances of the district, subject to the approval of Congress, provides, "that until the governor and judges shall adopt laws, real estates may be conveyed by lease and release or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may lie, and attested by two witnesses."

The ordinance provides for the conveyance of real estates, and points out the manner in which such conveyances may be made by deed duly executed, thereby clearly excluding all parol conveyances of land, under whatever circumstances they may be made, or with whatever solemnities attended—*expressio unius est exclusio alterius.* It evidently was not the intention of Congress merely to legalize those modes of conveyance which are mentioned in the ordinance, leaving it at the option of owners of real estate within the territory, upon the sale of their lands, to convey the same either by the ancient common law mode of feoffment, with livery of seizin, or by deed duly executed; but to provide that every conventional transfer of real estate by vendor to vendee, should be evidenced only by deed. And this opinion is strengthened by the provision of the ordinance that "personal property may be transferred by delivery," and by the clause saving to the French and Canadian inhabitants in certain parts of the territory, "their laws and customs now in force among them, relative to the descent and conveyance of property."

The governor and judges, in 1795, executed the powers vested in them by the ordinance, and adopted a law directing the manner of executing, proving and acknowledging deeds, as well as providing for recording them. In 1802 the territorial legislature made further provisions upon this subject, and gave effect to deeds for lands in the territory where such deeds were made out of the state, but executed and proved or acknowledged in the manner prescribed by the laws of the state where made, and recorded in the county where the land lies.

The provisions of these laws are substantially enacted in the act of 1805, which provides for the whole subject of executing, acknowledging, proving and recording deeds, and directs, among other things, that the deed shall be recorded in the county where the land lies.

None of these acts provide, in express terms, that land shall only be conveyed by deed; but they are all evidently framed on the hypothesis that real estate cannot be transferred by parol. The latter act contains many provisions which can be neither literally nor substantially complied with, if a parol conveyance be effectual in law to vest a legal estate. Such (for example) is the provision that conveyances, whereby any lands, tenements or hereditaments shall be affected in law or in any manner incumbered, shall be recorded. It is claimed that the exchange proved in this case, accompanied as it was with possession,

amounts to a conveyance of the estate in the lands exchanged; and if it can have any legal effect, it must be as a conveyance of the estate, and, as such, must, by the positive enactment of the statute, be recorded. Yet it is, in its very nature, incapable of being recorded.

The care of the legislature, in providing in each county an officer for the recording of deeds of real estate, in providing for the formal execution of such deeds, and in requiring them to be acknowledged before some judicial officer, is idle and vain, if a mere parol convevance, necessarily unaccompanied with these formalities, will vest in the purchaser a valid legal estate.

Admitting, then, as contended for by the defendant, that that part of the ordinance which points out the mode of conveying real estate, had ceased to be effectual by the act of the governor and judges of 1795, made *in pari materia*, being a substantial compliance with the provision which limits its duration to the time of the governor and judges' adopting of laws,—yet its provisions are substantially re-enacted in the act of 1805, which was in force when this exchange of lands was made. The ordinance was the first of a series of legislative acts respecting the transfer of real estate, and its provisions, with little variation, have been incorporated into all subsequent statutes. We are satisfied that, upon a fair construction of the legislative acts in force at the time the parol exchange, relied upon by the defendant, was made, no conveyance would pass a valid legal title to real estate, except such conveyance were by deed. If the defendant acquired any interest in the land in dispute, by the exchange with Wilkins, it is an equitable and not a legal interest, and his right must be asserted in a different manner and before another tribunal. It cannot avail him as a defence in the action of ejectment, when the legal title to the land in controversy is in the lessor of the plaintiff.

The motion for a new trial must be overruled.

WILBER v. PAINE.

JUDGES HITCHCOCK AND BURNET.

1824.

A party in possession of land under a parol contract may maintain trespass against the owner.

Possession given under a parol contract for leasing lands, and performance by the lessee takes the case out of the statute of frauds.

The facts were these. The defendant in error made a parol contract with one E. Shearer, that he (Shearer) should clear and fence a certain lot of ground, in consideration of which, he should be permitted to raise on the premises, a crop of corn. Shearer, in pursuance of the contract, took possession of the lot, cleared and fenced it, and raised his crop; but before it was gathered, he sold it to the plaintiff, Wilber, for a valuable consideration, and authorised him to gather and remove it. Notice of this sale was given to Paine, who afterwards went on the premises, gathered the corn, removed it, and converted it to his own use, for which this act of trespass was brought.

The declaration contains two counts. The first is laid with a *quare clausum*

fregit. The second with an *exportavit* only. Plea not Guilty—The court of Common Pleas (the President dissenting) decided, that the case was within the statute of frauds and perjuries, and gave judgment against the plaintiff below, to reverse which this writ of error was brought.

Douglass, for the plaintiff in error. *Brush*, for the defendant.

By the COURT.

The objection to the form of the action cannot be maintained. The nature and object of the contract required, that Shearer should be put into possession of the lot, which appears clearly to have been the fact. The sale by Shearer to Wilber, transferred all his right in the crop, and if the contract had contained no stipulation in relation to the possession, it would nevertheless have transferred that right, as far as was necessary to protect, gather, and remove the crop; which could not have been done without an entry on the premises. The sale of a growing crop, without the right of entering on the premises, upon which it is growing, would be of no avail. The contract would be a perfect nullity. As Shearer's right of possession, by the terms of his contract with Paine, was to terminate when the crop was removed, and as the crop, with the right of removing it, was sold to Wilber, there can be no doubt as to the real intention of the parties. The possession passed with the crop. Shearer had no right or interest remaining, and Paine, by entering and removing the corn, was a trespasser. As between the parties to this suit, there was no contract. Wilber was not privy to the agreement with Paine. He entered by virtue of a right derived from Shearer, and his proper remedy was trespass. We do not consider it necessary however to maintain this action, that the plaintiff should have the full and exclusive possession of the premises. A possessory right under an agreement is sufficient. The grantee *vesturæ terræ* or *herbagii terræ*, may maintain trespass quare clausum fregit though he have not the soil, *Co. Lit.* 4 *b.* an exclusive right of digging turf, is a sufficient interest in the soil, to maintain trespass. 3 *Burr.* 1824. So he who has the exclusive right to the herbage or pasture of a close, may maintain trespass against the owner, or a stranger. *Moore* 355; 5 *Term Rep.* 329. So the person entitled to the exclusive enjoyment of a crop growing on land, may maintain trespass against the owner of the land, although the agreement only authorises the cutting and carrying of it away. 6 *East* 602. But in this case Shearer had the entire and exclusive possession of the lot, delivered to him under his contract with Paine, and Wilber, by his agreement with Shearer, succeeded to that possession. Paine, therefore, had no right to enter, till the expiration of the term, which was to continue till the crop was gathered and removed.

But the defendant principally relies on the fifth section of the act for the prevention of frauds and perjuries, which is in these words: "that no action shall be brought, whereby to charge the defendant on any contract, for the sale of lands, tenements, or hereditaments, or any interest in, or concerning of them unless the agreement, upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person, thereunto, by him or her lawfully authorised." As the contract which gave rise to this action, and on which the plaintiff claims

the right to sustain it, is for an interest in land, it comes within the operation of the statute; and if either party had wholly refused to execute it, neither could have sustained a bill for a specific performance; but this court has repeatedly decided that part performance may take a case out of the statute, and although the policy of such exceptions has been questioned, we are induced to believe, that, if they be admitted with caution, they have a salutary tendency; and that they are sometimes necessary to prevent the statute from confirming and legalizing the frauds it was intended to suppress. No case has been decided in this court, from which any general rule can be inferred, as to the description of part performance, that will take an agreement out of the statute. It has been settled in England, that payment of money alone will not do it, because by the repayment of principal and interest, the parties may be placed in *statu quo;* and because their statute has said, in relation to goods, that payment of money shall prevent its operation. This provision, existing in the statute, and being confined to one class of cases, they infer the intention of parliament that it should not extend to any other. In the construction of our statute, this distinction cannot arise, because it does not exist. The statute does not contain any provision by which payment of money, in any case, shall prevent its operation. It is not necessary, however, to express an opinion on this point, as it is not presented by the case before us. The circumstance relied on by the plaintiff in error, is, that he was put in possession of the lot, and that he has performed the contract fully on his part. In the case of *Clinan v. Cooke,* Lord Reddesdale lays it down as a rule, that nothing should be considered as a part performance, that does not put the party in such a situation as that it would be a fraud on him not to perform the agreement, and cites a case similar to the one before us, to illustrate his meaning, and show the propriety of the rule. In *Foxcraft v. Leister,* (2 *Vern.* 436,) it was said, that the party who had been let into possession, ought not to be liable as a wrong doer, because he entered in pursuance of an agreement—that for the purpose of defending himself against a charge that might be brought against him, parol evidence was admissible, and if admissible for one purpose, there was no reason why it should not be admissible throughout.

In the Earl of Aylesford's case, 2 *Stra.* 673, there was a parol agreement for a lease of twenty-one years. The lessee had entered and enjoyed for a part of the term; and then the Earl brought a bill to oblige him to execute a lease for the residue of the term. The lessee pleaded the statute, which was overruled, because the agreement had in part been carried into execution.

The cases cited from 1 *L. Ray.* 11 *East.* 1 *Bos. and Pul. and* 3 *Day,* might be in point in a case between Wilber and Shearer, but as between these parties, we do not see their application.

It has frequently been held, on the circuit, that the delivery of possession, on a parol agreement, was sufficient to take it out of the statute, and we see no reason to reverse the rule, or to reject the principle on which it is founded.—When the existence of a contract, is evidenced by a change of possession, which must result from the joint act of the parties, the mischief intended to be remedied by the Statute, is scarcely to be apprehended. The fact, as far as it goes, is as satisfactory evidence of the existence of a contract, as a memorandum in writing could be, and it may be added, that under such circumstances, to enforce

the statute, and leave the party who has been put into possession, by virtue of an agreement, to be treated as a wrong doer, would not only be repugnant to justice, but would make the statute a shield and protection for injustice.

In giving a construction to any statute, the court must consider its policy, and give it such an interpretation, as may appear best calculated to advance its object by effectuating the design of the legislature. The great object of the statute in question, is clearly expressed in the title prefixed to it. It is for the prevention of frauds and perjuries. It is not therefore to be presumed that it was intended, in any instance, to encourage fraud, and we may infer, that any construction which would have a certain tendency to do so, would counteract the design of the legislature, by advancing the mischief intended to be prevented. Most of the decisions restricting the statute, 29 *Charles* 2*d*, and taking cases out of its operation that might be brought within it, by a literal construction of its terms, have been made on the same principle, as for example: although the statute requires that all contracts for the sale of lands, should be in writing, yet defendants in equity have been, and are permitted to introduce parol evidence, varying or discharging such contracts, or for the purpose of avoiding them for fraud, accident, or mistake, notwithstanding they are for the sale of land.

The reason commonly assigned, in support of these cases is, that the statute is intended for the benefit of the party to be charged, yet it is easy to perceive that the decisions may be ascribed to the license of construction before referred to, and that they depend on the same principle, that the contract, as it appears in writing, cannot be enforced, without a fraud on the defendant. In the case before us, we cannot forbear to enforce the contract, without sanctioning a fraud on the plaintiff. It is also the constant practice, to permit a complainant to vary his written contract, by parol, if he can make out a clear case of fraud, such an one as in the language of Lord Thurlow, "comes among the string of cases where it is considered a fraud upon the rule of law."

Such cases as these, and such as are founded on the fact of part performance, shew it to be the impression of Courts in Great Britain, and in this country, that for the due administration of justice, it is necessary, by the use of a sound legal discretion, so to interpret statutes, as to advance the remedy and suppress the mischief.

On this principle, we have decided, that a parol lease of a farm, for one year, after the lessee had been put into possession, was valid, and that the tenant might defend his possession, against his landlord, as well as against a stranger. In the case now before us Shearer was not only put into possession, but was permitted quietly to occupy till he made all the improvements that were agreed upon as a substitute for the rent, and until he had raised his crop and sold it to the plaintiff for a valuable consideration, then the defendant entered, and removed the crop, on the ground that his contract was void, and to protect himself in this act of fraud, he sets up the statute against fraud. We have no hesitation in saying that the defence attempted is against conscience, and that the facts in this case, take it out of the statute.

The judgment of the Court below, therefore, must be reversed.

MANLEY v. HUNT, ET AL.

JUDGES PEASE AND BURNET.

1824.

Trust estates are not liable to judgments rendered against the trustee. Thus land which has been *bona fide* sold, but not conveyed, is not liable to a subsequent judgment against the vendor.

A sale upon execution may be stayed by Injunction. A defendant is not permitted to answer without affidavit of merits, after a demurrer has been overruled.

The facts alledged in the bill were these. That one John Lay, being owner and proprietor, and vested with the legal title to a certain tract of land, in the county of Ashtabula, contracted to sell it to one Harman. That in July 1818, Harman, not having received a legal title, sold all his right and interest in the land, bona fide, and for a valuable consideration, to the complainant, Manley. That in November following, the defendants recovered a judgment at law, against Harman. That Lay, after the recovering of this judgment, conveyed the land in question, to Harman, who conveyed the same in April, 1820, to Manley, the complainant, according to his contract. That in June, 1823, the defendant sued out execution on their judgment against Harman, and caused it to be levied on the same tract of land, and that they were proceeding to sell it.

The prayer of the bill is, to be relieved from the execution and to be quieted in the possession and title.

The defendants demurred on the ground, that the matter stated in the bill did not entitle the complainant to the relief prayed for.

The question discussed at the bar and submitted to the court was, whether the judgment against Harman was a lien on the land, and authorized the defendants to proceed and sell it in satisfaction of their debt, as the legal title had been vested in Harman, after the rendition of the judgment.

By the COURT.

We are decidedly of opinion that the land in question is not affected by the lien of the judgment, although the legal title was vested in Harman subsequent to the judgment. After Lay had sold this land to Harman, he held the title in trust for him, and the land ceased to be liable for the debts of Lay. After the sale to Manley the trust inured to his benefit, and Lay became his trustee, so that the land was not liable to the debts either of Lay, or Harman. There was no necessity of passing the title through Harman, the deed might have been made direct to the complainant but as it is, his equitable rights are not affected by the course pursued, for the moment the title vested in Harman, he was seized in trust for Manley, and had he conveyed the title to a third person, for a valuable consideration, with notice, the lands would have continued chargeable with the trust, and equity would have decreed the title to the complainant.

It would be productive of much mischief and injustice, to make trust estates liable to judgments against the trustee. Such a principle never has been, and we trust never will be recognized in this state. From the moment Harman

contracted, in good faith, to sell the land to Manley, for an adequate consideration, he became a trustee for Manley, and the land ceased to be liable for his debts on after acquired judgments. It then became liable in equity to the debts of Manley, and the purchase money, if any part of it remained unpaid, might be reached in the same way, by the creditors of Harman.

The Demurrer must be overruled.

The defendants then moved for leave to answer, but not having produced an affidavit of merits and that the demurrer was not filed for delay, as the statute requires, the court were on the point of overruling the application, when by consent of the complainant, defendants were permitted to file their answers.

SPENCER, Treasurer, *v.* BROCKWAY.

JUDGES PEASE AND BURNET.

1824.

A sister state may sue in the courts of Ohio.

Judgments regularly obtained in other states, against defendants who have been served with process, or have otherwise appeared and had an opportunity of making a defence, are to be received as conclusive evidence, and no re-examination of the grounds on which they are rendered can be permitted; but when the defendant has not been served with process, or had an opportunity of making his defence, it seems the record is considered only *prima facie* evidence, and may be impeached.—If an action on the case be brought on a judgment from a sister state, a liability and breach must be averred.

The plaintiff describes himself, as treasurer of the state of Connecticut, and successor in office, to Andrew Kingsbury, late treasurer of that state. The declaration contains two counts. The first states, that a suit was commenced in the Supreme Court of the state of Connecticut, wherein Andrew Kingsbury, treasurer of the state of Connecticut, was plaintiff, and Elias Brockway was defendant, on a bond of recognizance, made by the said Elias to the said Andrew, as treasurer aforesaid, and that such proceedings were had that the said court rendered judgment in favor of the said Andrew, against the said Elias, for the sum of one hundred dollars debt (or damage) and cost taxed at $21,90.

The second count states, that there was another suit at the court aforesaid depending in favor of Andrew Kingsbury, treasurer of said state of Connecticut. That such proceedings were had, that the said Elias being three times solemnly called, came not, but made default, and that judgment was thereupon rendered, that the said Andrew recover of the said Elias the sum of one hundred dollars (debt or damage) and cost, taxed at 21,90, which judgment remained in full force, &c. by reason whereof, the said Elias became liable to pay the said Andrew, treasurer, &c. and being liable in consideration thereof undertook, &c. that the said Elias did not pay, &c. to the defendants, damage $350.

The defendant demurred to each count of the declaration separately, and the plaintiff joined in demurrer.

The defendant craved oyer, and set out the records of both judgments, from which it appeared, that they were recovered on two forfeited recognizances, taken in consequence of an alleged violation of the penal laws of that state, and that the defendant was in court, by his counsel, when his default was entered,

and that on his application, the court exercised their chancery power by reducing the sum from $200 to $100 on each recognizance.

Webb, in support of the demurrer.

By the COURT.

We do not discover any reason why the state of Connecticut should be prohibited from prosecuting her just claims, in the courts of this state. There is not any thing in the constitution, or laws of Ohio, that requires such a prohibition, nor do we believe that it is necessary, or that it would be expedient; but if the position could be supported, it would not apply in this case, because the suit is brought in the name of an individual, and not in the name of the state, and it cannot be a matter of any importance, for whose use the money is recovered.

The second objection is equally groundless. There is nothing in the declaration from which it can be inferred, that the object of this suit is to enforce the penal laws of the state of Connecticut. If the defendant had a right to crave oyer, and if it were proper to look into the transcripts, it would be found that those laws, as far as this demand is connected with them, have been enforced, in the courts of that state.

The suit is for the recovery of a sum of money. It is founded on judgments obtained in the Supreme Court of the state of Connecticut, and not on the penal laws of that state. The objection, therefore, cannot be sustained.

The third ground of demurrer, leads to the enquiry, how far judgments recovered in sister states, are to be regarded in this state. This court has often decided, that judgments regularly obtained in other states, against defendants who have been served with process, or have otherwise appeared, and had an opportunity of making a defence, are to be received as conclusive evidence, and that no re-examination of the grounds on which they were rendered can be permitted. We believe this to be the true construction of that section in the constitution of the United States, which requires that "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state," and of the act of Congress, in pursuance thereof, which requires that they shall have such faith and credit given to them, in every court within the United States, as they have by law or usage, in the courts of the states, from whence the said records are, or shall be taken." The faith and credit here spoken of, requires us to admit, not only that there is a record, and that it is what it purports to be, but also that it is just; that the money awarded to the plaintiff, is legally due, and that he has a right to recover it, without a re-investigation of his claim. Such is the effect of the faith and credit, given to it in the state, from whence it came, and such must be its effect here, or like causes do not produce like effects.

Had a suit been commenced on this record in the state of Connecticut, the defendant could not have questioned its correctness, in consequence of the faith and credit given to it in the courts of that state, and the same degree of faith and credit must produce the same results here. We are aware that a different opinion has been given, in some of the states. In Massachusetts and New York, it has been decided, that judgments obtained in other states, are only

prima facie evidence, and that the defendant, in a suit brought on such a judgment may impeach the justice of it. But it appears to us, that the provision in the constitution extends farther, and embraces the effect, as well as the admissibility of the record. Such a provision would seem to be of but little use, if it merely required the record to be acknowledged, and received in evidence, and left its operation as it stood at common law.

In cases where both parties have been before the court, and have had an opportunity of being heard, it does not require the exercise of an unreasonable degree of confidence, to conclude, that justice has been done; but where the defendant has not been served with process, or had an opportunity of making his defence, the conclusion may be different. In such cases we have considered the record as prima facie evidence, and permitted the defendant to impeach its justice, because it shews on its face, that the merits, on his side, have not been heard, and because it would not only be deciding without evidence, but presuming against probability, to take the judgment under such circumstances, as conclusive evidence, that the merits have been fully heard on both sides. In the state of New York, it has been decided that an action cannot be maintained in that state against a person not a resident, who has not been served with process, or had actual notice, (5 *John.* 41, *Kilburn v. Woodworth*—8 *John.* 86, *Robinson v. Ward.*) This question, however, does not arise on the demurrer, and it will be unnecessary to pursue it further.

The plaintiff having seen proper to treat these records as foreign records, by bringing an action on the case, the question might have been presented in a different form, by another course of pleading, but as the issue now stands, the records are to be considered as conclusive evidence, by the uniform course of decision in this court, and our enquiry must be confined to the sufficiency of the declaration.

The first count is manifestly defective. It contains no averment of liability, or promise of payment, or breach by the defendant. The demurrer, therefore, as to that count, must be sustained. In the second count, we do not discover any substantial defect.

Judgment for the plaintiff on the second count.

McMURTRY *v.* CAMPBELL.

JUDGES HITCHCOCK AND BURNET.

Where a sealed bill is assigned and suit brought in the name of the assignee, he must prove the assignment under the plea of *non est factum*.

The facts were these: In December, 1821, McMurtry executed a sealed bill to William Campbell, for sixty pounds, of the value of two hundred dollars. William Campbell assigned the bill to Matthew Campbell, the defendant, in error, who commenced an action of debt in his own name, as assignee, under the statute. A judgment by default was entered, and afterwards opened, on motion and leave was given to plead issuably. The defendant filed the plea of *non est factum* with a notice of infancy, and the statute of limitations, but unaccompanied with an affidavit. On motion of the plaintiff, the court ordered the notice to be stricken out, as incompatible with the terms on

which the default was opened. At the trial, the plaintiff offered the sealed bill in evidence, which was objected to, unless the plaintiff would prove the hand writing of the endorser.

The objection was overruled, and the bill read in evidence: without the proof required, to which the defendant took his bill of exceptions.

Three errors were assigned. 1st. That the defendant had a right to avail himself of his notice of infancy, and of the statute of limitations.

2d. That no consideration for the assignment, was averred or proved.

3d. That the court permitted the bill to be given in evidence, without proving the assignment, or hand writing of the assignor.

By the COURT.

The statute dispensing with proof in certain cases provides, that upon plea of *non est factum* offered by the person charged as the obligor, or grantor of a deed or plea of non assumpsit, or *nil debet* offered by the person charged as the maker of any promissory note, it shall not be necessary for the plaintiff to prove the execution of the deed or note, upon which such suit is brought, unless the party offering such plea, shall make affidavit of the truth thereof.

As this action was brought against the obligor, or maker of the sealed bill and the plea of *non est factum*, was not accompanied with an affidavit, it was not necessary for the plaintiff to prove the execution of the deed, nor does it appear from the record, that such proof was required. The exception taken at the trial was, that proof was not required of the assignment, or hand writing of the assignor. The statute dispenses with proof of the execution of the bill; but it does not extend to the assignment. When the bill was first offered, the parties stood on the same ground that they would have occupied, if this statute had not been in existence, and the plaintiff had proved the execution of the bill, but that testimony alone would not entitle him to recover, because it is not only necessary to show the liability of the defendant, but also the title of the plaintiff. The admission, or the proof of the execution of the bill, would establish the first point, but it could not affect the second. The plaintiff was bound to show that the right of action had passed from the obligee to himself, in order to sustain the suit in his own name, which could not be done without proving the assignment, by which the statute passes the interest, together with the right of suing in the name of the assignee.

As the case appeared before the jury, the right of the plaintiff, and the liability of the defendant, stood as they would have done, if no assignment had been made, or in other words, a debt was proved to be due from the defendant to William Campbell, on which proof Matthew Campbell was permitted to recover.

As the statute did not dispense with proof of the assignment in this case, and as it was incumbent on the plaintiff, not only to prove the defendant's liability, but also to show his own title, the judgment must be reversed.

The opinion of the court being for the plaintiff on this part of the assignment, it is unnecessary to consider or decide the other questions that have been discussed.

Judgment reversed and cause remanded.

LESSEE OF CUNNINGHAM ET AL. *v.* BUCKINGHAM.

JUDGES HITCHCOCK AND BURNETT.

1824.

The omission to record a deed does not render it necessarily void as against a subsequent purchaser. Its validity or invalidity depends upon the fact of notice to the subsequent purchaser, which may be proved by parol.

Adverse possession in such a case is not evidence of actual notice, yet it may afford a strong presumption.

The plaintiff gave in evidence a deed from James Black to Cunningham, one of the lessors, and John Cully, for the lot in controversey, dated January 18, 1822. Consideration $140. Also a deed for the same premises, from John Cully to John W. Cully, the other lessor.

The defendant then proved that the lot in question was levied on by virtue of an execution, in 1810, and sold as the property of James Black,—that Schenck and Stansbury became the purchasers,—that James Black, the then owner of the lot, being satisfied with the sale, agreed for a small additional consideration, to execute a deed to the purchasers under the sheriff. He then offered a deed for the lot in question, from James Black and wife, to Schenck and Stansbury, under whom he claimed, dated 19th May, 1810. This deed was objected to, on the ground that it had not been recorded within six months after its execution, according to the act providing for the acknowledgement and recording of deeds. The clause of the statute relied on, is in these words: "And if any deed for the conveyance of lands, tenements, or hereditaments, made and executed, whereby the same shall be affected in law, or in any manner incumbered, shall not be acknowledged, or proved and recorded within the respective times allowed, the same shall be deemed fraudulent against any subsequent bona fide purchaser or purchasers, without knowledge of the execution of such former deed or conveyance.

The court were of opinion, that the omission to record the deed, did not necessarily destroy its validity. That it was not an objection to the deed itself but to its effect as evidence in the cause, and that the objection might be rebutted by parol testimony. They, therefore, overruled the objection, and the deed was read to the jury.

The defendant then called several witness for the purpose of charging the lessors of the plaintiff with notice.

Mr. Statton, testified that, Cunnningham and Cully were living in the town of Newark, at the time of the levy and sale—that the sale was made near Mr. Cully's door—that the sale and the deed from Black to Schenck and Stansbury, were generally known and spoken of in the town—that the making of the deed was a subject of conversation for several weeks, and that there were not at that time, more than a dozen families residing in the town.

Mr. Johnston, testified, that he saw the sheriff's advertisement; that he was present at the sale to Schenck and Stansbury, and that the circumstances of the sale were generally known and spoken of in the town.

Judge Wilson, testified, that he recollected the sale and purchase by Schenck and Stansbury,—that it was notorious and commonly talked about, and so was the deed from Black. He understood, and he thinks it was generally understood, that Huston and McDougal were in possession of the lot under Schenck and Stansbury.

Mr. Wright, testified, that he knew of the sale at the time; that it was generally known and talked of, and he supposed every body knew it.

Mr. Van Buskirk heard it publicly talked of, that Black had given the deed to Schenck and Stansbury.

Mr. Lincoln lived in town at the time of the sale, which was a notorious thing—he supposed every body knew it. He thinks, from the conversation on the subject, that every person in town must have known it.

Mr. Black—he was at the sale, it was generally known.

Mr. Smith, testified, that Cunningham was searching the records for the deed.

Mr. Evans, testified, that Cunningham had told him he had searched for the deed.

The plaintiffs then called several witnesses to rebut.

Colonel Davidson, testified, that he had heard a long time back of the sale to Schenck and Stansbury—that some said there was a deed—that others thought not.

Mr. Obannon, testified, that he did not live in town at the time of the sale, but heard of it, and that there was a difference of opinion about it.

Mr. Gillespie had heard of the sale and purchase.

Mr. Elliot was in town, and knew of the sale, but not of the deed.

Mr. McDougal, testified, that he always understood there was a deed from Black to the purchasers, under the sheriff.

On this testimony the cause went to the jury.

The plaintiff's counsel called on the Court to charge them, that it was necessary for the defendant to prove that the lessors of the plaintiff had actual notice of the deed from Black, under which the defendant claimed; and that if such proof had not been made, it would be their duty to find for the plaintiff.

The court refused to give the direction required; but after stating the case, and summing up the evidence, informed them, that the omission to record the deed, did not necessarily render it void. That its validity or invalidity, depended on the fact of notice, which might be proved by the same description of evidence, that is admitted in other cases. That violent presumption, or the proof of such facts as imply notice, was sufficient, and that if their minds were convinced, by the whole testimony, that the lessors of the plaintiff had knowledge of the deed, under which the defendant claimed, they should be charged with notice. That a man was not at liberty to shut his eyes against the truth, and shelter himself under the plea of ignorance. That where a fact comes to his knowledge, that necessarily puts him on his guard, he is bound to make diligent enquiry, and to search for information at the sources, from which it is most natural to expect it. That although the adverse possession which existed,

in this case, and was known to the plaintiffs, was not evidence of actual notice, yet it was a violent presumption, which, in connection with other facts, might satisfy the mind of a jury. That the cases under the registry acts of Great Britain, cited at the bar, were inapplicable, as those acts do not contain the proviso, that is found in ours. They declare the instrument absolutely void, and relief against them can be had only in chancery, on the general principles of equity. Stricter proof is therefore required. The party applying for relief, must make out a clear case of fraud, but our statute provides relief, and the jury is authorised to examine, and decide the fact, and they must do it according to the established rules of evidence, in ordinary cases, at common law.

Verdict for the defendant.

HARVEY ET AL. *v.* BROWN ET AL.

JUDGES SHERMAN AND BURNET.

1824.

The minutes of the daily proceedings of courts form no part of the record, nor can they be considered as the foundation of an assignment of errors.

Such minutes, however, ought to be made with the same precision as is required in the complete record.

The facts of the case were these. The cause having been called in its order, in the Common Pleas, the defendants were defaulted, and judgment ordered to be entered against them. The clerk, in making up the minutes of the day, stated the cause, and entered the order in these words, "Judgment," &c. in which form the entry stood, when the minutes were read and signed by the presiding judge. After the rising of the court, the clerk made up a complete record of all the proceedings in the cause, setting out the judgment fully and technically, and entered the same in the book provided, and kept for that purpose, agreeably to the statute. The writ of error was then taken out and returned, with a transcript of that record certified in due form. An attested copy of the minutes of the court, containing the original entry of the judgment, was also annexed to, and returned with the writ.

Woods, for the plaintiff in error.

By the COURT.

The copy of the minutes forms no part of the record, and cannot be considered as the foundation of an assignment of errors.—The statute makes a clear distinction between the daily entries on the minute book, and the complete record which is to be made up in the vacation and entered in the book of records. The former is intended to prevent mistakes in entering the orders of the day, and to detect them, where they are made. The latter is considered the record of the cause, and supersedes the necessity of any further recurrence to the minute book. The writ of error must be returned with a transcript of this record, and the assignment must be predicated on it. The plaintiff cannot be permitted to contradict it by a paper purporting to be a copy of detached parts of the proceedings in the cause.

Such a course, is unprecedented, and might jeopardize a large portion of the judgments that have been rendered, in the Common Pleas, throughout the state. On the same principle, the copy of any paper, improperly admitted, or rejected, or of any motion improperly granted or overruled, might be tacked to the record, without having been made a part of it, by a bill of exceptions. Such a practice would lead to endless confusion—it would destroy the certainty of records, and defeat the object for which they are made. The entries which are required to be made in vacation, are the records of the court, and as there is no error in the transcript of that record, the judgment must be affirmed.

It may not be improper, however, to make a remark on the manner in which the entries should be made on the daily minutes of the court. Although the 87th section of the Judiciary Act, which requires the proceedings to be entered, read and signed, does not prescribe the form in which the minutes shall be kept, or expressly require the orders, judgments, and decrees, to be entered at length, or direct the clerk to pursue the exact form of those entries, in making up the record, yet that course would be the most safe one, and would be most conformable to the spirit of the statute. This, however, has not been the common construction given to that section by the clerks throughout the state. Many of them have considered the minutes as concise memoranda of the proceedings of the day, from which full records were to be made up in the vacation, and if those memoranda were sufficiently explicit to enable them to make the record with certainty and correctness, they have considered them as made in conformity with the statute. This construction has probably resulted from the reason given in the statute, for requiring the duty, which is "to prevent errors in entering the judgments, orders, and decrees, of each court." It is the opinion of this court, however, that the correct course is to make the entries with the same technical precision as is required in the complete record made up in vacation.

Judgment affirmed.

TREASURER OF CHAMPAIGN COUNTY v. NORTON.

JUDGES BURNET AND SHERMAN.

1824.

The acquiescence of the attorney of record, binds the party.

An appeal from the Common Pleas to the Supreme Court, does not vacate a submission to arbitrators nor their award, but the award is open to the same exceptions in the Supreme Court as in the Court below.

It was an action of debt, brought on an administrator's bond. From the record it appeared that the parties had submitted the cause to the Court of Common Pleas, on an agreed case. The court referred it to a special commissioner, who reported a balance due from, and in the hands of the defendant as administrator. Exceptions were filed to the report, which were overruled. Judgment was entered for the plaintiff, and an appeal taken to this court.

O. PARISH, for the defendant, moved to set aside the report: first, because the submission was made to the Common Pleas, without the knowledge, or con-

sent of the defendant's attorney on record. Secondly, because the report having been made on a reference in the Common Pleas, prior to the judgment, it ought to be considered as vacated by the appeal.

As it appeared from the record that the cause had remained in the court below more than a year after the submission, before the rendition of judgment, during which time one of the attornies of that court, at the request of the attorney on record, had answered to the suit without objecting to the submission or the reference, and it appearing further that the submission and agreed case were signed by the attorney of a co-defendant, with the knowledge of the agent of Norton's attorney, the court were of opinion, that whatever might have been the merits of the motion, had it been made in time, it was then too late for the party to avail himself of it.

On the second ground, it was the opinion of the court, that neither the submission, nor the report, were vacated by the appeal, but that the report was open to the same exceptions as in the court below. Motion overruled.

The defendant then took sundry exceptions to the report, some of which were sustained, and it appearing that payments had been made by the defendant, for the benefit of the estate, which had not been submitted to the commissioner, in consequence of the vouchers not being in the possession of defendant, the case was referred to the same commissioner for re-examination and report, at the next term.

MILLER *v.* THE COMMISSIONERS OF MONTGOMERY COUNTY.

JUDGES BURNET AND SHERMAN.

1824.

Summary proceedings under the statute cannot be had, when the collector's bond is erroneously taken.

It appeared from the record, that James L. Miller, had been appointed collector for the county of Montgomery, and had executed a bond, payable to the treasurer of Montgomery, conditioned for the faithful performance of his duty. The money contained on the duplicate, not having been paid over, agreeably to the condition of the bond, the commissioners served the collector with notice of a motion for judgment, and in pursuance of that notice, a motion was made before the Court of Common Pleas, and a judgment entered in the name of the commissioners, against the collector, for the sum claimed to be due, with twelve per cent. damages thereon, and cost of suit. To reverse this judgment, the writ of error was sued out.

ALEXANDER for the plaintiff, relied on two errors: first, that the bond, not having been taken agreeably to the statute, was void. Second, that the court were not authorized to render a judgment against the collector, for a greater penalty than ten per centum.

By the COURT.

The statute under which these proceedings were had, requires the collector

Such a course, is unprecedented, and might jeopardize a large portion of the judgments that have been rendered, in the Common Pleas, throughout the state. On the same principle, the copy of any paper, improperly admitted, or rejected, or of any motion improperly granted or overruled, might be tacked to the record, without having been made a part of it, by a bill of exceptions. Such a practice would lead to endless confusion—it would destroy the certainty of records, and defeat the object for which they are made. The entries which are required to be made in vacation, are the records of the court, and as there is no error in the transcript of that record, the judgment must be affirmed.

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By the COURT.

The statute under which these proceedings were had, requires the collector

hold the transcript, in consequence of a refusal to pay the cost, and whether the suit was not commenced before the cause of action arose.

The opinion of the COURT was against the defendant on both points. The statute is not only silent as to the payment of cost, but requires the appellant to give security for the debt and cost, and cost that may accrue in the court of Common Pleas, it is therefore impossible to suppose that the costs are to be paid before the appeal. It would be an outrage on common sense to give the law such a construction, as would require the appellant to pay the cost, and at the same time to give security to pay them.

The second point is equally clear. The Justice is not to deliver the transcript to the clerk of the court of Common Pleas. It is his duty to hand it to the appellant, on demand, and it is the duty of the appellant to deliver it to the clerk, on or before the first day of the term next following the appeal. The cause of action, therefore, arose at the time the security was given and the transcript demanded.

Verdict for Plaintiff.

DAWSON v. HOLCOMB.

JUDGES HITCHCOCK AND BURNET.

1824.

Money collected on execution by the sheriff cannot be attached in his hands. If he refuse to pay over the money thus made he may be amerced, notwithstanding the service of such attachment.

It appeared from the record, that Dawson recovered three judgments against Joseph Fletcher, in the Supreme Court, which were regularly certified to the Common Pleas, with a special mandate to carry them into execution. That on the 14th of December, 1822, executions were issued thereon, and put into the hands of the defendant, Holcomb, who was sheriff of Gallia county, to be executed. At the May term following, Holcomb returned the executions, with an indorsement, that he had made the money, as he was commanded, and that having the money in his hands, a writ of foreign attachment, at the suit of Fletcher, the defendant, in execution, against Dawson, the plaintiff in execution, came to his hands, by virtue of which he attached the said money, so that he could not have it before the court, to be paid over, &c. Dawson, having demanded the money, served the sheriff with a notice of amersement, according to the statute, and in pursuance of that notice, moved the court below for judgment, which motion, on hearing, was overruled, on the ground, that the sheriff was excused from paying the money, by reason of the attachment. To reverse that judgment, the writ of error was sued out.

Opinion of the COURT.

We see nothing in this case, that could protect the sheriff against the motion to amerse. By the terms of the writ of execution, he was not merely commanded to make the money, but to have it before the judges, on the return day, to satisfy the plaintiff. In strictness of law, he was not at liberty to pay it over

to the judgment creditor, before he brought it into court, and although this is often done with impunity, yet it is always at the risk of the officer, and if a third person should appear from the record to have an equitable right to the money, it would become a question whether such payment would exonerate the officer.

The form of the writ, as far as it goes, is good evidence of the duty of the sheriff. He may be held to a literal compliance with it, and whenever that is dispensed with, it is not because he has a legal right to do so, but because the court are presumed to have permitted it. While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently it is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to bring the money into court, so that it might be subject to their order. Cases frequently occur, in which the right to receive the proceeds of a judgment is contested, and in which the decision of the court is necessary as a guide to the officer.

It will not be contended that he is the proper person to determine the rights of claimants; but if he may legally dispose of the money, before the return of his writ, that power is necessarily vested in him. In the case of *Ross v. Clark*, (1 *Dall.* 354,) the defendant had obtained a judgment against Ross, who paid the money into the hands of the prothonotary, and then attached it. On a rule to shew cause, the court quashed the writ, because the money in the hands of the prothonotary, was to be considered in the same state, as if it had been paid into the hands of the sheriff. In the case of *Turner v. Fendall*, (1 *Cran.* 117,) it was the opinion of the court, that although money could be taken in execution, if in the possession of the defendant, yet that it could not be so taken till it had been paid over to the person entitled to receive it, because, until so paid, it does not become his property—he has not the actual legal ownership of the specific pieces of coin which the officer may have received. Such a right, say the court, can only be acquired by obtaining the legal, or actual possession of them, and until this be done, there can be no such absolute ownership as that an execution may be levid on them. By the authority of this case, the money in question was not liable to an execution while in the hands of the officer. It would be difficult then to assign a reason, why it should be subject to an attachment, for in this case, as well as in the other, it is necessary that the thing taken, should be the property of the person against whom the process issues.

The second section of the statute regulating attachments, requires the officer to whom it is directed, to go to the place where the property is, or may be found, and there, in the presence of two creditable witnesses, to declare that by virtue of the writ to him directed, he attaches, &c. The third section requires, that if the property be left with the person in whose custody, or possession it shall be found, that person shall enter into bond to the officer, with two good and sufficient sureties, with condition that such property, or the appraised value thereof, shall be forthcoming, &c. Now it may be asked, how the sheriff could discharge this duty in the case before us? But it is not thought necessary to rely on the impossibility of a literal compliance with these requi-

sitions of the statute, although a strong argument might be drawn from them, in favor of the position that the act was not intended to apply to a case like the present, or if it was, that the process should be directed to some other person. A strong argument might also be drawn, from the mischievous consequences that would follow such a course of practice. It would lead to endless delay and vexation. One attachment might follow another, till the whole demanded was absorbed in cost. The honest creditor, on the eve of receiving the fruit of his judgment, might find himself farther from his object, than when he sued out his original process. In short, the introduction of such practice would measurably defeat the aim of legal process, as far as it is resorted to for the recovery of money.

We are clearly of opinion, that the sheriff's return contains no apology, or excuse for the non-payment of the money, and that he ought to have been amersed, on the motion of the plaintiff. If the attachment issued with a special reference to the detention of this particular sum in the hands of the officer, it was an abuse of the process of the court. This, however, we are satisfied was not the fact, from the known respectability of all the parties concerned in the transaction.

The judgment must be reversed, and the cause remanded to the Common Pleas for further proceedings.

LESSEE OF CURTIS v. NORTON.

JUDGES HITCHCOCK AND BURNET.

1824.

The deed of the sheriff is not valid unless the sale be approved by the court, and an order made for the deed.

The lessor of the plaintiff, claimed title under a sheriff's deed, made on a sale of the premises in question, by virtue of judgments and executions against Samuel H. Smith. In order to lay a foundation for offering his deed in evidence, he produced the record of a judgment for $1446 50 against S. H. Smith, in favor of James Smith, entered on the 14th September, 1822. Also, the record of a judgment for $450 17, against the same defendant, in favor of William Stansbury, entered at the same time. He also produced two executions issued on the aforesaid judgments, which had been returned, levied on the premises in question. The report of the appraisers was also produced, valuing the property at $1325, and the return of the sheriff that he had sold it to the plaintiff, on the executions aforesaid, and made $835. He then offered the sheriff's deed, made in pursuance of that sale. This evidence was objected to, unless the plaintiff would produce an order of the court for the execution of the deed, in pursuance of the tenth section of the act regulating judgments and executions.

By the COURT.

The question now presented is a new one. The provision on which the objection is taken, was first introduced into our code, by the act of 1822, and we are now, for the first time, called on to give it a construction. The words of the

proviso are these: "That if the court, to which any writ of execution shall be returned by the officer, for the satisfaction of which any lands and tenements may have been sold, shall, after having carefully examined the proceedings of such officer, be satisfied, that the sale has, in all respects, been made in conformity to the provisions of this act, they shall direct their clerk to make an entry on the journal, that the court are satisfied with the legality of such sale, and an order that the said officer make to the purchaser a deed for such lands and tenements, which deed, so made, shall be *prima facie* evidence of the legality of such sale, until the contrary be proved."

The act of 1824 contains the same provision, with these additional words, "and the officer, on making such sale, may retain the purchase money in his hands till the court shall have examined the proceedings as aforesaid, when he shall pay the same over to the person entitled thereto, agreeably to the order of the court."

The plaintiff contends, that it is optional with the purchaser, to pursue this course, or not—that it was intended for his ease and benefit, and that the only consequence of his omitting to pursue it is, that he must shew the legality of all the proceedings, anterior to his offering the deed. This exposition is rendered plausible, by the manner in which the proviso is introduced, but we do not discover any substantial reason why that construction should be adopted. Viewing the proviso in connection with other parts of the statute, relating to the same subject, we are led to the conclusion that it was the intention of the Legislature, that deeds should not be executed by the sheriff, until an examination was made, and an order for that purpose entered on the journal.

The construction contended for by the plaintiff, would take away the principal part of the benefit, that the legislature seem to have intended. We cannot believe it was their design merely to aid and protect the rights of the purchaser, when the same proviso, with a more extended, and equally natural construction, would also protect the rights of the parties to the judgment, and prevent much of the litigation that arises from irregularity in the proceedings of sheriffs. Although the letter of the statute does not expressly require the examination and the order, before the execution of the deed, yet we incline to the opinion that the spirit of it does. We feel disposed to give the proviso a liberal construction, and to extend the relief as far as the terms used in the law will justify. If we look at the object in view we must conclude, that it was to prevent, as far as possible, the difficulties that arise from illegal proceedings on writs of executions. These difficulties, not only affect purchasers, but also the parties, and frequently third persons. It would be unreasonable then, to give the law that limited construction, which would rob it of more than half the remedy which it seems to have provided. If the statute in this particular, intended nothing more than to authorise the purchaser, by pursuing the course prescribed, to offer his deed without shewing the previous proceedings, and thereby throw the onus on his opponent, it has done but little to cure the evil, and remove the inconvenience heretofore experienced; but we cannot believe the views of the legislature were so limited, when the provision they have made, without doing violence to the terms in which it is couched, will admit of a more enlarged construction, and a more extended relief.

From the best view of the subject we have been able to take, we have c to the conclusion, that in all cases, the proceedings of the sheriff must be e ined, and approved by the court, and an order obtained before the executi a deed. This construction is strengthened, by refering to the additional c in the law of 1824, authorizing the officer to retain the money, till the exar ion is made, and then to pay it over, on the order of the court.

This course, not having been pursued, the deed cannot be given in evid The plaintiff submitted to a non-suit.

DECISIONS IN BANK.

1824.

ROADS v. SYMMES ET AL.

The judgment of a court of record operates as a lien upon the real estate of the defendant. This principle has been recognized from the commencement of the administration of justice in the territory north west of the Ohio river.

Such lien is co-extensive with the jurisdiction of the court, but does not attach to after-acquired lands, and which have been conveyed before levy.

Under the laws of Congress, the legal title does not vest until the patent issues.

An equitab e interest in lands cannot be sold upon execution at law.

The act of 1795, did not require unimproved lands to be appraised.

Process from the General Court run throughout the state without the *testatum clause.*

That the debtor owned lands not aliened, at the time of the execution, cannot be given in evidence to defeat a sale upon the execution. All such questions ought to be settled upon the return of the execution.

The acknowledgement to a sheriff's deed is indisputable, nor can such acknowledgement be presumed, when the deed itself is produced, nor can such acknowledgement be made in any other court than that in which the judgment is recorded. The law of 1802, regulating executions, extends only to judgments rendered after its passage.

The complainants severally were in possession of separate parcels of the 4th section, 1st township, 13th range of United States Military land, situate in Licking county. This section or quarter township contained four thousand acres. The complainants derived title under a sheriff sale, and the bills were brought to obtain a disclosure of a claim set up by the defendants and to have the title of the complainants quieted.

The material facts of the case were as follows: on the 8th of February, 1800, the land in question was located and registered in the name of John Cleves Symmes, and patented to him on the 3d of April following.

At March term, 1800, of the general court sitting at Cincinnati, Daniel McLure recovered a judgment against J. C. Symmes for $3882 16. On the 10th of April of the same year a *fi. fa. et. lev. fa.* was sued out on this judgment, directed to the sheriff of Hamilton county, which process was from time to time renewed, tested alternately at Cincinnati and Marietta, until October, 1802. Upon these processes about 430 dollars was made. In October, 1802, a *fi. fa. et. lev. fa.* was sued out, and directed to the sheriff of Fairfield county. Upon this writ the following return was made:

"Nulla bona; and I have levied on five tracts of land in the military grant, to wit: section 1, township 4, range 16. Section 4, township 1, range 13. Also,

two thousand six hundred and fifty acres, on the east side of section 4, township 4, range 16. Also, one thousand nine hundred and eighty-four acres, on the west side of section 1, township 3, range 16. Also, two thousand two hundred and seventy-five acres, being part of section 3, township 3, range 14, of which I have sold seven thousand acres, and made two thousand six hundred and eleven dollars. The residue of the land remains unsold for want of bidders."

On the 10th of December, 1803, a *vendi.* issued from the Supreme Court of Hamilton county, founded on the above levy and return, for the sale of the lands returned unsold. This *vendi.* was directed to the sheriff of Fairfield county, and was returned by the sheriff that he had sold one thousand acres, in the 4th section, 1st township, 13th range, to one Stone, who, on tender of the deed, refused to make payment.

On the 25th of August, 1805, an alias *vendi.* issued from the same court, directed to the sheriff of Fairfield county, upon which he returned, "sold the within three thousand two hundred and seventy-five acres of land, as the law directs, on the 30th of September last—one thousand acres to Elnathan Scofield, for 250 dollars, two thousand two hundred and seventy-five acres to Daniel McLure, for 105 dollars.

The complainant, John Roads, claimed the north east quarter of section 4, township 1, range 13, sold to Daniel Vanmetre upon the first sale, for 507 dollars. The purchase money paid on the 7th of March, 1 03, and a deed executed and delivered on the 8th of April, in the same year. This deed was not acknowledged by the sheriff, until May, 1822, when it was acknowledged by Kratzer, the original grantor, in the Supreme Court of Clermont county. Roads deduced a regular title from Vanmetre.

Daniel Beaver claimed the south east quarter of the same section, sold upon the first sale, and bid off to Abraham Kinney. On the 20th of June, 1803, Kratzer conveyed to Kinney. The deed is not acknowledged by the sheriff, but is proved by one subscribing witness and recorded.

On the 13th of July, 1803, Kinney made to Kratzer, the sheriff who made the sale, a power of attorney to sell all his lands in Fairfield county. Under this power, Kratzer conveyed the land in question to Daniel McLure, the plaintiff in the action for 500 dollars, from whom Beaver deduces title.

Ziba Lindley claims the one thousand acres sold at the second sale to Elnathan Scofield. The conveyance was made by the sheriff to Scofield on the 15th of April, 1806, but was not then acknowledged. This was done by Kratzer, in the Supreme Court of Clermont county, May, 1822. Scofield conveyed to Lindley, November 7, 1806.

The defendants claim title under John C. Symmes, who, on the 26th of January, 1801, conveyed to the defendant, John C. Symmes jr. the section 4, township 1, range 13, for the consideration expressed in the deed of 4,000 dollars, and took back a mortgage on the premises to secure the payment. John C. Symmes entered satisfaction on this mortgage, October 15, 1803.

Testimony was taken in the cause impeaching the integrity of the sale by Kratzer, as sheriff, to Kinney, and also the fairness of the conveyance between the Symmes'. But as the court deemed it unnecessary to decide upon either allegation, that part of the case is omitted.

It was also in proof that John C. Symmes, the debtor, owned other lands than

those levied on at the time the levy was made, the title to which stood in his own name.

STANSBERRY, objected to the validity of the title of the complainants upon the following grounds:

1st. The judgment rendered in Hamilton county, in March, 1800, did not attach as a lien upon the land in question before levy made, because the legal title was afterwards acquired by the judgment debtor.

2d. No inquest was held upon the land as required by law.

3d. No execution could issue from Hamilton to Fairfield county, and if any could issue, it ought to have been a testatum.

4th. The return upon the *fi. fa. et. lev. fa.* to Fairfield county, does not specify the lands sold, and this cannot be explained by parol.

5th. John C. Symmes had other lands not conveyed, upon which the judgment ought to be executed, before lands aliened could be taken.

6th. The lands claimed by Lindley, and sold on the *vendi.* are not described in the writ, which is indispensable.

7th. Under the law, a *liberari facias*, and not a *vendi.* was the proper, and only proper process.

8th. The act of 1802, does not affect the case, because the law of 1795 remained in force for enforcing judgments rendered before the act of 1802.

9th. The acknowledgement by the sheriff in open court, of a deed for lands sold upon execution, is essential to the validity of such deed, under the act of 1795, and the acknowledgement by Kratzer, in 1822, cannot avail any thing.

Ewing for complainants:

By the COURT.

It has long been settled, that the judgment of a court of record, operates as a lien upon the real estate of the defendant. Whether this is a maxim of the common law, or was first introduced by the *statute of Westminister* 2, is of no importance in this case. The law of 1795, declaring what laws shall be in force, adopts both the common law, and all the statutes of the British Parliament, made in aid of it, prior to the fourth year of James the first. In either case, this law established the principle amongst us, and it has been acted upon from the commencement of the administration of justice in the territory.

It is equally well settled, that the lien is co-extensive with the territorial jurisdiction of the court that renders the judgment. The general court of the territory, exercised jurisdiction, and sent its process, original and final, into any county within the territory. The judgments rendered by it, were of consequence a lien, or charge upon all the lands owned by the defendant, and situate any where in the territory. This, it is understood, is not controverted.

The legal title to the lands in dispute, was not vested in the defendant when the judgment was rendered, and before the levy was made, he conveyed them to one of the present defendants, under whom the other claims. Under these circumstances, it is maintained, the judgment, upon which the execution issued never attached as a lien upon these lands. And this is the opinion of the court.

The complainants' counsel assert that the doctrine is settled differently in

England, and in some of the states of the American confederacy, and have adduced authorities in support of this position. But these are all rather inferences than direct adjudications.

In the case of *Calhoun v. Snyder*, (6 *Binney*, 145.) the point is very fully and ably examined by two of the judges. The force of the authorities, cited in support, of the opposite doctrine, is much weakened by this exposition. And the decision of the court, in that case, is placed upon such clear and satisfactory grounds, that we feel no hesitation in adopting it. The judgment, in the case of *Mc Lure v. Symmes*, rendered at March term, 1800, did not attach as a lien upon the lands in dispute, the legal title to which was obtained by the debtor in April following, and conveyed in Jan. 1801, before execution levied.

The lands in controversey, were located by the debtor in February, 1800, and though not patented until April, the counsel for the complainants contend, that the act of congress, under which the title is derived, invested the locator with the legal title before the emanation of a patent.

It was certainly competent for congress to declare what should be done to invest those deriving title to lands under the laws of the United States with the complete legal title to such lands. They have provided that this shall be done by granting a patent to those entitled. Whatever right a party may have previously acquired, he is not invested with the complete perfect title until this patent is issued. The patent is not the foundation, but the consummation of the title. Until it emanates, the legal power of the government over the subject is not at an end. Upon its emanation that power terminates, and the right of the grantee is perfected. Symmes, therefore, held no legal estate, which could be bound by a judgment, until the patent issued.

It is further insisted, that whatever interest, legal or equitable, Symmes held in these lands, under the registry and location made in February 1800, that interest was bound by the judgment in question. And this is said to be conformable to the decisions in Pennsylvania, where the principles of jurisprudence are the same that prevailed under the territorial government in 1800. The liability of equitable interests in land, to be seized and sold upon execution as land, has never been recognized by this court, as existing either under the territorial or state governments. That it cannot now be so seized and sold, is settled both by judicial determination and legislative enactment. If these equitable interests ever could have been taken in execution at law, they must have been seized in the character in which they existed, not in a different character. This was not and could not be done in the case before the court. The equity, whatever it might be considered, merged in the legal title before the levy made. And, as the judgment could not attach as a lien upon the after acquired legal title, it could not operate upon an equity extinguished by, and merged in that title. There is no principle, upon which it can be held, that a judgment may bind an interest which cannot be seized and sold to satisfy it.

There is no force in the objection, that an inquest was not held upon the land before the sale on execution.

The second and third sections of the law of 1795, subjecting real estate to execution for debt, provide for the case of land yielding rents or profits. The fourth section embraces the case of "*all other lands*," that is, lands *other* than

those which yield rents and profits. It requires no inquest, but directs a sale, "*with all convenient speed.*" If lands, only liable to be sold as directed by the second and third sections, should be sold under the fourth, it would be good reason for setting the sale aside, upon proof of the fact. But as the law authorizes a sale, without inquisition, the court must presume the sale rightfully made, until proof is adduced that it is not.

It is no objection to the process, that it was not a *testatum*. The county of Fairfield was as fully within the jurisdiction of the court, with respect to process, as the county of Hamilton. The *testatum* is only required where a court issues process to a county in which it has no general jurisdiction.

With respect to the fact, that the debtor owned lands not aliened, at the time of the execution, it cannot be given in evidence to defeat a sale upon execution. When the sheriff's sale is completed, by payment of the money, and delivery of the deed, the title of the purchaser ought not to be affected by a circumstance of this character. To permit this, might introduce great mischiefs; and would render purchases under execution too insecure. Upon a return of the execution is the proper time to settle all questions of this kind. If a sale were pressed on before the return of the execution, so as to deprive a purchaser of an opportunity then to be heard, he might obtain an injunction to stay it for that purpose.

The objections, that the return upon the *fi. fa. et lev. fa.* is insufficient, that a *liberari facias*, and not a *vendi.*, ought to have issued, and that the *vendi.* does not sufficiently describe the lands to be sold, have not been considered and decided by the court, because, it is not necessary now to decide them, and they may, possibly be hereafter presented for consideration in some other form. There is one objection, which the court consider fatal to the complainant's claim, as now presented. None of the deeds have been acknowledged in the manner prescribed by law, and without such acknowledgement, they convey no title.

The fourth section of the act of 1795, after directing the manner of sale upon execution, proceeds, "and upon such sale the sheriff or other officer shall make return thereof endorsed or annexed to the said *levari facias*, and give the buyer a deed duly executed and acknowledged in court for what is sold."

It is obvious that the provision requiring the acknowledgement to be made in court was not meant as a mere idle ceremony, nor could it be intended as evidence of the execution of the writ, which must be returned with the sale endorsed or annexed. The requisition is plainly made for the just and useful purpose of giving the defendant an opportunity to object to the regularity or fairness of the sale. As to these matters, without this provision, he could have no day in court, and might claim to make his objections to the sale in a subsequent suit with the purchaser, which would not only be inconvenient, but might operate great injustice. This acknowledging the deed in court conduced to the security of all parties, and is a substantial part of the transaction, which cannot be dispensed with.

The case from 1 *Sergeant & Rawle*, 54, is full in point as to what is the doctrine in Pennsylvania. It is of higher authority than the *nisi prius* cases cited from Judge Yeates' reports; not only because it is a much later decision, but because it was made by a full court, upon mature deliberation.

The deeds are not aided by the statute of 1802 regulating executions; that act in terms extended only to judgments rendered after its passage. For the purpose of satisfying judgments then rendered, it left the law of 1795 in full force. One of the means of satisfying these judgments was by the sale upon execution of the debtor's lands. This sale could only be conducted and perfected under the provisions of the law of 1795. These require the sheriff to acknowledge the deed in open court; if this is not done the deed is inoperative.

After the time that has elapsed, the counsel for the complainants suggest that the acknowledgment of the deeds ought to be presumed. His argument on this point, though ingenious, is not satisfactory. The deeds are produced, and the acknowledgment, which constitutes an essential part of their execution, does not accompany them. A grant may sometimes be presumed: but if it be produced and is defective, nothing can be presumed to aid that defect. The circumstances of the case rebut the presumption contended for. One of the deeds is proved by a subscribing witness; the other two have been recently acknowledged by the grantor. These facts shew the clear understanding of the parties, that the acknowledgment required by law was never made.

The two deeds acknowledged in the Supreme court of Clinton county, derive no additional validity from that act.

The first legislature held under the state government abolished the general court. The 26th section of the act of April 15, 1803, transferred to the Supreme court "cognizance of all judgments, causes, and matters whatsoever, whether civil or criminal, that were then pending, undetermined, or *unsatisfied* in the general court." It also provided that all writs issued out of the general court should be continued over of course to the first session of the Supreme court to be holden in the respective counties.

Under this law the writ of *fi. fa. et lev. fa.* then in the hands of the sheriff of Fairfield county, was returned to the Supreme court of Hamilton county, from which the subsequent processes issued. If, then, these deeds can be perfected by any after acknowledgment in the Supreme court, that acknowledgment can only be made in the Supreme court of Hamilton county, where the judgment is. The object of the acknowledgment is to give the parties an opportunity to contest the regularity of the sale, and this cannot be done unless the judgment and process upon which it was made are before the court. It would be absurd and unreasonable to send the parties to any other county to make this investigation. Nothing short of a positive law authorizing the acknowledgment to be taken in any county, would warrant the court in receiving it in any other than that where the judgment, execution, and return are of record.

The foundation of the bills in all the cases is that the complainants each has a legal title. But the court is of opinion that the sheriff's deeds under which they severally claim, are all defective and inoperative; the bills must therefore be dismissed.

Judge Burnet, having been attorney for McLure, upon whose judgment the lands were sold, did not sit in this cause.

JACKMAN v. HALLOCK, ET AL.

The assignment of a note given for the purchase money of real estate does not transfer the equitable lien of the vendor, either at law or in equity.

A judgment cannot operate as a lien upon an equitable interest. The award of an execution upon *sci. fa.* upon a justice's judgment, is no lien before an actual levy.

The land in question was sold to Vandike by Elliot, part of the purchase money paid, but no deed given. Vandike sold to the defendant Decker, and an arrangement was made by which Decker gave his notes to Elliot for the balance of purchase money due from Vandike, and Elliot gave to Decker a bond to convey. Two of Decker's notes to Elliot for the sum of fifty dollars fifty cents each, being the balance of the purchase money of the land, were assigned by Elliot to the complainant Jackman. Upon these notes, Jackman, as assignee, brought suit against Decker before a justice, and recovered judgment. Execution issued, and returned no goods.

Jackman then filed a transcript, and obtained a *sci. fa.* from the court of Common Pleas, to shew cause why execution should not issue against Decker's land. At August term, 1821, execution was awarded against the real estate of Decker. At this time Elliot had not conveyed to Decker, and he had no real estate except his interest in the land in question.

At August term, 1821, suit was brought by Decker against Elliot upon the conveyance bond, in which the defendant Hallock was attorney for Decker.—At the December term, 1821, the counsel for Decker tendered a deed for the land from Elliot and wife to Hallock, who refused to take it, because it did not sufficiently describe the lands.

Decker becoming indebted to Hallock for fees as counsel, and for moneys advanced to secure the payment, and also to secure him for becoming his bail upon an appeal bond, in January, 1822, assigned to him Elliot's bond then in suit. Hallock gave Decker a memorandum of the object of assigning the bond, and a stipulation to reconvey when paid and indemnified. At the time of this transaction Hallock knew that part of the purchase money due to Jackman upon the assigned notes, was unpaid, and knew of the legal proceeding upon these notes.

At March term, 1822, a deed from Elliot and wife, properly describing the land, was offered to Hallock for Decker, but was not accepted. At this term the suit of Decker v. Elliot was discontinued. This suit was commenced in April, 1822, against Hallock, Decker, and others, praying a sale of Decker's equitable interest in the land, and a preference in payment of the judgments for Jackman upon the notes taken for purchase money. The court directed a sale of the property, and that the proceeds be brought into court. The question how they should be distributed was reserved for decision here.

Three questions were submitted for decision.

1. Whether the assignee of the notes, given for the purchase money of land, can enforce, in equity, the original lien of the vendor against the land?

2. Whether Jackman's judgment attached as a lien upon Decker's equitable interest in the land?

3. Whether when execution is awarded by the court of common pleas, against real estate upon a judgment rendered by a justice, a lien upon land attaches before levy made?

Wright & *Colliers*, for complainant. *Hallock*, for defendant.

By the COURT.

The vendor's lien for purchase money is founded upon an implied trust between the vendor and purchaser. The purchaser is held in equity to be the trustee of the vendor, receiving the contract or conveyance to hold it for the use of the vendor, until the purchase money is paid. The trust attaches to the land, and follows it into the hands of a subsequent purchaser with notice upon the universally received doctrine, that he who purchases a trust property, with notice of the trust, is bound by it. But this trust does not, and cannot, attach to notice given for the purchase money. It is an equity between the vendor and vendee, which the notes cannot affect, but which exists in the same character, whether a note be given or not. This equity arises to the vendor for his own safety; but it cannot be transferred to another. No law has made it the subject of conveyance or assignment. It cannot follow the notes, because the assignee takes in them a legal interest, and the assignment does not purport to transfer, and could not transfer, an equity existing independent of them. The notes for purchase money are evidences of debt, without any reference to the consideration for which they were given; the vendor's lien is a substantive right, distinct and separate from the notes. The vendor may unite them by keeping the notes in his own hands; but he cannot transfer both to his assignee of the notes, neither at law nor in equity. A majority of the court are of opinion, that the complainant can claim nothing upon the ground of Elliot's lien for purchase money.

Jackman's judgment did not attach as a lien upon Decker's equitable interest in the land. This court have so decided in the case of *Roads v. J. C. Symmes and Stansberry*, at this term.

An execution issued by a justice of the peace cannot be levied upon lands; it follows as a necessary consequence, that a judgment upon a justice's docket cannot attach a lien upon real estate. The proceedings upon *sci. fa.* is not to have a new judgment, but an execution of a particular character. Upon this *sci. fa.* no judgment is rendered; execution only is awarded as prayed for in the writ. This award of execution cannot attach a lien upon land before levy, which is only effected by a judgment for money. It gives a new capacity to the justice's judgment, but no new effect. In such case, lands, like chattels, are bound from the levy and not before.

On the first point JUDGE BURNET dissented.

STARR v. STARR, ET AL.

In a suit by the purchaser under execution the judgment under which the sale was had, cannot be controverted.

A conveyance made voluntarily by a debtor to his creditor is without consideration, if the parties afterwards treat the debt as still subsisting.

The re-delivery of a deed by the grantee to the grantor is not a re-conveyance of the title.

The grantor exercising control over the property conveyed, selling and receiving the purchase money, and making conveyances, are badges of fraud.

The law recognises a tacit as well as an express trust.

The complainant derived title under certain proceedings in attachment prosecuted by him against Ephraim and William Starr. The attachment was sued out of the Common Please of Cuyahoga county, on the 13th day of May, 1819; the lands in question were attached, and such proceedings had that they were sold and purchased by the complainant, and a regular deed obtained from the sheriff.

The bill charges that Ephraim Starr, the original debtor and owner of the lands, had previously made a pretended sale to the other two defendants fraudulently and without consideration, and upon a secret trust that Ephraim Starr should have the benefit, and calls upon the defendants to answer.

Ephraim Starr, in his answer, states that in the year 1816, Nathan Starr, the complainant, and William Starr were partners, in trade in New York, and agreed upon a dissolution. That William Starr assumed the payment of all the debts of the firm, and that Ephraim Starr became his security in a bond to Nathan, to indemnify Nathan against the debts of the firm. It was upon this bond that the proceedings in attachment were had, and Ephraim denies any knowledge of the debts of the firm paid by Nathan after making the bond.— He further states, that in the year 1817 he resided in New York, and was indebted to Truman Starr about 11,000 dollars for money borrowed, and to Giles Griswold about 3,000. That to secure the payment of these sums, he, on the 1st day of May, 1817, conveyed to Truman Starr the lands in question, with others, in the whole about 5000 acres, with intent that Truman should convey an equal proportion to Giles Griswold, which deed he delivered to Truman Starr, and received from him a power of attorney to sell the same lands.

He further states, that sometime afterwards he found it necessarry to apply for the benefit of the insolvent laws in the state of New York. And at this time, the deed, not being recorded, was returned to him by Truman Starr, and Truman Star, as well as Griswold, signed his petition as a creditor, praying that he might have the benefit of the insolvent laws. He further states, that after his discharge under the insolvent law, feeling himself morally bound to pay the debts due Truman Starr and Giles Griswold, he made to them a new deed, antedated so as to bear date the 1st May, 1817, the purpose of which, was to protect sales made under Truman, anteriour to the date of the second deed. This deed, he states, he made without the knowledge of Truman Starr, and kept it in his possession until September, 1818, when it was delivered,

and his notes held by Truman Starr, given up and cancelled. The original power of attorney from Truman to Ephraim Starr was retained, under which sales had been made by Ephraim as attorney for Truman, and moneys received and accounted for. He relies upon his discharge under the insolvent laws of New York, as discharging him from liability on his covenant to Nathan Starr, upon which the proceedings were had. He denies all fraud, and all secret trusts, in making the conveyance.

Truman Starr's answer is substantially the same. Griswold in his answer states, that he knew nothing of the facts charged, further than that Ephraim Starr was indebted to him, and that he had received a conveyance of land in payment from Truman Starr, in pursuance of an understanding between Ephraim and Truman at the time the conveyance was taken by Truman of the land in dispute.

At the hearing, the complainant adduced an authenticated transcript of the proceedings and discharge of Ephraim Starr, under the insolvent act of New York, from which it appeared, that Truman Starr and Giles Griswold were petitioning creditors.

The defendants produced the deed from Ephraim Starr to Truman Starr, which bore date May 1st, 1817, and had on it a certificate of its acknowledgment by Ephraim Starr, before a Master in chancery, September 10th, 1817. It also had on it the certificate of the acknowledgment by Mrs. Starr, dated September 17, 1818. Her name inserted in the body of the deed, and her signature are in different ink from the other parts of the deed, and the ink appears to correspond with that in the certificate of her acknowledgment; it was recorded before the attachment issued.

Copies of the power of attorney from Truman to Ephraim Starr, and an agreement of counsel as to sales made by Ephraim in the name of Truman, under that power, were also produced. The deed from Truman Starr to Giles Griswold was executed after the attachment issued.

Whittlesey, Lyman, Brush and Fitzgerald, for defendants.

Kelley and Grimkey, for complainants.

By the COURT.

The complainant claims title under a sale upon execution, founded on a judgment rendered at law, in action of covenant commenced by attachment.—This judgment cannot be here controverted. It is conclusive that Ephraim Starr owed him the debt, for which it is rendered at the time stated in the proceedings, and places him in the attitude of a creditor, entitled to contest the fairness of the title which the defendant set up to the land in dispute.

This title is a deed of conveyance from Ephraim Starr to Truman Starr, dated May 1st 1817. The deed is produced, and upon inspection, it appears to have been acknowledged by Ephraim Starr upon the 10th of September, 1817, and by his wife on the 17th of September, 1818. The wife's name and signature being inserted in ink different from that of the writing in the body of the deed, and corresponding with that of her acknowledgment. It is evident, that although two deeds are spoken of in the answers, there never was but one

executed. The same deed made and acknowledged by Ephraim Starr in 1817, was executed by Mrs. Starr in 1818. There is no reason to presume that the master in chancery, taking Ephraim Starr's acknowledgment, antedated his certificate. And this must have been done, if the deed produced was executed after Ephraim Starr's discharge, as stated in the answer.

The defendants all insist, that the first deed was executed in May, 1817, to secure the debts due from Ephraim Starr to Truman Starr and Giles Griswold. The date of the deed corresponds with this statement, and the court being satisfied that there was but one deed, and that this is it, the right of the defendants, Truman Starr and Giles Griswold, depend upon the validity of this deed.

The court agree with the defendant's counsel, that the re-delivery of the deed did not re-convey the title. That re-delivery is of no other importance, than as one of many circumstances elucidating the character of the transaction. The deed is absolute and indefeasible, the consideration for which it was given must have arisen at the time of its execution. If given in payment of an existing debt, there must have been an agreement that the debt should be extinguished. If the debt subsisted, and was really due, after the deed was made, there was no consideration.

It is distinctly admitted by all the parties, that the debt was not extinguished, but remained due between them. Truman Starr presented himself a petitioning creditor for account of this very debt. Giles Griswold did the same with respect to his. Both made affidavit that his debt was due to him, which could not be the case, if it had been paid by the conveyance of the land in question. Ephraim Starr in his answer, distinctly states that it was in September, 1818, that the notes, evidences of the debt, were given up and cancelled upon the delivery of the pretended second deed. Truman Starr states the same thing. The avowed object of making the alleged second deed, was to discharge this debt, which Ephraim felt a moral obligation to pay.

The deed, if operative at all, was operative from May, 1817. At that time, and until September, 1818, the parties to it shew that it was without consideration. And being so, the grantee held the title in trust for the grantor. It was not recorded, and there is no evidence, except the allegation in the answers, that it ever was in the power of the grantee before September, 1818; and how long it was in his power, if ever, is not alleged.

The suggestion in the answer that Truman gave up the deed to become a petitioning creditor, is in every view of it most lame and impotent. If the transaction had been in good faith, the execution of the deed extinguished the debt. The re-delivery, or giving it up, could not revive the debt, unless there was a contract that it should do so. Such a contract would have vested an interest in Ephraim which he was bound to put in his schedule for the benefit of his creditors. Nothing of this kind was done. If the debt was paid by making the deed, Truman Starr was guilty of both fraud and perjury in presenting himself a petitioning creditor. If the debt was revived by agreement when the deed was given up, Ephraim Starr was guilty of perjury and fraud too in not assigning it for his creditor's benefit. But if the conveyance was voluntary, upon no secret trust distinctly expressed, the conduct of the parties is more consistent than it could be upon any other supposition.

The circumstance that Ephraim Starr, the grantor, continued to exercise

control over the property, and sell and dispose of it, receiving the purchase money, and making conveyances, is an additional badge of trust and fraud. It does not essentially change the character of this part of the transaction, that Ephraim acted under a power of attorney from Truman. That power was created at the time of the conveyance, and continued unrevoked after the return of the deed to Ephraim. Like the deed itself, it was kept a secret until it became necessary to use it to enable Ephraim to enjoy the benefit of the land.

It is another strong and unfavorable circumstance, that the deed, though unrecorded, was permitted to remain for so great a length of time, in the hands of the grantor; and was a second time brought out, not at the request of the grantee, but upon the motion of the grantor, and the consideration got up, that of a debt discharged by the proceedings under the insolvent law, upon the petition of the grantee.

All the principal facts of the case unite in convincing a majority of the court, that the deed was originally made voluntarily and without consideration, and that the object was to cover the land from creditors, and save it, that it might be enjoyed by the grantor. That this trust was not formally declared or expressed between the parties, is no reason why it cannot exist. The law is not to be evaded by contrivances of this nature. A trust, tacitly created, is more difficult to reach than one that is expressed; but when it is ascertained the same consequence is attached to it.

Giles Griswold is in no better situation than Truman Starr. His title rests upon the same deed, which was never operative. And although he was no party to the original transactions, yet, he acquired no interest in the lands until the conveyance was made to him. He could not enforce the parol trust in Truman Starr, if there were no doubt of its existence. And his deed is made since the land was attached, and since a right was commenced in the complainant. Both deeds must be decreed fraudulent and void.

Judge BURNET'S *dissenting opinion.*

I dissent from the opinion of the court in this case, principally, because the defendants, Truman Starr and Giles Griswold, have expressly denied the fraud imputed to them, and their answers have not been contradicted by a single witness.

They were creditors of Ephraim Starr, for money lent, to a greater amount than the estimated value of the land, and whatever might have been the fraudulent views of Ephraim Starr, or the imposition practised by him, on his creditors, these defendants are not infected by it. Fraud must be proved, it cannot be presumed. The facts from which unfavorable inferences might be drawn, against these defendants, appear to be satisfactorily explained. They may all be true, and they perfectly innocent. On such grounds, I cannot agree that the complainant, who is an after creditor, has a right to wrest from them their *tabula in naufragio*, and effect, for his own exclusive benefit, the same object, which he alleges is a fraud in them. Their equity, to say the least of it, is as strong as that of the complainant. It is prior in point of time, and they have the law on their side. Equity being equal, the law prevails. *Prior est in tempore, potior est in jure.*

The deed first executed, and delivered by Ephraim to Truman, was for a

valuable consideration. It was made before his application for the benefit of the insolvent laws of New York, and when he was at liberty to prefer one creditor to another. The execution and delivery of this deed, vested the legal title in the grantee, and the conveyance was complete. As the land was not received in full discharge of the debt due to Truman, and to Griswold, it was perfectly consistent with the nature of the transaction, that the notes of Ephraim should be retained, until the proceeds of the land should be ascertained. When that was done, the amount was to be credited, and the residue, if any, would have continued a subsisting debt.

The re-delivery of the deed to Ephraim, did not divest the grantee of his title, or render the conveyance void, and the fraud that might have been practised afterwards, on the bankrupt laws of New York, could not relate back, so as to avoid a conveyance previously made, in good faith, and for a valuable consideration.

The second deed may be considered as a nullity, because there was no interest in the grantor that could be conveyed by it, and I cannot discover how the validity of the first deed can be affected by the subsequent conduct of the parties, in relation to third persons, who had no interest, or concern in the transaction.

COURCIER ET AL. v. GRAHAM.

What covenants are independent, dependant and mutual.

In covenant greater strictness is required in pleading than in most other actions. *Non est factum*, puts nothing in issue but the execution of the instrument declared upon.

Non est factum, it seems, is such a general issue as will authorize a notice of special matter under the statute.

No continuance of *possession* for any time less than where the statute of limitations would operate to bar a recovery in ejectment, is sufficient to warrant the presumption of a deed.

Where a vendor covenants to make an indisputable title, he must make out a complete connected paper title.

A deed attested by one witness, since 1825, does not convey the legal title.

The value of merchandise agreed upon between the parties, is the proper rule of damages where no fraud is alleged, and where one party has furnished the merchandise, and the other party has neglected to do some specific act in payment therefor, according to the terms of the contract.

The plaintiff stipulated to deliver to the defendant merchandise to the amount of 11,418 dollars thirty-two cents, upon account of the purchase of the land; and from time to time when thereto required, within one year from the date, to deliver to the defendant or his order any further quantity of merchandise, as he or his agent might select, to the amount of dollars, further on account of the land.

The price of the land was to be fixed by three persons living in Cincinnati, to be chosen by the parties within six months; Graham covenanted that if he approved the price fixed he would at the end of one year from the date, by a good and sufficient deed of conveyance and assurance in the law, well, and sufficiently, grant, convey, and assure the land to the plaintiffs, in fee simple, clear of all incumbrances, and *at the same time deliver the possession of the premises to them*, they securing to be delivered on demand to the defendant, or his order,

such goods suitable to the Cincinnati market, at a fair price, as he may choose, to the amount of any difference beyond the amount of goods and merchandise then actually received.

The declaration contains a single count. After reciting the substance of the covenant, and avering the delivery of the 11,418 dollars thirty-two cents amount of goods, it alleges that the plaintiffs have "at all times since the making the said article, been ready and willing, when legally required, and upon reasonable request made by said Graham or his order, to deliver to him or his order any other and further quantity of goods, wares, and merchandise, which he, the said Graham, or his agent, might select, when the same should be selected on account of the aforesaid tract of land agreeably to the provisions and stipulations contained in said article. And the plaintiffs further say, that since the execution of said articles they have at all times been ready and willing, in pursuance to the terms thereof, to receive a good and sufficient deed, &c. and to pay or deliver to said Graham, or to secure to be delivered to him or his order on demand, such goods, suitable to the Cincinnati market, at a fair marketable price, as he or they may choose, to the amount of the difference, &c. And they further say, that since the execution of the articles, and since the expiration of the year therein mentioned, they have at all times, at the period in said articles contemplated, been ready to receive possession of the premises in the said article described. And in fact they say their covenants have been kept and performed. And they further in fact say, that although the period of one year, mentioned in said articles, at the end of which the said Graham, by his covenant, should have conveyed the said land, has long since elapsed and gone by; and although the said tract of land has been long since valued, and the price fixed to the same, and the said valuation approved by said Graham, yet said Graham, well knowing the premises, and well knowing that he had and did receive the goods and merchandise in said articles specified, amounting in value to 11,418 dollars 32 cents, and that the said plaintiffs had well and faithfully fulfilled and performed all and singular the covenants and agreements on their part in this behalf to be kept and performed; nevertheless, said Graham has not executed and made to said plaintiffs a good and sufficient deed, nor hath he delivered possession, nor hath he secured to be paid the value of the said goods and merchandise; wherefore his covenants he hath not kept, but hath broken the same," &c.

The plea is *non est factum*, without an affidavit, but accompanied with a notice stating an offer to perform a tender of the deed, bad quality of the goods &c.

The plaintiffs gave in evidence the covenant declared upon, and proof of the delivery of the merchandise stated in it. They also gave in evidence a letter from Graham to the plaintiffs, dated at Philadelphia, Oct. 20, 1818, stating that he had approved the price fixed by the valuers, and intended to comply with the contract; and submitting for consideration a connection of the paper title, and a conveyance from himself to the plaintiffs; and remaking it was doubtful whether he could tender a performance at any other time than the end of the year, and adding, "I am ready either now or then to perform what is necessary; and remarking also, that the deed from Symmes to Dayton, under whom the title was derived, was not among the papers but should be supplied.

The plaintiffs also gave in evidence a letter from them to the defendant, dated October 22, 1818, objecting to the sufficiency of the title.

1. That there was no deed from Symmes to Dayton.

2. That Mrs. Symmes had not relinquished her dower.

3. That the deed from Vanhorne to Williams was not recorded in time.

4. That there was no certificate that there were no unsatisfied judgments against intermediate owners.

Upon this proof the plaintiffs rested the case, stating to the jury that they claimed to recover the 11,418 dollars 32 cents, with interest.

The defendant moved the court to direct a non-suit, upon the ground that the evidence given by the plaintiffs did not make out their cause of action as alleged in the declaration, and the court reserved the decision of this motion until the cause was further heard, and directed the defendant to proceed in the case. The defendant then gave in evidence that he had tendered a deed to the plaintiffs on the 30th of March, 1819, in compliance with this contract, and also, that he had offered, to the plaintiffs for their acceptance a deed, with an abstract of the title, in October, 1818, and also, in February, 1819, before the end of the year in the covenant stated, to which the plaintiffs objected, because there was no deed from Symmes, who received the patent from the government, to Jonathan Dayton, under whom Graham deduced title, and because of several supposed existing claims for dower. The defendant also gave evidence of the possession of Joel Williams, from whom he purchased, and of a connected and uninterrupted possession, from and under a purchase made from Dayton, in the year 1791. And also the paper title from Dayton to the respective persons in succession, who had held possession down to Joel Williams, from whom the defendant derived possession, except a deed from Riddle to Vanhorne, which deed, dated in the year 1808, attested by one witness, acknowledged before a justice, by the grantor, and recorded, the defendant also offered in evidence; but upon the suggestion of the plaintiffs' counsel, it was rejected by the court. The defendant also gave in evidence a deed from J. C. Symmes to Moses Miller, for a tract of land adjoining the section No. 19, in which the land in question is situate, bearing date Nov. 1798, reciting that Jonathan Dayton was the purchaser and and locator of section 19. The defendant also gave in evidence the deposition of Jonathan Dayton, stating that a deed had once existed from Symmes to himself for said section.

Upon this evidence the defendant asked the court to instruct the jury that by a just construction of the covenant, the place for the carrying it into execution was Cincinnati, that the deed must be made, the possession delivered, and the delivery of the goods on demand secured, at the same time, and the plaintiffs not having alleged in their declaration or shewn in evidence that they were ready at Cincinnati at any time to perform the contract on their part, and accept a performance from the defendant, they could not recover at all in this action, or if they could recover, could only recover nominal damages. But the court instructed the jury that the plaintiffs were entitled to recover the full damages they might have sustained without adducing any proof of the matters claimed as necessary to be made out in proof by the plaintiffs.

The defendant also asked the court to instruct the jury that upon the evidence adduced, they ought to presume a deed from John Cleves Symmes, to

Dayton. And that the deed from Riddle not being in evidence before the court, and not having been objected to by the plaintiffs, at any time, until the trial in the Common Pleas, and the possession under it having continued so that the possession of Graham or those claiming under him could not be disturbed, a good and sufficient title was made out to satisfy the terms of the covenant. But the court instructed the jury that no continuance of possession for any time less than where the statute of limitations would operate to bar a recovery in ejectment was sufficient to warrant the presumption of a deed, and that if the title was found to have been in Dayton, no other title would satisfy the terms of the contract, except a complete connected paper title from Dayton to Graham the defendant.

The defendant also gave in evidence to the jury, that the goods delivered as stated in the convenant were of very inferior quality, and were not worth in money the sum stated as their price, and asked of the jury if they found a verdict for the plaintiffs, to find such sum only as the true cash value of the goods. But the court instructed the jury that it was not competent for the defendant to contest the justness of the price fixed upon the goods in the covenant, and that such price must be taken by the jury as their true value.

The jury found a verdict for the plaintiffs for the amount of the goods with interest.

The defendant moved the court for a new trial upon the ground of misdirection in all the matters here stated. The consideration and decision of this motion, as well as of the point reserved in regard to a non-suit, was adjourned to *Columbus*.

Este and *Hammond*, for defendant. *Rowan*, for plaintiffs.

Opinion of the COURT *by Judge* HITCHCOCK.

In the case of *Kingston v. Preston, Doug.* 690, 91.) Lord Mansfield observes, "There are three kinds of covenants: 1st. Such as are called *mutual* and *independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2d. There are covenants which are *conditions dependent* on each other, in which the performance of one depends on the prior performance of the other, and therefore, till this prior condition be performed, the other party is not liable to an action on his covenant. 3d. There is also a third sort of covenants, which are *mutual conditions* to be performed at *the same time*, and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act.

Much difficulty arises at times in the construction of covenants, and in ascertaining whether they are dependant or independent; but the same rules must be adopted as in the construction of other instruments of writing. The

intention of the parties is to govern, and that intention must be collected from the whole instrument taken together. The order of time in which the several acts are to be performed, however much they may be transposed in the deed, will shew the intent of the transaction. If, upon the whole, it shall appear to have been the intention of the parties, to trust each to the personal security of the other, the covenants must be considered as independent. So when the covenants in a deed are established, in one particular instance, to be independent, it seems to be settled that they must be so considered throughout, although in the deed there may be mutual acts to be performed at the same time; or although the plaintiff had covenanted to do certain acts on his part, in the intermediate time, between the performance of the different acts to be done by the defendant. (2 *John.* 273, 387. 5 *John.* 78. 2 *H. Bl.* 389.] So where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, it has been determined that they are to be regarded as independent. (7 *John.* 244, *and cases there cited.*)

In declaring in covenant, the declaration must be varied according to the nature of the instrument declared on. If the liability of the defendant depends upon the performance of a prior covenant or condition on the part of the plaintiff, performance or a tender of performance must be averred, or the declaration will be bad on demurrer. If the covenant contains *mutual conditions* to be performed at *the same time*, the plaintiff must aver that he was ready and offered to perform on his part, but it is not necessary that he should aver performance or an actual tender of performance. (1 *East.* 203. 3 *Bos. and Pull.* 457. 5 *John*, 179.)

There is, perhaps, more difficulty in determining to which class of covenants, the contract before the court belongs, than seems to be apprehended by counsel. The agreement was made on the 27th of March, 1818, at which time, merchandise, estimated at the value of *eleven thousand four hundred and eighteen dollars and thirty-two cents*, was paid by the plaintiffs, Courcier and Ravises, to the defendant, Graham, and paid as expressed in the contract, on account of the purchase of the land. They covenanted to deliver the aforesaid amount of merchandise, forthwith, and the evidence proves that it was forthwith delivered. In addition to this, they covenanted that they would, "from time to time, when thereunto required, within one year from the date hereof, deliver to him the said Thomas Graham, or to his agent, or order, any further quantity of merchandise, as he, the said Thomas Graham, or his agent, or order may select, at a fair market price, to the amount of dollars, further on account of the aforesaid tract of land."

The defendant, Graham, agreed on his part, that, if he approved of the price at which the land should be valued, he would, at the end of one year from the date of the agreement, convey, by good and sufficient deed of conveyance, &c., the same land to the plaintiffs, they securing to be delivered, on demand, to the said Graham, or his order, &c., goods suitable to the Cincinnati market, &c. But if Graham did not approve of the price at which the land should be valued, then, at the end of one year from the date of the agreement, he was to secure the payment for the goods which had then been received, and which should thereafter be received, &c. in four annual payments, with interest after one year. By the terms of this contract, the land was to be

conveyed, and the purchase money secured at the same time, and had these been the only acts covenanted to be performed, the covenant would have been clearly within the description of those containing *mutual conditions* to be performed at *the same time*, and neither party could have sustained an action against the other without shewing a readiness and offer to perform. The plaintiffs covenanted to deliver goods of the value of eleven thousand dollars and more, forthwith. Had they refused to deliver these goods, might not the defendant have had his action against them for the breach of this covenant, and that too without waiting until the end of the year? They further covenanted to deliver other merchandise in addition, within the year; and had this merchandise been selected and demanded, what could have prevented the defendant from maintaining an action against the plaintiffs for a breach of this covenant, provided they had refused to deliver the merchandise thus selected and demanded. Graham on his part was bound to do nothing until the end of the year, except to agree in the appointment of three persons to value the land. He was neither bound to convey, nor to secure payment for the goods. Now if to this case we apply the principles which were settled in the case cited from the 2 *and* 5 *Johnson*, it would appear to me to be at least doubtful whether these must not be considered as independent covenants.

Again—let us compare the covenants in this case with those in the case of *Bennet v. the executors of Pixley*, (7 *John.* 249.) In that case the declaration stated, that the testator on the 22d of February, 1802, by his writing obligatory, sealed, &c., promised and agreed with plaintiff in consideration of 400 dollars to him paid, to convey to the plaintiff, on or before the 1st day of December then next, one certain lot of land, lying, &c., and if the said lot of land should be appraised over the sum of 400 dollars, &c., same was to be made up to the testator, and if it was appraised under 400 dollars, the sum which it fell short was to be deducted out of certain notes, &c. In the case before the court, Courcier and Ravises, covenanted forthwith to deliver goods estimated to be worth more than 11,000 dollars, which goods were actually delivered at the time of making the contract; within six months after that time the land was to be valued, at the end of the year it was to be conveyed: if the valuation exceeded the amount of goods received, the plaintiffs were to secure the difference, to be paid in goods on demand; but if the valuation fell short of the amount of goods received, then payment was to be secured by the defendant.

There appears to be a great degree of similarity in the features of the two cases. In one 400 dollars was paid in land, in the other more than 11,000 dollars was to be paid, and actually was paid upon the execution of the contract. In both, the land was to be valued and conveyed at a subsequent period, and in both, if the valuation exceeded the amount already paid, the vendee was to make up the difference, in the one case by payment, in the other by securing payment, and if the valuation fell short of the amount already paid, then the difference to be accounted for by the vendor. It may be said, that in the case cited there was no agreement that the amount beyond the 400 dollars should be paid at the time the conveyance should be executed. But what say the court? "Assuming that there was a covenant on the part of the plaintiff, to pay for the amount of the appraisement beyond 400 dollars, yet it only went to a *part* of the consideration, and the rule is settled that where

mutual covenants go only to a *part* of the consideration, and a breach of that part may be paid for in damages, the defendant shall not set it up as a condition precedent. The covenants in such case are to be considered as independent." "The damages sustained would be very unequal if the covenant of the plaintiff was held to be a condition precedent. He in the meantime loses his 400 dollars, and the testator might not lose any thing. The plaintiff had in part (at least) executed the bargain by paying the 400 dollars, and the testator ought not to keep that sum without conveying the land, because, that *possibly* there may be a surplus to receive, and he may sustain some damage by the plaintiff not tendering that surplus. This would be unjust. He is bound to convey, and he may then resort to his action, if a surplus should be found to exist upon the appraisement."

The principle decided, and the reasoning adopted, apply strongly to the case under consideration.

The mutual covenants go only to a part of the consideration. More than 11,000 was actually paid, and additional payments were to be made or secured, provided the land should be valued at an amount grater than what was then paid. In this case it may be said that the damages would be unequal if the covenant of the plaintiff was held to be a condition precedent. He would lose his 11,000 dollars, and Graham *might* not lose any thing. In this case the plaintiff has in part (*at least*) executed the bargain by the payment which he has made, and in this case had Graham at the end of the year conveyed the land, and had the plaintiffs refused to secure the payment of the surplus, he might have had his action to receive that surplus.

If the cases cited are law, (and the principles by them decided appear to be consistent with reason, justice, and common sense,) I should be led to the conclusion that the covenants in the case before the court must be regarded as independent. But as the decision of the court upon the motion for a non-suit is not founded upon this idea, it is unnecessary to give a definite opinion upon the point. The defendant contends that the covenants are dependant, or, at least, that they contain *mutual conditions* to be performed *at the same time*. The plaintiffs in their declaration have thus treated them, and have alleged performance on their part, or a readiness and offer to perform. Upon the trial, these averments in the declaration were not proven, and if by the pleadings they were properly put in issue, the motion for a non-suit should have prevailed.

Whatever is admitted in pleading, need not be proved, and whatever is not denied may be considered as admitted. In covenant greater strictness is required in pleading than in most other actions. If the defendant relies upon matter of excuse for the non performance of his covenant, he must plead it specially. If he would excuse himself on the ground that the plaintiff hath not performed a condition precedent, this must be pleaded specially. 1 *Chitty's pleading*, 483.) This form of pleading is adopted in the books, and I find no case where the plaintiff, for the purpose of supporting his action *merely*, has been compelled to prove the performance of a precedent condition, unless the fact of performance was in some shape denied by the plea. If the defendant relies upon his own performance, it must be specially pleaded; and under this plea I presume it will not be contended that the plaintiff would be bound to prove the performance of a precedent condition. The performance of the

defendant, and not of the plaintiff, is the thing in issue; and for the purpose of trying that issue, the performance of the plaintiff is admitted.

In the present case the plea is *non est factum*. What is put in issue by this plea? Counsel for defendant say, that this is a general issue plea, and that a plea of the general issue puts the plaintiff upon proof of all the material averments in his declaration. This, as a general rule, is undoubtedly correct. But in some actions, it is said in the books, there is no general issue. And in some actions the general issue plea is not considered as a denial of all the allegations of the declaration. In replevin, for instance, the plea of *non cepit* puts in issue nothing but the taking of the property. Under that plea the plaintiff is not bound to prove any interest in the property taken. Yet this is a general issue plea; and what is denied in an action of debt or covenant by the plea of *non est factum*, except the sealing and delivery of the deed, upon which the action is founded. Chitty, in his treatise on pleading, (*vol.* 1. *page* 116.) says, that this plea puts nothing in issue but the sealing of the deed; and Esp. in his Digest, (*page* 306) that the issue is only upon the existence or goodness of the deed. For this dictum he cites 2 *Black. Rep.* 1152. The doctrine laid down by Chitty and Espinasse is supported by this and other adjudged cases. *Muscett v. Ballet*, (2 *Cro.* 369.) *Bishop v. Brooke*, (*Com. Rep.* 303.) *Gardner v. Gardner*, (10 *John* 47.) are full in point, so that the counsel for the defendant must be mistaken in supposing that this plea is a denial of all the material averments in a declaration, for most declarations in covenant contain other averments than the single allegation of the sealing and delivery of the deed. But are not these opinions and decisions consistent with reason and common sense. One principal object of pleading is that the parties may have notice of the grounds of complaint and defence upon which they severally rely. The plaintiff in his declaration alleges among other things, that the deed declared on is the deed of the defendant. To this declaration the defendant pleads *non est factum*, in other words, he denies the existence or goodness of the deed. By this plea he apprizes the plaintiffs that he shall contest the validity of the deed in some way, but does he apprize him of any other defence? Under this plea the defendant may show that the deed was void at common law *ab initio* that it was delivered as an escrow, or that it became void after it was made, and before the commencement of the suit, by erasure, interlineation, alteration, &c. Evidence of this description the plaintiff must expect to meet. But would proof that the plaintiff had not performed a precedent condition in the same deed by him to be performed, be evidence that the deed was not the deed of the defendant; or would it destroy its validity? Evidence of this description under a proper state of pleading, might and would destroy the plaintiff's right of action, but would not prove that the deed was void. This idea, with respect to the operation and effect of the plea of *non est factum*, seems to have been generally entertained by pleaders, and therefore, in many instances, we find this plea connected in the same case with a special plea that a plaintiff has not performed a condition precedent. If a plea of *non est factum* puts such performance in issue, such practice would not have been introduced. And it is because the operation of this plea is thus limited, and because there is no one plea that puts in issue every material allegation in a declaration in covenant, that some writers on the

subject of pleading, have said that in this action there is, properly speaking, no plea of the general issue.

In the case under consideration, the defendant having pleaded as before stated, the cause was submitted to the jury. The plaintiffs introduced in evidence the deed, the validity of which was not questioned. He introduced further evidence to prove the amount of damage sustained. The testimony was competent, and having it before them, the jury could not have found that the deed was not the deed of the defendant, but must of necessity return a verdict for the plaintiffs upon the issue joined; and the court could not with propriety have directed a non-suit.

Having disposed of the question upon the point reserved, I will now proceed to consider the motion for a new trial.

On the trial of the cause, the counsel for defendant insisted, that by a just construction of the contract, Cincinnati was the place where the same should have been performed. And as plaintiffs had neither averred in their declaration, nor shewn in proof that they were ready either by themselves or agents at Cincinnati, to perform or accept a performance from the defendant, therefore they were not entitled to recover, or if entiled to recover, could only recover nominal damages. The court however were of opinion, and so instructed the jury, that the plaintiffs, under the pleadings, were entitled to recover the full amount of damages sustained. It is said, that in this opinion the court were mistaken. As to the right, of recovery, sufficient has already been said. If the declaration was defective, this should have been taken advantage of by the demurrer, or (if the defect was not cured by verdict) by motion in arrest of judgment. By craving oyer, the deed itself might have been made a part of the record. The defendant having relied upon the plea of *non est factum*, and the issue being found against him, no sufficient reason can be assigned why the plaintiff should not recover the damages proven to have been sustained. These damages were the value of the merchandise delivered, estimated at *eleven thousand four hundred eighteen dollars thirty two cents.* This amount was sought to be recovered, together with the interest, and to this they had a right.

An attempt has been made to assimilate this case to a case standing on default. The reason assigned for this similarity is, that the plea was not sworn to according to the statute. But in this case, as well as every other where a plea is filed, there was an issue to be tried. That issue must be found either for plaintiffs or defendant. In a case standing on default, the jury have nothing to do but to assess the damages.

That the defendant did not rely for his principal defence upon the plea filed, we may well conclude, from the circumstance that several notices are attached to, and connected with the plea. The principal object of pleading *non est factum* seems to have been to lay the foundation for giving notice, and to save the trouble of special pleading with technical precision. These notices are, in substance, that the defendant will on trial prove performance, tender of performance, readiness and offer to perform, &c. and also, that the plaintiffs refused on demand to deliver goods and merchandise which had been selected, and that the merchandise delivered was of less value than *eleven thousand four hundred eighteen dollars and theirty-two cents.* In support of the notice con-

nected with his plea, the defendant gave in evidence the facts particularly set forth in the motion, and the court instructed the jury as therein stated. Was there any thing incorrect in this opinion, or any mistake as to matter of law?

The first position of the court was, that no continuance of *possession* for any time less than where the statute of limitations would operate to bar a recovery in ejectment, was sufficient to warrant the presumption of a deed. The authorities cited by counsel shew that continuance of *possession* for a less period of time, accompanied by *other circumstances*, might be sufficient to warrant this presumption. In *Bealy v. Shaw and others*, (6 *East*, 215.) Lord Ellenborough says, "I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament. But less than twenty years enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right." From this I infer, that *possession alone* would not be sufficient to warrant the presumption, unless continued for twenty years; and, if so, the court were correct. The *possession* under Dayton had continued for more than twenty years, and this possession was accompanied by circumstances which would justify the jury in presuming, and they probably did presume, a title in that individual. But suppose the expression used by the court upon this point was not sufficiently guarded, or even that there was a mistake as to the law, could this circumstance have made any difference in the final decision of the case? If it would not, to grant the motion for a new trial would be worse than useless.

The next position assumed by the court was, that if the title was found to have been in Dayton, then no title would be sufficient to satisfy the terms of the contract, except a complete connected paper title from Dayton to the defendant Graham. By the terms of the contract, Graham covenants that he will "by a good and sufficient deed of conveyance and assurance in the law, well and sufficiently, grant, convey, and assure the aforesaid tract of land, with the appurtenances, unto the said Andrew Courcier and Frederick Ravises, their heirs and assigns, in fee simple, clear of all incumbrance, the title to the same to be indisputable."

The evidence adduced and admitted by the court, shewed a paper title from Dayton to Riddle, and from Vanhorne to the defendant. What was there to prove title in Vanhorne? Possession, and nothing but possession, unless it be the fact, that he was put in possession by Riddle. This fact hardly conduces to prove title. Graham then could trace his title back no further than to Vanhorne, whose only evidence of title consisted in a possession commenced in 1808, and which at the time of the tender had continued in himself and those claiming under him, for about eleven years. Under these circumstances, had Graham conveyed the land to the plaintiffs, and had they accepted the conveyance, would it have vested in them a "title to the same indisputable?" Most clearly it would not. Here was an important link wanting in the chain of title. From the evidence before the jury, the fee was vested in Riddle. And had Riddle commenced his action of ejectment against Graham, the latter would have been without defence. Will it be said that Riddle would have been estopped by his deed attested by one witness? It must be recollected that this deed was not in evidence. It had been excluded by the court, and there was nothing

submitted to the jury to prove that the title had ever passed from Riddle. In this situation of the case, I can have no doubt that the court were correct in instructing the jury that there must be a complete connected paper title from Dayton to Graham, to satisfy the terms of the contract.

The deed from Riddle to Vanhorne was properly excluded. By the first section of the act providing for the execution and acknowledgment of deeds, passed February 14, 1805, it is provided that all deeds for the conveyance of lands, &c. "shall be signed and sealed by the grantor, in the presence of two witnesses, who shall subscribe the said deed of conveyance, attesting the acknowledgment of the signing and sealing thereof," &c. This law was in force at the time the deed from Riddle purports to have been executed. This deed was defective, inasmuch as it was attested but by one witness. The law was not complied with. It could convey at most only an equitable interest. The plaintiffs were to receive a legal estate, free from incumbrance, the title to which should be indisputable. This deed did not convey such an estate; of course it could not be received in evidence.

On the subject of damages, the jury were instructed that the price fixed upon the merchandise in the covenant, must be the governing principle, and that it was not competent for the defendant to contest the justness of the price. In this opinion it is insisted that the court mistook the law, and the case of *Basten v. Butter* (7 *East* 479) is relied on as an authority to shew this mistake. In that case the plaintiff declared as upon a *quantum meruit*, for work and labor done, and materials found. There had been no previous contract as to the price to be given, and the claim rested solely upon the worth or value of the work. The court decided that it would be proper to permit the defendant to prove that the work was less valuable than claimed to be by the plaintiff; and they go so far as to intimate, that when there has been a particular price agreed upon, for which work and labor shall be done, the defendant having given notice, may shew that the materials are bad, and the work defectively done. But in cases of this description, the decisions have been variant, although the rule appears to be finally settled as stated by Lord Ellenborough in *Farnsworth v. Garrard*, (1 *Campbell* 28.) "That if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for the negligence. The claim shall be co-extensive with the benefit."

The case of *Basten v. Butter* would in some degree compare with the case before the court, were this a *quantum valebant;* and had there been no previous agreement as to the price of the goods. In this case, however, the goods were estimated at a specific price. This price was agreed upon by the parties. The defendant agrees to pay this price at a future period in land, if he is satisfied with the valuation. The valuation is made, and he assents to it; but he fails to make the conveyance, and thus remains debtor for the goods. No fraud was practised, none was pretended. He agreed to the price of the goods with a full knowledge of their character; and it is not competent for him now to say that they were of less value. There must be judgment on the verdict.

Judges PEASE and SHERMAN concurred.

Judge BURNET, having been counsel with Graham, did not sit in this cause

FITCH v. SARGEANT.

The plaintiff may recover upon the general counts in assumpsit, where a special contract has been put an end to by the act of the parties.

This was an action of assumpsit. The first count in the declaration stated in substance, that, in consideration that the plaintiff, at the request of the defendant, had before that time leased and let to the defendant a certain house and lots of ground in the town of Pike, for the term of one year, together with the ferry and boat near said town, the defendant promised to take proper care of the premises, to attend the ferry, and pay the plaintiff as rent therefor a large sum of money; to wit: the sum of two hundred twenty-five dollars.

The second count, after stating the contract the same as in the first, alleged a promise to pay the plaintiff for the enjoyment of the premises, so much as he reasonably deserved to have, &c. The declaration also contained general counts. The breach alleged was injuring the premises, and non-payment of rent. The defendant pleaded the general issue, with a notice of special matter.

The contract as proved by the plaintiff's witnesses was, that Fitch rented to Sargeant the house, lots and ferry, for one year, at 200 dollars. That the defendant said if he made enough to enable him to pay more rent he would do it; but 200 dollars was the rent agreed upon. The plaintiff also proved that the property had been abandoned by the defendant before the expiration of the year, and had received some injury.

The defendant proved that after he took possession of the premises and ferry, the lessor's right to the ferry was decreed by the court of common pleas to another person, and the lessee was entirely deprived of the use of the ferry. Upon which the defendant sent the plaintiff notice, that as he had lost the ferry, he could not remain in the house and pay the rent, but should leave it. The plaintiff directed a third person to take charge of the house if the defendant should abandon it. The defendant soon after left the premises, and they were taken charge of by the person spoken to by the plaintiff.

The defendant moved the court to direct a non-suit, upon the ground of variance between the contract laid in the declaration, and that proved. But the court directed the cause to proceed, and the jury found a verdict for the plaintiff, for an equitable proportion of the rent, taking into consideration all the circumstances.

The cause was tried in Pike county, before judges Hitchcock and Burnet. The defendant moved for a new trial, upon the ground of misdirection in refusing to direct a non-suit, and the motion was adjourned here for decision.

Creighton and *Bond* in support of the motion.

Douglas, contra.

By the COURT.

A majority of the judges are of opinion, that the special contract was put an

end to by the concurrent act of the parties. The defendant sends word to the plaintiff that he can no longer retain the possession of the premises, but intends to abandon them. The plaintiff directs a person, in the event of such abandonment, to take charge of them. After this, the defendant leaves the house and lots, and the possession is resumed by the plaintiff. The special contract is thus given up—and the right of the plaintiff to recover rent for the time the defendant enjoyed the premises, must be decided by the same rules as if the possession had been originally taken upon an understanding that the defendant should pay what was reasonable. The verdict of the jury is founded upon this view of the subject. Substantial justice has been done between the parties, and a new trial ought not to be granted.

Judge BURNET's *dissenting opinion.*

I dissent from the opinion of the court, given in this case, from a conviction that the variance between the contract proved, and that set out in the declaration, is material and fatal. The sum laid in the declaration as the consideration of the lease, is 225 dollars. The sum proved by the witnesses is 200 dollars certain, and more if the defendant could afford it.

I do not perceive any resemblance between this case and those cited by the plaintiff. This contract has not been performed by either party. Fitch did not secure to Sargeant the use of the ferry for the term stipulated, in consequence of which Sargeant left the premises before the term expired, under a belief that he had a right to do so. The contract is open, and the question between the parties seems to depend on its legal import, and the effects of their acts under it. The plaintiff contends, that he has a right to recover the full amount of rent stipulated to be paid for the term, and also damages for breach of the engagement to keep the premises and boat in repair, and to deliver them in good order. The defendant contends, that in consequence of the loss of the ferry, he was not bound to perform on his part, and that he is not answerable for rent or damage.

I do not see how these questions can be settled on the general counts, or how such questions could exist, if the contract had been either abandoned or performed. If the plaintiff had proved the contract precisely as he has stated it, the subject of controversy would have been the loss of the ferry, and the damage done to the property, and whether the former exonerated the defendant from the payment of the whole, or a part of the rent, and whether the latter entitled the plaintiff to damages, and if so, to what extent. These questions arise out of the contract, and must be determined by a reference to it. Their existence shews, that the contract is open and disputed, and the variance between the contract charged, and that proved at the trial, shews also that the terms of the contract are disputed.

I know of no exception to the general rule, that a contract open and disputed, must be declared on specially. As Fitch was bound to secure to the tenant the use of the ferry for the whole term, when he failed to do so, he broke the contract. The defendant has also failed to perform it, by losing the boat, injuring the property, and withholding the rent, or a part of it; consequently neither party has performed. The removal of Sargeant from the house before the expiration of the term, was no abandonment of the contract; it was neither more nor less than a declaration, that having lost the ferry he was not bound to per-

form; the correctness or incorrectness of which depends on the terms of the contract. This fact does not assimilate the case to that class of cases in which the plaintiff abandons and sues to recover back his deposit, nor to the cases in which the plaintiff having fully performed, resorts to his general counts.

BUCK v. WADDLE. ET AL.

It is well settled, that where money is paid upon a parol contract for the sale of land, and the vendor refuses or neglects to execute the contract, the money paid may be recovered back;

Where justice is done by a verdict, a new trial will not be granted on technical grounds.

This was an action of assumpsit. The declaration contained the common money counts, in support of which the plaintiff offered the deposition of Joseph Ronck, which stated in substance, that deponent had sold to defendants eight lots of ground, for which they owed him 1200 dollars; that the defendants were to pay the money secured by a mortgage on the premises, previously given by deponent to John T. Barr, for about 800 dollars. That after that contract, and before the execution of the deed, the defendants told deponent that they had sold one of the lots to Samuel Buck, the plaintiff, for 125 dollars, and that Buck was to pay the money to the deponent for the defendants' use; that he had understood from both parties, that the defendants were to cancel and lift, the mortgage, so that it should have no lien on the lot sold to Buck; that the defendants directed him to make a deed for the lot to Buck, which he did on Buck's securing the 125 dollars; that on a settlement with the defendants he gave them a credit for the 125 dollars; that he had no interest in the event of the cause, for Waddle, McGarraugh and Buck knew the situation of the case as well as he did, and Buck gave him a general release on the 15th July last and had since given him a special release. The deed to Buck was a general warrantee deed. The releases referred to in the deposition were produced. By the first, "Buck releases to Ronck, his heirs, &c. all demand in law or equity against him by reason of any act of him, said Ronck, to this day." The second releases "all right of action against him on account of any real estate by him deeded to me, and allow him to convey the same to any one else." The deposition was objected to, but the court being divided on the question, it went to the jury. The plaintiff then proved the mortgage from Ronck to Barr, and produced the record of a judgment by *scire facias* on the mortgage, in favor of Barr against Ronck, and an execution on the judgment, by which it appeared the lot had been sold by the sheriff, and purchased by the defendant, Waddle. A witness was then called, who proved, that after the above transactions, a blacksmith wished to rent the lot; that the defendant, Waddle, said Buck had no right to rent the lot till he paid the expense of the sheriff's deed; that he could have the lot if he would pay that expense. He thought Waddle also said, that he himself had no right to rent it.

The second witness testified, that Buck lived on the lot at least one year; that he afterwards rented it to a person of the name of Legore; that the witness himself had rented it of Buck for ten months, for which he paid him 20 dollars; that he was still occupying the lot, but under no particular person; that no one molested him.

The third, and last witness, testified to the possession of Buck, and that Wilson had rented from him.

No testimony was offered to shew the plaintiff had divested himself of the title derived from Ronck, or that he had given notice of his intention to abandon the contract, other than by the commencement of the suit.

On this evidence the case went to the jury, who found for the plaintiff.

The defendants moved to set aside the verdict, and grant a new trial. 1. Because the deposition of Ronck was improperly admitted. 2. Because the testimony presented a case which did not entitle the plaintiff to a recovery in this form of action. The court were divided, and the decision reserved, &c.

King, in support of the motion. *Leonard*, contrà.

By the COURT.

We are all agreed that there is nothing in the first ground assigned for a new trial. It is well settled in New York and in Kentucky, that where money is paid upon a parol contract for the sale of land, and the vendor refuses or neglects to execute the contract, the money paid may be recovered back, and this stands upon too plain a principle of justice to be disputed.

Upon the second ground assigned, a majority of the court is of opinion that a new trial ought not to be granted. The defendants contracted to remove the lien of the motgage from the lot they sold. They did not do so. On the contrary, they possessed themselves of the paramount title derived under the lien they agreed to extinguish, and refused to conform it to the plaintiff unless he would make a new purchase. For the principle upon which they could demand a dollar for making a new deed, is none other than that having it in their power, they would insist upon a new bargain. Whether this amounted to an abandonment of the first contract was left to the jury, who have found in the affirmative. It is not pretended but that upon a special count, rightly framed upon the contract, the plaintiff ought to have recovered. Substantial justice has therefore been done, and where that is the case, a new trial ought not to be granted.

Judge BURNET'S *dissenting opinion.*

In stating the reasons that have induced me to dissent from the opinion expressed by the court in this case, I shall confine myself to the second reason filed for a new trial viz: that the testimony does not support an action for money had and received. The case appears to be this. Ronck being the owner of certain lots in the town of Washington, mortgaged them to Barr, and afterward sold them to the defendants, who agreed to satisfy the mortgage. The defendants afterwards sold one of the lots to the plaintiff for 125 dollars, who, by the agreement, was to pay the purchase money to Ronck, and receive from him a deed, the defendants promising to discharge the mortgage. The plaintiff paid the purchase money, and received his deed, according to contract. The defendants did not satisfy the mortgage, as they were bound to do, in consequence of which the lot was sold on a judgment obtained on the mortgage, and purchased in by one of the defendants for the benefit

of the plaintiff, who was required to pay the expense of drawing the deed. The plaintiff took possession of the lot, at the time of the contract—lived on it himself, and rented it to different persons. He still holds the deed; he has not restored the possession to the defendants, or offered to do so; nor has he given notice that he considered the contract at an end. On this state of the case, the question to be decided is, whether he can now recover from the defendants the money paid to Ronck in an action for money had and received. It is well settled, that an action of assumpsit may be sustained on a sale, either for the price of the thing sold, or to recover back the purchase money, when there is a defect in the article sold, or a fraud in the vendor. It is also settled, that in every sale the vendor is supposed to have a good title, and if it turns out that his title is defective, the vendee may waive the contract, and recover back the money paid; and it is admitted that this principle applies to contracts for the sale of real estate, as well as of goods and chattels. (5 *Bur.* 2639. 2 *Blac. Rep.* 1078.) In the case before us, it appears that the lot sold to the plaintiff was incumbered by a mortgage, of which he had notice, and in consequence of which it was afterwards sold by the sheriff. The plaintiff therefore had a right to waive the bargain, and recover back the purchase money, unless his title had been otherwise secured. Without stopping to inquire whether the offer of a deed from the sheriff, on condition of paying the sum of one dollar, under the circumstances of this case, was not such a security of title as would bar him from the right of abandoning the contract, I will proceed to the enquiry, whether he has in fact waived the bargain, so as to entitle himself to this action, or whether, as the case stands, he was not turned over to his special action on the contract. In cases where the article sold has not been delivered, if there be a defect in the thing itself, or a fraud in the vendor, the vendee, by giving notice that he declines the bargain, may recover back his money in this form of action. But if possession has been given, the action for money had and received cannot be maintained till the thing purchased has been restored; for till that be done, the contract is not at an end; it remains open, and the proper remedy is an action founded on the contract. Until the contract be terminated its stipulations are matters that may be controverted. A contract may contain a warranty, or, as in this case, a promise to remove an incumbrance, and while the contract remains open, these stipulations may be disputed, but they cannot be tried in this form of action. The plaintiff must resort to the contract. In the case of *Towers vs. Barret*, (1 *Term Rep.* 133.) this action was sustained, but it was on the ground that the property purchased had been returned, and the contract thereby terminated; and it was admitted in that case, that while the contract continued open, the plaintiff could only recover damages, and that for that purpose he must state the special contract, and the breach of it. It was also said by justice Buller, in that case, that if the plaintiff intended to recover back his money, he must rescind the contract, by returning the property in a reasonable time, otherwise he will be put to his action for damages on the special contract. *Weston vs. Downes* (*Doug.* 23) was an action for money had and received. The plaintiff was nonsuited by Lord Mansfield, on the ground that there was a special contract, and that the defendant ought to have had notice, by the declaration, that he was sued on that contract. Buller Justice observed, that the action would not lie, because the defendant had not precluded himself from entering into the contract by taking

back the horses, and that when the contract is open it must be stated specially.

In *Power v. Wells*, cited in the last case, the defendant had warranted a horse sound, which proved to be unsound. The plaintiff having tendered a return of the horse which was refused, brought an action for money had and received, to recover back twenty guineas paid on the contract, and it was held by the court, that the action would not lie. The distinction seems to be clearly settled that when the contract has been disaffirmed, and the property restored, assumpsit will lie, to recover back the money paid, but where the contract is open, or the property remains in the hands of the vendee, the action must be on the contract itself. In this case there is nothing in the evidence from which an inference can be drawn, that the contract was terminated. On the contrary it appears to be open, and subject to litigation. The plaintiff accepted, and still holds a general warranty deed for the lot, which is an affirmance of the contract. He was put into possession, has occupied and rented it, and the person now in possession is his tenant, holding over. The evidence of the first witness is nothing more than the expression of an opinion, by one of the defendants, that the plaintiff was liable to pay the expense of the sheriff's deed, and that he had no right to rent the lot, till he had done so, or in other words, that the plaintiff was bound, by the bargain, to do something more than he had done. This language so far from conveying an idea, that the contract was at an end, could only have proceeded from a conviction that it was open and disputed.—The import of it seems to be, that Waddle, having purchased in the lot, to quiet the title, the plaintiff ought to pay the expense of the deed, as by the contract, the deed was to be made by Ronck, without expense to the defendants. If Waddle had believed that the contract was at an end, his language must have been very different. But whether this opinion of Waddle was correct, or not, does not alter the case. The inference to be drawn from it is still the same, that the contract was open, and disputed. If it be admitted that the release to Ronck, has discharged the action of covenant, so as to make him a competent witness, it does not divest the plaintiff of his claim of title, nor of his possession. He may still consider Waddle, as his trustee, and by a decree in chancery, require him to convey the right, derived from the Sheriff. The existence of such a remedy, is a complete negative to the pretence, that the contract is closed. The general rule on this subject is, that if there be a special contract, it must be declared on. The safety of the defendant requires that he should be informed of the real ground of action. Should this rule be dispensed with, he may be surprised at the trial, and subjected to a judgment, that might have been avoided, had he known in time the nature of the plaintiff's, claim. He may also be exposed to the danger of a second recovery, for the same cause. In *Wear v. Burrough's* 1 *Stra.* 648, the plaintiff declared on a special contract, and also on an indebitatus assumpsit. At the trial he proved a special agreement but variant from the one declared on, and the Chief Justice would not permit him to have recourse to his general counts. The same principle will be found in 1 *Lord Ray.* 735. 1 *Term* 447. 4 *Term* 314. The plaintiff in this case, having omitted a special count altogether, cannot be in a better situation, than if he had stated a special contract, and proved one different, in substance,

from that which he had set out. The omission is as fatal as the variance and on the same principle.

See note A. at the end of the volume.

AYRES v. HARNESS.

A valid Bond cannot be made by writing it over a signature and seal, made upon a blank sheet of paper.

This was an action of debt brought upon a sealed bill, and the case made by the pleadings and submitted for the decision of the court was as follows:

The defendant, Harness, being indebted to the plaintiff a sum of money, the exact amount of which was not ascertained, made his seal and wrote his name in connection with it, upon a blank sheet of paper, and authorized the plaintiff to write over it a note for the sum found to be due, and the subscribing witness attested this sealing and subscribing. The paper thus signed and sealed was delivered to to the plaintiff an entire blank, who wrote over it, the note upon which the suit was brought, for the sum due, according to his agreement, which it appeared was parol.

The cause was originated in Ross county, and was adjourned here for decision from the Supreme Court sitting in that county.

Hammond, Bond and *Creighton*, for the plaintiff.

Leonard, Brush and *Fitzgerald*, contra.

By the COURT.

The ancient law was well settled that a valid deed, could not be made by writing it over a signature and seal, made upon a blank or an empty sheet of paper. We know of no decision by which this ancient doctrine is overruled. The cases cited by the plaintiff's counsel, are of promissory notes not under seal, and of deeds where all the material parts were written at the time of making the signature and seal. They are not analagous. An authority to fill one particular blank falls far short of an authority, to make an entire deed. While the distinction between contracts under seal, and parol contracts is preserved by our Legislature, and by our courts, the different modes of executing them must also be preserved. We are accordingly of opinion that the writing in this case cannot be operative, and that the judgment must be for the defendant.

TURNER v. CREBILL, ET AL.

A final decree is no notice to a subsequent purchaser. A decree, that the respondents, by a certain day, should assign a certificate of certain lands to the complainant, provided that the decree should not be operative, if the complainant did not pay the respondents a certain sum of money by a given day, and provided that before that day, the respondents should assign or tender an assignment of the certificate, is a final decree.

The facts of this case were as follows. Before the first Tuesday of August, 1807, the complainant prosecuted a bill in chancery, in the Common Pleas of Hamilton county, against one A. King, and M. Williams, to obtain the assign-

ment of a certificate for the tract of land now held by the defendants. At the August term, 1807, a decree was pronounced by the common pleas, from which an appeal was taken to the Supreme Court.

On the 22d day of September, 1808, the Supreme Court decreed that King and Williams should assign the certificate to Turner: but the decree not to be operative if the complainant did not pay to King a certain sum of money by the first day of June, 1809, provided King and Williams should at any time before that day, assign, or tender an assignment of the certificate.

King and Williams did not tender an assignment of the certificate, nor did Turner pay the money by the first day of June, 1809. Sequestration was ordered to enforce the decree which was not executed.

Williams carried the certificate into Grant, and conveyed the land, part in 1810, and part in 1813, to the present defendants, who had no notice of the decree in Hamilton county, or of the complainant's claim.

On the 1st day of June, 1814, Turner paid the money into the clerk's office of the Supreme Court in Hamilton county, and upon motion obtained a writ of possession for the land. This writ was superseded. Turner then prosecuted a bill against the defendants, to enforce against them the decree in Hamilton county, charging that they were *lite pendente* purchasers, and otherways had notice. The defendants denied notice in their answers, and the complainant's bill was dismissed by the Supreme Court in Champaign county. Upon this decree of dismissal the present bill of review was prosecuted in the Supreme Court of Champaign county, and adjourned for decision to this court.

Cooly, for complainant. *Bacon*, contra.

By the COURT.

We cannot doubt but that the decree made in Hamilton county in September, 1808, was a final decree between the parties to it.

The subsequent orders where such as are usually made to give effect to at final decree, and cannot lead to a conclusion that any of the original matters liti gated in the suit, were still open to be decided.

It is well settled that a final decre is not notice to a purchaser. It is not pretended that the purchaser had actual notice.

The bill of review must be dismissed.

BOTKIN ET AL. v. THE COMMISSIONERS OF PICKAWAY COUNTY.

The court of common pleas have no authority to amend a final judgment at a term subsequent to that in which it is rendered, except in mere matter of form.

This case came before the court upon a writ of certiorari to bring up certain proceedings before the common pleas of Pickaway county. An action of debt was brought in the name of the commissioners against Botkins, Kellar, and Mc Neal, securities in a sheriff's bond. At April term, 1820, judgment was rendered for the plaintiff. Instead of directing execution to issue for the sum due, the judgment was worded to be discharged by the payment of so much money.

At the July term, 1824, notice was given to the defendants that a motion would be made to amend the judgment; upon this motion the court of common pleas directed the judgment of April term, 1820, to be amended, by striking out the words *"to be discharged by the payment of,"* and inserting in their place, *"and that execution issue thereon for."* To reverse this order of amendment, the certiorari was sued out, and, the decision adjourned to this court by the Supreme court of Pickaway county.

By the COURT.

The order of the common pleas of Pickaway county must be reversed. The court of common pleas have no authority to amend a final judgment at a term subsequent to that in which it is rendered, except in mere matter of form. The alteration made in this judgment was in a material and substantial, and not a formal circumstance.

McDOUGAL ET AL. *v.* HOLMES ET AL.

(SEE NEXT CASE.)

The defendant Holmes, was president of the Granville Alexandrian Society, which had for some years issued bills, discounted notes, and transacted business as a bank. The complainants having become borrowers, gave their joint note to Holmes, who received it for account of the society. In October, 1817, judgment was rendered on this note, and upon this judgment several payments were made to the society. In May, 1820, the judgment was assigned for the balance due upon it to the other defendants, who refused to receive the paper of the bank in discharge of it. The bill was prosecuted to compel them to receive it, charging that the assignment was only in trust for the bank, and claiming that if it were not; still the assignees were bound to receive the paper in payment.

The answer denied that the assignment was a trust, and stated that the assignees were the real owners; and upon this state of the facts the cause was adjourned here from Licking county for decision.

Essing for complainants. *Goddard* contra.

For the opinion of the court, see *Pancoast v. Ruffin, et al.* post.

PANCOAST *v.* RUFFIN, ET AL.

Where a bank has *bona fide* parted with all interest in a debt due the bank, the debtor cannot pay the assignee in the paper of the bank.

This was a bill in chancery, in which the complainant charged, that on the 20th June, 1820, he gave his note to the bank of Cincinnati, payable in sixty days, upon which note a suit was brought by the bank, and a judgment recovered. That this judgment was afterwards assigned to the bank of the Uni-

ted States. That execution was sued out upon it, and placed in the hands of sheriff Ruffin to be executed.—That complainant offered and tendered to said sheriff the amount of the debt and interest in the notes of the bank of Cincinnati, which, at the request of the bank of the U. S. he refused to receive, and was about to proceed to levy the execution upon complainant's property, by the sale of which he would be greatly injured. It further stated, that the notes of the bank of Cincinnati were brought into court with the bill, and prayed an injunction, which was allowed.

To the bill the defendants demurred generally, and the decision upon the demurrer was adjourned from the Supreme court of Hamilton county, to this court.

Este, in support of the demurrer. *Hammond*, contra.

By the COURT.

This case, and that of *McDougal and others, v. Holmes and others*, depend upon the same principle; the just construction of the "act to regulate judicial proceedings where banks and bankers are parties," &c.

The first seven sections of the act are employed in making provisions to enable those who are creditors of banks or bankers to secure their claims. For this purpose such creditors are authorised to attach the debts due to the bank or banker in the hands of their debtors, and thus secure the credits of the institution for the liquidation of its debts.

The 8th section relates to proceedings between the banks and their debtors. Its first enactment gives to the banks or banker a more simple method of suing for its debts secured by endorsement; the proviso or latter clause of the section secures to the debtors of the bank or banker, *in certain cases*, the privilege of paying the debts they owe to a bank or banker in the bank paper issued by the institution with which the debt was contracted. This privilege extends only to a case where the suit is prosecuted against the debtor, in *any way for the use and benefit of the bank or banker.* It cannot consistently with the other parts of the statute be extended further; for if the construction contended for by the complainants were adopted, all the benefical effects of the previous sections would be defeated by the eighth. The creditor of the bank, after he had been at the trouble and expense of prosecuting his attachment, and obtaining judgment against the debtor to the bank, and when he hopes that he is about to receive the fruits of his trouble and expense, is paid off with the paper of the same bank, and finds himself, after all his pains and losses, just where he started.

Statutes should be so construed as to give effect to the intention of the legislature, and if possible, render every section and clause effectually operative. In this act the intention of the legislature is manifest: it is to aid both the creditors and debtors to banks.

It cannot be rationally supposed that it was intended to hold out encouragement to claimants to prosecute for their claims under the provisions of the act, and then mock them and disappoint their just expectations. Such trifling ought not, an dcannot be imputed to the legislature.

The terms in the eighth section to which the parties give a different and directly opposite construction are these, *"That in all suits or actions prosecuted*

by a bank or banker, or persons claiming as their assignees, or under them in any way for their use or benefit." The complainants insist that the disjunctive conjunction *or* separates the sentence so as to form three distinct classes of cases, in which the rights of paying in the paper of the bank is secured: so that an assignee is obliged to receive the paper although the bank has no interest in the debt assigned.

This construction is founded upon a mere grammatical criticism, which is never received to change or control the intention of the legislature, where that intention is otherwise clearly expressed. Something may depend upon the punctuation in the statute book, which may be incorrect, and ought never to vary the true sense. Leave out the comma after the word "*assignees*," and the plain construction is that the after words "*for their use or benefit*," apply to each preceeding clause of the sentence. This is believed to be the correct interpretation, either with, or without the comma, and perfectly consistent with the reason, the justice, and the spirit of the act. When, therefore, the debt has been *bona fide* assigned, and the bank has no interest left in it, the assignee is not bound to receive the notes of the bank in discharge of it.

Bill dismissed with costs.

JUDGE BURNET dissented.

INNES *v.* AGNEW.

The act concerning covenants real, does not extend to a deed containing a covenant of seizin as well as of warranty.

The declaration on the covenant of warranty must avee an eviction.

This was a writ of error to the court of common pleas of Muskingum county, in an action of covenant in which judgment had been rendered for the plaintiff, the now defendant in error.

The declaration set forth a deed for the conveyance of a lot of ground, containing covenants of seizin of general warranty, and against incumbrances. It assigned as breaches that the grantor was not seized. That he did not warrant and defend the premises against all claims, but that on the contrary the legal title, at the date of the deed, was in one Pierce. That the premises were encumbered with a mortgage, and that the mortgagee had prosecuted a *scire facias*, obtained a judgment and sued out execution, upon which the premises were sold.

To the first breach the defendant pleaded that he was seized in fee upon which issue was joined, and to the three last breaches he demurred.

The cause was submitted to the court both as to fact and law. They found the issue on the first plea in favor of the defendant, and on the other breaches gave judgment on the demurrers for the plaintiff and assessed his damages, and entered final judgment.

Upon the writ of error several errors were assigned and argued by counsel. But as the court decided upon one point only, it is not necessary to notice any other in the report.

It was assigned for error that the second breach does not aver an eviction, and that in this particular the declaration was defective.

Downer, for plaintiff in error. *Goddard*, contra.

By the COURT.

The usual or common covenant of seizin stipulated that the grantor in the deed was seized of a good and sufficient title and had right and authority to sell and convey. This covenant was in the present tense, and if the fact was contrary to the stipulation, the agreement was violated as soon as made, and a right of action, arose immediately. The common covenant of general warranty is in the future, that the grantor will warrant and defend the title. Courts of justice doubted whether the grantor could be called upon to perform this covenant, while the grantee was permitted to hold possession under the grant. The evil of this principle was, that if the title was defective, and the person who had better title, chose to lie still, the grantee could do nothing for his future protection and security. To remedy this mischief the statute was enacted. The mischief did not exist, where the deed contained a covenant of seizin in the usual form. If the grantee covenanted that his title was indefeasible, when it was not, or that he had right to sell when he had not, or that he was seized of a good title, when his title was defective, the grantee could have immediate remedy. If his deed contained those covenants which usually accompanied the covenants of seizin, as part of it, his case required no statutory provision. And it would be one to which the terms of the statute do not extend. It is neither within the mischief, nor the letter. And it would be unwarrantable to include it.

The second breach is not well assigned upon common law principles. The court consider the law to be settled, that the breach ought to allege an eviction under a superior or better title to maintain an action upon the common covenant of general warranty. And it is also their opinion that the case is not within the provisions of the statute. The damages assessed are upon the three last counts; the judgment must therefore be reversed, and judgment given for the defendant upon the demurrer to the second breach.

HATCH v. BARR.

A deed describing the grantors as a corporation, but executed by the president of the corporation, in his own name, and under his own seal, does not pass the legal title from the corporation.

This was an action of ejectment, tried in the Supreme Court of Hamilton county. The case was as follows:

At June term of the Supreme Court in Hamilton county, in the year 1821, a judgment was recovered by the treasurer of state against the president and directors of the Miami Exporting Company, for 9618 dollars 27 cents. Upon this judgment execution issued, and was levied upon the property in dispute, the bank-house in Cincinnati; and the law not requiring property seized upon execution for a debt to the state to be valued, the plaintiff bid off the house for the sum of 250 dollars, at sheriff's sale. A deed of conveyance by the sheriff to

the plaintiff was duly executed, and upon these proceedings and this deed the plaintiff rested the cause.

The defendant produced a paper purporting to be a conveyance of the property in question to him by the president and directors of the Miami Exporting Company, dated the 8th day of June, 1821. In this deed the president and directors of the Miami Exporting Company were named as grantors. The attesting clause was as follows: "In witness whereof, I, Oliver M. Spencer, president of the said Miami Exporting Company, have hereto set my hand and seal," &c. Oliver M. Spencer, president of the Miami Exporting Company;" written opposite a seal of wafer and paper, with no distinct impression.

In connection with this deed the defendant produced a resolution of the board of directors of the Miami Exporting Company, made on the same 8th day of June, 1821, in the following words:

"Resolved, that the president of this institution be authorised and directed to sell and convey to John T. Barr, of Baltimore, by deed in fee simple, with covenant of general warranty, the brick house and lot which was conveyed to the president and directors of the Miami Exporting Company by Martin Baum, by deed bearing date the 26th day of March, 1816. Also, one hundred and thirty-eight acres and one-tenth of an acre, in the fourth section of the third township, of the second fractional range in the county of Hamilton, and state of Ohio, being the same land that was conveyed to said company by the president and directors of the bank of Cincinnati, by deed bearing date the 8th day of February, 1821. Also, the house and lot late the property of David Brown, lying on Fifth street, in the town of Cincinnati, and being a part of lot, number 293, and which was conveyed to said Miami Exporting Company, by R. Ayres, sheriff of said county, by deed bearing date 23d day of June, 1820, for the consideration of the sum of ten thousand seven hundred and sixty dollars, in part discharge of the debt due from this institution to the said John T. Barr.

"Resolved, that the said president be authorized to execute to the said John T. Barr, a bond, with a condition, that if the said John T. Barr shall at any time within the term of one year re-convey to this institution the same property in the same manner, the conveyance shall be received, and the sum of ten thousand seven hundred and sixty dollars placed to the credit of the said John T. Barr on the books of this institution."

The defendant further offered to prove, in connection with the deed and resolution above stated, that the sum of ten thousand seven hundred and sixty dollars was paid to the bank at the time of making the deed, by a check in favor of the bank, drawn by the agent of John T. Barr, and charged to his account on the books; which fact of payment so made was admitted by the counsel for the plaintiff.

The defendant further offered proof, that the Miami Exporting Company had never, by any formal resolution, adopted a seal; but that the seal impressed upon the paper in question was procured by the president, and had been used as a seal of the institution, which fact was also admitted by the plaintiff's counsel.

The plaintiff objected to the paper, purporting to be a deed, being given in evidence to the jury, because not executed by the president and directors of the company, and under the seal of the corporation, and therefore not operative as a

conveyance. The court decided that the deed could not be given in evidence to the jury, and the plaintiff had a verdict.

The defendant moved for a new trial, on the ground that the court erred in not permitting the deed to go to the jury. And at his request the decision of this motion was adjourned to Columbus.

Wade and *Hayward* in support of the motion. *Hammond*, contra.

By the COURT.

The paper offered in evidence, purports to be a conveyance from the president and directors of the Miami Exporting Company, as grantors. It is executed by O. M. Spencer as president, in his own name and under his own seal, as president. The grantors named in the deed do not execute it. The person who executed it, had no interest in the subject conveyed, and is not named as grantor in the deed. It is therefore no conveyance. The motion for a new trial is overruled, and judgment entered on the verdict.

JUDGE BURNET, being a stockholder in the Miami Exporting Company, did not sit in this case.

LESSEE OF BOND v. SWEARINGEN.

An estate forfeited to heirs in consequence of a conveyance for a gambling debt, is taken and held by the heirs, subject to the debts of the grantor.

Whether the grantor in a voluntary deed be indebted at the time of the grant, is a fact to be found by a jury Where a party locates and surveys lands and dies before patent, and the patent afterwards issues to his heirs, they take by descent and not by purchase.

Where the ancestor conveys with warranty his heirs are estopped to claim the same land.

The owner of an entry and survey, has a right to dispose of, and alien the lands embraced in such survey; and where a patent afterwards issues to him or his heirs, whereby the legal title is perfected, it enures to the benefit of his grantee, and all persons claiming under such grantee, so as to perfect their title.

This was an action of ejectment, and came before the court upon a motion for a new trial, made by the plaintiff, and reserved in the county of Ross. As the opinion and decision of the court is confined altogether to the title of the defendant, so much only of the statement of the case, and the argument of the counsel, as relate to that title, are presented.

The suit was brought to recover a lot in the town of Chillicothe. The tract of land including the lot in question, was entered by N. Massie on the 27th of June, 1795, as in his own right—was surveyed on the 24th of December, 1796, and the plat and certificate of survey recorded in the surveyor's office, June 9, 1797.

On the 21st day of September, 1797, Nathaniel Massie conveyed the lot in question to Basil Abrams, by deed of general warranty.

Basil Abrams, on the 21st of May, 1801, conveyed the lot in question to John S. Wills, by deed of general warranty, for a consideration expressed of 1200 dollars. The real consideration was as proved and admitted at the trial, that Wills won the lot of Abrams at a game of billiards.

Soon after the execution of this deed Basil Abrams left the country, to which he never returned. On the 15th of February, 1802, an attachment against B. Abrams, as an absconding debtor, was sued out of the Common Pleas of Ross county, and levied upon the lot in question, upon which such proceedings were had that the lot was sold by auditors, and regularly conveyed, under which conveyance the defendant claimed.

The debts of Basil Abrams, as found and certified by the auditors, amounted to 1999 dollars 22 cents.

In the year 1811, Nathaniel Massie deceased, leaving several children his heirs at law. After his death it was discovered that no patent had issued for the tract of land in which the lot is included, and a patent was obtained to his heirs, dated 31st December, 1814.

Upon the trial of the cause before the Supreme court of Ross county, the jury found a verdict for the defendant, and a motion was made for a new trial, upon the ground that the verdict was against law. The decision of the motion rested altogether on the validity of the defendant's title.

Leonard, for the plaintiff. *Brush*, *Fitzgerald* and *Douglass*, contra.

Opinion of the Court by Judge SHERMAN.

The result of the motion for a new trial in this cause must depend upon the question, which of the parties has a valid legal title to the premises in question. The defendant has obtained a verdict, and that verdict ought not to be set aside if his title papers, connected with the evidence in the cause, shew a subsisting legal title in him. In order to determine this question, it is necessary to ascertain the effect of the deed from Basil Abrams to John S. Wills, of May 1st, 1801; the proceedings had under the attachment, at the suit of Reuben Abrams against B. Abrams, and the grant by the government of a tract of land including the premises in controversy, to the heirs of Nathaniel Massie, deceased.

The deed from B. Abrams to J. S. Wills, of the lot in question, dated May 1st, 1801, is admitted to have been executed upon a gambling consideration.

By the act of the territorial government, then in force, entitled "a law to suppress gaming," it is provided, "that all conveyances, &c. made for a gambling consideration, shall enure to the use of the heir of the bargainer, &c. and vest the whole estate, and all the interest of such person in the land so bargained, to all intents and purposes, in the heir of the bargainer, the same as if the bargainer had died intestate."

It is believed that this act of the territorial government has never received a construction by our courts.

It is contended by the plaintiff's counsel, that the lot in question, by virtue of this act, became forfeited to the heirs of B. Abrams upon the execution of the deed from him to Wills, and that they took the same discharged from all liability for his debts.

In the opinion of the court this construction is neither warranted by the words nor intent of the law. The legislature can, without doubt, attach forfeitures to the commission of offences, and such forfeitures may be general,

including all the property of the offender, subject only to actual liens, or limited in amount or kind, and restricted by provisions for the benefit of creditors and others. Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it.

When a deed is founded on a gambling consideration, the statute vests in the heir of the bargainer all his interest to all intents and purposes, the same as if such bargainer had died intestate, the law considers the bargainer *per hoc vice* as dead, the heir takes the same as if the ancestor, instead of executing the conveyance, had that moment died. The estate does not become forfeited, but the grant is to enure to the benefit of the heir of the grantor, and he takes the lands mentioned in the conveyance by virtue of the statute, the same as he would had they descended to him by the death of the ancestor. He takes as heir, and not as the grantee of government of a forfeited estate. The property vesting in him as heir he necessarily takes, with all the responsibilities and liabilities attached to that relation. The expression of the statute that the interest of the bargainer shall vest "in the heir the same as if the bargainer had died intestate," would be rendered vain and useless by any other construction than that the land so coming to the heir shall in his hands be subject and liable to all claims that it would had it descended to him by the death of the bargainer.

The construction contended for by the plaintiffs, would work manifest injustice in many cases. An individual who had obtained credit, and become indebted, could not well devise a more ready and easy way of protecting his property from his creditors than by conveying the same for a gambling consideration, if such conveyance was to enure to the use of his heirs, the natural objects of his care and bounty, to the exclusion of the claims of his creditor. The expression of a law should be clear, and the intent manifest, before a court could be justified in giving it a construction that would obviously protect fraud and deprive creditors of their just claims upon the property of the debtor, and such would be the effect of this law, if the construction contended for by the plaintiffs should prevail. The heirs of B. Abrams would hold this estate as forfeited to them by the act of their ancestor free from any liability to the claims of his creditors. We are satisfied such was not the intent of the territorial government in adopting this law; but that it was intended to protect the improvident from gambling away their property to the injury of their creditors and heirs, and that to effect this purpose the statute prevents all lands conveyed for a gambling consideration from vesting in the grantee named in the deed, but makes such deed enure to the use of the heir of the grantor so that he shall take the lands subject to the same liabilities he would, had he inherited them in the usual course of descent.

It will be perceived upon the perusal of this statute that it no where expressly prohibits gaming, or subjects persons guilty thereof to any species of judicial prosecution, and it is difficult to perceive how a forfeiture of lands should result from the doing of an act neither prohibited nor punished.

At the time Basil Abrams executed the deed to J. S. Wills for a gambling consideration, the real, as well as personal estate of the debtor, was subject to the payment of his debts. If he was living, his real estate, if it would not extend in 7 years for sufficient to satisfy, the judgments against him, might be levied on, and sold. And in case of his dying intestate, the whole real estate of

which he died seized, and which of course descended to his heirs, might, if necessary, be sold by the order of the court of probate for the payment of debts, or the judgment creditor might enforce a sale.

The heir took the estate with this legal liability or incumbrance attached thereto, and had B. Abrams died on the 1st May, 1801, the day of the date of the deed, to J. S. Wills, without executing that deed, the lot now in question would have descended to Eleanor his heir subject to the payment of his just debts. The territorial law gave to the heir of a grantor for a gambling consideration no greater interest in the lands conveyed, than if the same lands had come to the heir by descent. Their lands are therefore subject to the payment of the debts of Basil Abrams.

If the deed from B. Abrams to Wills, enuring as it does by virtue of the statute to the benefitof his heirs, be considered as a voluntary conveyance, without valuable consideration from him to them, the effect is the same, for by the statute of Eliz. then in force in the territory, as well as by the principles of the common law, such voluntary conveyance is void as against creditors.

It is said that admitting this property liable to payment of the debts contracted by B. Abrams before the conveyance to Wills, there was not evidence to warrant the jury in finding him so indebted.

This was a question of fact submitted by the court to the jury for their determination, and the evidence fully justified the finding. It appeared that immediately after executing the deed to J. S. Wills, B. Abrams shut himself up and kept concealed, until a few days thereafter he left the country. He had therefore little or no opportunity of contracting debts, and after divesting himself of his property it is not presumable he would obtain extensive credit; and yet the auditors appointed under the attachment to adjust and examine the several claims against his estate, report a list of his creditors to whom he was severally indebted in sums from $1,91 3-4 to $669,50 amounting in the whole to the sum of $1999,22. In addition to this there was direct evidence of his indebtedness at the time of his executing the deed.

If the matter were even doubtful, it was the province of the jury to weight the testimony and determine the fact, and the court ought not to disturb the verdict because the fact was not proved beyond doubt. It is sufficient that there was testimony going to establish the fact, especially in the absence of all proof to the contrary and after the lapse of twenty years.

But it is said that admitting the sale by the auditors, under the attachment transferred to the purchaser, all the interest that B. Abrams ever had in the lot in controversy, yet as the deed from Massie to Abrams was executed before Massie had obtained a grant from the United States, although subsequent to his entry and survey, Abrams acquired but an equitable interest, and the patent, after the death of Massie, having issued to his heirs, they acquired an estate by purchase, and the plaintiff claiming under a deed from their trustee has the legal estate.

This presents a question upon which the court have felt the most anxious solicitude and upon which they have not arrived to a conclusion without doubt and embarrassment. It is a question of great interest to the inhabitants of the Virginia Military district, as well as the parties to this suit.

Nothing is more common than for the holder of a Virginia Military Land warrant to make any entry of the same, cause it to be surveyed and recorded, go into possession of the lands designated in such entry and survey, reside thereon for years, making large and valuable improvements, and die without obtaining a patent which is afterwards issued to his heirs. If those heirs acquire the estate by purchase from the government, they must at law hold the same free from the debts and contracts of their ancestor; if by descent, the estate in their hands will be liable to the payment of the debts of their ancestor in the same manner and to the same extent, it would had the patents issued to him in his life time. The question whether heirs acquire an estate in lands so situate by purchase or descent, is one therefore of great importance.

Nathaniel Massie, as early as 1795, made an entry of 1900 acres, including the lands in controversy, in the books of the principal surveyor of the Virginia Military district, and within a short time thereafter, caused a survey thereof to be made and recorded in conformity to the Virginia land law. He had done every thing incumbent upon any holder of a warrant to appropriate the lands described in his survey, and had entitled himself to a patent therefor. He had by the Virginia land law, acquired an indefeasible estate in the lands, and by our statutes it was subject to taxation, dower and many other incidents of real estate.

In Kentucky, where the titles to a large portion of the real property depend upon the locations conforming to the Virginia land laws, it has been held that an entry or survey is an inchoate, legal title, and that lands so held will descend, may be devised, or alicned, and are subject to be sold on execution issuing from a court of law, (*Thomas, v. Marshall, Hard.* 19.) It would seem to follow as a necessary consequence, that it must be considered as legal assetts in the hands of the heir subject to the payment of the debts of the ancestor. The heir inherits it as he would any legal estate to which the ancestor had an imperfect or incomplete title.

The act of Congress of August 10th, 1790, (*vol. 1st, U. S. laws, p.* 252,) to enable the officers and soldiers of the Virginia line, on Continental establishments to obtain titles to certain lands lying north west of the river Ohio, &c. after various provisions respecting the locations and surveys of said lands, directs that the President shall cause letters patent to be issued for the lands designated in said entries to the persons originally entitled thereto, their heirs or assigns, or their legal representatives, their heirs or assigns. It is by virtue of this provision that the patent issued to to the heirs of N. Massie. It is because they standing in his place, and representing him are entitled to the same rights he had at his death. They take the same interest he would have taken had the patent issued to him in his life time.

The recitals in the patent, shew the consideration upon which it issued. The entry of the ancestor, the warrant under which it was made, the survey had thereon, and the acts of Congress regulating the appropriation of the land and the isssuing of the patent are all referred to, and all shew it was not a gift by the government, to the heirs of Massie, but that it was the execution of a trust in his favor so far as the same could be executed after his death, by transferring to his heirs the naked legal title to lands which he had fully appropriated and for which he was in his lifetime entitled to a patent. There is no pretence

of any consideration moving from the heirs for the grant under which it is claimed they hold as purchasers; on the contrary the patent furnishes conclusive evidence that the consideration moved from the ancestor, that it was the services for which the warrant therein named issued, the location and survey in conformity to law, that caused the emanation of the patent. The ancestor had fully and legally appropriated the land. The naked legal title remained in the United States as trustee at the time of Massie's death, and his heirs procuring that legal title by virtue of the act of Congress of 1790, vested in them no greater or other estate than their ancestor would have taken had the patent issued in his life time.

It was said in Shelly's case, (1 *Rep.* 98.) "When the heir takes any thing which might have vested in the ancestor the heir should be in by descent. Then, although it first vested in the heir, and never in the ancestor, yet the heir shall take it in the nature and course of descent," and the principle was adopted by the court in giving judgment. In Wood's case, reported 2 *Roll.* determined in the court of Ward's 3 *Eliz.* and recognized as law in Shelly's case, it was held "that if a man seized of the manor of S. covenants with another that when J. S. shall enfeoff him of the manor of D. then he will stand seized of the manor of S. to the use of the covenantee and his heirs. The covennantee dies, J. S. enfeoffeth the covenantor, the heir shall be adjudged in course and nature of descent, and yet it was neither a right, title, use, nor action that descended, but only a possibility of a use which would neither be released, or discharged, yet it might, if the condition had been performed, have vested in the ancestor."

It will be readily perceived that this case is stronger in most of its featuaes than the case at bar. The covenantee had no estate or interest in the land, none was to arise except upon the happening of an uncertain event which did not take place until after his death. In the present case, the ancestor had done all that was required by law, to perfect his claim to a grant from the government. His estate was not dependant upon any uncertain event. There was no contingency which could enlarge or diminish his estate, the mere form of sealing the grant was only wanting to evidence by the highest and best title known to our laws, his interest in the lands. He could have assigned the entry and survey and the assignee would have been entitled to a patent in his own name, or he could have devised it, and the devisee would have had an indefeasible estate. He could have maintained ejectment against any person not having a grant from the government. In short, by his warrant, entry, and survey, he had acquired an incomplete or inchoate legal title to the land designated in his entry; this right and title was not destroyed by the death of the ancestor, but descended to the heir as part of his estate; and if a patent afterwards issued to the heir it does not enlarge his estate or increase the quantum of his interest in the land but changes the evidence of his right from an entry and survey to a grant from the gonvernment in whom the mere legal title was vested in trust for those who should legally appropriate the land.

The case of Chapman *v.* Dalton, (*Plowd.* 284,) is although not strictly analogous, illustrative of the same principle. D. the defendant, leased land for 21 years, to J. C. and covenanted with lessee to make to him and to his assigns a good lease for 21 years to commence immediately after the end of the first term; the lessee dies having appointed an executrix, the executrix makes her execu-

tor and dies, the first term expires. It was held that the executor of the executrix of the covenantee should have an action of covenant for the second lease and that it would, in his hands, be legal assets. The reasons of the court are not given in the report but the decision is obviously on the ground, that as the covenant was made with the first testator, the title thereto was derived from him to the plaintiff and that which is done, in performance of the covenant ought to be in the plaintiff, in the same degree, as the covenant was in him, so that he shall have the lease in the like manner as he had the covenant.

If a lease, made to an executor in performance of a contract with the testator, would be legal as contradistinguished from equitable assets, in the hands of such executor, and for the reason that the right to such lease was derived from the testator, then it would seem that, by analogy, the heir would take by descent those lands, the right to which the ancestor had by contract with government, and in performance of which contract a patent had issued to the heir.

It was held by the court of Appeals in Kentucky, in *lessee of Gist's heirs v. Robinet*, (3 *Bibb.* 2) that a right to land, under the proclamation of 1763, neither located nor surveyed, could be devised; and although the devisor, after making the will, procured a warrant, caused a survey of the lands to be made, obtained a grant therefor, and died without republishing his will, it was decided that the devisee should hold the lands, the court at the same time recognizing the principle, that lands acquired after the making of a devise, could not pass thereby. In this case, although the warrant, entry, survey, and grant, were all after the devise, yet they were all in execution of, and had reference to the proclamation of '63. By the issuing of the grant to the devisor, subsequent to the making of the will, he did not acquire a new estate; it was not, in the language of the books, lands acquired after making the devise, or they would not have passed by the will, but descended to the heir.

"In case of an exchange, one of the exchangers enters, the other dies before entry; now the heir of him that had not entered may enter, and he shall be in by descent, although the father never had any thing in it." (*Jenk.* 249. 14 *Vin.* 260.) This is on the same principle recognized in *Shelly's case*, that if the act, which is to perfect the title to the estate, might have taken place during the life of the ancestor, the heir shall be in by descent, although in fact the title was first perfected by the heir, and by his act. In the case at bar, the only act necessary to perfect the title in Nathaniel Massie was the sealing the patent. This act might have taken place in his life, and would have perfected in him the legal title to the lands designated in his survey; the legal title is, after his death, perfected in his heirs by the doing of the only act necessary to complete it, it would seem to result, from the authorities cited, that they would be in by descent, and not by purchase.

In the case of *Smith v. Trigg*, (8 *Mod.* 23.) it was held that if a copyholder surrenders to the use of his will and devises to his heir, and then dies before admittance, the heir, after admittance, shall be in by descent.

In the case of *Marks v. Marks*, (10 *Mod.* 425.) where lands were devised to be for life, remainder to B in fee, provided that if C, within three months after the death of A, the tenant for life should pay B five hundred pounds, then to C and his heirs. C died during the life of the tenant for life, who afterwards dies

and it was held that the heir of C should be allowed to perform the condition of paying the money to B, and that he should take the land in course of descent from his ancestor C. Here, by the will, a mere executory contract is limited to the ancestor, without in terms being extended to his heirs, and by performance of the condition the estate might have vested in him. The right to perform this condition descends to the heir; the vesting of the estate is a necessary consequence of such performance, and the court therefore hold that the heir shall be in the estate by descent, because the right to perform the condition upon which the estate depends came to him by descent.

It is a general rule that the heir shall not take by purchase when he may take the same estate in the land by descent. (7 *Cranch, and the authorities there cited.*)

If a man devises to his heir at law an estate, neither greater nor less than he would have taken without such devise, he shall be adjudged to take by descent, even though it be charged with incumbrances. (*Bl. Com. and authorities there cited.*)

In *Vent.* 372, the court say, it is a long established rule, that "a man cannot, either by conveyance at the common law, or by limitation of uses or devise make his right heir a purchaser."

The court are of opinion, that as the patent must have issued to Nathaniel Massie, had he been alive at its emanation, as he had at the time of his death an inchoate legal title to the lands designated in his survey, which could be transferred, was subject to dower, the payment of taxes and many other incidents of real estate; as he had a right to a patent therefor, which right vested at his death in his heirs, and the patent issued to them from necessity, occasioned by his death, that they, standing in his place, and representing his rights, are, by the principles of the common law, in this estate by descent, and not by purchase.

This opinion renders it unnecessary to give any construction to the two acts of the legislature, *vol.* 18, *p.* 93. *vol.* 19, *p.* 80, appointing a trustee for the heirs of Nathanial Massie, dec'd. or to determine the effect upon this case of the provisions therein contained, that the title which shall be acquired by said heirs, by virtue of any proceedings under said act, shall be considered in all courts as being taken by descent.

The only remaining question necessary to be considered is, whether the heirs of Nathaniel Massie, and those claiming under them, are estopped from denying his title to the lots in controversy, or, in other words, whether the patent enures to the benefit of the purchasers from Massie, and those deriving title from such purchasers.

Massie, after making his entry and survey, and before the issuing of a patent, conveyed the lot in question to Basil Abrams for a valuable consideration, by deed of bargain and sale, with covenants binding himself and his heirs to warrant and defend the title.

The authorities, both English and American, abundantly and clearly shew, that had N. Massie, after executing his deed to B. Abrams, acquired by patent from the government or otherwise, a perfect title to the lands conveyed by him; he, his heirs, and all others claiming under him, would have been estopped from setting up the after acquired title to the prejudice of his grantee. (1 *L. Raym.*

729. 12 *John.* 201. 13 *John.* 316. 4 *Bibb.* 436.) In *Coke Litt.* (352, *a.*) it is expressly said, that privies in blood, as the heir, are bound by, and may take advantage of estoppels.

The heirs of Massie, standing in his place, and inheriting from him, are bound by his warranty, and estopped by his grant from controverting the goodness of his title, at the time he conveyed.

If the heirs of Massie could recover these lands, on the ground that their ancestor, when he conveyed, had not a perfect legal title, they, claiming by descent from him, would be responsible in consequence of such recovery to his grantee, and those claiming title from him, upon the covenants of warranty contained in his deed, and it is to avoid this circuity of action that the heir has been held to be estopped from denying the title of his ancestor.

This doctrine would not apply were they purchasers from government, but having derived all their interest in this estate by descent from their ancestor Massie, they are estopped by his grant, and bound by his covenants in which they are named.

We have no doubt that N. Massie, after his entry and survey, had a right to dispose of and alien the lands included in such survey; and when a patent afterwards issued either to him or his heirs, whereby the legal title was perfected, it enured to the benefit of his grantee, and all persons claiming under such grantee, so as to perfect their title.

This opinion renders it unnecessary to examine the title of the plaintiff to the lot in controversy; the defendant having the legal title is entitled to judgment upon the verdict. The motion for a new trial must be overruled.

DOUGLAS v. WADDLE.

Endorsers of prommisory notes endorsed for the use and accommodation of the drawer, are co-securities, and the last endorser cannot recover more than a contributable share against a previous endorser.

This was an action of assumpsit. The declaration was by the endorsee of a promissory note against his immediate endorser; it contained also the common money counts. The cause was tried in the Supreme court of Ross county, and a verdict given for the defendant. A motion was made for a new trial, and the decision of the motion referred to this court for decision.

The facts were these:—On the 6th of October, 1818, a note, drawn by James Barnes, payable to the plaintiff, Douglas, and endorsed by Douglas and the defendant, Waddle, was discounted by the office of discount and deposit of the bank of U. S. at Chillicothe, where it was made payable, and the proceeds drawn upon the check of Waddle, the last endorser, and carried to the account of Barnes, the drawer. Though treated in form as a real note of business, it was, in fact, for the accomodation of Barnes, the drawer. Four notes were successively drawn, endorsed, and discounted in the same manner, and the proceeds of each successive note applied to discharge the amount due upon the one preceding it. A note was then drawn by Barnes, payable to the defendant, Waddle, and endorsed by him and one Hoffman, discounted and applied as before. Four notes were

again successively drawn by Barnes, payable to Waddle, and endorsed by Waddle and the plaintiff Douglas, and the proceeds applied in the same manner. The last of these was the note in question, upon which suit was brought by the bank, under the statute against drawer and endorsers as co-defendants, and judgment and execution had, upon which the plaintiff and defendant each paid half the amount, and the plaintiff claiming, that the defendant was liable to him for the amount by him paid, obtained the note, struck out his own endorsment, and brought this suit.

Brush and *Fitzgerald* and *Douglas*, for the plaintiff. *King* and *Leonard*, contra.

By the COURT.

The principle that the endorsee of a negotiable promissory note, may sustain an action against a previous endorser, upon the endorsement alone, without showing other consideration, was originally settled upon sound and correct notions of justice. And, in its application to a proper case, it is a rule which ought not to be disturbed. A promissory note was created as evidence of a real debt due from the maker to the payer. It was received and held as such. If transferred or endorsed by the payee, the endorsement was a real separate contract between the endorser and endorsee of the note; the latter received it for a consideration paid, and hence the endorsement, like the making, was held to be evidence of a debt due from the endorser to the endorsee. The same fact attended every subsequent endorsement, and attached to it the same consequences. As between parties to a note thus made and endorsed, the principle maintained by the plaintiff is well applied. But where the transactions of the parties are, in fact, of a totally different character, neither the reason of the rule, nor the justice of the case, admit its application.

The form of transacting a real business was in time used for the creation of an artificial credit. Notes were made, endorsed, and thrown into the market for the purpose of raising money for one of the parties only, the others being in fact securities, and receiving nothing whatever upon their endorsements. It is urged, that in England and in some of our sister states, this species of notes is placed upon exactly the same foundation with real paper, and that no distinction can be safely made between the two classes. So far as it relates to the interest of a *bona fide* holder, who has advanced his money, this is right and just; and so far the rule rests upon authority. There is no decision adduced by which it is adjudged that this rule is inflexible in its application to the original parties, who made and endorsed the note, and between whom nothing was paid. And, if a direct authority did exist in another country, we should feel ourselves bound to examine the subject upon principle, before we adopted it here.

In this country the parties to this description of paper usually understood their relation to be that of principal and security, and upon this understanding they have generally acted, both in creating the paper, and in adjusting their liabilities upon it. Were it fully admitted that no rule of law could be founded upon *general understanding*, the admission would have no bearing in this case, where the inquiry is, whether the form of creating a note, and putting it into

market, shall absolutely settle the rights of those concerned, contrary to their own understanding of the matter. When the litigation is between the original parties, we are of opinion that the form of making and endorsing a note does not preclude an inquiry as to what the parties intended, and what was the real transaction between them. And the propriety of making this investigation is the more manifest from the well known fact, that many more notes like this are created artificially in this country, than are made and endorsed upon actual dealings between the parties.

The real principle upon which the plaintiff proceeds, is, that he purchased the note from Waddle, and paid him a consideration for it. He must be the owner of the note or he has no right to recover in an action founded upon an endorsement on it. It appears from the evidence, that Waddle, when he endorsed the note, delivered it to Barnes, the drawer, who took it to the plaintiff and obtained his endorsement. When the note was handed to Douglas, it was not for the purpose of vesting in him any property. Suppose he had retained it then, and brought this action? Would any lawyer contend that parol evidence to explain when the note was made, and how Douglas became possessed of it, could not be received? It is assumed, that no lawyer would attempt this, and if Douglas had not then an interest in this note, upon which he could sustain this action, how, and when did he acquire such an interest? He could not acquire this interest by subsequently paying half the money due upon it; for that payment only entitled him to demand the amount paid from him for whom it was made; it could invest him with no new interest in the note. It is therefore clear, that if Douglas can maintain an action upon the endorsement, it must be in consequence of the interest acquired in the note by Barnes' handing it to him for endorsement; and that he then acquired no interest upon which he could maintain an action, admits, we think, of no doubt. He knew that Waddle did not, in fact, own the note, but had endorsed it for the accommodation of Barnes, as a security. He knew that he himself endorsed it for the same purpose, and not as owner; it was intended to pay a debt due from Barnes, who, and not Waddle, was the person to be benefitted. Douglas himself never had a beneficial interest in the note; and the money paid by him was paid for Barnes, not for Waddle. He therefore can have no action against Waddle for the amount.

Cases have occurred without number, in which two or more persons have endorsed notes to be discounted in bank, when neither would have endorsed alone, because no one of them was willing to risk the payment of the whole debt; and when the requisite number of endorsers have been obtained, they have paid no attention to the order in which they placed their names on the paper. Such was the fact in this very case. This could only arise from a distinct understanding among the parties, that the endorsers stood in the relation of sureties to each other.

By the 19th section of the act regulating judgments and executions, we are directed to receive parol proof when one or more of the defendants signed the note as securities, and it is made the duty of the clerk, upon such proof, to certify which of the defendants is principal debtor, and which is security, in order that the property of the first may be exhausted before execution can be levied on the latter. We have uniformly understood this law as applying to the endorsers upon accommodation notes, and have so applied it, and this could be

done upon no consistent principle but that of considering such endorsers as securities.

The defendant, under this statute, might, when judgment was rendered against the drawer, the plaintiff and himself, have applied to have the certificate made, that he, with the plaintiff, were sureties. Upon the proof in this cause, the certificate must have been made. It would be absurd to consider and treat them as securities as between them and the creditor; but between themselves as parties to separate contracts.

Where the original transaction was in its character and object that of principal and security, the court, as between the original parties, will so consider them, no matter what form may have been given to it; and where there are two or more endorsers upon an accommodation note, all of whom endorsed before the note became operative by being transferred to some person not a party, for value received, and all of whom are charged by notice of demand and non-payment, they shall be treated as co-securities, and contribution shall be made between them as such. In this relation the plaintiff and defendant stood to each other. Each has paid his half upon the principle of being joint securities. The plaintiff cannot recover in this action.

With respect to the various difficulties urged by the plaintiff's counsel as necessarily resulting from this decision, it appears to the court that the opposite counsel have sufficiently answered them. If, however, the salutary and just principle upon which this decision is predicated, cannot be extended to every case without too great innovation upon established doctrines, the only consequence will be, that it must be limited to cases situate as this. It will be time enough to meet these suggestions when a case arises in which they are presented for determination.

See Renner v. Bank of Columbia, 9 *Wheat.* 582.

HUDDLE *v.* WORTHINGTON.

Covenant will not lie upon the penal or obligatory part of a bond.

This was an action of covenant. The declaration contained a single count, as follows: "for that, whereas, by a certain writing obligatory, commonly called a title bond, executed, &c. in the usual form, it was concluded and agreed on the part of the defendant in the manner following, to wit: the defendant by the same writing obligatory did covenant, promise, grant and agree to, and with the plaintiff and his heirs, that the said defendant should and would, on, or before, the 20th day of August next, ensuing the date of said bond, by a good and sufficient general warranty deed in fee simple, convey unto the said plaintiff or his heirs, a certain tract of land, &c. alleging a breach for non-conveyance.

The defendant craved oyer of the bond, the penal part of which was in the usual form for the payment of a sum of money; he also craved oyer of the condition, which was in the following words. "The condition of the above obligation is such, that if the above bound T. Worthington shall convey, by a good and sufficient general warranty deed, in fee simple, on or before the 20th of August next, after the date hereof, to the said Jacob Huddle or his heirs, a certain tract of land, &c. then this obligation to be void, &c. upon this the defendant

demurred to the declaration, and the decision was adjourned to this court, by the Supreme Court sitting in Ross county.

Hammond, Creighton and *Bond*, for the plaintiff. *Leonard*, contra.

By the COURT.

We are of opinion, that an action of covenant cannot be sustained upon the condition of a bond like this, separated as it is in the declaration, from the penal or obligatory part of the bond. It might be different, if the entire bond was declared on, as in the case in first Munford, stating that the covenant was made under the penalty in the obligatory part specified. Judgment must be for the defendant.

CURTIS ET AL. v. CISNA'S ADMINISTRATORS.

A court of chancery does not act as a court of errors, to examine or reverse judgments at law.

Upon a case made which comes exclusively within the jurisdiction of a court of chancery, and where a court of law could give no relief, chancery will interfere to enjoin or relieve against a judgment at law.

But when courts of law and equity have concurrent jurisdiction, and a party electing to pursue his remedy in one fails, he shall not be permitted, as a general rule, to resort to the other.

The assignee of an agreement is concluded in equity by a decision at law against his assignor, the assignee at the time of the assignment having notice.

This case was reserved for decision here in the county of Knox. It is charged in the bill, that the complainant, Wilkins, being owner of a tract of land in the county of Knox, on the 11 of May, 1816, contracted to sell it to Thomas Cisna, since deceased. That seventy sheep were delivered by Cisna upon account of the purchase money, and a written agreement entered into, by which Wilkins agreed to convey the land to Cisna, on or before the first day of September ensuing, upon Cisna then paying 100 dollars, and securing to be paid by his own bonds, and a mortgage on the lands, for the further sums of 150 dollars, payable 1st of April, 1817; $100, 1st of April, 1818; and $100, 1st of April, 1819. That the contract was made and executed, and deposited for safe keeping, at Mount Vernon, where, complainant understood, the parties were to meet on the 1st of September to carry it into effect. The bill further charged, that Wilkins attended at Mount Vernon on the day to execute the contract, but that Cisna did not attend. That on the 7th of September Wilkins executed a deed to Cisna for the land, and shortly afterwards caused it to be tendered to Cisna, at his residence in Fairfield county, and required of him, to perform his part of the agreement, when Cisna refused to receive the deed, or to comply with the contract. That a subsequent tender of the deed was made to Cisna, at Mount Vernon, who again neglected to perform on his part. That Wilkins being pressed for money, about the 1st February, 1817, assigned his contract with Cisna to Silliman and Curtis, and entered into an agreement with them, that they should use his name to enforce the contract with Cisna, they to indemnify him against any claim of Cisna, and delivered to them the deed executed for Cisna; at the same time a deed for the lands from Wilkins to Sil-

liman and Curtis, was executed and delivered to them. The bill further alledged, that Cisna was notified of this transaction, and again requested to accept the deed, and perform the contract, but did not do it; that Silliman afterwards transferred his right to Curtis, who was at all times ready, willing, and able to perform the contract on his part; that while the contract remained unexecuted, Cisna deceased, and his administrators brought an action against Wilkins to recover back the value of the property received by Wilkins on the contract; that upon this trial a recovery was had against Wilkins, in consequence of the defendant not being able to prove a tender of the deed at the day, and in consequence of a defect in the proof of the chain of title at the trial.—The bill prays an injunction against the judgment at law, and that the administrators of Cisna may be compelled to accept the conveyance, and pay the money.

The answer denies all knowledge of the facts set out in the bill, and calls for proof. It insists, that Wilkins having conveyed to Silliman and Curtis, Cisna, or his representatives, are not bound to take from them a deed; and it sets up and relies upon the trial at law, as concluding the rights of the parties under a contract, which ought not to be re-examined in equity.

The proofs substantially sustain the allegations in the bill, except that there is no testimony of Wilkins' being at Mount Vernon to complete the contract on the 1st of September. The written contract between Wilkins and Silliman and Curtis, by which Cisna's contract was assigned to the latter, contained the following reference to the contract with Cisna in describing the land: being the same that Wilkins "had contracted to sell to one Thomas Cisna, and *which contract has since fallen through in consequence of Cisna's not complying with his part.*"

Curtis, for the complainants. *Irwin*, contra.

Opinion of the Court by Judge HITCHCOCK.

From the pleadings and evidence in this case, it is manifest that the subject matters of the present controversy has been adjudicated by a court of law, in an action commenced by the present defendants against the complainant Wilkins. The object of the former suit was to recover back the consideration money which had been paid for the land, and could have been sustained upon no other principle than that the contract had been abandoned, or put an end to by the parties. In that case full defence was made, and precisely the same evidence exhibited on the part of the defendant as on the present occasion, with the exception of the testimony of a single witness. The testimony of this witness does not materially vary the facts. Having this evidence before them, the jury returned a verdict for the plaintiff, and upon this verdict the court rendered judgment. About two years after the rendition of this judgment, the bill now before the court is filed, the prayer being first to enjoin the judgment at law, and second to enforce the specific performance of the contract.

As before observed, the court of law must have proceeded upon the principle that the contract was at an end. There can be no doubt that the subject was completely within their jurisdiction; and whether the decision of the case was or was not correct, is not now a subject of inquiry. A court of chancery does

not act as a court of errors, to examine or reverse the judgments of a court of law. Upon a case made which comes exclusively within the jurisdiction of a court of chancery, and where a court of law could give no relief, chancery will interfere to enjoin or relieve against a judgment at law. But where the courts of law and of chancery have concurrent jurisdiction, and a party electing to pursue his remedy in one fails, he shall not be permitted, as a general rule, to resort to the other. It is said, however, in the present case, that the complainants seek to enforce the specific performance of a contract, which could not have been done by a court of law. This is true; and had the present bill been filed during the pendency of the suit at law, and had no defence been made in that case, this court might, and probably would, have given relief. This, however, was not the course pursued. Wilkins had a right to elect, and did elect, to make full defence in that court. He preferred to submit his controversy to that jurisdiction, and after a full examination, the decision was against him. In this decision he acquiesced for two years or more, and, when threatened with execution, comes into this court to have the matter tried over again. I think he is too late, especially, if in addition to the other circumstances, we take into consideration the fact that Cisna, the person with whom the contract was originally made, is dead, and that this suit is prosecuted against his personal representative.

The complainants, aware of the difficulty they have to encoonter in consequence of the decision at law, undertake to distinguish this from ordinary cases. It seems to be admitted, that if Wilkins were the sole complainant before the court, the judgment at law would be conclusive, and the bill must be dismissed. But it is argued that Curtis was not a party in that case, and no person who has not had a day in court, none but parties and privies, can be concluded by a judgment at law, or a decree in chancery. It is urged that Curtis alone is the meritorious and interested complainant—that Wilkins has no interest—that he is joined from necessity, or for the sake of form, in order to obtain the injunction—that inasmuch as Curtis has had no day in court, he has now a right to be heard —and that the judgment against Wilkins shall not operate to the disadvantage of him, Curtis. This point has been argued with ability and ingenuity.

Many authorities have been cited for the purpose of sustaining the positions assumed. I feel no disposition to question the force of these authorities, but the difficulty is, that they do not, in my apprehension, apply to the case under consideration. In order to ascertain the strength of this argument, let us for a few moments examine as to the relative situation of these parties, and inquire whether Curtis appears before the court in a more favorable point of view than Wilkins. He claims to be, and is, an assignee, not of Cisna, but of Wilkins. The contract for the purchase and sale of the land was entered into by Cisna and Wilkins. When this contract was reduced to writing, partial payments were made by Cisna to Wilkins, and it was agreed that at a subsequent period the land should be conveyed, further payment made, and other acts performed. Both parties made efforts for the performance of this contract, but whether it were in fact performed by either is not now the subject of inquiry. Previous to the commencement of any suit, and but shortly after the contract was made, Wilkins assigned to Silliman and Curtis his interest in the contract, conveyed to them the land, and at the same time took from them an obligation to indemnify him against

any claim on the part of Cisna. This assignment was made without the assent of Cisna, the assignees having full knowledge of all the facts connected with the whole transaction. Subsequently Silliman transferred his interest to Curtis. Thus Curtis by his own act, became interested in the business, and, as far as he could, voluntarily placed himself in the situation of Wilkins. By these transactions the rights of Cisna could not, it is believed, be affected.

It will not be denied, I presume, that had Cisna on his part complied with the contract, he might have applied to a court of chancery to enforce a specific performance by the other contracting party; or he might have resorted, at his election, to a court of law for the recovery of damages for the non-performance by his adversary. Or if the contract was abandoned, he might recover back the amount which he had paid. If he elected to proceed at law, he must from necessity proceed against Wilkins. Curtis was no party to the contract, and at law Cisna would have no claim against him. But were we to adopt the principle contended for by the complainants, Cisna, by the joint act of Curtis and Wilkins, would be deprived of his legal right; he could not avail himself of the remedy at law, but would be driven to chancery; a doctrine from which such consequences would result, cannot be sanctioned.

The complainants urge that Curtis had no day in court; but can this be said with propriety? True he was not a party upon the record; but from the bill it appears that he was in fact and in truth the party in interest. He had undertaken to indemnify Wilkins against any claim which might be brought against him by Cisna. When the action at law was commenced, he appeared, as is proven by the testimony, and managed the defence until final judgment, and it is presumed that he will not complain that his rights were sacrificed in consequence of any misconduct or neglect on the part of his assignor.

Upon the whole, I am of opinion, that inasmuch as the subject matter of this controversy has been settled by the adjudication of a court of competent jurisdiction; was acquiesced in for two years; and inasmuch as the assignee, under the circumstances of this case, does not come before the court under circumstances any more favourable than those of the assignor, therefore the bill of the complainants must be dismissed with costs.

JUDGE PEASE concurred.

JUDGE SHERMAN, having been of counsel, did not sit in this cause.

Judge BURNET'S *dissenting opinion.*

In stating the reasons why I cannot concur in the opinion of the court, in this case, it will be necessary to examine.

1. The consequences of the non performance of the contract on the first of September.

2. The effects of the assignment to the complainant Curtis.

3. The operation of the judgment at law, on the rights of the parties to the present suit.

1. The covenants in this contract are simultaneous. The deed was to be executed and delivered to Cisna, on, or before the first of September, upon his then paying the first instalment, and securing the residue by bond and mortgage. Neither party could charge the other with a breach, so as to sustain an action

at law, till he had tendered a performance, for till then they were in *part delicto*. If a man gives credit, and relies on his remedy, he is left to that remedy, but in this case no credit was given. The vendor was not to part with the title, nor the vendee, with the money, till each was secured. In *Jones v. Berkly and Hotham, v. the East India Company, Doug.* 665, 1 *Term Rep.* 633, Lord Mansfield decides, that the dependence, or independence, of covenants, must be collected from the evident sense and meaning of the parties, and that however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. Every person will decide from the first reading of this contract, that neither party intended to trust the other, or to render himself liable to perform in consideration of his remedy, on the contract, but in consideration of an actual performance, by the other party. Wilkins engaged to deliver the deed to Cisna, on the first of September, upon his then paying, &c. It is not pretended, that either party tendered a performance, on that day, or that Cisna on any subsequent day, offered to perform, or was ready, or willing to perform, or that he made any attempt either to execute or disaffirm the contract, prior to the tender of the deed by Wilkins. It seems that Wilkins, on the first of September, was at Mount Vernon, where the contract was made and deposited for safe keeping, and where he understood the parties were to meet, for the purpose of performing it, and he avers that he was then ready to execute the deed. Cisna not attending, Wilkins executed a deed at Mount Vernon, seven days thereafter, and had it tendered to Cisna, at his residence, in Lancaster. During the succeeding winter, a second tender was made of the deed, and after the assignment, an offer was made by the assignees, to perform the contract, on the part of Wilkins. On these facts the question arises, whether this contract has been forfeited by any laches of Wilkins, so as to bar him, or his assignees, from a specific performance. Admitting that Cisna was under no obligation to attend on the first of September at Mount Vernon, where the contract which consisted of but one part was deposited, and where the land of which livery was to be made, was situate, and that the understanding of Wilkins on that point, was incorrect, it would by no means follow, that there has been that kind of laches, that ought to induce a court of equity to refuse their aid. Time is not usually considered as being of the essence of contracts, though it may be made so by the stipulation of the parties. Equity will relieve in cases of forfeiture, when compensation can be made, and the default is only in time; and the books abound in cases, where chancery has enforced agreements although the plaintiff had failed to perform on the day fixed on in the contract. It will not be contended by me, that time is of no moment, and that men may fulfil their engagements when they please. Such a principle would be fraught with mischief. It would introduce that kind of negligence, and disregard of obligations, that would be as inconvenient to the business of society, as it would be injurious to public morals. The modern rule on this subject seems to be, that a party who has not performed his undertaking, on the day appointed, may nevertheless claim the aid of a court of chancery, if he can shew a reasonable excuse for his omission, or if the opposite party has acquiesced in the delay, unless there has been such a change of circumstances, as would render a specific performance manifestly inequitable. In the case of *Vernon v. Stephens*, 2 *P. W.* 66, the complainant, the purchaser, had not paid the money on the day stipulated,

yet he obtained a decree, the chancellor observing, that if the defendant got his money, interest and cost, he would have no reason to complain; that lapse of time in payment, might be compensated with interest and cost; that in cases where there has been no acquiescence by the defendant, nor any specific apology offered by the complainant, courts have decreed a performance on the ground, that there had been no unnecessary delay practised by the plaintiff. It is also said, the title to an estate requires so much clearing and enquiry, that unless substantial objections appear, not only as to time, but as to an alteration of circumstances, affecting the value of the thing, or such as arise from the conduct of the parties themselves, during the time, the objection cannot be sustained, *Newland, covn't.* 235.

In the case of *Langford v. Pitt*, 2 *P. W.* 629, the complainant not only had not tendered a conveyance on the day stipulated, but had it not in his power to do so, by defect of title. The master of the rolls decided, that it was sufficient if the party contracting to sell, had a good title at the time of the decree, and in the case of *Stourton v. Meers*, cited in the last case, it appeared that the complainant, the vendor, had not a perfect title at the time of the articles, or even at the time of the decree, and the court granted him further time. The title was afterwards perfected, and the defendant decreed to be the purchaser. In the case of *Wynn v. Morgan*, 7 *Vez.* 202, it was held, that as no unnecessary delay was imputable to the complainant, a specific performance ought not to be refused, because he had not a good title at the time of the contract, or even at the filing of the bill, and the title having been perfected, the court decreed a specific performance. It was decided in the cases of *Williams v. Thompson*, *and Gregson v. Riddle, referred to, in Newland*, 238, that even though a clause be inserted in an agreement, declaring it void, if the stipulation as to time be not complied with, still equity will not consider the performance at the day, an essential part of the contract. In the latter case, Lord Thurlow said, "it has been often attempted to get rid of an agreement on this ground, but never with success. The most that has ever been made of the circumstance of an agreement, not being carried into execution at the time agreed on is, it has been held to be evidence of the waiver of the agreement, but has never been held to make the agreement void." It is not to be inferred however from these cases, that time, in a contract, is wholly immaterial, and that parties may trifle with their agreements on a calculation that they may perform them as may be most convenient to themselves. If delay takes place, some satisfactory reason must be given for it, or it will be considered as a waiver of the bargain. There is a great diversity in the causes that give rise to delay in the performance of contracts, and each case must depend, more or less, on its own circumstances; but it is believed no case can be found, in which equity has considered the day wholly immaterial. Newland in his treaties, 242, states the rule to be, that when a party who applies for a specific performance of a contract, has omitted to execute his part of it, for a considerable time after the day appointed for that purpose, without being able to assign sufficient reasons to justify, or excuse his delay, the court will not compel a specific performance, and the reason given is, that the court consider his conduct as evidence of an abandonment of the agreement. The equity of this rule has been extended to contracts, in which no day was specified, where the complainant had consumed much time unneces-

sarily, and a material alteration had taken place in the value of the property. *Guest v. Homfray*, 5 *Vez.* 818. In that case, the master of the rolls observed, that if the plaintiff stands acquitted of the charge of practising unnecessary delay, in making out his title, the court will not refuse him a specific performance, because he afterwards suffers a period of time to elapse, before he files his bill. The opinion of Chancellor Kent, in *Bennedict v. Lynch*, does not clash with the principle here stated. It will be found on examination, that there is no similarity between the facts of that case, and those which exist in this. Benedict had not merely neglected a performance, for a few days, but for several years. The contract contained an express stipulation, that if the plaintiff failed, in either of his payments, the agreement was to be void. The plaintiff had admitted his inability to perform, and had agreed that if defendant would permit him to remain on the premises, one year, he would then give up the possession. He was not only guilty of gross negligence, but the facts of the case amounted to an actual abandonment. Here the contract was to be performed by both parties, on the 1st September. The land was contiguous to Mount Vernon, where the contract was made and deposited. The complainant understood the parties were to meet at that place, to execute the contract, and attended on the day, as he avers, ready to do so. The defendant did not attend. Seven days afterwards the complainant executed a deed, which was tendered to defendant at his residence, and afterwards at Mount Vernon. These facts shew that the delay of the tender was neither unreasonable nor unaccounted for, and every presumption of an abondonment is excluded. I therefore conclude, that the objection as to the time of the tender, cannot be sustained.

2. The second inquiry is, how far the rights of the parties have been affected by the assignment to Curtis.

It appears from the bill and exhibits, that on the first of February, 1817, which was several months after the deed had been executed and tendered to Cisna, and after his refusal to perform the contract, Wilkins, being pressed for money, was under the necessity of selling his interest in the contract, and did sell and assign it to Silliman and Curtis, authorizing them to make use of his name in any suit that might be thought necessary; at the same time the deed executed and tendered to Cisna was delivered to them, with authority to deliver it to Cisna, should any compromise take place. Silliman, afterwards, sold and assigned all his interest in the contract to Curtis, for whose benefit the suit is prosecuted. These are the material facts in relation to the assignment.

On the part of the defendant it was contended, that by this asssgnment Wilkins put it out of his power to perform his covenant, and that the defendant could not be required to accept a conveyance from an assignee.

It is not easy to perceive the force of this objection; Wilkins had a right to sell his interest in the contract, provided he did it so as not to prejudice the rights of the defendant. This appears to be the fact, as it is one of the stipulations of the agreement, that the deed first executed and tendered to Cisna, should be put into the hands of the assignees, with power to deliver it to Cisna on his performing the original agreement. There was no necessity, therefore, of a conveyance from the assignee to the defendant. The title offered is from Wilkins himself. The object of the assignment was not to vest the title in the assignee, but the money due on the contract with Cisna; and with that view the

deed executed on the seventh of February was delivered, in the form of an escrow, to be delivered over to Cisna on his complying with the contract. A deed generally takes effect from the delivery, but this rule is departed from, and the doctrine of relation is resorted to, when it becomes necessary to prevent fraud, or give effect to the intention of the parties, if third persons are not injured.

A deed delivered as an escrow, usually takes effect from the performance of the condition, and the actual delivery to the grantee, but the fiction is always resorted to, and the deed considered as taking effect from its execution, when justice requires it.

In the case of *Butler and Baker*, (3 *Co.* 35.) it was decided, that a deed delivered to a third person, as an escrow, and afterwards delivered to the grantee, should relate back, and take effect from the first delivery, for the purpose of giving effect to the deed; as if a *feme sole*, having made a deed, should marry after the conditional delivery, and before the delivery to the grantee; or if a grantor, whether feme sole or not, should die between the first and second delivery. In these cases, the deed would relate back to the first delivery.— This is done to prevent injury, and to uphold the deed, or in the language of Coke, "from necessity *ut res magis valeat quam pereat.* To this intent, by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not his deed till the second delivery." In the case of the *lessee of Woollams v. Clapham*, (1 *Term Rep.* 600.) it was held, that the title of the surrenderee, after admittance, was perfect, as from the time of the surrender, and should relate back to it.— That is, although the title in strictness of law, is not complete till the admittance, the title shall relate back, and take effect from the time of the surrender.

So in the case of *Hermitage* v. *Thompkins*, (1 *Lord Ray.* 729.) it was ruled, that if a man demises lands by indenture, in which he has no interest, and afterwards buys them, he will be estopped, unless the want of title appears in the recitals of the lease. In that case, the fiction carried back the grant to the lessor to a period antecedent to its date, to give effect to the lease made at a time when the lessor had no pretence of title. In the case before us, the deed to Cisna was executed on the 7th September, and tendered shortly after, and on the first of February following, when the contract was assigned, it was delivered to Curtis, the assignee, as an escrow for the use of Cisna, and is now brought into court for that purpose; and, if accepted, must relate back to the first delivery, or, if necessary, to its date. Curtis, by the terms of the assignment, was made the instrument for passing the title direct from Wilkins to Cisna. He disavows all claim of title in himself, and produces the deed, praying for such a decree as will make it operative, to vest the title in Cisna. There is, therefore, no ground for the objection, that the title must pass through a third person; but if such an inconvenience could result from the assignment, the decree can be so framed as to guard against it. Had Curtis purchased for the avowed purpose of overreaching the right of Cisna, he would have been a fraudulent purchaser, as he had notice of the contract, and he would have held the title subject to the equity of Cisna.

The deed of the 7th September, as we have seen, was delivered to Curtis as an escrow, and it was not the intention of the parties that the title should vest in

him, unless that deed should become inoperative by a failure on the part of Cisna; as Wilkins had a right to assign his interest, this court ought to protect it in the hands of his assignee. But it cannot be necessary to pursue this subject further. The case of *Hashbolt v. Porter*, (2 *Pow.* 138.) seems to establish the principle, that an assignee, not being a party to a suit against his assignor, is not bound by the decree rendered, but may go into the whole merits, in a subsequent suit, in which he is a party.

III. The next inquiry is, whether the judgment at law can operate as a bar to the decree prayed for by the bill. It appears by the exhibits, that after the assignment, the tender, and the death of Cisna, his administrator commenced an action of assumpsit against Wilkins, for the purpose of recovering from him the value of the sheep delivered on the contract. The declaration contained but one count, charging, that defendant was indebted to Cisna in his life, in the sum of 1000 dollars, as well for divers goods sold and delivered, as for one hundred sheep sold and delivered by the said Thomas to the said Francis, and also for money by the said Francis before that time had and received to the use of the said Thomas. The defendant pleaded the general issue, on which there was a verdict and judgment for the plaintiff. It is contended that this judgment is final, and that it must restrain the court from investigating and deciding the merits of the case now before them, on the ground, that when a court of law has competent jurisdiction, and can give full relief, its decision is final. Without attempting to controvert this principle, I will observe, that it does not and cannot apply to this case, because, the parties are different—the subject matter is entirely different, and the court that rendered the judgment had no jurisdiction of the case now presented, nor had they power to grant the relief prayed for in this bill. The bill presents a contract for the sale of real estate, involving the rights of an assignee, and the various questions growing out of a non-performance on the day stipulated, and it prays for the specific execution of the contract. To claim for the court that renderered the judgment, a power to hear and decide these matters, and to grant the relief prayed for, would be neither more nor less than to convert it into a court of chancery, and vest it with all the power that distinguish such a court from a court of common law.

1st. The parties are not the same. This bill is filed exclusively for the benefit of Curtis. The suit at law was against Wilkins alone; Curtis was not a party, and therefore was not, and could not have been heard, nor was it in his power to compel Wilkins to defend the suit. It is true that courts of law will protect the rights of assignees as far as their forms of proceeding will permit, but these fall far short of what was necessary for the security of this assignee, had his claim been before the court. To conclude a person by a decision at law, he ought to have a day in court, and an opportunity of being heard. As to the complainant, Curtis, this has not been the case: he is now heard for the first time, and for the first time his claims are presented for examination. By the rules of common law, a record cannot be received as evidence, unless it be between the same parties, and involve the same point. Hence the record of a conviction for an assault and battery, cannot be given in evidence in an action for damages against the same defendant for the same assault and battery.

2d. The subject matter of the suits is not the same, nor is the object the same. The suit at law, we have seen, was an action of assumpsit, founded on a sale

of goods and sheep, and the object was to recover the value of those goods and sheep. The subject matter of the bill is a contract for the conveyance of real estate, and the object of it is a specific performance of that contract. I am aware that the sheep had been delivered as a payment on the contract, but that circumstance cannot affect the case. We have seen that the contract had neither been forfeited nor abandoned by Wilkins; that it was not the ground of the action, nor necessarily, nor directly before the court; nor was there any thing in the record having a perceptible allusion to it. But the bill in chancery is founded directly on the contract. It brings before the court every circumstance connected with it, and the right of the complainant to enforce it. In the one case, the court decided on the right of Cisna to recover from Wilkins the value of certain sheep delivered on a contract; in the other, they are called upon to decide, whether Curtis is not entitled to the specific performance of that contract. The subject matter, and the object of the first suit was within the jurisdiction of the court that decided it; but neither the subject matter nor the object of the present suit was within their jurisdiction, nor could they have granted the relief here prayed for.

The fact that the representatives of Cisna have recovered a judgment for a sum of money, does not destroy the power of a court of chancery to investigate the equity of that judgment. This may be done without calling in question its correctness, in reference to the premises on which it was rendered. It frequently happens that such judgments are obtained because the only ground on which they could be resisted is not within the reach of a court of law. Whatever might have been the ground on which the judgment in favor of Cisna was had, it would appear to be sufficient to sustain the jurisdiction of this court, and the right of the plaintiff to the relief he seeks, that he has made and supported a case that entitles him to a decree for a specific performance, and that that decree cannot be rendered without enjoining the judgment at law. It might be inferred from the arguments of counsel, that it was considered by the court that rendered the judgment, that the tender of a deed was a condition precedent; that Wilkins having failed to tender on the 1st September, could not avail himself of a subsequent tender in a court of law. If this were the case, and there appears to be no other ground on which the recovery on such facts as are now before us could have been had, it must put the question at rest, as it pre-supposes a want of power in the court that rendered the judgment to grant the defendant that relief which a court of equity is in the daily habit of granting, nor can it affect the question to concede, that the court restricted their own powers unnecessarily. If, as a court of law, they held the defendant, Wilkins, strictly to a tender on the day named in the contract, it must have been from an actual or supposed want of that power which this court clearly possesses; and in either case the merits of this complainant have not been heard or decided. It is a question that has been much litigated, how far a court of chancery can relieve a person against the consequences of an omission to perform his contract on the day stipulated. It is not therefore surprising, that a court of law, viewing these covenants as it is understood they did, should have decided against hearing the only defence, on which a recovery could be resisted. The restriction imposed by that court, on its own jurisdiction, has compelled a resort to chancery, and it does not become us to say, they have erred in deciding the limits of their own power.

It is admitted that the merits of a judgment can never be overhaled, in an original action, either at law, or in equity. Such judgments are conclusive till reversed, or set aside, by a competent revising power; and I wish it distinctly understood, that no attempt is made, to sustain this bill, on the ground of supposed error in the court of law. It is to be taken for granted that that court decided correctly, and that we with the same case, and exercising the same extent of power, would have decided in the same way.

Disclaiming all right to examine the correctness of the judgment at law, the ground upon which I would sustain this bill is, that the relief it prays for, could not be granted by the court at law, and that in consequence of rejecting the evidence, and with it the defence of Wilkins, on the supposition of a want of jurisdiction to hear and decide it, a judgment has been obtained against him, which in equity and good conscience, ought not to be enforced. Viewed in this light, the case seems to be stripped of all difficulty, and to be placed on the ground on which chancery usually relieves against judgments at law. The case of *Moses and Macferlan* went further than is necessary, to support this bill. There an action at law, was sustained, to recover back a sum of money, paid on the judgment of an inferior court, because that court had rejected the defence set up as not being within their jurisdiction. Here the same ground exists, and in addition to that circumstance the whole object of the bill is without the jurisdiction of a court of law, and no part of the case could have been examined by them with a reference to the decision now prayed for.

Inasmuch, then, as the parties—the subject matter—and the object of the suits are different; as the one now before us calls for the exercise of powers not possessed by a court of law, and as Curtis is an assignee, and was not a party to the former suit, I must believe, that the judgment is not a bar to the present suit, and that the plaintiff is entitled to the relief he prays for.

HUNTER *v.* GOWDY, ET AL.

A court of equity never interferes to relieve against a contract, made in good faith, where both parties are mistaken as to the value.

This case came up from Green county. The object of the bill was to obtain relief against a judgment at law on certain sealed notes made in 1816.

The bill charged, that on the 2d of May 1816, J. Hunter agreed to purchase of Ekellis Willhite five lots in the town of Pittsburgh, in the then territory of Indiana. That Willhite represented that he, with David Hills, and John Minor, were proprietors of the town, which was represented to be in a flourishing condition, and likely to become a seat of Justice. That for the purchase money he gave five notes payable in September following, for 355 dollars. Three made payable to Ekellis Willhite, and two to his son John H. Willhite. At the same time he received from Ekellis Willhite five title bonds in the following terms:

We, Ekellis Willhite, John Minor and David Hillis, obligate ourselves and our heirs, to deed to John Hunter one inn-lot in the town of Pittsburgh, Indiana

Territory, as known on the plan of said town, as of record, by the No. 47, for lot aforesaid, for the performance of obligation we jointly and severally bind ourselves under the penal sum of 2000 dollars current money of the United States. Given under our hands and seals, this 2d day of May, 1816.

EKELLIS WILLHITE, [Seal.]
JOHN MINOR, [Seal.]
DAVID HILLIS, [Seal.]

This contract was executed for all the parties by Willhite who represented that he was authorized to do so by Minor and Hillis.

The bill further charges that Willhite's representations in relation to the town were false. That he had no power from Minor and Hillis to sell or to bind them in a bond. That the land on which the town was laid out, was not secured, being only entered, and one payment made to the government. That Thomas Hunter was not an original party to the contract: but executed the notes as security, after they became due, without any consideration. That after the notes became due they were assigned for a trifling consideration, and came to the hands of the Goudys by assignment, dated in February, 1818, by whom judgment had been obtained against Thomas Goudy alone, for the full amount of the notes. The bill prays an injunction and a recision of the contract.

The answers admit the contracts, assignments and judgment, as stated in the bill: but they deny the allegations of fraud and misrepresentation. Willhite asserts that Minor and Hillis were equally interested with him, and that he had power from them to sell and execute bonds: that they had a title to the lands which had not been forfeited, but was now secure: that John Hunter saw the town before he purchased: and that no misrepresentations were made.

The testimony on the part of the complainants proves that the town of Pittsburgh is entirely abandoned as a town: that Willhite has enclosed the whole site as a farm and has it under cultivation. It is also proved that Willhite had made but one payment on the land in 1816. But that the whole was paid before the time of hearing this cause, and Willhite entitled to a final certificate.

On the part of the defendants it was proved that Minor and Hillis were understood to be part proprietors of the town, and one witness testifies that he understood from them that they had authorized Willhite to sell lots. It was also proved that Minor and Hillis were men in good circumstances, sufficint to be responsible for the title to the land. And it was in proof that Hunter expressed himself well pleased with the bargain.

A deed for the lots from Willhite, Minor and Hillis, duly executed and acknowledged, dated 12th March, 1823, was made an exhibit in the case.

Collet, for complainant. *Alexander*, for defendant.

By the COURT.

The misrepresentation charged in the bill is not made out in proof, although it is plain that the complainants have made a hard and losing bargain. The lots appear to have been purchased upon speculation under the impression that a town would grow up, and property be valuable. The purchaser was on the ground and could judge for himself. He seems to have had the same opportu-

nity to form a correct opinion that was possessed by the other party. A court of equity never interferes to relieve against a contract, made in good faith, where both parties are mistaken as to the value. Had any circumstance given a great and sudden rise to lots in this town, the proprietors could not have asked equity to give them a new bargain against Hunter by increasing the price he was to pay. It was an equal risk, and equity cannot interpose.

By procuring Thomas Hunter to execute the notes as security after they became due, John Hunter then affirmed the contract, and acknowledged its continued obligation, although not performed by the other party making a conveyance. To make the state of the title a ground for rescinding the contract, the purchaser should have tendered payment of the purchase money, and demanded a title; or if the tender was not necessary in this case, he should have claimed his deed, or have taken some steps avowing an intention to give up the bargain. He has not shewn that he was ignorant of the state of the title, when he purchased, and we are not to presume it.

Judge BURNET's dissenting opinion.

I will state as concisely as practicable, the reasons which have induced me to dissent from the opinion of the court in this case.

1. The notes, or sealed bills, having been assigned, long after they were due, are subject to the same equity in the hands of the assignee, as if they had remained in the hands of the original payee.

2. From the terms of the contract, the delivery of the deed, and the payment of the money, were, to say the least, simultaneous acts, and the vendor had no right to demand the money, till he had offered the deed.

3. There was a suppression of the truth by Willhite.

4. There was also a suggestion of falsehood.

5. The disparity between the value of the lots, and the price to be paid, is so enormous, that it would, under the circumstances of the case, be inequitable to hold the purchaser to his bargain.

6. The object of the purchase has failed, in consequence of the improper conduct of the vendor.

7. There has been gross laches on the part of Willhite. He has trifled with his contract, till the circumstances of the parties and the value of the property are materially changed.

1. It is unnecessary to discuss the first ground, as the fact appears from the bill and answer, and the legal consequence is not denied.

2. By the tenor of the bonds, Hunter was entitled to a deed on demand.—The notes were payable at a future day. It must, therefore, have been the understanding of the parties, that the conveyance was to precede the payment of the money, or at least to accompany it, and if the whole contract had been embraced in one instrument, the conveyance would have been a condition precedent, and the tender of a deed must have preceded the commencement of a suit. The circumstance that obligations were given for the purchase money, distinct from the title bonds, ought not in a court of equity, to effect the construction of the contract, which should be considered as an entire transaction, in order to give effect to the manifest intention of the parties. There is nothing

disclosed in the case from which an inference can be drawn, that Hunter intended to rely on the faith of Willhite, or to part from his money, before he received his title. In latter years, courts of law, as well as courts of equity, have strongly inclined to consider the stipulations of contracts as dependant, and when a fair interpretation of the whole transaction would warrant it, they have so declared them. The principle is both just and equitable. While its tendency is to secure both parties, it does injustice to neither. Men may contract as they will; they may give credit at pleasure, but here no such intention appears. The situation of the property, at the time of the contract, was such that Hunter could not safely have parted with his money. Only a small part of the purchase money had been paid to government, and by the terms of their sale the entire tract might have been forfeited for the non-payment of the residue. It was prudent, therefore, on his part to make his contract so as to guard against that danger. In the case of *Hutchinson v. McNutt*, (*Ohio Rep.* 14.) this doctrine was recognized.

3. It was the duty of Willhite to communicate to Hunter the real situation of the title, and the time when it would be in his power to execute the deed. But it is not pretended by the defendants that this information was given, and the only inference that can be drawn from the bill, answer, and exhibits, is, that the deed was expected when the notes became due, and that Hunter had no reason to doubt of its being then executed. Every person, when he enters into a contract, has an object in view, to attain which, punctuality is necessary; if that be wanting, his arrangements, predicated on the contract, may be frustrated. This applies to every contract, and imposes it as a duty on a vendor, to disclose the nature of his title. Such a disclosure was not made in this case, and the consequences of suppressing the truth are very apparent. Had the vendor been informed that the purchase money had not been paid to government; that the land was subject to be forfeited, and that the title would not be perfected for more than six years, he might have made his calculations accordingly, and would most certainly have declined the contract. We find, on the part of the defendants, a disposition even at this time, to cover the gross negligence which has occurred in the completion of the title. This appears from the silence of the answers on this point, and the caution manifested in taking the deposition of the register of the land office. No question was proposed to him tending to disclose the time of paying the money, or of assigning the certificate to Willhite, nor was he required to annex to his deposition copies of the receipt and assignment filed in his office, or of the final certificate issued thereon, although he was required partially to testify of their contents.

4. Willhite affirmed that Minor and Hillis were joint proprietors in the town, and that he was legally empowered by them to sell and to affix their names and seals to the title bonds, and although this authority is expressly denied in the bill, no power of attorney is produced or proved. An attempt, however, is made to remedy this defect of power, by procuring them to join in executing a deed nearly seven years after the vendee had a right to demand his title. Although the defendant, Willhite, attempted to bind his co-proprietors, and to render them liable to an action, should there be a failure of title; yet it appears they were not to participate in the fruits of the contract, as their names were erased from the notes after they were drawn, by which three of them were made paya-

ble to Willhite himself, and the other two to his son. This circumstance shews, that Willhite was acting for his own individual benefit. If it be asked why Hillis and Minor joined in the deed, the answer is at hand. Hillis had previously assigned all his interest in the land to Willhite—Minor sets up no claim to any part of it—the patent had just been procured in the name of Willhite—the title was perfect—they run no risk therefore, by joining in the deed. They appear to be friends of Willhite, and disposed to aid him as far as it can be done without risk or loss to themselves; but I discover no admission of a liability on their part, or any disposition to interfere till Willhite had possessed himself of the entire interest and title in the land, by some arrangement, not disclosed, with his co-proprietors and the assignee of the notes. Then we find their signatures to the deed as mere matter of form. I use this expression because they had no interest in the land, either equitable or legal. Had this arrangement been made in time, it would not have rested with Hunter to object; he would have had the benefit of his contract, and could not have complained; but as the defects of the title were not disclosed at the time of the contract, nor remedied within any reasonable time thereafter, it has operated as a fraud on Hunter, which ought to release him from the obligation of the contract.

5. The great disparity between the value of the lots, and the sum stipulated to be paid, is also a circumstance worthy of notice. I am aware that this consideration, of itself, has been held not sufficient to set aside a contract, though it might induce a chancellor to refuse a decree for a specific performance; but when this disparity is connected with the other facts of the case, it will be entitled to great weight. Whatever might have been the supposed value of the lots at the time of the contract, in the estimation of a person ignorant of the defect of title, or whatever might have been the real value at that time, if the vendor had been possessed of a legal title, in which the community could have confided, it is very apparent that at the time the title was perfected, and Willhite was enabled to fulfil his contract, they were of no more value than an equal quantity of wild land of the same quality, in any part of the neighborhood. As this state of things is to be ascribed to the failure and abandonment of the town, which has resulted from the conduct of Willhite, it is proper to consider the present value of the lots as the consideration of the notes. If this be correct, the court require Hunter to receive a property worth four or five dollars, and to pay for it a sum exceeding five hundred dollars. It was not in the power of Willhite to perform his contract till the prospect of a town was lost sight of, and the lots reduced, in the public estimation, to their present value; it is therefore just to consider that value as the consideration, to whatever cause its diminution may be ascribed; for until the title was perfected, the purchaser could not safely improve or dispose of the property, or apply it to any valuable use. Under such circumstances, to compel him to pay at the rate of an hundred for one, seems to be inconsistent with equity, and the common dictates of justice. The disparity is so enormous as to shock the mind, and impress it at once with a conviction of fraud.

6. The object which might have induced Hunter to make the purchase, has wholly failed, and this is to be attributed to the conduct of Willhite, in neglecting to perfect his title, and in converting the site of the town into a farm. The

former circumstance would create such doubt and suspicion, as would deter adventurers from risking their money, by purchasing and improving in the town, and the latter was a virtual withdrawal of the lots from market. It must have diverted the attention of the public from the place, and they must have ceased to consider it as a town. This conduct, having removed every inducement to the purchase and improvement of lots, until after the season for establishing a town had entirely passed by, has rendered it impossible for Hunter to use the lots for the purpose intended. His object therefore has been lost. The consideration moving him to the purchase has failed, and that failure appears, in no degree, to be ascribable to himself. The proprietors, having laid out their town, and induced the complainant to purchase, were under a moral obligation to use reasonable diligence to advance its prosperity. Purchasers would naturally rely, and had a right to rely on such efforts, and the withholding of them, was a breach of an implied undertaking, injurious to those, who might have previously purchased. But in this case, Willhite is not only chargeable with an omission of duty, but with acts, directly calculated to destroy the town, or rather to prevent it from coming into existence, for it does not appear, that it ever has existed, otherwise than on paper. It appears from the testimony, that Hunter immediately after his purchase, engaged men to improve his lots; that he intended to settle on them, and commence a business, that could be carried on with advantage, only in a town, but discovering that the title was doubtful, and the fate of the town thereby uncertain, and that no efforts were making to advance it, he could not proceed with safety, and the event has proved, that his apprehensions were well founded.

7. Willhite has been guilty of gross laches, as will appear by reference to dates. The contract was made in May, 1816. The notes became payable in September following, when, if not before, Willhite was bound to convey the lots. The payment to government for the quarter section, on which the lots are situate, was not made till October, 1821. The last payment to government became due in August, 1819. In August, 1820, the land became liable to forfeiture, and was saved by the act of Congress, 1821. The deed to Hunter was not executed till March, 1823, more than six years after the time it should have been made, by the terms of the contract. These laches have not been acquiesced in, nor are they satisfactorily accounted for. In the mean time, the situation of the parties, and of the property, is materially changed. The contemplated town is converted into a farm. The purchaser, unable to procure a title, has abandoned the object, and has settled himself in the state of Ohio. The value of the lots has been reduced to the legal price of government land, and when separated from the farm of Willhite, of which they seem to form a part, are in reality of no value. Under such circumstances, it appears to me, that the complainant ought to be relieved from the contract.

The facts disclosed in the case, do not appear to establish the grounds on which the opinion of the court is predicated. The lots were purchased by complainant for his own use. It was his intention to improve and settle on them, not to speculate, by selling them at an advanced price. Nor do I discover any thing in the pleadings, or testimony, that will justify the inference, that Hunter had the same opportunity to form a correct opinion, that was possessed by the other party.

Willhite knew the standing of his title—the money due on the land to government, and his ability and arrangements to complete the payment. He does not pretend that he disclosed these facts to Hunter, nor is there any evidence to shew, that Hunter had reason to suspect that the purchase money had not been paid to government, or that Willhite's title was not complete.

If this contract had been made in good faith, both parties being ignorant of the value, the case would have presented itself to my mind, in a different aspect, but it appears to me, that on the part of Willhite, the contract was made, *mala fide*, and that the depreciation of value has arisen from the want of title, not disclosed, but since discovered, and from the conduct of Willhite himself, subsequent to the contract, of which Hunter could have no knowledge. Equity does not usually require any thing to be done *pro forma*, when the doing of it would be vain, and useless. The complainant had discovered that Willhite had no title, and that he could not execute a deed. It was altogether uncertain whether he would ever acquire a title. It was therefore natural for Hunter to draw the conclusion, that in the estimation of both parties, the contract was at an end. Under such circumstances, to require a formal tender of the purchase money, or a demand of a deed, to put the vendor in the wrong, seems to be, to say the least of it, *herens in cortice*.

It is true, that the complainant has not expressly proved a negative, as to his want of knowledge of the state of the title, but he has solemnly averred it under oath in his bill, and the defendants have not attempted to deny it in their answers, or to disprove it by testimony. I cannot therefore concur in the opinion expressed by the court.

ARNOLD v. FULLER'S HEIRS.

A writ of error and supersedeas does not vacate a levy upon real estate.

A levy on real estate is not affected by quashing the vendi, and setting aside the valuation.

Where a *fi. fa.* is returned levied upon real estate, another *fi. fa.* issued before the first levy is disposed of, is void.

A *sci. fa.* is a proper remedy to vacate a satisfaction improperly entered up.

This was a *scire facias*, brought before the Supreme Court in Gallia county, at May term, 1824, by appeal from the common pleas. The facts of the case were these. At the August term, 1813, Samuel Green Arnold, obtained judgment against Sylvester Fuller, for $468,95 damages, and cost of suit. On the 8th July, 1814, an execution issued to David Ridgeway, sheriff of Gallia, which was returned no goods. On the 28th October, 1814, an *alias, fi. fa. et, lev. fa.* issued to the same sheriff, who returned that he had levied on one hundred acres of land, being lot, number 730, of town one, range fifteen, Ohio company's purchase: and that further proceedings were stayed by writ of error, afterwards abated by the death of Fuller; the sheriff, Ridgeway, went out of office, and in February, 1818, a *vendi-expo.* issued to his successor, which was returned, property not sold for want of bidders. On motion of the defendant's counsel, this writ was quashed and the appraisement of the property set aside by the court. On the 28th Nov. 1818, a new execution issued to J. Holcomb, then sheriff of Gallia county, on which he returned that he had levied on a hundred acre lot of land, number, 730, town 1, range 15, Ohio company's purchase,

and had sold the same to David Putnam, plaintiff's attorney, for $920. The receipt of the said Putnam was also returned in the following words, $628, April 13, 1819; Received of Samuel R. Holcomb, by land bid off on this execution, six hundred and twenty-eight dollars, for debt and interest on this execution."

The defendant, Fuller, died intestate, having previously conveyed the land to his son, one of the present defendants. The plaintiff avers in his *scire facias*, that by reason of the premises, the sale was inoperative and void, and that his judgment still remains unsatisfied. The defendants are called upon to shew cause, why the proceedings, since the death of the defendant, Sylvester Fuller, should not be set aside, and the judgment satisfied of the lands and real estate of the said Fuller deceased, and particularly of the said lot, number 730. The defendants demurred, and the plaintiff joined in demurrer.

KING, *in support of the demurrer*. GRAINGER, contra.

Opinion of the Court by Judge BURNET.

Several questions are presented in this case. 1. Did the writ of error and supersedeas avoid and vacate the execution and levy, so as to render it a nullity, or did it merely stay the proceedings of the sheriff. 2. If the latter, did the order of the court, quashing the *vend. expo.* and setting aside the appraisement, affect the *lev. fa.* and the levy made thereon. 3. If the supersedeas merely stayed the proceedings, was the execution of Nov. 28, 1814, and the sale made thereon, merely irregular, or altogether void, so as to entitle the plaintiff to the relief prayed for. 4. Can a *scire facias* be sustained in a case like the present.

As to the first point, no authority has been cited to show the effect of a supersedeas on an execution levied on real estate. It is said in the books, that the object of a supersedeas is to stay proceedings *till the errors are disposed of*. In the *Bishop of Ossory's case*, (*Cro. Jas.* 534.) it was resolved by all the court, that the writ of error was a supersedeas *till the error was examined, affirmed, or reversed*. In *Badger v. Lloyd*, (3 *Salk.* 145.) it was said by Holt, Chief Justice, that although a writ of error forecloses the court, and ties up their hands, yet it doth not alter the right of the parties.

If a writ of error be allowed on the return day of a *ca. sa.* the sheriff may, notwithstanding, return the writ *non est*; the plaintiff shall have the benefit of the return, and may afterwards proceed against the bail. *Parkins v. Wilson*, (2 *L. Ray.* 1256.) This could not be the case if the allowance rendered the execution anullity. The same inference may be drawn from the reason given for quashing the writ in the case of *Smith v. Nicholson*, (2d *Stra.* 1186.) A *ca. sa.* had been taken out on the 3d of December, for the purpose of proceeding against bail. On the next day a writ of error was allowed, after which the *ca. sa.* was returned *non est inventus*. After the writ of error was at an end, the plaintiff proceeded by *scire facias* against the bail. On motion the whole proceedings were set aside, because the return of *non est inventus* was obtained after notice of the writ of error, which, in its nature, stops all proceedings. The sheriff could not so much as look after the defendant, in order to ground such a return thereon. The reason is apparent; as the rule required the *ca. sa.* to remain four days in the sheriff's office before he was authorized to return a *non est inventus*, for the

purpose of fixing the bail, and as the writ of error was allowed the next day after the *ca. sa.* issued, the operation of the *ca. sa.* was suspended before it was ripe for the return, and while something remained to be done, which the allowance prohibited; but in the preceeding case, the four days having elapsed before the allowance, the return was held to be good, and the bail were fixed. This could not have been the case if the writ of error had affected the *ca. sa.* so as to render void that which had been done before the allowance. In the one case, the execution being ripe for a return, before the supersedeas, the return was sustained, though made after the supersedeas. In the other case, the execution having been superseded before it was ripe for a return, was considered a nullity. The principle on which these cases were decided being applied to the case in hand, must lead to this conclusion: that as the *lev. fa.* had been levied, and was ready to be returned before the writ of error, the return was well made, and after the writ of error was at an end, the plaintiff was entitled to the benefit of it; but if the writ of error had been allowed after the execution had issued, but before the levy, the proceedings would have been void. We find many cases in which executions have been set aside for having issued after the allowance of writs of error; but where the allowance has been after the issuing of the execution, the operation has been to stay further proceedings, leaving the matter in *statu quo*. The general rule seems to be, that the writ of error operates as a supersedeas from the time of the allowance, and will therefore avoid an after execution, or levy; but on the principle here contended for, it will have a retrospective effect, by operating on a writ and levy anterior to the allowance. It would seem as reasonable that it should overreach an execution on which a part of the money had been levied and paid over before the allowance, as that it should render void a levy made before the allowance. Neither the necessity of the case, nor the object of the writ, requires such an effect. It does not follow from the allowance that the judgment will be reversed; when, therefore, a levy is made on land, which neither changes the possession, nor restricts the occupant in the use of it, his purpose is gained by a stay of proceedings till the judgment be reversed or affirmed. It is decided in *Withers v. Henley*, (*Cro. Jas.* 379.) cited by defendant, that a supersedeas is as good a cause to discharge a prisoner taken on a *ca. sa.* as the first process was to arrest him. This, however, is from the necessity of the case, for on no other principle can the party have the benefit of his writ of error. While that is pending the plaintiff ought not to hold a satisfaction of his judgment by detaining the defendant in custody. But the case of *Sare v. Shelton*, (2 *Roll. Ab.* 481.) where it was holden, that if before sale of goods seized under a *fi. fa.* the defendant deliver a writ of supersedeas, he shall have the goods again, because the property is not altered by the seizure, has been declared not to be law. (4 *Bac. title supersedeas pl.* 6, 7. *Yelv.* 6.) In *Charter v. Peeter*, (*Cro. Eliz.* 597.) the defendant's goods had been taken on a *fi. fa.* and before sale a writ of error and supersedeas were taken. The sheriff returned the seizure, also that the goods remained in his hands for want of bidders, and that a supersedeas was awarded. All the court held, notwithstanding the supersedeas, in regard it came not to the sheriff until he had begun to make execution, that a *vend. expo.* should be awarded to perfect it. In *Regina v. Nash*, (2 *L. Ray.* 990.) it was decided, that if goods are once levied, a certiorari, to re-

move the conviction, will not suspend their sale. In *Clerk v. Withers*, (1 *Salk.* 323.) it was ruled, that the sheriff might proceed to sell, after the plaintiff's death, and that execution being an entire thing, connot be superseded after it is begun. But admitting the case of *Sare v. Shelton* to be good law, it is by no means conclusive as to this case, for when goods and chattels are taken, the defendant loses the possession, and the property may be lost or destroyed during the pendency of the writ of error; but on a *lev. fa.* no such privation takes place. The possession and use of the property remain with the defendant; there is, therefore, no necessity for setting aside the writ and levy.

The second question does not admit of a doubt. The motion was confined to the *vend. expo.* and the appraisement, and the order of the court extended no further. The levy was not comprehended in the motion, and cannot be affected by the order. It is the constant practice to set aside valuations of property, without disturbing the levy; and it never has been supposed that such an order rendered it necessary to sue out a new writ, or to obtain a new levy.

The next inquiry is, whether the *lev. fa.* of November 23, 1818, and the sale made thereon were merely irregular, or altogether void. In the case of *Clerk v. Withers*, before cited, it was resolved that the plaintiff's death did not abate the execution; that an execution is an entire thing, and cannot be superseded after it is begun; that by the seizure the property was out of the defendant, and in abeyance, and that no further proceedings could be had against him, because the plaintiff had made his election. In *Ladd v. Blunt*, (4 *Mass.* 402.) it was decided, that after the sheriff has seized goods sufficient to satisfy the judgment, the defendant is discharged, though the sheriff may have wasted the goods, squandered the money, or has not returned the execution.

In 2 *Tid.* 937, it is laid down, that when the sheriff takes goods upon a *fi. fa.* to the amount of the sum directed to be levied, the defendant is discharged, and may plead it, &c. In 1 *Sell.* 571, it is said there ought not to be two executions at the same time, but if one proves ineffectual, another may be sued out. In the case before us the first execution did not prove ineffectual; a levy was made and returned, and the property had not been sold when the second execution issued.

In the case of *Stoyel v. Cady*, (4 *Day*, 222.) a *ca. sa.* had been executed after the return day had passed.

The defendant, to procure his discharge, paid the money, and then brought an action against the sheriff and recovered a larger sum than the judgment. The plaintiff, in the original action, paid the money, and after his death, his administrators brought a *scire facias*, to set aside the proceedings, and obtain a new execution, on the ground, that the *ca. sa.* had become a perfect nullity, before it was served; that the judgment had been discharged by mistake, and that there had been no real satisfaction. The court sustained the writ, and the plaintiff had judgment. In that case the return day of the *ca. sa.* being past, it was dead in law before it was served, and gave no authority to the officer; there had been a lapse of time; the parties were changed, and the plaintiff must have lost his debt without the relief sought for. In the case before the court, there was a levy by Ridgeway, in the life of the defendant, not disposed of. After that levy, and the death of the defendant, a new execution issued against him, to

Holcomb, by virtue of which, there was another levy, a sale and a return of satisfaction.

It is contended by the defendants, that these proceedings are not void, but only voidable. The distinction between void and voidable, is not as distinctly defined, as could be wished. It is said that those acts are void, which are contrary to law, at the very time of doing them, and no person is bound by such an act, but a thing is only voidable, which is done by a person who ought not to have done it, (5 *Bac. title void and voidable, A. pl.* 1.) By this rule, all the proceedings subsequent to the death of the defendant, were not only irregular, but void. The execution directed to Holcomb was illegal at the time it was taken out. 1. Because there was a previous execution and levy, on which no sale had been made. 2. Because the defendant was dead, before it issued. 3. Because his property, in the hands of his representatives, could not be taken, without a previous *scire facias*. Some of the cases cited by the defendants' counsel, to shew that these proceedings were merely voidable, are certainly strong; but the death of the defendant, and the change of the sheriff, are circumstances which did not occur in either of them, and are sufficient to show, that they do not meet the case before us. Had the sale been made by the same officer who made the first levy, the second writ and levy might perhaps have been considered as mere nullities, and the sale referred to the first levy; but such was not the fact. The sale was by a person, who derived no power, or authority, from that levy, and if it be supported, it must be done on the efficacy of the last process, and the proceedings had thereon. To justify this, the first levy must be considered as disposed of, by the writ of error, and should that be admitted, the death of the defendant, having intervened, a *scire facias* was necessary, and the process should have been against the representatives, and not in the name of the deceased defendant, so that in either case, the proceedings must be illegal.

As to the fourth point, the defendants' counsel urge several objections against proceeding by *scire facias*. They insist, from the definition of the writ given in 2 *Saund.* 70, that it is inapplicable to this case, but they seem to forget that there is here a satisfaction of record, which forms the chief difficulty of the plaintiff, and which he seeks to set aside.

The second objection, that a *scire facias* to revive a judgment was unknown at common law, and was given by a statute not in force in this state, as also the third objection, that no writ of *scire facias* can issue against the *terre* tenants until the heir has been summoned in, nor against the heir, till the personal representatives have been called on, are predicated on a mistaken apprehension of the object of the writ in the present case, which is to get rid of the illegal proceedings, since the death of Sylvester Fuller, so as to proceed on the levy, legally made, in his life time. It is not to revive the judgment, or to lay a foundation for process against any of his representatives. If the land levied on, in the life of the defendant, be not sufficient to satisfy the judgment, the plaintiff must pursue the course pointed out by the statute, before he can take out execution for the residue. The great object of this proceeding, is to avoid the entry of satisfaction, on the record, and the proceedings which have led to it, for the purpose of enabling the plaintiff to pursue his remedy, by commencing at the point, where the proceedings stood, at the death of the defendant.

This is the relief prayed for by the plaintiff, and we are all of opinion, that he is entitled to it.

Demurrer overruled.

LESSEE OF BURGETT *v.* BURGETT.

A voluntary conveyance, without consideration, and made to defraud creditors is not void as between the parties, but only as against creditors and subsequent purchasers.

It is frequently the duty of courts to restrain, or qualify or enlarge the ordinary meaning of words in order to carry into effect the intention of a statute.

This was an action of ejectment, tried at the July term, 1824, in the county of Butler.

The plaintiff gave in evidence a patent from the United States to Henry Burgett, for the land in question, and a deed for the same land from Henry Burgett to the Lessor of the plaintiff. The defendant then introduced witnesses to prove that the deed from Henry Burgett to Daniel Burgett was wholly without consideration, and intended to defraud creditors, and that Danied Burgett had notice of that intention. It was admitted at the trial, that John Burgett, late husband of the defendant, was a creditor of Henry at the time of the conveyance to Daniel; that he died in possession of the premises; that the defendant, his widow, had continued in possession ever since, and that John was in possession when the deed was made to Daniel.

Wood, for the plaintiff. *Sargeant*, and *Dunlavy* contra.

Opinion of the Court by Judge BURNET.

The question of greatest difficulty in this case, arises from the fact, that our statute, the second section of which, embodies, in part, the substance of the *2d section of the 13th, and the 2d section of the 27th Eliz.* contains no express words confining its operation to creditors, nor any proviso in favor of purchasers for a valuable consideration and *bona fide*. The section is in these words. "That every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattles, and every bond, judgment or execution, made or obtained, to defraud creditors of their just and lawful debts, or damages, or to defraud or deceive the person, or persons who shall purchase such lands, tenements, hereditaments, rents, goods, or chattels, shall be deemed utterly void and of no effect."

The statute contains no other provision, bearing on the subject.

It will be recollected that the *statutes* of 13 *and* 27 *Eliz.* not only contain provises, that restrain them from operating against conveyances made for a good consideration and *bona fide*, but also restrictions, by which conveyances intended to defraud creditors and purchasers, are made void, only as against the persons intended to be defrauded.

If the language of our statute is to receive a literal construction, the direction given to the jury was correct, but a majority of the court are of opinion that it ought not to receive such an interpretation, as it would lead to consequences not contemplated by the legislature, and would, in part, defeat the

intent of the law, which was, not only to prevent the effect of fraudulent conveyances, but to remove, as far as possible, the inducement to attempt them. The literal meaning of the language used, would render the covenous deed void, not only as to the persons intended to be defrauded, but also as to strangers, and even the grantor himself. If the deed be utterly void and of no effect, in the literal acceptation of those terms, the title must remain in the grantor, and he may, at any time, reclaim the property, by proving his own fraud. The consequences of such a doctrine, and the impunity which it offers to those, who may attempt to evade the statute, could not have been contemplated by those, who framed the law, nor do we believe the rules prescribed for construing statutes, require, or admit of such an interpretation.

It frequently becomes the duty of courts, in order to give effect to the manifest intention of a statute, to restrain or qualify, or enlarge the ordinary meaning of the words that are used. It is said, that the power of construing a statute is in the judges, who have authority over all laws, and more especially over statutes, to mould them, according to reason and conscience, to the best and truest use. That the learned sense entertained of the *statutes* 13 *and* 27 *Eliz.* is, that they render conveyances void, to such purposes, and to such extent, as may be necessary to accomplish their object, and that the construction adopted has been the *rei gerendæ aptior.* (*Roberts frau: cont.* 381, 4 *Bac. title statute H. S.* 1.

The intention of the law makers, may be collected from the cause, or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided, that a thing within the letter, was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged and sometimes the construction is contrary to the letter. (4 *Bac. title statute J. S.* 38, 45, 50.) The object of our statute appears from its title, to be the prevention of frauds and perjuries, and although it is said, that the title forms no part of the act, (1 *Lord Ray,* 77,) yet the reason of this dictum seems to be the practice of Parliament, by which, the title is prefixed to the statute, at the discretion of the clerk of the house, in which the bill originated, but such is not the practice with us. The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the legislature; we may therefore consider it as explanatory of the object of the law, and it may safely be said that the object disclosed by the title in this case, does not render it necessary to treat a fraudulent deed as utterly void against the grantor, or against stangers who have no interest, claim or demand, either on the property, or on him who has conveyed it. The same inference may be drawn from the language of the section, which declares a conveyance, &c. made to defraud *creditors or purchasers* to be utterly void. Why should it be void? Because it operates as a fraud on the *persons named*, not on strangers, who have no interest in the transaction, nor on the maker of the deed, who is the principal, or only agent in the fraud. The intention of the statute then, was to protect creditors and purchasers, and to effect this purpose it cannot be necessary to extend it to any other description of persons. The rights of this defendant are not affected by the deed to Daniel Burgett—it was not made to defraud her—she had no interest in the transaction—she was neither a creditor nor a purchaser, and consequently not one of those for whose protection the statute was made. Every

statute should be construed with a reference to its object, and the will of the law makers is best promoted by such a construction as secures that object, and excludes every other.

The rules laid down in *Heydon's case*, (3 *Rep.* 7,) which direct a reference to the common law, before the statute—the mischief complained of—the remedy provided, and the true reason of that remedy, are sufficient to authorize the construction claimed on the part of the plaintiff.

Although the principles of common law are strong against fraud in every shape, yet we find it decided in *Twine's case*, (3 *Rep.* 83.) that an estate made by fraud, can only be avoided, at common law, by him who had prior right, title, interest, debt, or demand, and not by one whose right, or demand was more puisne or subsequent to the conveyance. The common law also, of which the statute is said to be declarative, professed to protect only creditors, purchasers, and those having right. It did not extend its care to trespassers, or to persons pretending to claim without right, or to those who might be caught in their own toils. It was moreover considered, in reference to those for whom it professed to give a remedy, too tender in presuming fraud from circumstances, and too rigid in requiring proof.

This was the scope and extent of the common law, and it shews that the mischief to be remedied by the statute, was the difficulty of proof, and the frauds that might be successfully practised, on persons having right, title, interest, debt, or demand, accruing after the conveyance. Neither the condition of strangers, or persons without right or demand, nor the safety of the fraudulent grantor, entered into the consideration of the common law, nor did their case constitute any part of the mischief to be remedied. Hence we may conclude, that the statute was intended, exclusively, for the benefit of creditors and purchasers, and was made to increase the facility of avoiding frauds, on such as were creditors and purchasers prior to the conveyance, and to extend the relief to those whose rights might accrue after the conveyance, consequently the interest of the fraudulent grantor, and the pretences of those who have no right, were not within the mischief, and therefore not entitled to the remedy.

It being the duty of courts to give such a construction to statutes as will suppress the mischief, and advance the remedy, we are constrained to say that our statute, as it applies to the case before us, must receive the same construction as though it had contained the restriction and proviso found in those of Elizabeth, nor do we believe that in so deciding we enlarge the rules, or extend the license given for the construction of statutes. Should a case occur in which the intention of the legislature is doubtful, the literal and obvious interpretation of the terms ought to be adhered to; but in the case before us the majority of the court entertain no doubt. The case of the defendant is not within the mischief, nor necessarily within the terms of the remedy. It being decided, that the deed in question is void only as to creditors and purchasers, and the defendant being neither a creditor nor a purchaser, it follows that she has no right to impeach it.

On the authority of *Anderson v. Roberts*, (18 *John.* 515,) and the cases there cited, we consider this deed as voidable, only by the parties aggrieved. It remains doubtful whether the creditors of Henry Burgett will find it necessary to

contest it. Their debts may be provided for in a different way, and should that be the case, for what purpose shall the deed be declared void? Shall the title be considered as remaining in the fraudulent grantor, or in perpetual abeyance, or extinguished, so as to protect the defendant by the mere circumstance of occupancy. On the principle contended for we do not see how these consequences are all to be avoided. If the deed be literally a nullity, the parties stand as though it had never been executed; the title remains in Henry Burgett, and he may shew his own fraud to avoid his deed. If, on the other hand, the title has passed from him without vesting in his grantee, and the creditors should be otherwise provided for, it is either extinguished, or in perpetual abeyance, so that no person can question the right of him who may happen to be in possession, though without a color of title. Such a state of things, we are confident, the legislature did not design to produce—it was neither the intention of their act, nor was it necessary to secure its object. The title certainly passed by the deed to the grantee, subject to the rights of creditors or purchasers, but not liable to be questioned by strangers who have no claim, and as that was the situation of this defendant, she being neither a creditor nor a purchaser, a new trial must be granted.

Judge Hitchcock dissented.

CONN v. GANO.

Where a note or bill is made payable at a certain time and place, no demand is necessary to charge the maker or acceptor.

An averment of such demand, though immaterial, must be proved.

This action was founded upon two promissory notes, in which the defendants' testator promised at a day certain to pay a sum of money to the intestate of the plaintiffs. The notes contained the words "*negotiable and payable at the bank of Cincinnati.*"

Each count of the declaration contained an averment, that the note when due "was presented at the said bank of Cincinnati, being then and there due and payable according to the terms thereof for payment," and alleges non-payment. On the trial, the plaintiffs offered no evidence of this fact, and the defendants objected that without proof of the averment the plaintiffs could not recover; but the court permitted the cause to proceed, reserving the point. A verdict was found for the plaintiffs, and a motion made for a new trial on the ground of misdirection. This motion was reserved for decision here.

Este, for the defendants. *Longworth*, contra.

By the Court.

The plain interpretation of a promise to pay a sum of money at a certain place upon a certain day, is, that the person making the promise will on the day be at the place with the money; if he be not there, or does not have the money there, he has not performed his promise. The right of the plaintiff to receive the money does not depend upon his making a demand. It is absolute by the very terms of the promise. If the defendant is ready at the time and place to

pay the money, and there is no person there to receive it, his promise is not broken; the duty to pay the money remains, but no action can be sustained to recover it until a subsequent personal demand be made. This is the plain justice of the case, and is in accordance with the American decisions, which we prefer to follow. It was therefore not necessary for the plaintiffs to aver a demand at the place to maintain their action on these notes.

They have, however, made this averment, and though unnecessary, it is well settled, that being made it must be proved. In an action against the drawer or endorser of a bill, it is not necessary to state that the drawee accepted it; but Chitty says, if it be stated, it must, in an action against the drawer, be proved. 459. And in page 514 it is again said, that whenever a particular presentment has been averred, it must be proved; for this reason a new trial must be granted.

Judge PEASE.

I concur in the opinion of the court on the first point, but cannot on the second.

The averment that the note was presented at the bank, and payment demanded, is decided to be totally immaterial as it respects the plaintiff's right to recover, and also as it respects the defence. The true distinction between an immaterial averment which it is necessary to prove, and one which it is not, I consider to be this: when the plaintiff avers in his declaration a fact, the converse of which being pleaded or proved by the defendant would be a defence to the action, then the averment ought to be proved. But if the fact averred be every way immaterial—if it form no part of the plaintiff's right to recover, and if the contrary would constitute no defence to the action, then it would be not only useless to prove it, but would be an unnecessary waste of time and money, and a trifling with the administration of justice.

Such is the averment in this case; and when no other reason can be assigned for requiring the proof of an immaterial fact, but *that it is averred*, I consider the reason insufficient. If the fact *that it is averred* be a sufficient reason in this case, why not extend it to all others? The common averment in a declaration in slander, that the plaintiff hath always sustained a good character, is really of more materiality than this; because under the general issue, and even upon default, the defendant may prove the contrary for the purpose of lessening the damages, which, so far, is a partial defence; but no lawyer will pretend that this averment of good character must be proved to sustain the action. If the averment be wholly immaterial, it is my opinion that it need not be proved, and I would overrule any authority to the contrary.

SAUNDERS *v.* POPE.

It is not necessary to constitute a good consideration for an assumpsit, that the party making the promise should receive any actual value or benefit from the party to whom the promise is made, if, in consequence of the transaction a loss has been sustained by such party.

The delivery of a pledge to a third person not authorised to receive it, is a good consideration for an assumpsit.

This was an action on the case, in which the jury found a verdict for the plaintiff, upon the first count in the declaration, and assessed his damages to 300

dollars, a motion was made to arrest the judgment, and its determination adjourned to this court, by the Supreme Court sitting in Hamilton county.

The first count in the declaration states in substance, that on the 5th May, 1818, one Nathaniel Pope, was indebted to the plaintiff, 500 dollars, and delivered to the plaintiff a pleasure carriage *in part*, and directed and authorized the plaintiff to sell the same to any person for a sum not less than 300 dollars, and to receive and apply the moneys to the plaintiff's own use. That on the 1st May, 1822, J. W. Pope, the defendant, in consideration, that the plaintiff would deliver to him the carriage, promised to pay him 300 dollars, when thereto afterwards requested; and avers a delivery confiding in this promise.

Hammond, in support of the motion. *Guilford*, contra.

By the COURT.

It is not necessary to constitute a good consideration for an assumpsit that the party making the promise should receive any actual value or benefit from the party to whom the promise is made, if, in consequence of the transaction, a loss has been sustained by such party; this has long been settled.

In this case the plaintiff parted with his pledge, by which he lost a security for so much of his debt, and also rendered himself liable to N. Pope, the owner, for the value of it. This prejudice to him, incurred at the request, and upon the promise of the defendant, constitutes a good consideration to sustain an action of assumpsit. It is of no importance that the defendant could gain no advantage from the contract; he took that risk upon himself; and the fact does not render the contract *nudum pactum*. The motion must be overruled, and judgment rendered for the plaintiff.

HUNT ET AL. v. FREEMAN.

A court of equity will carry into effect the intention of the parties, where by fraud or mistake, such intention is not embodied in a written agreement.

Where there is no court of equity, and the parties do that which a court of chancery would direct to be done, a court of Law will sustain what has thus been done.

THIS was a bill in chancery, prosecuted by the complainants, to obtain a decree quieting their possession of section 35, township 4 east, 2d entire range in Symmes' purchase, and to enjoin perpetually execution upon a judgment in ejectment recovered against them in the supreme court of Warren county, from which court the cause was adjourned for decision here.

The material facts charged in the bill were as follows: On the 16th of July, 1789, Clarkson Freeman, under whom both parties claim, made a contract with J. C. Symmes to purchase of him eight sections of land specifically described, one of which is the land in dispute.

In January, 1790, Freeman agreed with Elias Boudinot for the purchase of six land warrants, for a section of land each, and agreed, upon certain terms and conditions, to locate them in Boudinot's name upon six of the sections purchased of Symmes. The warrants were numbered 235, 6, 7, 8, 9, 40. On the 22d of May, 1790, three of these warrants, numbered 237, 238, 239,

were located upon three of the sections as agreed upon; the warrant 239 being located upon section 35, the land in dispute.

In the year 1792, Clarkson Freeman, being in prison in New Jersey, for a judgment for a large sum of money, escaped, and in the October of the same year he made a power of attorney to his brother, Ezra Freeman, authorizing him to dispose of the lands held upon the six warrants purchased from Boudinot.

The judgment creditor of Clarkson Freeman prosecuted a suit against the sheriff for the escape of Freeman, when, for the purpose of indemnifying the sheriff, on the 7th of December, 1795, an agreement was entered into between Clarkson Freeman, by his attorney, Ezra Freeman, Elias Boudinot, and Aaron Ogden. By this agreement the interest of Clarkson Freeman in three of the sections of land, held upon the warrants purchased of Boudinot, was pledged in trust to Aaron Ogden as trustee, to be sold at certain times and upon certain terms and conditions, to raise the money recovered against the sheriff. The entries being made in the name of Boudinot, he covenants to convey the legal title to Ogden should a sale be required, and Freeman covenants that if payments are not made this shall be done. In this covenant the lands subjected to the trust are described only by the number of the warrants supposed to be located upon them, which are specified as numbers 235, 236, 237, neither of which is located on the section 35 now indispute.

Immediately after the completion of this arrangement, the complainants, Hunt and Phillips, purchased the judgment against the sheriff, and on the 17th of May, 1796, released it as against the sheriff upon receiving from the trustee a deed declaring the trust.

In September, 1796, the complainants received from Symmes a deed for section 34, covered by warrant 237, for the first instalment which was not then due. This deed was made with the assent of Freeman.

The second instalment fell due December 8th, 1797; it was not paid, and no measures were taken to execute the trust with respect to it. It remained unpaid, and on the 5th of November, 1798, Symmes conveyed to Boudinot the sections 34 and 35, neither of them located upon the warrants described in the trust agreement; and on the 5th of December following, Boudinot conveyed these two sections to Ogden, under the contract of trust, to be sold to raise the remaining instalments, the latter of which would fall due December 8, following. On the 8th of January following, Ogden, in execution of the trust, sold the two sections of land to the complainants. Upon this title the complainants rested their claim.

The defendant claimed under a conveyance duly executed from Symmes to Clarkson Freeman, in September, 1796, for the section 35, and a deed from C. Freeman to himself, dated February 5th, 1799.

The bill charged that it was the intention of the parties to cover and secure such sections as had been located, let them be covered by any number of the warrants, provided there were not other sections located more correctly answering the description. It also charged that Ezra Freeman gave assurance at the time the trust agreement was made, that all the warrants were regularly located; but that in fact three only of the six warrants were located, and that the other

three never were located. The three located warrants covered the three sections sold, including that in dispute.

The principal facts stated in the bill were admitted in the answer. It was silent as to the allegation that Ezra Freeman represented all the warrants as located, and it averred that each of the six warrants was located, and described the land upon which the location was made. It claimed to be a purchase for valuable consideration, but did not deny notice.

AARON OGDEN testified that Ezra Freeman informed him that the warrants were all located, and that the trust contract was entered into under that opinion. That land, and not floating warrants, was understood to be the subject of the contract.

JON. DAYTON testified that Ezra Freeman and A. Ogden requested him to value the lands. That he understood from Ezra Freeman that the warrants were all located, and made the valuation upon that impression.

It was in full proof that two of the warrants named in the trust agreement, numbers 235, and 236, were not located at the time that agreement was made. The sections upon which the answer alleged they were located, were not of the number sold to Freeman, upon which he contracted with Boudinot to locate them; and besides this the same section had been conveyed by Symmes to Boudinot, before these warrants were located upon them. The time of the location of the other warrant was not explained, nor was it certain that it had been located. The section named in the answer as covered by it, was not one of the number sold by Symmes to Freeman, and referred to in the agreement to Boudinot.

Two witnesses testified, that so early as 1796 they heard the defendant state, that he knew the complainants had a mortgage on the land in dispute.

Este, for the complainant. *Hammond*, contra.

By the COURT.

There is no doubt but that it was the intention of the parties to the contract creating the trust, upon which the complainants found their title, to subject lands and not floating warrants. This is manifest from the whole testimony, and the reason why the numbers of the warrants was adopted by way of description, is obvious. Freeman had agreed to locate the warrants upon six out of eight specified sections. Proceeding upon the ground that all the warrants were located, but the parties not being informed of the six sections they covered, this mode of description was the best within their reach. If the warrants had been all located as Ezra Freeman asserted, the description would have been sufficient. That it was defective, is to be attributed to the mistake or the fraud of Ezra Freeman, and is in no respect the fault of the other parties.

The intention of the parties to describe particular and distinct tracts of land was not carried into effect by the writing executed between them in consequence of a common mistake. The defendant cannot ask to place the case upon fairer ground than this, because if Ezra Freeman was not mistaken, when he assured the parties that all the warrants were located, he was guilty of misrepresentation and fraud, which is a more unfavorable view than attributing it to a common mistake.

The mistake was that three only of the six warrants were located, and of these three, one only of those upon which the trust was given: the other two were still unappropriated. It is not to be doubted that upon the discovery of this fact, a court of equity would have charged the trust upon the three located sections, because in doing so, they would do nothing but perfect the original object and intention of the parties. It would be but correcting the mistake into which the parties fell from a deficiency of correct information at the time the contract was executed between them.

When this matter was transacted there was no court of chancery in this country where the lands lie to take cognizance of the case. And if there was a court of chancery in New Jersey, neither the party nor the subject was within its jurisdiction, the parties therefore could only proceed to do that which a court of chancery would direct to be done, and when the rights of the parties were thus fixed, rely upon a court of law to sustain them.

As the property upon which this trust was created, was circumstanced, the parties did not require the aid of a court of chancery, and this aid could at no time have become necessary had not Clarkson Freeman obtained a deed from Symmes in violation of the original agreement with Boudinot. By that agree ment the control of the legal title to the whole six warrants, or the lands they covered remained in Boudinot to be transferred to Freeman upon the perform- ance of certain acts. Boudinot having a right to control the title to the whole, had covenanted to convey three, that they might be subjected to a particular trust. It rested with him to carry the intention of all concerned, in the trust agreement, into effect, by conveying any of the sections located, in the execu- tion of the trust, when it was ascertained that those designated were not appro- priated. It was his duty to retain his control over three sections of the land, if there were so many secured, to satisfy the trust. In the actual case a court of chancery would have enjoined him from parting with this control, had he attempted to do it. He might properly, notwithstanding the mistake in the description, have conveyed the three located sections to Ogden, and it would have been a good execution of the trust agreement on his part. No court of chancery, upon the application of Freeman, would have interfered, upon the case as it stood, to restrain Boudinot from thus proceeding; and such a proceed- ing must have been subsequently sanctioned by a court of law.

When Clarkson Freeman obtained the conveyance from Symmes for section 35, he knew that it was one of the three located sections, which his agent had agreed should be subjected to the trust. He knew there was no other land upon which the trust agreement could operate, and it was a fraud upon that agreement to take the legal title to himself so as to exclude the agreement from operating upon it. It was also a fraud upon Boudinot, in whom, by Freeman's own contract, the control of the legal title was to remain. By this fraud, as against those upon whom it was practised, Clarkson Freeman acquired no bene- ficial interest. The title passed to him, but the subject remained liable to the control of Boudinot, under both the original and trust contracts. And it was competent for Boudinot, in the execution of the trust, to enable Ogden to sell the actual ownership, though not the naked legal title to the land. And in a country where there was no court of chancery, a court of law would enforce

the validity of the sale, by giving the purchaser the possession, and regarding the beneficial ownership as superior to the naked legal title.

It is the opinion of the court that the trust attached upon the three located sections at the moment of executing the trust contract, and that the power to execute this trust was not defeated, or in any degree impaired by the conveyance of Symmes to Clarkson Freeman, which, in respect to the trust, was fraudulent and void. The trust was well performed according to law, at the time, and the purchasers at the trust sale became the owners of the land. They are well entitled to the possession, and also to have the legal title united with that possession; such as it exists in the hands of Freeman—a perpetual injunction and a conveyance is decreed.

JUDGE BURNET, having been at one time counsel for Hunt, and Phillips, did not sit in this cause.

HOUGH v. YOUNG.

The plaintiff cannot support his action by proof contradicting the averments in his own declaration.

A day may be made material by averments.

Where an endorsed note is left by the holder with a cashier of a bank for collection, and the cashier neglects to take the proper steps to charge the endorser, in a suit against him by the holder, the damages are merely nominal, unless the plaintiff prove the maker insolvent.

This was an action on the case against the defendant, who was cashier of the Zanesville Canal Bank. Its object was to charge the defendant for negligence in so protesting a note left with him for collection, and to take the steps necessary to charge the endorser, that the endorser was not charged.

The cause was tried before the Supreme court of Muskingum county, and a verdict given for the full amount of the note. At the trial the court instructed the jury that "the plaintiff was entitled to recover, and that there being no evidence of the ability or inability of the maker of the note, nor any other evidence to show the extent of the plaintiff's injury, the jury, in estimating the damages, must exercise a sound discretion, and be guided by such light as they had upon the subject."

A motion was made for a new trial on the ground of mis-direction, and the decision reserved for this court.

It was proved at the trial, that an agent from the plaintiff handed the note to the defendant, as cashier of the Canal Bank, requesting him to have the same note legally protested; that the defendant took the note, and afterwards informed the same agent that the note was protested. It was also in proof, that the defendant took the note to the notary public on the second day of August, 1819, with the words "*July* 30, *August* 2," endorsed upon it, and informed him there were no funds in the bank to meet the note. The notary immediately protested the note, gave notice to the endorser, and returned the note to the defendant the same evening, or the next morning.

The note was dated the 2nd day of May, 1819, payable sixty days from the 1st day of June, in the same year.

CULBERTSON and GODDARD, in support of the motion, made two points

1. That upon the proof the action was not maintainable.

Herrick and *Stillwell*, contra.

By the COURT.

The declaration states that the note in question was dated the 20th day of May, 1819, and was payable sixty days from the first day of June in the same year. It also avers that the defendant, on the 3d day of August, 1819, proceeded to make the demand, and give the notice of non-payment necessary to charge the endorsers: but did these so negligently that the endorsers were not charged. At the trial the negligence proved and relied upon was, that the demand and notice were made upon the 2d day of August, which being the day before the last day of grace was inoperative. The proof is in contradiction to the declaration which avers a demand and notice on the right day. This being the material point of the whole case, it was certainly not competent for the plaintiff to sustain his action by proof so essentially variant from his allegations —though in personal actions generally the day is immaterial, it may nevertheless be made material by the pleadings. And such is the case here; the declaration gave no notice that the negligence complained of referred to the day of giving the notice. The defendant could not come prepared to repel that which the plaintiff averred; yet this he must do, if, upon the proof offered, the plaintiff could recover. The instruction of the court, that the plaintiff ought to have a verdict, was therefore incorrect. It is unnecessary to decide upon the principal ground of liability.

The rule laid down for assessing damages was also incorrect. If the drawer of the note is solvent, the plaintiff may yet recover from him the amount. This right is not affected by a recovery here. In that event this defendant is only answerable to the plaintiff for the expense incurred in taking measures to charge the endorsers, and for disappointment in that particular. To charge him with the whole amount of the note the plaintiff ought to have produced proof, that the maker was insolvent. In the absence of this, and all other proof, he could only recover nominal damages. New trial granted.

WILES ET AL. *v.* BAYLOR.

Where lands are decreed by a court of chancery to be sold absolutely they must be valued as upon executions at Law.

This was a writ of error to the common pleas of Brown county. The case was as follows. Baylor, the defendant, in error, sold a tract of land to the plaintiff in error, and retained the title in his own hands, until the purchase money should be paid. The purchasers failing to pay, he prosecuted a suit in equity to have the land sold for the purchase money due. The court decreed a sale, and that Baylor the vendor should convey the legal title to the purchaser under such sale. The decree did not require the land to be valued and sold for a proportion of its valuation: but directed a sale without regard to valuation. Upon this ground the writ of error was brought to reverse the decree.

Brush and *Fitzgerald*, for plaintiffs in error. *Collins*, contra.

By the COURT.

The decree, in this case, directs the interest of both vendor and vendee to be sold, and the complete legal title to be perfected in the purchaser at such sale. The policy of requiring lands sold under execution for debt, to be valued, pervades the legislation of the state, and has prevailed for many years. In directing a sale of real estate, especially where the legal title is to pass, a court of chancery is not at liberty to adopt a different policy. This court have determined that mortgaged premises sold under a decree in chancery to raise the money due on the mortgage, must be valued, and sell for a proportion of the valuation. The same reason applies to this case. The decree is erroneous, in not directing a valuation, and for that cause must be reversed.

EMERICK v. ARMSTRONG ET AL.

In a joint action against several defendants, one may appeal the whole cause, by giving the bond required by law.

An executor or administrator in a joint suit can appeal the cause as well as to himself as to his co-defendants without giving any security.

A court will never investigate the right of parties settled by themselves, except upon suggestion of fraud or imposition.

This was a bill in chancery prosecuted by the complainant against Armstrong and Grandin, survivors of John H. Piatt, deceased, his heirs and administrators, and the admininistrators of A. H. Ernst, dec'd. While the suit was pending in the Common Pleas, the subject of it was adjusted between the parties: but they could not agree who should pay the costs. They thereupon entered into a written agreement, to submit the question of costs to be decided by the court of Common Pleas, as though no adjustment had been made, and upon hearing, the court of Common Pleas decreed costs against the defendants. From this decree the defendants appealed: but gave no bond. The administrators of Piatt and Ernst contending that they had a right to appeal, under the law, without giving security. A motion was made in the Supreme court to quash the appeal, and the decision of this motion as well as the final hearing of the case was adjourned to this court.

N. Wright, for the complainant. *Piatt*, contra.

By the COURT.

The first question to be decided in this case is, whether an administrator can, by appealing, take up the case as to his co-defendants, without any bond being given upon the appeal. Many reasons may be urged, with about equal force, upon both sides of this question.

There are some cases in which one of several co-defendants may appeal the cause separately without affecting the others. This may be done where the action is in its nature joint and several. In an action of trespass, tried in the Supreme court of Warren county, against two defendants, one was acquitted and the

other found guilty by the jury. The court decided that the defendant convicted had a right to appeal without his co-defendant; and that the plaintiff, if he wished to keep both parties in court, could do it by appealing himself.

But where the action is joint, the defendants must stand or fall together, and the question presents more difficulty.

It may be said, shall one defendant, who is satisfied with the judgment, be compelled to follow his co-defendant to the Supreme court where additional costs may be awarded, and higher damages? And this in a case where the defendant who appeals is irresponsible, and that very irresponsibility a strong inducement to indulge a litigious disposition in the security of having nothing to lose? In this there would be great injustice.

On the other side it may be asked, shall the only responsible defendant, and upon whom the whole burthen rests, be deprived of his appeal, where he thinks justice has not been done him, because his co-defendant, secure in his poverty, will not unite in consummating the appeal? This result would at least be equally unjust. The question, therefore, must be decided without reference to the inconvenience of either view of it, and upon the naked matter of right and power under the statute.

The provision of the law is, that in civil cases an appeal shall be allowed of course from any judgement or decree. The mode is prescribed in which the party wishing to appeal shall consummate it. One defendant can give notice, and if he can give the bond the law requires, he can perfect the appeal. No act is required calling for the joint agency of all the defendants; but the whole power of appealing the cause is given to any party who desires to exercise it. To require the concurrence of all the defendants in consummating an appeal, would be to give the statute an interpretation not warranted by its terms, nor by its general object and spirit. The court are consequently of opinion, that in a joint action one defendant or one plaintiff can appeal the whole cause by giving the notice and the bond required by law.

The law regulating this right of appeal directs, that in general cases the appellant shall give a bond; but with respect to executors and administrators the right of appeal is given upon different terms; no bond is required, and it is sufficient for an executor or administrator to give notice and docket the appeal in the Supreme court. As one defendant can consummate an appeal of the whole case by doing what the law requires in giving the bond, so, by the same rule, an executor or administrator, by doing what the law requires of him, can perfect an appeal of the cause, not only for himself, but for his co-defendants, in all cases where the interest is joint, and where an appeal as to one must be an appeal as to all. This must be the rule, otherwise the administrator cannot use the privilege of appeal without subjecting himself to a responsibility not imposed by law.

Against this rule it is objected, that it permits the privilege given to executors and administrators alone, to be enjoyed by others for whom it was not intended, and thus prejudices the plaintiff's right to have security upon the appeal. This is true; but the absolute right of the administrator to appeal, without giving security, is as clear and as strong as the absolute right of the plaintiff to have security from the co-defendant, and it is certainly the policy of our laws, that, in this collision, the right of the administrator should prevail.

The exemption is secured to him that he may proceed with confidence in protecting the interests committed to him; for were his duty to be connected with his personal responsibility, the feelings of self-interest might prevail so far that the administrator would regard rather his own safety than the interest under his direction. Require an executor or administrator to give security upon an appeal, and you require him to hazard his own estate; for, as the law now stands, he would be personnally liable to indemnify the security in case of loss. Impose this responsibility upon an executor or administrator, and its natural consequence would be to induce, at least in cases of difficulty, an abandonment of the interests he represents and should protect. It is obviously of much more public importance that the estates of deceased persons should be faithfully administered, than that an individual, setting up a claim against such estate, should fail to obtain an additional security for his claim in the progress of litigation. For it must be remembered, that in allowing the appeal to be perfected, without the bond and security, the complainant loses nothing that he ever possessed; and in respect to the right so confidently asserted to be an absolute one, it is, in fact, a decision that upon a just construction of the whole statute, no such right is, in the particular case, secured to him. The appeal must be sustained.

The merits of the case are easily disposed of. The parties have settled the subject of controversy, and by written agreement referred the question of costs to the court of Common Pleas, to be decided upon the point whether the complainant's bill could be sustained; and if sustained, to tax the costs against the defendants, otherwise against the complainant. This point the court of Common Pleas decided in favor of the complainant; and thus the whole cause is disposed of under the agreement of the parties by the umpire to whom they referred it. Nothing is left for this court to do, but decree the costs to the complainant, conformable to this agreement? This court never investigates the rights of parties settled by themselves, except upon suggestion of fraud or imposition.

NOWLER ET AL. v. COIT.

When an administrator makes a void sale of the lands of the intestate, and receives the purchase money, and afterwards the heirs recover the land, equity will not compel them to refund the purchase money.

But in such case, the taxes paid by the purchaser shall be refunded with interest and expenses of making the payment, where the heirs came into equity to disencumber the title.

In the year 1792, the state of Connecticut, then claiming certain lands situate within that tract of country in the now state of Ohio called the Connecticut Western Reserve, granted 500,000 acres, by particular description, to certain individuals to remunerate them for suffering during the revolutionary war.—This tract of country received the name of the fire lands. At the time of this grant the Indian title was not extinguished.

After the grant, and while the land was subject to the jurisdiction of Connecticut as claimed by her, the legislature of that state incorporated the proprietors of the land who were residents of Connecticut, and empowered them to do various acts for the preservation of the property, and the extinguishment of the Indian title, and among other matters, empowered them to assess a tax upon the land to raise funds for its preservation.

On the 30th of May, 1800, the governor of Connecticut, in virtue of an act of Congress, and of an act of the legislature of Connecticut, ceded to the United States the jurisdictional claim of that state to the tract of country called the Western Reserve including the fire lands, and the same were constituted part of the county of Trumbull, and made fully subject to the jurisdiction of the territorial government of the then North Western Territory.

The ancestor of the complainants was one of the grantees. He died in Connecticut, before the year 1801, and letters of administration on his estate was granted to Daniel Douglas, by the court of probate of the district of New London in Connecticut, in February, 1801, and that court upon a representation of the administrator, directed the interest of the intestate in these lands to be sold for the payment of debts. The sale was made on the 24th of March, 1801, and the defendant, D. L. Coit, became the purchaser, at a fair price and received a deed from the administrator.

In April, 1803, the legislature of Ohio incorporated the owners of these lands, for the same purpose and upon the same principles originally embraced in the Connecticut act of incorporation. It authorized the directors to extinguish the Indian title, and make partition among the proprietors, to levy and collect taxes.

Upon the tracts partitioned to the right of Douglas, the defendant, Coit, paid the taxes, as well those assessed by the company as those assessed by the state. But no improvement was made upon the lands, nor were any offers made by the heirs of Douglas to pay the taxes.

The bill was brought by the heirs of Douglas claiming the lands as in their possession, accompanied with the legal title, and calling upon the defendant to disclose under what title he set up a claim. The defendant, in his answer, set up the purchase under the administrator, and he claimed, if the title was adjudged defective, to have the purchase money and taxes refunded with interest. The Supreme court sitting in Huron county, adjourned the cause here for decision. The judges who heard the cause in Huron county, having strongly intimated an opinion that the sale not be sustained, that question was not argued, nor insisted upon by the defendant's counsel.

Whittlesey and *Newton*, for defendant. *Latimer*, contra.

By the COURT.

The defendant's counsel have very correctly abandoned the validity of the sale, and conveyance made under the order of the court of Probate of Connecticut. At the time the order was made the state of Connecticut had no jurisdiction over the lands in question. They were subject only to be sold and conveyed under the laws of the then territorial government. The sale to the defendant is neither authorized nor sanctioned by these laws; it is, of consequence, inoperative. The title remains untouched in the heirs to whom it descended.

The purchase money paid by the defendant upon the sale, constitutes no charge upon the land in the hands of the complainant. The lands of the deceased were never legally charged with the payment. The administrator,

from whom the defendant purchased, had no power over them. He paid his money upon a mistake as to the consideration. The present complainants are not the parties to whom he paid it, or with whom he made the contract; and his right to recover back his money cannot be litigated with them, neither at law nor in equity. We can therefore make no decree with respect to the purchase money.

The amount paid for taxes stands upon a very different ground. These were chargeable by law upon the land, and the payment was a direct benefit to the complainants. It was their duty to pay. In case they failed to do this, the land was liable to be sold for the taxes. They have derived a benefit from the payment, and in equity ought to refund the money. In one sense the defendant is a mere volunteer in making the payment; but when the owner of land in such case omits to pay the taxes as they fall due, he adopts the payment made by such volunteer, and as to that, constitutes him his agent, by recognizing his act. Perhaps a court of equity might not, in every case of such volunteer, and upon his application, decree a lien for the taxes; but where these taxes have been paid under an opinion that the person who paid them owned the land, and when the true owners came into equity to examine that claim of ownership, and to have it quieted, the rule that he who asks equity must do it, strictly applies. The court will not lend their aid to quiet the title, without securing to the defendant the moneys paid in preserving that title; moneys which the owners ought to have paid, and without the payment of which the land would have been lost.

The taxes assessed by the company are not to be distinguished from those assessed by the state. The whole, with interest, are justly due, and the payment must be charged upon the land.

The commissions, or other expenditures necessarily incurred in the payment of the taxes, also constitutes for the defendant an equitable claim against the complainants. It is a charge inseparable from the payment of the taxes, which, had the complainants paid the taxes themselves, they must have incurred; and, therefore, upon obtaining a decree of this court to rescue their title from suspicion, they must repay this expenditure to the defendant.

The cause must be sent back to the county of Huron, with directions that the master commissioner take an account of the payments made for taxes, and expenses in making such payments, with interest upon each sum paid from the time of payment; upon which a final decree must be entered, upon the priciples here decided.

EDWARDS *v.* MORRIS.

He who seeks equity must do equity.

A party seeking to set up a contract different from the written one, upon which a judgment has been had at law, must show an offer to perform the contract he claims to establish, at the time it ought to have been performed, also a readiness still to perform.

An obligation to pay in notes of a specific bank, must be paid in the notes of that bank, or their numerical value in money. Their value in market cannot be substituted.

A contract for the purchase of real estate will not be rescinded upon stale objections to the vendor's title, the vendee remaining in undisturbed possession.

The bill had a double aspect, each containing separate and distinct matter no wise connected with the other. It states:

1st. That on the 25th day of December, 1819, the complainant purchased of the defendant a certain farm and distillery, in Hamilton county, for the sum of eight thousand dollars, to be paid in different instalments, the two first of which, amounting to four thousand dollars, had been paid;—that the third instalment for two thousand dollars was to be paid on the first of February, 1822, and the *fourth* for the same sum, was to be paid on the first of February, 1823, and that for these several sums of money the complainant executed to the defendant his several promissory notes of hand promising to pay the sum of money mentioned in each, *in current bank notes of the city of Cincinnati;*—that the defendant previous to said purchase stated to the complainant, he would receive in payment the notes of the Miami Exporting Company, for the purchase money, and at the time of executing these notes, the complainant *supposed* that they contained a stipulation to pay only in the notes of the Miami Exporting Company, and that he would not have executed them had he understood otherwise:—That the two first instalments, for which notes were also given, the said defendant had been paid according to the terms of the contract as understood by the complainant:—That when the *third* note became due, the defendant informed the complainant he would receive no funds as payment, other than notes current as cash in Cincinnati, and that *at that time* the notes of the Miami Exporting Company had depreciated to *twenty-five* or *thirty cents* on the dollar:—That the defendant had brought suit on the said third note, due February 1, 1822, in this court, and had recovered judgment thereon for the amount thereof and interest.

2d. That the land purchased by the complainant of the defendant was the north-east quarter of section 21, in the 4th township, and 2d fractional range of townships, on which the complainant had paid four thousand dollars, estimated by *him* at two thousand dollars, and which, as *he* alleges, at a present cash valuation is about as much as it is worth, and that since the said purchase he has discovered that the title to the same is not complete and perfect:—That on the 20th of June, 1795, it was originally conveyed by John C. Symmes, but the conveyance never proved or acknowledged:—That in the year 1787, John C. Symmes sold, by contract on record, a large quantity of lands to one Benjamin Stites; that about the 1st of February, 1793, he acknowledged in writing, to have received a large sum of money on said contract; and that 10,000 acres of the land for which the money was paid laid around Columbia:—That on the 17th day of December, 1787, the said Symmes gave to said Stites a certificate that he had entered or located 10,000 acres on the Ohio and Little Miami; that these several papers contain evidence *that said Symmes could have no authority to convey said lands*, except from said Stites, and that the said quarter section is contained within the said tract of 10,000 acres:—And prays an injunction on said judgment at law, until the title is perfected; that the contract may be rescinded; that the money already advanced to the defendant be refunded to the complainant; and that, when the title shall be perfected, an account taken of the value of the notes of the Miami Exporting Company at the time the contract was made, or at the time the said notes became due; and a prayer for general relief. The defendant demurred.

Wade and *Hayward* in support of demurrer. *Este* and *Hammond*, contra.

Opinion of the Court by Judge HITCHCOCK.

The prayer of the bill in this case is to enjoin a judgment at law, rendered at the last term of this court, and also to procure a rescision of a contract. Two reasons are assigned why the court should interfere: 1st. A mistake in the terms of the note upon which the judgment was rendered. 2d. A doubt as to the title to the land conveyed by the defendant to the complainant, which land was the consideration of the note.

The facts set forth in the bill are admitted by the demurrer, and the question to be determined is, whether there is sufficient matter to justify the interference of a court of chancery.

It is the peculiar province of chancery to relieve against fraud, mistake, or accident. But how far parol testimony can be admitted to prove mistake in a written instrument, has been matter of much altercation and doubt. Mistakes in matter of fact it seems may be rectified, and the opinion of the court in the case of *Hunt v. Rousmanier's administrators*, (8 *Wheat.* 174) goes far to establish the doctrine, that where the parties through a mistake and ignorance of the law, execute a writing which does not carry into effect their contract and intention, that the true contract and intention may be enforced in chancery.

In the case before the court the alleged mistake consists in this; the purchase money, which was the consideration for which the note was given, was to have been paid in *notes of the Miami Exporting Company.* The note was to have been made thus payable, whereas in fact it was made payable in "*current bank notes of the city of Cincinnati.*" The complainant understood that he was to pay in the numerical value of the notes—If in consequence of this mistake the complainant has sustained an injury, he ought to be relieved.

It is an invariable rule in chancery, that he who seeks equity must do equity. Suppose the notes referred to had been drawn payable in the notes of the Miami Exporting Company, and there had been no mistake, what must the complainant have done to have defended himself at law, and to have secured to himself the privilege of paying in the notes of that bank? He must have tendered the notes on the day, and ought also to have brought them into court. The mistake, however, having happened, which rendered it proper that he should come into a court of chancery, what ought he to do here? The contract was, that he was to pay on a particular day, the sum named in the obligation, in a particular description of bank notes. He ought then to show that he tendered these notes at the time specified, and he ought to bring them into court that the opposite party may receive them. The notes, however, are not brought into court, nor is there any pretence that they have been tendered. The complainant then does not appear to be ready to do that equity which he requires of the defendant, and on this ground is not entitled to the relief prayed for. The circumstance that the defendant, some time before the promissory note fell due, stated that he would not receive those *bank notes* in payment, cannot excuse the complainant in not making the tender.

It is claimed that an account should be taken of these notes, and that the complainant should only be made liable for their specie value. This cannot be done—bank notes are considered as money. The holder has a right to look to

the banks which issue them for their *numerical value* in *specie*, and cannot be compelled to take for them a value fixed by *shavers* and *brokers*. The ability or inability of the bank to pay, ought not to be taken into consideration.

The doubt as to the title to the land grows principally out of an old contract entered into between Symmes and Stites in the year 1787. This contract was made before Symmes had any interest in the land. His contract for the purchase from the United States was made in the year 1788, and he obtained his patent in 1794. The deed from Symmes for the quarter section in controversy was executed in 1795. It is objected to this deed, that it was neither acknowledged nor proven. However, when it has been accompanied by a possession of twenty-nine years, it is pretty good evidence of title. Neither this defect in the deed, after so long a continuance of possession under it, nor the bare *possibility* that there may be an attempt to enforce the contract at some future period, which contract was made almost forty years since, is sufficient to justify the court either in enjoining the judgment at law or rescinding the contract.

The demurrer is therefore sustained, the injunction dissolved, and the bill dismissed with costs.

STUMP *v.* ROGERS ET AL.

Security may proceed against principal in equity to have his estate subjected to the payment of the debt, without making payment himself, before commencing his suit.

This was a bill in chancery adjourned here from Pickaway county. The facts material to be reported were as follows:—In the year 1816 the complainant and others endorsed a note for the defendant, W. Rogers, which was discounted by the bank of Chillicothe. It was not paid, and seperate suits were brought, and separate judgments rendered. Part of the amount was made upon execution against W. Rogers, and part against the other endorsers. Nothing was paid by the complainant upon the judgment against him. The bill was brought to subject certain real estate, charged to have been fraudulently transferred to the defendant, Jonathan Rogers, through the interposition of a court of Chancery, but which was justly liable to the payment of the debt, as the property of William Rogers. The answers denied the fraud, and the question of fact in relation to it was earnestly litigated.

Irwin, for the complainant. *Scott*, for the defendants.

The court decided the question of fraud in favor of the complainant. Whether the complainant could come into a court of equity to charge the principa debtor's estate with the debt, not having acquired at law a right to sue the principal by payment of the money, was a question which arose in the consideration of the cause; and the court held, that a security might ask a court of Chancery to aid in subjecting the estate of the principal to the payment of the debt, without first advancing or paying the money, as he must do before he could sue an action at law.

MILLS v. NOLES.

The court of Common Pleas cannot try the facts in a cause without the consent of both parties. In such case an appeal lies though the trial was irregular.

The question in this case arose upon a motion to quash an appeal from the court of Common Pleas of Perry county, to the Supreme court. It came up on a bill of exceptions and was referred for decision here.

Before the meeting of the court of Common Pleas the plaintiff notified the defendant that he did not purpose to try the cause: but meant to suffer a nonsuit and appeal. Accordingly, upon calling the cause in the Common Pleas, the plaintiff was nonsuit. Afterwards a suggestion being started whether an appeal would lie from a voluntary nonsuit, the plaintiff, during the same term, moved to set the nonsuit aside, which was done. He then proposed to submit the cause to the court, to which the defendant objected, but the court overruled his objection and proceeded to hear the cause; the plaintiff offering no proof. Judgment was given for the defendant, from which the plaintiff appealed.

Irwin in support of the motion to quash.

By the COURT.

The court of Common Pleas ought not to have taken upon themselves the trial of the facts of the cause upon submission, without the assent of the defendant. It is only where both parties consent that the court can try the cause. But this mistake cannot be corrected upon a motion to quash.—Here is a formal decision of the cause, and a judgment rendered from which the appeal is regularly taken. It cannot be quashed.

GREENE v. GREENE, ET AL.

The widow of a deceased partner is not entitled to dower in lands purchased and paid for out of the partnership funds, under articles stipulating for the sale of the whole partnership property for the payment of debts, and used exclusively in carrying on their trade, the partnership being insolvent, and the deceased partner greatly indebted to the firm.

This was a bill in chancery brought by the complainant, the widow of William Greene, deceased, to recover dower in certain lots in the city of Cincinnati. The facts in the case were agreed by the parties to be as follows:

On the 25th May, 1818, William Greene, deceased, the husband of the complainant, entered into partnership with the defendants, to erect and carry on a brass and iron foundry in Cincinnati.

The articles of co-partnership stipulated, among other things, that on the

dissolution of the partnership, the property of the concern should all be sold and the proceeds applied, first to the payment of the debts due from the partnership.

After the formation of the company, the premises of which dower is prayed were purchased by them as a scite for their establishment, and buildings were erected necessary for carrying on the business, which were used and occupied exclusively for the purposes of the partnership, and were necessary for that use. The title was taken in the joint names of all the partners, and with the buildings constituted a large portion of the capital invested. No part of the purchase money was paid by Greene, who died insolvent, and heavily indebted to the partnership. Before the death of Greene the partnership became insolvent, and judgments were, in his lifetime, recovered against the company for debts incurred in purchasing and improving the premises, upon which executions had issued, and were levied on the premises which had been appraised under the execution laws of the state, at about one-fourth of the amount of the judgments.

There was no other property of the concern, real or personal, out of which the judgments could be satisfied. William Greene, the deceased, was entitled to one fifth of the profits, and liable for one-fifth of the debts of the concern.

The complainant's marriage with William Greene was admitted, and his seizin during the coverture as one of the partners of the company.

The cause was adjourned to this court by the Supreme Court of Hamilton county.

Kimbal, for complainant. *N. Wright*, contra.

Opinion of the Court, by JUDGE SHERMAN.

This case depends upon the question whether the widow of a deceased partner is entitled to dower in lands purchased and paid for out of the partnership funds, under articles stipulating for the sale of the whole partnership property for the payment of debts, and used exclusively in carrying on their trade, the partnership being insolvent, and the deceased partner greatly in debt to the firm.

The widow, by our statute, is entitled to dower of all lands of which the husband was seized, as an estate of inheritance at any time during coverture.

Her estate is but a part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband. The husband can, by no act of his, destroy or affect her right of dower where it has once attached, but it only attaches where he has a real beneficial interest in the lands of which dower is claimed. Upon this principle it has been held, that the wife of a mere trustee was not entitled to dower in the trust estate, although the husband was at law seized of an estate of inheritance.

A mere technical seizin of the husband, without any beneficial interest in the estate, will not entitle the wife to dower, as where lands descend to the husband, and are afterwards, by virtue of the provisions of the statute, sold by the administrator of the ancestor, to pay debts due by such estate; here the husband is seized of a legal estate of inheritance, cast on him by operation of

laws, but subject to the payment of the debts of his ancestor, and its being sold for that purpose shews that the husband never had a beneficial interest therein.

So where the husband is only seized for an instant. (*Co. Litt.* 31.) Where lands are mortgaged to the husband, and the mortgage money is afterwards paid, the husband was seized during coverture of a legal estate of inheritance, and yet the wife cannot have dower in the lands so mortgaged.

Also where lands are purchased by the husband, and mortgaged at the same time to the vendor for the purchase money, it has been held that the mortgage is paramount to the claim of dower. (15 *John. Rep.* 461. *Mass. Rep.*. 566.)

In this case the property was purchased, and the deed taken in the names of the partners, but it was bought with partnership funds, and for partnership uses, and was therefore subject to the condition expressed in the articles of partnership, that at its termination all the property should be sold for the payment of the debts.

The interest which each partner had in the property so purchased, was, at the moment of the acquision, subject to this condition of the agreement.

This agreement in equity converts the land into personal property, as between the partners and their creditors, and subjects it to all the liabilities of their joint stock in trade. It shews the original understanding of the parties, that it is to be treated as partnership effects, and not as an estate in lands held in common.

In *Thornton v. Dixon*, (3 *Bro. Ch. Ca.* 199.) LORD THURLOW said, "that had the agreement been that the lands should be sold, it would have converted them into personalty." In this case the interest of the creditors was no way involved; it was a question between the real and personal representative of a deceased partner, and it was held, that as the articles of partnership did not provide that the land held by the partnership should be sold, or otherwise manifest an intention of considering it as part of the effects used in trade that the real representative was entitled thereto. The right of thereal representative is made to depend, not on the character of the estate, but the want of any agreement between the partners that it should be sold or otherwise appropriated to the payment of debts.

In the case of *Smith v. Smith*, (5 *Vez.* 189.) dower was decreed to the widow of a deceased partner of lands purchased in the name of her husband, and paid for out of the partnership funds, on the ground that by the agreement between the partners these lands were to be the husband's, and he made debtor to the partnership for the purchase money, the court observing, that had there been no agreement between the partners, the estate purchased with the partnership funds, though conveyed to one partner would have been part of the partnership property, and this principle was carried still further in the late case of *Featherstonhaugh v. Fenwick*, 17 *Vez.* 298, *by Lord Eldon* who held that a lease of premises where a partnership trade was carried on, renewed by one partner in his own name was a trust for the partnership to be accounted for as joint property although the lessor refused to execute a lease in which the other partners should be inserted.

The principle has often been recognized that lands bought with partnership funds and applied to partnership uses, are, when there is an agreement that they shall be sold for the payment of debts or other purposes connected with

the trade, considered in equity as personal property so far as necessary for any of the purposes of the partnership. It is considered as a trust attaching to the estate, at the time of its acqusition, and which a court of equity is bound to execute as against the partners, or those claiming under them with notice, (*Bell v. Phyn* 7 *Vez.* 454, *Balmain v. Shore*, 9 *Vez.* 500, 7 *Vez.* 425, 1 *Vez. jr.* 431.) and this is in accordance with the general principle that lands, agreed to be turned into money or money into lands, shall be considered in equity as that species of property into which they are directed to be converted, a rule, as observed by the Supreme Court of the United States, that is universal, (*Craig v. Leslie*, 3 *Wheat.* 543.)

In the case at bar, the partners, before the purchase of this land, agree that it shall at a particular period be converted into money; this agreement a court of equity would specifically execute, by directing it to be sold, upon the application of either of the partners, on the ground that it was held by the partners in trust, for the purposes mentioned in the articles of partnership, and that each partner was interested in having it converted into money for the payment of the debts of the firm. At the moment of the acquisition of this estate each partner acquired as against the others an equitable right to have this trust specifically executed according to the terms of their agreement, and each was under a corresponding obligation to the others to dispose of the land and appropriate the proceeds as originally agreed upon. It was an equitable lien which attached to the estate at the moment of its acquisition, and each partner and all claiming their estate as the heir or widow, must take subject thereto, and can have only the interest that the deceased partner had.

It has been too repeatedly determined to be now questioned, that the separate estate of a partner consists of that part of the partnership effects which shall remain after the debts of the partnership and the demands of the partner *qua* partner are satisfied, (*Ex parte King*, 17 *Vez.* 115. *Taylor v. Fields*, 4 *Vez.* 396. *Nicoll v. Mumford*, 4 *John. Chy. Rep.* 522.) and that interest or surplus only is liable to the separate creditors of each partner claiming either by assignment or under execution. (*Church v. Knox*, 2 *Day's Rep.* 514. 6 *Mass. Rep.* 242, 271. 11 *Mass. Rep.* 249, 472. 2 *John. Rep.* 280.)

The interest which William Greene, the husband of the complainant, had at the moment of his death in the partnership effects, was the surplus after payment of the partnership debts, and the balance due his partners. The case shews that he had never advanced any thing; the whole funds, both for the purchase of the lot of which dower is claimed, and for carrying on the business, was advanced by his partners, and at the time of his decease the partnership was insolvent. If this estate is to be considered in equity as personal property, and the court have no hesitation in saying it must be so considered as between the partners and their creditors, he had no substantial interest at the time of his death which would go to his representatives, or could be taken by his separate creditors. If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the husband, and the wife, when there is an agreement, unless it were executed after her right attached, would be bound thereby so as to exclude her right to dower.

The court are satisfied that the husband was at no time during coverture seized of such an estate of inheritance in these lands as is contemplated by the

statute giving the widow dower, and that she is, by force of the statute, entitled only to a share of the beneficial interest he had in the lands; and where real estate necessary or convenient for the conducting a trade is purchased by a partnership, and paid for by their joint funds, under an agreement that they shall, at the termination of the partnership, be sold for the payment of debts, and the residue of the partnership effects are insufficient to discharge the debts, that the land so purchased, whether conveyed to one or all of the partners, is not subject to dower of the widow of a deceased partner.

The bill must therefore be dismissed with costs.

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2 HAMMOND, 5.

MORS v. McCLOUD.

JUDGES PEASE AND BURNET.

1825.

A declaration upon a promissory note, in the same form as upon a specialty, is good, without averments of indebtedness, liability, assumption, &c.

The declaration was in these words: "Norman McCloud was summoned to answer unto James Mors, who sues, &c. of a plea of the case, for this, to wit: that the said Norman, on the eighteenth day of May, eighteen hundred and nineteen, at Green township, in the county aforesaid, by his certain note of that date duly executed, promised to pay the said J. Mors, or order, one hundred dollars, by the first day of October next succeeding said date, as by the said note to the court here shown appears. Yet the said Norman, although often requested, hath not paid the amount of said note, or any part thereof; but the same to pay he hath wholly refused, and still doth refuse, to the plaintiff's damage of three hundred dollars. Therefore, he sues," &c.

The defendant demurred generally. The court below sustained the demurrer, and gave judgment for the defendant.

The error assigned is, that judgment was rendered for the said Norman, when it ought to have been rendered for the said James.

Douglass, for the plaintiff, in error. *King*, contra.

By the COURT.

If this question were now presented for the first time, we should at least hesitate. The objections to this laconic mode of declaring, are not without their weight; but we consider the point as settled by our predecessors, and do not feel at liberty to disturb it. The judgment therefore must be reversed, and the cause remanded for further proceedings.

LACY v. GARARD.

JUDGES PEASE AND BURNET.

1825.

Where the answer denies all the material averments in the bill, the bill will be dismissed, the testimony being vague and contradictory.

It seems that a penal bond obtained from a person intoxicated, by the procurement of the obligee may be avoided at law.

Equity will not interfere where a good defence could have been made at law.

The bill states, that the complainant was fraudulently induced to sign a penal bond, as security for one Daniel Lacy. That his signature was obtained while he was intoxicated, by the procurement of Garard. That having signed the bond as principal, he could not shew, at law, that it was intended to be as security. That judgment was entered against him as a principal, and that he believes that Daniel Lacy, the real principal, on whom process was not served, has a good defence at law, consisting of several payments, of which complainant could not avail himself in the suit at law, and prays for a perpetual injunction.

The answer denies all the material averments in the bill.

By the COURT.

If the facts set out in the bill were admitted to be true, they would not entitle the complainant to the relief he asks for, as he might have taken advantage of them in the action at law. Had his signature been procured in the manner charged, the obligation would have been voidable at least. The facts might have been reduced to the form of a plea, and would have been a good bar to the action on the bond, or if the payment had been made, as is alleged, they might have been pleaded, or proved under a notice to the general issue. No reason is assigned, why the complainant could not have taken advantage of them, much less is it pretended, that he was prevented from doing so, by the fraud, or procurement of the defendant. But independent of these considerations, the material facts are all denied, and the evidence is not sufficient to overthrow the answer. The testimony is vague and contradictory. It does not show that the complainant was intoxicated *by the procurement of the defendant*; nor is it pretended that an unsuccessful attempt was made to discriminate between the principal and the surety, in entering the judgment. This allegation seems to be an after thought, seized upon as a pretext to delay the collection of the debt. A part of the payments proved by the complainant, were deducted from the debt, before the obligation was given; and it is proved that there were other dealings between the parties, to which the residue of those payments might have related, which is rendered probable, by the absence of all proof, tending to show that they were made with reference to the debt in question. The defendant's witnesses testify, that the bond was given for a part of the price of a tract of land, and that the residue of the price was paid by the delivery of the same kind of

property that is spoken of by the complainant's witnesses. They also testify that the complainant, and Thomas Lacy, acknowledged that they both signed the instrument, so that the testimony taken together, rather confirms than contradicts the answer.

Injunction dissolved, and bill dismissed.

HASTINGS v. STEPHENSON.

JUDGES PEASE AND BURNET.

1825.

A survey did not so appropriate lands as to render a subsequent entry void, in cases that occurred before the act of congress of 1807.

Lands cannot be appropriated without an entry, and where the survey and patent include lands not embraced in the entry, such land is subject to entry as vacant land, and the patentee or those claiming under him shall be decreed to convey to the subsequent locator.

The bill states, that on the third of August, 1787, an entry was made in the following words: No. 459. Capt. Churchil Jones enters 1000 acres of land, part of a military warrant 2311, on the north west side of the Ohio, beginning at the mouth of Brush or Eighteen Mile creek, running up the river fifty poles, thence from the beginning down the river five hundred poles when reduced to a straight line, thence at right angles from the general course of the river for quantity. That on the 17th of March, 1792, the following entry was made: No. 2023. Thomas McClanahan enters 2 0 acres of land, on a military warrant No. 1863, on the lower side of Brush creek, beginning at a poplar tree, marked J. B. 1791, on a branch one and a half miles from the mouth of Brush creek, running south 30, east 200 poles, and from the beginning north 30, west 40 poles—thence southwardly at right angles for quantity, of which entry, one hundred acres were surveyed on the 19th of August, 1809, for which a patent was granted to William Russell, assignee of J. Beasley, assignee of the said McClanahan, on the 23d of November, 1818. That Russell sold and conveyed the said 100 acres to the complainant, on the 4th March, 1819. That a survey, purporting to be made on the aforesaid entry of Churchil Jones, but variant therefrom, was fraudulently made, including a part of the land owned by the complainant. That a certain N. Grimes acquired an assignment from Jones of the aforesaid 1000 acre entry, and fraudulently procured a patent therefor, prior in date to the patent of the complainant, but junior to the entry on which he claims. That John Stevenson, the defendant, having obtained a title from Grimes for so much of the land as interferes with the prior equitable claim of the complainant, commenced an action of ejectment and recovered a judgment therefor.

The bill prays for a decree that the defendant withdraw, or relinquish to the complainant, and for an injunction.

The answer admits the entry in the name of C. Jones—avers that the same was legally surveyed on the 7th November, 1787—that the survey was recorded on the 17th March, 1788—that on the 28th October, 1799, a patent issued to Grimes—that the defendant has obtained a legal title to a part of said land, for which he recovered a judgment at law in an ejectment—that N. Grimes

sold and conveyed that part of the land which the defendant claims to Thomas Grimes, who sold and conveyed the same to the defendant. The defendant admits the entry for 200 acres in the name of McClanahan; but does not know whether it was special or legal, and that a part of it was withdrawn.

Several witnesses were examined, but their testimony did not cast much light on the subject.

Thompson, for the complainant. *Brush*, contra.

By the COURT.

The evidence in this case is not sufficient to enable us to make a final decree. The preliminary questions, however, on which the final decree must principally depend, may now be stated.

1st. It appears from the evidence, and the points conceded by the parties, that the entry of McClanahan, under which the complainant claims, was made agreeably to law—neither the sufficiency nor the notoriety of its calls has been disputed. Brush creek was generally known. The poplar, marked J. B. 1791, called for as a beginning, is well described. The side of the creek on which it stands—its distance from the mouth of the creek, and its situation on a run being given, a subscquent locator, by reasonable diligence, might find it. And the surveyor testifies, that in tracing the survey, he found all the corners as described in the complainant's deed, which appears to be a transcript from the patent.

2d. As this entry was made in 1792—and the entry of Churchil Jones was not carried into grant till 1799, it is the opinion of the court, that it covered and appropriated all the land embraced in its calls, not included in the calls of Jones' entry. The fact that the survey of Jones was made before the entry of McClanahan, does not affect the case, as the entry was made long before the passing of the statute that prohibits locations on lands previously patented or surveyed. We admit that entries may be amended, but not that a survey is necessarily such an amendment of an entry as will appropriate land clearly without the calls of that entry, in opposition to a subsequent location. Were this the case, lands might be appropriated by a survey without a previous entry, notwithstanding the express requirement of the statute of 1779. It has however been decided by the Supreme Court of the United States, in the case of Wilson *v.* Mason, that a survey not founded on an entry is a void act, and constitutes no title whatever; and that consequently the land so surveyed remains vacant and liable to be appropriated, by any person holding a land warrant. The principle here decided, seems to settle this question; for if an entry must precede a survey, the entry must cover the land surveyed, and every part of it, or a portion of it would be appropriated without an entry. If any portion of the land, however small, may be legally appropriated without an entry, we see no reason why an entire tract may not be taken up in the same way. If the holder of a warrant may enter one thousand acres, and in surveying, vary so far from his entry as to include one hundred acres not covered by it, he might on the same principle take one acre within and nine hundred and ninety-nine acres without its calls, or, as was the case in Wilson *v.* Macon, enter on one water course and survey on another.

The terms used in the entry of Churchil Jones are somewhat ambiguous; but we believe the true construction of it will give a base on the Ohio of five hundred poles, including the fifty poles above the creek. The mouth of the creek appears to be adopted merely as an object from which to ascertain the beginning corner, which is a point fifty poles above the mouth.

The words of the entry are, "beginning at the mouth of Brush, or Eighteen Mile creek, running up the river fifty poles—thence from the beginning down the river 500 poles when reduced to a straight line." The word thence must refer to the termination of the 50 poles, and consequently the 500 poles called for, must commence at that point. The most natural construction of the language is, running up the river 50 poles, and from thence, as a beginning, down the river 500 poles, &c. The same result will be had by a simple transposition of the words *thence* and *from*.

On the whole, we are of opinion, that the true construction of Jones' entry, requires it to be surveyed by beginning at a point on the bank of the Ohio, 50 poles on a straight line above the mouth of the creek, and by running from that point as a beginning corner, down the river with its meanders to a point on the bank of the Ohio, 500 poles on a straight line from the beginning course, and from those points at right angles from the base line so far as to include the quantity of 1000 acres, the opposite lines being equal and parallel.

It is contended by the complainant, that the survey heretofore made on this entry, extends further back from the river than the calls, as now construed, justify, *and that it has been run* so as to include a part of the land contained in his entry. On this point, it is the opinion of the court, that so much, if any, of the land included within the calls of McClanahan's entry and survey, as has been covered by the survey and patent of Jones, but not included within the calls of his entry as now expounded, has been fraudulently recovered from the complainant, and that in equity and good conscience, the defendant ought to release the legal title he has acquired to it, by obtaining the elder patent. But as no survey has been made of Jones' entry on the principles here laid down, whereby the interference, if any, can be ascertained, it is ordered that the surveyor of Adams county, execute a survey of that entry agreeably to the directions herein given, and return the same to the clerk of this court.

DUCKWALL v. WEAVER.

JUDGES PEASE AND BURNET.

1825.

When the subscribing witness to a writing denies his signature other witnesses may be called to prove its execution.

A note partly destroyed may be declared upon as entire, and proof received on the trial of the mutilated part.

The facts were these. Weaver instituted a suit against Duckwall and wife, on a note purporting to have been executed by the wife, when sole. The defendants filed the following affidavit "David Duckwall being sworn, saith that the promissory note on which the above action was brought, was not subscribed by

the wife of the defendant, when sole, as he verily believes." No plea was filed in the cause at the trial, a part of the note set out in the declaration containing the name of the subscribing witness was offered in evidence, accompanied with proof that the note had been torn, and a part of it lost by accident. John Carrel, whose name appeared on the note, as a subscribing witness, was also called, who denied the signature to be his. The plaintiff then offered witnesses to prove, that the name of John Carrel, on the paper offered, was the proper hand writing of the said John Carrel. The defendants objected to the whole of the evidence offered—the objection was overruled, and a bill of exceptions taken. A verdict was found for the plaintiff. Judgment entered, and a writ of error taken.

The errors assigned were: 1. "The court erred in admitting testimony to prove the hand writing of the subscribing witness."

2d. "The court erred in permitting *a part of the note* to be given in evidence, when the same was not declared on."

By the COURT.

It is a general rule, that the best evidence the nature of the case admits of, and that is in the power of the party, shall be produced. Deeds and other instruments of writing, are therefore ordinarily to be proved by the subscribing witnesses.

The rule however, admits of exceptions, as where the witness is dead, absent, incapacitated, or cannot be had. In these cases, inferior testimony is received, from necessity, to prevent the failure of justice. In *Lee v. Ballard Hill*, 1790. M. S. it was ruled by Lord Kenyon, that where there could be no direct proof of the execution of the bond, *by the subscribing witness*, collateral evidence was admissible. In *Abbot v. Plumbe, Doug.* 216. Lord Mansfield observed that it had been doubted formerly, whether if the subscribing witness denies the deed, you can call other witnesses to prove it, but that it had been determined by Sir Joseph Jekyl, in a case which came before him at Chester, that in such case, other witnesses might be examined, and that it had often been done since. The same doctrine will be found in *Peake's Evidence*, 101—2.

The admission of such testimony, cannot be considered as interfering with the rule, which prohibits a party from impeaching the credit of his own witness, for the witnesses subsequently called, do not directly discredit the first witness. They do not testify as to his character, and the impeachment of his credit, if any ensues, is indirect and consequential. The witnesses who were objected to, in this case, and admitted by the court, were called to prove a fact that was important in the cause, and although the first witness had proved that fact contrary to the expectation of the plaintiff, that circumstance could not prevent him from proving how the fact really was, by other witnesses; and if the feelings, or character of the first witness were in any way affected, it was the unavoidable consequence of the exercise of a legal right by the plaintiff.—The scope of the rule just referred to, seems to be to protect a witness from any direct attempt that may be made by the party who called him, to destroy his credit by general evidence, and one reason for the rule is, that such a license would put it in the power of suitors, either to sustain, or destroy their witnesses, as their testimony might operate for, or against them.

If the plaintiff in error be correct in the position he has taken, there must in many cases, be a total failure of justice. Persons who sign their names to instruments as witnesses, frequently lose all recollection of the fact, and sometimes their hand writing changes so much, as to induce them to doubt or even deny their own signature, when examined after a lapse of years; and it sometimes happens that a witness from corrupt motives, will knowingly falsify the truth, by denying his signature. To say, in cases like these, that a party shall be concluded, would be a sacrifice of substance to form. The rule we conceive does not require such a rigid construction. If the subscribing witness can be had, he must be produced. If when produced, he can prove the execution of the instrument, his evidence is that which the law requires, as it is the best in the power of the party, but if he cannot indentify his signature, he is, as to the party producing him, as though he was absent, or dead. The fact to which he is called, remains unproved, and the party may resort to secondary evidence. We believe this to be the common sense of the rule, and the settled construction of it.

The second assignment is that the declaration does not describe the note as mutilated and partly lost. This objection seems to have a reference to the rule laid down for declaring on deeds, of which the defendant has a right to oyer, and of which the plaintiff is therefore required to make profert. In these cases, when the deed cannot be produced, the plaintiff may excuse himself from making a profert, by averring that the deed has been lost, by time and accident. In the case before us, it appears that a part of the note had been destroyed, and the objection was, that that fact had not been set out in the declaration. There is no analogy between this case, and those in which that averment is required. In an action on a promissory note, the defendant not being entitled to oyer, a profert is not necessary, nor is it necessary to set out the note in the declaration—it may be given in evidence on the general counts —its mutilated state, therefore, need not be described in the pleadings. It is time enough to disclose that fact, and to account for it, when the paper is offered in evidence.

Judgment affirmed.

ROBBINS v. BUDD.

JUDGES BURNET AND SHERMAN.

1825.

A person fined by one justice for profane swearing and arrested and brought before another justice for the same offence, can only prove the former conviction by a transcript from the docket of the justice who assessed the fine.

The declaration contained three counts. The first stated in substance, that William Robbins was a son and servant of the plaintiff in his employ—that the defendant being a Justice of the Peace, issued his warrant against the said William, caused him to be unlawfully arrested, fined him in the sum of three dollars, and imprisoned him, whereby he lost the benefit of his labor. The second count charged the arrest to have been made with force and arms. The

third count charged the defendant with having caused the said William to be illegally arrested on a charge of swearing several finable oaths—that the said William had before that time been legally fined for swearing the same oaths—that the defendant knowing the premises caused him to be fined a second time, and to be imprisoned for the same offence by which he lost, &c.

Plea General Issue and Notice.

In support of the declaration the plaintiff gave in evidence a certified transcript from the docket of the defendant from which it appeared that William Robbins had been charged on oath before the defendant, as a justice of the peace, with having sworn two finable oaths, on which charge the said William was arrested, brought before the defendant, fined one dollar and cost of suit, and for non-payment of the fine was committed to prison.

B. Cook testified that he was a justice of the peace, that on the evening of the third of July, William Robbins, son of the plaintiff, swore two finable oaths in his presence, that he informed him at the time that he should take notice of it. That in the course of the evening he made an entry on his docket, that said Williams was fined fifty cents for swearing the said oaths.

On cross examination he stated that no process had issued and that no cost had been taxed. That after he had fined the said William, the constable came and took him on a warrant from justice Budd, and that he requested the constable to tell Esquire Budd what he had done.

J. Cook testified, that he heard William Robbins swear, and heard B. Cook tell him he would take notice of it. He saw the constable arrest young Robbins on the warrant from Budd—that he was called as a witness before Budd—that he proved the swearing of the oaths, and that he informed Budd, that B. Cook had fined Robbins before, for the same oaths. On cross-examination he stated that no transcript was produced from the docket of B. Cook, and that the defendant Budd had no knowledge of the fine imposed by Cook, but the verbal information given by the witness.

On this evidence the plaintiff rested, and the defendant moved for a non suit.

By the COURT.

The declaration charges that the defendant was a justice of the peace—that as such he issued a warrant against William Robbins, son of the plaintiff, for an alleged violation of the act for the prevention of certain immoral practices.—That the said William had been previously fined for the same offence—that the defendant with a knowledge of that fact unlawfully fined him a second time, and caused him to be imprisoned, whereby the plaintiff lost the benefit of his labour. In support of the motion it is contended, that these facts have not been proved. The only averment tending to subject the defendant to his action is his knowledge that the party accused had been previously fined for the same offence. The declaration does not state the manner in which the defendant acquired that knowledge, but it appears from the testimony, that it was by a verbal message, sent by Justice Cook, which message the defendant very properly refused to receive as evidence. It was the duty of the accused, if he wished to avail himself of that defence, to do it by a certified transcript from the docket of the justice who had imposed his fine. Parol evidence of the fact was inadmissible. If the suit had been brought in a court of record, and the defendant had plead a former

conviction in bar, he could not have sustained that plea by parol testimony, but must have produced the record of the conviction. Although the pleadings before the justice are *ore tenus*, the rules of evidence are the same as in courts of record, and the defendant, acting as a judicial officer, was bound to require the best evidence in the power of the party, and to reject that which was inferior. The plaintiff not having shewn that such evidence was produced, has failed to prove the only fact on which he could hope to sustain his action—we therefore advise him to submit to a non suit.

Judgment of non suit.

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2 HAMMOND, 18.

TOWNSEND v. ALEXANDER.

JUDGES PEASE AND BURNET.

1825.

Where a party seeking a specific performance of a contract insists upon an unconscionable advantage, the court will dismiss his Bill.

The facts are these. The defendant contracted to sell to the complainant a house and lot in the town of Springborough, on the complainant's paying for the same two hundred and forty dollars in the following manner. Twenty dollars to be paid on a day named; one hundred dollars to be paid on a subsequent day; one hundred dollars to be paid by assigning notes on good men; and in discharge of the residue the complainant was to convey five unimproved lots in Springborough. The first and second instalments, amounting to one hundred and twenty dollars, were paid. In discharge of the third instalment the complainant offered to assign promissory notes on different individuals to the amount of one hundred dollars. The defendant objected to the sufficiency of a part of the notes, amounting to seventy-one dollars and forty cents, but was willing to receive the residue, amounting to twenty-three dollars and sixty cents. Complainant refused to assign a part without the whole. Defendant then instituted a suit before a justice of the peace, for the whole amount of the third instalment. The justice mistaking the extent of his power, gave judgment that the defendant in the suit before him, should pay the plaintiff the sum of seventy-one dollars and forty cents, being the amount of notes objected to, and ordered him to assign to the plaintiff the residue of the notes, to which no objection had been made, amounting to twenty-three dollars and sixty cents. The complainant refused to assign the notes, but offered to pay the seventy-one dollars and forty cents, and to execute a deed for the five lots in Springborough. The prayer of the bill is that the defendant may be decreed to convey the house and lot.

On the part of complainant it was contended that the recovery before the justice was a judicial determination of the amount due on the contract. That the order relating to the assignment of the notes was a nullity, and not obligatory; but if otherwise, that the defendant had his remedy. That this court cannot overhall the merits of that judgment, which was rendered in a suit, in which the entire claim of the defendant was exhibited.

By the COURT.

The facts in this case are not disputed. The contract is admitted, and also the performance by the complainant as far as it is alleged in the bill. The only point of controversy is whether the defendant shall lose twenty-three dollars and sixty cents, part of the third instalment, in consequence of the erroneous opinion of the magistrate, as to the kind of judgment or decree he was authorized to enter. It is evident, and in substance admitted by the complainant, that the third instalment of one hundred dollars, was wholly unpaid when suit was commenced before the justice, and that judgment was rendered for a less sum than was due, in consequence of a belief that the justice had power to compel an assignment of a part of the notes. Although it is not in the power of this court to interfere with the judgment of the magistrate, yet it is in their power to require the complainant to do equity, as the only condition on which they will render him their aid. We cannot shut our eyes on the fact, that the complainant is seeking an unjust advantage of the defendant, and that if the prayer of his bill should be granted, he will obtain the property at a less sum than he stipulated to pay. He may claim the advantage he has gained at law by refusing to assign the notes, or to pay more than the amount of the magistrate's judgment, but while he does so we will leave him to his remedy at law. Before he has a right to ask equity, he must do equity. He must come with clean hands, if he expects to obtain the aid of this court. As the case now stands, we are called on to decree him a title, under such circumstances as must forever prevent the defendant from obtaining a part of the consideration. The complainant does not pretend that the sum for which the magistrate directed notes to be assigned has been paid, and he still persists in his refusal to pay it. We have no alternative therefore but to dismiss his bill.

M'CARTY *v.* BURROWS.

JUDGES PEASE AND BURNET.

1825.

Where a matter of fact, properly a subject of defence at law, is not litigated at law, equity will not relieve.

The bill states, that defendant being about to go to New-Orleans, and having a sum of money on hand in current bank notes, for which he had no immediate use, proposed to lend them to complainant, to be refunded on his return from New-Orleans. That the complainant took the bank notes, and gave his own promissory note for the amount—that after the defendant had returned, the complainant called on him, and told him that the notes did not answer his purpose—that he could not pay his debts with them, and offered to return them—that defendant agreed to take them back, and give up the promissory note which he held—that complainant then gave him the bank notes, on which the defendant promised to destroy the promissory note, which was not at that time present—that relying on the integrity of the defendant he took no receipt, and had no wit-

ness by whom he could prove the payment—that defendant, instead of destroying the note, commenced an action on it, recovered judgment, and had sued out execution.

The prayer of the bill is for a perpetual injunction.

The answer admits the loan of the money—the promissory note—the judgment and execution; but denies the repayment, and avers that the debt is just and that it is wholly unpaid.

Two witnesses were examined on the part of the complainant. The first testified, that he heard the defendant say he had received the bank notes from complainant, and had promised to destroy the promissory note. The second testified that he was present at a conversation between the parties, when the defendant made the same admission. On the part of defendant testimony was offered as to the general character of the first witness, and the cause was submitted.

By the COURT.

There is no ground on which this bill can be sustained. The credibility of the first witness is entirely destroyed. Independent of the proof as to his general character, he has equivocated, and told different stories at different times. His evidence therefore is entitled to no weight. The second witness contradicts one of the allegations of the bill, that complainant had no witness by whom he could prove the payment of the money.

The material averments of the bill are positively denied by the answer, which is responsive, and is not impeached.

The remedy of the complainant, admitting the truth of his allegations, was at law. The whole contest between the parties is a matter of fact, relating to the payment of a sum of money, of which the complainant might have availed himself in the action of the promissory note, and if the second witness testified truly, of which there is great doubt, McCarty knew by whom he could prove the confession of payment. But be this as it may, the case is not within the jurisdiction of this court. Putting the answer out of the question, the complainant has not presented a case that can be sustained. It might have been necessary for him to file a bill of recovery, pending the suit at law, but having submitted to a judgment in a case depending wholly on a contested fact, he cannot review the merits of that judgment in a court of chancery.

The injunction must be dissolved, and the bill dismissed.

WOOD ET AL. v. ARCHER.

JUDGES PEASE AND BURNET

1825.

When a party neglects to make a proper defence at law equity will not relieve.

The bill states, that after the complainants had taken out letters of administration, an allowance of 195 dollars was made for the support of the widow and children of the intestate for one year, agreeably to the statute. That a contract was afterwards entered into, between the complainants and the widow, that she

should receive 39 dollars for her own support, and that they should receive the residue and support the children, which was done. That the defendant was appointed their guardian, and in that character commenced a suit against the complainants, before a justice of the peace. for the money received by them under the agreement aforesaid, and recovered a judgment; that the complainants then gave notice of an appeal, after which an agreement was entered into, that the complainants should relinquish their appeal, and the defendant should amicably and honestly settle the matter; but that after the time for presenting the appeal had expired, the defendant refused to settle.

The answer denies the material averments of the bill.

The cause having been submitted on bill and answer, the following points were decided by the court:

1. The claim of the complainants was a proper defence to the suit at law.
2. The promise to settle or relinquish the appeal, was made on a good consideration, and may be investigated in an action at law.
3. The bill does not present a case that could be sustained in equity, if the facts were all admitted; but as they are principally denied, and no evidence is offered, the injunction must be dissolved and the bill dismissed.

DUCKWALL v. ZIMMERMAN.

JUDGES PEASE AND BURNET.

1825.

Where a party neglects to make a proper defence at law, equity will not relieve.

The bill stated, that suit was commenced against the complainants on an instrument, purporting to be a note executed by Kitty Ann, now the wife of the complainant Duckwall, while a *feme sole*. That the defendants in the suit at law, believing that the plaintiffs must prove the execution of the note, did not attend, and that judgment was entered against them. They deny the execution of the note, and pray for a perpetual injunction.

The defendant demurred—the cause was submitted without argument.

By the COURT.

There is no ground on which this bill can be sustained. It does not contain one feature of a case proper for, or relievable in this court.

The injunction must be dissolved, and the bill dismissed.

WOOD v. PRATT ET AL.

JUDGES PEASE AND BURNET.

1825.

The bill states that the defendant, Davis, being a justice of the peace, entered a judgment on his docket against the complainant in favor of S. Pratt, for up-

wards of 80 dollars; that he was not served with process, and had no knowledge of the suit till after judgment had been rendered and execution issued, and prays for a perpetual injunction.

The answer admits the judgment and execution, and avers that complainant had notice of the suit before the justice—that he appeared at the trial and admitted the debt to be just, on which judgment was entered against him.

The cause was submitted on bill and answer.

By the COURT.

Let the injunction be dissolved and the bill dismissed.

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2 HAMMOND, 24.

NUMLIN v. WESTLAKE.

JUDGES PEASE AND BURNET.

1825.

Where a suit is brought in the name of one person for the use of another, it is not necessary to show an assignment of the subject of the action

It appeared from the record, that a certiorari had issued from the Common Pleas of Gallia, to John Kerr, a justice of the peace, who returned the same with a transcript annexed, from which it appeared that a summons issued in the name of Jane Scott for the use of Workman, against Samuel Westlake, which was returned served. That defendant appeared and confessed judgment for $21 00 and cost. That sundry executions had been issued by the justice, on which no property was found. That the proceedings before the justice had been staid by an injunction which was afterwards dissolved. That the justice then issued a summons on the injunction bond, in the name of Scott, for the use of Workman, against the defendants Samuel Westlake and his securities. That the defendants appeared, made no defence, and that judgment was entered by the justice for the penalty of the bond, to be released on the payment of $28 47.

After the return of this transcript diminution was suggested, and a further return obtained, setting out the original note, on which the suit was brought. It did not appear from the note that it had been assigned to Workman. Pending the certiorari, Jane Scott died, and N. Numlin, administrator, was made party. The following reasons were assigned on the certiorari:

1. "The suit was brought in the name of Jane Scott, and the judgment was rendered in the name of Jane Scott, for the use of Workman."

2. "It does not appear that Workman had any interest in the note on which suit was brought, as there was no assignment, or order by Jane Scott to Workman for the payment of the same to him."

3. "The judgment does not agree with the writ."

On these reasons the court of Common Pleas set aside the judgment of the justice, and rendered judgment against the defendant in certiorari for cost, to reverse which this writ of error was taken.

The error relied on is, that the court of Common Pleas set aside the judg-

ment of the justice, and rendered judgment in favor of plaintiff in certiorari.

By the COURT.

The assignment in this case renders it necessary to examine the reasons filed in the court below.

The first and third reasons are not true in point of fact. The transcript shews that the original summons issued in the name of Jane Scott, for the use of Workman, and that there is no disagreement between the writ and judgment.

The second reason does not seem to be very material. As the note was not assigned, the suit was properly brought in the name of the payee. The additional words, for the use of Workman, were intended to show that he had a right to receive the money when it should be collected. The want of an assignment, or an order on the back of the note, does not disprove that right. It might have been created by a separate instrument, or a parol agreement, the validity of which could only be questioned by the payee. It is a matter of no interest to the defendant to whom the money belongs; it is enough for him to know, that the title to the note is in the plaintiff, in whose name the suit was brought, and that a second action cannot be sustained against him for the same demand.

It is a common practice in the courts of this state to designate in this way the person for whose benefit a suit was brought. When it is necessary to commence it in the name of the original obligee, or payee, and it has been considered a sufficient authority from the nominal plaintiff to justify the officer in paying the proceeds of the judgment to the person designated, where no objection is made. It has been treated as an acknowledgment, by the plaintiff, that he was a trustee, suing for the use of another, and it appears unnecessary to inquire in what way the trust was created, as long as the trustee is disposed to acknowledge it, and the interest of third persons is not affected by it.

On these grounds we are of opinion that the court of Common Pleas erred in setting aside the judgment of the justice.

Judgment reversed, and cause rendered for further proceedings.

KNAGGS *v.* CONANT.

JUDGES BURNET AND SHERMAN.

1825.

When a cause is certified to the Supreme Court, from the court of common pleas, on account of the interest of the judges, the parts upon which the interest arises, must be set out in the certificate.

It was certified to this court from the court of Common Pleas on the ground that there was not a constitutional quorum of disinterested judges to try it. The certificate accompanying the record was in these words "Whereupon this cause being called by the honorable court in chancery, E. Lane Esq. solicitor for the defendant suggests, that there is not a quorum of judges qualified to try this cause on account of interest, and this appearing, the clerk of our said court,

according to the statute in such case made and provided, certifies the pleadings to the Supreme Court."

The court having inspected the record, refused to take cognizance of the cause for want of jurisdiction, and ordered the transcript to be sent back to the common pleas of Wood county.

By the COURT.

The statute provides, that if in any suit or action in the court of Common Pleas, it shall so happen that there is not a sufficient number of disinterested judges of such court, to sit on the trial, it shall be the duty of such court on the application of either party, to cause the facts to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action to be forthwith certified to the next Supreme Court of the county, which Supreme Court shall thereupon take cognizance thereof, in like manner as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly. The jurisdiction of this court therefore depends on the existence of an interest in the court below, which must be ascertained by the record. The law requires the facts, from which this interest is inferred, to be entered on the minutes and certified to the Supreme court with a transcript of the proceedings. We are not to rely on the opinion of the court of Common Pleas, or of counsel in the case, that there is not a constitutional quorum of disinterested judges. We must be furnished with record evidence of the facts from which that conclusion is drawn. Judges and lawyers frequently differ as to what amounts to evidence of an interest, and, as our jurisdiction depends on the reality of such an interest, we must be furnished with the facts and form an opinion for ourselves. In this case it does not appear what the facts were, or that the Common Pleas directed any entry or certificate to be made. It is merely stated, that on the suggestion of counsel the clerk certifies, &c. On such a certificate as this we cannot venture to proceed, as it does not furnish us with evidence from which we can ascertain that we have jurisdiction. The letter and spirit of the statute requires that the courts below should ascertain the truth of the facts, from which the interest of the judges is inferred, and that they order those facts to be entered on their minutes, and certified with a copy of all the proceedings to this court.

HARTSHORN v. WILSON.

JUDGES BURNET AND SHERMAN.

1825.

Error in fact may be assigned on certiorari.

A judgment in attachment before a justice of the peace, may be set aside on certiorari, upon proof that the defendant was a resident of the county where the writ issued.

The facts were these. Hartshorn having made affidavit of a debt due from Wilson, and that he absconded to the injury of his creditors, sued out an attachment before a justice of the peace, by virtue of which the constable to whom

it was directed attached a yoke of oxen. Judgment was afterwards entered in favor of plaintiff, and execution issued. Wilson removed the proceedings to the Common Pleas by certiorari and assigned for error that before and at the time of suing out the writ of attachment, he was living and residing in the said county of Sandusky, and that from the day of the sueing out of the writ until the rendition of the judgment he was constantly within the county at his usual residence, pursuing his ordinary business.

The defendant demurred—the court below sustained the assignment and set aside the judgment of the justice, to reverse which the writ of error was brought. The error assigned was that the court of Common Pleas erred in setting aside the proceedings and judgment of the justice.

The cause was submitted without argument.

By the COURT.

The question presented in this case, is whether the plaintiff in certiorari, against whom judgment has been entered, on a writ of attachment, issued by a magistrate, can assign for error the fact that he was a resident of the county where the writ issued, and had not absconded as was averred in the affidavit on which the attachment issued. The writ of attachment is given by statute and can be issued only against absconding debtors, or such as do not reside within the county—for convenience or from the necessity of the case, the justice is authorized to receive the affidavit of the creditor, that his debtor absconds, or is a non resident, and on that evidence to issue the writ, but the legality of the process depends on the fact, and not on the affidavit, which is received as evidence of the fact. The process against a resident must be a summons or capias on which personal service is required—he must have a day to answer before judgment—he is entitled to a stay of execution, and his property is not liable to be taken in the first instance as in case of an attachment. The statute makes this distinction, and it is not in the power of a creditor, by perjury or mistake, to do away its legal obligation, or the right of the debtor to insist on it. Process may issue by mistake, and proceedings on it be sustained until the mistake is judicially ascertained; but whenever that is done, the party injured is entiled to relief. Individuals are not at liberty to change the law, or by fraud, or mistake to create a jurisdiction, not known to the law; and when such an attempt is made, the proceedings cannot be sustained after the truth is judicially known. An attachment founded on an affidavit taken in conformity with the statute, must be considered *prima facie* as legal, and will sustain the writ and the proceedings had on it; but as this mode of proceeding is not authorized against a resident, who does not abscond, whenever it is ascertained that the defendant is a resident of the county and has not absconded, proceedings must be staid.—The remedy by attachment being founded on the alleged absence of the defendant, personal notice is not required; the proceedings are *ex-parte*—the defendant has no day in court; judgment may be obtained and his property sold without his knowledge and before it is in his power to take advantage of the error. It seems necessary, therefore, to prevent abuses of legal process in cases like this, that the party injured should be permitted to assign the fact for error, on a writ of certiorari; and we do not discover any thing in the practice, inconsistent with the principles which govern proceedings in the nature of

appeals in other cases. On a writ of error, the plaintiff may assign for error, matter of fact not apparent on the record, and put the defendant to take an issue, either on the fact or on the law, which seems to be the course pursued in this case.

DECISIONS IN BANK.

2 HAMMOND, 31.

1825.

HAMMER v. McCONNEL.

Process against two, one not served, declaration against one, appearance and plea by one, verdict and judgment against both in Supreme Court; the judgment may be amended at a subsequent term by striking out the name of the defendant not served.

This case came before the court upon three separate motions, made in the Supreme Court for Tuscarawas county, and adjourned for decision to this court. The case was this: Hammer brought an action for goods sold and delivered to John and Alexander McConnel, as partners in trade—process issued against both, but as to John McConnel was returned not found. The declaration was filed under the statute suggesting the return of *non est.* as to John—Alexander appeared and pleaded to the action separately, and in the court of common pleas a verdict passed in his favor. The plaintiff appealed to the Supreme Court, where a verdict was found for the plaintiff. The verdict was returned as against both John and Alexander, and a joint judgment was rendered against both. At a subsequent term, the plaintiff moved for leave to amend the judgment by striking out the name of John McConnel. The defendant moved to set aside the verdict and judgment as irregular and award a *venire facias de novo*—and also, in the event this motion should be overruled, he moved for a writ of error *coram nobis.*

Wright, for the plaintiff. *Tappan*, for the defendant.

By the COURT.

The verdict in this case, is a substantial finding for the plaintiff. The issue was between the plaintiff and Alexander McConnel, and upon that issue alone the jury could decide. There is no difficulty in understanding how John McConnel was connected with the case, and it is perfectly easy to see how it happened that his name was included in the verdict. It was a mere formal error. When the clerk receives the verdict, it is always upon the terms, that the court may correct matter of form, not touching matter of substance. The verdict against a party to the contract, but not a party to the suit, was an informality and nothing more. It was the duty of the clerk to record the verdict according to the parties at issue, and to have entered the judgment in the same way. Had the mistake in the verdict, been discovered, as soon as the jury left the box, can there be any doubt but that the court would have corrected it, and directed a judgment conformable to such correction? We think there can be none. As a mere clerical error, it is still amendable. Leave is accordingly given to make

the amendment. This decision concludes the other two motions; they must of course be overruled.

WRIGHT *v.* LATHROP.

A verdict and judgment against one joint trespasser, cannot be pleaded in bar to a separate action for the same trepass, against another joint trespasser.

This was an action of trespass, with force and arms, for taking and converting goods. The defendant first pleaded the general issue of not guilty; and secondly he pleaded that the plaintiff had prosecuted a separate action, for the same trespass, against one Asa K. Burroughs, in the Supreme Court of Portage county, and recovered against him a verdict and judgment for damages and costs. To this plea the plaintiff demurred, and the defendant joined in demurrer. The question of law thus presented upon the plea and demurrer, was adjourned from the Supreme Court of Portage county to this court.

Whittlesey, *Newton* and *Sloan*, for plaintiff. *Wright*, for defendant.

Opinion of the Court by Judge SHERMAN.

The only point presented by the pleadings is, whether a judgment recovered by the plaintiff, against one joint trespasser, is a bar to an action brought against another for the same trespass. I am aware that the authorities on this subject are by no means clear or reconcilable. An examination of the English reports will show that though there is no modern case where the precise question made by this plea has been adjudicated upon, yet the principles upon which it rests have been often discussed. In *Bird v. Randall*, (3 *Burr*, 1345) lord Mansfield observed, that in case of joint trespass the defendants were all liable to the plaintiff, and he might proceed against one or all of them, as he pleased, yet he shall have but one satisfaction from all. In *Drake v. Mitchell et als.* (3 *East's Rep.* 251) lord Ellenborough says, "I have always understood the principle of *transit in rem judicatem* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy, from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till then it cannot operate to change any other collateral concurrent remedy, which the party may have."

That each joint trespasser is answerable for the act of all, and that the plaintiff may pursue his remedy against one or all, is unquestioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are *quasi* collateral security for each other until the plaintiff has obtained satisfaction. It would seem to follow, from this doctrine, that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another.

If a judgment against one of several joint trespassers is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plain-

tiff of his right of bringing several suits, and of his election *de melioribus damnis*, as each defendant, except in the suit first tried, may plead, *puis darrien continuance*, the recovery in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried.

If a joint action be brought against all the trespassers they may sever in their pleas, and the several issues made may be tried by different juries, and separate and different damages assessed; and the plaintiff has his election of the damages so assessed, which shall bind all the defendants. *Heydon's case*, (11 *Co.* 5.)

The case of *Brown v. Wooten*, (*Yelv.* 67 *Cro. Jac.* 73) is the only one I have been able to find in the English Reports, where a plea of a former recovery against a third person for the same injury, without an averment of satisfaction, was held good. That was an action of trover for goods; the defendant pleaded a judgment and execution, in favor of the plaintiff, against one J. S. for the same goods, and the plea was sustained. In *Livingston v. Bishop et als.* (1 *John. Rep.* 290) chief justice Kent, speaking of the case of *Brown v. Wooten*, says it was clearly introductory of a new rule, and cites *Brooke* (*Judgment pl.* 98) *Morton's* case (*Cro. Eliz.* 30) and that many cases subsequent to that seem to disregard it, and make the satisfaction against one trespasser the test of the plea. In *Brown v. Wooten* the plaintiff had sued out his execution on the judgment against J. S. and if that is to be considered an election by the plaintiff *de melioribus damnis*, it will conclude him from pursuing the other joint trespassers But in the case at bar, the plaintiff has not issued an execution on the judgment recovered by him, or done any other act from which it would be inferred he had elected the damages recovered by the verdict and judgment mentioned in the plea.

The Court of Appeals in Virginia has decided, that a verdict and judgment against one of several joint trespassers was a bar to a recovery against the others. (1 *Hen. and Mumf.* 488. 2 *Hen. and Mumf.* 355.)

The Supreme Court of New York, in *Livingston v. Bishop et al.* (1 *John. Rep.* 290) determined that a recovery against one joint trespasser is not a bar to a suit against another, and this decision has been adhered to by the same court in a number of subsequent cases.

When the authorities present so much uncertainty and contradiction on the subject, the court feel themselves at liberty to adopt that rule which to them appears most consonant with reason and justice. And the rule which appears the more rational to the court, and in accordance with the general principles of law applicable to the action of trespass, is, that the plaintiff may elect to bring separate actions for a joint trespass, and may have separate verdicts and judgments, but that he can have but one satisfaction. This will preserve to the plaintiff the right, which all the authorities admit he has, to bring a joint suit against all, or a several suit against each joint trespasser; and, also, secure to him his election, *de melioribus damnis*.

The opinion of the court, accordingly, is, that the plea in bar is insufficient, and the demurrer thereto sustained.

LESSE OF JOHNSTON v. HAINES.

Where the person taking an acknowledgment of a deed, gives himself no official character in his certificate or subscription, the acknowledgment is insufficient, and the record of the deed irregular. The copy of such a deed duly certified is not admissible in evidence.

***Quere*, if the original instrument had been produced whether evidence can be received that the person taking the acknowledgment was a justice. Such proof is inadmissible where a copy only is produced.**

At the trial of this cause, the plaintiff in deducing title, offered in evidence, the copy of one deed, in the chain of title, duly certified by the recorder, together with the copy of the certificate of acknowledgment as made by the person taking it. In this acknowledgment it was not expressed that the person taking it was an officer of any kind, and the name subscribed was without any official character. The plaintiff offered to prove, by other evidence, that the person who took the acknowledgment was, in fact, at the time a justice of the peace, duly commissioned and qualified. The defendant objected to the copy of the deed, and to the evidence of the character of the person who took the acknowledgment. The deed and evidence were both rejected, and the plaintiff was nonsuit. A motion was made for a new trial, on the ground of error in rejecting the deed and evidence, and the decision of the motion adjourned to this court.

Leonard, for the plaintiff. *Atkinson*, for defendant.

By the COURT.

When a copy of a deed, certified by the recorder, is offered in evidence, instead of the original, its admissibility depends upon the fact, whether the original has regularly been admitted to record: for the mere fact of recording a deed, without the legal requisites, gives it no validity.

The statute, providing for the execution and acknowledgment of deeds, which was in force when this deed was recorded, required that the execution of all deeds for the conveyance of lands should be acknowledged by the grantor, or proved by the subscribing witnesses, before some judge or justice of the peace, and recorded in the proper county. The acknowledgment or proof is nothing unless it be taken by an authorized officer, and whether the person be authorized or not is a fact which ought to appear in the certificate of the officer himself. This, *prima facie*, would be sufficient to authorize the record, and to throw the proof on the person impeaching the deed. In this case nothing of the kind appears in the certificate, or attached to the subscription, consequently the deed was not duly recorded, and the copy cannot be received as evidence.

Proof, distinct from the certificate upon which the record was made, that the person who took the acknowledgment was, in fact, a justice duly qualified, could not be received at the trial; because it was a copy, and not the original, to which the evidence was intended to be applied. We do not decide what would be the law had the original deed been in court, and proof offered that the person,

who took the acknowledgment, was a justice. We think it clear, that in the case of a copy, such proof cannot be received. The record being irregular, the original is not proved, and until that is done a copy cannot be used. The court decided correctly in rejecting the testimony, and the motion for a new trial must be overruled.

CLARK v. BOYD.

Where there is other proof that a subscribing witness to a writing resides out of the jurisdiction of the court, it is not necessary to take out a subpœna and have a return of not found.

Where the subscribing witness resides out of the jurisdiction of the court, proof of his hand writing is *prima facie* evidence of the execution of the instrument.

A note assigned and the note retained in the hands of the assignor until his death, vests no interest in the assignee.

This action was brought by the plaintiff as assignee of Philip Peirce, and was founded upon two promissory notes, one for thirty-eight dollars, the other for two hundred and eighty dollars, both given by the defendant to Philip Peirce. The defendant pleaded *non est factum*, without affidavit, and gave notice of payment.

At the trial before the Supreme Court in Highland county, to prove the execution of the assignment endorsed upon the note, the plaintiff introduced a witness to prove the hand writing of the subscribing witness to the assignment, accompanied with proof that he resided in Pennsylvania. No subpœna had been taken out for the witness, and the defendant's counsel objected to the evidence. The objection was overruled, and the proof admitted. The hand writing of the attesting witness to the assignment being proven, the plaintiff offered to give the notes in evidence to the jury, but the defendant objected, and insisted that the hand writing of the assignor must also be proven. The court overruled the objection, and the notes were read in evidence to the jury, and the plaintiff rested his case.

The defendant then gave evidence to the jury, that Peirce, the assignor of the note, had been sometime deceased, and that, at the time of his death, the note for 280 dollars was found among his papers, endorsed by him to the plaintiff. That the executors, supposing it to be the property of Clark, had not inventoried it as part of the assetts of Peirce, but had delivered it to the plaintiff. Upon this evidence the defendant's counsel moved the court to instruct the jury that the plaintiff ought not to recover, unless, in addition to the fact of executing the assignment, they were satisfied the note so assigned had been delivered to the assignee, or some person for his use. This instruction the court gave, but the jury found a verdict against the defendant for the whole amount.

The defendant moved for a new trial upon the grounds,

1. That the court erred in permitting proof to be given of the hand writing of the subscribing witness to the assignment, without a subpœna having been issued for such witness, and returned not found.

2. That the court erred in permitting the notes to go in evidence to the jury, without proof of the hand writing of the assignor.

3. That, no proof being given that the notes, after the assignment, were deliver-

ed to the plaintiff by the assignor, the verdict was against the charge of the court on that point, and against evidence.

The consideration and decision of this motion was adjourned to this court.

Bond, in support of the motion. *Sill* and *Leonard*, contra.

By the COURT.

The place where a person, who has subscribed any instrument of writing as a witness, may reside, is a matter of fact, existing in parol, and consequently capable of proof in different modes. The knowledge of a witness examined in court, is at least equal to any other mode of proof. The fact of a subpœna being sued out and put in the sheriff's hands, and returned by him "*not found*," cannot be higher proof than that of a witness who testifies to his own knowledge of the residence of the person. The one can, upon no principle, be held a pre requisite to the admission of the other. The court were correct in admitting the testimony as to the residence.

The authorities cited show conclusively that where the subscribing witness resides out of the jurisdiction of the court, proof of his hand writing is deemed *prima facie* proof of the execution of the instrument subscribed. If we examine the question, upon principle, we shall find no sufficient reason for departing from the rule as settled elsewhere.

The question is where the subscribing witness to an instrument is dead or absent, what is the proper secondary evidence to prove the execution of the instrument? The production of the subscribing witness is the best evidence. Where this cannot be obtained, the secondary evidence, which is substituted for it, ought to be the nearest and most similar to it, in its character and circumstances. The proof of the hand writing of the witness is, *quasi* bringing him into court, and the legal presumption arising upon this proof is, that the parties called him to attest the execution and delivery of the instrument. It proves as much as the subscribing witness can prove himself in many cases. Frequently he can by no more than recognise his own hand writing, being unable to recollect any thing of the transaction. In such case his testimony that the attestation is in his hand writing, and must have been made by him, is sufficient. The proof of the hand writing proves as much; its nature and effect ought therefore to be the same.

When the subscribing witness is dead or absent, the court have usually admitted proof of the hand writing of the obligor, but it does not follow, that this proof must be required, in addition to proof of the hand writing of the witness, nor is the exclusion of proof of the hand writing of the witness a necessary consequence of admitting the one, where the other cannot be obtained. Under proper circumstances, both modes of proof may be admissible, and either may be sufficient.

The jury were charged, that without proof that the large note, after the assignment, was delivered by the assignor to the asignee, or some person for his use, the plaintiff was not entitled to recover. Of this there was no proof, on the contrary, it was found among the papers of the assignor after his death.

The plaintiff's counsel insist that the delivery, by the executors, was a sufficient delivery to vest a right of property and of action in the plaintiff. But we do not think so. The assignment made by the assignor, while the note remain-

ed in his possession, and where no contract of sale was proved, was a mere nullity. It was in his own power and could at any time be legally erased. It gave no interest, or title, to the assignee, and when Peirce died he was the absolute owner of the note, notwithstanding the assignment. The right vested, by his death, in the executors and could only be assigned by them. The plaintiff acquired no more right by a delivery, from the hands of the executors, than he could have acquired had they delivered him a note, payable to the testator, without any endorsement. The charge of the court on this point was correct, and the finding of the jury is against both law and evidence. New trial upon payment of costs.

TAYLOR v. WILLIAMS, ET AL.

Evidence that a sale of goods to C. was made upon an understanding that W. was his partner, and upon the credit of W, is admissible against W. but is of no avail without other proof of the partnership.

Where a firm have assumed no name, one partner may bind the others by contracting in the name of himself and Co.

Evidence of the usage and customs of merchants may be admitted, but not the opinions of witnesses.

This cause was adjourned from the Supreme Court of Hamilton county, and came before the court upon a motion for a new trial.

The plaintiffs lived in the city of New York, and the suit was brought upon a promissory note, subscribed William Chase & Co. This note was executed by William Chase only, and in every thing preliminary to the trial, stood exactly upon the same grounds as the case of *Aspinwall v. Williams and others*, reported vol. 1, 84. The parties defendants being the same, and the foundation of the partnership the same as in that case.

At the trial of this case the defendants objected to evidence being given by the plaintiff, that the plaintiffs understood, from letters in the possession of Chase, written not by the other defendants, but by third persons, at the time they sold the goods, for which the note was given, that Williams, the defendant, was a member of the firm. But the court overruled the objection, and permitted the evidence to go to the jury.

The defendant also objected to the article of agreement, between Chase, Williams and Gardner, going to the jury, as evidence of the existence of the firm of William Chase & Co. whereon to charge the defendant, Williams, but the court overruled the objection, and the article was given in evidence to the jury.

The defendant introduced witnesses to prove, that, according to the law merchant, a partnership created, without taking a name, could only make contracts in the name of all the members of the firm, and that, according to the law merchant, the partnership, claimed to have been created in this case, having taken no name, the note subscribed William Chase & Co. could not bind Williams & Gardner. The witnesses examined testified that they knew of no established rule or custom, but expressed their own opinions, that, in the case stated, the note should only bind Chase, who executed, as it was admitted that

the goods, for which it was given, never came to the hands or use of the other defendants. The plaintiffs objected that the testimony was irrelevant, and the court overruled it. The court also instructed the jury, that the article of agreement constituted a partnership from the commencement, according to the decision in the case of *Aspinwall v. Williams and others*, before referred to.

The jury found a verdict for the plaintiffs, and the defendants moved the court for a new trial, upon the ground that the court erred in ruling all the points before stated. The decision upon this motion was adjourned here.

Gazlay, in support of the motion.

By the COURT.

The evidence that the plaintiffs understood the defendant to be a partner at the time the credit was given, was not offered or admitted to prove the partnership, but to prove that credit was, in fact, given to the defendant Williams.—For this purpose it was clearly admissible. Whether the conduct of the defendant had been such as to authorize this understanding, was a distinct fact, to be proved by other testimony, without which the plaintiff could not recover.

In the case of *Aspinwall v. Williams and others*, (1 *Ohio Rep.* 84) this court decided, upon full deliberation, that the agreement between the defendants constituted an immediate partnership; and to that opinion they still adhere. In that case too, they adjudged that the note subscribed *William Chase & Co.* bound the partnership. This opinion is not shaken by the authorities and arguments now urged for the defendant. The rule laid down in *Chitty*, and upon which the defendant relies, is thus stated: "Whenever a person draws, accepts, or endorses a bill for himself and partner, he should always *express that he does so for himself and partner*, or subscribe both the names, or the names of the firm, and that otherwise it will not bind the partner." This rule is broader than the defendants' counsel admits. Although neither the individual names of the partners, nor the name of the firm is used, still the partner may be bound if the party signing *express that he does so for himself and partner*.—There is no set form of words in which this expression should be made; and, where the firm have assumed no name, as in this case, the signing *William Chase & Co.* is a clear and sufficient *expression*, that the note was given for the drawer and his partners, and must bind the firm.

The evidence offered by the defendant of an usage and custom of merchants was overruled, after it was given, because it did not go to establish any such usage or custom as was set up. The witnesses testified only as to their own opinions. An universal usage and understanding among merchants, as in the case cited from *Douglas*, is very different from the mere opinions of witnesses, and upon this distinction the testimony was properly overruled. The motion for a new trial must be overruled, and judgment entered on the verdict.

CRARY, ET AL v. THE SAME DEFENDANTS.

The only distinction between this case and the foregoing one, was, in this no note was given, but the goods sold were charged and invoiced to William Chase & Co. The court held that this circumstance did not vary the case.

Same order and judgment.

McCORMICK v. ALEXANDER.

Judgments are not, *per se*, liens upon property, either real or personal, but how far they shall so operate depends upon legislative enactment.

Under the execution law of 1824, judgment creditors who had not sued out and levied execution within one year from the date of judgment, bore their lien as against subsequent judgment creditors, who had sued out and levied execution within one year, and this too in cases of judgments before the enactment of the law as well as after it.

The execution law of 1824 is not unconstitutional as impairing vested rights, or changing the nature of a contract.

This cause was certified from the Supreme Court of Clarke county. It was an action against the sheriff, and the question in controversy was who, of several parties, was entitled to a sum of money made upon execution. The facts of the case, as agreed between the parties, were as follows:

Several judgments had, at different periods of time, been rendered against the same defendant.

The first for the Urbana Bank, November term, 1820, upon which a *fi. fa.* issued, May, 1821, and another in February, 1822, both of which were returned, no goods, but not levied upon land.

A second judgment, for the same plaintiff, rendered March, 1822, upon which execution issued in May, 1822, which was regularly levied upon property, the proceeds of which are the subject of dispute, and process to enforce a sale regularly continued to July, 1823.

Another judgment, and the second in order of date, was obtained by Joseph Evans, March, 1821, upon which execution issued in November, 1822, and was levied on the same property, which was not sold, and to enforce a sale of which proper process was regularly issued up to the time of sale.

On the 21st July, 1821, the plaintiff in this action obtained a judgment, and on the 10th of January, 1822, sued out execution, and had it levied upon the same property, which was returned, not sold. In April, 1822, a *vendi* issued, upon which the same return was made. No other process issued until the 8th of January, 1824, when an *alias vendi.* was issued, which was returned and renewed until March term, 1825, when the property was sold under the *vendi.* in the plaintiff's judgment. The different parties all claimed the money, and this suit was brought to determine who was entitled to it. The claim of the Urbana Bank being pretty much abandoned, the controversy rested between Evans and M'Cormick. The first had the elder judgment, rendered in March,

1821, upon which no execution was sued out until November, 1822, more than twelve months after the rendition of the judgment. The latter, M'Cormick, had the junior judgment, but his execution was first issued and levied, and was levied within twelve months from the rendition of the judgment.

Anthony for Evans. *Cooley*, contra.

Evans's judgment being obtained under the act regulating judgments and executions, which took effect 1st June, 1820, was, when obtained, a good lien upon the real estate of the debtor, and preferable to any other judgment afterwards obtained under that act; the act pointing out no time when execution should issue, but declaring generally that the lands and tenements of the debtor should be bound from the first day of the term, at which judgment shall be rendered, when the lands, &c. lie in the county where judgment is so recorded. The house and lot, in controversy, lie in the town of Springfield, in the county of Clarke. This judgment, therefore, attached upon the real estate of the debtor, and vested in the plaintiff, Evans, a right which the legislature never intended to divest from him; but on the contrary, show clearly, they meant to preserve inviolate; for by the 16th section of the act regulating judgments and executions, which took effect 1st June, 1822, and which provides for several distinct classes of cases, it is made lawful, in all cases where judgments had been before that time rendered, and on which execution had not been taken out and levied, prior to the taking effect of that act, for the plaintiff, in any such judgment, to have executed thereon.

The opinion of the court by judge HITCHCOCK.

In the consideration of this case I lay out of view the judgments recovered by the bank of *Columbus*. The first of these was not followed by an execution sued out and levied in due time; the second was not obtained until after the judgments both of Evans and McCormick.

From the facts agreed in the case, it appears that Joseph Evans at the March term, 1821, of the Court of Common Please, for the county of Clark, recovered judgment against Jonah Baldwin for the sum of To enforce collection, on the 18th day of November, 1822, he sued out his writ of *fi. fa. et lev. fa.* which writ, on the 23d day of the same month was levied on a house and lot in Springfield. The property not being sold on this execution a *venditioni* was sued out, returnable to the march term of the Court of Common Pleas, 1825. Upon this writ the property was sold to James Bishop for the sum of eight hundred dollars.

On the 21st day of July, 1821, the plaintiff, George McCormick, in the same Court of Common Please, obtained a judgment against Baldwin and on McKinnen, for the sum of debt or damages and costs. Upon this judgment a writ of *fi. fa. et lev. fa.* was issued on the 10th day of January, 1822, and levied upon the same house and lot in Springfield. The property not being sold, a *vendi.* issued on the 10th day of April, 1822, and an *alias vendi.* on the 8th day of January, 1824.

From this statement, it will be seen that the judgment of Evans was first recovered; the *fi. fa.* of McCormick first sued out and levied, and the property

eventually sold under a *vendi.* at the suit of Evans. The decision of the case depends upon the determination of the question, whether Evans or McCormick had the preferable lien.

Judgments are not of themselves liens upon property, either real or personal. How far they shall so operate depends upon legislative enactment. Hence, the laws on this subject are different in different states and countries. In some states of this union, lands are bound for the satisfaction of judgments from the time such judgments are rendered: in others, only from the time they have been levied upon by execution. In some states and countries, they are sold under execution, in the mode prescribed by law; while in others, they are set off to the judgment creditors, at their appraised value; and in others, they can neither be sold nor set off, but can only be extended until the rents and profits shall satisfy the debt. In the state of Ohio, from its first settlement, judgments have operated as liens upon the lands and real estate of the judgment debtor. Lands have always been liable to be sold upon execution, under certain conditions and restrictions, prescribed by law. These conditions and restrictions, have been, from time to time, varied as policy seemed to dictate. Since the year 1816, no material alteration has been made with respect to the conditions of sale, although there is a great change as to the effect of the lien. In the 2nd section of the "act regulating judgments and executions," passed January 31st of that year, it is enacted, "that the lands, tenements and real estate of the defendant, shall be liable to the satisfaction of the judgment from the first day of the term in which said judgment is obtained," &c. In a *proviso* to the 7th section of the same act, it is declared "that judgments, voluntarily confessed in open court, shall only have a lien on lands, tenements or hereditaments from the day on which they are actually signed or entered." No time is specified within which the plaintiff shall sue out his execution in order to receive the benefit of his lien. He may do it whenever it suits his convenience. It is worthy too of notice, that, although by this act, all previous laws regulating judgments and executions are repealed, yet it is confined in its operations to judgments *only*, which may be *therafter* rendered: the legislature being peculiarly careful to provide that judgments rendered *before* its enactment should be collected according to the laws in force at the time of their rendition.

On the 24th of February, 1820, the legislature enacted another law with a similar title with the one last named. This act, so far as it respects the subject of liens upon "lands, tenements and real estate," does not vary the act of 1816, except that it confines the *liens* of judgments upon lands to those lands situate in the county where the judgment is rendered, and provides that when the lands do not lie within the county where the judgment is entered, they shall be like goods and chattels, only bound from the time they are seized in execution. This act repeals the law of 1816, but, in its operations, is confined to judgments which shall be *thereafter* obtained, leaving those *previously* obtained to be collected under the laws in force when they were rendered, except so far as relates to goods and chattels, which are not to be sold wi hout appraisal.

During the existence of this law, the two judgments in favor of Evans and McCormick, were obtained, the former being prior in point of time—and during the existence of the same law the house and lot in Springfield were seized in execution at the suit of McCormick.

By the act of Februrary 1st, 1822, "regulating judgments and executions" which repeals the act of 1820, the same principle as to the *lien* which judgments shall have upon "lands, tenements and real estate," is continued as in the last named act. In the second section it is provided however, "that in all cases where the party obtaining judgment, shall neglect for one year after the first day of the term, in which such judgment shall have been rendered, to sue out execution thereon, and cause the same to be levied according to the provision of this act, such judgment shall not operate as a lien upon the debtor's estate to the prejudice of any other bona fide judgment creditor." This is the first law, of all those recited, which requires the plaintiff to sue out his execution within a specified time, and it was manifestly the intention of the legislature to extend the provisions of this law to judgments which had been *theretofore* as well as to those which should be *thereafter* rendered. For, in the 16th section it is expressly enacted, among other things, as follows: "and no judgment *heretofore* rendered, on which execution shall not be taken out and levied before the expiration of one year next after the taking effect of this act, shall operate as a lien on the estate of any debtor, to the prejudice of any other bona fide judgment creditor."

Under this latter law, and within six months after it took effect, Evans, on the 18th day of November, 1822, sued out his execution which was levied upon the house and lot as has been before stated. By pursuing this course he secured to himself, as the law then stood, his lien upon the lands and real estate of the defendant, at least upon that part of it upon which the execution was levied.—And had the property been sold under this execution, or had it been sold while the then existing law remained in force, there can be no doubt but his judgment must have been first satisfied. This would have been the preferable or better lien.

Before the property was sold, however, the law then in force was repealed by the act of February 4th, 1824, on the same subject. The 17th section of the last act provides, "that no judgment *heretofore* rendered, or which *hereafter* may be rendered, on which execution shall not have been taken out and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor." It would seem from an examination of this clause of the statute, that it would be difficult to have made use of words conveying a more definite meaning. Had the words "*heretofore* rendered, or which *hereafter* may be rendered," been omitted, we should probably have come to the conclusion, that the statute was intended to apply only to subsequent judgments.

Where there is any thing doubtful in a statute, it is the duty of a court, in expounding it, to give it such construction as will comport with what is supposed to have been the intention of the enacting power. And where the intention is manifest, but that intention is in part defeated by the use of some particular word or phrase, the court will look to the intention, rather than the words. In the clause of the statute above referred to, however, there is nothing doubtful; nothing ambiguous; no words made use of which operate to defeat the manifest intention of the legislature. There is, in fact, nothing left for construction. We must apply it according to its literal meaning. Under this statute, the house and lot which had been levied upon by the several executions of Evans and McCormick, were sold. The execution of Evans had not "been

taken out and levied before the expiration of one year, next after the rendition of his judgment." The execution of McCormick had been "taken out and levied" within one year. The judgment of Evans, therefore, would not, under the law, operate as a *lien* so for as to prejudice McCormick, provided the latter was a *bona fide* judgment creditor. That he was such creditor is not disputed. The advantage which Evans possessed at the time of the levy of his execution, was lost by the repeal of the law then in force, and, under the present existing law, the *lien* of McCormick must be pronounced the better, or preferable lien.

It is objected, however, that the law of 1824 can have no effect upon the judgment of Evans, inasmuch as by the recovery of the judgment, and the levy of the execution, he had a right vested in him of which he could not be deprived by legislative enactment. This objection presents an important inquiry, as it calls in question the constitutionality of the law above referred to, at least so far as relates to all judgments entered prior to the time of its taking effect. There may be, and there undoubtedly are cases, where it is proper, nay, where it is the duty of a court, to refuse to enforce a statute, on the ground that it is inconsistent with the supreme law of the land. Yet this ought not to be done, unless the statute in question is a plain and palpable violation of the constitution. It should be both against the letter and spirit of that instrument. So long as there is a doubt, the decision of the court should be in favor of the statute. Whenever courts, undertake to declare laws unconstitutional, they may, with propriety, be accused of usurpation. They lose sight of the object for which they were constituted, and interfere with the rights of the people, as represented in a different branch of the government.

In order to dispose correctly of this objection, it is only necessary to ascertain the nature of the right vested in Evans. It was not a right acquired by contract or agreement; it was not one which vested in him in consequence of the recovery of judgment alone; for, as has been before observed, it is not the necessary consequence of a judgment that it shall operate as a *lien* upon either real or personal estate. Whether it shall so operate, and how far, depends upon legislative enactment. Had this right vested in Evans by contract, he could not have been deprived of it, but by his own act. The legislature are restrained from passing any law which shall impair, or even change the nature of a contract.

Neither can a law regulating judgments and executions be considered as a law which enters into the nature of contracts, or which the parties have in view when they contract. Judgments are recovered as well for injuries sustained by torts, as for those which are sustained by reason of breach of contract. Judgments, too, are recovered not only for breach of contracts entered into in our own state, but for the breach of those which are made in other states and countries. When these judgments are once rendered, they operate equally as *liens*, without reference to the consideration for which they are rendered. The law of the place where a contract is made, or is to be executed, may be said, in a certain degree, to constitute a part of the contract. It is always to be taken into consideration in construing, but never in enforcing the contract. A contract made in Virginia, and to be executed in that state, must be construed according to the laws of Virginia; but if that contract is enforced in Ohio, it must be done according to the laws of Ohio. This right, then, was not vested in him by con-

tract, neither was it vested in him by the operation of a law which could, with propriety, be said to constitute a part of the contract, if, perchance, his judgment was founded upon a contract.

Neither was this right founded in any principle of natural justice; because if it were founded in natural justice we might suppose all the laws on this subject would be similar in all countries, whereas we find them variant. Further, if natural justice had any thing to do with the case, it would seem to dictate that the debt first contracted should be first paid, whereas we well know that the priority of judgments does not at all depend upon the priority of the demands upon which they are founded. If any creditor suffers, it is generally the one who is most indulgent. Inasmuch, then, as this right was vested in Evans, not by any contract of his own—not by any principle of natural justice—but by the mere operation of a law, which cannot, with propriety, be said to enter into the nature of, or constitute a part of the contract, I see no reason for saying that the legislature had not power to repeal this law, thereby depriving him of his right. To determine otherwise would be to curtail very much the power of legislating. It is believed that no laws, especially in new states, are more frequently revised and amended than those relating to judgments and executions. In the short space of eight years, there have been no less than four different statutes on this subject in our own state, each succeeding one repealing the former. Whether such frequent changes are dictated by sound policy, it is not for the court to say; and we are not prepared to say that these several statutes are or were in whole or in part unconstitutional. It has long been a part of our system, that real estate should not be sold under execution, without valuation. Should the legislature repeal this provision of the statute, no doubt an immense majority of the people would say, and with reason, that such repeal was impolitic, but few, if any, would say it was in violation of the constitution.

Another objection which has been urged, is, that by giving to the statute its literal meaning, manifest injustice will be done. To this it may be replied that so far as relates to the case before the court, Evans and McCormick have equal equity. They both appear to be bona fide judgment creditors, equally in justice entitled to a satisfaction of their debts. If but one only can be satisfied it must be him who has obtained a legal advantage. It is easy to conceive however, that great injustice may be done in consequence of this statute. A creditor previous to 1820, may have recovered a judgment against his debtor. In one year and a day after its rendition he may have taken out his writ of *fieri facias* and caused it to be levied upon the real estate of his debtor. Repeated attempts may have been made, under the writs of *vendi* and *alias vendi*, to dispose of the property, until at length in 1824 or '25, a sale is effected. But the creditor who for five years has been striving to avail himself of his judgment, finds the property of his debtor swept from him and paid over to another who recovered a judgment subsequent to the "first of June, 1824." Again, a creditor previous to the year 1820 may have long had a demand against his debtor. At length he commences his suit and recovers judgment. Having proceeded thus far, being willing to indulge his debtor, and resting secure in his lien, he takes no steps to collect his judgment. At length, under the law of 1822, being fearful of losing his lien, he sues out his execution and seizes upon the lands of his debtor. These lands are not sold until after June 1st, 1824, and then the avails are taken

to satisfy a judgment not only junior in point of time, but a judgment recovered upon a debt contracted long subsequent to the rendition of the prior judgment. The indulgent creditor loses his demand while the one who is less so, is rewarded for what is termed his diligence. These considerations, however, are more properly addressed to a legislature, whose province it is to make, than to a court whose duty it is to expound law. That the statutes may, in some instances, operate unjustly, is no reason why it should not be enforced.

Upon the whole the court are of opinion, as before expressed, that the *lien* of McCormick is the better *lien*, and that judgment must be entered for the plaintiff.

FITCH v. DUNLAP.

2 HAMMOND, 78.

Where a newspaper is printed in a county it is sufficient for the sheriff to advertise in it sales upon execution. Notice need not be set up in other places.

This case was adjourned from Ross county Supreme Court. A motion was made to confirm a sale of lands made by the sheriff upon execution. The lands were situate in the county of Ross; and it was proved that the sale had been advertised for the time required by law, in a newspaper printed in the county, and of general circulation within it. But no advertisements had been set up, either on the court house door or elsewhere. It was suggested that this also was required by law, and to remove all possible doubt, as to what should be the practice, the final decision of the motion was reserved to be made in this court.

By the COURT.

The provision of the statute is, that notice shall be given "for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed within such county, then in some newspaper in general circulation therein, and by putting up an advertisement upon the court house door, and in five other places in the county, two of which shall be put up in the township in which such lands and tenements lie."

It is suggested that the terms of this act require the advertisement to be set up on the court house door, and at the other places named in the law, in all cases of sales of lands upon execution. A different practice has prevailed in most, if not in all parts of the state; and the court think that the practice is a correct one. The terms of the statute are somewhat ambiguous; but where that is the case, the construction should be preferred that may work the least mischief or inconvenience. The member of the sentence preceding the disjunctive "*or*," contains a full and ample provision for giving notice of sales upon execution. The disjunctive is introduced to provide for cases not embraced in the first provision; and the terms, as well as the grammatical construction of the sentence, are both satisfied by referring the direction for setting up advertisements to the latter case only. Where a newspaper is printed in the county it is sufficient to advertise in that paper: but where no paper is printed in the county, then the advertisement must be set up—one on the court house door, five in other places in the county, two of them in the township where the land lies. The order for confirming the sale is accordingl made.

REED *v.* CARPENTER.

In replevin the plaintiff may appeal from a voluntary judgment of non suit.

This was an action of replevin, adjourned from the Supreme Court of Huron county, upon a question whether the appeal was correctly taken.

The suit was brought in the Common Pleas. The plaintiff replevied the property, and upon the return of the writ filed his declaration. The defendant pleaded *non cepit*, with notice of special matter in bar. At the term when, by the rules and usages of court, the cause stood for trial, the plaintiff became non-suit, and judgment of non-suit was rendered against him. At the request of the defendant a jury was empannelled to ascertain the value of the property replevied. A verdict of the value was returned, for which judgment, with a penalty of fifty per cent., was rendered. The plaintiff gave notice of appeal, executed a bond, as required by law, and brought up the record to the Supreme Court, where the cause was docketed. The defendant moved to quash the appeal, upon the ground that the law did not permit the plaintiff to appeal from a voluntary non-suit.

Latimer, Williams, Whittlesey, Newton, in support of the motion.

Hopkins, contra.

Opinion of the court by Judge HITCHCOCK.

At an early period of the judicial history of the state of Ohio, it was determined that an appeal could not be sustained from the court of Common Please to the Supreme Court from a judgment of non suit.

The reason which operated upon the court in giving this construction to the statute, undoubtedly was, that such judgment did not conclude the rights of the parties. It was not final. The plaintiff might, at any subsequent period, recommence his action, and prosecute it to final judgment. The judgment of non-suit would be no bar. So uniform were the court in enforcing this rule, that the legislature thought proper to interfere, and on the 4th of February, 1813, enacted a statute providing in substance, that where the non-suit was ordered by the court of Common Pleas in consequence of a defect of testimony, or for any other cause, the plaintiff should have the right of appeal. From this statute no other inference, with respect to the intention of the legislature, than this, can be drawn, that where the non, suit was voluntary, the plaintiff should not have this right; and, from that period to the present, such has been the uniform decision of the court. Such being the case, the court would not hesitate to sustain the present motion, were the action of a different description, and did we suppose that by pursuing that course we should be carrying into effect the intention of the legislature, in securing to parties litigant the right of appeal.

The action of replevin is one of a peculiar nature; both parties are actors.—In this state it is regulated by statute. By the 5th section of the act of the 22nd January, 1813, the statute in force when this suit was Commenced, it is provi-

ded, that "if the plaintiff becomes non-suit, or on trial the jury find the defendant not guilty of taking the goods and chattels from the possession of the plaintiff, or find that such goods and chattels belonged to the defendant, the value of such goods and chattels shall be ascertained by the jury, and the court shall render judgment for the defendant, for the value so found, with fifty per cent. damages and interest from the time of their being replevied." By this section it appears, that after the plaintiff becomes non-suit, a judgment is not thereupon, as in ordinary cases, rendered for the defendant to recover his costs. The situation of the parties is changed. The defendant becomes plaintiff, or actor. He claims to recover not only his costs, but also the value of the goods and chattels repleived, together with damages. A jury is empannelled to ascertain this value, and return a verdict accordingly. Upon the verdict of the jury the court render a judgment for the value of the property, together with fifty per cent. penalty, or damages and interest. This judgment is final. It is not, strictly speaking, a judgment of non suit. The plaintiff cannot afterwards recommence his action of replevin, for the property is already in his own possession. It is a judgment whereby the defendant recovers the value of the property and damages after he becomes actor in the case; and in its effects may, with more propriety, be assimilated to a judgment by default, than to a judgment of non suit. The propriety of sustaining an appeal, under our statute, from a judgment by default, has never been doubted, and the same reason applies for sustaining the appeal in the present case, as in one of that description.

The motion to dismiss the appeal is overruled, and the cause continued.

ELLIS v. BITZER.

Where, in an action of trespass against five, the plaintiff accepts a note from two, payable at a future day, in satisfaction as to these but not to operate as a satisfaction for the other defendants, the cause of action is discharged as to all.

This was an action of trespass, assault and battery. The original writ was sued out against five defendants. Bitzer, Townsend, Whitacre, Williams and Adkins. As to Williams and Adkins it was returned *non est* The declaration was filed against the other three making this suggestion. They appeared and pleaded not guilty. They also pleaded two special pleas, the substance of which was, that, after the commencement of the suit one W. S. agent for the plaintiff, made an agreement with the defendants Williams and Adkins, to receive their note for one hundred and fifty dollars, payable at a future, but certain day, in satisfaction for the tresspass as to them, and to forbear further prosecuting the suit against them: and that in performance of this agreement Williams and Adkins made an executed their note for one hundred and fifty dollars to Smith, and delivered it to him, who, as agent for the plaintiff, accepted it, in satisfaction for the plaintiff. Issues were joined upon both these pleas. The testimony was reduced to writing and agreed by the parties, as follows:

W. S. testified that he was authorized by the plaintiff to conduct the suit against the defendants, but had no special authority to make a compromise.—He made the settlement with Williams and Adkins, and took their note, payable to himself; in consideration of which he agreed that they should not be further

prosecuted. He believed he had influence enough with the plaintiff to prevail upon him to acquiesce, in what he had done. The note had not been paid, and no offer had been made to restore it to the makers. It was in the hands of the plaintiff's attorney.

J. E. testified, that when the compromise was agreed upon, it was distinctly understood to be made for Williams and Adkins alone, and not to be a satisfaction for the rest. Williams and Adkins were to be entirely discharged from the civil suit, and the prosecutors were to do what they could to make the prosecution as light as possible.

J. G. testified the same as the last witness, and in additon, that after the note was given, Smith directed Eaton to endorse eighty-five dollars upon the note, as paid; Smith at the same time said, the real agreement was that sixty-five dollars was to be received, but that the note was given for one hundred and fifty, that the plaintiff might the more readily obtain from the others, a considerable sum, upon compromise. But this he did not wish disclosed.

J. M. G. testified that he heard the plaintiff say to his attorney, "what S. has done, I suppose I must agree to."

As to Williams and Adkins, the suit had neither been prosecuted, nor discontinued. The plaintiff's counsel produced the note in court and offered to cancel it.

In the court of Common Pleas, a verdict was taken for the plaintiff, subject to the opinion of the court upon this point reserved. Whether in law the testimony adduced supported either of the special pleas. The court of Common Pleas gave judgment for the defendants, and the plaintiff appealed. In the Supreme Court of Belmont county, where the cause originated, the cause was submitted to the court, upon the foregoing statement of the testimony, and an agreement as to the sum for which judgment should be given, if the court should decide for the plaintiff. The decision of the cause was adjourned to this court.

Hammond, for defendants, *Wright* contra.

Opinion of the court by judge SHERMAN.

This case is presented to the court in the form of an agreed case, but it is so only in name. The parties, instead of agreeing upon the facts, have agreed upon the testimony which the defendants could give in support of their second and third pleas, and ask the determination of the court, whether that testimony sustains either of those pleas. This is in effect, submitting the issues in fact to the court, instead of the jury, upon a written statement of the testimony of the witnesses; a course of proceeding not sanctioned by our practice. The parties, however, having agreed that if the evidence, contained in the written statement, does not support either the second or third plea that judgment may be entered in favor of the plaintiff for a specified sum, the court will not delay the parties or put them to the expense of having the finding of a jury upon the issue in fact, made upon those pleas.

Upon the pleadings and proofs in the case, three questions have been made. Was the note, mentioned in the plea, executed and received in satisfaction of the trespass, complained of in the declaration? Is a discharge of one of several joint trespassers a discharge of the whole, where the parties have expressly stipula-

ted it shall not have that effect? Is a note given for a trespass, which remains unpaid, and in court, to be cancelled, a satisfaction.

The first is purely a question of fact, and depends upon the testimony. The proof is, that Smith, the agent of the plaintiff to conduct the suit, but without any special authority to settle, compromised with Williams and Adkins, who were jointly concerned with the defendants in the trespass, complained of, and whose names were inserted in the writ, took their note for one hundred and fifty dollars, and agreed to forbear to sue them; that it was distinctly understood, that the compromise was only for Williams and Adkins; that they were to be wholly discharged from liability for damages, on account of the trespass, but that it was not to be a satisfaction for the other joint trespassers, and that the plaintiff, after being informed of the compromise made by his agent, said he supposed he must be bound by what Smith had done. Without going into a particular discussion of the facts, the court are satisfied that the note, mentioned in the third plea, was executed in satisfaction of the trespass complained of, so far as Williams and Adkins were concerned therein; and that it was received by the plaintiff in satisfaction, is apparent from the fact of the note being in his possession, and by him brought into court, as well as from the testimony that it was so received by Smith, his agent for conducting the suit. It was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with an express stipulation that it should not discharge the other co-trespassers.

That a release of one of several joint trespassers, operates a discharge of all, is a position too clear to admit of doubt. The authorities on this point are uniform, full and clear. (1 *Hob.* 66. *Co. Litt.* 232, *a.*) An accord and satisfaction of a joint trespass by one, is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he ha so btained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged, and he has thus made his election not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, but also of the persons from whom he would recover that recompense. He has been satisfied for the trespass committed upon him, and to permit him to recover in this action would give him another recompense for an injury already satisfied. It can make no difference that it was part of the agreement between the plaintiff's agent, and Williams and Adkins, that the giving and receiving the note mentioned in the pleas was not to be a satisfaction for the other trespassers. Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence, that satisfaction made by one, for his liability, operates as a satisfaction for the whole trespass, and a discharge of all concerned. Williams and Adkins could make no agreement impairing the legal rights of the defendants, nor cede to the plaintiff the privilege these defendants had of

availing themselves of any matter forming a legal defence to this action. The accord and satisfaction mentioned in the third plea, operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge. The plaintiff cannot complain, for he has agreed upon the quantum of damages he sustained by the trespass, and has received the note of Williams and Adkins in satisfaction from, and discharge of them, and they cannot complain; for, as joint trespassers, they were liable to make the plaintiff a full recompense in damages for all the injury he sustained, by the commission of the trespass.

The remaining question is, whether a note given for a trespass which remains unpaid, and in court to be cancelled, is a satisfaction. An accord without satisfaction is not good. The party must not only have agreed to accept, but he must actually have accepted, before it will amount to a satisfaction in law. A naked promise to make satisfaction, at a future day, for a trespass, is not a bar to an action brought to recover damages for that trespass. It must be shown, that the promise has been executed, by the payment or delivery of what was agreed to be received, in satisfaction, or the injury in law remains, and with it the right to recover a recompense. In this case, the evidence shows that the accord was executed, and the satisfaction actually made. The plaintiff agreed to accept the note of Williams and Adkins, two of the joint trespassers, for a specified sum, in discharge of their liability for the trespass. The note was accordingly made and accepted by the plaintiff. The discharge of Williams and Adkins was immediate upon giving the note, and did not depend upon payment of the money. The agreement was to receive the note in satisfaction, and the accord was executed when the note was made and delivered. The contract of the parties looked only to the execution and delivery of the note; and Williams and Adkins were to be discharged, not on the payment of $150, but upon their giving to the plaintiff their note for $150. It was not an accord without satisfaction, or a mere promise to make satisfaction at a future day, but an adjustment between the parties, of the amount of recompense to which the plaintiff was entitled, and a present satisfaction. The plaintiff's right of action for the trespass was gone by the acceptance of the note; and it will not revive, either against the makers or the joint trespassers, by the non-payment of the money at the time stipulated in the note, or by the plaintiff producing it in court, and offering to cancel and deliver it to the defendants. The plaintiff has, by his agreement, substituted one cause of action for another, and he cannot resort to both, or either, at his election. He has accorded with, and received satisfaction from part of the joint trespassers, and thereby discharged the whole; and he cannot deprive the defendants of the benefit of that discharge, by offering to surrender that which he had received in satisfaction for the trespass. Judgment must be entered for the defendants on the third plea.

2 HAMMOND, 95.

BEGGS v. THOMPSON.

The purchaser of land at sheriff's sale has neither the actual or constructive possession.

Trespass cannot be supported without actual possession in the plaintiff, at the time the trespass was committed.

The purchaser at sheriff's sale cannot sustain trespass for the crops, where he does not obtain the possession by ejectment.

This was an action of trespass, *quare clausum fregit*, adjourned from the Supreme Court of Columbiana county, upon a case agreed, embracing the following facts:

Thompson, the defendant, mortgaged the premises in question to Robert Patterson and others. A *scire facias* was prosecuted upon the mortgage, the land taken in execution, sold by the sheriff, and purchased by the plaintiff. At May term, 1823, the court made an order confirming the sale, and the sheriff made a deed to the plaintiff. The defendant was in possession; the plaintiff demanded possession of him, which was refused. He then served a notice on him in writing, and instituted a proceeding in forcible detainer, in which the plaintiff obtained a judgment; that was reversed on *certiorari*. In April, 1824, the defendant, who had been in possession of the premises, and used them and received the crops from the time of the levy, abandoned that possession, and the possession was taken by the plaintiff; after which he brought this action, to recover of the defendant for the rents and profits of the land. And whether it could be supported was the question submitted to the court.

Tappan and *J. C. Wright*, for plaintiff. *Loomis* and *Metcalf* contra.

By the COURT.

It is impossible to maintain that the purchaser of land, in Ohio, at sheriff's sale, can be considered as in the actual or constructive possession, in consequence of such purchase. He obtains a right of possession only; and where adverse possession is persisted in, he must resort to legal process to invest himself with it. A summary process of forcible detainer is given to him, and when he proceeds in that manner, his possession can only commence from the time he obtains it, in virtue of the writ of restitution.

From a careful examination of all the authorities cited, we are satisfied that a plaintiff cannot maintain this action of trespass without showing an actual possession, in himself, at the time the trespass complained of is committed. The action for mesne profits, founded upon a recovery in ejectment, rests on grounds peculiar to itself. The doctrines that govern it have never been extended to cases where possession of lands, held adversely, has been obtained by other means.

The cases cited from Massachusetts do not apply. They are all predicated upon the particular provisions of the statute of that state. There the growing crops are valued with the lands, and the whole together set off to the plaintiff in discharge of his claim. The officer is commanded by his writ to deliver

seizin and possession to the plaintiff. Thus an actual possession commences, and a price is paid for the emblements. It is not so here. The land is valued without reference to the crop. The officer has nothing to do with giving possession. The person to receive it is uncertain until the sale is effected—and at the sale the purchaser pays for the land only. The cases are essentially distinct in all their principal features. Judgment must be given for the defendant.

BYERS *v.* STATE OF OHIO.

Where the proportion of the land tax due to the county has not been paid, the collector, in an action on his official bond, cannot set off county orders against the claim.

This was a writ of error to a judgment of the court of Common Pleas of Morgan county, adjourned from that county for decision here.

The case was this: Byers was appointed collector of Morgan county, for the year 1824. The other defendants executed with him the official bond required by law, upon which the original suit was brought. The cause was submitted upon an agreed state of facts, which it is not material to recapitulate, as the decision turned upon a single point.

When Byers paid into the state treasury the land tax collected, he did not pay the proportion due to the county, and which, under the law, is transmitted by the auditor to the county treasurer; but he obtained a letter from the auditor of state, to the county treasurer, authorizing him to receive the amount of Byers, and give a receipt for it. Byers produced this letter to the county treasurer, and at the same time tendered and offered to pay the amount due to the county, in orders issued by the county, and payable at the county treasury. These orders being depreciated, in consequence of the state of the county treasury, the treasurer refused to receive them, and brought suit on the collector's bond. The court of Common Pleas gave judgment for the plaintiff for the amount, and Byers obtained a writ of error.

Silliman, for plaintiff in error. *Goddard*, contra.

By the COURT.

The collector is, by law, bound to pay all the money he collects, for state tax, into the state treasury. His contract or bond is in conformity with the law, and if he does not make the payment accordingly, he becomes liable. No tender of payment at the county treasury, could discharge or prevent this liability. The condition of the bond was forfeited by the failure to pay within the time prescribed by law, at the state treasury, and the right of action upon it then accrued.

The doctrine, that a debt due from the county to the defendant, may be offset against the debt due from him to the state, is altogether inadmissible. The claim of the county, for its proportion of the land tax collected, is upon the state, not upon the collector. The county can, in no form of action, subject the collector. There is no privity between them. Nor can the county be considered as, in equity, the owner of the money sued for. Although it may be admitted that the collector is indebted to the state, the state to the

county, and the county to the collector, yet these debts have not been so contracted, or rather have not originated in such manner as to be subjects of offset. The case is not within the principle of any of the cases referred to.—The judgment must therefore be affirmed.

2 HAMMOND, 108.

STATE OF OHIO *v.* TOWNSHIP 4.

When the claims of a religious society, for a dividend of section 29. have been erroneously rejected, and the proceeds divided among others, for the proper year, such claim cannot be charged upon the proceeds of a subsequent year.

This cause came before the Supreme Court of Warren county upon the return of the trustees of the town. 4, in range 3, to a mandamus, *nisi*, awarded against them by the Supreme Court at their term in the year 1824, and was adjourned for decision to this court.

The society of Shakers, denominated "*the United Society of Union Village*," are inhabitants of the town. 4, in range 3, of Warren county. In this town. the section 29 is set apart for ministerial purposes. The trustees of the town had refused to distribute any dividend of the proceeds to the society; and, at the May term of the Supreme Court, in Warren county, a rule was made upon the defendants to show cause, at the next term, why a mandamus should not be awarded, commanding them to divide the proceeds of the section so as to allow a dividend to the society.

The defendants, in obedience to the rule, appeared at the May term of the court, 1824, and showed cause.

Several exceptions were taken to the proceedings; and, among others, the following: that whether the applicants were or were not a religious society, entitled to a dividend of the ministerial section, was a question only triable by jury. This, and all the other causes shown, were adjudged insufficient, and a mandamus, *nisi*, awarded, requiring the trustees to receive the accounts and claims of the society for the years 1820 and 1823, and give the agent an order on the treasury for the dividend due, according to the number of members of the society, or show cause to the contrary, at the next term.

To this mandamus, the acting trustees made a return, that their predecessors in office, for the years 1820 and 1823, considering that the society were not entitled to any portion of the rents, had actually divided and paid out to other societies, all the monies received for those years, so that nothing of the proceeds of those years remained in the treasury, upon which orders could be drawn.—Whether this return was sufficient, was the question for decision.

Hammond, for the society. *Dunlavy*, for the trustees.

By the COURT.

The 14th section of the act of February 6, 1810, to incorporate the original surveyed townships, under which the right is claimed, provides, that the "trustees shall pay to the agent of each society an equal dividend of the rent, according to their numbers, within three months after it is received."

The trustees for the time being, acting under this law, decided that the claimants were not entitled, and divided the money within the time prescribed to those whom they adjudged entitled to receive it. It is therefore not subject to the order of the present trustees. The order required, if given upon the specific fund, would be unavailing. And we do not conceive that a general order to be paid out of any moneys in the Treasury, can be given under the law. The proceeds of each year are specifically appropriated to each society, according to the number of its members for that year. There are different owners of the rents of each separate year, and if injustice be done in making one dividend, it cannot be corrected, in a subsequent one, without injustice. We have no doubt but that the Union Society were entitled: a dividend ought to have been made to them; but it was not done. The fund was distributed to others, who are not before the court. Neither are those who made that distribution. The persons entitled to the funds now in the Treasury, or that may come into it, are not parties to this proceeding, and a judgment affecting their rights, cannot properly be pronounced. The consequence of this decision may be the loss of the claimant's right. This, it is admitted is a hardship; but it would be equally a hardship to make them safe at the expense of others. The return is considered sufficient, and a *peremptory mandamus* cannot be awarded.

LESSEE OF WHITE *v.* SAYRE.

A tenant in common or coparcenary, can convey a part of his undivided estate.

A deed by a tenant in common or coparcenary, purporting to convey in severalty, is a good conveyance of the grantor's undivided part, within its boundaries.

This was an ejectment, and came before the court upon a case agreed, adjourned from Greene county. The facts material to be reported, are these:

The defendant was in possession of a tract of land which had been the property of his former wife, by whose death it had descended in parcenary to her eight brothers and sisters; with one of the latter the defendant had again intermarried. By a judicial proceeding in the court of Common Pleas, partition had been made, and a separate part assigned to each by metes and bounds. The lessor of the plaintiff purchased the separate right allotted to three of the heirs, and took separate deeds from each for so much land specifically described. Error was afterwards brought in the Supreme Court, upon the proceedings in partition, and they were reversed.

The declaration contained several demises; among others, a separate one for one undivided eighth part of each of the tracts contained in his three deeds; and whether he could recover upon these deeds and demises, was the question submitted to the court.

Elsberry, for the plaintiff. *Alexander*, contra.

Opinion of the court by Judge HITCHCOCK.

It is well settled that where one joint tenant, or tenant in common, has ejected, or withheld the possession from his co-tenant, the person so ejected or held out of possession, may maintain his ejectment against the ejector, or person in

possession. To determine the case under consideration, then, it is only necessary to ascertain, whether the lessor of the plaintiff took any thing under the three several deeds referred to in the agreed case, or in other words, whether he had any interest in the premises in dispute. The grantors were three of the heirs of the deceased wife of John Sayre, jr. By the death of their sister the interest in the one hundred and fifty-five acres of land was vested in them and their brothers and sisters, as co-parceners, or tenants in common. It is to be observed that when these deeds were executed, partition had been made of the one hundred and fifty-five acres of land, by judgment of the court of Common Pleas, in pursuance of the statute in such case made and provided. The three parcels which were conveyed to White, had been, by this judgment, aparted and set off to the grantors in severalty. Under the then existing circumstances, they conveyed nothing more than they had a legal right to convey. So long as this judgment remained in force, the title of the lessor of the plaintiff to the lands to him conveyed, was perfect. This judgment, however, was subsequently reversed; and it is necessary to ascertain how far the deeds, which were before operative, were affected by this reversal. That the reversal must in part, at least, defeat the operation or validity of those deeds there can be no doubt. The judgment being reversed, the parties in interest could be no more affected by it than if no judgment had been rendered. Under these circumstances, the decision of this case must depend upon the solution of these several questions. 1st. Can one of two or more joint tenants, co-parceners, or tenants in common, convey his interest in the estate thus held. 2d. If he can convey his interest or estate in the *whole* property thus held, can he convey it in a *part*, merely? 3d. Is a deed, or grant, which purports to convey an estate in severalty, when the grantor has in fact only an estate in joint tenancy, coparcenary, or in common, void; or does it convey the whole interest of the grantor in the premises purporting to be conveyed?

1st. Can one of two or more joint tenants, co-parceners, or tenants in common, convey his interest in the estate thus held?

This is a question about which, it is presumed, there can be no dispute.—Such conveyances are frequently made, and their validity is not questioned. In fact, this is one of the most common modes resorted to for destroying a joint tenancy. One joint tenant aliens and conveys his estate to a third person, by which means the joint tenancy is severed and turned into a tenancy in common.

2d. If one joint tenant, &c. can convey his interest or estate in the *whole* property thus held, can he convey it in a part *merely?*

The determination of this question is attended with considerable difficulty.—This difficulty however, arises, not so much from any apparent inconsistency, or impropriety in such grant, as from a possible inconvenience which might result to the tenant who retains his estate. One tenant in common may grant his entire interest or estate in a particular species of property, a tract of land for instance, or he may grant *one half* as a smaller proportion of his interest in the same entire property. If this be correct, no good reason is perceived why he may not grant his entire interest in a *particular part.* A and B are seized of a section of land as tenants in common. It is well established, that A may grant his entire interest, or estate, in the section, and the conveyance will be valid. Upon what principle, then, can it be said, that if he convey his entire

interest in a *particular quarter* of such section, such conveyance shall be void? Certainly A and B, tenants in common as aforesaid, might with propriety unite and convey a *particular quarter* of the section, and a complete title in the grantee, would be vested. Would not the title of the grantee be equally valid, if the tenants in common should by separate deeds convey to him their individual interest in that *particular quarter?* This question, it is believed, must be answered in the affirmative, and if so, it proves conclusively, that one tenant in common may transfer to a third person his entire interest in a part of the property held in common. Otherwise we run into this absurdity, that a deed properly executed, by one individual, which is an entire thing, and purports to convey a specific property, must depend for its validity upon the execution of a similar instrument by a third person, who is no way party to the first. The principal reason assigned why one tenant in common shall not be allowed to convey, as before stated, is, that by so doing, he may do a great injury to his co-tenant, by compelling him, in case of partition, to take his proportion of the estate in small parcels, very much to his disadvantage. If such evils would result, they ought if possible to be avoided. It does not follow, however, that because one of two tenants in common can convey his estate in a *part* of the property so held, therefore the rights of his co-tenant are affected. This co-tenant will still have the same interest in every part, and in the whole of the property. He can still compel partition, and may have his share of the property set off to him in severalty, in the same manner he could have done had no conveyance been made.—Such, at least as at present advised, is the opinion of the court, and if in this we are mistaken, the objection is not of sufficient force to induce us to adopt any other principle as applicable to this case, than as before stated.

3d. Is a deed, or grant, which purports to convey an estate in *severalty*, when the grantor has in fact only an estate in joint tenancy, co-parcenary, or in common, void; or does it convey the whole interest of the grantor in the premises purporting to be conveyed?

Every deed is to be so construed as, if possible, to give effect to the intention of the parties. It is to be construed most strongly against the grantor. If the intention of the parties, apparent upon the face of the instrument, cannot be carried into effect, this object should be attained as far as is possible. Taking these principles into consideration, and adopting them as correct, it follows, that where an individual undertakes to convey to another a greater interest in the thing conveyed than what he possesses, the grantee may take that which was in his grantor. A conveys to B one hundred acres of land by metes and bounds. It is afterwards ascertained that C has title to fifty of the one hundred acres included within the boundaries. Will it be said that B can take nothing by this deed? On the contrary, all the lands within the prescribed boundaries, to which A had title, are, by the conveyance, vested in B. So far as the deed can have effect, so far it ought. The circumstance that the grantor has attempted to convey more land than he was possessed of, shall not prevent the deed from conveying that of which he was possessed. Upon the same principle, if A and C had been tenants in common of the same one hundred acres of land, and A had attempted to convey the whole in severalty to B, so far as A had any interest that interest would, by the conveyance, have been vested in B.—Thus far the deed would take effect. Under it B would become tenant in com-

mon with C, in the same manner he would have done had the conveyance from A been for an undivided moiety of the land.

These principles being applied to the case under consideration, it will be seen, that the grantors of the lessor of the plaintiff, although they had not a several estate in the parcels of land by them to him conveyed, yet had an interest as co-parceners or tenants in common with others. That, by the deeds of conveyance, this interest, whatever it might be, was vested in the lessor of the plaintiff; and, he being kept out of possession by the defendants, the action is well brought, and the plaintiff is entitled to a judgment. Let judgment, therefore, be entered accordingly.

Judge Burnet's dissenting opinion.

As I have not been able to join in the opinion expressed by a majority of the court in this case, I will present, as concisely as possible, the view I have taken of the subject.

The defendant is in possession of a tract of land containing one hundred and fifty six acres, which was the property of his former wife, who died intestate, without having had issue, leaving eight brothers and sisters her heirs at law.—The defendant has since intermarried with a surviving sister, being one of the heirs of his former wife.

By order of the court of Common Pleas the land (156 acres) was partitioned among the heirs, and one eighth part was assigned to each by metes and bounds, after which the lessor purchased the tracts set apart to three of the heirs, and received separate deeds of conveyance therefor, by metes and bounds. Shortly after a writ of error was brought, on which the order was reversed, and the partition set aside. Pending the writ of error the present ejectment was brought.

The declaration contained several demises, and, among others, three separate ones from three heirs, from whom the lessor of the plaintiff had purchased. At the trial the plaintiff claimed to recover an undivided eighth part of each of the three tracts described in his deeds, and also three undivided eighth parts of the residue of the entire tract.

The former he claimed to recover on his own title as tenant in common—the latter on the title of the three heirs from whom the demises were laid, who claimed severally as co-parceners, one undivided eighth part of all the land not included within the respective deeds to the lessor.

The judges who tried the cause were of opinion, that those claims could not be united and recovered in the same action, because they are distinct and unconnected. There is no privity of interest, or title, between the lessor and those heirs. Their claims are to different portions of the tract, and rest on different rights, and the plaintiff cannot be allowed to try several titles on one issue. (*Law of Ejectment*, 86.)

On the intimation of this opinion, it was agreed that the demises from the heirs should be stricken out, and the claim of the plaintiff be confined to the right of which he might avail himself, under his deed, as to which the points disputed, were reserved for consideration at the special session in the form of an agreed case.

Two questions have been discussed. 1st. Whether a plaintiff in ejectment can recover an undivided part of the premises described in his deeds, having declared for the whole. 2nd. Whether a parcener can convey, by metes and bounds, any part of the land held in parcenary, previous to a partition.

The first point admits of no doubt. In the case of *Burges' Lessee v. Purvis*, (1 *Bur.* 326) the lessor of the plaintiff claimed and declared for an undivided moiety. On the trial it turned out that she was entitled to an undivided third. A verdict was taken, subject to the opinion of the court. On this point, the court decided unanimously, that the plaintiff must recover according to the title. That she appeared entitled to a third, and that so much she ought to recover. In *Guy v. Rand*, (*Cro. Eliz.* 13) the declaration was for 100 acres: the plaintiff showed title to, and recovered 40 acres. And it appears to be settled, that if a person declares for an entire tract, and proves title to the moiety only, he shall recover so much. (2 *Roll.* 734, 2 *Lev.* 334, 2 *Bibb* 350, *Bul. N. P.* 109.)

The second question, on which I am so unfortunate as to differ from the rest of the court, is attended with more difficulty. I do not recollect to have seen many cases in which it came up. One has been cited in the court of Appeals of Kentucky, which will be noticed hereafter.

It is not pretended that the plaintiff is entitled to more than an undivided eighth of the land within the boundaries of his several deeds; and as he holds by purchase from a coparcener, he must claim to hold as tenant in common.

The unities of interest and title, appertaining to estates in parcenary, may be destroyed by one of the tenants, and the estate reduced to a tenancy in common; but the unity of possession, which cannot be affected by the act of a single parcener, will remain. It therefore becomes a question, whether an attempt to convey in such form as would necessarily destroy that unity, is not a perfect nullity.

As neither tenant can tell, certainly, which part of the premises will be assigned to him on a partition, it would seem that neither can convey a specific portion of it. Such a conveyance would operate to destroy the unity of possession, as it would vest in the grantee an estate in severalty; and the effect appears to be the same, whether the deed be considered as conveying to the purchaser an entire estate in the part designated, or an undivided interest in it; for, in either case the possession is severed and its unity broken. The possession of each tenant must be considered as extending to the whole premises, and to every part of it. But after such deeds as those now before us have taken effect, each of the grantors parts with the possession of so much of the land as lies within the limits of his deed, and retains his possession in so much as lies without those limits, and the grantee acquires the possession relinquished by the grantors, while the other parceners retain a possession extending to the whole premises. In other words, the heirs who have conveyed, retain a possession of so much of the land as lies without the boundaries given in their respective deeds, the lessor of the plaintiff acquires distinct rights of possession in each of the three tracts specifically conveyed to him, and the remaining five heirs (including the defendant, who holds in right of his wife) have possession in the whole tract, and every part of it. From this view of the case, it appears, that whether the deeds to the plaintiff be viewed as conveying the entire estate with-

in their boundaries, or an undivided eighth of it, they destroy the unity of possession that existed at the death of the ancestor.

It cannot be contended that these deeds convey any interest beyond their limits, so as to extend a right of possession to the whole tract. Whatever of right they pass, must be restricted to the limits they prescribe. There is therefore, no escape from this difficulty. Had the deed in question conveyed the entire interest of the grantor in the whole tract, or any proportionate part of that entire interest, this objection would not have existed. Such conveyances, while they destroyed the unities of interest and title, and charged the state to a tenancy in common, could not have affected the unity of possession, which is inseparable from such a tenancy, and without which it cannot exist. The question, therefore, recurs, is not the unity of possession destroyed by the operation that must be given to these deeds, in order to entitle the plaintiff to recover?

It is not claimed that he can recover more than one undivided eighth in each of the three tracts conveyed, nor will it be pretended that a recovery can vest him with any right in the residue of the tract. There will then be no community of possession between him and his grantors, as to any part of the premises; nor between him and the other tenants as to the land without the limits of the deeds; nor between the grantors and their co-heirs as to the land within those limits. The existence of these facts seems to be inconsistent with the existence of a unity of possession.

I do not discover how it is possible to give any efficacy to these deeds, without deciding that parceners may exercise a greater dominion over the estate, than the law has vested in them. It appears to be settled, that the unity of possession can only be dissolved in one of two ways; either by such conveyances, or transfers of right, as vest the entire interest in a single tenant, which requires the consent and co-operation of every tenant, or by partition. Neither of these expedients has been resorted to.

If a parcener can convey his undivided interest in a specified portion of the entire tract, he may locate a part of his claim on a particular spot, from which it cannot afterwards be removed, whereby the rights of the other tenants would be restricted, so that neither of them could, by any possibility, have that part set off to him on a subsequent partition. This must be the effect of every conveyance that vests in the grantee a right to the whole, or to an undivided part of any particular located portion of the entire estate. Such a deed, by excluding the co-tenants from the possibility of obtaining, by partition, the part conveyed, would materially abridge their rights.

If a parcener cannot do an act that would destroy the unity of possession, it would seem to follow, that he cannot do an act that would materially change the mode in which that unity exists. On the death of the sister, from whom the estate descended, the surviving brothers and sisters inherited, each, an undivided eighth of the entire tract, and the possession of each extended throughout the whole; but if these deeds receive the sanction of the court, this unity of possession, extending originally throughout the whole estate, is interrupted and broken; several unities will be created, as distinct and unconnected with each

other as if the property had descended from four different ancestors. The lessor of the plaintiff will become a tenant in common with the heirs who have not joined in these deeds, in the land conveyed by the deeds; and the grantors will remain co-parceners with those heirs in the premises not so conveyed, which is a change of tenure that I am inclined to believe cannot be produced by a part of the tenants, without the consent and concurrence of the whole.

There are many cases in which a deed will operate to convey less than it purports to convey, but this takes place when the grantor has power to convey that which passes by the deed; as, if a tenant in common execute and deliver a deed for the entire estate, his undivided interest will pass, because he has power to convey that interest. The deed is sufficient to cover it; he does not change the tenure by which he holds. The whole operation of the deed is within the scope of his power, and there is nothing resulting from it inconsistent with the rights of his co-tenants, or the established rules of law. But I cannot admit that cases of this description can be resorted to, to sustain a deed, which cannot operate in any form without transcending the power of the grantor, and restricting the vested rights of third persons. It appears to me to be unnecessary to vest parceners with the power which has been exercised in this case. If they are permitted to convey their entire interest, or any undivided portion of it, in the form in which it exists, it is sufficient for every necessary or useful purpose. This they may do, without injury to others; but whenever they attempt, by their own acts, to effect a partition, in whole or in part, they exceed their power, and their deeds ought to be treated as nullities. There seems to be some analogy between these deeds, and alienations by particular tenants, who attempt to convey greater estates than the law allows. If tenant for life, alienes by feoffment in fee, he attempts to do what is beyond his power, and inconsistent with the nature of his interest, and he thereby forfeits his own particular estate. If tenant in tail, alienes in fee, although this is not a forfeiture, it is a discontinuance. In neither of these cases can the alienee take the estate, and although various reasons are given for this rule, the most satisfactory are, that it is an attempt to go beyond their power, and is inconsistent with the nature of their interest. These reasons exist, and apply with considerable force in the present case, and although it is not pretended that these grantors have incurred any forfeiture, yet the reason of the law, as stated above, may be urged as a reason why the grantee should take nothing by his deeds.

It seems to be proper, on a question like this, to look to the consequences that may follow. If two persons should purchase a tract of land, as tenants in common, with a view of dividing it into two convenient farms, either of them may, under the decision of the court, lay it off into lots of ten acres, and sell his undivided moiety in all of them, to different purchasers, by which his co-tenant, instead of a convenient farm, would find himself the proprietor of a large number of disconnected five acre lots. Such a procedure could not be resisted, nor the consequences prevented; for, if the grants be valid, and the grantees take any thing, each must take the undivided interest of the grantor within the boundaries designated in his deed. The result then would be, that the tenant, who had taken no part in those conveyances, and might have been entirely ignorant of them, instead of taking the entire tract by moieties, according to the legal operation of his deed, and the right that vested in him at the time of his

purchase, would find himself a tenant in an indefinite number of lots, with as many different individuals, and be driven to the same number of partitions to obtain his interest in severalty. By this proceeding his title would be seriously affected, and his property injuriously divided and subdivided, without his agency or consent. But the inconvenience may not stop here; the purchasers of those lots have the same right to sell portions of their interest to sub-purchasers, so that the evil seems to be without limit.

When partition is made between tenants in common, can one of them claim, as matter of right, a part of any particular portion of the premises, or can he prevent the commissioners, by whom partition is made, from assigning to his co-tenant the whole of any portion of the tract, not exceeding the quantity he is entitled to? It appears to me that he cannot; because such a power would be inconsistent with the equal rights of the parties, and because his co-tenant might set up an equal claim to the same spot, and prevent a partition altogether. But on the principle contended for, this right may be claimed and secured, by executing deeds before partition.

I cannot see how these inconveniences can be prevented, but by assuming the ground, that as each tenant, or parcener, has an undivided interest in the whole, and in every portion of the land, neither of them can do any act by which either might be prevented from obtaining, by partition, the whole of any portion of it, not exceeding the amount of his entire claim. This restriction goes no further than to prevent the tenants from conveying specific portions, and thereby effecting a partition, *pro tanto*, by giving a fixed location to parts of their interest within designated boundaries.

In *Reed v. Tucker*, (*Cro. Eliz.* 803) it is said to be clear, that every act, by one joint tenant, for the benefit of his companion, shall bind; but those acts which prejudice his companion in estate, shall not bind.

If these conveyances were legal, we might naturally expect to find many cases reported in which they have been recognized. But such is not the fact. The counsel has not been able to cite a single case in which such a deed has been offered, except the one in 1 *Bibb*, 510. That case I have examined with some attention, and it appears to me that the point now under consideration was neither litigated by counsel, nor expressly decided by the court. Their attention seems to have been confined to the objection, that the deed purported to convey, not only the right of Johnston, the grantor, but also the right of Garrett, his co-tenant, and to the variance between the title set out in the declaration, and the title proved.

The question discussed and decided was, whether a deed executed for the whole, would operate to convey an undivided moiety. It seems to have been taken for granted, that for the same reason that a deed, purporting to convey the whole estate in the entire tract, would pass the undivided estate of the grantor in the entire tract, a deed, purporting to convey the whole estate in a specified portion of the tract, would pass the undivided interest of the grantor in the portion specified.

Had the point now under consideration been discussed, or had the attention of the court been directed to it, I feel inclined to believe, they would at least have hesitated, and whatever might have been their opinion, they would not have passed it over in silence. In the course of the opinion they remark, that John-

ten's right in the whole was the same that it was in any part, and that he could not, without the previous consent of Garrett, create in himself, by his own act, an estate in severalty, in any part, and vest that estate in another, any more than he could convey the whole.

It appears to me to follow from this doctrine, that he could not by his own act, separate the estate, so as to create a new distinct tenancy in common, in any particular part of it, and vest that in a third person.

If the question be asked, why could not Johnston create such an estate in severalty, as the court refer to, and vest it in another? the answer must be, because it would amount to an act of partition, which cannot be made by a single tenant, and because it would be inconsistent with the nature of his title. But it may be asked whether it is not also an act of partition, equally inconsistent with the nature of his title, to lay off a part, by metes and bounds, and vest in a third person his undivided interest in it. As far as the act goes it operates as a partition, by fixing the limits within which a part of his right shall be located, when the final partition is made, and by giving metes and bounds within which a sub-purchaser shall take his undivided interest. In order to make it an act of partition, it is not necessary that it should assign to every tenant his full share in severalty—if it designate any specific part, within which the whole, or any portion of the right of either tenant must necessarily be taken, it is so far a partition.

As it is admitted that Johnston could not effect a partition of the land, in whole, or in part, it may be asked, how he could make livery of seizin of his interest in any given portion of it. There must be certainty in the thing to be delivered, as well as power in the party by whom livery is to be made. Could Johnston, by his own act, designate to Caldwell the part of the one thousand acre tract, on which his moiety of the six hundred acres would be fixed, when partition should be made? If he could, he had power to make a partition, which is not pretended. If he could not, the thing of which livery was to be made was unascertained and uncertain, and therefore it could not be made.

Should it be objected that livery of seizin is now considered a matter of form, not necessary to be done, it may be replied that however this may be, it is a sound principle, that an estate of inheritance cannot be conveyed by a person who has not power to make livery of seizin; and it is equally certain that a tenant in common, not having power to locate any part of his claim, on any portion of the undivided premises, cannot enter on any specific portion, and by his own act sever it from the residue, for the purpose of making livery of his estate in that particular portion, to the exclusion of the residue.

As far as the points were discussed and *expressly* decided in that case, I most cordially acquiesce in the opinion delivered by Judge Boyle, but with due deference I must dissent from the implied opinion, resulting from the judgment of the court, as to the particular point now under consideration, which evidently passed *sub silentio*.

In the case of *French v. Lund*, (*Adams*, 42) it was decided that an execution against one holding land as a tenant in common, could not be extended on a part of the land so holden, by metes and bounds, but on the principal adopted by this court, the extent ought to have been sustained, as to the undivided interest of the defendant in the premises, within the boundary designated by the sheriff.

In *Barlett v. Harlow*, 12 *Mass.* 348) it was ruled that an execution against the land of a joint tenant, or tenant in common, could not be levied on any *particular portion* of the land, but must be levied on the debtor's share of the estate in the *whole land*. In arriving at that decision, the court established the principle, that a tenant in common cannot convey by deed, by metes and bounds, his undivided interest in a part of the estate, so as to entitle the grantee to maintain a writ of partition; and they lay it down, as an incident to such estates, that one tenant is prevented from conveying distinct portions of the land.

In *Porter v. Hill*, (9 *Mass.* 34) it was decided, that one joint tenant cannot convey any specific part of the land to a stranger, at least to the prejudice of his co-tenant.

WILLS v. COWPER ET AL.

A power to sell lands lying in Ohio, given by a will, executed in Virginia, to an executor, cannot be executed by an administrator with the will annexed appointed under the laws of Virginia.

This cause was adjourned from the Supreme Court of Brown county. It was a bill in chancery to enforce the specific performance of a contract, for the sale of a tract of land in Brown county. The following are the facts material to a correct understanding of the point decided by the court.

Josiah Parker, of Virginia, owned the land in question, and he lived and died in Isle of Wight county, in Virginia, where his last will and testament was duly proved and recorded. The will contained the following clause:

"I constitute and appoint my grandson-in-law, Joseph Baker, of the county of Nancemond, my executor to this, my last will and testament, with full power to dispose of all my lands in the states of Ohio and Kentucky, and also Randolph county, in Virginia; also, my proportion of the lots in the city of Washington, purchased of Stoddard by Luke Wheeler, John Cowper and Co.; and it is my desire that said property may be disposed of as soon as possible, and the residue of the money arising from the sale, after first paying my just debts, may be applied to the improvement of my Isle of Wight estates."

The executor thus nominated in the will, refused to act, and administration, with the will annexed, was committed to Joseph B. Baker. The contract set up in the bill, was made between the complainant and the administrator with the will annexed, April 11, 1815. Baker died intestate, and administration upon his estate was granted to the defendant, A. P. P. Cowper. Controversy having arose about the completion of the contract, the bill was commenced to enforce it. But the decision and opinion of the court being confined to the single point, that the power to sell conferred by the will upon the executor, could not be executed by the administrator with the will annexed, it is deemed unnecessary to swell the report, by stating the other points in the cause.

Brush, for complainant.

Opinion of the court by judge SHERMAN.

The first question which arises from the pleadings and proofs in this case is, had the administrator with the will annexed, of the estate of J. Parker, power, by virtue of said will, his appointment, and the statute of Virginia, to make the

contract set forth in the bill for the sale to complainant of the lands in controversy.

The clause in the will of J. Parker, creating the power to sell these lands, is in these words: "I constitute and appoint my grand-son-in-law, Joseph Baker, of the county of Nancemond, my executor to this my last will and testament, with full power to dispose of all my lands in the states of Ohio and Kentucky."

Joseph Baker, the executor named in the will, appeared in the proper court, in Virginia, and refused to accept the trust, or qualify himself to act as executor; and thereupon, J. B. Baker was, by the same court, duly appointed administrator with the will annexed, of the estate of the decedent, Parker.

By an act of the legislature of Virginia, passed in 1792, it is provided that where lands are devised to be sold and conveyed, and the executors named in such will shall not qualify, or die before the sale and conveyance of the lands, then, in either case, the sale and conveyance shall be made by such person to whom administration of the testator's estate, with the will annexed, shall be granted.

In April, 1815, Baker, administrator with the will annexed, of the estate of the decedent, Parker, entered into a contract to sell and convey to complainant the land now in controversy, being part of the estate of the testator, Parker, that the executor was authorized by the will to sell, and the bill seeks to have that contract executed by a conveyance of the lands.

It is a general and well settled rule, both of law and equity, that a power given by will to the executor to sell and convey land, is to be considered as a personal trust. In contemplation of law the power is given in consequence of the confidence which the testator had in the judgment, discretion, and integrity of the executor, and the execution of that power cannot, by the executor be delegated to any other person. (3 *East*, 410. 4 *John. Ch. R.* 368. 2 *Sch. & Lef.* 330.) It would be absurd to suppose that the confidence which the testator had in the knowledge and integrity of his executor, and which induced him to confide to such executor the power of selling and conveying his lands, could extend to unknown persons. To render a sale, under such a power, good and valid, the executor must personally assent and act; and upon this principle it has been held that a joint authority, given to two executors; can only be exercised by the joint act of both, and is determined by the death of one.

But it is said that the appointment of the administrator with the will annexed, did, by force of the statute of Virginia, confer upon such administrator all the authority which the executor, named in the will, could legally exercise over the lands in Ohio. To the correctness of this proposition we cannot assent. The executor derives his power from the testator, whose right it was to sell and convey, or otherwise to dispose of his estate, and who may and usually does limit the extent of the authority of his executor, and direct the time, place and manner, in which it shall be exercised. He acts as the trustee of the testator, to fulfil his intentions, and be governed by his directions, possessing no power over real estate, but such as is expressly given by the will. A person in whose favor the power has been executed, takes in the same manner as if the instrument executing the power had been contained in that given it. (*Marlborough v. Godolphin*, 2. *Ves.* 78.) He makes his title under the power itself; and, for

many purposes, the act of the trustee executing the power is in equity considered as the act of the party creating the power.

But the very appointment, as well as the power of an administrator over the estate of the decedent, emanates from the laws of the country where he receives his appointment. The extent of his authority, and the manner in which it shall be exercised, depend upon legislative enactments, and is confined to the jurisdiction of the country granting the administration. (*Doe v. McFarland*, 9 *Cranch*, 151.) An administrator, as such, cannot intermeddle with the effects of his intestate in another state, unless permitted so to do by the laws of that state, otherwise it would be in the power of one state to regulate the distribution of property situated in another. And the rule is the same, whether the administration be general, or with the will annexed. In either case the authority of the administrator emanates from the law, and cannot extend beyond the jurisdiction of the power conferring the authority; and the will being annexed to the grant of administration, does not change the tenure by which the administrator holds his office. The right which the administrator, Baker, had to intermeddle with any part of the estate, of the testator, Parker, even in Virginia, was not derived from any appointment of, or power conferred on him by the testator, but from the laws of Virginia, and an appointment of him by the proper court, in that state, as administrator, with the will annexed, of Parker's estate.

His power over the estate, real and personal, of the testator, within that state, was fixed and defined by the laws thereof, and to those laws only could he look to protect him in the due exercise of the authority they had conferred.

The owner of lands, wherever he may reside, has an unquestioned right to sell and convey them, in whichsoever state they may be situated, by pursuing the mode prescribed by *lex loci rei sitæ*, and he can give by deed or will this power to another. But it is not in the power of any state, by any legislative act, to prescribe the mode in which lands in another state may be disposed of, or the title thereto pass from one person to another. (*U. States v. Crosby*, 7 *Cranch*, 115.)

In *Kerr v. Moon*, (9 *Wheat.* 565) the supreme court of the United States say, "it is an unquestionable principle of general law, that the title to, and the disposition of, real property must be exclusively subject to the laws of the country where it is situated." And in *McCormick v. Sullivant*, (10 *Wheat.* 192) and *Darby v. Moyer*, (10 *Wheat.* 465) the same principle is recognized and enforced in the case of lands in one state, disposed of by will made in another.

At the time when the administrator of Parker's estate contracted with complainant to sell and convey to him the lands in controversy, the laws of Ohio authorized an administrator to sell lands of the decedent only for special purposes, upon a regular application to, and an order to sell by, the court of the county where the lands were situated.

To give validity to the sale of these lands, and consider it binding on the devisee, we must necessarily recognize the right of another state to prescribe a mode in which real property in Ohio may be disposed of, different from that prescribed by her own laws.

The conferring of power upon a person to sell and convey the lands of another, without his consent, is an act of sovereignty, and can only be exercised

by the government of the country where the lands are situated, and at the time when the contract was made, which the complainant seeks to have executed, by a conveyance to him of the lands, there was no law of Ohio authorizing administrators with the will annexed, whether appointed by her own courts, or those of another state, to sell or convey lands directed by the will to be sold or conveyed. And it is perfectly clear, that had the will of Parker been originally proven and recorded in this state, and administration thereon granted by our courts, such administrator would have had no authority to make the contract set forth in the bill.

If Barker, as administrator with the will annexed of Parker's estate, can legally sell or convey those lands, it is not by virtue of any power conferred on him by the testator, for he is nnknown to the will, nor from any authority derived from the laws of Ohio, where the lands are situated, for those laws did not authorize such a sale, but from the laws of Virginia, where administration was granted.

The law of Virginia empowers the administrator with the will annexed, to sell and convey lands directed by the will to be sold, and when, in pursuance of this legal power, a conveyance has been made by such administrator, the purchaser holds his title under the law giving the power, and if the land is within the jurisdiction of the state authorizing such conveyance his title would be perfect; and it would be equally so if there was no will, but the administrator was authorized by law to sell real estate. In either case the power of the administrator is derived from the law, and the purchaser would make his title under the law. The law would be the instrument creating the power—the deed of the administrator the instrument executing it, and the validity of the latter would depend upon its compliance with the terms, conditions, and limitations of the former.

But if the real property sold be situated without the jurisdiction of the state authorizing it, the sale will be inoperative, and the purchaser will not acquire any interest by the administrator's deed to him. In *Nowler et. al. v. Coit*, (1 *Ham. O. R.* 519.) this court held, that a sale and conveyance of lands in this state, made under the order of a court of probate in Connecticut, was inoperative and void, and that the title remained untouched, in the heirs to whom it descended.

The case of *Doolittle v. Lewis*, (7 *John. Ch. R.* 48) relied on by the complainant as authority, that a power given to sell lands may be executed by a person not named in the deed, creating the power, and that courts will recognize administrators as such, although appointed in another state, is not analogous to this case. The chancellor in that case sustained a sale by an administrator, appointed by the proper court in Vermont, made in conformity to the laws of New York, of mortgaged premises, situated there under a power contained in the mortgage deed to the mortgagee, his executors, administrators or assignees, upon failure of payment, to sell. The court holding, that as the administrator was named in the deed his power to sell was derived from the deed, the act of the mortgagor, and that it was immaterial where the appointment was made, as the administrator derived no authority to sell the lands in New York, from the court or jurisdiction appointing him, but from the express ap-

pointment of the mortgagor. The principle upon which the chancellor proceeded in making his decree, in that case is, that where there is in the instrument, creating the power, an express declaration that the power is not confined to an individual named, but may pass to others as his executors or administrators, the court cannot reject these words in the instrument, but will consider the power as legally vested in the person who may happen to answer the description or sustain the character given in the instrument creating the power.

Whenever a power is of a kind that indicates personal confidence, it must in equity, as well as at law, be considered to be confined to the individual to whom it is given, and will not, except by express words, pass to others than the trustees originally named; though they may, by legal transmission, sustain the same character. (16 *Ves.* 27).

In the will of J. Parker there is no provision that in case of the death or refusal to act of the executor, the power given him to sell the lands in Ohio should pass to others. None are nominated, either by name or character, upon whom the power conferred on the executor, was, upon any contingency, to devolve. And the will furnishes indications, other than the nature of the power, that the testator reposed a personal confidence in his executor.

Where the will confers a mere power of selling, or otherwise disposing of property, or of selecting the individual who is to enjoy the testator's bounty, and the power is not executed by the person nominated, a court of Chancery cannot execute it; but where a trust is created and power given to the trustee, which it is his duty to execute, he is considered as a trustee of the power, and not as having a discretion to exercise it or not; and neither the negligence or death of the trustee, or other circumstances, will be permitted by this court to defeat the interests of those for whose benefit it was his duty to execute it.—(*Brown v. Higg*, 8 *Ves.* 561.) But the court will execute such a power upon the application of those only who have an interest in the trust fund given by the will enacting the trust. It is for the purpose of effecting the intent of the testator, which would otherwise be defeated, and to secure the interests of those who are strictly *cestuy que trusts*, that a court of equity will execute a power coupled with a duty to execute, when the party, to whom that power was given, has failed to discharge the duty imposed on him. It does not so alter the nature of the power as to make it transmissible by the trustee, or by operation of law.

The testator, Parker, gave his executor power to sell his lands in Ohio, who declined accepting the trust, or executing the power. If the power had been coupled with a trust, and it was necessary that the power to sell should be executed to effectuate the intention of the testator in favour of *cestuy que trusts*, upon a proper application by them to a court of Chancery, such sale would be directed on the ground that the power to sell was coupled with a trust which can never fail for want of a trustee. If such *cestuy que trusts* had applied to a court of Chancery in Virginia, who had ordered a sale of testator's lands, it could not be pretended that the purchaser at such sale would thereby acquire a title to the lands in Ohio. The decree of the chancellor in Virginia might

have ascertained and determined the rights of the parties, but could not divest the title of the heir or devisee to lands in Ohio.

In this case, no *cestuy que trusts* are seeking the execution of the power to sell, as the only means to secure any benefit intended them by the will, but a purchaser from the administrator with the will annexed, who claims that by virtue of the statute of Virginia, the power to sell, given by the will to the executor, was legally transmitted to the administrator, and a contract having been made by such administrator to convey the lands in controversy to him, he is entitled to the aid of this court in procuring a legal title.

While we recognize an administrator appointed in another state, as we are bound by statute to do, his appointment being legally authenticated, we cannot look to the laws of the foreign state appointing him, to ascertain the extent of his authority over property within this state; that is, and must be, subject only to our own laws. Over the lands of the testator in Ohio, Virginia had no jurisdiction. She could prescribe no rule for the decent or disposition of them, nor could her legislature or courts confer any power upon an individual to sell, convey, incumber, or in any manner affect the rights of the devisee or heir.

The court being of opinion that J. B. Baker had no power to sell or convey the lands of the testator, Parker, in Ohio by virtue of his appointment as administrator with the will annexed, the statute of Virginia, and the power given in the will to the executor to sell, it follows, that the complainant acquired no interest, legal or equitable, in the lands in controversy, under the contract set forth in the bill.

This being the opinion of a majority of the court, and it going to the fonndation of the complainant's claim for a specific execution of the contract, against the devisee, it is unnecessary to consider the various other questions made in the cause. Bill dismissed.

JUDGE BURNET'S *dissenting opinion.*

From the most careful examination which I have been able to give to this case, my mind is brought to the conclusion, that the complainant is entitled to a decree.

As I am so unfortunate, in this opinion, as to differ from the rest of the court, it becomes my duty to state the grounds on which it is formed; and in doing this, it will be necessary to consider, not only the point on which the case has been decided, but also the other points taken by the defendants, or at least such of them as would, if decided in their favor, preclude the complainant from a decree. The defence may be considered as resting on three grounds:

1st. The alleged insufficiency of the statute of Virginia, to vest in the administrator a power to make the contract. First, because the statute is not to be regarded in this state, and secondly, because the will is not within the provisions of the statute.

2d. The inadequacy of the price to be paid by the complainant.

3d. That the complainant has been guilty of laches in not paying the purchase money at the time it became due.

On the first point it is contended, that the courts of this state will not regard

the laws of Virginia, so far as to consider the contract of sale, made by the administrator with the will annexed, as a legal execution of the power granted to the executor.

On this point it may be remarked, that the laws of Ohio do not require contracts for the sale of land to be made within the state, nor do they prescribe any form in which they shall be drawn, provided they are in writing, signed by the party, or by some person lawfully authorized.

Contracts may be made in person, or by an agent, and we have no established exclusive form of creating an agency. It is not necessary that it should be created, or executed within the state. The agent may reside in another state; he may receive his power there, and there he may execute it. We have nothing to controul the discretion, or restrain the will of a person of full age and sound mind, in the disposition of his land. Neither the interest of the state, nor the safety of individuals, requires that we should.

A contract to sell, is only an expression of the will of the owner, in the exercise of a legal right, and if that will be expressed on a sufficient consideration, it must be respected, without regard to form. Acts done in another state, in conformity with its laws, so as to be valid and binding there, are to be considered as valid and binding here, if they do not contravene our own laws. The laws of every well regulated state prescribe some mode of conveying real property; and, when a contract is made for that purpose, the execution of it must conform to the law of the state where the property lies. A foreign power cannot prescribe a rule of property, or dictate a mode of transferring it.

To effect a valid transfer of title, there must be the consent of the owner, in the form of a contract, and also the legal execution of a conveyance. There is, however, no necessary connection between the act of contracting, which expresses the consent, and the act of carrying the contract into execution, which passes the title. They may, and frequently do, depend on different laws. The former is generally left to the direction of the common law; the latter is most usually regulated by the statute. The former has but little influence on the policy of a state; the latter is of great importance, and is one of the most interesting attributes of state sovereignty. Hence it is, that prior to the statute for the prevention of frauds and perjuries, the owner of land in Ohio might have bound himself to sell it by a verbal promise, made in any part of the world, and the courts of this state, having ascertained the existence and consideration of the promise, by the ordinary rules of proof, would have enforced it; but the mode of transferring title was considered of such importance, that it formed a part of the ordinance for the government of the territory, and has ever since been regulated by statute. An attempt to divest a man of his property, without his consent, unless by the operation of a law which has constitutionally emanated from the supreme power of the state, would be oppressive, and could not be sustained in our tribunals; but when consent has been obtained, there remains no legal objection to the conveyance of the title, in the form prescribed by statute.

This distinction between the manner of making executory contracts, and of executing them specifically, has been overlooked in argument. Counsel have attributed to the engagement, or promise to sell, the solemnity required by statute, in the transfer of title. The law relating to the execution of deeds, has

been applied to the execution of contracts for deeds. I am aware, that every solemnity required by law, either in a contract for the sale of land, or in the deed by which it is to be conveyed, must be observed; but it is no objection to a contract, that the law does not direct, or expressly recognize its form, provided it does not prohibit it, or prescribe a different form. If the contract be good on common law principles, and is not repugnant to the statutes of the state, it must be obligatory; or if it be good under the statutes of the state where it is made, and not repugnant to the laws of the state where it is to take effect, it must be regarded as obligatory.

It has been observed before, that our laws neither prescribe, nor prohibit any form of contract. If it be in writing and signed, it is sufficient. On all other points the contracting parties are left to their own discretion. The owner of land in Ohio may contract to sell it at home, or abroad, in person, or by agent, and he may constitute an agent in conformity with the laws of the country where he may reside, or happen to be, as there is not any thing in the laws of the state to prohibit it. It becomes, then, a mere matter of fact, whether Parker has authorized this contract agreeably to the laws of Virginia, and whether Baker has made it in pursuance of the authority given him. As the local laws of Ohio are silent on the point, they have nothing to do with it.

Executory contracts, for the sale of real and of personal estate, are put by the common law, as to the solemnity required, very much on the same ground. The distinction which now exists, has been produced by statute. The only difference made by the laws of Ohio is, that the former must be in writing. That peculiarity having been observed in the case before us, the contract stands in other respects, on the ground of the common law. There is nothing in it, or in the mode of its execution, that is opposed to our law, nor is there any thing not contained in it that is required by our law. As to its object, its form, and its mode of execution, it is in strict conformity with the law of Ohio; consequently, if Baker was vested with such a power as would have authorized him to sell the land, had it been situate in Virginia, he must have been authorized, by the same power, to sell it, without reference to its situation. In conformity with this principle, this court, on a bill relating to land similarly situated in this state, received a record of a decree rendered in the state of Virginia, on a claim originating under the laws of that state, and held the decree to be binding on the parties; and as it appeared from the record, that an appearance had been effected for the defendants, they refused to look into the merits of the claim.

As the question presented in this part of the case, relates only to the validity of an executory contract, it does not involve a rule of property. It is not a question of title, but of testimony, depending on general principles, and not on the peculiar laws of Ohio. The first inquiry, in relation to it is, does the testimony offered satisfy the mind, that Baker had a power, legally derived from Parker, to make this contract? If he had, it is our duty to enforce it. Its obligation and its construction depend on the laws of Virginia, where it was made; the mode of enforcing, or of carrying it into execution, depends on the laws of Ohio, where the land lies.

Parker derived his title under the laws of Virginia, prior to the act of cession, when she held the right, both of jurisdiction and of soil. The will was made in Virginia—the power was to be exercised there. The consideration money re-

ceived, was to be disbursed there, and the trustee was to account for the execution of his trust, before the tribunals of that state, and according to their laws. The validity of the will, containing the power, depended on those laws; and it would seem to follow, that the construction, and legal effect of it, should be determined by them also. If a citizen of another state can delegate a power to sell his lands in Ohio, by a will executed agreeably to the laws of his own state, why may not the will be construed, and the rights and powers that it confers, be determined and executed, in all respects, agreeably to those laws. The testator had them in view, when he made his will, he relied on them for its construction, and he must have given the power with reference to the manner in which they authorized, and required its execution. It is then the same as if he had recited the statute, or had given to the administrator with the will annexed, in express words, the contingent power which the statute has given him. Parker was willing to vest this power in his executor, with a knowledge, that if he did not prove the will, the court would appoint an administrator, on whom the power would devolve. He therefore virtually gave the power, and authorized its execution by the administrator. As he appears to have been anxious that a sale of the land should be effected, it is presumable, that he would have made an express provision for the contingency that happened, if he had not relied on the remedy provided in the statute.

If a foreign legislature should pass a law affecting the title to lands in this state, or changing the mode of conveying them, it would be considered as a nullity; but the law in question has no operation on the land, or on the mode of conveying it. It merely authorizes the proprietor to dispose of it, or to vest a power in some other person to sell it, in such manner, and for such purposes, as he may direct.—It is the practice of every day, in appointing agents, to authorize them to make sub-agents, with all the powers they possess themselves, and this is, substantially, the amount of what is here complained of. In order that the will of a testator may not fail, and that the expense and delay of an application to chancery may be prevented, the act provides, that the powers of the executor, special as well as general, may be performed, in certain cases, by an administrator, but no testator is required to submit to this provision. He may avoid it, either by nominating a trustee, to act in case the executor does not, or by an express limitation of the trust to the executor, to the exclusion of all other persons; and when this is not done, it is an unequivocal adoption of the substitution provided by the statute. When Parker made his will he knew the law, he understood its operation, and intended to adopt the transfer of power which it provided. He virtually authorized the court to provide for the execution of the trust; on failure of the executor to execute it. It would seem then that the power of the administrator was legally derived from Parker himself.

Such was the doctrine laid down in the case of *Melan v. Fitzjames*, (1 *Bos. & Pull.* 133.) The contract in that case had been made in France. Rook, justice, said, "this contract is considered in France as not affecting the person. Then what does it amount to? It is a contract that the duke's estate shall be liable to answer the demand, but not his person. If the law of France has said, the person shall not be liable on such a contract, it is the same as if the law of France had been expressly inserted in the contract."

Chief Justice Eyre declared, that "*if it be a personal obligation there, it must*

be enforced here, in the mode pointed out by the law of this country; but what the nature of the obligation is, must be determined by the law of the country where it was entered into, and then, this country will apply its own law to enforce it;" or in other words, that the obligation of the contract depends on the *lex loci*—the mode of enforcing it, on the *lex fori*. In *Talleyrand v. Boulanger*, (3 *Ves. Jun.* 447) the chancellor said, "it would be contrary to all the principles which guide the courts of our country, in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place;" and by a parity of reasoning it would be equally inconsistent with those principles, to give it a less effect. *Huberus, vol. 2, b. 1, t. 3*, in treating of the *lex loci contractus*, says, "that by the courtesy of nations, whatever laws are carried into execution within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of other governments, or their citizens." If this courtesy be observed by nations, independent and unconnected, it ought to be adopted by states united under one government, the constitution of which requires full faith and credit to be given, in each state, to the public acts, records, and judicial proceedings of every other state.—That no prejudice can result to the state of Ohio, or to her citizens, from an acknowledgment of the contract in question, is very apparent from the fact, that our own legislature have introduced the same provision into their code, and having given to administrators with the will annexed, the same power that was exercised by Baker, under the statute of Virginia. This is an unequivocal expression of their opinion, that a power given to an executor to sell, may be transferred by law, to an administrator, without prejudice to the public, or to individuals; and as the provision extends to foreign, as well as domestic wills, it expresses the further opinion, that such a power, created and exercised in other states, according to their laws, may be safely recognised, as valid and operative in ours.

I have no objection to the proposition laid down in this case, by the majority of the court, that the executor derives his power from the testator; that he acts as a trustee, and possesses no power over real estate, but such as is given by the will; that an administrator derives all his power from the law of the country where he receives his appointment; and that he has no power to act in any other jurisdiction, unless it be conferred on him by the laws of that jurisdiction; but I differ from them in the application of those principles. Their effect seems to be, that Baker could not sell the land in question without the power given by the will; that the administrator, having received his power from the law of Virginia, cannot exercise it in the state of Ohio, further than he is permitted by the law of Ohio.

It appears to me, that as the will gave the power to the executor, and as the law under which the will was made, and by which the testator intended it should be construed and executed, transferred that power to the administrator, it is the same in effect, as if the testator had given the power to the administrator by name, and the administrator must be considered as having made the contract, by the authority of that special power, and not in virtue of the general power derived from his appointment.

The majority of the court admit, that a contract made by Baker, in conformity with the power in the will, would have been good, and might have been en-

forced in the tribunals of this state. It must also be admitted, that if the land in question had been within the jurisdiction of the state of Virginia, the contract by the administrator would have been good. The question then is, whether a contract for the sale of land in Ohio, made in the state of Virginia, by virtue of a power derived from the proprietor, agreeably to the law of Virginia, will be recognized in this state. This question, it appears to me, may be decided by adverting to the difference between a contract to sell, and a deed by which the title is to pass. The former may be made according to the laws of the state where the power is given and the agent resides; but the latter must be done, agreeably to the laws of the state where the land lies. Keeping this distinction in view, it will be difficult to assign a satisfactory reason, why it is, that a will which vests the administrator with power to contract for the sale of land in Virginia, may not also vest him with power to contract for the sale of land lying in another state. A written contract made by Parker, in Virginia, agreeably to the forms recognised in that state, for the sale of these lands, would have been good. though he could not have conveyed the title in any other form than that prescribed by the laws of Ohio: and why may not the administrator, vested with the power of Parker, agreeably to the laws of Virginia, do the same thing?

Although the power of an administrator must be exercised within the jurisdiction which gave it, yet his acts, legally done within that jurisdiction, are to be regarded as valid in every part of the world. If he collects a debt, and gives a release, or does any other act authorized by law, or by the will annexed to his letters, it ought to be valid, in any jurisdiction, as being within the scope of his power. But the ground taken by the court, would seem not only to prevent a foreign administrator from acting within our jurisdiction, but to deny the validity of his acts, properly done within his own jurisdiction; for in this case, he did not attempt to exercise power within our jurisdiction. He acted under the laws, and within the jurisdiction of his own state, where his acts were legal and valid, and where the contract was lawful and obligatory. The application to this court is against the administrator, to obtain the benefit of that contract in the mode prescribed by our own laws.

As Baker's power was derived entirely from the laws of Virginia, why do we recognize the validity of any of his acts? I can give only one reason, because they were authorized by the laws of that state, and not forbidden by ours.

Parker could have contracted away these lands in Virginia; he could have conveyed them by deed; or he could have created an agent with power to do the same thing, and the question would have been, was the power created according to the laws of that state, and was the deed, conveying the title, made in conformity with the laws of our state. On this ground I cannot reject the contract of Baker, as having been made without authority. I consider him *in loco testatoris*, and, as to these lands, vested with power to do whatever his principal might have lawfully done.

I agree with the court, that the annexing of the will to the letters of administration, cannot change the tenure, by which the administrator holds his office; but I contend that it may materially affect his powers and duties, as he is bound to take the will for his guide. I also admit, that an administrator, by virtue of his general power, cannot dispose of real estate; but I contend that Baker, in

this case, did not act under his general power, but under a special power, derived from Parker, in strict conformity to the laws of Virginia.

I dissent from the proposition laid down by the court, that a confirmation of this contract would recognise the right of another state to interfere in the disposition of our lands, or to prescribe a mode in which it should be done. There is a great difference between a statute that authorizes a sale of land, and prescribes the mode of executing deeds, and one that directs the manner in which the proprietor of land may constitute an agent, with power to sell, leaving the conveyance, and if required, the form of the contract of sale, to be directed and controuled by the laws of the state where the land lies. The former of these, to which the objection of the court applies, has not been attempted in this case.

I cannot admit, that a recognition of the validity of the statute in question, interferes with the sovereignty of this state. That statute merely designates the person who shall execute a power given in conformity with its own provisions, and that may be executed within that state, leaving the form, and every thing else connected with the execution of it, to the laws of the sovereignty within whose limits it is to operate. I take it to be true, as a general proposition, that an executory contract, made in any state, under a power delegated according to the laws of that state, will be regarded as binding in any other state, and yet the sovereignty of the state, where it operates, is not considered as impaired.

The court have placed the case altogether on the ground that the power to sell was conferred exclusively by the statute of Virginia, which seems to me to be a *petitio principii*. I consider that power as derived from the testator, by his own voluntary act. The statute provided a mode in which a power might be created, to be executed precisely as this has been. The testator availed himself of that mode, knowing, and consequently intending, that it might be so executed. The power to convey is full and sufficient; it emanates from the testator, and the only question is, by whom it may be executed.

But independent of every consideration, it appears to me that the right of the complainant is sustained by the statutes of this state. Our statute book has always contained a provision for putting wills, executed and proved out of the state, upon a footing with wills executed and proved within it, as will appear by referring to the territorial law of 1795; the 2d sec. of the state law of 1805; the 12th and 13th sec. of the act of 1808; the 12th and 13th sec. of the act of 1810; the 12th, 13th and 16th sec. of the act of 1816, and the 12th, 13th, 14th and 15th sec. of the act of 1824. Under these provisions the will of Parker has been offered for probate, and recorded in the county of Brown, in which the lands lie. The 12th sec. of the act of 1816, is in these words: "authenticated copies of wills and codicils, proved according to the laws of any state or territory of the United States, relative to any estate within this state, may be offered for probate in the court aforesaid, in the county where such estate shall lie. The court aforesaid may admit to record any such authenticated copies, and such copies, so admitted to record, shall be good and valid in law, in like manner as wills made in this state are declared to be." The 13th sec. entitles the executors to probate on such copies, and authorizes the court to grant administration with the will annexed. The 16th sec. is in these words: "that the sale and conveyance of lands devised to be sold, shall be made by the

executors, or such of them as shall undertake the execution of the will, if no other person be appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have accomplished it; but if none of the executors named in such will shall qualify, or after they have qualified, shall die before the sale and conveyance of such land, then, in those cases, the sale and conveyance thereof shall be made by such person, or persons, to whom administration with the will annexed shall be granted." This provision is general—it extends to all wills recorded after the statute took effect, without reference to the state, or country in which they were executed, and without reference to the time of their execution, whether before or after the passing of the act. Wills, that had been previously recorded, on which letters testamentary had issued, and estates on which letters of administration had been granted, are not within the operation of the act; but all wills that had not been presented, proved, and recorded, and all cases requiring administration, in which letters had not been granted at the time the law took effect, are within its provision. The distinction seems to be this, that estates which were in a progress of settlement before our courts, under the former law, should not be interrupted, but proceed as though the law of 1816 had not passed.

Wills, executed, but not recorded before the passing of this act, may be proved and recorded, and the estates may be settled agreeably to its provisions, because the former law can operate only on wills which had been proved, and on which letters had been granted before the present law took effect. The will of Parker was proved and recorded in the proper court, in the county of Brown, after this law had taken effect, and before any proceedings were had on it in the state of Ohio.

If it had been the intention of the legislature to restrict the operation of the act, by reference to the time when wills were made, or took effect, they would not have provided for the sale and conveyance of all lands *devised* to be sold, using the past participle, but would have selected terms confining it to the future. This language appears better calculated to embrace wills that had taken effect without reference to the time when, than to such as might afterwards take effect. The same inference may be drawn from the language of the repealing clause, which excludes only a certain description of wills, from which we are to understand, that all others were to be embraced.

The exclusion is limited to wills on which letters had been granted before the taking effect of the act. The question may here be asked, granted where? I would answer, in the courts of Ohio; because, as to foreign wills, the statute can operate on such only as have been proved and recorded in the state or country where they were made. When this has been done, they are put on a footing with wills made in a state, and, like them, are ready to be offered for probate. It would be a strange construction of the law, to exclude a will from its operation, because that has been done, which the law itself requires should be done, before it can be brought within its operation.

The obvious interpretation of the act is, that wills made in this state, or made, proved, and recorded, in any other state, on which letters shall not have been granted in the courts of Ohio, before the taking effect of the act, shall be proceeded on agreeably to its provisions.

The 12th section gives the same effect, to wills made and proved out of the state, as it does to those that are made within it, and as a power to sell land in a

will made within that state, before the taking effect of the act, but recorded after it, is transferred to the administrator with the will annexed, the same transfer of power must take place as to wills which have been made and recorded out of the state before the act took effect, on being recorded within it after it took effect, and particularly so as to wills made and proved in states, where the power has been transferred by statutes similar to our own.

I take it to be a self evident proposition, that all wills, made in this state, without reference to the time when, are to be governed by the provisions of the act of 1816, provided they are proved and recorded in the proper court, after that act took effect; and that authenticated copies of wills, made and provided in any other state, without reference to the time when, are to be governed by the provisions of the same act, provided they are presented and recorded in the proper court of this state, after the act took effect. From this proposition it seems to follow, that if a will, made in this state twenty years ago, containing a power to sell land, be presented and proved after the law of 1816 took effect, the administrator with the will annexed may execute the power, because the statute attaches with reference to the time when the will is presented and recorded, and not to the time of its execution; and, for the same reason, if a will made and proved in another state, twenty years ago, containing a similar power, be presented and recorded in this state after that act took effect, it will be governed by its provisions, and the administrator with the will annexed will be vested with the same power.

In support of the second branch of this objection, the case of *Wooldridge's heirs v. Watkins*, (3 *Bill*) has been cited. I have examined that case carefully, without being able to discover much similarity between it and the case under consideration. The wills of Parker, and of Wooldridge, are very different.—Parker designated specific parts of the land, and ordered them to be sold, absolutely, and as soon as possible; he directed how the proceeds should be applied, and appointed but one executor, who refused to perform the trust. Wooldridge did not direct any land to be sold, but "left it in the power of his executors to sell, or exchange any part of his estate, real or personal, as they might judge necessary for the advantage of his estate," and appointed four executors, one of whom only qualified and sold the land. The court decided that the case did not come within the statute, because the sale was not directed to be made unconditionally; that it stood as at common law, and that, as the power was not coupled with an interest, it must be executed by all the executors to whom it was delegated.

An attempt has been made to assimilate the cases, by reference to that clause in Parker's will, which requires his estate to be kept entire, except such parts as his executor, with the advice of his daughter, might think it to the interest of his estate to have disposed of. This clause must relate to those portions of the estate that are not devised to be sold, as will be evident by comparing the different parts of the will.

In the first section, the testator bequeathes to his daughter sundry portions of his personal estate, and the use of a part of his real estate in the state of Virginia, and then subjoins the following clause: "in the meantime my estate is to be kept entire, except such portions as my executor, with the advice of my daughter, may think it to the interest of the estate to have disposed of." By

the second section, he devises all the rest of his estate, both real and personal, to his grand-son. By the third section he constitutes his grand-son-in-law his executor, with full power to dispose of all his lands in the state of Ohio—in Kentucky—in Randolph county, Virginia, and also his proportion of the lots in the city of Washington, and declares it to be his desire, that the said property may be disposed of as soon as possible. In the succeeding clause, he declares it to be his will and desire, that all, or any part of his houses and lots in the towns of Norfolk, Portsmouth, and Quasport, be sold, provided his daughter, and Thomas Pearce, of Smithfield, shall think it proper, and for the benefit of his estate.

The provisions are distinct, and independent of each other, relating to different parts of his property. The injunction in the first clause, whatever property it may refer to, cannot be construed so as to revoke the unqualified power contained in the third clause, which is accompanied with a direction, that it be executed as soon as possible; and it is equally certain that the fourth clause, which gives a qualified power to sell the property therein described, cannot affect it. The rule for construing wills is more liberal than that which applies to deeds. As to the former, it is the object of courts to give effect to the intent of the testator, which they ascertain from his words, giving to them such a construction as will permit every part to stand. Formal and technical words are dispensed with when the intent can be clearly collected. (1 *Fonb.* 442.) In *Osgood v. Franklin*, chancellor Kent says, the intention of the testator is much regarded in the construction of powers to sell, and they are construed with greater or less latitude, in reference to that intent. (2 *John. Chy.* 22.)

The same doctrine is laid down in 3 *Term* 665, 4 *Term* 741, (*n.*)

From an examination of the whole of Parker's will, there cannot be a doubt, but that he intended to vest in his executor an absolute, unqualified power, to sell the Ohio land.

The three provisions that have been noticed, are different in their qualifications, and must refer to different portions of the estate. The property to which the first clause relates, is to be disposed of, with the consent of the daughter.—That described in the third clause, is to be sold by the executor immediately, without the advice or consent of any other person; while the houses and lots in the fourth clause are to be sold, provided the daughter and Thomas Pearce should think it for the benefit of the estate. If the condition in the first clause may be extended to the third, that in the fourth may be extended both to the first and third, so that the consent of the daughter and Pearce, would be necessary to authorize a sale of any portion of the estate, which would be contrary to the intention of the testator. The plain construction of the will is, that so much of the estate, as is not embraced in the third and fourth sections, shall be kept entire, unless the daughter consent to have it disposed of; that the land mentioned in the third section shall be sold by the executor, as soon as possible; and that the houses and lots in the fourth clause, may be sold, provided the daughter and Thomas Pearce think it advisable. The intention of the testator then, admits of no doubt. He has enjoined it on his executor to sell the Ohio lands, as soon as possible; but if this power cannot be executed without the consent of the daughter—if the trustee cannot do what the will positively enjoins, without her approbation, the power is subject to a condition that may

defeat it. The rule is laid down by lord Holt, in *Winters v. Loveday*, (*Carth.* 429) is, that where a qualification is annexed to a power, which, if observed, goes to destroy it, the law will dispense with such qualification. If the will then, be susceptible of the construction contended for by the defendants, it ought to be rejected, for the purpose of preserving the power, and of giving effect to the intention of the testator.

2. The second ground to be considered is the alledged inadequacy of price. On this point the authorities do not seem to furnish any settled rule. In the case of *White v. Damon*, (7 *Ves.* 30) in which the lord chancellor refused to decree a specific execution, the price was less than half the actual value of the premises. The title was undisputed, and there were circumstances of unfairness in the time and place of sale.

In the case of *Coles v. Trecothick*, (9 *Ves.* 246) lord Eldon declared, that unless the inadequacy of price was such as to shock the conscience, and amount in itself to conclusive, and decisive evidence of fraud in the transaction, it was not itself a sufficient ground for refusing a specific performance.

In *Burrows v. Lock*, the master of the rolls declared his doubts, whether he could refuse to act on a contract, merely on the ground of inadequacy of price, where fraud was out of the case. (10 *Ves.* 474.)

In 13 *Ves.* 103, it is declared that inadequacy of consideration, though not of itself sufficient to set aside a contract, is, when gross, strong evidence of fraud.

In the case of *Floyer v. Sherard*, (*Amb.* 18) which was an appeal from a decree made at the rolls, the chancellor refused to set it aside, on the ground of inadequacy, because there was no evidence of any particular imposition by the plaintiff.

In the case of *Eastland v. Vanarsdel*, (cited from 3 *Bibb.*) there was not only inadequacy of price, but strong circumstances of fraud. The complainant, who was the purchaser, had the reputation of a sharper; he drew the contract, and omitted a very important part of the consideration. The facts were such, as induced the court to declare the bargain unreasonable, hard, and unconscientious.

The doctrine laid down in 2 *Pow* (78) is, that inadequacy of price alone, when all parties are informed respecting that about which they are contracting, is not a sufficient ground for a court of equity to refuse to give its sanction to a contract, unless the consideration be inadequate in a degree that will warrant the court to conclude fraud from the internal evidence the transaction itself furnishes.

The inference to be drawn from the authorities seems to be, that inadequacy of price will not justify a court in rejecting a contract, or refusing to execute it, unless fraud be actually proved, or irresistibly inferred from the facts of the case. In the absence of such proof, fraud cannot be established by inference, especially in a contract for the sale of an estate, the value of which depends on a contingency, of which the purchaser is to stand the risk. When the title, or the value of the thing contracted for, is understood to be uncertain, or contingent, the validity of the contract is never affected by the result, otherwise such property could not be the subject of a certain contract. Men may make risking bargains, in which the price stipulated is influenced by the degree of risk to be run; and when a purchaser takes the risk on himself, it is not expected that he

will pay the intrinsic value of the property. An abatement is made in proportion to the risk, which is estimated by the parties themselves, and cannot be regulated by the conscience of the chancellor. The objection of inadequacy is therefore properly confined to cases where the purchaser stipulates for a sound title, and for a recourse if it prove defective. In such a case an estimate may be made, and the difference between the value and the price may be ascertained; but in the case before us, this is wholly impracticable. Wills contracted for nothing more than the right of Parker, if that failed he was to loose the purchase money. He took upon himself a risk, the consequences of which cannot be estimated by this court. It is known, however, that the uncertainty of title, in the Virginia Military District, is proverbial, and that in many cases it is impossible to ascertain the existence of conflicting claims, till they are set up by the claimants. The parties themselves were the best judges of these circumstances, and have contracted accordingly. There is no evidence of fraud, nor can it be inferred, because it is wholly uncertain whether the price stipulated be more or less than the value of the right to be received. In the case of *Osgood v. Franklin*, chancellor Kent lays great stress on the defects and difficulties of title. He observes that lands, in such a situation, have no determinate value, and are not to be estimated by the price of improved farms, or lots which have a clear title; and, although the estimated value of the property in that case was $2,000,000 and the price paid but $25,000, he sustained the contract.

3d. The third objection is, that complainant has been guilty of laches, in not paying the purchase money, at the time agreed on in the contract. To estimate correctly the force of this objection, it will be necessary to advert to the facts. The contract was made in April, 1815. The purchase money was to have been paid in June following, when the deed was to be executed, with a special warranty only. Before the day of payment, complainant discovered that a bill had been filed, in the county of Brown, by Gilliland and others, in which they set up a title to the same land, under a contract with Parker, in his life. Pending that bill Baker, the administrator, died. In April, 1817, the defendant, A. P. P. Cowper was appointed administratrix with the will annexed. Between the death of Baker and the appointment of Mrs. Cowper, there was no person authorized to receive the money, or make a deed; but Wills, anticipating the appointment of Mrs. Cowper, applied to her to know whether she would receive the money and perform the contract, which she refused to do. The present bill was filed in 1818. On the 2nd May, 1815, complainant wrote, stating that he did not expect to be able to pay the purchase money on the day stipulated, and requesting further time. On the 29th June following, he wrote, expressing doubts us to the power of the administrator to convey, and proposing a new contract. A part of the land has not yet been carried into grant, and a part has been patented to Josiah Cowper, the devisee.

It was urged, that the payment of the money was a condition precedent, and that, inasmuch as Wills did not perform that condition, he is without remedy at law; and that, therefore, equity will not relieve, as it would be a violation of the rule, that when damages cannot be recovered at law, on a contract, equity will not decree a specific performance. This rule is not general in its application; it does not relate to defective contracts, nor is it generally applied to the negli-

gence, or omission of the parties, for in both these cases equity does and will relieve; but it applies particularly to contingent contracts, on which an action at law cannot be sustained, because the contingency provided for does not happen. It is sometimes applied to contracts without consideration, as was the case in *Hickman v. Grimes*, (*cited from* 1 *Marshal*, 87) or where the consideration is so trifling that mere nominal damage could be recovered. (2 *Pow. on Con.* 243.) But I cannot admit the proposition, that the payment of the money in this case is a condition precedent. The engagements are simultaneous; the same day is fixed for the payment of the money, and the execution of the deed. Neither party has relied on the promises of the other, as his security, but on an actual performance.

The complainant was not bound to part with his money till he received the deed, nor was the defendant liable to be called on for a title, till the consideration money was paid. This being the case, an omission to perform, by either party, could not be considered as a forfeiture of the contract, while the other party was either unprepared, or refused to execute on his part, unless an unreasonable delay had been mutually acquiesced in, from which a voluntary abandonment might be inferred. It is true, that Wills did not pay the money on the 20th of June; but it is equally true, that the administrator was not then either prepared or willing to convey the title.

It was attempted to support the charge of laches on the ground, that time is of the essence of contracts. This principle cannot be admitted to the extent contended for. The fair inference to be drawn from the cases on this point is, that time is not of the essence of contracts, or in other words, that equity does not consider an omission to perform, on the day stipulated, as sufficient, in itself, to reject a bill for a specific performance. On the contrary, chancery will relieve, where there has been default in time, if compensation can be made; and it has been held, that lapse of time in payment, may be compensated by interest and cost, if the delay has not been unreasonable and unnecessary. Bills have been sustained in favor of vendors who had no title at the time they were to convey, or at the filing of their bills. Lord Thurlow decided, that although a contract contained a clause that it should be void if the stipulations, as to time, were not complied with, yet equity would not consider the performance at the day, an essential part of the contract; and in the case of *Thompson, &c. v. Riddle*, he declared, that it had been often attempted to get rid of a contract on that ground, but without success—that such an omission had never been held to make the agreement void, though it might be evidence of a waiver. (2 *P. W.* 66, 629. 7 *Ves.* 202. *New. on Con.* 235, 238, 242.) It is laid down in 2 *Pow. on Con.* 272, that the time limited for the performance of an agreement, having lapsed, is no solid objection to a decree for a performance of it; for it is the business of a court of equity to relieve against lapse of time, in the performance of agreements, especially if the non-performance does not arise by default of the party seeking to have a specific performance; therefore, a bill brought for a specific performance was decreed in favor of the plaintiff, without any regard to the lapse of time, the lord chancellor observing, that most of the cases relating to the execution of articles for the sale of estates were liable to that objection, but that he thought there was nothing in it." The same principle is adopted in *Tyree v. Williams*, (3 *Bibb*, 367) and in *Guest v. Hamfray*, (5 *Ves.* 818.) The

master of the rolls observed, that if the plaintiff stand acquitted of the charge of practising unnecessary delay, in making out his title, the court will not refuse him a specific performance, though he suffer time to elapse before he files his bill. On looking into the cases cited from 1 *Marshal*, 42, 225, and 240, I do not see their application to this case. In each of them there was a total inability, on the part of the complainant, to perform, either before or after the decree; and in 1 *Bibb*, 590, the question did not arise on the time of performance, but on the fact, that complainant had neither performed, nor offered to do it at the time of the decree.

The conclusion, from a review of the authorities on this point, seems to be, that lapse of time will not prevent a decree, unless it has been so unreasonable, and so far unaccounted for, as to furnish evidence of an abandonment of the contract. Such an inference cannot be drawn from the facts in this case. The delay has not been unreasonable, and it is satisfactorily accounted for. The complainant was not bound to part with his money, till he received a deed. The parties were to perform simultaneously. It is in proof, that, on the day fixed on for the performance, the land was in the possession of third persons, who had resided on it many years under a claim of title, founded on a written contract, made with the testator in his life, and that a bill in chancery to compel a conveyance was then pending. It also appears, that a part of the land had been conveyed by patent, to Cowper, the devisee, and that a part of it stood on entry and survey, for which no legal title had been obtained. Under these circumstances, it was impossible for the administrator to perform the contract. He could not make a deed, or deliver possession of the premises. The plaintiff, therefore, was under no obligation to pay the purchase money, nor can his equity be impaired on the ground of laches, for not having done it. As the complainant was to run the risk of the validity of Parker's title, it stood him in hand to see that the paper title was perfect, that he might avail himself of all the benefits of it. Baker covenanted to convey a legal title, which had not been acquired in June, 1815. The complainant had a right to insist on a legal title, and could not be repuired to accept of an equitable one. (1 *Mad.* 430.)

To obviate the difficulty produced by these facts, it was urged on the part of the defendants, that Wills knew them before the contract. The evidence, however, does not support this assertion. There is no proof of notice but the presumption arising from the pendency of the bill, which is of no avail, as this is not a case in which presumptive notice can be relied on. As between Wills and the persons who claimed title by that bill, it would have been notice, but not as between him and third persons. As the question here arises, he can be charged only with actual notice.

But if such notice were admitted, the consequences contended for do not follow. The contract could not be altered, or revoked, or the rights of the parties varied by it. Admitting that both parties knew of these difficulties, and with that knowledge entered into the contract, the inference would be, that the vendor undertook to remove them as a necessary step to enable him to fulfil his agreement. The only use that could have been made of it by either party, would have been by way of excuse, for a non-performance on the day stipulated. A large proportion of the contracts for the sale and conveyance of real estate, in the western country, have been made while the vendor had nothing

more than an equitable right, resting on an entry. This circumstance has not released him from the necessity of completing his payments, if any were due to the person of whom he purchased, and of perfecting his title.

Another circumstance that accounts satisfactorily for the non-payment of the money, is the death of Baker, before the claim of Gilliland, &c. was decided, and the subsequent disavowal of the contract by Mrs. Cowper his successor in the administration. From the death of Baker to the appointment of a successor, in April, 1817, there was no person to receive the money, nor did the appointment of the present administratrix remove this difficulty, for the fact cannot be disguised, that she determined to resist the contract, at all hazards, which led to the depositing of the money in bank, instead of the actual payment of it on the contract. In 1815, Baker was not in a situation to convey; there is no evidence that any step has been taken since that time to perfect the title; it is therefore questionable, whether the defendants can now execute the contract, notwithstanding they rely so much on the supposed laches of the complainant.

The letters that have been introduced, do not seem to have any bearing on the the case. The one dated in May, expresses a doubt whether complainant would be able to pay the money when it should become due, and requests further time, but whether he was able to pay, or whether further time was given or not, does not appear, nor is it material, as the defendants were not in a situation to demand it. The second letter expresses doubts as to the power of the administrator to convey. Whether those doubts arose from the imperfect state of the title, or a supposed defect in the power, does not appear: it is certain, however, that the doubts of a party do not affect his legal rights.

The argument drawn from the fact that the object of the testator, in directing this property to be sold, has been lost by the non-payment, would have been entitled to much weight, if the omission to pay were justly chargeable on the complainant; but as it results from the inability of the defendants to perform the contract, on their part, it cannot be urged to the prejudice of the complainant. It does not appear that the representatives of Parker have taken any trouble to clear or perfect the title. They seem to have been careless and indifferent about the matter, while Wills was doing all in his power to sustain the claim. No part of his conduct has evinced a disposition to abandon the contract.

The objection that no regular tender was made, of the purchase money, has been already answered; it may be added, however, that as the administratrix had refused to receive the money, or execute the contract, although that fact, in a court of law, might not excuse an actual tender, yet connected with circumstances, it is sufficient in equity, where form yields to substance, and things manifestly vain and useless, are not required to be done. The production of the money would have answered no other purpose than to test the sincerity of the refusal to receive it, on the one side, and the ability to pay on the other, which was afterwards done, by a rejection of the money, and a deposit of it in bank.

WALDSMITH v. WALDSMITH.

Where the defendants are named in the declaration as administrators, evidence may be given to charge them in their individual characters.

The form of judgment is not necessarily controlled by the *descriptio personæ.*

The omission of a material averment cannot be supplied by testimony at the trial.

The distributers of the personal estate of an intestate cannot join in an action against the administrators for their proper share.

This cause came before the court by adjournment from the Supreme Court of Hamilton county, upon a motion to set aside a non-suit, and grant a new trial.

It was an action of general *indebitatus assumpsit*, in which the plaintiffs claimed as heirs of Christian Waldsmith, and charged the defendants as his administrators. In the declaration, the plaintiffs described themselves as "children of John Waldsmith, deceased, and heirs of Christian Waldsmith." Besides the usual money counts, as for money received by the defendants after the death of the intestate, the declaration contained a count alleging a settlement by the administrators with the court of common pleas, and a balance being found in their hands due to the plaintiffs, in consideration whereof they assumed, &c. The defendants pleaded the general issue, and upon the trial the testimony offered by the plaintiffs was objected to, upon the ground, that it went to prove a personal liability in the administrators only, upon which they could not be sued as administrators. The court rejected the testimony, and the plaintiffs having suffered a non-suit, moved the court to set it aside, upon the ground that the opinion rejecting it was incorrect.

Guilford, in support of the motion. *Storer*, contra.

The plaintiff's counsel insist that in all cases, where the promise in the declaration is alleged to be made by the *administrator*, the judgment and execution must be *de bonis propriis*, and that it is only where the promise is alleged to have been made by the *intestate*, that the judgment is *de bonis testatoris.*

Opinion of the court, by Judge BURNET.

At the trial of this cause it was proposed, on the part of the plaintiffs, to prove that they were children of John Waldsmith, and heirs of Christian Waldsmith, deceased—that the defendants were the administrators of C. Waldsmith, and that on settlement of their accounts before the court of Common Pleas, a large sum was founded in their hands belonging to the heirs. This testimony was rejected, and a judgment of non-suit entered.

On a motion to open the non-suit, and grant a new trial, the question was, whether the court erred in overruling the testimony. In examining this case it is necessary to look at the declaration. The defendants are charged as administrators of C. Waldsmith, deceased; the plaintiffs are described as "children of John Waldsmith, deceased, and heirs of C. Waldsmith, deceased." It is averred, "that the said defendants, administrators of C. Waldsmith, deceased, accounted with the judges of the court of Common Pleas of and concerning the goods and chattels, moneys and effects, which were of said Christian at the

time of his death, and which, before that time, had come to their hands to be administered; and, upon such accounting, the said defendants were then and there founded to be in arrear, and indebted to the said plaintiffs in the sum of $2,358 74, and being so found in arrear and indebted, they, the said defendants in consideration thereof, undertook and promised," &c.

The declaration also contains the common money counts, in which the defendants were not named as administrators.

It was contended by the defendants at the trial, that the judgment against them, on this declaration, must be *de bonis testatoris*, while the facts charged, if they rendered them liable at all, made them so in their individual capacity.

The plaintiffs insist first, that the judgment must be *de bonis propriis*; and secondly, that the facts charged, supported by the proof they offered, are sufficient to entitle them to such a judgment.

These propositions must be separately considered. There appears to be some discrepancy between the authorities relating to the first point, which, on a superficial view, would seem to create a doubt.

It is true, as a general proposition, that in actions against executors or administrators, the judgment must be *de bonis testatoris*, and that it is necessary to resort to a *sci. fa.* in order to charge them with a personal liability; but this is to be understood as applying to cases in which they are liable only in that capacity, and not to those in which there is an individual liability. If the action be founded on a promise, made by the testator, or intestate, in his life, the defendant must be sued in his representative character; he may plead *plene administravit*, and the judgment must be *de bonis testatoris;* but, if the plaintiff rely on a promise by the executor, after the death of the testator, it is not necessary to name the defendant as executor, yet this may be done; they may be named as administrators by way of description, or for the purpose of showing the circumstances of the transaction, and the origin of the liability; but the defendants cannot plead *plene administravit*, and the judgment should be *de bonis propriis*. In such cases, the plaintiff is at liberty to describe the defendants as executors or not, at his election. The form of the judgment is not necessarily controled by that description, where it sufficiently appears that it is given merely as a *descriptio personæ*, and not as an indication of the capacity in which the liability attaches. If the declaration presents a claim, to which the defendant is liable in his representative capacity only, as on an obligation executed by the testator, he must be sued as executor, and the judgment must be *de bonis testatoris*; but if it present a demand, which originated from the acts of the defendant, in his capacity of executor, but for which he has become individually liable, as if he should settle a debt due from the estate, and give his own note in the character of an executor, he may be described in the writ and declaration as executor, or that description may be omitted, and in either case the judgment would be *de bonis propriis*. So in the case before us; the property of the intestate was received and disposed of by the defendants, as administrators; the money claimed in this suit was obtained, and is now held by virtue of their power as administrators; but having closed the estate, and settled their accounts by which the nett amount is ascertained, they hold that amount for the use of the heirs, and are liable in their individual capacity. Their liability, however,

does not depend on the simple fact that they are administrators, but on the subsequent transactions, which have brought the estate into their hands.

As regards creditors, the right of action against the intestate is converted, by operation of law, into a right against the administrators. They are liable to the creditor, because the intestate was so liable, and as the remedy must pursue the right, it must charge them in their representative capacity. But not so in the case of heirs; no right of action vested in them against their ancestor, and consequently none has been transferred against the representative. Their right had no existence till after his death, and it was then contingent, depending on the result of the settlement of the estate. It was in fact the right of the ancestor, transferred by operation of law, and not a right against the ancestor.

The property was received, and converted into money for their use. The defendants became liable as agents, in the same character in which they would have been liable to the intestate, had they disposed of the property in his life, and by his authority. In other words, they are under an individual liability, on which an action could be sustained against them in that character. The words "as administrators," in the writ and declaration, may be considered as descriptive of the *persons* sued, and not of the *character* in which they are sued, or they may be treated as surplussage. No person can read the declaration, and notice the manner in which the liability of the defendants arose, without discovering at once the character in which it is intended to charge them. As administrators of the deceased, they received and disposed of the property, paid the debts, and settled with the court. These transactions were authorized and required by the letters of administration; they form a part of the plaintiffs' title, and it was proper to set them out in the declaration, but as they show an individual liability, the judgment must be *de bonis propriis*. This conclusion seems to follow from the authorities on the subject. The case of *Wallis v. Lewis*, (*Ld. Ray.* 1215) was by an executrix, on a promise made to herself, as executrix. On a motion in arrest of judgment, the court decided, that the declaration being grounded on a promise to the executrix herself, the naming her executrix was but surplussage. This point, however, was ruled differently in *Elwees' executrix v. Mocater*, in the same book, *page* 865, but it was decided in the same way, in *Nicholas v. Killigrew*, (1 *Ld. Ray.* 436) which was *indebitatus assumpsit*, by an administrator to recover money paid to a third person, after the death of the intestate, for the use of the plaintiff as administrator. In *Jenkins and Wife v. Plume*, (1 *Salk.* 207, *and* 6 *Mod.* 92) which was assumpsit by executors, for money had and received by the defendants, to their use, as executors.—The action was held to lie, and that the naming themselves executors was only to deduce their right, and set it forth *ab origine*. *Marsh v. Yellowly*, (2 *Stra.* 1106) was decided on the principle, that on a promise made, or a wrong done to the executor himself, he may sustain an action in his own name, or as executor, and it was held that in either case he was liable for cost. In *Hooker v. Quilter*, (*Ib.* 1271) the declaration contained three counts, as executrix, and one for the use and occupation of the plaintiff's house. There was judgment by default which was reversed on error, for, said the court, there *being no verdict*, they could presume nothing but that the fourth count was, as it appeared, in her own right, which could not be joined with the others. In the final determination of *Jenkins and Plume*, (as reported in 6 *Mod.* 181) the court say "the

plaintiff needed not have named himself executor, it being on a contract with himself. His saying that it was to his use, as executor, is true, and therefore no harm, but rather better, for it shows how the right came."

The cases cited from 4 *Term. Rep.* 347, and 2 *Bos. and Pul.* 424, do not meet the question before us. It was decided in those cases, that counts, on promises made by the testator in his life, could not be joined with counts on promises made by the executor, as such, because they admitted of different pleas, and different judgments; but it seems to have been understood, that separate suits might have been sustained against the executor, on those promises, naming him as executor, and that on the latter, the judgment would have been *de bonis propriis*, although the defendant was named as executor. The same remark applies to the authority from 2 *Saund.* 328. The cases there referred to relate to the doctrine of joinder of actions, and were cited for the purpose of showing, that money claimed by, or from executors, in different rights, could not be united in the same declaration, which is a question altogether different from the one now under discussion. We should not expect to find the present question determined in cases of that character, but as far as they have a bearing on it, they seem to support the declaration before us. The author of the note admits, that a count, on an account stated, with an executor, for money due from the testator, may be joined with a count on a promise made by the testator; and though he strongly doubts the doctrine in *Petrie v. Hannay*, (3 *D. & E* 659) in which it was laid down, that several counts may be joined, for money had and received by the defendant, to the use of the testator, and to the use *of the executors as such*, yet Buller, justice, confidently affirms that such was the constant practice. The case of *Hooker v. Quilter*, before cited, seems to imply the same thing.

In *Carter v. Phelps' administrator*, (8 *John* 440) it was admitted, that a count charging an executor as being liable in his own right, on a cause of action arising after the testator's death, cannot be joined with one on a promise made by the testator in his life; but it was decided that a count, on a promise made by an executor or administrator *as such*, in which he *is not charged as personally liable*, may be joined with a count on a promise made by the intestate, and by a parity of reasoning a count on a promise by an executor, in which he is named as executor; but charged as in his own right, may be joined with a count on a promise in which he is not named as executor. In both cases the demand is made in the same right and the plea and judgment are the same in both. In *Myer v. Cole*, (12 *John.* 350) the cause of action stated in one count, arose after the death of the testatrix, and the promise was not alleged to have been made by the executors, as such; but the point decided in that case, does not arise in the case before us. It is, however, plainly to be inferred, from the language of the court, that in an action against executors, for a cause arising after the death of the testator, and for which they are personally liable, they may be named as executors, as a mere *descriptio personæ*, and consequently that the judgment, notwithstanding they are so named, will be *de bonis propriis*.—In *Hooker v. Quilter*, (as reported in 1 *Wil.*) the chief reason against the joinder was, that the court could not say what damages the plaintiff was to have, as administrator, and what *in proprio jure*. The reason of the decision, therefore, has no application to the present case. It was also stated in that case, that if an

executor name himself executor, when he may sue without, as in an action for rent, both in the life of the testator, and after his death, *it is but surplussage*, and this is the most that can be said in the present case.

It was not necessary to sue the defendants, as administrators, for although their liability arose from their acts as administrators, yet they were responsible in their individual characters, and the naming of them as administrators, *is* merely a *descriptio personae*. It may be treated as surplussage, or as intended to show the nature, and origin of their liability. It cannot affect the form of the judgment.

The case of *Barry v. Rush*, (1 *Term*, 691) cited by plaintiff, does not bear on this case. The point there settled was, that an administrator, by entering into an arbitration bond, admitted assets, and could not afterwards plead *plene administravit*. The case of *Farr v. Newman*, (4 *Term*, 621) cited by both parties, appears equally inapplicable. The point discussed and decided in that case, was, that the goods of a testator, in the hands of his executor, were not liable to be taken and sold, on an execution, for the private debt of the executor, to the exclusion of judgments for the proper debts of the testator. The same remark applies to the case of *Rogers v. Jenkins*, (1 *Bos. & Pull.* 383.) The point there settled by Eyree, chief justice, was, that if process issue in the name of one plaintiff, and a declaration be filed in the name of him and another, judgment will be set aside, for irregularity. In the marginal note to this case, it is stated, that in *Canning v. Davis*, Yates, justice, decided that though a plaintiff style himself executor, or give himself any other superfluous description, it will not hurt, for the demand is still the same. The 16th section of the act defining the duties of executors and administrators, has also been referred to on the part of the defendants. On a careful examination of that section, the true construction of it will be found to be this, that the judgment of the court against executors, or administrators, in all cases in which it is properly rendered *de bonis testatoris*, shall only subject the defendants to the amount of assets in their hands, *unadministered*, whatever may have been the form of pleading. It cannot therefore affect the present question. It contains no direction as to the description of cases in which the judgment shall be *de bonis testatoris*, although it appears to have been cited for that purpose.

The best view we have been able to take of this subject, conducts us to the conclusion, that there was no impropriety is describing the defendants as administrators—that that circumstance does not preclude them from taking their judgment *de bonis propriis*, and that there is nothing incompatible in the different counts contained in the declaration.

The second proposition is, that the facts stated in the declaration, supported by the proof offered at the trial, were sufficient to entitle the plaintiffs to a verdict.

It is a well settled principle, that every declaration must set out a good title. It must show such facts, as, if true, entitle the plaintiff to a judgment. The omission of a material averment cannot be supplied by testimony at the trial. The plaintiff's evidence must correspond with his case—he cannot extend it to aid a defective title; and although the evidence offered may present a clear case for the plaintiff, yet, if it be not the same case found in the declaration the court will reject it, although the consequence may be a non-suit.

Evidence, being that which ascertains and illustrates the point in issue, must be confined to that point. Without an observance of this rule uncertainty and confusion would ensue. The records of adjudged cases would not show, with any degree of certainty, the grounds on which recoveries were had: nor would it be possible to conduct judicial proceedings with that precision and certainty, which is justly ascribed to the science of special pleading, and is so essential to a safe and uniform administration of justice.—It can scarcely be necessary to refer to books in support of these principles—they are found every where.

The plaintiffs in this case claim, as heirs at law to the intestate, and the suit is brought for their distributive share of the personal estate. It is not pretended that any express promise has been made. The action is grounded on the legal liability of the defendants, and the implied undertaking which the law infers from it. The fact, that the plaintiffs are children of John Waldsmith, dec'd. does not constitute them heirs of C. Waldsmith; nor does it, in connection with the other fact, that the defendants, as administrators, have settled the estate, and retain a residuum, show any liability to these plaintiffs, because that fact may be true, and the plaintiffs be destitute of any right to recover. To show the existence of that right, two additional facts are necessary, viz: that they are grand-children of the intestate, and that the intestate survived their father. It is not stated that John was the son of Christian, nor does it appear which was the survivor. The former of these facts constitutes the foundation of the claim, and the latter is equally important; for if the father survived the grand-father he was the heir: the right vested in him at the death of the intestate—it continued in him till his death, on which it descended to the plaintiffs, who must claim it as a part of his personal estate, through his executors or administrators, and not as heirs at law to their grand-father—which would be presupposing that the right, at the death of their father, revested in their deceased grand-father for the purpose of descending to them, which would be an absurdity. As the declaration describes the plaintiffs to be children of John Waldsmith, it is not enough to add "and heirs of Christian Waldsmith," that does not follow as a consequence of the fact stated.

The rule, that plaintiffs, who claim as heirs, must show how they are heirs, applies in this case; and it is understood, that this relates to the declaration, as well as the evidence given at the trial.

If the defendants are liable in this action, it is on the concurrence of a variety of facts, which taken together, constitute a title in the plaintiffs, but cannot be proved, unless they are relied on, and stated in the declaration. A good title, defectively set out, may be supplied at the trial; but not so where the title itself appears to be defective.

It cannot be pretended, that a plaintiff who sues as an heir, and simply avers that he is an heir, sets out a good title, and yet this is the amount of the declaration in the present case. Without showing any privity, or liability, or any ground of an implied undertaking, on the part of the defendants, it is averred that they accounted with the judges of the court of common pleas, and were found in arrear and indebted to the plaintiffs. Their indebtedness to the plaintiffs in any amount, depends on the fact of heirship, which is not shown; and the amount of that indebtedness depends on the number of heirs—their respective degrees of consanguinity, and the total amount of residuum, ascertained by the

settlement, respecting which the declaration is entirely silent. If the plaintiffs be heirs of the intestate, they take *per stirpes*, and the share, to which they have a claim, depends on the number of children who survived the intestate, or who might have died before him, leaving issue.

It was proposed to supply all these omissions by proof at the trial, or, in other words, to make out a title before the jury, which was not found in the pleadings. We are of opinion that this could not be done. But there is another enquiry involved in this branch of the case, equally decisive. On what principle of law have the plaintiffs joined in this action? We learn, though not from the pleadings, that they are the grand-children, and a part of the heirs of C. Waldsmith, among whom the administrators are directed by the statute, to distribute, in equal shares, that portion of the personal estate of the intestate, that their deceased father would have inherited, had he survived him.

In regard to real estate, parceners have but one entire freehold, and must join in real actions; but this claim rests on different grounds—as between the plaintiffs, there is no joinder of contract, or of interest; their rights are separate and distinct. The defendants are answerable to them severally, and each of the heirs has a right to demand and receive his separate share of the residuum. In order to sustain a joint action, in any case, there must be a joint interest, as the proof must sustain the case made out in the pleadings. If two or more unite in one suit, they cannot sustain it by proof of distinct, unconnected claims, and perhaps a case could not be selected better calculated to illustrate the position, than the one in hand. C. Waldsmith died intestate, leaving several children and grand-children. The plaintiffs are the children of his son John, whom he survived, and the defendants are his administrators. The suit is brought to recover, in one entire sum, the distributive shares of the personal estate, claimed by three of the heirs. The bare statement of the case shows that they have not one entire claim, but that their claims are separate and disinct. Were it otherwise, the unity of interest would extend to the whole estate, and require all the heirs to join. It will not be pretended, that the administrators have not a right to settle with the heirs separately, and take from them releases, without affecting the rights of other heirs; and it is well known to be the constant practice, for administrators to make partial advances to the heirs, from time to time, as they may require it, which necessarily leaves unequal balances due.

In a joint action this inequality cannot be regarded. The plaintiffs cannot obtain separate judgments, nor can the judgment designate the amount due to each; it must be for an entire sum, in which they will have an equal right. On this principle, each heir would be bound by the acts of his co-heir, who might receive and release to the administrators, the whole personal estate. But the language of the statute seems to put this question at rest. It enacts, "that if any person shall die intestate, leaving any goods, chattels, or other personal estate, such goods, chattels, or other personal estate, shall be *distributed* agreeably to the foregoing course of descents." The right of the plaintiffs is derived from this statute, which directs the administrators to distribute, or pay to each of them, the share designated in the preceding sections.

Inasmuch, then, as it is made the duty of the administrators to pay to each heir the share designated by the act, and as the right of the heir to demand arises from the duty of the administrator to pay, the right must follow the duty; of

course each heir must have a separate, distinct, and independent claim, to his distributive share. Such claims cannot be joined in one suit, without violating the plainest rules relating to the joinder of actions.

Motion overruled.

CASE ET AL. v. MARK.

Distinction between case and trespass—where the injury is direct and immediate, trespass is the proper action.

Case is not the proper remedy where the defendant "so carelessly and negligently navigated his steam-boat on the Ohio River, that he run foul of, and struck the flat boat of the plaintiff, by means whereof it immediately sunk, and was lost to the plaintiff.

This case came before the court upon a writ of error to the Common Pleas of Hamilton county, and was reserved for decision here by the Supreme Court of that county.

It was an action on the case, and the declaration contained a single count, in which it was charged, that the defendant "so carelessly and negligently navigated his steam-boat upon the Ohio river, that he run foul of, and struck the flat boat of the plaintiffs, by means whereof it immediately sunk, and was lost to the plaintiffs."

A verdict was rendered for plaintiffs upon trial; the defendant moved an arrest of judgment, upon the ground that the facts stated in the declaration constituted a direct trespass, for which an action on the case would not lie. The court of Common Pleas arrested the judgment, to reverse which, error was brought, and the general error assigned.

J. W. Piatt, for plaintiff in error. *T. Hammond*, contra.

Opinion of the court by judge BURNET.

The error assigned in this case is, that the court of Common Pleas arrested the judgment, on the ground that the facts amounted to a trespass *vi et armis*, and that this action could not be sustained. It becomes necessary, therefore, to ascertain the distinction between trespass and case, and apply it to the facts and circumstances set out in the declaration.

The plaintiffs charge, that the defendant was the owner and commander of a certain steam-boat, called the Congress, navigating, the Ohio river—that he so carelessly navigated, managed, and steered the said steam-boat, that he run her foul of, struck and broke a certain coal boat, owned and navigated by the plaintiffs, by means of which the said coal boat immediately sunk, and was lost.

The plaintiffs contend, that, the injury here described, was consequential, and not direct; but if direct, that it was the result of negligence, and that in either event, the action ought to be case.

The first part of this proposition certainly cannot be sustained. The terms consequential, and immediate, are well understood. That is immediate which is produced by the act to which it is ascribed, without the intervention or agency of any distinct, intermediate cause, but the effect of an intermediate cause is sometimes considered as a trespass, produced by a preceding cause, when the former is the immediate effect of the latter. Thus the effect of pulling the trig-

ger of a loaded gun, is the production of fire, which causes the powder to burn which gives motion to the ball, by which the injury is produced; here the whole transaction is considered as one act, and the trespass is ascribed to the pulling of the trigger, though the injury is the immediate effect of an intervening cause which gave motion and force to the ball. So in the case of the lighted squib, although it would have been harmless to the plaintiff, without the agency of Willis and Ryal, yet as they acted in self defence, to avoid the danger produced by the agency of the defendant, their conduct was ascribed to him. All that was done subsequent to the original throwing, was considered as a continuation of the first act, and the putting out of the plaintiff's eye, was declared to be the immediate effect of that act. In this case the defendant was at the helm, directing the course of his boat—the steam which gave it motion, was under his controul; the boat therefore received its motion and course from the defendant, by which it was made to strike the plaintiffs' boat, so that it was broken, and immediately sunk. Here there was no distinct intermediate agency. The injury was the breaking and sinking of the coal boat—the cause of that injury was the act of the defendant, in running the steam-boat against her. The injury therefore cannot be considered as consequential—it was direct and immediate.

The second part of the proposition is equally untenable. The defendant could not shelter himself under the plea of negligence, and the plaintiffs are not at liberty to force on him an apology of which he could not avail himself. The character of the transaction, in reference to the form of the suit cannot be affected by the presence or absence of negligence. That circumstance may, in some cases, have an impression on the amount of damages recovered, by varying the degree of malice, but it cannot change the nature of the act. If it has the ingredient that stamps it with the character of a trespass, it must be treated as such. If a man shooting at game, does it so carelessly and negligently as to wound a person happening to be in the vicinity, the fact that it was done carelessly, and without design, will not protect him from an action of trespass. So if a man in self defence, aims a blow at another, and by negligence, or want of care strikes a third person, it is a trespass.

The proposition set up by the plaintiffs that where there is negligence, although the injury be immediate, the party may waive the immediate injury, and claim the damages only which is the consequence of the injury, amounts to this, that he may take up an entire, connected transaction by parts, and rely on as much of it as will answer his purpose, to the exclusion of the residue. This would be a convenient privilege, as it would often save a plaintiff from the unpleasant consequences of a non-suit; but it would destroy established distinctions, and introduce an uncertainty in judicial proceedings which would be inconvenient and injurious. One of the reasons given for not sustaining actions on the case, where the circumstances amount to a clear trespass, and *vice versa*, is the necessity of preserving the boundary of actions, by which I understand the rules that prescribe what particular action, or form of suit, shall be brought for each particular injury. These rules cannot be uniform, if plaintiffs are permitted to garble their cases, so as to convert an unequivocal trespass, into trespass on the case. Were this permitted, I cannot conceive of any trespass, that may not be sued for in the form of case.—What are the ordinary concomitants of a severe battery? They are pain, bodily and mental—incapacity for

business—the expense of medical aid, and disgrace in the public estimation. If under the pretence of waiving the immediate injury, which is the pain, the party may go for the consequential damage, which is the incapacity for business, expense, &c. it will be a matter of but little moment, whether he sue in trespass, or in case, as the only difference in the result would be, the portion of damage that might be allowed for the pain inflicted. If this be conceded, the boundary between trespass and case, is at once broken down—courts have no control over it—it is in the power of every plaintiff, and may be varied as the convenience of the moment may require. Should a party mistake his remedy, and sue in case for an undoubted trespass, he has only to turn on his opponent, and say, I waive the immediate injury, and he is perfectly safe. I have looked into the authorities cited to this point, and although some of them seem to be in opposition to the general tenor of the cases on the subject, I cannot believe that they sustain the plaintiffs. *Turner v. Hawkins*, (1 *Bos. & Pul.* 472) was a writ of error, after verdict. The court put the case entirely on the ground of *a non feasance*, which they said made it a complete action on the case. They referred all the circumstances alleged, to the not slackening of the rope, by the defendant's servants, as they were bound to do, and having done so, they declined looking into the cases cited to show the distinction between trespass and case.

In *Pitts v. Gaince, &c.* (1 *Salk.* 10) the question settled was, that the captain of a vessel, lying in port, not being the owner, may maintain case against an officer, who unlawfully detains her in port, for the particular loss he has sustained, by the detention of the voyage, or may bring trespass, founded on his possession, as the bailiff of goods may.

In *Slater v. Baker*, (2 *Wil.* 359) the injury complained of proceeded from ignorance and want of skill, in the defendants, who had been employed as surgeons by the plaintiff. After verdict, the court refused to look with eagle's eyes, to see whether the evidence applied exactly to the case or not, but they settled no point relative to the distinction between case and trespass, or the right of a party to waive a direct trespass, and bring case for consequential damage.

Huggit v. Montgomery, (2 *New. Rep.* 446) was an action of trespass against the master of a vessel, for an act of the pilot, done while the defendant was on board, but not by his order. The court do not give the reason of their opinion, but from an observation of CHAMBRE, justice, it appears to have been, that the master was not liable to an action of trespass for the act of the servant, done without his order.

In *Rogers v. Imbleton*, (*Ib.* 117) the marginal note cited, and relied on by the plaintiff, does not appear to be supported by the text. The distinction, however, between trespass and case, was not agitated, nor do the court refer to it in their opinion. The editor has taken it for granted, that it was an action on the case, but the defendant's counsel did not so consider it, or they would not have assigned as a cause of demurrer, the omission of the words *vi et armis*, and *contra pacem*, nor would the court have gravely decided that because the injury was alleged to have arisen from mere negligence, the words *vi et armis* and *contra parem* were not necessary in an action on the case. Those words have no place in such a declaration—their presence would have been a cause of demurrer, rather than their absence.

Ogle v. Barnes, (8 *Term Rep.* 188) has also been cited. At first view it

would seem difficult to reconcile this case with the mass of cases reported on the same subject, or with the rule adopted by the chief justice, in the case itself, which was, that if the act occasion an immediate injury to another, trespass is the proper remedy, but if the injury be not immediate but only consequential on the act done, case must be brought. But a careful examination, after reading the explanation given of it in *Leame v. Bray*, will remove the difficulty. It could not have been the intention of the court to shake the rule established by so many preceding cases, because they expressly recognize it, and because they have put their decision on a different ground, to wit, that it did not appear that the injury proceeded from the personal acts of the defendants, or that they were even on board of the vessel at the time.

The passage referred to in Chitty, does not lay down a general rule. It merely states that the party injured has sometimes an election, which is all that can be gathered from the cases he cites, most of which I have noticed above. The case of *Blin v. Campbell*, (14 *John.* 433) appears to go the whole length contended for by the plaintiffs; and although that decision was recognized as being correct, in *Percival v. Hickey*, (18 *John.* 288) on the authority of Chitty, and the cases cited by him, yet we cannot adopt it for the government of this case. Some of the references in Chitty do not touch the point, others are equivocal, and as far as they go to establish the doctrine contended for, they are opposed by others, which we think they ought not to control.

The uncertainty that exists in cases of this character, may be ascribed, in some measure, to the decisions that have been made in cases for running down ships, where the force that causes the injury does not always proceed from the agency of the person having the management of the vessel. Winds, waves, and currents may counteract his designs, by moving the ship in a course he has endeavored to avoid. It may be easy to determine the presence of this agency, but difficult to ascertain the extent of its effect. On a supposition that the defendant's vessel has been taken to the point where the injury was done, without his agency, or in opposition to his efforts, honestly made to prevent it, it would be hard to declare him a trespasser.—The impossibility of knowing with certainty the real extent of this extraneous cause, and how far it might have been in the power of the defendant to counteract it, or whether his efforts, by miscalculation or design, did not co-operate with it, renders it difficult to apply a uniform rule. But this difficulty cannot be found in cases that receive an unequivocal character from the certainty of the facts on which they depend.

Something may also be ascribed to the reluctance with which courts yield to the necessity of deciding against a just claim, on a technical objection, or of turning a party round, because he has mistaken his remedy. In some instances this feeling has induced judges to avail themselves of circumstances in support of a case, having justice and equity on its side, that do not form a legal distinction, or bring it within any established rule. The same circumstances are relied on in other cases, which tends to render the law apparently doubtful. For example, in some cases we find the lawfulness or unlawfulness of the act much insisted on, from which an inattentive reader might conclude that that circumstance formed the rule of distinction between trespass and case; but it is well known, that acts strictly lawful frequently amount to trespasses, while those that are unlawful, are attended with injuries, for which trespass cannot be sustained.

Thus, if a man shooting at a target, which is lawful, miss his aim and wound another, trespass will lie; but if he dig a pit in the highway, into which a traveller falls, trespass will not lie, although the act was unlawful.

In some cases, great stress is laid on the force that accompanies the act, by which an injury is done; but this is not a distinguishing fact—it forms no criterion by which to decide the character of the injury, or of the remedy. This will appear from the very familiar case of the log: if it be thrown into the highway with great force and violence, and afterwards a traveller falls over it, he cannot have trespass; but if it be laid very gently on his foot, by which he is injured, trespass will lie. So if a man quietly enters the enclosure of his neighbor and picks up an apple, trespass will lie; but if he should, by forcible and violent effort, obstruct a water course, whereby the water is caused to flow back on his neighbor's land, it would not be a trespass—he would be liable only in an action on the case.

It has also been contended, as it is in this case, that when the act from which the injury proceeds, was done wilfully, trespass is the proper remedy; but not so when it is the effect of carelessness, or negligence. But this distinction cannot be sustained, as will be evident from a little reflection. In the cases before mentioned, the log was thrown into the highway, and the water course was obstructed intentionally, and it might be, to produce the very injury that ensued, but trespass could not be maintained. On the other hand, if, while a person is carelessly handling a loaded gun, he should unintentionally cause it to go off and wound another, trespass would lie, although the act was not wilful, and the injury was the effect of negligence. So if a man should carelessly throw a brick-bat from a scaffold and unintentionally wound another, trespass would lie. In *Leame and Bray*, it was proved that the accident happened from negligence, and not wilfully, yet it was decided that trespass was the proper action. So in *Weaver and Ward*, where the defendant, exercising in the trained bands, fired his musket, and by accident hurt the plaintiff, it was trespass; and where a person suddenly turning round knocked another down, unintentionally, and without seeing him, trespass was holden to lie.

The true distinction unquestionably is, whether the injury be immediate, or consequential, as will appear clearly from the authorities.

Taylor v. Rainbow, (2 *Hen. and Munf.* 436) was trespass on the case, for shooting off a gun in a place where many people were assembled, so carelessly and negligently, though without any design to injure the plaintiff, that the contents of the gun struck his leg, and wounded him, in consequence of which wound his leg was amputated—he was unable to attend to his business, and was put to great expense, &c. It was contended that the plaintiff had mistaken his action, and that the defendant could be made answerable only in an action of trespass *vi et armis*. The whole court were of that opinion, on the ground that the injury was immediate, being occasioned by the discharge of the gun.—*Judge Roane* remarked, that there was no position in the law more clearly established than this, that wherever the injury is committed by the immediate act complained of, *the action must be trespass*. (*Covel v. Laming*, 1 *Camp. N. P. Rep.* 497.) In this case the defendant was the owner of a ship; being on board, and standing at the helm, he unintentionally, and through ignorance and want of skill, run her against the plaintiff's ship in the river Thames. The

action was trespass. It was contended for defendant, that the action could not be sustained, unless the act were wilfully done, and that it was wilfulness alone that could determine the nature of the act. Lord ELLENBOROUGH declared, he had always been of opinion, that the only just and intelligible criterion of trespass and case, was, whether the injury complained of arose directly, or followed consequentially from the act of the defendant. That as the defendant at the helm guided his vessel, the winds and waves being only instrumental in carrying her along, the force proceeded from him, and the injury was the immediate effect of that force.

Reynolds v. *Clarke*, (2 *Lord Ray.* 1399) was an action of trespass for putting up spouts to the defendant's house, by which the water was collected in great quantities, and thrown on the plaintiff's land, by reason whereof, &c. The question was, whether case or trespass was the proper action. The court decided the distinction in law to be, where the immediate act itself occasioned a prejudice, or is an injury to the plaintiff, or where the act itself be not an injury, but a consequence from that act, is prejudicial to the plaintiff; that in the first case, trespass *vi et armis* will lie; in the last, it will not. And in remarking on the case of *Preston* v. *Mason*, cited at bar, from *Hard.* 61, the court observed, that case might be law, because it was laid, that the defendant made the water to run; which was the same as if it had been laid, that the defendant poured the water; in which case trespass would have lain, because the immediate act of pouring would have been a trespass. In the report of this case, as we find it in 1 *Stra.* 634, the chief justice is represented as saying, if the action in the first instance be unlawful, trespass will lie; but if the act be *prima facie* lawful, and the prejudice to another is not immediate, but consequental, it must be an action on the case; but the chief justice, in his own report of the case, lays no stress on the lawfulness, or unlawfulness of the act.

Savignar v. *Roome*, (6 *Term Rep.* 125) was an action on the case, for driving wilfully against the plaintiff's carriage, whereby it was injured. After verdict, judgment was arrested, because the injury was immediate, and the action if any could be sustained, should have been trespass.

In the case of *Scott* v *Shepherd*, as we have it reported in 2 *Blac. and* 3 *Wil.* there was no diversity of opinion as to the rule, that where the injury is direct and immediate, the action should be trespass. The disagreement was as to the proper inference to be drawn from the facts of the case. Judge Blackstone considered the injury as proceeding from the person who last threw the squib, and not from the defendant. The other judges considered, that after the first act of throwing the squib, the different directions which it received from other hands, was a continuation of the first act of the defendant, and that the injury was the immediate consequence of that act, and on that ground the action of trespass was sustained.

In *Howard* v. *Bankes*, (2 *Bur.* 1114) the distinction between trespass and case was recognized to be this: immediate damage to the plaintiff's property is a ground for trespass, consequential damage to it, is a ground for case. The court decided that the damage was consequential, and sustained the action.

In 1 *Swift's Digest*, 540, it is laid down, that the criterion is not whether the act was accompanied with force, or whether there was an intent to do the injury, or whether the injury was occasioned by negligence; but the question always

will be, whether the injury was the direct and immediate effect of the act complained of, or whether it was merely the consequence of some act or omission.

In *Leame v. Bray*, (3 *East*, 593) the whole court recognized the rule laid down in *Scott v. Shepherd*, that where the injury is direct and immediate, the remedy is trespass; where it is mediate and consequential, it is case. This was said to be the rule deducible from all the authorities, ancient and modern; and LE BLANC, justice, declared, that in all the books, the invariable principle to be collected is, that where the injury is immediate on the act done, then trespass lies; but where it is not immediate, but consequential, then the remedy is case.

On the whole we are well satisfied, that whatever may be the apparent discrepancy between the cases, the rule is clearly and judiciously settled, that where the injury is direct and immediate, the action must be trespass, whether the act were done wilfully, or by negligence and want of care, and as the facts set out in the declaration show that such was the character of the injury complained of in this case, the judgment of the Common Pleas must be affirmed.

GIBBS *v.* FULTON.

In an action by the plaintiff to recover money paid by him as bail of the defendant, a transcript from an appellate court is not proper evidence of the proceedings in the court below.

This was an action of assumpsit, in which the plaintiff claimed to recover money paid by him, as bail for the defendant. The cause was brought from the Supreme Court of Ross county.

At the trial, the plaintiff, to prove the fact that he had been bail for the defendant, produced and offered in evidence, a transcript of a record, duly certified from the Common Pleas of Chester county, Pennsylvania. This transcript contained a proceeding, upon a *certiorari*, at the suit of *Gilbert Gibbs v. Samuel McClean*. This certiorari brought into the court of Common Pleas a transcript of a proceeding before a justice of the peace, in a suit between Samuel McClean, plaintiff, and John Fulton and Gilbert Gibbs, his bail.—Judgment had been rendered against Gibbs only, and this judgment, upon the certiorari; was affirmed.

When this transcript of the record was offered in evidence, the defendant objected to it as inadmissible, being but the copy of a copy. His objection was overruled, and a verdict found for the plaintiff. The defendant moved for a new trial, upon the ground of error in admitting the evidence, and the decision upon the motion was adjourned.

Leonard, in support of the motion. *Bond*, contra.

By the COURT.

The plaintiff could not recover against the defendant, without proof that he became his bail. This fact he was bound to prove by the best, not by secondary evidence. The best evidence was a transcript of the proceeding against Fulton, and the undertaking, as bail, founded upon it; whether that undertaking

was made, by a recognizance signed by Gibbs, or, by a judicial acknowledgement, made before the justice and entered by him.

Suit was brought against Gibbs, upon this undertaking, and judgment rendered against him. To this judgment he obtained a *certiorari*, and in his return the justice embodied all his proceedings, and upon this return the judgment was affirmed. We do not perceive upon what principle a judicial return can be made, where proceedings in one cause are required, embodying in it an official and judicial return in a different cause. As to the latter, if it were a judicial act, still, the original record remaining where it was first made, it should be resorted to as better and higher evidence than the transcript of it, certified into another court.

If special bail be entered in a suit in the court of Common Pleas, and the bail be fixed with the debt and judgment rendered against him, in a suit upon the recognizance, in the Common Pleas, and removed into the Supreme Court upon writ of error and affirmed, it would hardly be contended that a transcript of the record in the S. Court, certified by the clerk, would be proper evidence to establish the recognizance of bail. The plain course would be, to obtain from the court of Common Pleas, transcripts of the original suit in the Common Pleas, and also of the suit against the bail, with the certificate of affirmance upon error from the Supreme Court. The cases are the same in principal. The evidence ought not to have been admitted; and there must be a new trial, the costs to abide the event of the suit.

STEELE ET AL. v. WORTHINGTON.

Under particular circumstances, another consideration than that expressed in the deed may be given in evidence, where it does not contradict the consideration expressed.

Where a complainant in his bill calls upon the respondent to answer as to the consideration of a deed, such answer is evidence.

The Register of the land office might legally purchase lands at the public sales under the act of congress of May 1800.

A testator after appointing his executor, uses this language "I do invest him with full, ample, and complete power to dispose of (after my decease) in such manner as he thinks proper, all my estate of every description, real and personal, and invest him with full power to settle and adjust all my worldly affairs as he pleases; meaning expressly to invest him with as full power to that effect as I might possess, not incompatible with the tenor and substance of this last will and testament"—This confers upon the executor full power of sale over the estate.

Where parties understand their rights, and make an agreement to adjust a question of property between them, in a particular manner, a very strong case of imposition must be made out to induce a court of equity to interfere.

This cause was reserved for decision here by the Supreme Court in Ross county. It was a bill in equity, brought by the residuary legatees of Robert Gregg, deceased, to set aside a conveyance made by the executor under the will, upon the ground of fraud and imposition.

The bill charged, that the executor of the will of R. Gregg had conveyed the land in question, one hundred acres, to the defendant, without consideration and without authority. It charged, that the consideration expressed in the deed was one dollar only, and called upon the defendant to answer whether any other and what other consideration was given.

In his answer, the defendant admitted that no money consideration passed, and that the sum expressed was nominal only. He stated the real transaction to have been this: at the sales of public lands at Chillicothe, in 1801, a section and fraction of land, of which the land in controversy was part, was purchased in the name of Robert and Nathan Gregg, upon an agreement that the defendant was to be one half owner with them—that the first instalment was in fact advanced by the defendant, and the agreement was, that each party should pay half the purchase money, and when the patent issued, Gregg should convey to Worthington half—that the section and fraction contained a large surplus and that, after some time, it was agreed between the parties, that Worthington should receive back his money advanced, and accept of the 100 acres of land in question, as a compensation for his interest in the contract. A bond was given for the conveyance accordingly, and to take up this bond the conveyance was executed by the executor.

The facts stated in the answer were substantially made out in proof, in the progress of which it appeared in evidence, that at the time of the sale the defendant was register of the land office, and one of the persons who were required by law, and in fact did, superintend and conduct the sale.

Creighton and Bond, and Atkinson, for complainants. *Scott*, contra.

Opinion of the court by Judge BURNET.

The complainants insist that the deed executed to the defendant by N. Gregg, for himself, and as executor of the last will and testament of his brother, R. Gregg; ought to be set aside on the following grounds. 1st. That it was wholly without consideration. 2d. That the contract between the defendant and the Greggs, for the purchase of the land from the government at the public sales, was in direct contravention of the act of Congress, and therefore fradulent and void, and that it was also a fraud at common law. 3d. That the executor was not authorized by the will to execute the deed, and that by doing so he has attemptcd to practise a fraud on the complainants. 4th. Taht if the executor was authorized to convey, the answer and exhibits show such a case of imposition on the executor, that a court of equity will relieve against it.

1. It will be recollected that the consideration mentioned in the deed, is one dollar. This is *prima facie*, a good consideration, and until it be impeached, is sufficient to sustain the deed. But the complainants have cast on it the imputation of fraud. They declare it to be fictitious, and allege that the conveyance was wholly without consideration. They have callled on the defendant to answer that allegation, and to state what the real consideration was, if any existed. The answer sets out an agreement, by which the defendant and N. & R. Gregg purchased a section and fraction of land, at the public sales; that the defendant advanced the first payment: that the certificate of the purchase was taken in the name of the Greggs; that some time after, the Greggs purchased out his equitable right, and gave him a title bond for one hundred acres of land, being the land now in controversy, and that after the death of R. Gregg, N. Gregg, in good faith, executed the deed in question, agreeably to the title bond. The proof, as far as it goes, corroborates and con-

firms the answer. The certificate, signed by N. & R. Gregg, establishes the equitable interest of the defendant in a moiety of the whole tract. It declares that he was jointly concerned in the purchase, and that his conduct in the whole of the transaction was correct and honorable. It also admits that the first payment was advanced by him. The deposition of William Creighton corroborates the answer, in relation to the title bond. The whole answer is responsive to the bill. It is not impeached by any part of the testimony, and as far as the want of consideration is involved, it satisfactorily rebuts the charge.

But it is alleged that the defendant has no right to avail himself of the facts disclosed by the answer, because they show a consideration different from that expressed in the deed. Why then, it might be asked, was the defendant required to state them; and why did not the complainants rely on the evidence within their power. They seem to have taken it for granted, that the deed, *prima facie*, was good—that it was sufficient to convey the estate—and that they must fail in the object of their suit, unless they can impeach it. It was for that purpose that they called for the disclosure. If they avail themselves of it as evidence, it purges the transaction of fraud, as to the consideration. If they reject it, they stand as they were, and the deed remains unimpeached. It is believed however that this objection applies to deeds that have been actually impeached, and which cannot be sustained without explanatory proof, and that in such cases, it goes no further than to exclude evidence of a consideration, inconsistent with the one expressed; but that a party may aver another consideration, provided it be consistent with the one expressed in the deed. This seems to be the rule in *Philips' Ev.* 424—5, and in the cases there referred to.

If the objection should be applied to all cases in which there is a charge of fraud unsupported, and extend so far as to prohibit proof of any variance between the real consideration and that expressed, much inconvenience and injustice would result, because however fair and upright the transaction might be, an omission to state the exact consideration would prove fatal to the deed.

The proposition seems to amount to this, that a variance between the true consideration, and that expressed, is a fraud *per se*, that cannot be purged or explained by proving the truth. It sometimes happens, in an exchange of property on which no cash value has been fixed by the parties, that a nominal sum is stated in the deeds bearing no comparison with the value of the property conveyed. This is innocently done for the purpose of convenience; no person is, or can be injured by it, yet, on the proposition advanced by counsel, the deeds are fraudulent; they may be avoided by the creditors, or heirs of the grantors, and the grantees are without remedy.

The cases cited on this point do not sustain the complainants. The one in 7 *John.* 341, was a suit at law, brought on articles of agrement. The planiff offered parol proof of an agreement, not contained in the articles, in addition to the covenant expressed, which was not admitted. The court remarked, however, that if the deed were contrary to the truth, the party might have relief in equity.

The case cited from 1 *John.* 139, is of the same character. It was an action brought on a parol promise, set up as additional consideration for the conveyance of personal property, which was not mentioned in the written contract.

In the case of *Clarkson v. Hanway*, (2 *P. W.* 203) the grantor was a weak

old man, seventy years of age. The consideration expressed in the deed, was an annuity of 20*l.* which bore no comparison with the real value of the premises. To repel the fraud, proof was offered, that natural love and affection was a part of the consideration of the conveyance. The evidence was vague and contradictory, and was rejected as being incompatible with the consideration expressed.

Watt v. Grove, (2 *Scho. and Lef.* 500) was a case of gross and complicated fraud. The deeds set up were impeached. The chancellor remarked, "that it would be dangerous to permit *an impeached* deed to be supported by evidence of considerations *wholly different from those alleged in it.*" "*That the court might reform the deed when the incorrectness does not go to impeach the general fairness of the transaction.* This is all the defendant asks. Having shown that the transaction was perfectly fair, that the incorrectness was of a nature not calculated to injure or deceive, and that the real consideration was altogether consistent with the one expressed, he insists, that his deed is reformed, and ought to be sustained.

2. The second ground taken in support of the bill is, that the original purchase of the land in question, at the public sales, was in contravention of the act of congress, and contrary to the principles of the common law.

To decide on the first branch of this objection, it is necessary to examine the acts of congress on this subject.

The 4th section of the act of 1796 directs, that the land shall be offered for sale at public vendue, under the authority of *the governor, or the secretary of the western territory* and the *surveyor general.*

By the 8th section, *the governor* of the territory north-west of the river Ohio, is directed *to cause books to be kept, in which* shall be regularly entered an account of the dates of all the sales made,—the situation and number of the lots sold,—the price at which each was struck off,—the money deposited at the time of sale,—and the dates of the certificates granted to the different purchasers. It is made the duty of the *governor or secretary of the said territory,* at every suspension or adjournment, for more than three days, *of the sales under their direction,* to transmit to the secretary of the treasury a copy of said books certified, &c.

The 4th section, of the act of May, 1800, *substitutes the register of the land office in place of the surveyor general,* and directs the lands to be offered at public vendue, under the direction of the register of the land office, and of either the governor or secretary of the north-western territory. It also provides that *the superintendants* shall observe the *rules and regulations of the preceding act,* in classing and selling fractional with entire sections, and *in keeping and transmitting accounts of the sales,* and that all lands remaining unsold at the closing of the public sales, may be disposed of at private sale by the registers of the respective land offices, in the manner thereafter prescribed.

By the 7th section, it is made the duty of the register to *receive and enter on books, kept for that purpose only,* the *applications* of any person or persons, who may *apply for the purchase* of any section, or half section, and who shall pay, &c.

By the 9th section, it is made the duty of the registers of the land offices, to

to transmit quarterly, to the secretary of the treasury and to the surveyor general, an account of the *several tracts applied for.*

The 10th section, provides, "that the registers aforesaid shall be precluded from *entering on their books any application* for lands in their own name, and in the name of any other person in trust for them; and if any register shall wish to purchase any tract of land, he may do it by application to the surveyor general, who shall enter the same on books to be kept for that purpose by him, who shall proceed in respect to such applications, and to any payments made for the same, in the same manner which the registers, by this act, are directed to follow in respect to applications made to them for lands, by other persons."—These are all the provisions that appear to have any bearing on the question—and from a careful examination of them, the following conclusions seem to result:

1st. That at the time the land in question was sold, the register and the governor, or secretary of the territory, were constituted superintendants of the public sales.

2nd. That it was the *exclusive duty of the governor, as one of the superintendants, to cause books to be kept, in which should be entered an account of the proceedings at those sales.*

3d. That it was made the express duty of *the governor or secretary of the territory,* to transmit copies of those books to the secretary of the treasury—and that the public sales were considered as being under the particular direction of the governor or secretary, as either might attend.

4th. That the surveyor general, under the act of 1796, was not required to take any agency in keeping the sale books, or transmitting copies, and that as the register was substituted for the surveyor general by the act of 1800, which expressly requires the superindants to observe the same rules and regulations, in *keeping and transmitting accounts* of the sales, as were prescribed in the act of 1796, it follows that the register *was not required to take any agency in keeping those books or transmitting copies.*

5th. That private sales are to be effected by application to the register, who must enter the same in a book kept for that purpose only, which must therefore be distinct from the book of public sales, kept by the governor, and may be denominated the register's *sale book.*

6th. That the only prohibition as to the registers, is, that they shall not enter on *their books* any application for lands in their own names, or in the name of any other person for their use.

If these inferences be correct, it must follow that the registers are not prohibited from purchasing at the public sales, because public sales cannot be made on application, and are not entered on the register's book, but on the sale book kept by the governor or secretary, and because the prohibition being confined to such sales as are made on applications that must be entered on the register's book, it cannot embrace public sales, that are not so entered.

It also follows from these premises, that the public sales are so guarded by the agency of the governor, as to render the prohibition altogether unnecessary.

The government are as well protected from imposition at the public sales, by a faithful discharge of the duties assigned to the governor, as they are at private

sales, by the vigilance of the register. It would be unreasonable to extend the prohibition beyond the letter of the statute, when no beneficial object would be gained by it, either in relation to the rights of the government, or of third persons. The construction set up by the conplainants would effectually prevent the registers from purchasing any part of the land disposed of at public sale, because the provisions made in their favor by the 10th section, cannot be resorted to, till the public sales, at which every tract must be offered, have closed, and the private sales have commenced.

If it had been the intention of congress, to prevent them from purchasing at the public sales, in the ordinary way, it is a reasonable supposition, that some other way would have been provided through the agency of the governor or surveyor general, as has been done in relation to purchasers by *application and entry*. The privilege given to the registers, of purchasing by application and entry, was intended as a substitute for the right which is taken away in the preceding part of the section; we should therefore naturally conclude that it was as broad as the prohibition. But such cannot be its operation, if the prohibition be extended to purchasers at public sales, for the very obvious reason that the public sales must have closed before the register can have availed himself of the substitute.

It is not necessary here to resort to the technical meaning of terms, or the distinction of character, in which the defendant acted, first as superintendant of the public sales, and afterwards as register of the land office; for if the terms used in the 10th section, had been sufficiently comprehensive to embrace both public and private sales, we should not have construed their meaning or restricted their operation on that ground.

But if the register had been guilty of a manifest fraud on the government, it is a question between the parties affected by the transaction. Government might have disavowed the contract and withheld the title,—or they might have waived the objection and confirmed the sale. This they have done, and it does not lie in the mouth of a third person to complain. The party on whom a fraud is practised, may take advantage of it, or waive it. If he does the latter, and confirms the contract by executing a deed, third persons cannot impeach it, much less can a *particeps criminis*, be suffered to do so. If any fraud was practised in this case, it was by the Greggs, who purchased the property in their names, for the joint benefit of themselves and the register. They were the persons who consummated the fraud, and to say the least of them, they were *in pari delicto* with the register. The objection, therefore, extends further than counsel would willingly follow it. If the statute contains such a prohibition as renders a purchase, made in the name of another, for the benefit of the register, a fraud on the government, such a purchase is not only void as to the register, but as to all others concerned with him. The act cannot be purged by excluding the register. If fraud existed, the Greggs participated in it, and must be equally affected by it. The objection goes to the whole purchase, and taints it throughout. The same principle that would justify the court in deciding against the defendants, would restrain them from decreeing in favor of the complainants. In all such cases equity refuses to interfere in behalf of either, and as the complainants claim in the character of devisees of R. Gregg, they stand in his shoes.

In regard to the second branch of this objection, it may be remarked, that it is not necessary to resort to the common law to determine the legality of this purchase. The powers and disabilities—the privileges and prohibitions of the register, are regulated by the statute, and are to be decided by it. Congress having prohibited him from purchasing at private sales, by application in his own office, without including in that prohibition the right of purchasing at the public sales, the natural inference is, that they intended to permit the latter. By including in the prohibition only one of the modes of purchase, they have virtually excluded from it the other, thereby clearly indicating it to be their intention not to prevent him from purchasing at the public sales.

But waiving this inference from the statute, the authorities cited to show that the consideration is bad, and the sale void at common law, are not applicable to the case, as between these parties.

The general doctrine in *Sug. Law. Vend. chap.* 14, *sec.* 2, is, that trustees, agents, &c. are not permitted to purchase the property to which their trust extends, except under certain restrictions; but as such purchases are merely *mala prohibita*, not *mala in se*, they admit of confirmation by the injured party, who alone can take advantage of them; and if the *cestui que* trust acquiesces for a long time, equity will not assist him to set aside the sale.

In this case, the *cestui que* trust has not only acquiesced more than twenty-five years, but has literally confirmed the sale. He is still satisfied with it, and the only complaint we hear is from third persons, who occupy the place of a *particeps criminis*. The doctrine is well established, that the remedy for a breach of trust is exclusively with the party injured. The *cestui que* trust may apply for a new sale, or may confirm the former sale; and if the purchaser [the trustee] has sold at an advance, he may claim the excess.

In *Davoe v. Tanning*, (2 *John. Cha.* 252) the principle is clearly expressed, that none but the party injured can question the validity of the sale. In that case, chancellor Kent ordered the lot to be set up again, and re-sold for the benefit of the *cestui que* trust, provided it would sell for more than the amount of the former sale, together with the sum expended in improvements and interest; but, if it would not sell for more than that amount, that the first sale should be confirmed.

In *Doolin v. Ward*, cited from 6 *John.* 194, the claim of the plaintiff rested on a verbal promise, that if the plaintiff would not bid against him at a public sale, he [the defendant] would purchase the articles, and divide them with plaintiff. No consideration passed, nor was there any thing obligatory on either party.

But if, as in the case before us, the plaintiff had paid the first instalment of the purchase money, and the defendant having availed himself of that payment, had afterwards given his obligation to the plaintiffs to deliver him a part of the articles, there would have been some resemblance between the cases, and the decision would probably have been very different.

3. The third ground is, that the executor was not authorized to make the conveyance, and that in doing it he has attempted a fraud on complainant. From the phraseology of the objection, it might be considered as confined to the simple act of the execution and delivery of the deed; but as it is generally true, that the greater power involves the less, the objection was, no doubt, intended to ex-

tend as well to the power of negotiating the contract, as to the right of consummating it, by passing the title.

This branch of the case necessarily leads to the examination of the will of R. Gregg. After appointing his brother, N. Gregg, sole executor, the testator goes on to say, "I do invest him with full, ample, and complete power to dispose, (after my decease) in such manner as he thinks proper, all my estate of every description, real and personal, and invest him with full power to settle and adjust all my worldly affairs, as he pleases; meaning expressly to invest him with as full power to that effect as I might possess, not incompatible with the tenor and substance of this last will and testament." It appears to me, that language could not easily be selected better calculated to express the power claimed by the executor, than that which the testator has adopted. The epithets are strong and comprehensive; the power to dispose, and the manner of doing it, are limited only by the discretion of the executor, and it is extended to the whole estate, real and personal. He is also to settle and adjust all his worldly affairs as he pleases, and to prevent cavil, and as if to make certainty more certain, he declares it to be his express intention to vest in his executor the same power that he himself then possessed.

The unavoidable conclusion is, that the executor has power to sell the estate, and to settle and adjust all claims against it.

The executor being clothed with this power, the defendant presented the title bond, executed by the testator and himself. Being fully satisfied of the justice of the demand, he was bound in the faithful discharge of the trust to settle it by conveying the land, and taking up the bond.

4. The last ground taken by the complainants is, that if the executor was authorized to sell and convey, yet the answer and exhibits show it to be such a case of imposition, that equity ought to relieve. The complainants undertake to maintain this ground, by taking it for granted that the claim was against law, and without consideration. The first part of this hypothesis has been disposed of already, and it is only necessary to look into the answer and exhibits to ascertain that no part of it is supported by the facts. The defendant, as appears from the certificates of the Greggs, as well as from the answer, had an equitable right to the undivided moiety of a section and fraction of land in the vicinity of Chillicothe, purchased in the name of the Greggs, at the public sales. It was ascertained that there was a large surplus in the tract—the defendant had advanced the first payment—the claim had been held in common upwards of a year—the country was increasing at that time in population, with unexampled rapidity, and although the land in the first instance might have been purchased at a fair price, it must have risen greatly in value during the period that the parties held it as a joint property.

This being the state of the case, an agreement was made between the parties, by which the defendant was to relinquish his claim to the entire tract. The Greggs were to refund the money advanced by defendant, and convey to him, when the patent should be procured, one hundred acres, on the side of the tract adjoining his other lands.—The money was refunded, and a title bond given for the one hundred acres. From these facts it would seem, that the consideration was abundantly sufficient to support the contract, and that the advantage to the parties must have been about equal; but whether this was so or not, they were

all men of prudence, equally acquainted with the situation and nature of the property, and of their respective rights in it. There was no misrepresentation or concealment of the truth. N. & R. Gregg must have supposed they were making a good bargain; there is no evidence to show they were not, and they seem to have been contented. With the exception of Mrs. McClean's deposition, which, to say the least of it, is accompanied with very suspicious circumstances, there is no evidence, that they at any time complained of their bargain, or wished to rescind it. But if that deposition be taken as true, the presumption is, that the objection of R. Gregg, of which he speaks, was an after thought, originating, not from a belief that he had made a bad bargain, but from a hope that he might oust the defendant of all right, on the supposition that he could not become a purchaser at the public sales.

On no other ground can the objection be reconciled with the certificate he previously gave in conjunction with his brother. But be this as it may, the contract appears to be fair, equal, and equitable. The suspicions cast on it by the bill are very naturally explained, and fully obviated by the answer, which is responsive, and is not contradicted but corroborated by the testimony. It is not the province of equity to weigh the mutual considerations, leading to a contract, with great exactness, in order to ascertain if there be not some grains of difference, nor does it originally limit the power, or control the discretion of the contracting parties, who are treated as free agents, and left to the exercise of their own judgments. Whenever equity does not interfere with a contract, or refuse its aid to carry it into execution for inadequacy of consideration, it is on the ground of fraud, which must either be clearly proved, or result irresistably at the first view, and without calculation, from the grossness of the disparity.

The complainants do not present such a case. The most natural inference to be drawn from every thing disclosed, is, that the disparity, if there be any, was in favor of the Greggs. It was contended by the complainants' counsel, that the defendant, by his certificate to N. & R. Gregg that they were the purchasers of the land, was estopped from setting up a claim to any part of it. I do not see how such a consequence can result from that certificate, as it contained nothing inconsistent with the existence of a trust. It frequently happens, for convenience, that one joint purchaser, takes the title in his own name, at the request, or on the express order of the other purchasers. Sometimes land is conveyed to an agent by an absolute deed, as the most convenient way of effecting a sale, but such a deed would not estop the owner from showing the trust, and claiming the purchase money. The certificate in this case was *prima facie* evidence that the right was exclusively vested in the Greggs, but that inference was not inconsistent with the existence of a trust. A grantor is sometimes estopped by his own deed, but it must be in relation to a matter wholly incompatible with it; as, if a person holding an equitable title, should sell and convey by deed in fee, with covenants of sezin and warranty, and should afterwards obtain a legal title, in his own name, his deed would enure to the benefit of his grantee, and he would be estopped by his covenants from setting up title in himself, which would falsefy those covenants, and be wholly incompatible with them; for if the covenants were true, the legal title passed by the deed. In this case the certificate of the defendant was compatible with an agreement, that when the patent should be obtained in the name of the Greggs, they should convey a moiety, or any other portion of the land to the defendant.

But independent of all other considerations, if the facts set up by the complainants be true, and the legal inferences they draw from them be correct, they have a complete remedy at law. An examination of the case, as they present it, will show that on the death of their ancestor, the legal title vested in them. That the defendant never had an equitable right to any part of the land. That the executor had no right to convey, and that the deed to the defendant was fraudulent and void. On that state of the case, which is the ground on which they have placed themselves, they have no necessity for the aid of chancery.

Again, as it has been decided that the acts of congress do not prohibit the register from purchasing at the public sales, it follows that he had an equitable right to an undivided moiety of the whole tract, and that if the contract on which the title bond was given be not valid, that right has not been extinguished.—And as it is a rule, that he who asks equity must do equity, it would seem that if the complainants could get rid of that contract, they would thereby establish the defendant's right to the undivided moiety—conseqnently a decree for a reconveyance of the one hundred acres, would be on the condition that they conveyed to the defendant his undivided interest in the entire tract, on equitable terms.

The bill must be dismissed, at the cost of the complainants.

McFEELY *v.* VANTYLE.

Where the title of the plaintiff is defectively set out in the declaration, and the defendant in his plea supplies the facts omitted in the declaration, the judgment will not be arrested after verdict.

This case was adjourned from the Supreme Court of Hamilton county, upon a motion in arrest of judgment. The case was as follows:

The first count in the declaration sets out a contract, in which the defendant convenanted to convey to the plaintiffs the half of a mill seat, with a part of the defendant's plantation, necessary for said seat, &c. The part to be conveyed is decribed by metes and bounds, and was to contain five acres at least, or as much as the parties should deem necessary for a mill. One of the lines called for, is to run up the creek, through the bottom, as the parties might agree, to the line of Lawrence's land. It is averred that the defendant agreed to make the plaintiffs, a good and sufficient deed for the premises, on the payment of three hundred dollars, and that that sum was fully paid. The breach is, that the defendant did not make a good and sufficient deed, &c.

The second count sets out the contract substantially as the first does, but avers payment of a part of the consideration money, and a tender and refusal of the residue.

The first plea takes issue on the payment and tender. The second plea alleges that the plaintiffs ought not to sustain their action, because the defendant was ready to make and execute to the plaintiffs, a good and sufficient deed, whenever they would agree with him, as to the line, and pay agreeably to the form and effect of the indenture; and tenders an issue.

A verdict was found for the plaintiffs on both issues, and a motion for a new trial overruled.

The defendant then filed the following reasons in arrest of judgment.

1st. "That there is no averment, that the parties agreed on the land to be conveyed, or any proof of what land was agreed on, although the covenant states the same, and makes such an agreement necessary."

2d. "No offer to submit to arbitration; no proof that plaintiffs made any offer, although it is proved to be a part of their bargain, and not contradicted."

3d. "That there is no such covenant as that set out in the declaration, viz. that a deed should be made unconditionally."

4th, "No averment of a demand of a deed."

5th. "It is set forth that the land should be so much as the parties might agree on—no agreement averred."

Gazlay, in support of the motion.

Opinion of the court by judge BURNET.

The second, third and fourth reasons do not require to be particularly noticed. They either relate to matters not presented by the pleadings, or to such as should have been noticed at an earlier stage of the proceedings, and in a different form. The first and fifth reasons assign the omission of an averment, that the line, and the quantity of land to be conveyed, had been agreed on by the parties. These objections resolve themselves into one; for as the course and distance of all the lines are given, except one, which is to terminate at Lawrence's line, it follows, that fixing the course of that line must settle the quantity of land to be conveyed; but a reference to the record will show, that the defendant has supplied the omission by his second plea, which puts that matter distinctly, though informally, in issue, and as that issue was found for the plaintiffs, the facts must have been proved to the satisfaction of the jury.

The contract is drawn with a want of technical precision, though the meaning of the parties can be sufficiently ascertained. The pleadings are informal throughout, as well on the part of the defendant, as of the plaintiff. The title set out in the declaration appears to be a good one, but it is defectively stated. The substance of the contract is given correctly. The difficulty arises from the want of proper averments in the declaration. The defendant might have demurred, but he did not see proper to take that course. He chose rather to supply the defect, and rest on the evidence. After having traversed the payment and tender, he has informally put the agreement, as to the lien, in issue; the whole of that subject was therefore before the jury. It is true, that the defendant could not convey till it was ascertained what he was bound to convey but it is equally true, that the second issue could not have been found for plaintiff, unless that matter had been ascertained by the evidence at the trial. The defect, therefore, was supplied by the plea, or cured by the verdict. Whatever might have been the result of a demurrer, we do not feel at liberty, under existing circumstances, to arrest the judgment.

VANCLEVE *v.* WILSON.

In cases certified to the Court of Common pleas upon attachment from justices of the peace, the jurisdiction of the common Pleas is original, not appellate and an appeal lies to the Supreme Court.

This case was commenced by attachment before a justice of the peace, for the sum of 64 dollars 91 cents. A garnishee was summoned, in whose hands 11 dollars 31 1-2 cents were secured. Afterwards, an affidavit was made, and the justice issued an attachment against lands and tenements. The officer returned a levy upon lands, and the justice certified his proceedings, with the return of the officer, to the court of Common Pleas. The defendant appeared in the court of Common Pleas, and entered bail, pleaded to the action, and went to trial. The jury gave a verdict of 56 dollars for the plaintiff, and the defendant appealed to the Supreme Court of Montgomery county, where the proceedings were all had. The plaintiff moved to quash the appeal, and the decision of the motion was adjourned to this court.

Munger and Fales, in support of the motion. *Stoddart*, contra.

By the COURT.

The 17th sec. of the act regulating attachments before justices of the peace, passed in 1816, under which these proceedings were had, gives jurisdiction of the cause to the court of Common Pleas. This jurisdiction cannot be appellate, for nothing is appealed from; no judgment is rendered to be revised, and the cause does not come into the court of Common Pleas, by any act of either party, but in consequence of a legal duty imposed upon the justice. The proceedings in the court of Common Pleas, in taking bail, filing declaration and other proceedings, and in the trial of the cause, are all essentially of the original character, The jurisdiction, therefore, must be original, and the motion to quash the appeal is overruled.

MAXFIELD *v.* JOHNSTON ET AL.

Where there is a general verdict for the Plaintiff upon a declaration containing several counts, and one of the counts is defective, judgment will be arrested.

But a count, founded upon a receipt for money without alledging that the money was received for the use of the plaintiff is not so defective that judgment will be arrested after verdict.

This case was adjourned from the county of Portage, upon a motion made by the defendants, in arrest of judgment.

It was an action of assumpsit. The declaration contained two counts—the first was as follows:

"For that whereas the said Charles and Adamson heretofore, to wit, on the 21st day of August, 1818, at Nelson, in said county of Portage, made their cer-

tain memorandum in writing, commonly called a receipt, bearing date on the day and year aforesaid, their own proper hands and names being thereto subscribed, and then and there delivered said memorandum, or receipt, to the plaintiff, and thereby then and there acknowledged to have received on that day, of the said plaintiff, two hundred dollars. By means whereof, the said Charles and Adamson then and there became liable to pay to said plaintiff the said sum of money, in said receipt specified, according to the tenor and effect thereof: and being so liable," &c. charging the assumption and consideration in the usual form.

Second count, for four hundred dollars, for work and labour, four hundred for wares and merchandise, money lent, received, and advanced in the common form.

The jury found a general verdict for the plaintiff. The defendants moved in arrest of judgment, and assigned the following reasons.

The verdict is general upon all the counts in the declaration, and the first count therein is insufficient in law to authorize the court to render judgment in this: that it is not alleged in said count that the said sum of money, therein mentioned, was had and received, or otherwise possessed by defendant, to the use or on account of the plaintiff, or other than for the defendant's own use.

Wright in support of the motion. *Sloane* and *Newton*, contra.

Opinion of the court, by Judge HITCHCOCK.

The declaration in the present case contains several counts, and for a supposed defect in the first, it is moved to arrest the judgment. Where there is a general verdict for the plaintiff upon a declaration containing several counts, and one of the counts are defective, the judgment will be arrested. It is not however for every defect that such consequences shall follow. Mere formal defects are cured by verdict. Such defects too as arise from the manner in which the title of the plaintiff is set forth, are cured by the verdict, provided sufficient appears to satisfy the court that the plaintiff had good cause of action. If, however, it appears that the plaintiff has no cause of action, or in other words, that the title itself, upon which he claims to recover is defective, such defect is not cured by verdict. After a jury has passed upon a case, every thing is to be presumed to sustain their verdict.

The first count of the plaintiff's declaration sets out that the defendants received of the plaintiff a specific sum of money which they promised to pay, &c. It is defective in this particular, that it does not state that the money was received to the plaintiff's use. Had the declaration contained but a single count for money had and received by the defendants, to the use of the plaintiff, the receipt which is referred to in the present case, would have been good evidence under such declaration to authorize the plaintiff to recover. It is manifest then that the count objected to sets out a good title, although it is done defectively. After verdict the court must presume that it was proven on the trial that the money was received to the use of the plaintiff, otherwise the jury would not have found as they have done. The omission to state that the money was received to the *use* of the plaintiff is cured by the verdict. Whatever might

have been the opinion of the court upon a demurrer to the declaration, it is now too late to take exception to it.

If the receipt of the money had been accompanied with an express promise to pay, it would have been equivalent to a promissory note. The consideration would have been sufficient to support the promise. After verdict every promise laid in the declaration is to be considered as an express promise. It is too late to say that it is no other promise than such as is implied in law. This case then is presented to the court as it would have been had there been an express promise to pay. Such promise would have been a sufficient consideration to support it, and would be obligatory on the party. For this reason, therefore, the judgment cannot be arrested.

Let judgment be entered for the plaintiff.

LITLER v. HORSEY.

One of several sureties, against whom judgment has been obtained, cannot sustain a separate action against the principal, under the 5th section of the act for the relief of sureties. But in such case, where there is a joint judgment against several sureties, all must join in the action.

This was a writ of error to a judgment of the court of Common Pleas of Pickaway county, reserved in the Supreme Court of that county for decision here. The original action was a special assumpsit, and the facts, upon which the opinion of the court was founded, were as follows:

On the 21st of April, 1818, Litler the defendant, and one Heath made a note for 2,200 dollars negotiable at the office of the bank of the United States at Chilicothe. It was endorsed by the plaintiff, Horsey, John White, and James Moore, and discounted and the proceeds received by the drawers. This discount was an accommodation for the drawers, and the note drawn and endorsed by the same parties, was renewed until the 27th October, 1818, when Asael Heath's note, endorsed by the plaintiff, John White, James Moore, the previous endorsees, and Job Radcliffe, an additional endorser, was discounted, and th proceeds applied to take up the note of Litler and Heath. Litler's name was thus withdrawn from the paper, and the note was renewed and reduced by the same parties until June 1, 1819, when Asael Heath's note was discounted, endorsed by the plaintiff, and by James Moore, Job Radcliffe, and Jonathan Heath, instead of John White. The note thus endorsed was renewed once, and not being paid, suit was brought against the plaintiff and the other endorsers, and judgment rendered against them. Horsey had not paid the money; and it was agreed that there was no proof that Horsey endorsed the first note at the request of Litler, other than the presumption arising from the fact, that Litler was one of the drawers of that note; and there was no proof that Litler had any information or knowledge that Horsey had endorsed the note in question.

These facts appeared upon the pleadings, and upon a bill of exceptions, made part of the record. The jury found a verdict for the plaintiff, and judg-

ment was given upon the verdict, to reverse which the writ of error was brought.

Irwin, for plaintiff in error. *Ewing*, contra.

By the COURT.

At the common law a surety has no action against his principal, until such surety has paid the money; and the remedy extends no further than to recover back the amount paid, as in any other case of money paid for the defendant, at his request. This being the rule, the action of every surety must be for his own advances, and must be in its nature separate. For although two or more joined as sureties in the writing, that act gave them no right, even if it could be considered a joint act. Each surety could recover the amount he had paid, and no more, and the principal, though subject to the expense of separate suits, could not be subjected to a judgment for any greater sum than his own original debt.

Our statute gives to the surety a totally different remedy. It authorizes the surety to sue a severe process, and obtain a summary judgment against his principal, so soon as the creditor shall have obtained judgment against the surety. The judgment is to be rendered for the "*proper amount*," which of course must be the amount of the judgment against the security. The foundation of this proceeding in favor of the surety is totally different in principle from the proceeding at common law. It is not the amount paid by the surety, but the whole amount of the judgment, for which the surety may proceed against the principal. Where there are, as in this case, four sureties, upon the doctrine contended for by the defendant in error, each is entitled to a separate judgment against the principal for the whole amount. And each, upon the hypothesis that *he* might be compelled to pay, would claim to proceed and collect the whole amount of his judgment. Thus a necessity might be created for more litigation, to settle and adjust all the rights of the parties. The court conceive that this would not be a reasonable construction of the statute. The judgment which gives the right of the surety to sue, is an entire and single judgment against all; the right it confers upon them must also be entire. Such being the opinion of the court, it is unnecessary to enquire whether the plaintiff could, upon the facts stated, be considered a surety for the defendant. Were that fact fully admitted, he could not, in this case sustain his separate action. The judgment must be reversed.

LESSEE OF ATKINSON v. DAILEY.

A lease for school lands is not valid unless it be acknowledged by the grantors before a judge or justice.

At the trial of this cause, which was an ejectment, in the Supreme Court of Monroe county, the plaintiff offered in evidence a lease executed by William Kent and Robert Carpenter, trustees of the original surveyed township, No. 7, in range 7, Monroe county, for section sixteen, in said township, the premises

in dispute to his lessor. The execution of this lease was attested by three witnesses, one of whom was the township clerk. It was not acknowledged before any judge or justice, but was recorded. The defendant objected to the lease being given in evidence; the objection was sustained, and the plaintiff became non-suit.

A motion was made to set aside the non-suit, and award a new trial, on the ground that the court mistook the law in rejecting the lease. The decision of this motion was adjourned to this court.

Beebe, for plaintiff. *Stokely*, for defendant.

By the COURT.

The lease offered in evidence in this case and rejected, is dated December 28, 1822, and appears to have been recorded January 8, 1825. It was made under the provisions of the act to provide for leasing certain school lands therein mentioned, passed *January*, 27, 1817. (*vol.* 15, 292.) This act is silent as to the mode of executing leases; but the third section requires, that leases executed under the law shall, "*in all cases, be recorded by the clerk of the township, and also by the recorder of the county at the proper costs and charges of the lessee or lessees.*"

As the act providing for making these leases prescribes no particular mode of executing them, the court are of opinion, that they can only be valid when executed conformably to the general law. By the act of *Feb.* 24, 1820, (*vol.* 22, 219) it is distinctly required, that in addition to being signed and sealed in the presence of witnesses, deeds, for the conveyance of lands, shall be acknowledged before a judge of the court of Common Pleas, or a justice of the peace. This provision extends not only to deeds, but to "*other instruments of writing, by which any lands, tenements or hereditaments shall be conveyed, in whole or in part, or otherwise affected, or incumbered in law.*" The lease in question has not been thus acknowledged; it has not, therefore, been executed agreeably to law, and cannot invest the lessor of the plaintiff with title. It was properly rejected, and the motion for a new trial must be overruled.

VANCE *v.* BANK, OF COLUMBUS.

Poundage is only due to the Sheriff where he has actually made and received the money on execution. He is not entitled to poundage when the money is paid by the debtor directly to the plaintiff.

This cause came before the court upon a writ of *certiorari* from the Supreme Court of Champaigne county, to the court of Common Pleas of the same county.

The facts of the case were these: At the April term of the Common Pleas, 1822, the bank obtained a judgment against Vance for 6000 dollars, upon which an execution was issued and levied upon real estate. A sale not being effected, in consequence of no person bidding the proportion of the valuation required by law, the execution was returned with the levy and valuation, and endorsed not sold for want of bidders. Several successive writs of *venditioni exponas* were

issued, upon which the same return was made. After the last *vendi.* was thus returned, Vance paid the money to the bank, and paid up all the costs, but the poundage claimed by the sheriff. This he refused to pay, and made a motion in the Common Pleas to have an entry of satisfaction made on the judgment.— This motion was resisted, and overruled by the court. To reverse this order the *certiorari* was brought.

Mason and *Cooley*, for plaintiff in certiorari.

By the COURT.

The distinction taken by the counsel, between the language of our statute and that of other countries referred to, is a very clear one. The phrase "*money made on execution*" can only relate to such sums as are actually paid into the sheriff's hands, upon the execution. The money is not *made* by the officer, when paid directly by the debtor to the plaintiff. A different construction would imply that the poundage was given merely to swell the bill of costs, and increase the sheriff's perquisites, and to this we cannot assent. We agree with the counsel, that is given as a compensation for services really performed.— When this is not done compensation cannot be claimed. The order must be reversed, and the Common Pleas instructed to enter satisfaction on the judgment.

FULTON ET AL. v. STUART.

Where a lessee assigns a part of the premises to a third person, for the whole term of the lease it is but an under-leasing, and the lessor can sustain no action on the lease for rent against such assignee.

This was an action of covenant brought from Muskingum county. The declaration sets forth a lease for years, from the plantiff to Jeremiah P. Munson, and alleges, that all the estate, right, title, and interest of the said Munson, the lessee, to the demised premises, except thirty feet square of vacant ground, by assignment came to the defendant, who had occupied the same, and assigns the non-payment of the rent reserved as a breach. The defendant demurred generally, and the decision was reserved.

Silliman and Spangler, in support of the demurrer. *Culbertson*, contra.

By the COURT.

It seems to besettled, that where a lessee assigns his lease for any shorter period of time than that for which the lease was granted, the lessor cannot sustain an action of covenant against the assignee upon the lease; because this is considered, not an assignment of the whole term, but an underletting. The principle applies with at least equal force to the case of an assignment, or underletting of a part of the premises only.

If the lessee constitute two under tenants, by assigning one third of the leased premises to one, and one third to another, retaining one third himself, the lessor may have three distinct actions; and in apportioning the rent, the aggre-

gate given against each might amount to more or less than the amount reserved, and the parties in either case would be without remedy. If the lessee underlet or assign the whole premises in unequal quantities, to different persons, the lessor will be driven to as many actions against different persons to recover his rent, instead of having one action against the lessee. For the separate assignee of a part can neither be charged with the whole rent individually, nor jointly, with one or more of his co-tenants.

In this case the declaration states, that the defendant was not assignee of the whole premises; he did not take, and does not hold, the whole term of the original lessee. The demurrer must, therefore, be sustained.

LESSEE OF BENTLEY'S HEIRS *v.* DEFOREST.

JUDGES PEASE AND BURNET.

1826.

An assignment, by a grantee, upon the back of his deed, "*of all his right and title in the deed*" to the plaintiff, does not pass such a title as will enable the plaintiff to recover in ejectment.

Such an assignment might perhaps be considered in equity as an executory contract.

This was an action of ejectment. The plaintiff having offered in evidence, a deed conveying the premises in question, from Adgate to Vanderbarrack, with an indorsement thereon, subscribed by Vanderbarrack, by which he assigned *all his right and title in the deed to Bentley*, under whom the lessors of the plaintiff claimed as heirs at law, rested his cause.

Webb, for the defendant,

Moved to overrule the testimony, and for a non-suit, on the ground that the deed and assignment did not show a title to the premises in Bentley, the ancestor of the lessor.

Wheeler, for the plaintiff,

Contended that the laws of Ohio, did not prescribe any particular form of transferring the title to real estate. That the assignment was in fact a deed, and that the intention of the parties was sufficiently manifest to require the court to give it effect.

By the COURT.

There never has been a time, since the establishment of the territorial government, when the title to real estate could be conveyed by an assignment, indorsed on a deed. The ordinance for the government of the territory, provided, that real estates might be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, by the person, being of full age, in whom the estate might be; attested by two witnesses, provided such conveyances be acknowledged, or the execution thereof duly proved and recorded, &c. This form of conveying real estate has been recognized ever since.

The indorsement relied on as a deed, conveys nothing but the instrument

itself. It may vest in the assignee a right to the paper and the wax, but it cannot affect the title to the land. It does not describe the land, or purport to convey it, much less does it contain the operative words of a grant. It is an assignment of all the right and title of the assignor in the deed on which it is written. In equity it might be considered as an executory contract, and on proof of the facts connected with it, might entitle the assignee to a decree for a specific performance, but it cannot operate as a conveyance of the legal title.

Judgment for defendants.

LESSEE OF ELY v. McGUIRE.

JUDGES HITCHCOCK AND BURNET.

1826.

Where the mortgage money is due and unpaid, the mortgagee may recover the mortgaged premises in ejectment.

Mortgaged premises may be sold on judgment, and execution against the mortgagor.

The title of mortgaged premises remains in the mortgagor as against all the world except the mortgagee, and also as against him, until the mortgage is forfeited.

This was an ejectment, brought by a mortgagee against the mortgagor, after the whole of the mortgage money had become due and payable.

The case was submitted without argument, on the single question, whether the mortgage deed be sufficient evidence of title, to sustain the action.

By the COURT.

We have always considered the title of mortgaged premises to remain in the mortgagor, as against all the world, except the mortgagee, and also as against him, until the deed becomes absolute at law, by the non-performance of the condition, and the mortgagee takes legal steps to reduce the premises to possession.

On this principle we have decided, that mortgaged premises may be sold on judgment and execution against the mortgagor, and that a mortgage, executed by the defendant, before the judgment, could not be set up as evidence of an outstanding title in an action of ejectment, brought by a purchaser under the sheriff, against the person in possession under the mortgagor, on the ground, that as the mortgage did not divest him of the legal title, the judgment was a lien on the premises, subject to the mortgage. In this case, it appears that the money secured by the mortgage was due and unpaid. The condition was therefore broken. The deed has become absolute at law, and the plaintiff has a right to recover.

Judgment for the plaintiff.

LESSEE OF PHELPS v. BUTLER.

JUDGES PEASE, HITCHCOCK, AND BURNET.

1826.

The execution and delivery of a mortgage does not divest the mortgagor of his legal title.

A judgment is not a lien upon after acquired lands until actual levy.

A party in possession of land, which has been sold on judgment and execution against him, cannot defend himself, in ejectment, against the purchaser at sheriff's sale, by setting up a mortgage executed by himself, before the judgment became a lien on the premises.

The equity of redemption may be sold on execution at law.

The cause was submitted to the court on the following agreed case. On the 6th of March, 1819, A. Tannehill recovered a judgment in the court of common pleas of Geauga county, against S. Butler, the defendant, on which an *alias fi. fa.* issued on the 24th of August, 1824, under which the land in question was levied on, sold, and purchased by the lessor of the plaintiff, and a deed thereof duly executed to him by the sheriff. The defendant obtained a legal title to a part of the land in question on the 27th of May, 1820—and to the residue on the 9th of February, 1822. On the 19th March, 1822, the defendant executed a mortgage deed on the same, to S. Hinchley, to secure the payment of $628,40. The plaintiff rests upon his title under the purchase at sheriff's sale, and the defendant sets up the outstanding mortgage in Hinchley. The defendant is in possession.

Wheeler, for plaintiff. *Sloan*, contra.

By the COURT.

The main question set up in the defence is, whether a person in possession of land, which has been sold on judgment and execution against him, can defend himself against the purchaser under the sheriff, by setting up a mortgage executed by himself, on the premises, before the judgment became a lien on those premises. The question may be so stated, because it has been decided by this court, in *Rhodes v. Symmes*, (1 *Ohio*, 313,) that a judgment is not a lien on after acquired lands, till a levy is actually made, consequently the case stands as it would have done, if the mortgage had been executed before the rendition of the judgment.

It has been decided by this court, as often as the subject has been presented, that the execution and delivery of a mortgage, does not divest the mortgagor of his legal title. In *Hitchcock v. Harrington*, (6 *John.* 290.) it is stated by Kent, Ch. Jus. to be the settled law in that court, and in the court for the correction of errors, that the mortgagor is to be deemed seized, (notwithstanding the mortgage,) as to all persons, except the mortgagee and his representatives. When the interest of the mortgagee is not in question, the mortgagor, before foreclosure or entry under the mortgage, is now considered at law, as the owner of the land, and it was decided in that case, that neither the heir of the mortgagor, nor his assignee, could deny the seisin. The mortgage is for the exclusive benefit of the mortgagee, and those claiming under him, and until steps are taken to en-

force it, it is only a lien on the land, in which third persons have no concern. A mortgagor cannot be permitted to disown his legal rights, to the prejudice of his creditors, or to protect himself in the possession and enjoyment of his estate, by admitting the existence of rights in third persons, who do not appear to set them up, which rights cannot be affected directly, or indirectly, by the success, or failure of his defence. The property in the possession of the plaintiff will be as liable, and as sufficient to satisfy the debt, as it will be if it remains with the defendant. If the mortgaged premises be of greater value than the debt for which they are pledged, the plaintiff, by his purchase from the sheriff, is entitled to the difference. The equity of redemption, as well as the legal estate was vested in Butler, at the time of the levy and sale, and it was decided in *Waters v. Stewart*, (1 *Caine's Cases Error* 47,) that an equity of redemption may be sold on execution.

The rights of Hinchley are not involved in this question. Were he in possession, and an ejectment brought against him, he might protect himself by his mortgage, but neither the mortgagor, nor any other person not claiming under the mortgage, can set up the rights of the mortgagee to defeat the Sheriff's sale.

In *Klein's Lessee, v. Graham*, (3 *Caine's Rep.* 188.) it was decided, that in an action of ejectment, by the purchaser at Sheriff's sale, against the debtor, the defendant cannot shew title in another, because the plantiff goes into his shoes, and acquires the same right, whether possessory or otherwise, which he held, and nothing more. Much less shall he be permitted, as in the present case, to set np a mortgage executed by himself, which not only admits his possessory right, but also his legal title.

The plaintiff purchased all the right of Butler, be it more or less, and if that right consisted merely of a naked possession, Butler cannot be permitted to dispute it.

In *Jackson v. Willard*, (4 *John.* 41) it was said to be an affront to common sense, to say that a mortgagor in possession, was not the real owner. In that case it was decided, that the mortgagee held only a chattel interest, which could not be sold on execution, after the debt became due, but before foreclosure, and while the mortagor remained in possession. This being the law, in relation to the rights of the mortgagee, if mortgaged premises cannot be sold as the property of the mortgagor, subject to the mortgage, they are placed beyond the reach of creditors, and are completely protected against the debts, both of mortgagor and mortgagee. But we do not consider it necessary to pursue this subject further. We are satisfied with the decisions heretofore made, that the legal title to mortgaged premises remains in the mortgagor, while he continues his possession, whether the debt for the security of which the mortgage was given, has become due, or not. On this ground the Sheriff's sale was regular, the purchaser acquired the legal title, subject to the mortgage, and he stands in the shoes of the mortgagor, who cannot be allowed to set up the mortgage as evidence against his own title.

Judgment for plaintiff.

BYINGTON v. GEDDINGS.

JUDGES PEASE AND BURNET.

1826.

The holder of a note payable to A. B. or bearer in cattle may maintain an action upon it in his own name, but he must aver and prove that the note was delivered to him for a good consideration.

The case was this: Byington gave a note in April, 1822, for $17, payable in cattle, to R. Knap, or bearer.

Geddings brought an action in his own name, in which he declared on the note, without showing how he became possessed of it, whether by assignment, delivery, or otherwise. The defendant demurred. The court sustained the declaration, and gave judgment for the plaintiff, to reverse which, the writ of error was taken.

By the COURT.

This note is not negotiable. The statute of 1820, does not, like that of 1810, embrace notes payable in property. The right of the plaintiff, therefore, to recover in his own name, depends on the form of the note, and the operation of the promise. We consider the promise in the note, as made, not only to Knap, but to the person to whom he should deliver it.

The objection taken in the argument, that the note was not indorsed, is not entitled to any weight. An indorsement is not necessary to pass the interest of the first holder—a delivery is sufficient for that purpose. It is well settled, that the holder of a note, payable to bearer, may recover the contents in his own name, provided he has obtained it for a valuable consideration, in the fair course of trade. To entitle a holder to recover on such a note, in his own name, it must be stated as a part of his title, and proved at the trial, that the note was delivered to him for a valuable consideration, or that he acquired it in the usual course of trade, or business. It was decided in *Grant v. Vaughan*, (3 *Bur.* 1516) that a negotiable note, payable to bearer, may be recovered in an action for money had and received. But in this case, the action is founded on the note, which is declared on, as though it were made payable to the plaintiff, he being the bearer. Under these circumstances, he was bound to make the averments before stated, and also to prove them. Without these averments and this proof, he cannot maintain his right to a recovery. He cannot rely on the presumption, that he obtained the note fairly. That fact is a substantial part of his title, which must be averred and proved. Without the averment, he sets out a defective title, and without the proof, he does not sustain his title. For any thing that appears in the record, the note might have come into the hands of the plaintiff by fraud, or accident, without delivery, or consideration. In the first instance, the right was vested in Knap, and the record does not show, that that right has been transferred. We consider it to be as necessary to aver a delivery, in this case, as it is to set out an assignment on a note payable to order. The declaration is,

therefore, defective, and the court erred in overruling the demurrer. Judgment reversed.

COLWELL v. THE BANK OF STEUBENVILLE.

JUDGES BURNET AND SHERMAN.

1826.

In foreign attachment under the act of 1810, it is error to render judgment unless three months notice be given.

It was a writ of foreign attachment on which final judgment had been rendered in the court of Common Pleas.

From the record it appeared that notice of the issuing of the writ had been published only six weeks, which was the principal error relied on.

The cause was submitted without argument.

By the COURT.

It appears that the writ of attachment issued under the statute passed in eighteen hundred and ten, and that the plaintiff has pursued the fourth section of that act which relates to domestic attachments, instead of the fifteenth section which directs the mode of proceeding on foreign attachments. This section requires a notice of three months before the rendition of judgment, and expressly provides that no judgment shall be entered in cases to which it relates, until the notice required shall have been given.

As this is a statutory proceeding unknown to the common law, it is necessary to pursue it strictly.

Judgment reversed.

LAMB v. STEWART.

JUDGES PEASE AND BURNET.

1826.

Declarations made by a witness previous to his examination, contrary to his statement when examined, are admissible to discredit his testimony.

It appeared from the record, that the plaintiff in the trial before the Common Pleas, called a witness, who testified to certain items in his account against the defendant. The defendant then offered to prove that the same witness, on a former occasion, when conversing on the same subject, not being under oath, had made different statements. The testimony offered, was objected to, and overruled, and a bill of exceptions taken.

The case was submitted without argument.

By the COURT.

The testimony offered by the defendant was strictly legal. He had a right to

discredit the witness, who had been examined against him, and one method of effecting that object was, by proving that he had told *different stories at different times*, when conversing on the same subject. Such evidence is always admitted when offered, and the effect of it is left to the jury.

Judgment reversed, and cause remanded.

LESSEE OF HUGHEY *v.* HORRELL ET AL.

JUDGES BURNET AND SHERMAN.

1826.

Lands in the Virginia military district divided by County lines, where the owner resides on par can only be listed for taxation in the county where the owner resides.

If otherwise listed and sold for taxes the sale is void.

Advertisements of sales of lands for taxes must be made in two newspapers, one at the seat of Government, one in the county, or if none there, then one in most general circulation therein.

As the case turned on the sufficiency of the defendant's testimony, who claimed under a tax title, it is not necessary to state more of the case, than will be sufficient to present the points on which it was decided.

It appeared from the testimony, that the county line divided the land, part of it being in Madison, and part in Pickaway. The land was entered for taxation in the county of Madison, in the name of E. Prichard, who lived on that part of the tract, which was within the county of Pickaway. The land was charged with the taxes of 1820, and 1821. The notice was published in a newspaper printed at Columbus, and in no other. The newspapers of Chillicothe and of Springfield have a partial circulation in Madison, but the Columbus papers have the most general circulation. There was no newspaper printed in the county of Madison.

The principal objections to the validity of the tax title, were, that the land had not been listed according to law, and that the notice had been published in one paper only, when the law required it to be published in two. Other objections were taken which it was not thought necessary to decide.

By the COURT.

The 9th section of the act of 1820, under which the land in question was listed and sold, makes it the duty of the County auditor, to call on each resident proprietor of lands within his county, and take a list of all his lands subject to taxation within the county, with a proviso, that "all lands lying within the Virginia Military district, which shall be divided by county lines, so as to leave parts of said tracts in two, or more counties, shall be listed by the proprietor, in the county in which he lives." By the 13th section, it is made the duty of the Auditor, on failure of the proprietor to furnish a list, to enter the land from the best information in his power. As the land in question was within the Virginia Military district, and divided by a county line, and as Prichard, the proprietor in whose name it was listed, resided in the county of Pickaway, the auditor of Madison was not authorized to enter it on his list. It was made the duty

of the proprietor to enter it in the county in which he lived, and on his failure to do so it ought to have been entered by the auditor of Pickaway.

It is evident therefore, that this land has not been entered in conformity with the statute, and that it has been sold by an officer who was not authorized by law, to make the sale.

The 38th section provides, that the County Auditor, on receiving the delinquent list, shall forthwith cause the same to be advertised six weeks successively, in some newspaper printed at the seat of government in this state, and also in a newspaper printed in his proper county, if any such there be, and if not, in some newspaper in most general circulation in said county.

It is contended by the defendant, that as there was no paper printed in the county of Madison, and as the Columbus paper was in general circulation in that county, it was not necessary to publish the notice in any other. The law does not admit of such construction. The publication must be made in two papers, one printed at Columbus, and the other in the county where the auditor resides, if there be such a paper, and if not, then in some paper, (other than the one printed at the seat of government) in most general circulation in his county.

The object of the Legislature in both of these provisions, is obvious.

The first was intended for the convenience of the resident proprietor, and for the safety of all others concerned.

Instead of dividing the tract, and requiring double entries and payments, they have required it to be entered and paid in one county, and to prevent confusion they have designated which that should be.

For any thing that appears, the land may have been entered, and the taxes paid in Pickaway. The other provision, was designed to extend the notice, as generally as possible, for the information of owners, and for the purpose of increasing competition at the sale.

The requisitions of the law are substantial and useful, and cannot be dispensed with. Tax sales are attended with greater sacrifice to the owners of land, than any others. Purchasers at those sales, seem to have but little conscience.—They calculate on obtaining acres for cents, and it stands them in hand, to see that the proceedings have been strictly regular.

The jury rendered a verdict in conformity with this opinion, on which judgment was entered.

MATTOX v. MATTOX.

JUDGES HITCHCOCK AND BURNET.

1826.

A Divorce will not be granted where the applicant is living in adultery.

The principal charge relied on in the bill, was the adultery of the husband, which was very satisfactorily, proved; but, on cross examinating the witnesses, it appeared that the complainant was living and cohabiting with another man, who had deserted his wife, and that she had had a child by him.

The bill must be dismissed. It would be a libel on the Legislature to suppose, that the statute was designed for the convenience of that class of characters to which these parties seem to belong. It was intended for the relief of injured innocence, not to encourage persons of loose morals, or rather of no morals at all, to live in the open, scandalous violation of the common rules of decency.

This application is to the equitable jurisdiction of the court, and must be decided by the principles which prevail in courts of equity. The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains. These parties are *in pari delicto* and to grant relief to either of them, would be offering a bounty to guilt. It would place the permancy of the marriage contract, in every case, at the disposal of the contracting parties, and remove one of the strongest motives to that correctness and chastity of conduct, which is necessary to render the marriage state, either pleasant or convenient.

The ground on which this bill is dismissed, is not new in the practice of this court. Many have been dismissed for a similar reason, and we had reason to believe, that the practice was sufficiently known to prevent applications liable to this objection.

Bill dismissed.

LESSEE OF McCULLOUGH'S HEIRS *v.* RODRICK.

JUDGES HITCHCOCK AND BURNET.

1826.

An assignment, by an insolvent in Pennsylvania, of all his estate both real and personal, does not pass real estate in Ohio.

The plaintiff having exhibited a patent to the ancestor of his Lessors, covering the land in controversy, and proved the possession of the defendant, rested his cause.

The defendant then offered a transcript from the state of Pennsylvania, for the purpose of showing that S. McCullough, under whom the plaintiff's claim, had taken the benefit of the insolvent act, and assigned his property for the use of his creditors. The assignment was in these words: "I do hereby assign all my estate, real, personal, and mixed, to J. B. and J. H. in trust for the use of my creditors. In testimony whereof I hereunto set my hand and seal, 11th December, 1824, and I do hereby authorize and empower any attorney to appear for me, in an amicable ejectment in the name of the assignees, and confess judgment for the 273 acres with the appurtenances."

This testimony was objected to, and overruled by the court, on the ground that whatever may have been the effect of the assignment in Pennsylvania, which was a question not necessary now to be decided, it could not pass the title to real property in Ohio, which must be transferred in pursuance of our own laws. The legal title therefore remained in the assignor, and descended at his death, to the lessors of the plaintiff, who are his heirs at law.

If we were disposed to give to this document the greatest effect that can be

claimed for it by the defendants, it would show nothing more than an outstanding equity in third persons, which cannot be set up to protect the defendants' possession against those, who hold the legal estate, and as this is the only use that could be made of it, it cannot be received as evidence.

Verdict for the plaintiff.

LESSEE OF SHALER v. MAGIN.

JUDGES HITCHCOCK AND BURNET.

1826.

An occupying claimant is entitled to recover for improvements made on the land before his title commenced.

The commissioners appointed at the last term, to estimate the valuable and lasting improvements made on the premises, prior to the commencement of the ejectment, having reported, Mr. Brush moved, on behalf of the successful claimant, to reject the report and discharge the commissioners, on the ground, that the improvements were made before the title commenced under which the defendant claimed.

The facts as they appeared from the report and the testimony were these. An entry had been made on the land in dispute prior to the year 1818, under which the defendant took possession, and made the improvements in question.—In October, 1818, after the improvements had been made, the entry was withdrawn, and about the same time another entry was made on the same land by Ellis, under whom the defendant claimed.

By the COURT.

This motion cannot be sustained. The defendant had an equitable title of record at the time he commenced his improvements, which continued till the improvements were completed. His possession was not interrupted by the withdrawal and re-entry of the warrant, nor were the rights of the plaintiff in any manner affected by that circumstance.

But independent of this consideration, we discover nothing in the statute, that limits the claim of the occupying claimant to a compensation for such improvements as were made after the commencement of his title. The statute is in the present tense; "when any occupying claimant, being in quiet possession of land, from which he *can* show a plain and connected title in law or equity," &c.—"If any person shall set up and prove an adverse, and better title to said land, such occuppying claimant, shall not be evicted, until he shall be fully paid the value of all lasting and valuable improvements made by such occupying claimant, or the person under whom he may hold the same, previous to receiving actual notice by the commencement of suit," &c.

The exhibition of his title, is to be made to the court at the rendition of the judgment, and if he can then shew such a title as is required by the statute, he is protected in his possession till he shall be compensated for the improvements made by himself, or by the person under whom he claims. There is nothing in

the law, that excludes a right to receive pay for improvements made by the tenant, or the person under whom he claims, at *any time* before the commencement of the suit.

It sometimes happens, that persons seat themselves on vacant land, make valuable improvements thereon, and afterwards locate it. In such a case, if, in consequence of a defect in their entry, a junior entry should prevail, we cannot see any thing in the law, or in the policy on which it is founded, that entitles the successful claimant to take the improvements, without making compensation of the tenant.

It may also be remarked, that in this case it does not appear at what time the better title of the successful claimant commenced; whether before or after the making of the improvements in question.

It is not necessary now to decide, that an unsuccessful claimant must in all cases be entitled to pay for improvements made before the commencement of his title although the statute does not contain any thing expressly prohibiting it, yet a case might arise accompanied by such circumstances, as would take it without both the letter and equity of the statute. All we mean to say is, that this is not a case of that character.

Motion overruled.

MARTIN v. BOON, ET AL.

JUDGES HITCHCOCK AND BURNET.

1826.

Notoriety of entry.

The following testimony was given. Ellis Palmer swore, that he was on Todd's expedition in July, 1787.

They crossed the Ohio at Limestone, fell on the Big Three-mile-creek, continued up it, crossing it frequently till they came to where Shepherd now lives, from thence they bore up, on the west side, to where the beginning of Minnis' survey was made, at a walnut and two sugar trees, on the east side of the creek, and east side of the trace. Letters were made on the walnut, but does not recollect what they were; has seen the tree every year since except in 1818 and 1819.

Has always heard that called the beginning corner of Minnis' survey. The corner trees stand near to where the trace crosses the creek the last time. He showed the corner to the county surveyor of Brown.

There was about three hundred men on the expedition. The trace was plain but narrow. Kenton called it the *old war road from Limestone to old Chillicothe*. Three-mile-creek empties about three miles below Limestone. It is the first creek below Limestone, except *fishing-gut, so called, which is the first below Limestone*, on the Ohio side. Has not heard it called a creek, or by any other name than Fishing-gut.

Limestone and Kenton's station, were the nearest settlements to the survey. The tract was generally known by the name of *Todd's trace*, and was plain enough to be followed.

The mouth of Limestone creek was notorious in 1784, and has always been known by that name.

Benjamin Beasley testified, that he settled in Manchester in 1790. Shortly after he heard of Todd's trace running up Three-mile-creek and about the same time, he heard of the tree spoken of by Palmer. He was acquainted with the beginning corner of T. Peyton's entry, and showed it to the county surveyor of Brown.

Manchester was settled in the year 1790. He became acquainted with the branch, on which T. Reese lives, in 1797, it was called Covert's run.

On the part of the defendants, it was testified by N. Beasley, that *the first creek* on the north side of the Ohio, below Limestone creek, is called *Fishing-gut*. It went by that name since 1791. According to his apprehension Fishing-gut is of such size and description as to entitle it to the appellation of a creek. It is such as surveyors have been in the habit of calling creeks.

Fishing-gut empties into the Ohio better than two mile above Three-mile-creed.

In 1803 he became acquainted with the beginning corner of Minnis' survey, has seen it several times, and has surveyed from it; he never saw any letters on it.

The corner is about five miles from the nearest point on Fishing-gut-creek.

He does not know that he has heard the people call Fishing-gut a creek, he has generally heard it called Fishing-gut only.

Three mile-creek was generally known by the name of *Big Three-mile*.

James Pilson being asked the name of the first creek below Limestone, answers Fishing-gut is the first that would be called a creek. It is not a large stream. Does not know its length, there is a mill on it, always heard it called Fishing-gut, believes he should call it a large branch; it empties about two miles above Big Three-mile.

He has seen the walnut on Big Three-mile claimed as the corner of Minnis' entry, and has made a survey from it. He thinks he saw marks on the walnut, but cannot tell what they were. Big Three-mile is the first creek on the north below Limestone, if Fish-gut is not considered a creek.

Peter Lee testified, that he was with Col. Todd on his expedition in 1787.—They crossed the river at Limestone, then a landing place of great notoriety, they crossed Three mile-creek several times. It was then, and has ever since been known by the name of *Three-mile*, after they crossed the creek the last time they followed a trace previously existing. The trace crossed the creek the last time, near where two branches unite.

At the time the expedition went out, there were several stations settled in Mason county, Kentucky, from which there were men on the expedition. After the expedition, the trace was called Todd's trace, and could have been found and followed.

Limestone, Todd's trace, and Three-mile-creek, in 1787 were places of great and general notoriety.

The cause was argued by,

Brush, for the complainant. *Marshall*, for the defendant.

By the COURT.

The complainant claims under an entry made in May, 1797, in the name of Timothy Peyton, in the following words: "Timothy Peyton (heir) enters 1000 acres of land, on part of a military warrant, No. 1296, on the waters of Three-mile-creek, beginning at the most westwardly corner of William Love's entry, No. 2712, running with this line N. 46° E. passing his corner to the line of Thomas Perkins' entry, 2798, thence with his line N. 60° W. to his corner, thence N. 30° E. to another corner in the line of Isaac Hite's survey 1759, thence N. 60° W. so far that a line N. 60° W. from the beginning, at right angles with the line N. 30° E. will include the quantity.

The defeudants claim under an entry made in 1796, in the name of John Bartlett, and are in possession under the oldest patent. This being the case, they cannot be disturbed till the complainant makes out an equitable title, clearly and satisfactorily. The merits of that title must therefore be first investigated.

It is very evident, that the call for the waters of Three-mile-creek, though a good descriptive call, is too vague and uncertain to ascertain the locality of the land, intended to be recovered by the entry; recourse must therefore be had to the other objects referred to. Love's entry, a corner of which is called for as a beginning, calls for the upper back corner, of T. Obrian's entry, which calls for the lower corner of Jacob Edwards, in the line of P. Slaughter's survey. Edwards calls for Slaughter's survey, which lies opposite the mouth of Limestone, and is admitted to be special and abundantly notorious. The complainant has therefore succeeded in establishing his beginning corner. But this is not enough. As he calls to run from his beginning, with the line of Love's entry, to the line of Perkin's entry, without giving the distance, the termination of his first line cannot be known, without establishing and locating the lines of the entry by which it is to be bounded. As it is taken for granted that the lines of every entry are open and cannot be ascertained without a survey.

On looking into the entry of Perkins, we find it depends altogether on the survey of H. Brooks. H. Brooks' survey depends on other surveys called for, which surveys depend on the survey of Samuel Hopkins. Hopkins' survey calls for the south east corner of Callohil Minnis' survey, No. 460, and depends on it, consequently it is indispensably necessary for the complainant to establish this survey of Minnis, in order to sustain his own entry.

It appears that the intermediate entries called for have been correctly surveyed, so that no difficulty arises from that source. The right of the complainant to question the defendant's title, must therefore depend on the validity of Minnis' survey, No. 460, as that claim must be correctly located and established before he can ascertain the termination of his first line.

Minnis' survey calls to lie "on the N. W. of the Ohio, on the waters of Three-mile-creek, beginning at a walnut marked H. and two sugar trees, on the bank of the creek, running N. 30, E. 400 poles," &c.

It must be evident, that this survey does not convey the precision and certainty in its calls, that is necessary to enable a subsequent locator to ascertain

its situation. The waters of a creek and a marked tree on the bank of the creek is too general a description. It imposes on the enquirer, the necessity of examining the timber on both sides of the creek, from its mouth to its source. The length of this creek does not appear, but from circumstances it must be of considerable extent. It is called by way of distinction *Big Three mile*, and the witnesses speak of several branches which empty into it. The valley of such a creek must be too extensive to be searched by subsequent locators, for the purpose of finding a marked tree; and without that tree, the beginning corner of the survey cannot be determined.

But the complainant rather relies on the entry, which he contends has been surveyed in strict conformity with its calls, and which is in these words, "Callohil Minnis enters 1000 acres," &c. on the waters of the first creek emptying into the Ohio below Limestone, beginning at a walnut marked 1 H, by a branch, where the left wing of Colonel Robert Todd's scout crossed in June, 1787, running N. 30. E. 400 poles, &c. Although the survey appears to have been made in strict conformity with the courses and distances of the entry, yet we discover a striking difference in the calls. The entry calls for the first creek below Limestone, and for a walnut marked 1 H by a branch. The survey calls for Three-mile-creek, and for a walnut marked H, on the bank of the creek. This discrepancy was calculated to produce doubt and uncertainty. It imposed on the enquirer the task of deciding what streams were denominated creeks, in order to ascertain whether Three-mile was, or was not, the first creek. But suppose th is difficulty overcome. Is he to look for a walnut marked H, on the bank of the creek, or for a walnut marked 1 H, by a branch of the creek, and if he should find either, how is he to know whether it be the right one or not?

But we will pass over these difficulties for the present, and examine the entry on which the complainant relies, without reference to the terms used in the survey.

1st. It calls for the waters of the first creek emptying into the Ohio below Limestone.

2d. For a walnut marked 1 H.

3d. For the branch where the left wing of Colonel Todd's scout crossed in 1787.

1st. Ellis Palmer states that Minnis' survey was on Big Three-mile-creek, which was always said to be three miles below Limestone. On being asked if it is not the first creek that empties into the Ohio below Limestone, he answers, "it is, except Fishing-gut, so called, which is the first below Limestone on the Ohio side." He further states that he never knew it called by any other name than Fishing-gut.

James Pilson being asked the name of the first creek below Limestone, answers, "Fishing-gut is the first that would be called a creek." He further states that it is not a large stream; that he does not know its length; that there is a mill on it; that he always heard it called Fishing-gut; believes he should call it a large branch; that it empties about two miles above Big Three-mile.

N. Beasley states, that *the first creek* on the north side of the Ohio below Limestone-creek, is called *Fishing-gut*; that it went by that name in 1791; that according to his apprehension, Fishing-gut is of such size and description as to entitle it to the appellation of a creek; that it is such as surveyors have been in

the habit of calling creeks, and that it empties better than two miles above Three-mile-creek.

On this evidence the complainant relies, to establish the notoriety of Three-mile, as *the first creek* below Limestone; but instead of proving that fact, it rather shows it to be the *second creek*. On such information, a subsequent locator would naturally go on to Fishing-gut in search of Minnis' survey, the beginning corner of which is said to be at least five miles from the nearest point of that stream. The witnesses all speak of it as a creek, though they do not remember of hearing it expressly called so. General Beasley, who has been a surveyor many years, calls it a creek, and states that in size and description, it is such a stream as surveyors have been in the habit of calling a creek.

If it be urged that its appropriate name was Fishing-gut, it may be replied, that the appropriate name of the other, was Big Three-mile, and a person hearing their names, would naturally consider them both to be the names of creeks. There is no evidence to shew that three mile was understood to be the first creek below Limestone, or that it was known by that name among locaters, or others, either when the entry in question was made, or at any time since.

Palmer states that in 1787, it was known by the name of Big Three-mile, probably to distinguish it from a smaller stream in the neighborhood, known by the same name. In the survey, it is simply called Three-mile-creek, which varies both from the description in the entry, and from the real name, as proved by all the witnesses.

Here naturally arises the question, why was the water course designated in the entry by a description, when it had an appropriate name, notorious in the contiguous settlements. If Minnis' entry was really on the creek claimed, it ought to have been called Big Three-mile, which was at that time its appropriate name, and by which subsequent locators might have readily found it, as that name not only identified the water course, but was expressive of its true situation, in reference to the mouth of Limestone. By omitting the name and describing it as the first creek; *subsequent locators* were not merely left in doubt and uncertainty, but were liable to be misled and thrown on to Fishing-gut, which from the weight of evidence might fairly be considered as a creek, and the first creek below Limestone.

The next call is for a walnut marked I H.

Palmer states, that at the beginning corner of Minnis' survey there was a walnut marked, which he saw within a few minutes after the corner was made; that there were letters on it, but he does not remember what they were, though he says he saw the tree every year afterwards for more than twenty years.

Benjamin Beasley settled in Manchester in 1790. Shortly after, he heard of the tree, spoken of by Palmer. It does not appear that he ever saw it, he gives no description of it, nor does he know any thing of the letters by which it was distinguished in the entry of Minnis.

General Beasley states that he become acquainted with the beginning corner of Minnis' survey in 1803. That he has seen it several times, and has surveyed from it, but that he never saw any letters on it, and that it is five miles from the nearest point on *Fishing-gut creek*.

James Pilson has seen the walnut on Big Three-mile, claimed as the corner of

Minnis' entry, and has made a survey from it; he thinks he saw marks on it, but cannot tell what they were.

This is all the evidence relating to that point, and it certainly falls very far short of establishing the notoriety of the tree in question.

The entry calls for a walnut marked I H; the survey calls for a walnut marked H. The witnesses, except Palmer, do not know that the tree claimed by the complainant to be Minnis' corner, was ever marked with any letters, and Palmer does not know that it was marked with either of the letters named in the entry. As walnut is a common timber in the part of the country where the land lies, and particularly on water courses; the call for a tree of that description is of but little use, unless it be distinguished by some peculiarity generally known, of which information can be obtained in the contiguous settlements and by which it can be distinguished from other trees of the same kind. It is therefore necessary to prove, that the tree in question contained the distinguishing marks described in Minnis' entry, and that it had acquired general notoriety at the date of the complainant's entry.

The third call is "the branch where the left wing of Col. Todd's scout crossed in 1787.'

Palmer states, that the trace was generally known by the name of Todd's trace, and was plain enough to be followed.

Benjamin Beasley says, that shortly after he came to Manchester, in 1790, he heard of Todd's trace running up Three-mile-creek, the scout crossed at the mouth of Limestone, which was a place of general notoriety, and the trace commenced on the bank of the river opposite the mouth of that creek. Before, and down to the time of that expedition, the trace appears to have been known by the name of *the old war road.*

We will concede for the present, that these witnesses prove the notoriety of the trace, and proceed to enquire, whether this call is in other respects, sufficiently sustained.

1st. The entry refers to a trace running up the first creek below Limestone. In addition to what has already been said on this part of the case, we will only remark, that if Fishing-gnt is to be considered the first creek, the call for a trace on a different creek cannot help the entry.

2d. The entry calls for an object by *a branch* of the creek; the survey calls for the same object *on the bank* of the creek.

The entry calls for the corner *by a branch, where the left wing of the scout crossed,* not for *the trace* which must have been followed by the main body of the detachment, and which crossed *the creek.*

From the very terms used, it is apparent that the corner was not on the trace spoken of by the witnesses as being plain and notorious, but at some point on a branch where one of the wings crossed. How far the left wing marched from the trace, or at what point they left it, is uncertain, nor does it appear that there was any thing to designate the route of that wing, by which a surveyor could be enabled to follow it so as to ascertain where it crossed the branch, nor does it appear at what distance, or in what direction the branch was, from any given object. This circumstance seems to acoount for the discrepancy between the corner called for in the entry, and the one from which the survey was made. The latter is on the bank of the creek, where the trace most probably passed, the

the former is by a branch, where the left wing crossed, but what branch, or how far from its mouth, or from the trace, is altogether uncertain.

The survey of Minnis appears; at this day, to have acquired very general notoriety; but that was not the fact when Peyton's entry was made.

On the whole, we are of the opinion, that the complainant has not sustained the equitable claim set out in his bill.

It is therefore unnecessary to examine the case, on the part of the defendants.

Bill dismissed.

McVICKAR v. THE HEIRS OF LUDLOW.

JUDGES HITCHCOCK, BURNET, AND SHERMAN.

1826.

Where a sci. fa. is prosecuted to make the heirs party to a judgment rendered against the administrator of an intestate, and thereby subject lands taken by descent to sale on execution, the sci. fa. must allege that the judgment is in force and unsatisfied, and that the personal estate is exhausted.

The sci. fa. must contain every thing necessary to constitute a good declaration.

Quere,—Whether the lands must not be particularly described either in the body of the writ, or in the sheriff's return.

A writ of *scire facias* had issued, in the court below, in the following words: "Whereas, in the Term of December, Anno Domini 1818, of the Court of Common Pleas, within and for the county aforesaid, D. M'Vickar recovered a judgment, by reason of the non-performance of certain promises and undertakings lately made, &c. against John Ludlow, James Findlay, David Risk, and Charlotte C. Risk, being the surviving administrators of the goods and chattels of Israel Ludlow, deceased, for the sum of twelve hundred and forty-eight dollars, for his damages, together with the sum of twenty-three dollars and twenty cents, for his costs and charges, by him, about his suit, in that behalf expended;—and it being represented to us, that James C. Ludlow, Israel Ludlow, A. Dudley, and Catharine his wife, late Catharine Ludlow, Jepthah D. Garrard, and Sarah Bella his wife, late Sarah Bella Ludlow, are heirs at law of the said Israel Ludlow, deceased, and that they have lands lying in the county of Hamilton, which they received from their ancestor, the said Israel Ludlow, deceased, as we, by the suggestion of the said D. M'Vickar, have been given to understand, we therefore command you, that you give notice to the said James C. Ludlow, Israel Ludlow, A. Dudley, and Catharine his wife, Jepthah D. Garrard, and Sarah Bella his wife, children and heirs of Israel Ludlow, deceased, if they may be found in your bailiwick, to be and appear before the honorable the Judges of the Court of Common Pleas, at Cincinnati, within and for the county, on the twenty-ninth day of November next, to show cause, if any they have or can show, why the said D. M'Vickar should not have execution of the judgment aforesaid, and the same be levied of the lands and tenements, so by them the said James C. Ludlow, Israel Ludlow, Jepthah D. Garrard, and Sarah Bella his wife, A. Dudley, and Catharine his wife, children and heirs, as aforesaid, held, agreeably to the statute of this state, in such case made and provided, if they shall think fit, and further to do and receive what may be then and there considered concerning them, and have then and there this writ. Witness," &c.

A rule for plea was taken, and at the August term, 1825, the defendants were defaulted, and judgment entered; and afterwards, at the same term, on motion, the judgment was set aside. The defendants then demurred to the *scire facias*—the demurrer was sustained, and judgment rendered for the defendants—to reverse which this writ of error was taken.

Gazlay, for plaintiff. *Este*, contra.

By the COURT.

In deciding this case, it will be proper to examine the errors assigned for a reversal of the judgment in the Court below, and also the grounds of the plaintiff's claim to a judgment in his favour, in this Court.

It was decided in *Botkin, &c. v. the Commissioners of Pickaway county*, (1 *Ohio Rep.* 375) that a final judgment in the Court of Common Pleas could not be altered, in any matter of substance, at a term subsequent to that in which it was rendered; but we do not know of any case that restrains a Court of Record from altering, or setting aside a judgment improperly entered, at any time during the term in which it was rendered, while the proceedings are considered as being in paper. Such a power seems to be necessary to the correct administration of justice. In the hurry of business, many entries are made, which require to be amended, or erased, and a discretionary power, exercised by the Court, to correct the journal in such cases, prevents much error and expensive litigation. The form in which applications of this kind are made, depends chiefly on the rules and practice of the Court. In this case, the judgment was by default, and was set aside on motion, without the formality of filing written reasons, which we believe is the usual mode of setting aside judgments of that character.

The second enquiry leads to an examination of the *scire facias*, on which the plaintiff prays for judgment. This proceeding is founded on the 27th section of the act of 1824, regulating judgments and executions; and although the section does not prescribe the form of the process, yet it is sufficiently explicit, when taken in connexion with its object, and the general rules of process and pleading, to enable us to decide without difficulty, what averments it ought to contain. Writs of this description, are entered on the record, with a mere formal charge, in the caption and conclusion, as the declaration in the cause. They must, therefore, contain every thing that is required to constitute a good declaration; or in other words, they must set out all the facts that are necessary to show a right in the plaintiff to the relief prayed for. The question then arises, does the record before us contain these requirements. The statute, as far as it governs the case, is explicit. It limits the remedy to judgments that are *unsatisfied*. It authorizes the procedure, *only* after the time allowed by the Court for the settlement of the estate, shall have expired. It requires the writ to set forth, that the defendants hold lands by devise, or descent, of the testator, or intestate, and the defendants must be called on to show cause, if any they have, why the judgment should not be levied of the lands so by them held. It was, therefore, incumbent on the plaintiff, in setting out his title, to aver, that his judgment was unsatisfied, and that the time allowed by the Court, for the settlement of the estate, had expired. On these points, the record is wholly silent.

The averments may be all true, and yet the debt may have been paid, or the time allowed to the administrators may not have expired. The *scire facias* contains an averment, that lands descended to the defendants from their ancestor, but what lands, or of what value, or whether they are *now* held by the heirs, subject to an execution, or not, does not appear, either in the writ, in the return, or in any part of the record. And if a judgment should be rendered in this case, there is nothing to guide the officer in making his levy; or if the lands descended have been sold; under such circumstances, as to place them beyond the reach of the judgment creditor, there is nothing from which the value of the assets descended can be ascertained. Although the statute is silent on this point, yet the nature of the claim set up, and the uniform practice of courts in similar cases, require that the lands which have descended, should be set out in the body of the writ, or ascertained and described in the sheriff's return. The latter course seems to be the practice of the courts of Westminister.

The propriety of ascertaining the lands, or their value, will appear from this consideration, that the heir is not answerable, beyond the amount of assets descended, and it may be, that he has paid other claims against his ancestor, to the amount of the assets, which came to him by descent. (1 *Stra.* 665, *Buckley v. Nightingale.*)

But as no rule has been established by this court on the point now under consideration; and as it is not necessary to settle it, in order to decide the case in hand, we will leave this part of the subject open, and dismiss it for the present, with one additional observation, that the plaintiff must see, that in some part of the proceedings, the assets are shown which have descended to the heirs, so that an issue may be formed, and the matter reduced to a certainty.

Another defect is, that the *scire facias* does not show, that the assets, in the hands of the administrators, have been exhausted. Until this is the case, the real assets cannot be made liable. It is contrary to the general policy of our laws, to subject real estate to execution for debt, until the personal property has been disposed of; and this principle applies as strongly in favor of heirs, charged with the debts of their ancestors, as in any other case, and perhaps more so. Before the lands of a defendant can be taken in execution in payment of his own debt, it must appear by the official return of the sheriff, that there are no goods and chattels to be found within his bailiwick. This is required by statute, and cannot be dispensed with, in this or in any other case. For any thing that appears, the administrators may have assets in their hands, that can be reached without difficulty. The record does not contain any averment inconsistent with this supposition.

This is a fact that must not be left in doubt. It is a necessary part of the plaintiff's title, without which he cannot recover. If there be personal assets, he must pursue them, and if there be not such assets, he must ascertain the fact by the return of process, and distinctly state it as one of the grounds of his right to call on the heirs.

Inasmuch then, as the record does not show that the judgment against the ancestor of these defendants is in force, and unsatisfied, or that the time allowed by the court for the settlement of the personal estate had expired, before the issuing of the writ of *scire facias*, or that the personal property which came to

the hands of the administrators had been exhausted, the plaintiff cannot be allowed the judgment for which he prays.

Judgment below affirmed.

EDMISTON v. EDMISTON.

JUDGES BURNET AND SHERMAN.

1823.

It is error for the court of common pleas to direct a *sci. fa.* to subject lands to sale on the judgment of a justice, unless the transcript from the justice shows that an execution was returned, "no goods," and a suggestion made that the defendant owned land.

A transcript of a judgment rendered in favor of the plaintiff, before a justice of the peace, was forwarded to the clerk of the court of common pleas; on which a writ of *scire facias* issued, requiring the defendant to show cause why execution should not issue against his lands and tenements, to which a demurrer was regularly filed, on the ground, that neither the transcript, nor the *scire facias* contained any suggestion, or averment, that the defendant had lands and tenements, of which the debt could be made. Before a joinder in demurrer was filed, or a rule for joinder taken, the court overruled the demurrer on motion.

Mason, for the plaintiff. *Jewett*, contra.

By the COURT.

The remedy pursued in this case, is given by statute—it is therefore necessary to follow the course which it prescribes in every material point.

In order to entitle the plaintiff to have recourse to this proceeding, two things are necessary; first, that goods and chattels cannot be found within the jurisdiction of the justice; and secondly, that the defendant has lands and tenements within the county. The first is to be ascertained by the return of an execution, and the second by a suggestion made to the justice. Whatever may be the opinion of counsel as to the utility of attending to these requirements, it is enough for us to know, that the legislature have directed them, and have expressly made them the foundation of the jurisdiction of the common pleas. The *scire facias* cannot be resorted to until an execution has been returned *nulla bona*, and a suggestion made to the justice, that the defendant has lands and tenements within the county.

When this has been done, it is his duty to send a transcript to the clerk of the court, who is required to file it, and issue the writ. Unless the transcript set out these facts, the clerk cannot know officially, that a *scire facias* is either required or authorized, and unless they are set out in the *scire facias*, which ought to contain the substance of the transcript, the court of common pleas cannot know judicially that the case is within their jurisdiction. It is a general rule, that every record must present a case apparently within the jurisdiction of the court, and when the jurisdiction is specially given by statute, and is to be resorted to only on the recurrence of particular facts, those facts must be shown, for however correct it may be to presume jurisriction, where the want of it

does not appear, in cases within the general jurisdiction of the court, yet where the jurisdiction is created by statute and limited to particular cases, of which the court could not take cognizance without the statute, the jurisdiction cannot be presumed. If the facts on which it is made to depend, are not averred, the party does not bring himself within the jurisdiction, and he cannot resort to the statute for aid, because his record does not contain the case provided for by the statute.

The maxim *esi boni judicis ampliare jurisdictionem*, does not apply to courts of a limited jurisdiction, much less to cases of which the jurisdiction is wholly dependent on statutory provision. It would be a *malus judex* who would thus apply it, as it would confound a distinction, without which there can be no limits to the power of courts. It cannot be necessary to advert to the uncertainty and inconvenience that would follow the practice contended for by the defendant.

We know that transcripts are taken for various purposes. Plaintiffs have always a right to require them, as well before as after execution,—consequently, if the clerk may issue a *scire facias* on a transcript that does not contain these averments, a plaintiff may in every case proceed against real estate, although there may be goods and chattels sufficient to satisfy the judgment.

In relation to the second assignment, it has been intimated by counsel, that the record does not fairly represent the proceedings of the court; but we cannot listen to such a suggestion. We must take the record as we find it; and as it is, it shows a proceeding not warranted by law, or the practice of this state. When a demurrer has been regularly filed, a joinder becomes necessary, in order that an issue may be made to the court. It is irregular to dispose of the demurrer on motion in this summary way.

Judgment reversed.

WILSON *v.* HOLEMAN.

JUDGES BURNET AND SHERMAN.

1826.

When the bond for an appeal from the common pleas is given after verdict and before judgment, the appeal will be quashed.

The cause had been brought up by appeal from the Common Pleas. It appeared from the record, that a verdict had been rendered for the defendant, at the May term, 1821, and notice of appeal then entered. On the 4th of June the appellant gave bond with a condition, that he would prosecute his appeal to effect, and not depart the court without leave, and would pay the amount of cost and condemnation money, if a decree, or judgment should be rendered against him. Final judgment was rendered on the verdict in the Common Pleas, at the July term following.

The appellee moved to dismiss the appeal, on the ground that it had not been taken in conformity with the statute.

By the COURT.

The right of appeal from the Common Pleas, to this court, for the purpose of having another trial on the merits, is given by statute, and extends only to cases in which judgments, or decrees have been rendered, and the plain construction of the staute requires, that the judgments or decree must be rendered, before any steps are taken to perfect the appeal. The appeal is allowed from judgments and decrees.

The notice, which is the first step to be taken, must be entered on the records of the court at the term in which judgment is rendered, and bond with security must be given within thirty days after the close of that term. In this case it appears that notice was entered and the bond executed before the term in which judgment was rendered. The bond is also defective.

It does not describe, or set out the suit with sufficient precision, to determine with certainty to what case it was intended to apply. As this suit therefore is not within the original jurisdiction of this court, and the steps required in order to give us appellate jurisdiction have not been taken, the appeal must be dismissed.

A motion was then made to enter judgment against the appellant for costs. The motion was overruled on the ground that the cause was not within the jurisdiction of the court, and consequently that no judgment could be rendered for or against either party.

Appeal dismissed.

MURPHY v. LUCAS.

JUDGES HITCHCOCK AND BURNET.

1826.

In forcible entry and detainer a bill of exceptions cannot be tested by a bystander.

Forcible entry may be tried in any township within the county where the lands lie.

The complaint in forcible entry and detainer, must describe the premises in such a manner as will afford a guide to the sheriff in executing the writ of restitution.

It was a writ of error to reverse the judgment of the court of Common Pleas, rendered in a case of forcible entry and detainer, certified to that court by the justices, before whom it was tried.

Creighton and *Bond*, for plaintiff in error. *Clough* and *Douglas* for defendant.

The errors assigned were,

1st. The proceedings show no definite description of land for which a restitution could issue.

2d. The process is directed to the Sheriff, but returned by the Coroner.

3d. The proceedings were not in the township in which the land is situate.

4th. The verdict is not in the form prescribed in the statute.

5th. The matters set out in a bill of exceptions taken to certain proceedings before the justice and certified by a bystander.

By the COURT.

The second, third and fourth errors, are not sufficient to reverse the judgment. It appears that the sheriff to whom the process was directed, died between the test and return. The coroner was therefore the proper officer to execute and return it. The statute does not require the proceedings to be had in any particular township, but gives jurisdiction to any two justices of the county in which the land is situate, leaving them at liberty to try the cause in any township within the county, as may be most convenient.

The verdict is in these words: "We the jury find the defendant guilty in said suit of forcible entry and detainer."

The statute directs, that if the jury find the complaint true, "they shall return a general verdict of guilty, or they shall return a special verdict of such parts as they do find true."

Perhaps the order in which the jury have placed the words composing their verdict, might be improved, but we think it conforms substantially to the requirements of the statute. It may be taken as a general verdict of guilty, with an unnecessary description of the case in which it is found, or by transposing a single word, the jury find the defendant in said suit guilty of forcibly entry and detainer, or by rejecting the words "*in said suit*" as surplussage, the same result will be produced.

The plaintiff cannot avail himself of the 5th error, because there is no law in this state, authorizing bystanders to allow or certify bills of exceptions, and if there had been, an allowance by a single bystander, interested in the cause, as was the fact in this case, would not have been sufficient.

But the first error seems to be a fatal one.

The complaint before the justice, was, "for forcibly entering upon, and detaining possession of the lower part of a tract of land situate on the bank of the Scioto River, opposite Piketon, the same being patented to the complainant by a patent from the President of the United States, bearing date the 2d of March, 1821."

The complaint is in nature of a declaration. It must give a venue, and must describe the premises with such certainty as will apprise the defendant of what is demanded of him, and as will afford a guide to the Sheriff in executing the writ of restitution. In this case it does not appear in what township, or county the land is situate, nor how much of the entire tract is demanded.

The judgment and writ of restitution must pursue the complaint, and consequently, the Sheriff must be directed to restore to the complainant, the lower part of a tract of land, on the bank of the Scioto river opposite Piketon.—This description forms no guide to the officer, it does not direct him how to find the entire tract, nor what quantity of it he is to restore, after it is found. The lower part of a tract, without metes and bounds, or quantity of acres, is too vague and indefinite. It neither contains certainty, nor the means of arriving at certainty.

Judgment reversed.

DAVIS v. MATHEWS.

JUDGES HITCHCOCK AND BURNET.

1826.

In slander a plea of justification is bad on demurrer if it do not distinctly admit the speaking of the words.

The declaration set out sundry words spoken of by the defendant, charging the plaintiff with the crime of perjury. The defendant justified, and the plaintiff filed a general demurrer to the plea.

In the court below, the demurrer, had been overruled, and issue made up on the plea, a verdict and judgment rendered, and an appeal taken to this court.

By consent of parties, the record was amended by withdrawing the replication and issue, and reinstating the demurrer.

The plea contained a full and technical averment of the truth of the words charged in the declaration, but did not aver, or confess that the defendant had spoken them.

Murphy and *Bond*, for plaintiff. *Douglas*, contra.

By the COURT.

The rules of pleading require, that special pleas in bar, shall contain an answer to the whole declaration. The declaration in this case charges, that the defendant spoke and published the words set out, and avers that they were false and malicious.

The plea avers, that the words were true, but does not confess or deny the speaking of them. A material part of the declaration therefore remains unanswered, which could not be decided by any verdict that might be rendered in the case. It is immaterial whether the words be true, or false, if the defendant did not speak them, consequently an issue on which that fact alone is to be decided cannot settle the merits of the case, as it leaves the principal matter in controversy undetermined.

The ground taken by the defendant, that what is not denied by the plea, is admitted, is correct in many cases In debt on bond, the plea of payment necessarily admits the making of the bond, because the defendant could not have paid it, unless it existed. So in trespass; a plea, that after the trespass committed, the defendant tendered amends, &c. admits the trespass, because he could not tender amends for the trespass after it was done, unless it had been done. But in the case before us, there is no allusion to the speaking of the words, either in the commencement or close of the plea. It does not begin by alleging that before the speaking of the words charged in the declaration, the fact set out in the plea occurred, nor does it close with an admission, that for the cause aforesaid he spoke the words, as he had a right to do, nor is there any connexion between the

truth, or falsity of the words, and the fact of speaking them. The jury must find the words either true or false, and in neither case could it be inferred that the defendant did, or did not speak them.

The notice relied on by the defendant, is good, as far as it goes, but it falls short of the point to which it ought to extend.

Approved precedents, are good evidence of what the law is, on points of practice and pleading, and it is always safe to pursue them, as well in form as substance.

We believe that no form of a plea of justification of slanderous words, can be found in any approved collection of entries, or precedents, that does not aver the subject matter of the plea, to have taken place, before the speaking of the words, and that does not also expressly, and distinctly confess the speaking. Such are the forms in *Lilly, Morgan, Richardson, and Chitty.* Demurrer sustained.

McVICKAR *v.* LUDLOW'S HEIRS.

JUDGES HITCHCOCK, BURNET AND SHERMAN.

1826.

After the appearance of the defendant and continuance of the cause, it is error to dismiss it for want of security for costs. In such case a rule for security should be taken.

Gazlay, for the plaintiff,

Assigned for error, that the court below had improperly dismissed the writ for want of security for cost.

The case presented by the record was this: the writ was tested on the first day of September, returnable to the December term, 1823. At the return Term, a rule was taken for plea, and the cause continued to April term, when security for cost was entered and judgment taken by default. The judgment was afterwards opened on motion, leave given to plead, and the cause continued to August term. At the August term, the writ was dismissed on motion, on the ground, that security for cost had not been given according to the statute, and judgment entered against the plaintiff for cost. The writ of error was taken to reverse this judgment.

By the COURT.

The 10th section of the practice act, in force in 1823, required "that in all cases of mesne process, where the plaintiff doth not reside, or is not a freeholder in the county, the writ shall be endorsed by some freeholder, resident in the county, as security for costs, before the sheriff shall serve the same."

As the plaintiff was a non-resident, and had no freehold in the county, it was incumbent on him to procure an indorser, and until that was done, the sheriff ought not to have served the writ. But in this particular, we consider the statute as directory. The service, although unadvisedly made, was nevertheless valid, and if the defendant saw proper to waive his security, the proceedings on the writ, if in other respects regular, would be legal. The want of an indorsement for cost could not be considered as error. But the negligence of the offi-

cer did not deprive the party of his legal right. It was competent for him to claim it after the service and return of the writ, by an application to the court for that purpose, either at the first, or at any subsequent term, before final judgment.

Without undertaking to decide, whether or not it would have been regular for the court to have quashed the writ at the roturn term, we have no hesitation in saying, that it was erroneous to do so under the circumstances of this case. The defendants by appearing, submitting to a rule for plea, and a continuance of the cause, acquiesced in the irregularity of the service. They had put the plaintiff off his guard, and could not afterwards avail themselves of the statute, unless on motion, and a rule for security, within such time as the court might think reasonable.

A different construction would be inconvenient, expensive, and vexatious. But in this case, the plaintiff voluntarily furnished an unexceptionable indorser, before the objection was taken, and probably before the defendants had ascertained whether security had been given or not. The object of the provision had been fully accomplished, and the parties interested were in as good a situation as if the law had been literally complied with. The course taken was, therefore, unnecessary, and not warranted by the statute.

Judgment reversed, and the cause remanded for further proceedings.

BAIRD v. SHEPHERD.

JUDGES HITCHCOCK, AND BURNET.

1826.

Time for the performance of a decree in chancery may be enlarged.

By the decree rendered in this cause at the last term, the complainant was required to execute and deliver to the defendant a bond, with approved security, to indemnify him against certain covenants of warranty, which he had made in the sale of the property in controversy. The complainant was directed to execute and deliver the bond within a specified time, in order to entitle himself to the benefit of the decree.

The facts of the case were, that the bond was executed in conformity with the decree, but was deposited in the clerk's office, instead of being delivered to Shepherd.

GRIMKEE and FITZGERALD now moved for a rule to enlarge the time limited in the decree for the delivery of the bond, (and cited 2 *Mad. Ch.*) 493, 495—6, 524—5.) The motion was granted on terms,—allowing the defendant the same time to pay the money after the present term, and ordering interest to be calculated from the same day in reference to the commencement of the present term, as was provided in the original decree in reference to the commencement of the last term.

Motion allowed.

McCUTCHEN, v. KEITH.

JUDGES HITCHCOCK AND BURNET.

1826.

Under the the act of 1810, a bond for the conveyance of town lots to which no value is affixed, cannot be prosecuted by an assignee in his own name.

This was an action of covenant brought in the name of Keith, assignee, on a bond conditioned for the conveyance of two town lots, to which no value or price was affixed.

Judgment was rendered in favor of the plaintiff, in the court below, and a writ of error taken to this court.

The error assigned was, that the bond was not negotiable, so as to authorize a suit in the name of an assignee.

By the COURT.

The obligation in question, was assigned under the statute of 1810, which provides that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money, or other property certain, and made payable to any person or persons, or to his, her, or their order, or unto bearer, shall be negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof, &c.

It also authorizes the assignee to institute and maintain an action in his own name. By the construction which we have uniformly given to this statute, it has been restricted to instruments drawn for a sum, or sums certain, payable in money, or property. We have believed this to be the fair interpretation of the act, and the only one that would give effect to the apparent design of the legislature. The certainty required cannot relate to the species of article to be delivered, or paid, whether money or property, but to the numerical value, in that description of money for which judgment is to be entered. On any other interpretation, the restriction would be useless, as it would not prevent that uncertain kind of speculating traffic, in which the parties must be ignorant of the real value of the instrument which is the subject matter of their contract. To prevent this evil, the English courts have confined the statute (*3 and 4 Ann,*) to notes for the payment of money *absolutely*, to the exclusion of such as are contingent either in whole or in part. The assignment of the obligation in this case, could not vest in the assignee an absolute right to demand or recover any certain sum, as the value of the lots was not fixed, and could not be ascertained without the verdict of a jury.

Judgment reversed.

LESSEE OF SPENCER ET AL. v. MARCKEL.

JUDGES BURNET AND SHERMAN.

1826.

An equitable title connected with possession is no bar to an ejectment.

The only notice necessary to enable a plaintiff in ejectment to recover is the ten days notice required by the statute.

It was an action of ejectment, and was submitted to the court on the following agreed case. "Jonathan Dayton, the ancestor of the Lessors of the plaintiff, contracted by parol to sell the land in question to defendant. The contract of sale contained no stipulation as to the possession, but defendant took possession, claiming to hold under said Dayton. For the purpose of this suit, it is admitted that the purchase money has been paid by defendant. No notice to quit was given, previous to the commencement of this suit. If the court shall be of opinion, that payment of the purchase money, and compliance with the said contract of sale, can be set up as a defence in this suit, or if the court shall be of opinion that notice to quit was necessary, then the plaintiff is to become non-suit. Otherwise judgment against defendant."

Wilcox, for plaintiff. *Brush*, contra.

By the COURT.

The first question presented in this case, has often occurred on the circuit. Several cases have recently been tried, in which it was determined, that an equity cannot be set up, as a defence against the legal title, in an action of ejectment. The principle on which those cases were decided, is in conformity with the rule now settled at Westminster, and is supported by the authority of decisions in many of the states. The cases cited in the argument are full to the point. We believe the safest general rule that can be adopted, is, to leave the equitable claimant to assert his right in a court of chancery, and were we at liberty now to consider this question as open, we should feel bound both by precedent and expediency, to decide it against the defendant.

The general rule in England, in relation to notice, seems to be this; that no person is bound by law to give notice to another, of that which such other may otherwise inform himself, except such notice be directed by act of Parliament. In ordinary cases, no notice is necessary to the person against whom there is a legal demand, before the commencement of a suit for the recovery of that demand, because he is bound to do his duty, and to take notice at his peril, that he will be held responsible for the omission of it. In this case the defendant went into possession without a legal title, and without any authority from general Dayton, under whom the lessors of the plaintiff claim. He may therefore be considered in the light of an intruder, rather than as a person standing in the relation of a tenant to his landlord. Viewed as a purchaser, he does not come within the scope of the general rule; he has relied on his contract, and he cannot

be presumed to be ignorant of the law, by which it is governed. He is therefore to be considered as having taken possession at his own risk, and bound to take notice of all the consequences, resulting from his own act. He may be compared to the locator of a Virginia land warrant, who acts on his own information, takes on himself the whole risk of title, and is not protected by an averment of want of notice.

But it is not necessary to investigate this point, with a view of shewing, that this case does not come within the class of cases, in which notice has been held necessary by other courts. The doctrine of notice to quit, as it is applied in actions of ejectment, depends on statutory provisions, and on rules of courts, which have often been changed, and differ materially in different tribunals. The only notice required by the laws of this state, is a notice of ten days to the tenant in possession, before a plaintiff in ejectment can proceed to judgment against the casual ejector. This notice has been considered as legally given by the service of the declaration with the common notice attached, ten days before the first day of the term to which it is returned.

We have no rule requiring any other, or different notice, and have never considered the rules adopted by other courts, or prescribed by the Legislatures of other states or countries, as obligatory here.

Judgment for the plaintiff.

HOOD *v.* BROWN.

JUDGES PEASE AND BURNET.

1826.

A mortgage executed in January, 1821, for the express purpose of keeping the property out of the reach of a creditor who had commenced his suit, and retained by the mortgagor in his own possession until 1823, and then delivered and recorded, cannot overreach the lien of a judgment rendered in July, 1821.

The governing facts in the case were these. In January, 1821, Bentley and wife executed a mortgage of the premises in question, to the complainant, for the ostensible purpose of securing a debt. The reason given for executing the mortgage at that time was, that the United States were about to commence a suit for a large amount, against a private banking company, of which Bentley was a member, and liable by the law of this state to the payment of the demand. He retained the mortgage deed in his possession, till the summer of 1823, during which time he exercised acts of ownership, leased a part of the premises for the term of twenty years, to H. Stevens, informing him at the time, that he had executed a mortgage to Hood, but that he held it in his possession, and did not intend to record it, unless the United States should recover a judgment. At the same time he informed Stephens, that the defendant, Brown, had a suit pending against him, that it was necessary to hasten the arrangement, for if Brown should get a judgment, it would bind the property. In the summer of 1823 Bentley sent the mortgage to Philadelphia, to be delivered to Hood, on condition that his creditors would give him a general release, which it appears was never executed; the mortgage however, was delivered, and was recorded shortly after.

In July, 1821, Brown recovered a judgment against Bently and Quimby, for $2,393: in August he issued a *fi. fa.* which was returned, by his directions, without service, at which time there was personal property in Bentley's possession, estimated by one witness, at $800. This property was alleged to be embraced in a previous assignment, for the benefit of creditors. An *alias* execution issued in October, 1823, which was levied on the mortgaged premises, by virtue of which they were sold, and purchased by the defendant Brown, for $567. Brown denies notice, admits he heard rumors that Bently had executed conveyances of his property, which were retained in his possession, to be delivered, or not, as circumstances might dictate.

The object of the bill is, to avoid the sale and conveyance of the premises to Brown, and to obtain a sale for the benefit of the complainant.

Wheeler, for complainant. *Stone*, contra.

By the COURT.

The mortgage set up by the complainant, though executed in January, 1821, remained in the possession of the mortgagor, without any attempt to perfect it by a delivery, till some time in the summer of 1823. The judgment under which Brown purchased and claims the premises, was obtained in July, 1821, and by the statute of the state, was a lien on the lands and tenements of the defendant, from the first day of the term in which it was rendered. In order to overreach this judgment, it has been strenuously contended, that the deed took effect from its date, and operated as a lien on the premises, from January, 1821, which was anterior to the term in which the judgment was had. The authority principally relied on, to support this position, is the case of *Will vs. Franklin*, (1 *Binney*, 502.) in which it was decided by a majority of the court that the deed executed by Keely to Bartholomew, should take effect from its date, so as to overreach a judgment rendered against Keely, after the execution, and before the delivery of the deed. There is however a striking difference between the facts of that case, and of the one before us.

The deed by Keely was made for the benefit of all his creditors: it was retained in his possession only a few days, which was in part accounted for, by the fact, that the grantee resided in the country, at the distance of about thirty miles. In this case the mortgage was for the benefit of a single creditor; it was kept in the hands of Bentley nearly three years, subject to his disposal. It was made for the avowed purpose of placing the property beyond the reach of *one* of his creditors. It was not his intention to deliver it, unless that creditor attempted to enforce his claim, and Bentley treated the property, during that time, as his own, exercising acts of ownership, and leasing a part of it for the term of twenty years. Whether the distinguishing facts of that case, led the court to determine, that the operation of the deed should relate back to its execution, or not, we do not know, but if it was intended to adopt the principle set up by this complainant, we are constrained to declare, that we cannot recognize that case as a rule of decision in this state. We consider the law to be well settled, that deeds are to take effect from delivery, wherever the rights of third persons are involved. The doctrine of relation exists only between the immediate parties to the transaction. It is founded on a legal fiction, intended to prevent, not to

promote injustice. As when a deed is executed and delivered as an *escrow*, if the grantor die before the performance of the condition, yet, when the condition is performed, the grant shall relate back to the date, so as not to be defeated by the death of the grantor. And in a similar case, if the grantor be a *feme sole*, and marry before the performance of the condition, the same relation shall take place, and for the same purpose. But these, and similar cases, are not considered as affecting the general rule. They may be considered as exceptions, or as constituting a separate class of cases, resting on a different principle. It is not necessary to examine the authorities applicable to this point. Those cited on the part of the defendant, sufficiently establish the doctrine, and it is plainly inferable from most of those relied on by the complainant. The circumstances of this case, are not such as to take it out of the general rule. They are rather calculated to illustrate the propriety of the rule, by showing the fraudulent purposes that might be accomplished, were it not in existence. Without it, a debtor might execute a deed of all his real estate, and place it in his desk, to be used as circumstances might require, and when pressed by judgments, might deliver it to the grantee, as a deed overreaching the whole of their liens. This was, at least partially, the avowed object of the mortgagor. He declared to Stephens and others, that the mortgage was under his control, and that he did not intend to use it, unless the United States pressed for their claim. In this point of view the transaction was tainted with fraud, though it is not necessary for the purposes of this decision, to consider it in that light. It is sufficient to say, that the instrument, operating from its delivery, did not take effect till the summer of 1823, and consequently, that the judgment in 1821, has the prior lien.

We recognize the doctrine of marshalling assets, when justice and equity require it, but on this subject it is sufficient to say, that if the personal property had been unincumbered, the whole amount of its estimated value, added to the proceeds of the real estate sold under the judgment, has not satisfied more than a moiety of the debt. The principle therefore cannot be applied in the present case.

It is also admitted, that a deed, executed without the knowledge of the grantee, may be good, when it is not impeached by other circumstances. And that whatever might have been the motives of this mortgagor, at the time of executing the instrument, the mortgagee does not appear to have been a participator in them. But exonerating him from a charge of fraud, is not sufficient to establish his claim. His innocence cannot change the rules of law. If the transaction were free, both from moral and constructive fraud, the result would be the same. The deed as to the defendant Brown, would take effect from its delivery.

The bill as to the defendant Brown, must be dismissed with costs.

DECISIONS IN BANK.

1826.

SLAUGHTER *v.* HAMM.

A public officer who receives money to pay to a public creditor and obtains a receipt for the whole, upon the payment of a part, is liable for the residue, though no deception or fraud be practiced.

This was an action of assumpsit for money had and received, submitted to the court to decide upon the law and facts, and reserved for decision, at Columbus, in Muskingum county.

The facts in the case were as follows: the defendant, in 1820, was marshal of the Ohio district, and was charged by law with taking the census, then taken under a law of the United States. The plaintiff was appointed his assistant to take the census in the county of Fairfield. On the first day of August, he subscribed a written paper, engaging to perform all the duties required by law, "including an account of the manufacturing establishments, and their manufactures, at the rate of one dollar twenty-five cents for every hundred persons in said county, the marshal furnishing all the regulations, restrictions, forms, and interrogatories necessary." The district judge allowed the marshal two dollars fifty cents per hundred persons, for taking the enumeration of Fairfield county, which amounted to 336 dollars 66 cents. This sum was paid to the marshal, and an additional sum of 67 dollars 33 cents, for taking the account of manufactories and manufactures, amounting in the whole to 403 dollars 99 cents.

On the 5th of June, 1821, the plaintiff settled with the defendant and gave his receipt for 336 dollard 66 cents, "being in full for taking the census of Fairfield county," and also for "20 per centum upon that sum, being the allowance, in full, for taking an account of the manufactures in said county." The whole sum actually paid by the defendant and received by the plaintiff, was 253 dollars 49 cents. At the time of receiving this sum and giving the receipt, the plaintiff was apprised of the amount received from the government by the defendant. The suit was brought to recover the difference between the sum paid to the plaintiff and that received by the defendant.

Goddard for the plaintiff.

By the COURT.

The act of Congress distinctly marks out and defines the several duties of the marshal and of his assistants. The compensation which each is to receive, is separately provided for, and they are in no way connected. No fraud can be properly imputed to the contract between the parties, by which the compensation that the plaintiff should receive, was fixed at one dollar twenty-five cents the hundred. At the time it was entered into, the sum which the district judge might determine to be reasonable, was not known. That allowance was subsequently made, as well as the allowance, by the secretary of state, of 20 per cent. for taking the account of manufactures. When these allowances were made, they were made for the assistant, and he alone was entitled to them The marshal, when the money was paid to him, received it for the assistant, and not for himself. By receiving it, he became responsible that he would pay it to the plaintiff. He was, in fact, the plaintiff's debtor for the amount.

The case of the defendant is not that of an individual, authorized by another to receive his money, and therefore held to account for it. He was the agent of the government, acting in an official character, and confided in by the government to pay a debt due from it, for services performed. The honor, the integrity, the justice of the government required that the payment should be fairly and fully made.

The fact that the plaintiff knew all the circumstances, at the time he received less than his due, and gave an acquittance, does not authorize the defendant to keep what never was his—what he never had any color of claim to keep. By what motives the plaintiff was influenced to give a receipt for money he did not receive, and to leave in the defendant's hands money he had a right to receive, we do not know. One thing, however, is certain:—there is no pretence that the defendant gave any equivalent to the plaintiff. His claim to retain it, rests upon the naked assent of the plaintiff that he might do so. A public agent, who retaining any part of the money, put into his hands to pay the debts of the government, by the assent of the creditor, is not in the situation of a man who voluntarily pays money, in the discharge of an alleged debt, where nothing is due. Such retaining is an abuse of the public confidence; and if the law should permit a public officer, guilty of this abuse, to secure profit to himself, by his misconduct, the mischiefs would be incalculable. The vexations that would be practised to obtain a receipt for the whole, upon the payment of part, could seldom be made out in proof, whilst the receipt would always speak for itself.—Were the principle once established, that in a case like the present, the defendant was secure in his gains, it would be proposing encouragement for public agents to practice frauds, both upon the government and its creditors. The public policy, and the public justice are both opposed to such a doctrine.

The plaintiff is clearly entitled to recover both the principal retained, and interest upon it.

Judgment for plaintiff.

LYTLE *v.* DAVIES.

A bond for the prison limits is void unless the defendant is actually in prison, and that fact be recited in the bond.

A recital that he is arrested and in the custody of the Sheriff is insufficient. A joint bond for the prison limits in separate suits is void.

This was a writ of error prosecuted by the plaintiff, who was plaintiff in the court of Common Pleas, to reverse a judgment rendered against him in that court, and was reserved in the Supreme Court of Hamilton county, for decision here.

The suit in the Common Pleas, was an action of debt brought against the defendant, one of several securities upon a prison bounds bond.

The obligatory part was in the usual form. Wm. Lytle, administrator of A. St. Clair being the obligee. The condition was as follows, "Whereas Jacob Baymiller has been arrested by R. Ayres, Sheriff of Hamilton county, on three several writs of *capias ad respondendum*, returnable to the next Supreme Court, in favor of William Lytle, administrator, &c. amounting altogether to the sum of $53,419 35, and is in the custody of the said Sheriff. Now the condition of the above obligation is such that if the said Jacob Baymiller shall well and truly stay and keep within the limits or bounds of the prison of the county aforesaid, as laid off by the statute in such case made and provided, until he shall be legally discharged by law, then this obligation to be void," &c.

The declaration was upon the obligatory part of the bond as upon an obligation for the payment of money, in general terms. The defendant craved oyer of the bond and of the condition, and demurred generally, and the plaintiff joined in demurrer. The court of Common Pleas gave judgment, upon the demurrer, for the defendant, to reverse which this writ of error was brought.

The demurrer involved exceptions to the pleadings as well as to the validity of the bond itself. The general error was assigned, and the cause elaborately argued upon several points.

Wade and *Hayward*, and *Hammond*, for the defendant.

Haines and *Benham* contra.

By the COURT.

Our statute provides, "that every person *imprisoned* for debt, either on mesne process, or in execution, shall be permitted and allowed the privilege of prison bounds." The bond, in the case before us, recites that Baymiller has been arrested, and is in custody of the sheriff; but does not state that he was imprisoned. An arrest, and being in the custody of the sheriff, precede imprisonment, and are distinct and different from it. The facts stated in the bond, show that the case, in which the statute authorizes the bond to be taken, had not occurred. Baymiller was not imprisoned, but only arrested on mesne process. The sheriff, in that situation, could not legally discharge him, on taking a prison bounds bond. In doing so he permitted an escape.

The plaintiff's counsel have cited many cases, in which bonds of this description have been sustained, though not taken strictly according to the law. But so far as we have been enabled to examine them, these bonds were taken, when, upon the circumstances attending their execution, they were legally taken. The facts existed which authorized the officer to take the bond, and the exception was to the form of the bond itself. But the ground upon which we hold this bond defective is that the officer had no authority, upon an arrest only, to accept it, and discharge the body. By doing so he could not affect the plaintiff's rights, who might insist upon a recaption, or proceed against the sheriff, for an escape. It was at his option to treat the bond as a nullity, but he could not by his assent give it validity.

The exception, that one bond is taken in three distinct suits, is, also, in our opinion, a fatal one. The obligation is entire, and the whole penalty must remain, even if two of the suits were disposed of. It is in the nature of an appearance bail bond, and is therefore a part of the proceedings in the cause. For this reason it should be taken separately, so as to be connected with the separate case to which it belongs, and separately proceeded upon, should it be forfeited. It would be vain and useless to attempt enumerating the many inconveniences which might arise from taking a joint bond, upon the execution of separate processes. The power to require such a bond might be used for very oppressive purposes. And where the statute does not authorize it, the court think they ought not to sustain it.

The plaintiff has cited two cases in which a single bond was taken by the

officer upon separate processes and held good. But we do not consider these cases analagous. In 8*th John.* 111, the exception was not taken by counsel or noticed by the court. In stating the case, it is noticed that the bond was given upon three executions issued from a justice of the peace. We know not how far the law of New York might, in terms, warrant such a proceeding. As it formed no ground of exception, we should infer that it was conformable to statute, or to a settled practice. However, as the point was not made nor decided upon, we cannot consider the case an authority.

The case from 2 *Call*, 290, was one where a forthcoming bond was taken, in two cases of suits against the securities of two separate sheriffs of the same county, under a special act of assembly directing the executions to be staid, upon a forthcoming bond being given. The court, in their opinion, admit that it is not common to take a joint bond upon separate executions. They say the bond was so taken that neither party could be prejudiced. But they decide the cause upon the act of assembly, which they say "rather points to one bond only." We cannot regard this case, any more than the one from New York, as an authority to which our own opinions should be yielded. The unity and consistency of legal proceedings, and the safety and security of all the parties requires that a bail bond, or a prison bounds bond should be taken separately in each separate suit.

It is strongly urged by the plaintiff's counsel that if defective as a bond under the statute, this bond is good at common law, as a voluntary bond.

The numerous cases cited to sustain this position are all essentially different from the one before us. The sheriff takes a bond from the prisoner conditioned that he will remain a true prisoner. This is in the nature of a contract. It relieves the sheriff from an incessant vigilance, and it secures to the prisoner the enjoyment of his own time, free from the superintendance of the officer. The contract is a beneficial one to both parties, and, if not prohibited by law, would be deemed valid.

In the case of a forthcoming bond, the sheriff having legally levied upon the defendant's property, restores it to him, upon taking a bond with security for its re-delivery. If taken in a proper form, and returned with the execution, in Virginia, a very summary remedy is given upon such a bond. But if not thus taken, it is still deemed a good bond, and may be sued upon as in the common case of a contract. And for this reason, the contract was a valid one, made for a legitimate purpose, and operating beneficially for the obligor. There is no case where a bond is unauthorized by law, and where no advantage can result to any one, that a bond given under the belief that it is for a legal purpose, when it is not, is held valid.

If an officer, alleging he has process, when he has not, without making any arrest, take a bond for the prison bounds, where the obligor is actually the judgment debtor of the obligee, it would clearly be a voluntary bond, yet it would undoubtedly be inoperative, because it was taken without authority, and could, in no respect, benefit the obligor.

So, in this case, Baymiller not being in prison, the sheriff had no authority to take the bond. It was therefore voluntary. But it did not preclude the plaintiff from retaking the defendant had he chose to do so, or from proceeding against the sheriff as for an escape. Had the defendant been retaken, would the bond

have been obligatory? If it would, he certainly received no advantage from it. If it would not, the reason must be that it was void from the first. There is nothing in it, by which its obligation can be made to depend upon the act of the plaintiff. In declaring this bond inoperative, we impugn none of the decisions adduced by the plaintiff in support of it, on the contrary, we conform to the principles upon which all those decisions rest.

Judgment affirmed.

LESSEE OF MASSIE'S HEIRS v. LONG ET AL.

If a defendant die after execution is levied, the execution proceeds as if the death had not taken place.

But where execution is issued after the death of the defendant, upon a judgment rendered in his life time, and levied upon lands of which he died seized, the sale if made, is void.

The assessment of a tax upon a "part of a lot" or "one acre of a lot" without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part, or in any place.

Tenants in common may make a joint demise.

Prochein amie, cannot make a demise.

This was an action of ejectment, reserved for decision, in Ross county.

The title of the lessors of the plaintiff, was founded on a patent issued to them, since the death of their father, as heirs at law, to take as tenants in common, and not as joint tenants. This patent was given in evidence, and the possession of the defendants was admitted.

The defendants set up a title in themselves. First, under a sale upon execution. Second, under a sale for taxes.

The sale upon execution, was founded upon a judgment rendered against Nathaniel Massie, in his life time, upon which executions had been sued out, so that it had not become dormant. Nathaniel Massie died in 1813. On the 19th of January, 1818, execution was sued out against Nathaniel Massie, as against a person then in life, was levied upon the property in question, which was sold by the sheriff. The sale was regularly conducted, and the deed duly made. The defendants are in possession, under the purchaser.

The premises in dispute, are part of out lot No. 43, on the plat of the town of Chillicothe. The title set up under a sale for taxes, rested upon the following facts: The corporation record showing the levy of the tax for the year 1816, was adduced in evidence; the appointment and qualification of the collector, the advertisement of the time of sale, the sale and deed to John Hillings, were all in evidence. The list or duplicate, in which the lots were set for, or charged with the tax, was given in evidence. In one place upon this list, a *part* of out lot 43 was charged with a tax. In another place, "one acre of out lot No. 43," was charged with tax, in the name of Edward Long, one of the defendants. Parol proof was offered, that the "one acre," named on the list, was on the north quarter, where Long lived, which is the lot in question. But the testimony was objected to and overruled.

Verdict for the plaintiff.

The defendants moved for a new trial, upon four distinct grounds:

1. The title, under the sheriff's deed, was a valid one.

2. The title, under the marshal's sale for taxes, was valid.
3. Tenants in common, cannot make a joint demise.
4. An infant cannot make a lease by *prochein amie.*

Douglas and *Leonard* in support of the motion. *Bond*, contra.

By the COURT.

It is well settled, that if the defendant die, after execution is sued out and levied, that the execution proceeds, as if the death had not taken place. The reason generally given for this is, that execution is an entire thing, and, having once commenced, cannot be stopped. But there is undoubtedly a much more satisfactory reason to warrant the proceeding, at least in the case of a levy upon chattels. By the levy, the property of the defendant in the goods is divested, and the sheriff acquires a special property, which it his duty to divest himself of according to the exigent of the writ. No rights are affected by this proceeding but those of the actual parties,—no other interests are touched.

If the defendant die, after execution sued out, and before levy made, the execution cannot proceed. And the reason is this: the sheriff is commanded to take the property of the defendant, but by his death this becomes impossible. His right of property is terminated, and other rights have commenced. Whether this right rests in the heir, administrator, executor, or devisee, it matters not. The right of property is changed, and with that change the authority of the sheriff, under the execution to take it, is gone. He might as well levy the property of an entire stranger.

This proposition is not affected by the fact, that the property of a deceased person remains liable, in some shape, for the satisfaction of the judgments against him. The law has prescribed the mode of reaching it, in the hands of those to whom it passes, at the death. And that method must be pursued.

It may, for the sake of argument, be conceded, that an execution issued upon a judgment, where the defendant is dead, is not void, but voidable only; its effect is not the less nugatory. There is nothing upon which it can operate. It commands that to be done which is impossible. If the officer seize chattels, of which the defendant died possessed, they belong to the personal representative. If he levy on land, it is the property of the heir or devisee. The only true return he can make, is, that there is nothing upon which he can levy.

We have carefully examined the cases cited by the defendant, in which it is said to be adjudged that a sale of lands, upon execution sued out and levied, after the death of the judgment debtor, is so far valid, that it cannot be questioned collaterally on the trial of an ejectment. The cases do not sustain this position. In the case of *Jackson v. Delancy*, (13 *John.* 550) a *scire facias* to revive the judgment was issued, served, and a judgment rendered upon it. It was alleged, that the person to be affected was not made a party, and that, as to her, the case stood, as if no *scire facias* had issued. What weight this had in the decision we cannot tell. Judge Kent, himself, placed the cause upon the ground, that the description of the lands, in the sheriff's deed, was too indefinite and vague to convey title.

The case of *Jackson v. Robins* (15 *John.* 169) is open to the same objection. There was a *scire facias*, and it was served upon the part claiming in that case, and judgment rendered on it. So that the point now before us was not decided, although discussed, and some remarks made upon it by Judge Kent.

We have every possible respect for the opinions of that distinguished jurist. But we cannot adopt the arguments he has thrown out, upon this subject. He says he "takes the law to be, that even the omission altogether of the *scire facias* will not, as of course, render void a sale under execution." He illustrates this position, by referring to cases where executions, sued on judgments, after a year and a day, were held not to be void, but a justification to the party who acted under them. He supposes that there is no difference between such cases, and one where the defendant was actually not in existence. And he cites the case from 2 *Binney*, as in point, to sustain his opinion. But we think the cases are materially and essentially different.

In the first case, there is no change of parties, nor of interests. The defendant, on the judgment against whom execution issues, is a living party, competent to protect his own rights. It is upon his property that the execution is to be levied, and when so levied, the command of the writ is strictly complied with. No rights are interfered with, but those of a party to the judgment. It has been already shown, that in the case of the defendant's death, the rights of property are changed, and other parties are interested. This single consideration destroys all analogy between the two cases.

By our laws, the personal goods of a decedent constitute the primary fund for the payment of debts. It is only when they are exhausted, that land can be subjected in aid of them. If, upon execution against the deceased, a sale of land could be valid, the heir might be greatly prejudiced. The personal representative having the personal estate in his possession, the sheriff could not touch it, the land only could be levied on, and thus might be swept away, for the payment of debts, when in fact the personal estate is sufficient. The heir or devisee may thus be deprived of his estate without an opportunity to defend it. The concession, that such execution is irregular and may be set aside, at a proper time, does not remedy the mischief. The heir is no party, and is not bound to know, or take notice of the proceeding. On the contrary, the maxim of the law is, that he should have a day in court, not to be sought for by himself, but upon the call of the plaintiff. We think that there is a much stronger necessity, in this case, for a *scire facias* against the heir or devisee, than in the case of judgment, where the defendant is alive, but no execution has been sued within the time limited by law.

We do not consider the case from *Binney* as any more in point than those from New-York. In that case, a *scire facias* was sued out, as in the New-York cases, and there was a judgment upon it. The defect in the service was an irregularity, but the judgment upon it was not therefore void. The execution issued upon a judgment, against a living defendant, party to that judgment, not, as in this case, against a deceased defendant. In that case, the execution was levied upon the land of a living defendant, not, as in this, upon the lands of persons, neither parties nor privies. It was clearly a case of irregularity, which amounted to error, but could not make the judgment a nullity.

The cases from Massachusetts are all judgments against executors or administrators; and, in that state, lands are assetts, in their hands, so that the doctrine there, can have no application here.

It is therefore the opinion of the court that the sale by the sheriff was inoperative and did not divest the lessors of the plaintiffs of their title.

Upon the second point there can be no difficulty. The assessment of a tax, upon a "part of a lot" or, "one acre of a lot" without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part, or in any place.

By the 59th section of the judicial act it is provided that "in all actions of ejectment the plaintiff shall have the same benefit and advantage from a joint demise, that he could from several demises." This embraces the case of tenants in common. We have so settled this term in the case of the lessee of *Wilkinson v. Fleming*, from Butler county.

The objection that infants cannot make a lease by *prochein amie* is fatal to the plaintiff's recovery for all that he claims upon the demises of the infants.

Although the demise is a mere fiction, it is treated for many purposes as a real transaction. If the lessor of the plaintiff die pending the suit, it does not abate, because the nominal plaintiff survives. If, pending the suit, the lessor convey his interest in the land, the plaintiff may still recover. The lessor by transferring the fee cannot destroy the term of the lessee, but must convey subject to it. The demise, for the purpose of justice, is thus considered a *real* transaction, and must therefore, have the *appearance* of a *legal* one. A *prochein amie* has no power to lease the lands of his protege. He is neither attorney nor guardian. His office is solely to prosecute the suit, and for this purpose it is not necessary he should execute the supposed lease. A person acting in the character of an infant's friend, could not make a lease of lands that would bind the infant, or give the lessee a right of possession. Such a lease, though fictitious, yet being a necessary part of the plaintiff's right to recover, must be equally inoperative for that purpose. The verdict is incorrect and must be set aside. Except for the undivided part of the lessor, who being of age joined the *prochein amie* in the demise.

Judgment accordingly.

GILMORE *v.* MIAMI EXPORTING COMPANY.

An execution upon a judgment at Law and a return of no property, is not indispensable to authorize proceedings in chancery under the Statute.

This cause was adjourned from the Supreme court of Hamilton county. It was a bill in chancery, under the 59th section of the statute regulating proceedings in chancery, to charge debts due from the other defendants to the Miami Exporting Company, with the payment of a judgment obtained by the complainants against the company. Upon one judgment no execution had been sued out, upon the other execution had issued, was returned *nulla bona*, and levied upon real estate, which upon a *vendi*, had been sold for a very small sum. No new *fi. fa.* had been taken. The bill did not charge that execution had been sued and nothing to be found, and for this cause the respondents demurred.

N. Wright and *Este* in support of the demurrer.

Storer, Caswell and *Hammond*, contra.

The court overruled the demurrer. Judge Burnet being a stockholder in the Miami Bank did not sit in the cause. Judge Sherman dissented. A majority of the judges not uniting in the opinion, no reasons were given.

WRIGHT v. LEPPER ET AL.

A bond for the redelivery of property taken in execution and not sold for half the appraisement under the act of 1820, and not redelivered or tendered to the officer who made the levy, or his representatives, is forfeited, though no new execution be sued out.

This case was adjourned from the Supreme Court of Columbiana county. It was an action of debt upon a bond given, under the 12th section of the act of Feb. 24, 1820, for the re-delivery of property taken in execution, and not sold for one half its appraised value.

The condition of the bond, after reciting the previous facts of execution, levy, and re-delivery, is in these words, "if the said James Orr doth well and truly and without fail deliver unto the officer having an execution on the above judgment, the above mentioned goods and chattles, within six months from this date, then this obligation to be void."

There were several pleas and notices, but the facts in the cause intended to be presented, and upon which the cause was decided, were, that the plaintiff did not sue out any execution upon his judgment within six months from the date of the bond, and no delivery was made of the goods to the officer, or plaintiff, nor any offer made to deliver them.

J. C. Wright, for plaintiff. *Loomis* and *Metcalf*, contra.

By the COURT.

The defendants in this case, are securities, in a bond for the re-delivery of property, seized in execution, at the suit of the plaintiff, against James Orr. After the execution of the bond no second execution was sued out within six months and no tender was made by the defendants, or by Orr, to perform the condition of the bond. The question to be decided is, whether the condition of the bond is forfeited under these circumstances.

By the 12th section of the act of Feb. 24, 1820, it is provided, *inter alia*, "that it shall be lawful for such officer to deliver such article or articles to the judgment debtor, upon his giving bond, with two securities, to the satisfaction of the officer, that he will deliver said article or articles to the officer *having in his hands* the execution upon the same judgment, within six months thereafter, which bond shall be made payable to the other party to the execution, and shall be returned with the execution, to the court or justice of the peace from which the same issued.'

The case turns upon the construction to be given to this execution. It is contended for the defendant, that the words "*to the officer having in his hands the execution*," must refer to the time, when the obligor is to re-deliver the property, and that therefore the execution creditor, if he mean to resort to the bond, must sue out, and place in the hands of an officer, a second execution, before the ex-

piration of the six months. If he omit this, he prevents the performance of the condition by his own act, and the bond is discharged.

We do not think that the law can correctly receive this interpretation. It was undoubtedly the intention of the Legislature to give the debtor a stay of execution, for six months, if his property would not sell for one half its appraised value, and it is our duty, if possible, to give the law such construction, as shall give effect to this intention.

The phraseology of the act is very loose and indefinite, "*within six months*" are terms of uncommonly general import. But there can be no question that he, who is bound by a condition, to do an act *within six months*, has the whole period of six months to perform it in, and cannot be called upon, by the other party, to perform it before the last day. It would be a violation of just principles to read the provision so as to connect the words "*within six months*" with the fact, of the officer having in his hands an execution, and thus enable the plaintiff, by suing out a new execution, to enforce a performance of the condition within six days, instead of six months.

The principal difficulty is to determine the true meaning of the words "*the officer having in his hands the execution upon the same judgment.*" The present participle "*having*" may refer to the period of time when the bond is taken; it may also refer to the period when the bond is to be performed. The first is its most natural interpretation. The officer *now having* THE execution upon the judgment, is the plainest reading. If it referred to the future, its proper reading would be the officer who shall have AN execution. The most obvious sense of the language of the act, is in accordance with its intention.

When the officer *having* the execution made the levy, he acquired a special property in the chattles levied upon, he became entitled to the possession, and could sell them without an execution, if they were not sold in the first instance, for want of bidders. The special property of the officer excluded all other claims upon the property, of subsequent date.

Was his special property divested by the re-delivery of the goods to the plaintiffs and receiving a bond? We are of opinion that it was not. The bond was in the nature of a security, that the property should be safely kept, and returned to the officer when the time of keeping it expired. But the special property of the officer remained, until the condition of the bond was broken. Up to that period the possession of the judgment debtor, was the possession of the officer. Before the forfeiture of the condition, no other execution could be levied upon the property. This construction is consistent with principle, and for the security and ease of the debtor. It enabled him to obtain security, because the re-delivery of the property to him did not expose it to the grasp of another creditor.

The forthcoming bond, in Virginia, is of the same character with the bond to re-deliver in this case. And it has been settled in that state, after great consideration, by two judges to one, that the re-delivery of property taken in execution, to the defendant, upon giving a forthcoming bond, does not divest the right of property from the sheriff, and that the security has a right to deliver the identical property, to save the condition of his bond. (*Lusk vs. Ramsay*, 3 *Mun.* 417.)

If then the special property in the goods, in this case, vested in the sheriff, upon the levy, and remained in him while the condition of the bond was unbroken, it is a necessary consequence, that the condition only could be saved by a re-delivery, or an offer to re-deliver to him, or his legal representatives, at the time stipulated in the bond, which at the option of the defendants, might be the last day of the six months. The plaintiff could not sue out a new execution, for the levy was *quoad* a satisfaction. This interpretation, a majority of the court are of opinion, gives force and effect to the intention of the legislature; is consistent with the literal meaning of the language employed, and harmonizes with established principles. Judgment for the plaintiff.

Judge Burnet dissented.

DOE EX DEM. WILKINSONS v. FLEMING.

Tenants in common may make a joint demise in ejectment.

This cause was reserved in Butler county. It was an action of ejectment, in which the declaration contained a single demise. The lessors of the plaintiff were six in number. They deduced title under the will of John Wilkinson, their father, who devised his lands to his seven children, as joint devisees. One of the devisees had conveyed his share to a co-devisee, one of the lessors of the plaintiff.

The plaintiff having exhibited his title, as above stated, the defendant's counsel moved for a non-suit, upon the ground that the title exhibited, showed that the lessors of the plaintiffs were tenants in common, who could not make a joint demise. This motion was sustained by the court, and the plaintiff became non-suit. The question, whether the non-suit was correctly ordered, was, by agreement, reserved for decision at Columbus. If the decision was correct, judgment of non-suit to be entered. If otherwise, the non-suit to be set aside, and a new trial awarded.

Higgins, for the plaintiff.

By the COURT.

In the case of the *Lessee of Massie's Heirs v. Long and others*, decided at this term, the court have settled, that under our statute, tenants in common may make a joint demise. That decision is decisive of this case.

The non-suit must be set aside, and a new trial directed.

STARLING v. BUTTLES.

Where a surety, under the statute, gives notice to the creditor to commence suit, it is no compliance with the statute, to sue the surety alone.

This was an action upon a promissory note, and was adjourned from Franklin county.

The declaration was upon a promissory note, executed by Eli Adams, J. B. Gardiner, and Joel Buttles; and it appeared on the face of the note, that Adams and Gardiner were principals, and Buttles a security.

The defendant pleaded that he was a security only, and the other two parties principals; that before the commencement of the suit against himself, he gave notice, in writing, to the payee of the note, and requested him to commence suit against the principals, agreeably to the provisions of the act, for the relief of sureties and bail, in certain cases, but that the payee wholly neglected to commence such suit.

To this plea, the plaintiff replied, that within a reasonable time after receiving such written notice, the plaintiff commenced the present suit against the defendant, and has proceeded with due diligence. To this replication the defendant demurred.

Wilcox, for the defendant.

By the COURT.

The act for the relief of sureties and bail, in certain cases, provides, that in cases where the principal debtor is likely to become insolvent, or remove from the county or state, without discharging the debt, the security may give the holder of the obligation notice, in writing, forthwith to put the obligation in suit. And if the holder do not, in a reasonable time after such notice, commence a suit and proceed diligently to judgment and execution, he shall forfeit his right to demand the money of the surety.

The object of this act is plainly to enable sureties, to compel a creditor, where his debt is due, to pursue the principal debtor by a suit, or exonerate the surety. It was intended to relieve sureties where the creditor felt safe in the responsibility of the surety, and took no steps to collect his debt, and it contemplates extending this relief, in a different form, from that of compelling the surety to pay the debt himself, and thus become the creditor, and bring suit. If, upon receiving the notice, it would be sufficient to sue the surety alone, the object of the law would be evaded: indeed, its provisions would be converted into insulting mockery. Upon receiving the notice, the creditor is bound to bring suit against all the parties, and pursue them all to judgment. He need not pursue the principal separately. But a separate suit against the surety, without any suit against the principal, is not a compliance with either the letter or spirit of the law.

The demurrer is well taken, and must be sustained.

LESSEE OF DAWSON v. PORTER.

A deed from the lessor of the plaintiff, made after the suit is brought, is inadmissible to defeat the plaintiff's recovery in ejectment.

This case came before the court, upon a motion for a new trial, adjourned from the supreme court of Clermont county. The case was this: in an action of ejectment, the plaintiff gave in evidence, a patent, for the land in dispute, to his lessor. The defendant then gave in evidence, a deed for the same premises, from plaintiff's lessor to James Robb and others, dated after the commencement of this suit, and after the consent rule had been made, and the issue joined.

The plaintiff objected to the admission of this deed; but the court overruled his objection, and a verdict was given for the defendant. The plaintiff moved for a new trial, on the ground of mistake in the law, in admitting the deed offered by defendant.

T. Morris, in support of the motion. (*Cited* 2 *Wheat.* 223. 1 *Marshal*, 166 *Adams Eject.* 31.)

By the COURT.

The authorities cited, are conclusive that the court erred in receiving the deed offered by the defendant. There must be a new trial.

SERGEANT v. STEINBERGER, ET AL.

Estates in joint tenancy have no existence in the the State of Ohio.
A devise to husband and wife and their heirs is a tenancy in common.

This was a writ of error, brought to reverse a decree in Chancery, dismissing the complainants' bill, and was adjourned for decision from Pike county.

The bill was filed to obtain partition of certain lands, one-fifth of which the complainants claimed in right of Mrs. Sergeant, as heir at law to her mother.

The bill charged that D. M'Neil, by his last will and testament, dated June 17, 1806, made the following devise: "I give and bequeath unto my daughter Sarah, and unto her husband, Charles Steinberger, and their heirs and assigns forever, three hundred acres of land," &c. That Steinberger and wife took possession of the land. That Mrs. Steinberger died before her husband, leaving five children, of whom the complainant, Mrs. Sergeant, was one. That Charles Stinberger, after the death of his wife, made his will, and devised the lands in question to the defendants, his three sons. The defendants demurred. The court of Comon Pleas sustained the demurrer, and dismissed the bill.

King, for the defendants. *Bond*, contra.

By the COURT.

It has more than once been decided by the Supreme Court, on the circuit, that estates in joint tenancy do not exist under the laws of Ohio. The reasons which gave rise to this description of estate, in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reason of policy applicable to our society or institutions. But on the contrary, it is adverse to the understandings, habits, and feelings of the people.

We have no statute recognizing the existence of any such principle as the right of survivorship. But we have various statutory provisions inconsistent with it. The laws passed, both during the territorial government and since, authorize joint tenants, tenants in common, and co-parceners, and, in some cases, the executors, administrators, or guardians of such persons, to demand and have partition. It is from this, evident that the legislature have treated a joint tenancy as a tenancy in common.

It is well settled, that the joint tenancy of husband and wife varies in many principles from other joint tenancies. The estate could not be severed, which resulted, most probably, from the fact, that the wife could do no act separate from her husband. The conviction of one of the parties of treason, did not work a forfeiture of the other's right. And this was, we may fairly infer, a principle introduced to lessen the number of forfeitures, which were always odious. But the right of survivorship was the same, as in other cases of joint tenancy, and in the case of husband and wife, is as much at variance with our laws and usages, as in the common case. Upon the death of Mrs. Steinberger, her undivided half of the land devised, descended to her children, who became tenants in common with their father. The complainants show a good title to one-fifth of their mother's part, constituting one-tenth of the whole tract, and appear to be entitled to have that tenth set off to them.

The decree of the court of Common Pleas is reversed, and the cause sent back to be further proceeded in.

LESSEE OF McCULLOCK *v.* ATEN.

Where a deed cal's for a corner standing on the bank of a creek "thence down said creek with the meanders thereof" the boundary is the water edge at low water mark.

This case came before the court upon a motion for a new trial, and was reserved by the Supreme Court of Jefferson county.

Upon the trial, deeds were given in evidence, from Emons the patentee to Smalley, from Smalley to Burson, and from Burson to M'Cullock. Each of these deeds contained the following description of the boundary which was in dispute, "*beginning at a white oak, on the south east bank of Yellow-creek, thence down said creek with the several meanders thereof, 207 perches to a post on the point, at the mouth of Hollow Rock, upper side.*"

The defendant gave in evidence a deed from Emons to Nessly for a part of the same section of land, of prior date to that of Smalley. This deed conveyed to Nessly, land "to the north bank of Big Yellow creek, thence up said creek," &c. contained a covenant to allow Nessly to raise a dam on said creek ten feet high, for water works, acknowledging satisfaction for all damages done to the residue of the section.

Also a deed from Emons to Aten subsequent to that of Smalley, under which the lessor of the plaintiff claimed, in which the line in controversy was thus described "*to land the property of Burson, thence up Yellow-creek, the several courses and distances thereof, to a marked white oak, corner of said Burson's land, thence across Yellow-creek.*" Excepting to Nessly the right to back water, &c.

The white oak called for by both deeds was found on the ground, about four rods from the channel of the creek, and about one rod from the top of the bank.

There was a salt well on the beach, below the break of the bank, but not within the water channel, and this was the matter in dispute. The defendant Aten was in possession of the well.

The defendant offered evidence to prove that at the time of the sale from Emons to Smalley, it was understood that the line was to run at the top of the

bank, or along the beach and slope of the bank. But the court rejected the evidence and instructed the jury that according to the calls of the deed, the plaintiff had a right to recover to low water mark on the creek as a common boundary. Verdict for the plaintiff and a motion for a new trial.

J. C. Wright, in support of the motion. *Doddridge*, contra.

By the COURT.

The single question to be decided, in this case, is, what boundary is described by the terms "*down the creek with the sevaral meanders thereof?*" And we think it perfectly clear that these terms describe the water in the bed of the creek, and not the top of the bank. This, we understand, to be a settled rule, wherever the stream is made the boundary. It is the water, and not the bank of its channel that is referred to. The state is bounded by the Ohio river: but it can scarcely be supposed that the beach, below the break of the bank, is not within her jurisdiction. In the case of *Handly's Lessee v. Anthony*, (5 *Wheat.* 374) this doctrine is distinctly recognized by the Supreme Court of the United States, as being a rule of boundary. And it is one to which this court have always adhered.

An attempt is made to distinguish this case from the general application of the rule, upon its particular circumstances. The boundaries described as corners, are found on the bank, at a considerable distance from the water's edge. And it is maintained that by these corners the grantee must be concluded.—This position involves the consequence that corner trees always stand in the mathematical line, which technically is the boundary.

But this is not the fact, either with respect to corner or line trees. It is not unfrequent that both stand a greater or less distance from the actual line. The nearest and most permanent trees are usually marked. A tree marked as a corner, upon the bank of a stream, never can stand, upon the water line, at low water mark. And where the call is for the meanders of the stream, the corner is not supposed to be exactly in the line.

The fact that the marked corner, called for, stands four rods from the water, does not create any ambiguity in the terms "*down the creek with the several meanders thereof.*" They import the water edge, at low water, which is a decided natural boundary, and must control a call for corner trees, or stakes upon the bank.

There is nothing in the various deeds inconsistent with this interpretation.—Emons did not grant the creek to Smalley, but the land south of it. He did grant it to Aten, and made Smalley's line the boundary of the grant to Aten, and his repetition of the calls, in Smalley's deed, cannot change their legal import. Nor does such repetition evidence any intention to do so, or to confine Smalley's grant to the top of the bank. When we decide that the plaintiff's boundary is the water, and not the bank, we impugn none of the principles laid down by Judge Washington in the case of *Wright and Hill*, so strongly relied upon by the plaintiff. New trial refused, and judgment for plaintiff, on the verdict.

DORFLINGER *v.* COIL.

Equity will not grant a new trial where the party seeking it has been guilty of neglect.

This cause was adjourned from the Supreme Court of Ross county. It was a bill in chancery, praying that a new trial might be granted at law.

The bill charged that the respondent brought an action of covenant against comp't. in the court of Common Pleas of Ross county. That after the service of process, he was informed by the clerk of the court, that no security for costs was given, and that there could be no trial upon that account. In consequence of which information, he did not attend to make defence. That judgment passed against him in the court of common pleas by default, of which he obtained information, and took and perfected an appeal to the supreme court. That he employed judge Thompson to defend it, who advised him there could be no trial at the ffrst term of the supreme court. Reposing upon this advice, he did not attend the court; and judge Thompson, his counsel, was absent at the sitting of the supreme court, in his place, as a member of congress, at Washington. That judgment, by default, was rendered against him in the supreme court, of which he knew nothing until served with an execution. He also charges a full and complete performance of the contract, upon which the suit is brought, which he could establish by proof, if a new trial were granted. He prays a new trial. The respondent demurred, and the cause was heard upon the bill and demurrer.

Sill and *Leonard*, for defendant. *Bond*, contra.

By the COURT.

The bill makes no case of either surprise or mistake; but only a case of negligence. Had the defendant attended the sitting of the court, and paid proper attention to his business, a judgment by default could not have passed against him. It is no sufficient apology for abandoning all attention to a suit in court, that counsel informed the party it could not be tried at the first term. However great the hardship, a court of equity never relieves in a case of this character.

The demurrer must be sustained, and the bill dismissed.

SMITH *v.* THE COMMISSIONERS OF LICKING COUNTY.

In an action on a sheriff's bond, the judgment must be for the debt, with leave to take out execution for the damages. A judgment for damages only is erroneous.

This was a writ of error to the judgment of the court of Common Pleas, in Licking county, adjourned here, for decision by the Supreme Court sitting in that county.

The suit was brought by the commissioners against the administrators of Smith, who was security upon a sheriff's official bond. The defendaut pleaded *non est*

factum, upon which issue was joined, and also a special plea, to which there was a demurrer. The Common Pleas sustained the demurrer. And upon the plea of *non est factum* the jury found a verdict for the plaintiff, and assessed the damages sustained by the person for whose use the suit was brought, Judgment was entered for these damages only, and not for the debt, to have execution for the damages.

The case was argued at large, upon the question presented by the plea and demurrer, as well as upon the form of entering the judgment.

Irwin, for plaintiff in error. *Ewing*, for defendants in error.

By the COURT.

There is a difference of opinion among the judges, as to the validity of the plea. But as they are unanimous in the opinion, that the judgment was erroneously entered, they do not decide upon the other matters. The statutory provision, in cases like this, is express, that the plaintiff shall "recover judgment for the amount of the bond, on which judgment an execution may issue for such sum, as it may be ascertained, will be sufficient to indemnify the person so suing." The judgment in the case before us, does not conform with this provision. It is therefore erroneous, and must be reversed. The court award a *venire de novo*, and remand the cause to the court of Common Pleas of Licking county, with leave to the parties to amend their pleadings.

LOINES ET AL *v.* PHILIPS.

The original application of an insolvent debtor is ex parte.

When an application of an insolvent debtor is dismissed upon hearing, on the ground that he was not two years a resident, the sureties are liable.

This was an action of debt upon a bond executed by the defendant as security for Stephen Loines, upon his application for the benefit of the act for the relief of insolvent debtors.

The declaration set out the bond, the condition of which was that the applicant Stephen Loines "should faithfully assign all his property for the benefit of his creditors to such Trustee as the court may appoint." The defendant pleaded seven pleas, some of which were demurred to, and to others there were replication and rejoinders, and demurrers again, presenting all the complexity and nicety of special pleading. The state of facts upon which the judgment of the court was required, is as follows. Stephen Loines being arrested upon mesne process, in October, 1832, applied to the court of Common Pleas of Ross county, then in session, for the benefit of the act for the relief of insolvent debtors. The usual order was made that it appearing to the court, that the applicant had been two years a resident of the state, he should be discharged out of custody upon giving a bond with security to assign his property to such Trustee as the court might appoint, upon the final hearing. The defendant with the applicant executed the bond in question, and the applicant was discharged out of custody.

The regular notice was given, and at the next term the applicant appeared in court, and applied to have a Trustee appointed, that he might make the assign-

ment of his property, in compliance with the condition of his bond. The plaintiffs in the actiou also appeared, and objected to the appointment of the trustee, upon the groond that the applicant had not, in fact, been two years in the state, and, therefore, was not entitled to the benefit of the act for the relief of insolvent debtors. This fact being made out to the satisfaction of the court, they refused to appoint the trustee, and made an order dismissing the petition. The question was, whether upon this state of facts, the plaintiffs were entitled to recover.

Douglas, *Brush* and *Fitzgerald*, for the defendants. *Leonard*, contra.

By the COURT.

The application of a debtor in custody, under the act for the relief of insolvent debtors, in 1822, when this bond was taken, was altogether *exparte*. It was only after the petition was filed, the order made, and the bond taken, that notice was to be given of the proceedings. The object of that notice was to bring in the parties interested to contest the right of the applicant to the relief sought. The facts assumed in the first order cannot therefore conclude any body.

The bond is required in the first place, for the security of the plaintiff in the action, that he shall lose nothing by discharging the defendant out of custody: the security of all the debtor's creditors is a secondary object. The applicant cannot be admitted to obtain his discharge upon false grounds, and then protect himself upon the plea of ignorance. The power of the court to appoint a trustee, receive his assignment, and finally discharge him, depended upon the fact that he had been two years a resident of the state. The court were not bound to investigate this allegation when it was made. But it was the right of those interested to make this investigation when they came in under the notice. Parties were then, for the first time, properly before the court, to litigate the applicant's right to a discharge. The order made, upon that litigation, is the first adjudication between the parties, and it is the first proceeding that concludes them.

The opposition made by the plaintiffs to the appointment of a trustee, and the acceptance of the assignment, is not of that character which discharges the obligation. No act of a plaintiff pursuing and insisting upon his legal rights, can be attended with such a consequence. It is an illegal and a *mala fide* interference on the part of the plaintiff, that excuses the performance. Here the plaintiffs did nothing but require a legal decision upon facts presented to the court. And this they had a right to do without prejudice to any matter in the case.

The applicant voluntarily undertook to do that which he knew the law did not permit. His object was to obtain a benefit for himself, to the prejudice of another's rights. For this purpose, he imposed upon the court a statement of facts that did not exist. The truth is elicited, and the applicant's purpose is defeated. This cannot be a case where the performance of the undertaking may be excused.

The defendant, Philips, was a security only, and it is insisted that he shall not be prejudiced by an error or mistake of the court. But how can he separate himself from the applicant, his principal? He joined him in the undertaking, and must stand or fall with him. He volunteered his aid to procure the applicant's discharge from custody, at the suit of the plaintiffs. If he did this upon a false

statement, surely he to whom it was made, and upon whom it operated so as to produce confidence, ought to suffer, not the plaintiffs, who had no control over the subject, who legally were not parties, and who reposed no trust whatever. The error of the court was induced by the applicant. It operated to his advantage, and to the prejudice of the plaintiffs. The security, and not the plaintiffs, incurred the risk. The court are all of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs, and the cause remanded to the supreme court of Ross county, for an inquiry of damages.

CONN v. DOYLE.

A writ of error and supersedeas from the territorial general court to the common pleas, staying proceedings where the sheriff has a vendi. in his hands, and judgment affirmed, a procedendo from the general court to the sheriff, authorizing him to proceed to sell, is irregular; and a sale under such procedendo is void.

A motion was made in the supreme court for Hamilton county, by Charles Vattier, for an order on the present sheriff of Hamilton county, successor of James Smith, a former sheriff, to make the applicant a deed for the lot No. 86, in Cincinnati, alleged to have been sold by Smith, as sheriff, upon legal process, to Vattier. The facts of the case, material to be stated, were as follows:

At February term, 1801, in the common pleas of Hamilton county, James Conn obtained a judgment against Thomas Doyle for debt and costs, 50 dollars, 78 cents. C. Vattier, at the same term, also obtained a judgment against Doyle for debt and costs, 37 dollars, 52 cents. On the 11th of February, 1801, a writ of *fi. fa. et lev. fa.* issued on each judgment. On each of these writs, the sheriff made the same return, that he had levied on the house and lot, No. 86, and held an inquest, which appeared in the schedule annexed to the return. The inquest, attached to each writ, found the yearly issues to be of the value of $12.

On the 12th of May, 1801, a writ of vendi. issued on each judgment, upon which the sheriff returned "stayed by writ of *supersedeas* from the general court."

In April, 1801, writs of error were allowed and issued in both cases, and on the 30th of April, writs of *supersedeas* issued to the sheriff, commanding him, that if final process of any kind was in his hands, or should come into his hands, in the causes stated, he should forbear, and altogether surcease proceeding thereon, until the judgment of the General Court should be signified to him.

On the 27th March, 1802, a writ of *procedendo* issued from the General Court, in the case of Conn and Doyle, directed to the sheriff, reciting the issuing of the writ of *supersedeas* and the writ of error, and the affirmance of the judgment, and commanding the sheriff as follows: "Therefore, you will now proceed to do execution in the premises, as the law directs, our writ of *supersedeas* aforesaid, to you before directed, to the contrary thereof in any wise notwithstanding." Upon this writ of *procedendo*, is endorsed the amount of damages, interest, and costs, in the Common Pleas, the costs in the General Court, and sheriff's fees, amounting in the whole to 95 dollars, 10 cents. The sheriff has also endorsed upon this writ as follows: "I have sold the property within referred to,

being in lot No. eighty-six in Cincinnati, to Charles Vattier, for ninety dollars, and have made the money."

It was proved by parol testimony, that Vattier purchased the lot at sheriff's sale, and that the sale was advertised in a newspaper, in the manner prescribed by law.

The question arising upon these facts, was reserved for decision here.

Caswell, for the application. *Doddridge* and *Haynes*, against it.

By the COURT.

This application is made to us, upon the ground that the writ of *procedendo*, from the general Court, was the process upon which the sale was made, and that the Supreme Court of the state, now represents that court.

By the writ of affirmance, upon the writ of error, in the General Court, the judgment of the Common Pleas, and the proceedings under it, were placed in the situation in which they stood, when the writs of error and *supersedeas* issued. The party was at liberty to sue out a new writ of *venditioni*, upon which the sheriff could proceed as he would have done, upon the writ previously superseded in his hands. The *procedendo*, if it were well directed to the sheriff, which is certainly doubtful, conferred no power to sell. It only removed the prohibition interposed by the writ of *supersedeas*. The authority to sell was originally given by the process of the Common Pleas; it had been suspended, but was not taken away by the writs of error and *supersedeas*. The *procedendo* restored it, but did nothing more. If the sale was really made without other process than the *procedendo*, it was made without authority. As no other process issued from the General Court, this court, now representing that one, cannot make the order asked for. They have no jurisdiction of the subject, and the application must be overruled.

SARCHET *v.* SARCHET.

When upon an equitable adjustment of partnership transactions, two parties, are in equity creditors of a third partner, equity will set off such credits against a joint debt due from the same two parties to the third.

This case was adjourned from the Supreme Court of Guernsey county.—The facts material to understand the point, decided by the court, were as follows:

In May, 1809, Peter Sarchet, whose representatives are the prineipal defendants in this case, with John and Thomas Sarchet, the complainants, and Thomas Knowles purchased a lease upon the Muskingum Salt Works. Price $5000. $1000 to be paid in hand, and 1000 on the 10th of June, annually, until completed.

The terms upon which the purchasers agreed to carry on the manufactory of salt, were, that they were to be jointly and equally interested.

By an endorsement on the article dated, June 12, 1809, Knowles sold out his interest to Peter Sarchet, who agreed to comply with the article in Knowle's place.

The three Sarchets proceeded to engage in manufacturing salt, and in the course of their business, before 1811, Peter Sarchet sold one third of Knowles' interest, purchased by him, to Thomas Sarchet, and one third to John Sarchet. Knowles received what was estimated at $1300 of Peter. Thomas Sarchet paid Peter $433 33 cts. one third of that sum, and John Sarchet agreed to pay the same amount.

Upon the dissolution of the salt manufacturing firm, a controversy arose between John and Peter Sarchet, as to John's indebtedness to Peter, for one third of Knowles' share. John claimed that he was to pay for it out of the profits of making salt; that no profits were made and nothing was due. Peter claimed the whole sum, $433 33 cts. as a subsisting debt. Though other private accounts existed, and although the partnership affairs were unsettled, this seems to have been the only item of dispute. They agreed to refer it to men. An arbitration bond, in the penalty of $500, submitting all matters in dispute between the parties, was drawn up, and executed by John and Thomas to Peter, conditioned that John should abide the award. The arbitrators proceeded to make an award embracing all subjects of controversy between the parties, and specifically and in terms including matters connected with the partnership. It also awarded that John should pay Peter $633 13-100 in money.

So soon as this award was delivered, an allegation was made by John Sarchet that it was founded in a great mistake. Explanations took place among the arbitrators, and an attempt was made to draw them to a re-consideration, but it did not succeed because Peter was not to be found.

Peter Sarchet left the country in 1813, and is since dead, insolvent. Pending the litigation upon the arbitration bond, Chandler prosecuted two suits against the Sarchets and Knowles, for the purchase money, upon which John and Thomas Sarchet have paid the amount recovered, being $4076 65; except $100 paid by Peter, credited on the first judgment, and $500 paid on the second by Knowles and others, which was carried to the account of Peter Sarchet, leaving $3476 65.

The object of the bill is to be relieved against the award upon the ground of mistake, and if that fail, to off-set, against the judgment, the amount paid to Chandler which was Peter's part of the original purchase money.

The case was elaborately argued upon all the grounds, by Goodenow for the defendants, and Culbertson and Hammond for the complainants. But as the court confined their decision altogether to the question of off-set, it is deemed unnecessary to report the arguments on the other points.

Goodenow, for defendants. *Culbertson* and *Hammond*, contra.

By the COURT.

The purchase of the lease of the salt works, by the three Sarchets and Knowles, to carry on salt works, constituted them partners. When Knowles sold out to Peter his one-fourth, and Peter sold an equal proportion of that fourth to Thomas and John Sarchet, the three Sarchets became, in equity, partners in the salt works property. Peter Sarchet covenanted with Knowles to perform to Chandler, Knowles' covenant with him, and Thomas and John became parties to this contract, by their subsequent agreement with Peter. In this state of the case

Thomas and John Sarchet, when they paid the whole purchase money to Chandler, could not compel Knowles to contribute his fourth part, because, in equity, Knowles owed nothing. The three Sarchets were the real debtors. Thomas and John owed two-thirds, and Peter one-third. Peter was, therefore, the debtor to Thomas and John, for all the money they paid beyond their own proportion of that contract.

But as between the original parties, no change was made in their respective legal rights. The three Sarchets and Knowles remained bound to Chandler, upon their covenant, for the purchase money; and the new arrangements between Knowles and the Sarchets was never reduced to such legal forms as to create new legal interests. When suit was prosecuted against Thomas and John Sarchet by Peter, they had not paid the amount dne to Chandler, and had they made such payment, a doubt might have arisen whether it could have been set-off at law, because it was only by a resort to equity that the true state of their respective interests and liabilities could be determined and adjusted.

If there were no doubt due from Thomas and John Sarchet to Peter, and they having paid the whole amount due to Chandler, sought to subject Peter to the payment of his proportion, it would be necessary for them to resort to equity, as well upon account of the partnership, as that the contract with Chandler, upon which the payment was made, embraced other parties. In a bill to account by Thomas and John against Peter, it would be sufficient to mark Peter defendant, and there can be no doubt that he could have set off his judgment against Thomas and John. This view of the situation of the parties, seems to demonstrate the property of allowing the set-off now claimed. It is a cause of mutual credits, "due to and from the same persons in the same capacity," and is within the principle laid down in *Dale v. Cook*, 4 *I. C. R.* 11, relied upon by the respondents'counsel. In *Quintin's case*, (3 *Ves.* 248) and in *James v. Kynnier*, (5 *Ves.* 108) set-offs were allowed in equity, which, it was admitted, could not be made at law. These, it is true, were cases of a bankruptcy of one of the parties. But in *Dale v. Cook*, Chancellor Kent correctly remarks, that the set-off cases in bankruptcy "leave the general rule very much as it existed before."

Set-off decreed—each party to pay his own costs.

LESSEE OF WALSH *v.* RINGER.

A defendant arrested upon execution for a fine, may surrender land in discharge of his body. Land thus surrendered may be sold without valuation. "Seventy acres, being and lying in the south west corner" is a good description, and the land will lie in a square.

This was an ejectment, adjourned from the Supreme Court of Harrison county, upon a case agreed.

Both parties deduced title under James G. Ward. The history of the claim of each is as follows:

James G. Ward owned seventy acres of land, situate on the west side of the south-west quarter of section 4, township 12, range 5, beginning at the south-west corner of the section, and lying in an oblong square, extending north 160 perches, and east 70 perches, from the south-west corner.

The title of the lessor of the plaintiff, was founded upon a sheriff's sale. J. G. Ward was convicted of an assault and battery, at the November term, 1820, of the Common Pleas of Harrison county. Upon this conviction, an execution issued against his goods, chattels, lands, tenements, and body, for the fine and costs, amounting to about thirty dollars. This execution was dated May 28, 1821, and upon it the sheriff took Ward in custody. To obtain the discharge of his body, Ward surrendered to the sheriff land, described in the return as follows: "*Seventy acres of land, it being and lying in the south-west corner of the south-west quarter of section* 14, *township* 12, *range* 5, *of the land sold at Steubenville*;" and it was returned not sold for want of bidders. A *vendi* was issued to sell the land, and after a succession of writs, it was sold on a *pluries vendi*. March, 1824, without valuation, to the lessor of the plaintiff, for thirty-one dollars twenty-five cents. The sale was approved by the court, and a conveyance made by the sheriff to the lessor of the plaintiff, dated 14th April, 1824, in which deed the description of the land conforms exactly to the levy.

The defendant claimed under a deed from James G. Ward, for seventy acres of land, described by metes and bounds—exactly including the land owned by Ward—dated August 25, 1821, which was after the surrender to the sheriff of the same land.

Beebe, for the defendant. *Goodenow*, contra.

By the COURT.

We entertain no doubt but that upon an execution, in a case like that against Ward, the defendant, if arrested may surrender land to the Sheriff, in discharge of his body. This surrender the Sheriff may accept, and when accepted, the effect of the proceeding is the same as that of a levy. It is a legal appropriation of the land to satisfy the execution. No subsequent disposition of it, by the defendant, can pass a title, so as to defeat and divest the interest attached by the execution and the proceeding on it.

We think too that judgments, for pecuniary fines, are debts due the state within the meaning of the law, authorizing, in such cases, the sale of lands without valuation, and that lands surrendered to obtain a discharge of the body seized in execution, are to be sold in the same manner, as if levied upon by the sheriff in the first instance.

The description of the land is in general terms. Seventy acres, being and lying in the south west corner. The defendant contends that this description is so vague and uncertain as, for that reason, to be void and inoperative. On the other hand the plaintiff contends, it is a good description to convey seventy acres of land, commencing in the south west corner, and extending on the west line, to the north west corner, in an oblong square. Neither of these constructions can be maintained.

The general position of the land conveyed, is given with sufficient certainty. It is in the south west corner. According to the rules of decision, both in this state and in Kentucky, that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include by parallel lines, the quantity conveyed. From this point the section lines extend north and east so as to fix the boundary west and south, the east and north boundaries only

are to be established by construction, and the rule referred to gives them with sufficient certainty.

It is argued for the lessor of the plaintiff, that the court, performing in this case the functions of a jury, are to decide not only the *construction* of the deed, but the intention of the parties. Where there is no ambiguity in the description, the construction of the terms employed is matter of law, independent of the intention of the parties. And here, upon legal principles, there is no ambiguity. Had the description been "seventy acres on the west side of the quarter," the whole west line must have been considered the west line of the tract, and the quantity laid out in an oblong square. It would have been a violation of the plain legal sense of the terms used, to lay out the land in a square, at either corner, upon parol proof that such was the intention of the parties. So in this case, no proof can justify us, in giving an interpretation, by which terms, that locate the land, in a square at the south-west corner, shall be made to locate it on the west side. The plaintiff must have judgment for so much of the land, in dispute, as may be included by a line, north from the south-west corner, such a distance, that the parallel line, of a square with four equal sides will include seventy acres.

THOMPSON *v.* YOUNG, ET AL.

Where the charter of a bank is extended and no new security taken of the cashier, the securities under the old charter are not liable for defalcations under the new charter.

A defendant cannot be concluded by an adjudication to which he was not a party.

This was reserved from Muskingum county. It was a bill in Chancery to compel contribution, upon the following state of facts:

In the year 1811, the bank of Muskingum was incorporated, the charter to continue from its passage until the 1st of January, 1818. The company was duly organized under this charter, and D. J. Marple appointed cashier. Isaac Vanhorn, Jeffrey Price, Samuel Thompson, and John M'Intire executed with Marple, as securities, a bond in the penalty of twenty thousand dollars. And Marple proceeded to discharge the duties of cashier.

Before the 1st day of January, 1818, the legislature passed a law, extending the charters of existing incorporated banks until the 1st of January, 1843, upon certain terms and conditions; and with these terms and conditions the bank of Muskingum complied, and Marple was continued cashier, without either a new appointment or a new bond.

In 1815, M'Intire, one of the securities died. In 1819, Marple became a defaulter to a large amont; and suit was commenced against Marple, Vanhorn, Price, and Thompson, the surviving obligors, and judgment obtained against them for the amount of the defalcation. At the trial, no evidence was given of any default before the first of January, 1818. Thompson, the complainant, having paid one-third of the judgment, brought this bill against the devisees and executors of M'Intire for contribution. The facts were presented by a plea, to which the complainants excepted.

Goddard, for defendants, in support of the plea.

By the COURT.

The authorities adduced by the defendants are conclusive that the securities were not bound for any defalcation that took place after the expiration of the first charter. And we hold them to be in accordance with the soundest principles of justice.

It is equally clear, that the defendants cannot be concluded by an adjudication in a case where they were not parties. The bill must be dismissed.

WADDLE ET AL. v. BANK UNITED STATES.

In an application to chancery for a new trial at law, the court being equally divided in opinion the bill was dismissed.

This case was reserved for decision at Columbus, by the supreme court in Ross county. It was a bill in chancery, to obtain a new trial at law, under the following circumstances:

The complainants endorsed a note for M. W. which was discounted, and renewed for some time, at the office of discount of the bank of the United States at Chillicothe. It was at length protested for non-payment, and suit brought against the endorsers. At the trial of that suit, the bank made no proof of demand of the drawer, and notice of non-payment to the endorsers. But in the place of this proof, gave in evidence a deed of trust from M. W., made for the security of the endorsers, upon a tract of land, equal in value to the debt. And upon this evidence, the bank recovered a verdict and judgment against the endorsers. Subsequent to this recovery, J. H. prosecuted a bill in chancery against Waddle and McCoy, upon a previous mortgage given by M. W. to him, on the same land, charging Waddle and McCoy with notice of such previous mortgage. In their answers, they denied notice. But on the hearing of the bill, the court decided that they were chargeable with notice, and decreed against them. The mortgaged premises were subjected to the payment of the debt to J. H., and nothing was left for the indemnity of Waddle and McCoy. The bill was filed to obtain a new trial, upon the ground, that facts of subsequent occurrence, and which could not have been proved at the trial, rendered the verdict iniquitous and unjust.

Leonard and *Atkinson*, for complainants. *Grimke*, contra.

The court were equally divided upon the question of relief, so the bill was dismissed, but no opinion given.

DOE EX DEM. THOMPSON ET AL. v. GIBSON ET AL.

Where the plaintiff in ejectment shows that the original grantee was within the exception of the statute of limitations, proof that others deriving interest under the grantee are not within such exception, is unnecessary; if sued upon to defeat the recovery, it must come from the defendant.

QUAERE, whether the statute of uses was ever in force in Ohio.

This case was adjourned from Highland county. It was a motion by the defendants for a new trial, where a verdict passed *pro forma* upon the following facts.

The plaintiffs deduced title from a patent to Ann Byrd, administratrix of Otway Byrd, deceased, with the will annexed, in trust for the uses and purposes declared in the last will and testament of Otway Byrd, deceased. This patent was dated January 31, 1803. It was admitted to include the lands in question, and it was also admitted that Ann Byrd, the patentee, resided in Virginia, and had never been in Ohio. There was no proof before the court of the nature of the bequests in the will of Otway Byrd, and none that any of the persons for whose use the lands were granted, had ever been in Ohio, or where was their place of residence.

For the defendants it appeared that they claimed title to the lands under a patent, dated February 23, 1810, founded upon a survey, made April 27, 1800; that under this claim of right, they took possession, in the year 1803, and had ever since remained in possession. The ejectment was brought in 1825.

Brush, Fitzgerald and *Collins*, for defendants. *Bond*, contra.

The court were divided in opinion, upon the point whether the statute of uses (27 *Hen.* 8. *Chap.* 10,) had ever been in force in Ohio. Two judges held that that statute was in force in Ohio, from 1795, to January, 1806, for all the purposes that it was in force in Virginia or England. The other two judges held differently.

But the judges were unanimously of opinion that, it being shown that the grantee, Ann Byrd was within the exception of the statute, it was incumbent on the defendants to show that those whose interest was dependent on hers were not within the exception. Consequently the motion for a new trial was overruled, and

Judgment given for the plaintiff.

COURCIER ET AL. v. GRAHAM.

The doctrine of compensation, abatement and modification, is this: the complainant asks for a decree, and it may be granted to him upon terms; he may be told that he shall take less or give more, and to do so or not is at his own option: but the court cannot tell the defendant that he shall take less or give more, because to tell him so gives him no option.

This was a writ of error brought to reverse a decree of the court of common pleas of Hamilton county, pronounced in favor of the defendant in error against the plaintiffs in error, and was adjourned from the supreme court, in Hamilton county. The case was this:

In the year 1818 Graham made a contract with Courcier and Ravises, to sell them a tract of land, near Cincinnati, at a price per acre, to be fixed by men chosen by the parties, and to be paid for in merchandise in Philadelphia. Merchandise estimated at eleven thousand four hundred and eighteen dollars thirty-two cents, was delivered to Graham on the contract The land, containing one hundred and two acres, was subsequently valued under the contract at three hundred dollars per acre. Exception being taken to the title, Courcier and Ravises sued upon the contract at law for the amount of merchandise delivered, and recovered. Graham brought his bill in equity to enforce a specific performance of the contract. The court of common pleas decreed a performance upon terms. The decree reduced the price of the goods delivered thirty-three and a third per cent. and the price of the land thirty-three and a third per cent. and decreed the balance of purchase money to be paid in cash. The general error was assigned.

Gazlay, for plaintiff in error. *Hammond*, contra.

By the COURT.

This decree is erroneous. As we understand the doctrine of compensation abatement and modification, it is this. The complainant asks for a decree, and it may be granted to him upon terms. He may be told that he shall take less or give more, and do so or not, is at his own option. But the court cannot tell the defendant that he shall take less or give more, because to tell him so, gives him no option whatever. In this case it was competent for the court to decree a specific performance at the request of Graham, upon the terms of abating thirty-three and a third per cent. in the price of the land. But the court had no power to reduce the price of the merchandise. The decree must therefore be reversed: and we retain the cause for further hearing, on the whole merits.

STERRET v. CREED.

A judgment will not be reversed for an error manifestly beneficial to the party seeking the reversal.

This was a writ of error, to the court of common pleas of Fairfield county, reserved for decision here, by the Supreme Court sitting in that county. The principal, and only material error assigned, was, that the judgment did not agree with the verdict. It was an action on the case, by a subsequent against his immediate previous endorser, on a negotiable promissory note. The jury found a verdict for ten thousand nine hundred and fifty-three dollars—the judgment was for six thousand five hundred dollars, and the record contained no remittitur of any part of the damages assessed by the jury. The defendant sued the writ of error.

Irwin, for plaintiff in error. *Ewing*, contra.

By the COURT.

No case is cited to us—we have found none, in which a judgment has been re-

versed, for error manifestly beneficial to the party that asks the reversal. Had the plaintiff below, in this case, asked for a reversal, we should be bound to reverse: for, on the record, the judgment is to his prejudice. But the plaintiff in error has no ground of complaint. The cases cited, by the counsel for the defendant in error, and the reason of the thing, unite in proving that a judgment ought not to be disturbed, for an error beneficial to him who complains. He is not injured, so that his request is in contradiction to the allegations of the writ, that *error has intervened to his prejudice.* It is, in fact, to his advantage. There is a wide difference between a judgment in favour of a party and error in his favour. A man may be *prejudiced* by a judgment in his favour, where it is not for the thing he asks, or for less than he asks. But he never can be *prejudiced* by an error in his favour, such as rendering judgment against him for six thousand five hundred dollars, instead of ten thousand nine hundred and fifty-three dollars.

There may be cases where the court would feel justified in reversing a judgment, for errors apparently beneficial to the plaintiff in error. But this is not one of them. The judgment must be affirmed.

DAY *v.* BROWN.

Where the clause of a deed containing a covenant of seisin, is blank as to the names of those who are seized, the blank cannot be filled with the name of the grantors by implication or construction so as to render them liable.

A covenant to warrant and defend "as executors are bound by law to do," is not a personal covenant.

Quere,—Whether coverant will lie on a warranty without eviction under the statute in relation to covenants real.

This was an action of covenant, and was reserved for decision here, in Clermont county. The declaration contained two counts: one on a covenant of seizin—the other on a covenant of warranty; but without any averment of eviction. The defendant craved oyer of the deed, and demurred generally: the plaintiff joined in demurrer.

The deed, as set out, was a conveyance from David and Robert Brown, executors of George Brown, deceased, and was a common printed blank, in the usual form, with covenants of ownership, and warranty, except in filling up the blanks. The covenant of ownership was as follows: "And the said David Brown and Robert Brown, executors, for heirs of George Brown, deceased, do covenant, grant, and agree to and with the said Mark Day, that ———— the true and lawful owners of the premises," &c. The deed being blank where the dash is inserted. The covenant of warranty was, that the grantors would warrant and defend the premises, *as executors are bound by law to do, &c.*

Collins, in support of the demurrer. *Fishback*, contra.

Opinion of the Court by Judge BURNET.

The declaration filed in this case contains two counts—one on a covenant of seizin; the other on a covenant of general warranty. The defendant has craved oyer of the deed, and demurred generally, and contends:

1st. That the deed does not contain a covenant of seizin.

2d. That the action cannot be sustained against the defendant in his private character, but as executor, only, if it can be sustained at all.

3d. That the second count being founded on a covenant of general warranty ought to contain an averment of eviction.

4th. That there is a material variance between the declaration, and the deed on which it is founded.

1st. That part of the deed which is set out and relied on as containing a covenant of seizin is insensible and contains no covenant, or undertaking of any description. If any meaning can be attached to it, it is, that the defendants covenant for the heirs of G. Brown, that some person not named, is the true and lawful owner of the premises; and to make out even that meaning, it will be necessary to supply words not contained in the deed. It is true that the blank might have been so filled up, or such words might have been inserted in the deed before its execution, as would have amounted to a covenant, but as this *was* not done, the legal and natural inference is, that it was not the intention of the parties, that such a covenant should be created. The liability of these defendants must depend on the terms they have used, and not on those they might have used. There are cases in which the omission of a word, in the draft of a contract, will be supplied, where it appears to have been occasioned by accident, or mistake, and the meaning of the parties is sufficiently apparent, but the inference naturally arising in this case is, that the parties omitted to fill the blank in the part of the printed form calculated for a covenant of seizin, because they did not intend to have such a covenant in the instrument. But be this as it may, the deed does not contain the covenant set out in the first count, and we do not perceive any thing on the face of it, from which the intention of the parties can be so ascertained, as to authorize us to supply the omission. It is very evident, that the latter clause of the sentence "have good right, full power, and lawful authority to sell and convey, in manner aforesaid," relied on by plaintiff's counsel, does not remove the difficulty, because there is nothing preceding those words that points out the person of whom they are predicated. They were intended to apply to the person who should enter into the covenant, but as the name of no person has been inserted, they are words without meaning.

2d. The second ground is, that if the covenant of general warranty, binds the defendants at all, it does not bind them in the character in which they are sued.

It appears from the deed that the defendants were the executors of the last will and testament of George Brown, deceased, that the land described in the deed was a part of his real estate, that the deed was executed in obedience to an order of the court of probate by the defendants, in their character of executors, and that the object of the deed, was to pass the title of the testator, and nothing more.

In the covenant of warranty, they bind themselves as executors to warrant and defend the premises as far *as executors are bound by law to do.*

The plaintiff's counsel contends, that on this covenant the executors are personally bound, and are liable to answer the damage from their private funds, and he relies on the case of *Duval vs. Craig* (2 *Wheat* 46) and the authorities there cited. The principle on which this point was decided in that case, admits of no doubt. Trustees and agents may bind themselves personally, and subject

their private funds, though they are under no obligation to do so, and if they *do* so bind themselves, they will be held to their contracts, notwithstanding their fiduciary character clearly appears. A person may describe himself as executor, or trustee, and yet bind himself as firmly and extensively as if that description had been omitted.

The terms that are used in a contract to show the character or relation in which the parties stand, may be so used, as to amount only to matters of description, or they may be so used, as to limit and qualify the extent of their liability. In the cases referred to, the former was the fact, and the defendants were held personally responsible. But there is a striking difference between those cases and the one before us. Here the defendants not only describe themselves as executors of Geo. Brown, professing to convey the title which he held at the time of his death, in pursuance of an order of the court of probate, but they expressly qualify and limit the operation of their covenant, so as to show that it was not the intention of either party, that they should be personally bound. They undertake that they will warrant the title, *as far as executors are bound by law to warrant*, but the statute under which the order was made, and the deed was executed, does not require them to warrant in any form, or to any extent.

It cannot be necessary to consider the authorities cited to show, that contracts are construed according to the intention of the parties, and that the intention must be gathered from the whole contract, nor will it be contended that the clause qualifying this covenant can be rejected. The terms used in that clause show it was not the understanding of the parties that the defendants were to be personally bound, which is decisive of the present question.

3d. The third ground is, that the count on the covenant of general waranty, does not contain an averment of eviction.

It has already been decided in this case, that this deed does not contain a covenant of seizin, consequently the validity of the third objection will depend on the interpretation of the first section of the statute "declaring the law in certain cases of actions upon covenants real." In *Innis vs. Agnew*, (1 *Ohio Rep.* 389) it was decided, by this court, that this section did not apply to deeds, which contained a covenant of seizin, but to such only as contained a covenant of waranty, without a covenant of seizin. The question now presented is, does it, in such cases, authorize the action without averring an eviction. Such was probably the intention of the Legislature, but it seems to admit of serious doubts, whether that intention is sufficiently expressed. The first part of the section authorizes an action of covenant on a deed containing covenants of general waranty, in the same manner as if the deed had contained also a covenant of seizin. Thus far the satute does not change the common law. The latter part of the section provides that such action may *in like manner* be commenced before the grantee shall have been evicted, &c. Now, as the former part of the section authorizes the action on the covenant of waranty *in the same manner* as if the deed had contained *also* a covenant of seizin, the question may be made, whether the phrase *in like manner* in the second part, does not mean *in the same manner* as if the deed had also contained a covenant of seizin, or in other words, whether this be not the fair construction of the section: that on a covenant of general waranty in a deed, which does not contain a covenant of seizin, the

grantee may maintain an action of covenant, in the same manner as he might have done, at common law, if the deed had also contained a covenant of seizin, and that such action may be commenced before eviction, *in like manner* as it might have been commenced, at common law, before eviction, if the deed had contained *also* a covenant of seizin. But it has not been thought necessary to decide this point, as the case is fully disposed of without it. For the same reason, I shall forbear any remarks, on the fourth and last point.

It is the opinion of the court that on the first and second grounds, the demurrer must be sustained.

Judgment for the defendant.

COMMISSIONERS OF BROWN CO. v. BUTT.

A county is responsible for the escape of a prisoner, confined for debt, where the escape happens for want of a jail, or where the jail is insufficient.

The county is liable to the Sheriff for not providing a jail when the Sheriff has been subjected for an escape.

When there has been an escape for want of a jail the sheriff may be sued by the judgment creditor, and the sheriff has his remedy over against the county commissioners.

In such suit by the sheriff, the record of the suit by the party injured, is admissible to show the amount of injury.

The commissioners in such case are responsible whether their negligence be gross or otherwise.

A special action on the case is the proper remedy for the sheriff against the commissioners, when he has been thus subjected.

This was a writ of error to the judgment of the court of Common Pleas of Brown county, in an action on the case, brought by the defendant in error, against the plaintiff in error, and was adjourned, by the Supreme Court of Brown county, for decision at Columbus.

The case was this: Butt brought a special action on the case, against the commissioners, and charged that one Shaw brought an action agsinst Parker, by *capias*, requiring bail, which was put into Butt's hands, as sheriff, to be executed. That he arrested Parker, and took appearance bail. That in term time, the bail surrendered to Parker, who was committed to the custody of the sheriff and escaped, the county having provided no jail. That Shaw prosecuted an action for the escape, against the sheriff, the plaintiff in this action, and recovered, whereby he sustained damages. Plea, not guilty.

At the trial, the plaintiff offered and gave in evidence:

1st. The record of the suit, *Shaw, vs. Butt.*

2d. The order of the court, committing Parker to custody.

3d. Shaw's receipt to Butt, for the amount recovered.

4th. Butt's commission as sheriff, with his oath of office.

5th. Proof by witnesses, that there was no jail in the county, when Parker was committed.

To the admission of this testimony, the defendants objected, and their objection being overruled, they took a bill of exceptions.

They then moved the court to instruct the jury, that the plaintiff could only recover nominal damages. This motion was overruled, and it was decided that the judgment obtained by Shaw against Butt, was *prime facia* evidence of the

damage sustained by the plaintiff. To this opinion, the defendants also took a bill of exceptions.

The defendants moved the court to instruct the jury, that unless the commissioners were guilty of gross neglect, in omitting to furnish a jail, they were not liable. This motion was also overruled, and the court instructed the jury, that it was the duty of the commissioners to furnish a jail—that if no jail was furnished, the sheriff was nevertheless liable for escapes, and the commissioners liable over to him. To this opinion, the defendants also excepted. Verdict for the plaintiff for the amount recovered against him of damages and costs. Judgment on the verdict—general error assigned.

Marshall and *Gilleland*, for plaintiffs in error. *Brush* and *Fitzgerald*, contra.

Opinion of the Court by Judge HITCHCOCK.

The first and most important question presented to the court for decision in the present case is, whether a county can be made responsible for the escape of a prisoner, confined for debts where the escape happens in consequence of the want of a jail, or where the jail furnished by the county commissioners is insufficient. It is necessary to dispose of this question in the first place, because if the county is not liable, the judgment of the court of common pleas was erroneous, and must be reversed.

The law has been long settled in England, the country from which we derive most of our laws, as well as our ideas of jurisprudence, that the sheriff is liable for escapes. It is to him, and him alone, in such cases, that the judgment creditor can look for redress. The same principle prevails in some although not in all our sister states. Whenever a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. It is undoubtedly correct that such should, as a general rule, be the case. But to adhere blindly to English decisions when no good reason can be assigned for them, or when no other reason can be assigned, than, *that it has been thus decided*, to do this without inquiring what influenced the courts to make such decisions, to do it without inquiring whether the same reasons exist in this country as in that, would be foolish in the extreme. It is a useful maxim, that when the reason of a law ceases, the law itself should cease. A particular law, or rule of law, might be very beneficial in England or one of our sister states, which, if enforced in Ohio, would be attended with injurious consequences. Influenced by these circumstances, this court has ever been in the habit of looking to the effects which would follow the adoption of any particular rule of decision. Why is the sheriff in England made liable for an escape? The reason is obvious. The sheriff in that country, as well as in this, is the keeper of the jail. But he is not bound to confine the debtor in the public jail of the county if there be one, but he may confine him in a house or prison, furnished by himself. If the public prison is insufficient he may make all necessary repairs or alterations, and for the expense will be indemnified. In short, he may adopt any course which is essentially necessary, to secure his prisoner, provided he confines him within the proper bailiwick. Such being his situation, it is perfectly proper that if the prisoner escapes, he should be liable. The escape will not happen without a violation or neglect of duty on his part, and whenever an individual sustains an

injury in consequence of the violation or neglect of duty on the part of a public officer, justice requires that the officer should make reparation for that injury. But to make the officer liable where no such circumstance intervenes, when he has in fact, complied with the requisitions of law, and with his own duty, would be manifestly unjust. What then is the situation of the sheriff in Ohio? Can *he* confine the debtor in such place as he thinks proper? Can he confine him in a prison of his own choice? It will not be pretended. On the contrary, the law requires that the debtor shall be confined in the jail of the county. And should he be confined in any other place, the sheriff would be liable to the *creditor* for an escape, or to the *debtor* for false imprisonment. True, the sheriff may, under peculiar circumstances, convey his prisoner to the jail of an adjoining county, but this is only in extraordinary cases. Is the sheriff authorized to fix upon the place for, or to erect a jail for the county? In the "act providing for the erection of public buildings," passed January 22d, 1810 the law in force when the escape now complained of happened, but which does not materially vary from the present law on the subject, these duties are assigned to the county commissioners.

The sheriff has no power to provide a prison, nor can he repair one unless at his own expense. Under these circumstances, to make the sheriff ultimately liable for the escape of a prisoner, when the escape happens for the want of a jail, the law giving him no power to furnish such jail, or to make him liable when the escape happens through the insufficiency of the jail, the law conferring no right upon him to make necessary repairs, would be manifestly unjust. It would be to inflict a penalty on an officer, who had violated no law, who had been guilty of no violation or neglect of duty. It would in fact be to punish him for a neglect of duty on the part of others.

When the escape is voluntary, or where it happens in consequence of the negligence of the sheriff, he ought to be liable. But where it happens in consequence of circumstances not within his control, the principles of justice require that he should be exonerated.

It may perhaps be thought by some, that if the sheriff is to be exonerated, on the grounds before specified, it would be proper to make the county commissioners liable in their individual capacity. But we must consider the capacity in which the county commissioners act. They are the representatives of the county. The money which they expend is the money of the county. The funds with which public buildings are erected are the funds of the county. In fact, the acts of the commissioners are the acts of the county, and it is only through them that the business of the county can be transacted. And when it is said that it is the duty of the commissioners to furnish public buildings, nothing more is intended than that this should be done by the county. It is true the commissioners, may in some cases be punished criminally for a neglect of duty, but *this* is a civil action, the object of which is to recover remuneration for a civil injury. The injury has been sustained in consequence of a neglect of duty on the part of the commissioners, not as individuals, but in their corporate capacity, as the representatives of the county of Brown. If liable at all, therefore, they must be liable in this capacity.

Inasmuch then, as it is the duty of the commissioners of a county, or in other words of the county itself, acting by its commissioners, to furnish a good

and sufficient jail, and inasmuch as the sheriff has no voice or controul in this business, it is the opinion of a majority of the court, that where an escape happens in consequence of the want of, or insufficiency of a jail, the county must be eventually liable for such escape. Similar considerations influenced the court in the decision of the case of *Campbell v Hampson*, 1 *Ohio Rep.* 119) and we see no reason to change the principle there decided.

Having disposed of the question which I considered the most important in the case, I will now proceed to consider the other points made by the counsel for the plaintiffs in error. It is urged that, admitting the principle settled by the court to be correct, *Shaw* could not with propriety have a recovery against *Butt*, turning *Butt* round against the county for his indemnity; but should in the first instance have commenced an action in his own name against the county. If this were a new question, I should feel disposed to concur in opinion with the counsel for the plaintiffs in error. It being the duty of the county to furnish a prison, and the escape having happened in consequence of a neglect of this duty, it would seem to be proper that the county should be directly liable to the party injured. By adopting such course, circuity of action, would be avoided. The party in fault, would suffer for his negligence, while an innocent individual would not be put to the trouble of defending or prosecuting a suit. But I do not consider this question as open for discussion. It has been repeatedly decided that the judgment creditor must look to the sheriff for his remedy, and in this case we settle the principle that the sheriff shall be indemnified by the county. The decision of the court of Common Pleas was therefore in this particular correct.

It is further objected, that the court of common pleas permitted the record, in the case of *Shaw v. Butt*, to be given in evidence to the jury—the plaintiffs in error not being either parties or privies to the judgment in that case. The principle contended for, is, as a general rule, undoubtedly correct. Had the action been founded upon that judgment, the record should have been excluded: such action could not have been sustained. But the foundation of the action, was the negligence of the commissioners in furnishing a jail, in consequence of which the plaintiff below had sustained an injury. The extent of this injury must be ascertained; and this could be done only by showing the amount he had been compelled to pay. For this purpose, the record was introduced. It was mere collateral matter, and for this purpose might well be given in evidence.

The next exception is, that there was no evidence that *Shaw* proved that he sustained any damage in consequence of the escape of *Parker*, and, therefore, that the damages in the case of *Butt* against the *commissioners* should have been merely nominal. And, moreover, that the recovery against *Butt* was for a voluntary escape. It is the opinion of the court, that the amount of damages recovered by *Shaw v. Butt*, is the proper rule of damages in the present case. Whether the evidence submitted to the jury was sufficient, in that case, to justify them in finding that amount of damages, we know not. The reasonable presumption is, that it was. Nothing to the contrary appears—nor can the correctness of that verdict be questioned in this case. As to the nature of the escape, whatever might have been the form of action against *Butt*—whatever might have been the evidence in the case against him, it appears from the bill of exceptions before us, that the escape happened in consequence of the want of a jail. Had a

sufficient jail been furnished, the county must have been exonerated. The sheriff alone would have been liable. But such was not the fact.

It is further objected, that the court of common pleas refused to instruct the jury, that unless they believed the commissioners had been guilty of gross negligence, they must find for the defendant. Such instruction would have been improper. Should the commissioners of a county be indicted for not erecting public buildings, under the 14th section of the "act establishing boards of commissioners," it might be a good defence for them to show that they had not been guilty of gross negligence. But such defence cannot be allowed in a case like the present. Here, an individual has sustained an injury in consequence of the neglect of the commissioners. The injury to him is the same, whether the negligence was gross or otherwise, and he is equally entitled to redress.

An objection is made to the form of action. It is said it should have been assumpsit. But this objection will not avail. The action is a special action on the case, and well brought.

In whatever point of view I can consider the case, it appears to me that the court of common Pleas were correct in the determination of the several questions submitted to them, and in this opinion a majority of the court concur.

The judgment of the court of common pleas is therefore affirmed, at the cost of the plaintiffs in error.

Judge BURNET'S *dissenting opinion.*

The ground on which I dissent from the opinion of the court in this case, is, that I cannot consider a county, in its corporate capacity, as liable for the illegal conduct of its officers; and if it is not so liable, I do not perceive any ground on which this action can be sustained. There is no statute in this state, by which it is made responsible, and if there be any principle of common law that can sustain the suit, it has escaped my observation. There is not any contract, either express or implied, subsisting between the plaintiff and the county of Brown, on which the claim can be founded, nor has the county, in its corporate capacity, been guilty of a tort to his prejudice. If the commissioners, by a wilful omission of duty, have caused him an injury, they may be answerable for the consequences, in an action properly framed for that purpose. The statute made it the duty of the commissioners to provide a sufficient jail, and gave them the means of doing so. They voluntarily accepted the trust, and if they have neglected to execute it, and by that negligence the plaintiff has been injured, the injury has not proceeded from the county, but has been occasioned by the illegal conduct of the commissioners, for which they are personally responsible.

Reference has been had to considerations of policy. If there be any weight in these arguments, they are better calculated for the legislative hall than for a court of justice. They might influence the legislature to provide a remedy, but they do not show that it already exists. It may, however, be fairly questioned, whether good policy requires such a recourse. A county cannot provide public buildings, in any other way than by the agency of its officers. If those officers may neglect their duty with impunity, as will be the case, if they can transfer the consequences of their negligence to the county, a strong inducement to the faithful and punctual discharge of duty is lost. It will be a

matter of but little moment, as it regards them personally, whether they provide a sufficient jail or not, if the consequence of their negligence is to operate on the public treasury, instead of their own purses. If considerations of policy can be properly used in a case like this, I incline to the opinion, that it is better to let the officers bear the consequences of their omissions of duty, than invite them to such ommissions, by providing an indemnity, or by suffering them to offend with impunity. It cannot be good policy to remove incentives to duty. If it be said that cases of hardship may arise, in which the commissioners are not chargeable with inexcusable neglect, so as to be personally liable, it may be replied, that in such cases, the sheriff, or other person injured by an escape, may petition for relief, with a fair prospect of success, if his claim be a meritorious one. But it does not follow, that a legal right of recovery must exist for every loss attended with hardship. There are cases without number, in which losses are sustained, and the officers are destitute of a remedy, because there is no person legally bound to indemnify. It cannot be overlooked, however, that in the case before us, all the parties acted voluntarily and advisedly. The sheriff knew the situation of the public buildings when he accepted his office, and the defendant had the same knowledge when he caused his debtor to be imprisoned. The hardship, therefore, is not as great as it would seem at first view.

If the liability contended for, really existed, it is a natural inference, that some adjudged cases might be found, to support it, but the research of counsel has not enabled them to produce a solitary case, in which the funds of a county, or corporation, have been rendred liable for injuries sustained by the unauthorized, illegal, and tortious acts of its officers. As far as the case of *Campbell v. Hampson* applies, I consider it an authority against the plaintiff. That case was decided on the principle that a sheriff, who was expressly commanded by the statute to commit a person in his custody, to the common jail, and to a particular apartment in that jail, could not be charged as *a trespasser* in discharging that duty, because, by the misfeasance of the Commissioners, the apartment, in which he was directed to confine the person, had not been provided, by which it was impossible for him to perform the duty, in the precise manner directed.

And in delivering the opinion, the court do distinctly intimate that the party injured had a remedy against the Commissioners, whose duty it was to have provided a separate room for debtors. If any thing can be inferred from that case applicable to this, it is that this plantiff, was not liable for an escape, which he could not prevent, &c. that he might have defended himself against the suit of the creditor, and turned him over to the Commissioners, who were exclusively liable for the injury he had sustained. And again, I do not see how, a decision that the sheriff is not liable to an action *of trespass*, in a particular case, and that he may defend himself against it, can be improved as an authority to show, that in a case of a different character, he may submit to a judgment, and then compel an indemnity from the county.

The books abound in cases, both English and American, in which recoveries have been had against sheriffs for escapes, but not an instance can be found, in which they have recovered an indemnity against the county. If it be replied, that this is because the sheriffs in England are not bound to confine debtors in the public jail, but may at their election, provide a private jail, or may repair

the old one, if necessary, for which they are not to be remunerated; the same reply may be given, with equal force in the present case. In Ohio, the County Commissioners are authorized and directed to provide sufficient jails, and it is their duty to levy and collect money, or to contract debts for that purpose, if necessary. Consequently they stand in the situation of sheriffs in England, in relation to escapes, and ought to be answerable for the insufficiency of the jail, in the same manner, and to the same extent. They, as well as the sheriff, are county officers, and in providing public buildings, they all act as agents for the county.

If an escape happens in England, through the insufficiency of the jail, the sheriff must answer for it, and he has no recourse on the county. For the same reason the commissioners in Ohio, should be answerable without recourse. It is a just maxim that "the reason of the law is the life of the law." The sheriff in the case put, is liable without recourse on the county. Why? Because he has been guilty of a misfeasance, in not providing a *sufficient* jail. Therefore, and for the same reason, the commissioners should be liable without recourse, they having been gullty of a non-feasance, in not *providing* a jail.

In every instance, within my knowledge, in which a county has been held liable for an escape, it has been made so by statute. It is by statute the hundred in England, is made liable for robberies, in certain cases, and under our territorial government, a statute was adopted by the governor and judges, in August, 1792, declaring the counties liable for escapes that should happen through the insufficiency of the jail. The act pointed out the manner in which the money should be assessed, and paid, and also the manner of commencing and conducting suits for the recovery thereof, in case the courts should not order it assessed and paid. The frauds that were practised on the counties, under that law, by collusions between plaintiffs and defendants, when no debts were really due, and when defendants were utterly insolvent, became so apparent and oppressive, that the first territorial legislature in 1799, repealed the act, and no subsequent legislature has seen proper to receive it.

Prior to the adoption of that law, I believe no attempt was made to charge a county in such a case, and this is the first suit that has been brought for that purpose, within my knowledge, since the repeal of the law, although escapes have been numerous, for which sheriffs have been held answerable to the persons injured. The natural inference is, that it has been the prevailing opinion, that such actions could not be sustained at common law.

From the most careful view I have been able to take of this case, it appears to me, that the county of Brown is not liable either by statute, or by contract, to pay the money demanded, nor do I discern that she has committed any tort to the injury to the plaintiffs, and I do not know of any ground, distinct from these, on which the action can be sustained.

The duty and the power of the commissioners is created by statute. While they act within the scope of their powers, the county must be bound, but if they should make a contract, to remove the seat of justice, or should seize on private property, for county purposes, contrary to law, the county would not be bound by the contract, or liable for the trespass, they would be responsible in their private capacities. The proposition therefore that "the act of the com-

missioners is the act of the county," must be taken in a restricted sense. It would be mischievous, as well as unprecendented, to hold the county answerable for their tortious and illegal proceedings.

BUCKINGHAM & Co. v. GRANVILLE ALEXANDRIA SOCIETY.

Upon a motion for an order to the sheriff to make a deed the court look only to the execution on which the sale was made, and the proceedings under it.

This was a motion for an order to the sheriff to make a deed for lands sold on a *fi. fa.* It was certified to the Supreme Court of Licking county, from the court of Common Pleas of that county, for the want of constitutional quorum of disinterested judges to decide it, and was reserved for decision at Columbus. The facts were these:

At the October term, 1820, of the Common Pleas, the plaintiffs recovered judgment against the defendants for $3,752 62. Upon this judgment a *fi. fa.* issued in April, 1821, and among other property was levied on S. half Qr. 3, T. 4, R. 13, and on another tract of twenty-two and a half acres, on which the Granville furnace was erected. These lands were mortgaged to the Bank which was defendant, and the levy was made in conformity with the provisions of the act of February 2d, 1821, providing for the collection of debts due from banks and bankers. The amount of debt due upon the mortgages and the value of the property were found and appraised according to law, and the sheriff returned that the lands were not sold for want of buyers.

At the September term, 1822, on the motion of the plaintiffs in execution, the levy and appraisements were set aside by the court. At the next succeeding term, May, 1823, the plaintiffs moved the court to rescind the order of the previous term setting aside the levy and appraisement. This motion was continued for decision, and at the December term, 1823, an order was made rescinding the previous order, and restoring the parties to all the rights they had secured previous to the order of September term, 1822. At August term, 1824, the appraisement made upon the first. *fi fa.* was set aside, a new appraisement directed, and leave given to the plaintiffs to release so much of the levy as they might choose. A new appraisement was had, and the property bid off, at two thirds of that appraisement, upon which this application for the order directing a deed was made.

Ewing, for plaintiff. *Irwin*, for defendants.

JUDGE SHERMAN, did not sit, having been counsel in the cause.

Opinion of the Court, by Judge HITCHCOCK.

This motion was originally made in the court of Common Pleas of Licking county, and there not being a quorum of disinterested judges in that court to determine the question, it has been certified to this court for decision, according to the provisions of the sixty-eighth section of the practice act. (*State Laws, vol.* 22. *page* 64.)

It is necessary in this case, as in every other, to enquire what is the matter in controversy, what is the question to be decided? The application is for an order upon the sheriff, to make a deed to the purchaser of certain lands, by him sold on execution, at the suit of the plaintiff, against the defendants. The case must be considered in the same light, as if the execution had been issued from this court. In such case we should not have gone back to enquire whether the judgment upon which the execution had issued was erroneous, or whether an improper order had been made for issuing the execution. If the execution had been improvidently issued, the party injured thereby would not be without redress. The proper course for him to pursue, would be to move to have the execution, or the proceedings under it, set aside. Upon such motion the court might with propriety travel back and enquire, whether subsequent to judgment, there had been any thing irregular in their own proceedings, or in the conduct or proceedings of their officers.

Counsel for defendants in argument treat the question as if it arose upon a motion to set aside the execution and proceedings, or as if the proceedings had been removed from the court of Common Pleas, to this court, by *certiorari*, for irregularity. In this they mistake the point in issue. Admitting that there was so much irregularity in the proceedings, that the court would, upon a proper application set them aside, still it does not follow that the motion now under consideration must be overruled. We certainly are not acting as a court of errors, to review the proceedings of the court of common pleas. We are in effect acting as a court of Common Pleas. That court not being competent, in consequence of interest in some of its members, to decide the motion submitted to them, the duty of making the decision, is by virtue of the statute transferred to us.

Upon a motion to set aside an execution, as has been before observed, the court can with propriety examine the previous proceedings to ascertain whether there has been any irregularity in the orders of the court, or in the proceedings of the clerk; but upon a motion similar to the present, I apprehend we can look no further than to ascertain whether the officer in making the sale has pursued the law. I infer this from the nature of the application, and from the words of the statute. These words are as follows, "*provided*, that if the court to which any execution shall be returned by the officer, for the satisfaction of which any lands and tenements may have been sold, shall, *after having carefully examined the proceedings of said officer*, be satisfied that the sale has been made in all respects in conformity to the provisions of this act, they shall direct their clerk to make an entry in the journal, that the court are satisfied of the legality of such sale, and an order that the said officers make to the purchaser a deed for such lands and tenements."

Let us enquire then whether the sheriff in making the sale, complied with the requisitions of the law. From the documents before us, it is manifest, that he caused the lands to be appraised "*by five respectable disinterested freeholders*" of the county, that these freeholders were by him duly sworn before they made the appraisement, that the said appraisers made a return to him of their appraisement, "under their hands and seals," that he forthwith thereafter, deposited a copy of the return "with the clerk of the court from which the writ issued, and that the property was sold for two-thirds of the appraised value. It is fur-

ther manifest that he gave public notice of the time and place of sale, for more than thirty days before the day of sale, by advertisement in a public newspaper, printed in the county of Licking, the county in which the land lies, and that the sale took place at the court house in said county.

I am at a loss to discover in what particular the officer has failed in his duty. In fact the complaint is not so much with respect to the officer, as to the court. Upon the whole, "*after having carefully examined the proceedings*" of the *officer*; I am "*satisfied that the sale has in all respects been made in conformity to the provisions*" of the statute, and that the order must be made according to the request of the plaintiff. Let it be made accordingly.

Dissenting opinion of Judge BURNET.

Having dissented from the opinion of the court in this case, it becomes my duty to assign the reasons which have induced me to do so. The cause having been certified to the Supreme Court, for the want of a constitutional quorum of disinterested judges to hear and determine it, in the court below, it necessarily comes before us as it stood before them, and it is our duty to examine the proceedings as though they had all taken place in this court, for the purpose of ascertaining whether they have been such as to entitle the applicant to the benefit of his motion.

I am so unfortunate as to differ from my brother judges, who have taken a part in the decision of this case, at the very threshold, as to the extent of the ground we are authorized, or required to occupy. They draw a very marked distinction, between this investigation, and that which would be proper on a motion to set aside an execution. I confess that I do not discover any difference in the latitude of enquiry that is admissible or necessary in the two cases. I do not contend that the court can go behind the judgment in either case, but I do contend that the object of this procedure cannot be attained without a thorough investigation of all the proceedings subsequent to the judgment, that are connected with the execution and sale, whether they emanate from the sheriff, the clerk, or the court. If, on an application like the present, it should appear that there had been no judgment, or execution, or levy, or that the officer had proceeded to sell after the court had set aside the execution, or if it should appear that the levy and appraisement had been set aside before the sale, as was the fact in this case, would we be justified in shutting our eyes upon these discoveries, and blindly ordering a deed to be made to the purchaser? I am constrained to answer in the negative. This answer would be forced upon me, by the strict letter of the statute, were I at liberty to overlook the spirit and design of it. In conducting this enquiry, the statute requires three things.

1. The court must examine the proceedings of the sheriff, to ascertain, if they have been regular.

2. They must be satisfied that the sale has *in all respects* been made in conformity with the provisions of the act.

3. They must be satisfied of *the legality of the sale.*

If, on the first branch of the enquiry, the proceedings of the sheriff should appear regular as to the levy, appraisement, return, advertisement, and mode of sale, it would not necessarily follow that the sale had *in all respects* been made in conformity to the statute. Other parts of the statute might have been viola-

ied. When we speak of the *legality* of a sheriff's sale, we understand that all the proceedings connected with it, from the issuing of the execution, to the striking off of the land, has been regular. To confine the import of that term to its literal signification, which is the simple act of crying off the premises, would be a narrow interpretation indeed. The maxim *qui heret in litera, heret in cortice*, would well apply. Although the acts of the sheriff, in themselves considered, might be unexceptionable, yet if it should appear that the execution on which he acted, had been issued by a justice of the peace, or that there had been no levy, or that the levy and appraisement had been regularly set aside before the sale, it could not be said, that the sale had, in all respects, been made in conformity with the act, nor would the court be satisfied with the legality of the sale, because such circumstances would render the sale a perfect nullity, and clearly show that the purchaser was not entitled to a deed. Such facts as would avoid a deed after it was made, ought to be sufficient to withhold an order for making it; but on the limited construction which has been given to the statute, the provisions which are most essential to the legality and validity of the sale, must be disregarded. The act requires an execution founded on a judgment of a court having jurisdiction of the subject matter, on which there must be a levy and an appraisement. These are provisions of the act, and if they have not been performed, the court cannot see that the sale has, in all respects, been made in conformity with them. If a statute provides that there shall be a levy and an appraisement, before a sale, and the sale be made without a levy, it appears as plain as an axiom, that the sale is not made *in all respects* in conformity with the provisions of the statute, because a levy is one of those provisions. If such matters as these are not to be regarded, this investigation must be a useless sacrifice of time. The form might be dispensed with, and the deed executed at once. From this view of the subject, I feel it my duty to examine the objections to the levy, including the orders of court in relation to it, as well as the objection to the appraisement and sale.

The defendant objects—

1st. Because the statute under which the levy was made (1821) had been repealed before the issuing of the *vend. expo.* on which the sale was made.

2d. Because the levy on which the sale was made, had been set aside by the court, on motion, and at a subsequent term had been reinstated.

3d. Because the lands had not been separately appraised, as the statute directs.

4th. Because the sheriff rejected a part of the land levied on and embraced in the mortgage, and refused either to value or sell it, on an allegation that the title of the mortgagor was defective.

It appears from the record, that the plaintiff obtained judgment against the Granville Banking Company, and proceeded to levy an execution, on sundry tracts of land, mortgaged to the bank, by three separate deeds. The levy was made in April, 1821, under the act of 1820, which was repealed by the act of 1822; the act of 1822, was repealed by the act of 1824, under which the sale was made.

In September, 1822, the court of Common Pleas set aside the whole levy, on motion of plaintiff, the premises having been twice offered for sale. At the December term, 1823, the court on motion rescinded the order of September, 1822,

and directed the levy of April, 1821, to be reinstated. In the interval, a number of executions were issued on judgments at the suit of other creditors, and levied on the same property, by which those creditors claimed the preference. The different tracts contained in the mortgages were not separately appraised, and a part of the mortgaged property was relinquished by the sheriff, on the ground that the title of the mortgagor was defective. These are the most important facts relating to the points that are to be considered.

1st. I agree with the majority of the court, that the first objection cannot be sustained, because the repeal of the law under which the levy was made, did not affect the execution previously issued, or the levy that had been made on it. The proceedings as far as they had gone, were valid. The levy was as operative after the appeal as before it. The new law affected only those proceedings that took place after it came in force. The principle assumed by the defendant, would be inconvenient and mischievous in its consequences.

The act regulating judgments and executions, has been frequently changed, and if the repeal of one law, by the substitution of another, should render void the steps that had been previously taken, it would be difficult for judgment creditors to recover their money, as every revision and repeal, would make it necessary to commence *de novo*, so that it would be impossible to calculate when their labors would come to an end. And it may be remarked that the last statute refers to judgments, executions, and levies previously made, and by a fair construction, recognizes them as valid.

It has been decided in this court, in several analogous cases, under the practice act, and under the act in question, that such a change as has taken place in this instance does not affect proceedings which have been had, or rights which have been acquired prior to the change, unless it be expressly so directed. It was not necessary for the plaintiff to obtain a new writ and a second levy.—(*vide, G. Arnold vs. Fuller's heirs*, 1 *Ohio Reports*, 450.) The authorities cited by defendant's counsel, in support of this objection do not sustain it. *Milner's case* (cited from 3 *Bur.* 1456, and 1 *Black. Rep.* 451) is not applicable. That was a special jurisdiction, given to the justices by a statute which had been repealed "to all intents and purposes whatsoever," without providing any substitute. All jurisdiction had been taken away in express and strong terms, and the question was not whether the steps that had been taken were regular, but whether the justices were authorized to proceed any further in any form. The same remark applies to the case of *Hollingsworth vs. Virginia*, (3 *Dall.* 378.) That was also a question of jurisdiction. By an amendment to the constitution, the jurisdiction of the court had been entirely taken away, and they were necessarily compelled to stay further proceedings. But such was not the fact in this case, the subject matter in question was, and continued to be, within the jurisdiction of the court, and the change in the law, operated only on the proceedings that should subsequently take place.

The execution and levy had been regularly and legally conducted, and as the whole process of execution, is one entire act, the proceedings after the levy, relate back, and take their effect from the date of the levy.

Pasmore's case, from 4 *Dall.* was an indictment for perjury, founded on the bankrupt law of the United States. It was pending when the law was repealed. The court determined that the case was not within the saving clause, and the defendant had a verdict. *Duane's case*, from 1 *Binney*, was an indictment for

a libel against a public officer. Pending the prosecution the legislature of Pennsylvania passed a law, declaring, that from and after the passing of that act, no person should be liable to prosecution by indictment, for the publication of such papers as the one complained of. The court divided in opinion. The majority, however, decided that the act put an end to the prosecution. But there cannot be any analogy between these cases, and the one before us.

They were on penal statutes, which are not constructed by the same rules, nor with the same latitude of discretion as remedial statutes.

2d. The second objection leads to an examination of the power of the court of common pleas, over their own orders and proceedings, and of the effect of their rescinding the order of December, 1823. They had an undoubted right to set aside the levy, and when that was done, the parties in interest were placed on the ground on which they would have stood, if the levy had never been made. It appears from the record that the order setting aside the levy, was made in September, 1822, and that Buckingham permitted that order to stand till December, 1823, a period of fifteen months, during which time other judgment creditors, availing themselves of the right secured by statute, sued out executions, and caused them to be levied on the same property, by which they claim a lien, to the exclusion of the plaintiff. The 17th section of the act regulating judgments and executions, provides that no judgment, heretofore rendered, or which may be thereafter rendered, on which execution shall not have been taken out and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor.

From September, 1822, to December, 1823, Buckingham had no levy on the property in question. His levy having been set aside on his own motion, he stood, as to other judgment creditors, as though no levy had ever been made, and a new execution and levy became necessary; but if it could be admitted, that the court had power, at the December term, to revoke an order which had long before become matter of record, and to reinstate the levy on the old execution, it must as to third persons, operate as a levy from that term, and consequently the plaintiff will have lost his preference, because much more than twelve months had elapsed, and other judgments had been levied on the same property. It is impossible for the order in December, 1823, to relate back, so as to divest rights legally vested before it was made. Such an operation would defeat the intention of the statute.

It appears to me, that this question may be brought within a narrow compass.

Had Buckingham a levy on these lands when the junior judgments were levied?

He certainly had not, as appears from the record, and as his judgment at that time was of more than three years standing, he had lost his preference, by the 17th section of the statute of 1824, and it was not in the power of the court to restore it, so that, whether the court had or had not power to pass the rescinding order, does not change the effect, for, admitting they had the power, it could not operate retrospectively. The plaintiff's rights must stand as if his levy had been made at the time of the rescinding order. This principle was fully settled by this court, in the case of *Patten v. Hedges*, at the present term. It was decided in that case, that after Patten had set aside his levy, he stood, as to

all subsequent proceedings, as though no levy had been made, and that the property could not afterwards be sold, *till it was again seized in execution.* It was also decided, that by setting aside his levy, after the expiration of twelve months from the date of his judgment, he lost his preference, by the 17th section of the act of 1824, although he had the first judgment, and had made his first levy within the term of twelve months.

3d. The third objection renders it necessary to look into the statute, subjecting mortgaged premises to execution on judgments against banks and bankers. The 14th section makes it the duty of the officers to ascertain and report to the court, the amount due on the mortgage. The 15th section provides, that when lands are mortgaged to secure a sum greater than the value thereof, the interest of the mortgagee shall not be sold for less than two-thirds the appraised value; and when mortgaged for a sum not exceeding the value therof, the same shall not be sold for less than two thirds of the sum due on such mortgage. The 16th section directs, that when more than one tract is included in the mortgage, the amount due on the mortgage shall be ascertained, *and each tract shall be appraised separately,* and if the appraised value of the land shall exceed the sum due on the mortgage, it is made the duty of the sheriff *to apportion the amount due on the mortgage, among the several tracts of land, in just proportion to their appraised value,* and to sell each tract of land contained in the mortgage, for not less than two-thirds of the amount apportioned to the same, *liable to be redeemed by the mortgagor,* by payment of the amount apportioned to the same. The 17th section requires all lands held by a bank, in fee simple, or in trust, to be valued and sold, as in other cases of execution.

It appears from the record, that a large number of tracts of land was levied on, and that these tracts were contained in three separate mortgages, in which different persons were concerned as mortgagors; it was, therefore, the duty of the officer to ascertain the amount due on each mortgage separately, and to make separate appraisements of the several tracts embraced in each mortgage, and in all respects to proceed in the apportionment and sale, under the 16th section, as though the mortgaged premises had been taken on separate executions, against different defendants, because it might be, that the money due on one mortgage was more than the value of the land, and the money due on another, was less, in which case, each tract contained in the former, would be sold for two-thirds of its value, while each tract contained in the latter, would be sold for two-thirds of its proportion of the mortgage money, apportioned as above. This course must be pursued, where the parties to each mortgage are the same, and the necessity of observing it is much more apparent, where they are different. If it is not attended to, lands may be offered and sold at two-thirds of their valuation, when the law directs that they be offered and sold at not less than two-thirds of the money due on the mortgage. The officer was not at liberty to proceed as though the lands had been all embraced in one mortgage. By pursuing this course, he has subjected them all to be sold at two-thirds of the valuation, and it was impossible for the court to decide, on his report, whether or not some portion of them ought not to have been sold under that provision, which gives the mortgagor a right of redemption, on the terms prescribed.

The proceedings of the officer, in relation to the valuation, appear to be defective and irregular in another particular. He has not reported the appraise-

ment of all the land, although the statute makes it his duty to cause each tract contained in the mortgage, to be appraised, and gives him no discretion on that subject. The report was imperfect in this respect, and it was impossible for the court to decide, under which branch of the 16th section the lands ought to have been sold, admitting that it was correct to treat the three mortgages as one.

4th. The fourth and last objection that I shall notice, is the conduct of the sheriff in releasing a part of the mortgaged premises from the execution. One of the mortgages contained one thousand seven hundred and fifty acres, of which about one thousand one hundred acres were valued and sold—the residue having been given up by the sheriff, on the ground that the title of the mortgagor was defective. The objection to the title seems to have been made by the plaintiff, and decided by the officer, on his own authority. This step was in direct opposition to the statute, which requires each and every tract to be appraised and sold. It contains no provision for rejecting or omitting any portion of the premises, much less does it authorize an officer to decide on the validity of the title, at the instance of the plaintiff. Questions of title involve matter of fact and of law, which the sheriff is not supposed capable of deciding, and the statute, as we should naturally expect, gives him no such authority. Such an examination of title, must necessarily be *ex parte*. The sheriff can hear but one side, and of course there must be but a slender prospect of a correct result, if he were, in other respects, competent to decide the question. Such a practice would be fraught with mischief. Judgment creditors might select favorite tracts, to the exclusion of others less desirable, and by reducing the reported value of the mortgaged premises below the amount due on the mortgage, might subject them to a sale without the statutory right of redemption. These consequences are serious, and show the impolicy and danger, as well as illegality of the practice resorted to in this case. It may happen, that the title to a part, or the whole of the land contained in a mortgage, is objectionable. The judgment creditor may be embarrassed by that circumstance, but this does not authorize him to select his own mode of getting over the difficulty—he is not at liberty to decide the matter himself, or to have it decided in a summary way by the sheriff. The rights of other persons are involved, and must be respected, however inconvenient it may be to the plaintiff. In ordinary cases, the creditor may select for himself; but in this case, he is pursuing an extraordinary remedy, given by statute, and it is necessary to follow it without any material variation. The plan devised by the legislature will be deranged, and some of the most material principles contained in it must be lost, if the valuation does not embrace every tract contained in the mortgage.

On these grounds, it appears to me, that the proceedings on the execution have been irregular—that the sale was manifestly illegal, and that the order applied for ought not to be granted.

LUDLOW'S HEIRS v. KIDD'S HEIRS.

In a bill of review, the original Bill, answers, exhibits and depositions, are open for examination, when the decree contains no statement of the facts found, or principles decided.

Persons interested in the subject, though not parties to the original Bill, may be made parties in the bill of review, and when the decree is reversed, the bill of review as to such new parties, will be retained as a supplemental bill.

This was a bill of review, adjourned for decision here, from the Supreme Court of Hamilton county.

The case was this: Israel Ludlow died in Hamilton county, in the year 1804, leaving four infant children, and a large real estate. Among this was the lot No. 401, in Cincinnati, the legal title to which had been obtained by John Kidd and Joel Williams. To obtain the conveyance for this lot, the infants prosecuted a bill, by their next friend, against Kidd and Williams. The case was strongly litigated, and a mass of exhibits and depositions introduced into the cause. In 1817, the Supreme Court pronounced a general decree of dismissal, containing no recital of the facts considered as proved, or of the principles of law upon which the dismissal was grounded.

After this dismissal, the lot was disposed of, in different modes, by Kidd and Williams, and had passed, in separate parts, into different hands. Kidd and Williams having both deceased, and the heirs of Ludlow attained their lawful age, they prosecuted this bill of review, to procure a reversal of the decree pronounced against them, and obtain the original object of their bill.

In this bill of review, they recited the substance of the original bill and answers, of the exhibits and depositions, and set forth the decree of dismissal.—They made the heirs of Williams, the devisees of Kidd, and the persons now holding the legal title, defendants, charging them with notice.

The bill prayed a review and reversal of the decree against the complainants, and a decree for the legal title against those holding it. To this bill the defendants put in a general demurrer:—upon which they maintained,

1st. That in a bill of review, nothing could be loked into but the decree itself.

2d. That upon the case made, the decree was correct.

The case was elaborately argued by HAMMOND and STORER, for complainants, and by FOX and N. WRIGHT, for respondents. But, as the decision, upon the first point only, is to be reported, it is only necessary to state so much of the case, and insert such part of the arguments as are necessary to understand that point alone.

N. Wright, in support of the demurrer. *Storer*, contra.

Judge Burnet, having been original counsel for the complainants, did not sit in this cause.

By the COURT.

In bills of review, the practice of this court has been to examine the whole case, and decide as if the matter was open before them, in the same situation

as it was when the decree was pronounced. When the facts proved, and principles decided, are not inserted in the decree, a bill of review, for error in law, would be useless, if this course was not pursued. It is attended with some inconveniences; but greater mischief would probably result were we to decline reviewing any decree where, from the nature of the case, a brief general decree would, on its face, be free from error. In the case now before us, however, we may be satisfied that the decree of dismissal is unsupported by any possible deduction from the facts in proof: the complainants would be without remedy, if we are confined to the examination of the decree alone. Whether it be erroneous or not, must depend upon facts, on which it was predicated. As they are not recited, we can only find them by an examination of the proofs.

This mode of proceeding has not therefore been controverted. The general adoption and acquiescence in the practice, both by the bar and the court, evinces a general sentiment as to its correctness and utility.

The difference between our practice in drawing up and entering decrees, and the practice in England and New-York, sufficiently accounts for the departure, amongst us, from what is elsewhere an established rule, of proceeding. On this point the demurrer must be overruled. It must also be overruled generally. But, as the case may again come before us, we do not express the grounds upon which we go, on the second point.

The court pronounced a decree, reversing the original decree of dismissal, and made an order that the bill of review be retained as a supplemental bill, and stand for plea or answer; and that the cause be proceeded in, as upon original and supplemental bills.

TIERMAN v. BEAM, ET AL.

As between vendor and vendee, the vendor has a lien upon the lands sold, for the purchase money, though personal security be given.

Such lien passes to the devisee of the vendor when the legal title remains in him.

When in an entire contract for the sale of five quarter sections of land, a separate bond is given for the conveyance of two, the purchaser cannot have a specific performance, without performing the entire contract on his part.

Chancery may aid a deed, rendered inoperative by accident or mistake, when the grantor had power to convey, but it cannot generally supply a want of power.

Thus a conveyance made by executors under a defective order of court cannot be aided in equity.

This cause was reserved for decision here, by the Supreme Court sitting in Richland county. It was argued by

J. C. Wright, for complainant. *Wm. Stanbury*, for respondent.

Opinion of the court by Judge BURNET.

There is some contradiction in the testimony, and some inconsistency in the statements of a part of the witnesses, but the leading facts on which the case must depend, are sufficiently ascertained. The bill, answers, and exhibits, show, that in 1811 Newman sold to the defendant, Beam, five quarter sections

of land, containing eight hundred acres, at four dollars fifty cents per acre, amounting to four thousand four hundred dollars. For two of these quarter sections, Newman had obtained a patent. The remaining three had not been paid for, in full, to the government, and consequently were held by certificates of purchase. Beam was to complete the payments, and, to enable him to do so, the certificates were assigned. The legal title of the two quarters remained in Newman, who gave a title bond, in the penal sum of seven hundred and fifty dollars, with a condition to convey them on the payment of the sum. One thousand two hundred dollars of the purchase money was paid in hand—notes, or sealed bills, with the defendant Hedges as security, were given for the residue, payable by instalments. Newman, the vendor, died in 1813, having devised the notes to his widow, one of the defendants in this suit. Payments were made by Beam to Newman in his life, and to his widow since his death, by which the debt has been reduced to one thousand one hundred and sixty-seven dollars and seventy-six cents. After the death of Newman, his executors obtained a general order of court to execute deeds. The order is admitted by both parties to have been illegal and void. The executors, however, executed a deed to Beam, for the two quarter sections in question, on the supposed validity of that order. The complainant obtained a judgment against Beam in August, 1817, in Belmont county, on which there is a balance of one thousand two hundred dollars due. Execution on this judgment has been sent to Richland county and levied on the two quarter sections not conveyed, there being, as it is alleged, no other property on which the money can be made.—The object of the bill is, to subject the two quarter sections to sale, for the satisfaction of the complainant's judgment. The principal matter in dispute is, whether the court will require the defendants, or those holding the legal title, to part with it for the benefit of the complainant, before the residue of the purchase money is paid.

The principal points discussed by the counsel, are the following:

1st. Had the vendor a lien on the land for the purchase money?

2d. If he had such a lien, has it been lost or relinquished by the subsequent conduct of the parties?

3d. Did the payment of the sum of seven hundred and fifty dollars, named in the bond, entitle the purchaser to a deed for the two quarter sections, before the whole of the purchase money due on the contract was paid?

4th. Will the court give effect to the deed made to Beam by the executors of Newman, agreeably to the prayer of the bill?

On the first point, the authorities clearly show, that a vendor has a lien on the premises sold, for the purchase money, and that his lien is not affected by conveying the premises, and taking a note or bond, with personal security, for the money. It exists in every case of a sale, where the money is not paid, unless it be otherwise agreed by the parties, either expressly or by such arrangements as clearly show their intention, and it is incumbent on the party contesting the lien, to show that it has been relinquished. (9 *Ves.* 209. *Tumner v. Bayne*, 1 *John. Rep.* 308. 2 *Ves.* 622. 3 *Eq. Ca. Ab.* 682, [*n.*] 1 *Vern.* 267. 3 *Atk.* 272. 6 *Ves.* 752. 3 *Bibb. Rep.* 183. 1 *Wash. Rep.* 142. 1 *Brow. Cha. Rep.* 301) In Pennsylvania, and in South Carolina, the right of the vendor to this equitable lien seems not to have been recognized, but it has been admitted

and enforced in most of the state courts, and in this court, as often as the question has been presented. (*Jackman v. Hallock*, 1 *Ohio Rep.* 318.) As between vendor and vendee, the rule is not questioned by the counsel on either side.—But on the part of the complainant, it is strenuously contended, that it does not exist in favor of these defendants, and a variety of circumstances have been referred to, for the purpose of taking the case out of the rule. As for example, that the vendor took obligations with personal security, for the purchase money, and that these obligations were payable by yearly instalments. The first part of this objection has been disposed of already, and it is not easy to discover, why the fact, that the money was payable by instalments, should charge the rights of the parties. That circumstance cannot affect the contract, or the consequence resulting from it. As to every thing connected with this question, it is immaterial whether the money be payable in a gross sum, or by instalments, on different days. It was also urged, that because the legal title was retained by the vendor, for a time, and afterwards conveyed, with the assent of the devisee, we must draw the conclusion, that the parties did not intend to have a lien reserved. To rebut the inference drawn from this circumstance, it is only necessary to state, that the retaining of the title by Newman till the time of his death, evidences a determination on his part to hold the land as his security; and that, as the executors were not privy to the contract, and were ignorant of the intention and understanding of the parties, at the time it was made, their attempt to convey the land after the death of Newman, cannot have any bearing on the question; we cannot draw from it an inference inconsistent with the manifest design of the vendor. But this qustion does not rest on inference alone. The testimony of Pierce, proves that it was a part of the contract, that Newman should hold the land as security for the money. Such proof however was not necessary on the part of the defendants. The existence of the lien must be presumed, until the contrary appears. It rests with the complainant to show that the vendor did not rely on it.

The second enquiry is, has the lien been lost by any thing that has taken place since the contract was made. The complainant contends, that if the lien did exist in the life of Newman, it ceased at his death, and that the devisee cannot claim it, because by the devise, the debt has been separated from the land.

The case of *Jackman v. Hallock*, (1 *Ohio Rep.* 318,) has been cited to sustain this position. That was a claim set up by the assignee of a note, in the life of the vendor. It was a transaction between the living. A majority of the court were of opinion, that the lien did not pass by the assignment. But the circumstances of the two cases are materially different, and the decision in that case does not necessarily conclude this. The force of the argument used on that occasion, seems to be, that the vendor may separate the equitable lien, from the legal right, that he may assign the latter but cannot pass the former, because it is given for his own exclusive benefit. Adopting this reasoning as conclusive, it admits that while he retains the legal right, the equity will attach to it, and upon that principle, if he retain them united till his death, they must both descend to his heir, or pass to his devisee, because the act of God shall not injure any man. The death of a vendor cannot impair his rights. They must pass to his representatives in the condition in which they were, at his death. If the debt, in the hands of Newman, during his life, was an equitable lien on the land, it must

continue so in the hands of the heir or devisee, for at his death all his legal and equitable rights, pass by operation of law, in the same state in which he held them. No good reason can be assigned why any of them should be forfeited by an act of Providence not under his controul. The duration of an estate may be limited by the terms of the grant, to the life of the grantee. But such a limitation was not contemplated by the parties in this case. The rights mutually acquired were intended to survive. There was nothing in the nature or terms of the agreement inconsistent with such an incident, and I do not see by what rule of construction, a limitation can be applied to the equitable, that does not equally affect the legal right. The security for the debt, should be as permanent as the debt itself. They ought to exist and expire together. The object of the one was to ensure the enjoyment of the other, and if either is to be forfeited by the death of a party, I am at a loss to determine which it should be. The lien of a vendor is not founded on arbitrary principles, that require a rigid construction. It is not of such a nature as should induce a court to lay violent hands on it, whenever a plausible pretext can be found for doing so. It is founded on principles of justice, and ought therefore to be protected. It originated in the care which the law has for the preservation of equitable rights. It was intended to prevent one man from enjoying the property of another, without consideration, and it therefore applies as well to the representatives of a deceased vendor, as to the vendor himself. It is in the nature of a mortgage, provided by the benignity of the law for those who may have been too confiding; and in my estimation, our legal system would be imperfect without it. The great object of every code of laws is, to prevent injustice, and the more effectually that end is accomplished, the nearer does it approach to perfection. Justice certainly requires that real property, sold on contract, should be answerable for its price, as far as is consistent with the safety of third persons. Hence legal mortgages have been resorted to, and the doctrine of equitable liens has been established; and as these securities are similar in their operation, and have originated from the same policy, they ought to be equally favoured. In *Martin v. Mowlen, and Green v. Hart,* (2 *Burr.* 979. 1 *John. Rep.* 590) mortgages are treated as chattel interests, which may be discharged by parol, not being within the statute of frauds.

This would show that there is no essential difference between legal and equitable mortgages, as to the solemnity required in their discharge. They both originate in contract, the one by express stipulation, the other by operation of law.

From this view of the subject, it seems to be a just conclusion, that the death of Newman did not extinguish his lien on the land in question, and that the right survived for the benefit of those to whom it legally belongs.

As the death of Newman, and the attempt to convey by his executors, are the only circumstances which have taken place since the contract was made, calculated, in the opinion of counsel, to destroy the lien, and as neither of these is sufficient for that purpose, the conclusion follows, that if the lien ever existed, it continues to exist.

But before this point is dismissed, I will notice some of the authorities cited by counsel as having a bearing on it.

Much importance is attached to *Pollexfen v. Moore,* (3 *Atk.* 272.) The defendants rely on it to establish the lien, and the complainant quotes it, to show

that the lien expired at the death of the vendor. It has often been remarked, that the report of that case was very obscure, and the Master of the Rolls, in *Trimmer v. Bayne*, (9 *Ves.* 210) affirms, that Lord Hardwicke destroys his own *dictum*, that "the equity will not extend to a third person," by the decree which he makes in the same case. The object of the cross bill was to protect a legacy, given out of the personal estate, either by requiring the complainant in the principal bill, who was a vendor, seeking for his purchase money, to resort to his equitable lien, or otherwise, if he were allowed to exhaust the personal estate to the prejudice of the legatee, that she might succeed to his equitable right; and in the face of his own dictum, the chancellor marshalled the assets, so as to give her all the relief she was entitled to. He established the *equitable lien*, and confined the vendor to *that fund*, by which the personal estate, was, so far preserved, for the legatees. In other words, he decided, that the land, after it had descended to the heir of the purchaser, should be bound for the purchase money, for the benefit of a person not a party to the contract; and not only so, but that the vendor should resort to that lien, and exhaust the fund in the first instance. The object of the cross bill was therefore gained, and the equitable lien enforced, for the benefit and at the instance of *a third person*.

So for as the principle, really settled in that case, has a bearing on the *dictum* of the Chancellor, it appears to condemn it, and to favor the conclusion, that it has been introduced by the carelessness, or misapprehension of the reporter. It appears however to be the foundation of the doctrine now contended for, and to have led to all the controversy on the subject, which is found in the subsequent cases. But the object I had principally in view in turning to that case, was, to distinguish it from the case before us, by shewing that these defendants cannot be treated as *third persons* in the sense in which the Chancellor used the phrase. Mrs. Moore, whom Lord Hardwicke denominated a third person, was not concerned in the sale, or purchase of the land, she had no interest, either original, or derivative in the purchase money. Her claim had no connexion with the debt created by the purchaser, or with the lien which the law created for its security. She was, in the literal sense of the word, as to that transaction, a third person, a stranger, seeking to protect a legacy, that had no relation to the sale of the land, and in which the vendor never had an interest. Her prayer was, if the vendor did not avail himself of the lien, that the court would place her in his shoes, and transfer to her his equitable right. A simple statement of the case shows that it is not analogous. Mrs. Newman, in this sense, is not a third person, she cannot be called a stranger to the transaction, she has succeeded to the rights of her husband, resulting from that contract—she stands in the shoes of the vendor, and as the legal owner of the debt, claims the benefit of the security attached to it. She is the only party in interest. The lien cannot operate in favor of any other person; she does not attempt to meddle with the rights of others, and cannot therefore be denominated *a third person*.

That case ought not to be carried further than its terms necessarily require. Subsequent cases should not be brought within its influence by remote analogy. Mortgages are considered as inseparable from the debts to which they relate. They follow them as the shadow follows the substance, so that any act amounting to a legal transfer of the debt, will carry with it the mortgage. In *Martin vs. Mowlen*, (2 *Burr*, 973) Lord Mansfield states it as a settled rule, that a mort-

gage, being a charge on the land, whatever will give the *money*, will convey the estate in the land along with it, to every purpose. If the debt be assigned, devised, or discharged, without naming the mortgage, the mortgage will share the fate of the debt. The right in it, passes by the operation of law, rather than by the act of the party. *Green v. Hart*, (1 *John.* 580) adopts the same principle. The *dictum* of Lord Hardwicke as it is expounded by the complainant, would be inconsistent with the doctrine maintained in these and other cases of similar import. But it appears to me, that it cannot be applied to a person who has acquired an intertest in the debt, and with that limitation, it has no unfavorable bearing, on the claim of the defendant, nor does it conflict with the cases just cited.

It must be recollected, however, that the matter directly in contest between these parties, is the two quarter sections not conveyed by Newman in his life. The three quarters which were conveyed, have been disposed of. As to these quarters the defendants certainly stand on higher ground. They have the legal title, against which the complainant is setting upon equity, and the question is, whether the court will deprive them of that title, and if they will, upon what terms. In deciding this question, it is necessary to consider, on what ground the complainant stands. He had no concern in the contract, and as a party, he has no interest in it. He is pursuing the rights of Beam, in the character of a creditor, and any circumstances of hardship, in his own case, are not to be considered here. He stands in the shoes of Beam, and the case must be decided, as though Beam were the complainant praying for a specific execution of his contract. Viewed in this light the complainant must do equity before he can expect to receive it.

Whatever might have been the understanding of the parties, we find the defendants with the law on their side, and with an equity at least as strong as that of the complainant. The purchaser is insolvent, and the defendants must lose the purchase money if they are compelled to give up the title, which is the only plank on which their hopes can rest. I do not know on what principle Beam can extort it from them, before he has complied with his part of the contract. It certainly was not the intention, or expectation of those concerned, that he should have the land without paying for it. If the title had remained in the vendor by mere accident, I could not hesitate to say that equity ought not to take it from him, till the contract is fulfilled. But in this case there is both positive and presumtive evidence that Newman relied on his title and retained as his security.

The third enquiry is, did the payment of $750, the sum named in the title bond, entitle the purchaser to a deed for the two quarters, before the whole of the purchase money due on the contract was paid. The counsel for the complainant have treated the case as though there were two contracts, one relating to the three quarters conveyed, and the other to the two quarters not conveyed, and on that ground they claim a right to the two quarters, because they alledge the purchase money for them has been paid in full. But they have certainly taken an incorrect view of the subject, for in the first place there is not any thing that indicates two contracts, and in the second place the most rational conclusion as to the payments is, that they were not made with reference to one portion of the land, more than another.

The defendants allege, positively, in their answers, that the five quarter sections were sold in a body, at the average price of $5,50 per acre, amounting to $4400. Henry Bell, Michael Newman, and Michael Beam, Jun. testify to the same fact. They prove that the land was sold *in a lump*, at an average price, and by a single contract. The testimony of Pearce amounts to the same thing. He heard the parties speak of the transaction as one contract, and understood from them that the land was bound. In addition to this the nature of the transaction and the circumstances attending it, show clearly that there were not two contracts. There was a great difference in the value of the quarters, both as to quality of soil, and improvements. Some of them were entirely unimproved, a part of them was improved to a considerable extent, and yet they were sold at an average price.

This could not have been the case, if they had been purchased separately. The sum of twelve hundred dollars paid in hand was deducted from the amount of the five quarters, and notes with security were given for the residue, without distinguishing for what particular portions of the land they were given, and all the quarters were purchased at one and the same time. From these circumstances, independent of the testimony, the inference is irresistible, that the five quarters were purchased by one and the same contract. The execution of the title bond, is no evidence of two contracts. It was the natural consequence of the difference in the situation of the title. As there was money due to the United States on three of the tracts, which was to be paid by the purchaser, it was necessary to assign him the certificates for those tracts, to enable him to complete the payment, and as the vendor was to retain the title of the two, for which patents had been obtained, it was natural to give a title bond, and as it was the understanding of the parties that all the land was to be bound for the purchase money, and as obligations had been given for the whole amount, the sum named in the title bond was most probably accidental. There is no rule of calculation suggested by the case, from which it can be ascertained that seven hundred and fifty dollars was due on the two quarters. At the average price, they amounted to seventeen hundred and sixty dollars. If the whole payment of twelve hundred dollars, be deducted from them, the sum due would be five hundred and sixty. If a proportionate part be deducted, the sum due would be twelve hundred and eighty dollars.

The admission so much relied on, that seven hundred and fifty dollars had been paid, amounts to nothing, for it appears from the testimony of Mr. Parker, that at the time those declarations were made, the payments amounted to more than three times that sum, as the original debt had been reduced to eleven hundred and sixty-seven dollars. But there is not the slightest reason to suppose that any part of this money was paid with special reference to these quarters. Counsel have labored to give the case aspect, but without success. The facts do not sustain it.

The fourth and last enquiry is, will the court give effect to the deed executed by the executors.

Chancery may aid a deed, rendered inoperative by accident, or mistake, when the grantor had power to convey, and intended to do so, but it cannot generally supply a want of power. It cannot give effect to deeds executed by persons who have neither title, nor authority to convey, from those who have the title.

The deed from the executors of Newman to Beam, was unauthorised and illegal. Its operation was not prevented by a defect in the form, or in the execution of it, but by a total want of power to convey, which no court of equity can supply. A decree may remedy a mistake in a conveyance by a person having power to convey, but it cannot create a power. The former is often done, when the rights of third persons are not affected, or when equity would, in the first instance, have decreed a conveyance. But in this case the executors attempted to convey without authority, and if their deed had taken effect, it would have been injurious to third persons. The statute has pointed out the only method by which executors, or administrators can obtain power to sell real estate, or to execute contracts for the sale of it, made by their testators, or intestates. It is necessary to pursue that course, in order to obtain that power, and an attempt to convey, before they have done so, must be wholly inoperative. The power must be obtained from the common pleas, and it would not be more irregular, for this court to grant the power in the first instance, than to remedy a want of it, after a fruitless attempt had been made to execute it, and besides, when application is made to the common pleas, for an order to execute a contract, it is their duty to see that the contract has been fairly made, and fully complied with on the part of the purchaser, and if they should unadvisedly, order a conveyance, while any portion of the purchase money was due and unpaid, it would be contrary to the statute, and such a fraud on the heirs or devisees, as would justify the interference of this court for their protection.— There are two circumstances then, which prevent us from giving effect to the deed made by the executors of Newman.

1. They made it without having obtained a power for that purpose from the court of Common Pleas.

2. As the contract had not been fully complied with on the part of Beam, the Common Pleas were not authorized to grant the power, and if they had made an order for that purpose, it might have been avoided as a fraud, on those who were interested in the contract; so that the question resolves itself into this, will chancery give effect to a deed made without authority, and under such circumstances as would authorize them, if an authority had been granted, to lay their hands on it as a fraud on third persons.

The complainant seems to rely much on the alleged equity of his case. But if he has an equity it cannot aid him, because the defendants have an older and a stronger equity. It does not appear when the debt to Tiernan was contracted, nor is it material to know. His judgment was rendered in 1817. The lien of the defendants has existed since 1811. The equity of the complainant extends only to that portion of interest, that would remain in Beam, after all prior equities are satisfied. On this principle he is to be postponed to the defendants who hold an older equity. The defendants have also the strongest equity. Newman was the proprietor of the whole property. He was not bound to sell it; and after he had contracted to sell, he was not bound to convey, till the consideration money was paid. Beam had no right to appropriate it to his own use, or to the use of his creditors, further than he had made it his own by paying the purchase money. Were we now to appropriate the proceeds of this land to the satisfaction of the judgment, we should virtually decree the estate of Newman to pay the debts of Beam, without a previous liability, and without a

consideration; but on the other hand, if the complainant receives what the land is worth, more than the residue of purchase money due on the contract, he will obtain all the right of his debtor, beyond which he has no equitable claim.—The complainant's counsel to strengthen himself on this point, urged very earnestly, that Beam had treated the land as his own—that it was reputed to be his—that it gave him credit—and that the world was thereby deceived. In a contest about personal property, as to which possession is *prima facie* evidence of right, such facts as these are entitled to weight and are sometimes decisive of the matter in controversy, but the occupancy of land is not considered as an evidence of title. No prudent man would rely on such circumstances, but would rather resort to the records, where the truth may be ascertained, and if he omit this precaution the consequences are chargeable to himself. But the argument drawn from this source is wholly gratuitous, because there is no evidence to show that Tiernan knew of such facts, or relied on them, when he gave credit to Beam. If the legal title had been conveyed to Beam, and the defendants were resting entirely on their equitable lien, there might be some plausibility in recurring to these circumstances: but the fact is not so, the legal title has not been conveyed, the defendants were not bound to vigilance, they had the same right to rely on their title, as a legal mortgagee has, and the same right to reply to the complainant, *caveat. emptor.* It is readily admitted that facts of this description, sustain the exception to the general rule, made in favor of subsequent purchasers, for a valuable consideration, without notice, as to whom the equitable lien cannot be enforced. It was also urged that Hedges, considered the deed from the executors as valid, and supposed that he had no right to rely on the land as a fund to pay the purchase money for which he was bound to Newman. This may be so, but his ignorance does not forfeit his rights.

On the whole, we are satisfied, that the sum due to the estate of Newman, must first be paid out of the proceeds of the sale, and the residue paid over to the complainant.

MICHAEL PATTON v. THE SHERIFF OF PICKAWAY COUNTY.

Under the execution law of 1824 a levy made within a year from the date of the judgment, and set aside after the expiration of the year, loses the lien as against subsequent judgments upon which a levy is made within the year and continued until the sale.

Where a levy is set aside, the parties stand in the same situation as if no levy had been made.

This was an amicable action, brought to decide the right of the plaintiff to certain monies made upon execution. It came before the court, upon a case agreed, and was adjourned from the county of Pickaway.

The plaintiff, Patton, obtained two judgments against Bently—one in July, 1820, one in April, 1821. Upon both these judgments executions were sued out, in June, 1821, and, on the 28th of that month, levied on the real estate of Bently. In July 1822, the appraisement and the levy were set aside. On the 23d of January 1823, writs of *fi. fa.* were again sued out, and on the 22d of February, 1823, were levied on the same property first levied upon, and on one

additional lot. *Alias process* was sued out from term to term until January, 1826, when a sale was made.

At April term, 1821, J. Allen obtained a judgment against Bently. In June 1821, he sued a *fi. fa.* which was levied on the same lots, July 21, 1821, and the process was regularly continued until the sale was effected in January, 1826.

There were other subsequent judgments, previous to January, 1823, upon which executions issued and levies were made. But as the two cases stated, embrace the point decided in the opinion, it is unnecessary to state them.

Patton's first judgment secured the first lien. His second judgment was of the same term with that of Allen. None of the executions were sued out within ten days. Patton's were first sued out, and put in the hands of the sheriff. His levy was set aside in July, 1822. The levy of Allen was continued, and the question to be decided was, whether Patton lost his preference by setting aside his levy.

Opinion of the court by Judge HITCHCOCK.

In the present case, the court are called upon to give a further construction to the judgment and execution law of 1824. In the case of *M'Cormick v. Alexander*, (*ante.* 65) delivered at the last term, it was determined that, *under that law, judgment creditors, who had not sued out and levied execution within one year from the date of the judgment, lose their lien and preference, as against subsequent judgment creditors, who had sued out and levied execution within the year*; *and this, as well in cases of judgments before the enactment of the law, as after it.*

It has been suggested, that such construction *might* be given to the *fourth section* of that act as would induce the court to doubt the correctness of this decision. That section of the law was carefully examined before that case was decided: it has been since, with equal care, re-examined, and we discover nothing in it which can, in the least, tend to change the opinion then expressed. Although a court *may*, and undoubtedly sometimes *do*, in the examination of a statute, find some things which are not consistent with their ideas of policy or of justice, yet it would be hghly improper to distort the language, or the evident meaning, in such manner as to give the statute a construction consistent with their own feelings, when such construction would manifestly defeat the intention of the legislature. The judgment and execution law of 1824, contains a system which is as well adapted, perhaps, for the state of Ohio, as any other which could be formed on the same subject. So far as it respects judgments, which shall be subsequently rendered, no one, it is believed, can, with propriety, complain. If there is any complaint, it must be on the ground, that the statute extends to judgments which were rendered before its enactment. If this be an evil, it will soon be past. And to give a construction to any part of the statute which would destroy the harmony of the whole, in order to remedy this particular evil, would be followed by consequences, the injurious effects of which cannot be easily foreseen.

The *4th section* above referred to provides, *"that when two or more writs of execution, against the same debtor, shall be sued out during the term in which judgment is rendered, or within ten days thereafter; and when two or more writs of execution against the same debtor, shall be delivered to the officer on the same day, no*

preference shall be given to either of such writs, but if a sufficient sum of money is not made to satisfy all executions, the amount made shall be distributed to the several creditors, in proportion to the amount of their respective demands; in all other cases, the writ of execution first delivered to the officer, shall be first satisfied; and it shall be the duty of the officer, to endorse on every writ of execution, the time when he received the same." Provisions similar in substance have been contained in every law on the same subject for many years.

In order to give a proper construction to this section, we must, as in every other case, look through the whole statute, and if possible, so construe it, that the whole may have effect, and that one part shall not defeat another. We must bear in mind that the legislature in acting upon this subject, are not legislating for a particular case. They are determining the rights of different judgment creditors, and also the rights of the judgment creditor and debtor. It is for these persons they are legislating, and as to others they go no further than an attempt to provide, that in the contest between these, their rights shall not be violated. Neither is the legislation confined to any particular species of property. Property in possession, whether real or personal, is taken into view.

By the first section of the act it is enacted, "*that lands, tenements, goods and chattels shall be subject to the payment of debts, and shall be liable to be taken in execution,*" &c. The second section provides, "*that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term, at which judgment shall be rendered,*" &c. It is this section which gives the creditor a lien upon the lands of the debtor, in consequence of the recovery of judgment, but it extends only to the lands situate in the county where the judgment is rendered. For the same section provides that where the lands are situate in a different county, such lands as well as the goods and chattels of the debtor, shall be bound from the time they are seized in execution.

The lien which is thus created, is by subsequent provisions of the statute regulated as to other *bona fide judgment creditors:* as to all the rest of the world it appears to be perpetual. By the 9th section provision is made, that if an execution be levied upon the lands of the debtor, and it shall appear by the inquisition required by the statute, that the lands thus levied upon, at two thirds their appraised value, are sufficient to satisfy the execution with all costs, the judgment upon which such execution issued "*shall not operate as a lien upon the residue of the debtor's estate to the prejudice of any other bona fide judgment creditor.* The 17th section determines the character, or continuance of this lien. Without repeating this section, it is sufficient to say, that by its provisions the lien is to continue one year, and for a greater length of time provided an execution be sued out and levied within *that* period. But if an execution is not levied within the year, the judgment shall not operate as a lien to the prejudice of "*any other bona fide judgment creditor.*"

Taking these parts of the statute together, it is apparent that a judgment operates as a lien upon the lands and tenements of the debtor, and that this lien is secured to the creditor for the term of one year. Within that time no individual can deprive him of it. But if not enforced within that period, it is inoperative so far as respects a more diligent creditor.

If, in giving a construction to the 4th section of the statute, we were to pay no attention to the priority of judgments, upon which executions were issued, if

we were not to regard the description of property upon which such executions were levied, but were to determine that unless the executions were issued within ten days after the term, in which judgment was rendered, or unless the executions were delivered to the officer on the same day, the one first delivered should be first satisfied, all that is said in the statute upon the subject of judgments, operating as liens upon the lands and tenements of the debtor, would be rendered nugatory. Lands and tenements, as well as goods and chattels, as to any beneficial effect, would be only bound from the time they were seized in execution. Such could not have been the intention of the legislature.

What construction then can this section receive which will give it full effect, and, at the same time, not interfere with the other parts of the law. It appears to me that the intention of the legislature is easily ascertained. In this section, they intended to provide for cases where there were two or more judgment creditors, having equal rights, and where there is no priority of lien, as when the judgments are recovered in the same term, for cases where the judgment does not operate as a lien, but the property is bound only from the time when seized in execution, as goods and chattels, or lands not situate in the county where the judgment is recovered; for cases where the creditor, in consequence of not having an execution levied within one year, from the date of his judgment, has lost the benefit of his lien so far, that it "*shall not operate to the prejudice of any other bona fide judgment creditors.*" If this section is construed to extend to these different classes of cases, it will be found to be beneficial, if extended further, it will defeat some of the essential provisions of the statute.

The case before the court differs only in one particular from the case of *McCormick v. Alexander*. In that case no execution issued upon the judgment of *Evans*, one of the creditors, within twelve months from the date of his judgment. In this case, *Patton* caused execution to be issued and levied upon part of the property which was eventually sold, within twelve months from the first day of the term in which his judgment was recovered. At the July term of the court of Common Pleas, 1822, however, this levy and the appraisement made in pursuance of it, was on motion of the plaintiff set aside.

It remains then to consider the effect of setting aside a levy. It would seem that upon this subject there could be but one opinion. If the levy is set aside, as to all subsequent proceedings, the course to be pursued must be the same as if no levy had been made. Before the property can be sold it must be again seized in execution. Had the *fi. fa* been levied upon goods and chattels, so soon as the levy was set aside, the goods and chattels must have been restored to the debtor. Patton, while he abided by his first levy was safe, but having elected to pursue a different course, if that course operates to his injury, he must abide the consequences.

The first levy of an execution issued upon the plaintiff's judgment, which can be noticed by the court, is the one which was made on the 22d of February, 1823. This was more than one year after the date of the judgment. It follows, that according to the principle settled in the case of *McCormick v. Alexander*, he lost his lien so far that the same could not operate to the prejudice of other *bona fide* judgment creditors, whose executions had been levied within twelve months after the date of their respective judgments. This being the opinion of the court, and it appearing that the money made will not be more than sufficient

to satisfy judgments which must be preferred to that of the plaintiff, according to the terms of the agreed state of facts, judgment must, in the present case, be entered for the defendant.

ESTE ET AL. v. STRONG ET AL.

It is a general rule, that upon a bill to carry a decree into execution, the court will not, unless under special circumstances, examine the justice of the decision, or the law of the decree.

A decree in equity against a guardian, touching the real estate of his ward, does not affect the ward unless he be a party to the original suit.

Where a guardian has given a lien upon real estate claimed by and in possession of his ward, such lien cannot be overreached by the ward purchasing a paramount title.

This cause was adjourned from the Supreme Court of Hamilton county. It was a bill to carry into effect a decree pronounced in a case between E. Pearson, and S. R. Miller, guardian of the heirs of Elijah Strong, deceased. The interest in the decree had been transferred to the present complainants, in trust for certain purposes. The state of the case is as follows:

Pearson prosecuted a suit in chancery against Miller, as guardian of the heirs of Strong, to obtain a decree for the specific performance of an agreement, made as guardian, charging the rents of a house in Cincinnati, with a balance due Pearson, for erecting the house, upon a previous contract, as guardian, made by Miller, under an order of court to sell part of a lot to improve the residue.

Miller alone was made defendant, and a decree was pronounced against him for the specific execution of the contract.

Pending the original suit, the defendant, D. E. A. Strong, had attained his full age, and upon proceeding on a petition for partition had become the sole owner of the house and ground in dispute. And before this, Miller had made a lease, as guardian, for a term of years to the other defendants, upon which considerable rents had accrued and remained unpaid.

This bill was filed against D. E. A. Strong, the legal owner, against the lessees, and the widow, to whom dower had been assigned, to obtain the benefit of the original decree, and was so framed as to have no reference to any matter behind that decree.

D. E. A. Strong pleaded in bar,

1st. That the heirs of Strong were not parties to the original suit, and that, although Miller was his guardian when the alleged contract was made, yet before suit brought, Miller was superseded and another guardian appointed in his place; and that before the decree was pronounced, he had attained his full age.

To this plea, the complainants replied, that the new guardian permitted Miller to act as guardian, in controling and renting the property; and that the defendant, Strong, after he had attained his age, sanctioned the acts of Miller. The defendant demurred to this replication.

2d. The defendant pleaded that he had purchased and owned the property under a title paramount to that of E. Strong, for whose children Miller acted as guardian.

And the complainants replied, denying the validity of the title purchased, and asserting the continuance of the possession under the heirs of E. Strong, and the lease of their guardian.

To this replication also, the defendants demurred.

The decision of the court being confined to these two pleas, it is considered unnecessary to take any notice of the various other facts presented by answers and pleas in the cause.

C. Hammond, for complainants. *Caswell* and *Starr*, contra.

Opinion of the court, by Judge SHERMAN.

The bill in this case is filed to enforce a decree of this court rendered in the case of *Pearson vs. S. R. Miller*, as guardian of D. E. A. Strong and others, children of Elijah Strong deceased, charging the rents of certain real estate with the payment of the balance due Pearson for improvements thereon. It is carefully framed to avoid bringing into litigation the matters controverted in the former suit. The defendant D. E. A. Strong, the only party in interest, seeks to avoid the effect of the decree by showing that Miller was not, at the time of filing the bill by Pearson, his guardian, and that he attained his full age before the decree was pronounced; and upon this plea, and the replication thereto, the question is made, whether the decree against Miller is conclusive and ought to be enforced against the defendants, without reference to the facts upon which it was founded.

It is a general rule, that upon a bill to carry a decree into execution, the court will not, unless under special circumstances, examine the justice of the decision, or the law of the decree, but if the case be proper for their interference, will specifically execute the decree. There are cases where this rule has been relaxed, and the decree been varied, if, upon examining the proofs taken in the cause, wherein the decree was made, or the directions given, a mistake has been discovered. (*John. vs. Northy*, 2 *Ver.* 409. *West vs. Skip*, 1 *Ves.* 245.)

It ought to be observed, that at the time of filing the bill against Miller, in which the decree, now sought to be enforced, was rendered, all the defendants were in esse, claiming the same rights to and interest in the rents in question, as they do now, with the exception that D. E. A. Strong, one of the defendants, purchased, during the pendency of the former suit, the adverse claim of Hinde and wife to the lot, out of which the suits in controversy arise.

If this decree should be enforced against the defendant, D. E. A. Strong, it would have the effect of incumbering his property, with the payment of a large sum of money, on the ground that Miller, his guardian, had so subjected it, during his minority, without his ever having had an opportunity of showing either that Miller was not, in fact, his guardian, at the time the supposed contract for building was entered into, or, if his guardian, no such contract was made, or any other matter going to impeach the justice or legality of the decree now sought to be enforced.

The extent of the power of a statutory guardian, over the real estate of his ward, and how far he can lawfully incumber it, for improvements, or other purposes, it is unnecessary to consider in this case; for, if the power of the guardian be admitted to the extent claimed by the complainants, but has been so defectively executed as to render it necessary for the party claiming, under the act of the guardian, to resort to a court of chancery, to charge the estate of the

ward, it is proper that the ward should be a party to such suit; and a decree obtained against the guardian, as such, in a suit where the ward was not a party would not be conclusive upon him. In those cases where the legal right of the guardian is unquestioned, as to sell the personal property of the ward for his support and maintenance, and the contract of the guardian has been executed by the sale and delivery of such personal property to a *bona fide* purchaser, the sale would be binding upon the ward, and the property would vest in such purchaser, without his being at all answerable to the ward for the faithful application of the purchase money. But if the contract of the guardian be executory, and it become necessary to resort to a court of chancery for its execution, the ward ought to be made a party to such suit, and any decree obtained against the guardian, in a suit in which the ward was not joined, would not be conclusive upon him, nor enforced against him, upon a subsequent bill, founded only on such decree against his guardian.

But whatever might be the effect of a decree against the guardian of an infant, in his character of guardian, upon the estate of his ward, the pleadings in this case show that this relation did not exist between Miller and the defendant, D. E. A. Strong, at the time of filing the original bill by Pearson, nor at any time during the progress of that suit to its final termination, by the decree now sought to be enforced. Miller was not, at the commencement of that suit, or ever after, the guardian of D. E. A. Strong, and although he suffered the suit to proceed against him as such guardian, without objection, or disclosing the fact of his not being such guardian, neither his silence or unauthorized acts, however fraudulent or injurious to the complainants, can prejudice, much less conclude the rights of the defendant.

If D. E. A. Strong, after he arrived at full age, having a knowledge of the facts, had recognized and sanctioned the act of Miller in pledging the rents accruing from the city lot, toward the payment of the improvements made thereon by Pearson, under the contract of 1817, it would be obligatory on him, and a court of chancery would enforce the contract against him. But this fact cannot aid the complainants in this case, their bill being avowedly framed to charge the rents, on the ground of the decree against Miller, as his guardian, and not upon the contract of 1817, the improvements made by Pearson, and the recognizing that contract by D. E. A. Strong, after he arrived at full age.

The decree is against Miller, as guardian of the heirs of E. Strong, deceased, and subjects the rents of certain real estate, belonging to those heirs, to the payment of a large sum money, those heirs not being parties to the suit in which the decree was made. During the pendency of that suit, the interest of all the heirs was vested in D. E. A. Strong, who had attained full age at the time of the rendition of the decree against Miller, and is now the only one of the heirs of E. Strong, deceased, interested in the lot, the rents of which are charged with the payment of the claim of Pearson. Miller, the sole defendant in the former suit, although there described as the guardian of D. E. A. Strong, was not in fact at that time his guardian. To consider, under these facts, the decree rendered against Miller, as guardian, conclusive upon the rights and interests of D. E. A. Strong, would be manifestly subversive of some of the plainest and most obvious principles of law and justice. It would be directly adjudicating upon the property of an individual, without giving him an opportunity of being

heard, and that upon a pretence which is shown to be false. For it is evident that the defendant, D. E. A. Strong, the only person claiming title to the property, the rents of which are affected by the decree, has never had an opportunity, directly, by himself, or indirectly, by his guardian, to object to the claim of Pearson, to have the rents applied, in discharge of the debts due him, for the improvements he made.

If D. E. A. Strong had been made a party to the suit of *Pearson* against *Miller*, it would clearly have been competent for him to have shown that Miller was not, at the time when the contract to pledge the rents was entered into, his legal guardian, or otherwise authorized to act for him, or in any manner incumber or dispose of his estate. If this decree could be enforced against him, because rendered against one called his guardian, without enquiry into its merits, or the facts upon which it was founded, he would be forever concluded from showing that Miller was not, in fact, his guardian. This consequence may also result, that an entire stranger, by assuming the name and character of guardian of a minor, may dispose of the personal property, and encumber the real estate of such minor, in such manner as to be binding and conclusive, and the infant be driven to seek a compensation from the intermedling stranger, for the injury he may have sustained.

Whatever, therefore, may be the extent of Pearson's equitable lien upon the property of the defendant, D. E. A. Strong, to be reimbursed the amount of his expenditures, for lasting and valuable improvements, made on said property in pursuance of the contract of 1817, with Miller, as the guardian of the heirs of E. Strong, deceased, the matters contained in the first plea of the defendant, D. E. A. Strong, is a legal bar to the relief sought by the complainants in this bill, framed as it is, upon the supposition that the decree in the suit against Miller, as guardian, is conclusive upon the defendants, and seeking only to enforce that decree: and that the legal effect of this plea is not changed by any thing contained in the replication thereto.

Upon the question growing out of the second plea of the defendant, D. E. A. Strong, the court have never entertained a moment's doubt. E. Strong, the ancestor of the defendant, D. E. A. Strong, was in possession, and claimed title to the lot in question. Upon his death it descended to his heirs at law. A part thereof was sold by the court of Common Pleas, as his real estate, for the benefit of his heirs; the residue, improved by Miller as guardian of those heirs, leased by him, as such guardian, for a term of years, and the lessor still continues in possession under the lease. If Miller, as guardian of the heirs, was legally empowered to improve the property, (a question not made in this case,) and to give a lien upon the accruing rents for the payment of the costs of those improvements, it is not competent for the heirs, by the purchase of a paramount title, to defeat the previous lien, legally acquired.

If Miller had no authority to encumber the estate, his act of pledging the accruing rents would be inoperative and void. But if he was authorized to encumber it, his act must be considered as the act of the heirs, equally binding upon them, as if they, being of full age, had encumbered it; and it cannot be permitted for a party, creating a lien on an estate, to defeat that lien by any act of his own. It has, upon this principle, been held, that a mortgagor cannot defeat the lien of the mortgagee by the purchase of a paramount title to the mortgaged

premises. It would also be unjust, while the defendant is in the enjoyment of the rents and profits of the estate inherited from his ancestor, to compel the complainants to litigate the validity of the title of a stranger, in order to enforce a lien created by the defendant.

BARRET v. REED.

QUERE, whether a constable under a plea of justification may show that he was a constable de facto, or must show that he was such de jure.

If a constable is duly elected, takes the oath of office, and gives bond, he may justify acting as a constable, though the bond be executed to a wrong obligee.

It seems that such a bond is not void.

This was a writ of error to the judgment of the court of Common Pleas of Ashtabula county. The plaintiff in error was defendant in the court of Common Pleas: and the case was this:

Reed brought an action of false imprisonment against Barret and others. Barret justified that he was a constable, and acted under process. The other defendants justified under Barret.

In support of his plea, Barret, in the first place, offered evidence to prove that he acted as a constable, and was generally understood and reputed to be such. This testimony was objected to, and overruled; and Barret took a bill of exceptions.

It was then given in evidence, on behalf of Barret, that he had been duly elected a constable, had taken an oath of office, and had executed an official bond, made payable to the trustees of the township, in the proper form, and with sufficient security. The sufficiency of this proof was objected to, because the law required the constable's bond to be made payable to the township treasurer, and not the trustees. The objection was sustained, and Barret took a bill of exception.

A verdict was found in favor of the other defendants, but against Barret, against whom the court of Common Pleas gave judgment for the damages found by the jury, upon which he sued this writ of error, the decision of which was adjourned here, by the Supreme Court of Ashtabula county.

Giddings, for plaintiff in error.

Opinion of the court by Judge HITCHCOCK.

In this case, a number of errors have been assigned by the plaintiff in error, two only of which have been particularly considered by the court. The first is that in which it is substantially alleged, that *Barret*, the plaintiff in error, having proven that he was a constable *de facto*, the court below refused to let him prove that he committed the act complained of, under and by virtue of a warrant, to him directed, as constable, unless he would first prove that he was a constable *de jure*. The second is that in which it is alleged, that *Barret*, having proven in addition, that he was duly elected a constable, that he took the necessary oath of office, and gave bond, conditioned for the faithful performance of the duties of his office, in all things conformable to the provisions of the statute, in such case made and provided, except that the same was made payable to the

trustees of the township, instead of being payable to the treasurer, as the law then required, the court below still refused to permit him to prove that the act complained of was committed *under*, and by *virtue* of a warrant to him directed, as aforesaid, and in pursuance of which warrant, the defendant in error was arrested and imprisoned.

As it respects the first of those errors, and the question thereon arising, there is not a perfect coincidence of opinion amongst the members of this court. The principle contended for by the council for the plaintiff in error, is one which is recognized and sustained by the Supreme Court in the state of New York, as appears from the case of *Potter v. Luther*, (3 *John.* 431.) The correctness of the principle, too, seems to be sustained by many of the English decisions. Nor is it perceived that any great evil could result from the establishment of such a rule in this state. In a government like ours, where most officers are elective, it cannot be believed, that there is any danger that any person will presume to discharge the duties of an office unless he has at least some color of right; and should such a thing be attempted, it would be an offence against the law, for the punishment of which ample provision is made.

On the other hand, it may be urged with propriety, that when an individual is sued in trespass, and would justify on the ground, that the act complained of was committed by him while in discharge of the duties of a public officer, it is in the power of such individual to show conclusively, whether or not he is entitled legally to officiate in such office; and to receive evidence of reputation, or of his being an officer *de facto*, would seem to be a violation of the rule, which requires that the best evidence which the nature of the case admits of, shall be produced. Third persons are not supposed to know whether an officer has taken every necessary step to qualify himself; and, therefore, it is sufficient for them to show that he is such, *de facto*.

As to the second error, above referred to, it is the unanimous opinion of the court, that the exception is well taken, and that the court of Common Pleas, in making that decision, mistook the law on the subject.

It has been a law of the state, from its first organization, and it is a law founded in sound policy, that sheriffs and constables should give bonds with security, conditioned for the faithful discharge of the duties of their respective offices. These officers have important duties to perform. They receive in the ordinary course of business, large sums of money; and as they are the agents *constituted by the law*, not only of the *law*, but in some respects of *individuals* for whom they act, it is perfectly proper that every convenient method should be adopted to secure the interests of those who are compelled to intrust business in their hands. It would seem to be immaterial, however, to whom the bond is made payable. It is proper this should be fixed by law; and convenience dictates that the obligee should be a public officer, or body corporate, where there is perpetual succession. The obligee has no particular interest in the bond, and if suit is commenced upon it, cannot, under any statute, be made liable for costs, in case of failure in prosecution. The obligee can be viewed in no other light than as a trustee for those who *are*, or who *may become* interested.

The statute in force, at the time the act complained of in the present case was committed, required that the constable should give bond in any sum not

exceeding two thousand, and not less that four hundred dollars, with one or more securities resident, &c. conditioned, &c. and payable to the township treasurer. The bill of exceptions states, that Barret was duly elected constable, that he was duly sworn, and that he executed a bond in all things conformable to the statute, except that it was made payable to the trustees of the township. Having done this he proceeded to officiate as constable, and was recognized as such. The question which naturally presents itself here for consideration is, whether the bond thus executed was void. If it was not void, but obligatory on the obligors, the object of the law being to secure the interest of those, who should be compelled to entrust business with the officer, that object is, attained, and the law has been *substantially*, although not literally complied with. A *substantial* compliance must excuse the officer. It is all that can with propriety, be required of him.

Why is such bond void? Can any other reason be assigned than that it is not according to the *letter* of the statute? There is nothing upon the face of it which is illegal. It is not given to secure the performance of an *immoral*, *vicious*, or *illegal* act. The sole object is to secure on the part of one of the obligors the performance of duties, which if no bond had been required he would have been bound to perform. Suppose there had been no bond required by law, would this bond then have been void? I apprehend not, and it appears to me that the single circumstance that it is required by the statute, that a bond should be made payable to a different obligee, is not sufficient to destroy its obligatory effects. Upon the whole, I come to the conclusion that the bond if not good under the statute, is good at common law, and that any person who should be injured in consequence of the neglect of the officer to discharge any duty appertaining to his official station, might obtain redress by suit upon it. (1 *Wash.* 91. 2 *Call.* 290. 2 *H. and M.* 459.) Such appears to be the opinion of the courts of Virginia in several cases by them decided. Or it may perhaps with more propriety be said, that the opinion of the court in those cases, goes rather to establish the doctrine that a bond, similar to the one under consideration, is substantially in compliance with the statute.

It is stated further in the bill of exceptions that the bond had not been *accepted* by the trustees. (*State laws vol.* 18 *p.* 108.) The words of the statute then in force, and which has been already referred to, are "and every constable within ten days after his election or appointment, and before he enters upon the duties of his office, shall appear before the clerk of the township, and give bond, with one or more sureties, resident in the township, such as the trustees thereof hall *approve*," &c. The trustees, as the guardians of the township, are to approve of the sureties. Whether they did so or not, we can ascertain only from the record, or rather from the bill of exceptions which is a part of the record. It is there stated that *Burnett* "proved that he had given bond *agreeably* to the statute in all respects except" &c. From this it is reasonable to presume that the sureties were *approved* of, this being one question of the statute. It may perhaps be thought that this presumption is destroyed by the allegation that the bond "had not been accepted by the trustees." There is certainly a difference between the *approval* of the "*sureties* and the *acceptance* of the *bond*. The one will most naturally *precede*, and the other *follow*, the sealing of the instrument. Any formal acceptance of the bond is believed to

be unnecessary. It is to be left with the township clerk, and by him filed away in his office. When it is said that a formal acceptance is unnecessary, I would not be understood that the trustees may not if they deem the bond insufficient, reject it, and require another. But there are many things which would amount to an acceptance. If the bond is received without objection, it is equivalent to an acceptance. After having received it, and having it filed away by the clerk, in consequence of which the constable proceeds to officiate in his office, neither the trustee nor any other person can be permitted to say that it has not been accepted. To permit this would have a tendancy to involve the officer in difficulty and almost certain ruin. For it will be perceived, that by the law, as recognized by the court of Common Pleas, that a sheriff or constable who has not *specifically* and *literally* complied with every requisition of the law before proceeding to officiate, although he may have done it *substantially*, will be liable in trespass to every person he shall have arrested, and in trespass or trover for every article of property he shall have seized upon attachment or in execution. Wherever the constable has executed a bond, intended to be in pursuance of the statute, and is not notified that the same is not accepted, he may well suppose that he has done all in this respect which can be required of him.

Further, suppose the trustees do not accept the bond, or in other words, suppose they disapprove of it, what is their duty? If the officer but neglects or refuses to give the bond, it is equivalent to a neglect or refusal to serve in the office. The office is, in fact, vacant. (*State laws vol.* 18, *p.* 28.) By the 15th section of the "act for the incorporation of townships" it is enacted "that when by reason of non-acceptance, death, or removal of any person chosen to any office in any township chosen at the annual meeting, or in case where there is a vacancy, the trustees shall appoint a person to fill such vacancy," &c. By the 13th section of the same act it is provided, "that any person elected to any office under this act, and not exempted by law, who shall neglect and refuse to serve in such office, shall forfeit and pay to, and for the use of the township the sum of two dollars." It is further made the duty of the township clerk to sue for and recover the same. In the case of the constable, if no bond is executed, the office is vacant, and the trustees must appoint another person to fill the vacancy. If it be *executed*, but is not *accepted*, the same consequence results. It must of course follow, that if a bond be executed, and no appointment is made, as if to fill a vacancy, the presumption is irresistible that the bond thus made or executed is accepted, especially when the circumstance is added that no prosecution is instituted against the officer elect, for neglecting or refusing to serve in his office.

In the present case it does not appear that any appointment was made to fill the vacancy occasioned by the neglect or refusal of Barret to serve in the office to which he had been elected. It does not appear that he was prosecuted for such neglect or refusal. It does not appear that any exception was taken, by those whose duty it was to except, to the bond which he had made and delivered, or any notice given to him of such exception. Under these circumstances he might well suppose, and undoubtedly did suppose, that he had taken all the necessary preliminary steps to qualify him to officiate in his office. He proceeded in good faith thus to officiate; and to make him liable in a case like the present

would be unjust and iniquitous in the extreme. It is that kind of injustice and iniquity which the law cannot countenance.

Considering then that Barret had substantially complied with the law in the giving of bonds, and even if it were not so, that he gave such bonds as were not objected to by the trustees, but were by them considered, as sufficient, as is apparent from the circumstance that they did not consider the office as vacant, and did not notify him that any thing further was required of him, the court of Common Pleas erred in rejecting the evidence offered by him to prove that the act complained of was done under and by virtue of a warrant directed to him as constable. For this error the judgment of that court, so far as it respects *Barret*, must be reversed, while it is affirmed to the other two defendants in the original suit.

The opinion of the court upon this question renders it unnecessary to examine the other errors assigned in this case.

McARTHUR v. PHŒBUS, ET AL.

An invalid entry may obtain sufficient notoriety and become a good location call.

A complainant having obtained a patent, as assignee, is not bound to prove his purchase from the assignor.

The doctrine of notice has no application between the claimants of conflicting titles.

The plea of innocent purchaser cannot protect the purchase of a title originally defective against a better adverse title.

An entry cannot be made valid by subsequent notoriety.

An entry originally void because of the disproportion between its length and breadth, is made good by a withdrawal of a part so as to give it the proper proportions.

Matters not put in issue by the pleadings cannot be investigated.

Allegations made by one party and not admitted or denied by the other are in issue and may be proven.

Proof as to notoriety of entry.

Entry defective for want of notoriety.

This was a bill in chancery between conflicting claimants of land upon distinct entries, and grants. It was adjourned from Madison county, and was elaborately argued by SCOTT and DODDRIDGE for the complainant, and DOUGLASS, and BRUSH and FITZGERALD for the defendants. As the case is fully stated, and the arguments of counsel noticed and recapitulated, in the opinion of the court, the report is confined to that opinion.

Opinion of the Court by JUDGE BURNET.

The complainant claims under an entry in the name of Robert Means, made on the twenty-third day of May, 1808, in the following words: Robert Means, assignee, enters two thousand six hundred and sixty-six and two-thirds acres of land, on Military warrant No. five thousand three hundred and eighty-seven, on the waters of Deer-creek, beginning at three elms, south-easterly corner to Baron Steuben's survey, No. two thousand six hundred and ninety-eight, running north 30 east 296 poles, &c. On the margin of this entry is the following memorandum, fifteen hundred acres withdrawn from the north-east end, (entered 147.)

This entry was surveyed 14th June, 1809, recorded 12th August, 1811.—Patent obtained 7th Oct. 1812, in the name of complainant, assignee, &c.

Steuben's survey, No. two thousand six hundred and ninety-eight, was made June, 1796, and in the following words, surveyed for Major General Steuben, eleven hundred and fifty acres of land, on part of Military warrant, No. 104, on the north-west of the Ohio, and on Deer-creek, a branch of the Scioto, beginning at an ash, a whiteoak, and a maple, north-east corner to James Innis' survey, No. seventeen hundred and twenty-seven, running with Innis' line, south 20, west 400 poles, crossing Deer-creek, at 108 poles to a stake, south-east corner to Innis', thence south 21 east 374 poles, to three small
thence north 69, east 320 poles, crossing the creek at 16 poles, to three elms, thence north 18, west 670 poles to a stake, thence south 69, west 84 poles to the beginning.

The survey of James Innis was made on the same day, (30th June, 1796,) and calls for Deer-creek.

The defendants, Doolittle and Thomas, claim under an entry in the name of Thomas Chilton, made on the 27th of April, 1807, in the words following: Thomas Chilton, heir at law, to John Chilton, deceased, enters five hundred and forty-one acres of land, on part of Military warrant, No. twelve hundred and forty-nine, on the waters of Deer-creek, a branch of the Scioto river, on a branch emptying in on the upper side, by some called Oppossum, and by others called Plumb-run, beginning, by survey made, at three elms and a large white oak, running south 19, west 20 poles, south 60, west 40 poles, to three pin oaks, marked as a corner, north 30, west 160 poles, north 60, east 44 poles, north 210, east 260, south 30, east 62, south 57, east 120, south 45, west 145, thence, and from beginning, south 70 west for quantity. This entry was surveyed 30th August, 1810, and a patent was granted to Doolittle, 27th July, 1812.

The defendants, Dunlap, McHenry, Phoebus, and Senate, claim under an entry in the name of John Stokes, made November 8, 1807, in the following words: John Stokes enters four hundred acres of land, on part of warrant No. thirteen hundred and ninety, on Oppossum, or Plumb-run, a branch of Deer-creek, beginning on the run, where the lower line of Thomas Chilton's entry crosses the same, running down the run, with the meanders thereof, 480 poles, when reduced to a straight line, thence, and from the beginning, at right angles to the general course of the run, on each side, to include an equal quantity on each side, by parallel lines, to the general course thereof. This entry was surveyed December 10th, 1811, recorded 1st January, 1812, and patented 8th April, 1812.

As the defendants have the first entries, and are in possession under the oldest patents, they may protect themselves by showing the sufficiency and legality of their own locations, or the insufficiency and illegality of the location, under which the complainant holds. If they have succeeded in establishing either of these propositions, or if the complainant has failed in sustaining the validity of Means' entry, he is not entitled to a decree. But before I proceed to examine the evidence which has a direct bearing on those points, it will be proper to notice some collatteral questions, which have been discussed by counsel, in the course of the argument.

1st. It is alleged, on the part of the defendants, that there is no proof of the entries and surveys mentioned in the pleadings, or that Steuben's survey is numbered 2698.

This objection does not appear to be true in point of fact, and probably would not have been taken, if the connection of entries and surveys, from the records in Col. Anderson's office, had been carefully inspected. In the voluminous file of papers appertaining to the cause, this document must have been overlooked, because it contains certified copies of all the entries and surveys referred to in the pleadings, and was received as evidence without objection. It does not appear on what ground this exception was taken. If it be predicated on a supposed defect, or informality in the mode of authentication, the objection comes too late. The document was received as evidence—the defendants took no exception to it at the time—the complainant has relied on it, and it would be a mischievous precedent to permit an objection to be taken at this stage of the proceedings.

2d. It is urged, that Steuben's entry and survey depend on Innis' entry and survey, the situation of which is not shown.

This objection would have some weight, if the complainant could be required to show that Steuben's entry was precise and certain, at the time it was made. This, however, is not the case. It is immaterial to him, whether that locations can be sustained or not, because a survey of a void entry may be a good special call in a subsequent entry, if the survey called for, has obtained general notoriety, before the entry calling for it is made. This being the settled principle, the complainant is not required to show the situation of Innis' entry, or survey. He may safely admit, that Innis has neither entry nor survey, and that Steuben's entry had neither certainty nor precision, at the time it was made. The reason why Steuben's survey is a good call, if it shall be found to be such, is, that it had become an object of notoriety, and on that account, might be readily found by a subsequent locator; and that when found, it would, by reasonable attention, lead an enquirer to the beginning of the entry calling for it. A burning spring, if generally known, would be a good call, not because it had become a valid land-mark to a former location, but because it would enable a subsequent locator to find the entry calling for it. On the same principle, if Steuben's survey, at the date of Means' entry, had become an object of general notoriety, it was a good call on that account, whether the entry of Steuben was a valid appropriation of the land or not. Steuben may have lost his land, for want of precision and certainty in his call, and yet Means, by calling for Steuben's survey, may secure his land, on the ground, that his call was sufficiently certain, precise, and notorious, to identify the land intended to be appropriated, and to enable subsequent locators easily to find it.

3d. The next objection is, that the complainant has not shown his right to the entry of R. Means.

To this, it may be replied, 1st. That the assignment of the entry to the complainant, is averred in the bill, and impliedly admitted in some of the answers if not in all. 2d. That a patent having regularly issued to the complainant, as assignee of R. Means, is *prima facie* evidence that the assignment was legally made, and must be considered as conclusive on that point, until the contrary is proved, at least as to third persons, who have no pretence of claim under the as-

signor, nor any interest in vindicating his rights. The complainant must have produced an assignment of the plat and certificate, or the patent could not have issued in his name. If that assignment was improperly obtained, the original proprietor, or those claiming under him, are at liberty to impeach it. But if this objection be entitled to any weight, it applies with equal force to the defendants. Doolittle and Thomas claim by assignment from Thomas Chilton, who is said to be heir at law to John Chilton, the original owner of the warrant. But no evidence, other than the recital of the patent, is produced to show, either the heirship of Thomas Chilton, or the transfer from him to the defendants. Strictly speaking, this is a question between the complainant and Means, in which the defendants have no concern.

4th. It is alleged, that complainant had personal notice of the defendant's entries, before he made the entry in the name of Means. The evidence on this subject is, that he had notice of those entries in 1809, about the time he surveyed for Means, which was more than a year after the entry. His notice, however, may safely be admitted, to the extent claimed.

It was decided by this court, in *Kerr v. Mack*, (1 *Ohio Rep.* 161) that the common doctrine of notice does not apply to cases under the land laws of Virginia, when the parties claim under distinct entries. Every claimant must rest on the validity of his own location. If that be illegal and void, it does not appropriate the land; and any holder of a warrant may locate the same tract, notwithstanding he has full knowledge of the former illegal entry. Notice cannot make that valid, which is void in itself; nor can a legal location be rendered void by a notice, that a prior illegal entry had been made on the same land. This doctrine will be found also in *Craig v. Pelham*, (*Printed decisions*, 287.) *Wilson v. Mason*, (1 *Cranch*, 100.)

5th. It is urged, that these defendants are innocent purchasers, without notice.

The same plea might be advanced in favor of every person who may be so unfortunate as to purchase a bad title; but ignorance, or want of care, cannot destroy the rights of others.

If the contending parties in this suit, had purchased from the same individual, and the defendants, under the junior contract, had obtained the legal title for a valuable consideration, and without notice of the elder contract, they would have been protected, but such is not their situation. They have purchased the title of Chilton and Stokes—the complainant has purchased the title of Means, and the only enquiry is, which is the better title. If they have been so unfortunate as to purchase from a person without title, a knowledge of that fact cannot prevent others from purchasing of the real owner. This objection is fairly met by the maxim, *caveat emptor*. In *Taylor v. Brown*, (5 *Cranch* 235) it was decided that a subsequent locator, with notice of a prior location cannot protect himself by obtaining the elder patent.

6th. The next objection is, that in May, 1818, Chilton's entry had become as notorious as Means'—that the equity of the parties was, therefore, equal, and that the law must prevail.

It was decided by this court, in *Kerr v. Mack*, in conformity with the current of decisions in Kentucky, and in the Supreme Court of the United States, that an entry cannot be aided by "after acquired notoriety." In the face of that

decision, the court did not expect to have the question again agitated. It is evident, that without the aid of that description of notoriety, the doctrine of equal equities can have no place in this discussion. The entry of Chilton must be considered as it was on the day it was made; consequently, if it has an equity, it must be older and superior to that of the complainant. The equities cannot be equal.

7th. It is said that a call to adjoin an *entry*, requires that all the locative calls of that entry be shown, for which 3 *Bibb.* 536 is cited. The principle, however, has no application to the complainant, who calls for Steuben's *survey*, and not for his entry, but it applies in all its force, to the defendants, who claim under Stokes, whose entry calls for, and depends, wholly, on the *entry* of Chilton. It cannot be useful therefore to pursue this part of the subject farther, unless it shall be founded necessary to do so, hereafter, in considering, and deciding on the validity of Stoke's entry.

8th. Another objection is, that the original entry of Means was void, because its length compared with its breadth, exceeded the proportion allowed by statute.

If this objection has not been obviated by the amendment of the entry, made by the withdrawal of the fifteen hundred acres, it would seem to be fatal to the complainant's claim. The statute under which these warrants were located, (*Swan's collection of Land Laws, page* 122) requires the breadth of each survey to be at least one third of its length in every part, unless when such breadth shall be restrained, on both sides, by mountains, water courses, or former locations. The calls of the entry, show that this proportion has not been observed, and it is not pretended that the obstacles provided for exist. The question then is, has the withdrawal of the fifteen hundred acres removed this difficulty.—This question admits of but one answer. If the withdrawal has not destroyed the validity of the entry, as the defendant's counsel contends, it has obviated the difficulty, because the survey that has been made on the residue of the entry, and on which the patent issued, is clearly conformable to the requirements of the statute, in this respect.

The question then represents itself: has the withdrawal vitiated the original entry? There is no doubt but that locators have a right to amend their entries, or to withdraw them in whole or in part. The rule on this subject seems to be, that a withdrawal of part of an entry, will not destroy the validity of that entry as to the residue, provided it be so made, as to leave the residue possessed of the certainty and precision required to constitute a good original entry. (1 *Marshall*, 612. *Ogden v. Sprigg.*) In *Preble v. Vanhousen*, (2 *Bibb.* 121,) it is laid down, that after a withdrawal, the remaining part of the entry, should be considered as having the calls of the original entry, and if, with those calls, it would be good, as an original location, it ought to be sustained. Tested by this rule, the withdrawal does not injure the entry, because the calls of the original entry, being saved, the residue is certain both as to quantity, and situation, and can be ascertained with the same case and precision, as the entire entry could have been ascertained, before the withdrawal; hence it follows, that if the first entry was good as to its calls, the residue, as an entry, is also good. There is no weight in the argument drawn from the fact that the withdrawal throws the complainant entirely from Steuben's south-east corner, and consequently from

his own beginning corner, because having a right to refer to that corner as one of the locative calls of his entry, it affords the means of ascertaining and fixing his beginning, with absolute certainty. "That is certain which can be rendered certain." The amount of the argument is, that a withdrawal cannot be made of that part of an entry, which includes its beginning, because it must always throw the location at a distance from its original beginning; but we think there is nothing in the objection. The beginning of the first entry may by a withdrawal, be converted into a call, pointing out the beginning of the residue of that entry.

On the part of the complainant it is insisted that the certainty and notoriety of Mean's entry have not been put in issue, and that proof should not be required to establish them, nor admitted to controvert them. It is true that the bill avers the entry of Means to be good, certain, legal, and valid, when made, and the answers neither admit, nor expressly deny the averment, though some of the defendants, state their ignorance of the facts relating to Means' entry.

The complainant attempts to sustain this ground, on the case of *James v. McKennon*, (6 *John.* 543.) The rule settled in that case is one which has been generally observed in this court, viz: That evidence ought not to be received of a matter not put in issue. But the important question arising here is, when shall a matter be said to be in issue. The complainant has taken it for granted, that the sufficiency of his entry is not in issue, but the authority on which he relies, does not sustain him. In that case the bill alleged, that the defendants had possessed themselves of property to which complainants were entitled, and prayed that it might be decreed to them. One of the defendants in his answer set up a contract under which he claimed a right to the property. The replication was general. The defendant proved the contract: the complainant offered evidence to impeach it, on the ground of fraud. It was decided, that he could not do so, because he had not alleged fraud in his bill, or replication, and therefore the fact of fraud was not in issue. Here, it will be remarked, that the contract was not noticed, either in the bill or replication.

It was averred in the answer, and that averment was considered as putting it in issue. The silence of the complainant was not taken as admission, but proof was *required*. The evidence of *fraud* was rejected, because it was *no where* alleged in the pleadings. But from the course of reasoning, it is evident, if an averment of fraud, as to the contract, had been found in any part of the pleadings, the evidence would not have been rejected. It has been the constant practice of this court, to consider any fact that is distinctly averred in the pleadings, if it be relevant to the matter in controversy, as being in issue, and susceptible of proof. If any material averment in the bill, be not answered by the defendant, the complainant has his election to except, and require a further answer, or to proceed, and take on himself the risk of sustaining the matter by testimony, and this is sometimes the wiser course, as requiring less evidence than is necessary, after the defendant is driven to a denial. It has been decided, in the Court of Appeals of Kentucky, that if a bill charges the matter *to be within the knowledge of the defendant*, and the answer is silent as to the matter so charged, it will be taken to be admitted, but *if not so charged*, an omission to answer does not admit it. (2 *Bibb.* 69. *Moore v. Docket*, 3 *Bibb.* 465. *Kennedy v. Meredith*, 1 *Bibb.* 173. *Cowan v. Price.*) It was decided in *Oldham v. Bow-*

en, (3 *Bibb.* 539.) that a fact charged in a bill, and not admitted by the answer, either expressly, or by implication, must be proved at the hearing. And in *Young v. Grundy*, (6 *Cranch.* 51) it was decided, that allegations in a bill, neither admitted nor denied by the answer, must be proved at the hearing. Our practice is in conformity with this rule, and requires the averment, in relation to the sufficiency of Means' entry, to be sustained by proof, though the answers are silent on that point, nor does this requirement interfere with the rule relied on by the complainant, that the *allegata et probata* must agree.

Having disposed of these questions, we are next to examine and consider the locations on which the parties severally rely.

The defendants being in possession under the oldest grant, the complainant cannot disturb them, without showing in himself the commencement of a good title, anterior to their surveys. To effect this, three points are to be made out.

1. That Means' entry was precise and certain at its date.

2d. That the entries of Chilton and Stokes were uncertain and insufficient.

3d. That Means' entry was made before the entries of Chilton and Stokes was surveyed.

The calls of Means' entry, are for Deer-creek, and the south-easterly corner of Baron Steuben's survey, No. two thousand six hundred and ninety-eight.—It is admitted that Deer-creek was generally known in May, 1808, and was therefore a good general call, and it seems to be conceded that Steuben's entry did not possess the certainty and precision necessary to constitute a valid location at the time it was made. It is sufficient however, for the complainant's purpose, if he has succeeded in shewing that the survey of Steuben had acquired general notoriety on the 23d May, 1808, when the entry of Means' was made. To ascertain this point it is necessary to examine the testimony.

1st. It appears that the survey of Steuben had been made about twelve years before the entry of Means. That Churchil Jones had called for it in his survey, and that Jones' survey was improved and settled by at least three persons, before and at the time when the entry of Means was made. These circumstances afford a presumption in favor of the notoriety of that survey. In addition to this, its notoriety is proved by a number of witnesses, six of them being experienced surveyors, prior to the date of Means' entry.

Isaac Minor settled in the neighborhood in February, 1802; shortly after, he was informed of Steuben's survey, [2698.] It appeared notorious. Many persons were residing in the neighborhood. The adjoining survey had been cut up into small farms, and settled before the date of Means' entry. He believes that an enquirer, on Deer creek, would have been directed to Steuben's survey. Bell's survey, and Baylor's survey, immediately below, on the creek, were also settled and improved before the entry of Means was made.

Henry Ward was on Steuben's survey in 1802, in 1804, and in January, 1807. He states the names of about fifteen persons who were settled in the immediate vicinity of Steuben's survey, in 1807. That it was known to the settlers generally, and was notorious as early as the spring of 1807. He had been, at different times, with the surveying parties of Evans, Rector, Langham, Massie, and O'Bannon, to all of whom Steuben's survey was known.

John Harrison first went on to Deer creek, in 1806, and settled in the neighborhood of Steuben's survey. He gives the names of about twenty persons settled in the vicinity of that survey, before the date of Means' entry. He thinks it would have been found by an enquirer as early as May, 1808.

Patrick McLain knew Steuben's survey as early as May, 1808.

John Fallon knew the survey in 1807. Thinks a locator, by proper diligence, would have found it at that time. That it was notorious, and generally known to surveyors, locators, and others, as early as 1807, at which time, many persons were residing near it.

Jesse Spencer was acquainted with Steuben's survey in 1800. He thinks that a locator, in 1807, with proper diligence, could have found it. He believes that survey was notorious, and generally known to surveyors, locators, and others, as early as 1807.

John Evans was acquainted with Steuben's survey in 1807. The south-east corner was then standing. He believes that any locator, by proper diligence, could have found it in 1807. In January, 1808, he thinks it was generally known to the inhabitants of the neighborhood. In January, 1807, he could have found it without difficulty.

Jeremiah Minor moved to the neighborhood of Steuben's survey in 1808. Heard it then spoken of by the neighbors as generally known. Thinks any body could have found it; and that it was as well known in the neighborhood as the creek itself.

John Eckford knew the survey of Steuben in 1807; heard Langham and other persons speak of it as early as that time.

E. Langham has known Steuben's survey since 1801. It was then so notorious, that he found it, very easily, from the information of others. The beginning corner was notorious to himself, and the locators, and surveyors, as early as 1807.

N. Massie knew the chain of old surveys on Deer-creek, including Steuben's, long before 1807. He thinks any locator, with that connexion and reasonable diligence, could have found Steuben's survey before 1807.

James Galloway, Jr. thinks there would have been no difficulty in finding Steuben's survey in 1807. He had occasion to search for it in June, 1809, when he found it without difficulty.

F. Graham, W. Willson, and J. Freeman, identify the survey, and the elm on the south-east corner, called for by Means.

The defendants have introduced a number of witnesses, who testify that Steuben's survey was not known to them, at periods subsequent to the location of Means. We admit the principle, that negative testimony is entitled to its full weight, on questions of notoriety, for reasons which it is not necessary now to detail, provided the opposing witnesses have equal advantages of information; but we are decidedly of opinion, that the negative testimony in this case cannot preponderate. The witnesses by whom it was proven, have not had the same opportunities of acquiring information on the subject, as those who testified in the affirmative. Several of them have a direct interest in the suit. Some of them resided in a more remote settlement. A portion of them appear to be industrious, domestic men, who have paid little, if any attention to entries, or surveys. Some have recently moved to the settlement. Others never heard of

Steuben's survey till the commencement of the present suit; though it is admitted by all, that if that survey was not notorious before, it became so shortly after the location of Means. The affirmative witnesses, generally, are the most intelligent, and those of them who live in the neighborhood, reside nearer to the survey, and more immediately on the creek, and would be most likely to be called on for information, by subsequent locators.

It is not necessary to consume time, by commenting particularly on the complainant's testimony, which is very full and precise. We are, on the whole, perfectly satisfied, that the notoriety of Steuben's survey, at the date of Means' entry, is sufficiently established.

Chilton's entry calls to begin at three elms, and a large white oak, on the waters of Deer-creek, on a branch emptying in on the upper side, by some called Oppossum-run, and by others, Plumb-run. Stokes' entry calls for Oppossum-run, and the lower line of Chilton's entry.

Testimony was introduced for the purpose of proving that Oppossum-run was notorious, when Chilton's survey was made, and that Chilton's location had acquired general notoriety before Stokes' entry was made, but it is very apparent that the testimony does not establish either point. Langham, who made these entries, says that they were made before there was any settlement on the run, and that the run became notorious after the settlements were made; of course it was notorious when the entries were made. But if the defendants had succeeded in proving the notoriety of that run, it would not sustain the entry. The creek, it appears, was two miles in length, and the valley through which it runs about two miles in width. A subsequent locator was therefore subjected to the necessity of searching the whole extent of that valley, to find the marked trees called for. This we think was unreasonable, and imposed a duty that the law does not authorise. The entry of Chilton is destitute of the precision and certainty which is required to constitute a valid location. The witnesses who were examined to sustain both of these entries, refer to periods subsequent to their date, and in addition to this, they state, that the entry claimed by Chilton, was known by the name of Langham's entry, or that the two together, were known as Langham's and Doolittle's eight hundred acre tract. They never heard them spoken of as the entries of Chilton and Stokes, until after the date of Means' entry. When Stokes entered, Chilton's entry, if it had any notoriety, which is, to say the least, very doubtful, was known by the name of Langham's entry, which circumstance was calculated to confuse and deceive, rather than to aid subsequent locators.

A careful examination of the whole testimony, relating to these entries, leads to the following results. That Oppossum-run, the only important call in the first entry, did not acquire notoriety till after that entry was made, and that if it had been notorious it was not a good locative call. That at the time Stokes entered, Chilton's entry was not generally known. That as far as it was known it was called Langham's entry, and that the lower line of that entry, called for by Stokes, was an open line, and could not be found without ascertaining the precise situation of every part of the entry. Much of the defendant's argument in relation to Stokes' entry, is predicated on the assumed fact, that Chilton's entry had been surveyed before the entry of Stokes was made; this however, as has been shown, was not the case. But if it should be admitted that Langham

had made a survey, as contended, it was unofficial, and not recorded, nor was it called for by Stokes. He calls for the lower line of Chilton's *entry*, which line was run in 1810. Till that period, there was no such line in existence, and yet it is relied on as an object of notoriety to sustain an entry in 1807, about three years before it was run. The age of this line and consequently of the survey, is also ascertained by the blocks taken, and returned by the surveyor, from which it appears to have been marked in 1810, or 1811. Were it necessary to pursue this part of the case any farther, reference might be had to the discrepancy between the objects described in the entry of Chilton, and those actually found on the ground, and to the situation of Stokes' entry, as it has been surveyed, which appears from the diagram before us, not to touch any line, or point in the entry, or survey of Chilton.

The next and last point to be disposed of, is the date of the defendant's surveys.

It is contended, that their entries were actually surveyed before the date of Means' entry; and that they are, therefore, protected by the act of Congress of March, 1807.

This objection is positively contradicted by the record evidence before us.—The survey of Chilton's entry, was made by N. Massie, on the 30th August, 1810, and that of Stokes was made on the 10th December, 1811, as appears from the records in Col. Anderson's office, certified copies of which are on the file of papers in this case. The entry of Means was made in May, 1808, and surveyed in June, 1809. But the defendants seem to rely on a supposed survey, made by Langham, about the date of the entry. To this it may be replied, in the first place, that there is no conclusive evidence of such survey. The witnesses say something of Langham's surveying, but none of them state, that he made a regular survey of the whole entry; and the notes taken by him at that time, are strongly presumptive that he did not. They show that the lines and corners, generally, were not marked. But if he had made a complete survey at that time, it would not alter the case.

1st. Because he was not a deputy, and had no authority to survey.

2d. Because there is no such survey recorded.

3d. Because the defendants, or those under whom they claim, have relied on the survey of Massie, and made it their own, by recording it, and making it the basis of their legal title.

If that be not their survey, the patent has improperly issued. Admitting that Langham had made private surveys of these entries in 1807, and Massie, relying on his correctness, and to save himself trouble, adopted and certified them as his own in 1810 and 1811, they certainly received all their validity by that adoption, and could operate as surveys only from that time.

The position taken by the defendants, goes to destroy the distinction between the acts of authorized and unauthorized surveyors, which is inadmissible. An official survey is an indispensable link in the chain of title. Such a survey cannot be made by a person who has not been legally appointed and qualified, for reasons that are too obvious to be questioned. Every person concerned in the transaction, whether as surveyor, marker, or chain carrier, must be appointed and sworn as the law directs.

From this view of the subject, the complainant is entitled to a decree, for so

much of the land claimed by the defendants, as is covered by his amended entry, and the survey in pursuance of it.

GREEN v. DODGE, ET AL.

A declaration upon an endorsement of a promissory note guarantying payment by the maker, must set out the consideration of such endorsement.

The guarantor upon such endorsement is not liable without a demand and notice of non-payment.

This cause was adjourned for decision here, by the Supreme Court of Washington county, and was heard and decided, upon an agreed state of facts.

Sidney Dodge was indebted to the plaintiff upon his own private account, for which he gave to the plaintiff a note, payable at a day future. Upon this note, the defendants endorsed their names in blank. This endorsement was made without any consideration from the endorsers to the payee; and at a subsequent period, the following was written over it, "We, the undersigned, bind ourselves as security for Sidney Dodge, for the payment of the within note, according to the tenor and effect thereof, to Daniel Green, the obligee in said note." The plaintiff had prosecuted a suit against Sidney Dodge to judgment and execution, who had no property from which the judgment could be satisfied.

The declaration was special upon the guaranty, charging that it was made for value received, but setting out no other consideration; and it alleged a breach in the non-payment of the note, without averring any demand upon the payors upon the day the note fell due, or notice of non-payment to the endorsers.

Several points were made and argued by counsel, but as the court decided the cause upon two only of those points, it is deemed unnecessary to notice the others, in reporting the cause.

Arius Nye and *Goddard*, for defendant. *Mayberry* and *Ewing*, contra.

By the COURT.

The authorities and arguments relied upon by the defendant's counsel, appear to us conclusive, that the declaration ought to aver some legal and valid consideration, for the promise, upon which it is sought to charge the defendants.—The mere fact of writing their names upon the note, would not subject the defendants. To charge them, it must have been done upon some description of contract with the plaintiff, by which the defendants might gain, or the plaintiff might be prejudiced. And that contract, whatever it was, ought to be substantially set out in the declaration. This is not done, and, for that reason, the plaintiff cannot recover.

The guaranty of the defendants, as written out, amounts to this, that the guarantors will pay if the promissor does not. But this is, in its very nature, conditional. There is no pretence, in any of the authorities, that the holder of the paper, upon which the guaranty is written, is bound to do nothing. The plaintiff's counsel do not proceed upon that ground. If he is bound to do something, what is it? To sue and obtain judgment, it is asserted, is enough. But we do

not think so. To demand payment, and notify the guarantor that it is not made, and that, consequently, he is holden, is the diligence, which, we think, ought to be used. Such demand, with a certain knowledge that notice of failure will be given to the guarantor, is calculated to have more effect in stimulating to an effort to make payment, than the prospect of a suit and judgment and execution at a future day. It enables the guarantor to look more effectually to his security, and is, therefore, safest for all concerned. As this demand and notice is neither averred in the declaration, nor admitted, as a fact in the case, we consider it also, a decisive ground against the plaintiff's recovery. Judgment must be for the defendants.

SMITH *v.* LORING.

Where one of two partners, without the knowledge of the other, substitutes the partnership for his individual endorsement on an accommodation note, he is individually accountable to his co-partner for any consequent loss.

The recognition and payment of such endorsement to the creditor, does not change the liabilities between the partner.

An agreement to adandon such claim against his co-partner, though made for good consideration, may be relieved against under circumstnnces of unfairness and impesition.

This case was reserved for decision here by the Supreme Court in Hamilton county. It was a bill in chancery brought by one partner against another for an account, and settlement of the partnership concern.

The bill stated that the complainant and defendant entered into partnership as merchants, in the year 1817, and continued to deal as partners until December, 1821, when the partnership was dissolved by mutual consent. It alleged that the affairs of the company remain unsettled. But as the controversy related entirely to a single item of account between the parties, it is unnecessary to state more of the case than embraces that item.

The bill charged that amongst the unsettled business of the firm was a cluim set up by Loring to charge the complainant with one half the amount of a partnership liability incurred by Loring for his own account.

It stated that one William Harlow, being in good credit, had obtained an accommodation loan, at the bank of the United States, in Cincinnati, for sixty-three hundred dollars, upon the endorsement of Whipple and Washburn, and Oliver Fairchield. That on the 4th day of May, 1819, David Loring substituted his individual name, upon the note, for that of Fairchild, and the note so endorsed was discounted, and on the 6th of July and 7th of September following, notes for renewal were endorsed by David Loring with Whipple and Washburn, and discounted: That in the mean time the credit of Harlow had very much declined, and on the 9th of November, Loring, without the consent or knowledge of Smith, endorsed the note with the name of Smith and Loring, instead of David Loring, and it was discounted, and the proceeds applied to take up the note endorsed by David Loring alone. And when this note became due, it was protested for non-payment.

The bill further charged that when the transaction came to the knowledge of Smith, he objected, but was assured by Loring that a full indemnity had been

obtained from Harlow, which induced the complainant to rest easy. It charged that the indemnity was altogether insufficient, and that in March, 1824, in settling the concerns of the firm of Smith and Loring, the complainant was charged with, and actually paid one half the sum of sixty-three hundred dollars, upon account of said endorsement. The bill prayed a general and final account, and that Loring should be charged with the amount paid by Smith, upon this endorsement.

The answer admitted the endorsements of the note of Harlow, as stated in the bill, and insisted that the name of Smith and Loring was substituted for that of David Loring, in good faith, and in conformity to the power of one partner to endorse the name of the firm. That Whipple and Washburn were endorsers for Smith and Loring, and that the endorsement was made for their common advantage to preserve the credit of all. It alleged that immediately after the endorsement, Smith was informed of it and did not object.

The answer further alleged that Smith had acquiesced and made no complaint until difficulty arose between them in respect to a transaction, at New Orleans, in which an award had been made against Smith. It further insisted that at the time of making the adjustment with the bank, Loring refused to go into any adjustment or settlement unless Smith would agree to abandon all claim against him for this endorsement. That Smith did make this agreement, and upon that being done Loring went into the settlement and it was completed to the mutual advantage and satisfaction of the parties. Further, the answer charged that Smith was justly responsible to Loring, for endorsing the name of the firm upon a note of one P. A. Sprigman, without the consent of Loring, all claim for which, Loring abandoned at the settlement. It denied that Harlow's circumstances became worse in the summer of 1819, and denied all fraudulent design or intention.

A voluminous mass of testimony was taken, and filed in the cause, from an analysis of which, the following facts resulted.

That the name of Smith and Loring was endorsed by Loring in place of his own, without the knowledge of Smith, and that the fact was not known to Smith until after the note was discounted. That at the time the note was protested, or shortly after, an indemnity was given, which was then thought sufficient, and that Smith joined with Loring in a negotiation with the bank to take this indemnity and discharge the endorsers. That in the settlement with the bank, the property of Smith and Loring, though divided between themselves, was given to the bank at a joint valuation, and each of them received a credit for half the value. At the time of the division, Loring had agreed to give Smith, two hundred dollars, for his choice, which was unpaid, and which Smith was induced to relinquish at the settlement: that Loring had made most improvements, and that when the property was given to the bank, Loring's part rented for one hundred and fifty dollars per annum more than Smith's. That at present the rents were about equal, and the property esteemed of about equal value.

That at the time of this settlement Smith manifested great anxiety to effect it. That for the Sprigman endorsement, there was a judgment against Smith, and an execution levied on his property, but no judgment against Loring. That Smith, through the negotiation of friends, agreed to give up his claim for the Harlow endorsement, and that Loring agreed to give up his claim for the Sprig-

man endorsement, in respect to which it appeared that it had been originally made by Loring, and not by Smith, but with his assent. That subsequently an agreement was made that Sprigman should obtain other endorsers, but not being able to effect this, Smith endorsed a note for renewal, and to prevent a protest, and that Loring subsequently endorsed another note to be renewed, but it was not discounted, and the protest and suit were had upon the note endorsed by Smith. That the circumstances of Harlow were bad in May, 1819, but it was not so well known as it was in the autumn of the same year.

N. Wright and *Hammond*, for complainant. *Storer* and *Benham*, contra.

By the COURT.

There is no difficulty about the facts material to the decision of this cause. It is clear that Loring originally endorsed Harlow's note with his own name, and upon his own account, and that he afterwards substituted that of the partnership without the knowledge, authority, or consent of Smith.

We entertain no doubt, but upon this state of facts, Loring was accountable to Smith for any loss sustained by the partnership. The making use of the partnership name to remove his own, was an application of the partnership credit to his separate use. And, if pecuniary loss followed, its consequence was an application of the partnership funds to the individual benefit of one of the partners. The power of the partner to do this, by no means includes the right to do it, without being accountable. Wherever a partner binds the partnership for his own private advantage, he is liable to the partnership. No principle is better settled, and it is impossible to conceive how a court of justice could adjudge otherwise.

We can conceive of no course of reasoning, by which an individual endorsement, can be distinguished from an individual note. Both create an individual liability, for some legal consideration received by the party that incurs it, and the discharge of that liability must be for the benefit of the party liable. The firm of Smith and Loring derived no benefit from their endorsement of Harlow's note, more than they would from paying any other debt due by Loring. The benefit resulted wholly to Loring, the prejudice to the firm.

It is attempted, in argument, to distinguish the two cases, by alleging that it was equally the interest of both partners to sustain Harlow's credit, and that therefore the endorsement was for the benefit of both. But this argument would more strongly apply to an individual debt of Loring's. The firm would be deeply interested in preserving the credit of one of its members; and this might form a reasonable apology for a temporary application of partnership credit, or funds to that purpose. But it could be no legal ground for exempting the partner, whose debt was paid, from accounting to the firm for the amount.

It is urged that if the endorsement was made, without authority from Smith, it did not bind him, that the payment was, therefore voluntary on his part, and he cannot now recover it back.

As between Smith and the bank, upon the state of facts in this case, there is no doubt, this argument would be conclusive. It would be equally so, had the supposed liability been created by Loring, for money, which he actually re-

ceived and applied to the purchase of a private estate. In that case, we presume, it would scarcely be resorted to. A partner borrows money and gives for it the note of the firm. With this money he buys a farm, and takes the title to himself. The lender of the money was fully apprised of the fact, that it was obtained for private investment, consequently this co-partner was not legally liable. Nevertheless, to avoid controversy, he pays the debt, and takes up the note. Can in be for a moment supposed, that in a settlement between the partners, a court of justice would permit the maker of the note to exempt himself from accountability, by proving that, in point of law, the payment was voluntary, though made upon a liability of his own creating, and in payment of money that he had received and invested? As we view this case the argument of voluntary payment is the same, as it would be in the case supposed.

Upon the whole proof it is clear, that when the settlement was made with the bank, Smith agreed to relinquish his claim against Loring, upon account of this endorsement. And this presents the real, and only diffiult point in the cause. If this agreement was made upon a good consideration, with a knowledge of his rights, and in circumstances that gave Loring no unfair advantage, it must conclude Smith.

At the time of the adjustment, when the separte property of the parties was made a common stock, and sold to the bank for their mutual and equal advantage, it would seem that Loring's part was of the greatest value. Though Smith gave some equivalent for this, in giving up his claim upon Loring for the original difference of exchange, still the difference in value, in favor of Loring, constituted some consideration. Under ordinary circumstances, the adequacy of the consideration is not to be taken into account. In the settlement of partnership affairs, where they settle upon equal terms, and mutually agree to share losses from motives of friendship, and a disposition not to scrutinize each other's conduct too closely, such settlements should not be disturbed, although the liabilities of one might greatly exceed those of the other. And for this reason: the inducement to settle, of itself constitutes a good consideration.

But in this case, and when this settlement was made, the parties were not upon equal terms. The property of Smith was under execution for a company debt, which it was equally the duty of Loring to pay. The property of Smith was bound, that of Loring was free. With this advantage in his favor, Loring refuses to make a settlement of the debts of the firm, which the testimony concurs in describing as advantageous to both Smith and Loring, unless Smith will relinquish this claim upon Loring's own terms. The conduct of Loring, throughout all the negotiations, is that of a man who feels that he has an advantage, and is determined to use it. Loring was, in any event, liable for Harlow's debt, and there could be no justifiable reason for refusing to settle it, and the other debts of the firm, to the mutual benefit of both, without an abandonment on the part of Smith, of his claim for compensation. There was a necessary connection between the payment of debts due from the firm, and a settlement of accounts between the partners. The only conceivable reason for connecting the two subjects would seem to be this: unless I can secure a certain residuum for myself, by a settlement, I will keep all, and let the creditors do their worst. It is, indeed, in proof that a threat, something in this character, was thrown out.

In the course of these negotiations Loring steadily refuses to concede any thing. He would not give up the award in his favor, in the New Orleans affair. Smith was acquired to give up the debt due from Loring for the difference of exchange, and the liability of Loring for the Harlow endorsement.—For these concessions by Smith, Loring would exonerate Smith from an alleged liability in the Sprigman case, which, upon investigation, turns out to be totally groundless, and without color of justice. In the course of Loring, there was no equality or reciprocity of concession. The execution levied on Smith's property seems to have given Loring this advantage over him. It is evident that in the negotiations Smith did not contend upon equal terms. His great anxiety to effect the settlement is even alleged and insisted upon in the answer, as a ground why he should be concluded by it. Smith pressed the settlement: Loring insisted to clog it with conditions.

Every case of this kind must be decided more or less, upon its own circumstances. Three judges only, sit in this cause. Two of us are of opinion that connecting the situation of Smith, the conduct of Loring; and the inadequacy of consideration together, they present a proper ground for allowing the relief sought. Upon the first and second points, we all concur in opinion. It is only as to the effect of the settlement that we differ.

Judge Sherman, dissented. *Judge Burnet*, did not sit.

BANK UNITED STATES *v.* SCHULTZ.

A court of equity may enjoin a sale upon execution, when no title would pass to the purchaser.

The court equally divided upon a question of lien.

This cause was reserved for decision here, by the Supreme Court of Hamilton county. It was a bill in Chancery to enjoin the defendant from selling certain real estate, of which the complainants were in possession, upon an execution at law. The facts of the case were as follows:

On the 12th October, 1820, C. Schultz recovered a judgment against the Cincinnati Bank for two thousand six hundred and ninety-eight dollars. Execution was sued out November 8, 1820, and levied on real estate, appraised at four thousand four hundred and fifty-eight dollars; and returned not sold for want of bidders. The same return was made upon several writs of *vendi.* and on October 7, 1822, the valuation was set aside, and a new valuation being made, the property was finally sold, August 16, 1824, for three hundred and fifty-two dollars twenty-six cents. The plaintiff, in October, 1824, sued out a new *fi. fa.* and caused it to be levied on the property in question, which was owned by the Bank of Cincinnati, at the date of the judgment, and sold by them to the complainants, and conveyed on the 17th of October, 1820. The bill assumed that, by the proper construction of the statute of Ohio, the defendant, Schultz, had lost his lien upon the lands, and prayed an injunction to prevent

the sale. The defendant demurred to the bill, and the cause came on for hearing upon the demurrer.

Storer, *Hammond* and *Ewing*, in support of the demurrer.

Fox and *Este*, contra.

The court were unanimously of opinion that a court of equity might properly interfere to prevent a sale of land upon execution, where such sale would not at law, confer a title on the purchaser. And its only consequence would be to embarrass the title of the complainants. Upon the merits of the case arising on the construction of the provisions of the statutes, the court were equally divided in opinion. Consequently the bill was dismissed.

HOUGH v. HUNT.

Where a person deeply in debt, in order to obtain a loan of money agrees to purchase a tract of land at more than double its value and gives a mortgage upon other property to secure the loan, and part of the purchase money, the vendor having notice of the purchaser's necessities, equity will rescind the contract.

This case was reserved for decision here, by the Supreme Court of Ross county. It was a bill in chancery, asking relief against a contract for the purchase of a tract of land, by Hough from Hunt, upon the ground of advantage being taken of the necessities of the complainants' intestate, and unfair practices in respect to the contract. The facts of the case were as follows:

In September, 1818, Hough, the intestate, being pressed for money to pay a debt due from him to the Branch Bank of the United States at Lexington, applied to the defendant for a loan of money to make that payment, about two thousand six hundred dollars. Hunt made an agreement with Hough, to make him a loan of ten thousand dollars, upon condition that Hough would buy of him five hundred and ninety-three acres of land, near Chillicothe, where Hough resided, at twenty dollars per acre. Hough assented to these terms, and received, by way of loan, two thousand six hundred dollars.

The price of the land, and the money advanced, amounted to fourteen thousand four hundred and seventy-five dollars. Hough gave his three separate notes to Hunt, dated September 15, 1818, for four thousand eight hundred and twenty-five dollars each; one payable 15th September, 1819; one 15th December 1819; one 15th March, 1820. In November, 1818, Hunt gave the intestate a bond to convey the five hundred and ninety-three acres of land, upon the payment of the two last notes. At the time of taking the notes, he took from Hough a mortgage of a separate valuable tract of land, to secure the payment of the first note, due September, 1819, which was given in part for the money borrowed, and in part for the purchase money of the land. The balance of the loan of ten thousand dollars, beyond the two thousand six hundred, was never advanced, Hough not being able to give such security as was required by Hunt. Hough died on the 4th of September, 1819. Judgments were obtained, on all the notes, against Hough's administrators, and

also upon the mortgage. Hunt knew of Hough's embarrassments at the time of the contract; and the land purchased at twenty dollars per acre, was proved, by several witnesses, to have not been worth half that sum. The bill prayed that the contract of purchase might be cancelled, and the mortgage discharged by the payment of the two thousand six hundred dollars loaned, with interest.

Grimke, for complainants. *Brush* and *Fitzgerald*, contra.

By the COURT.

From the evidence, in this case, it is manifest, that, at the time of the contract for the sale of the land in question, the vendor knew that the purchaser was in some degree embarrassed. It is also fully proved that the land was not worth half the price that Hough agreed to pay for it. The circumstances of the case are altogether extraordinary. Hough is hard pressed for the sum of two thousand five hundred dollars. He applies to Hunt for a loan of that sum. He obtains it, and an engagement that the lender will loan him seven thousand five hundred dollars more, upon good security. But at the same time that the twenty-five hundred is borrowed, and a contract made for a further loan, a contract of sale is made for a tract of land, at eleven thousand nine hundred and seventy-five dollars, being more than double its real value. Two thousand three hundred and twenty-five dollars of which, with the money actually loaned, is secured upon other property than that sold.

The mind revolts at the idea that a man so embarrassed would, to obtain the loan of two thousand six hundred dollars, voluntarily embarrass himself further, by creating a new debt of eleven thousand nine hundred and seventy-five dollars, for property not worth half that sum. It is impossible that the vendor, who also made the loan, was not sensible that he was taking advantage of the purchaser's necessity. The imprudence of the proceeding, on the part of Hough, was so gross, that it could justly be attributed to no other cause.

It is not in proof that Hunt knew the extent of Hough's embarrassments. But he knew that he was in necessity to some extent; of that necessity he must have been sensible he took advantage, in exacting the contract for the sale of the land. The wish to obtain further loans and the agreement to make them, with the subsequent escape from performing that agreement, are strong circumstances, in confirmance of the fact that Hunt knew Hough's situation, and acted upon it.

One peculiar hardship of the case is, that upon account of this unconscionable contract Hunt has fastened a part of the purchase money, upon Hough's other lands, sweeping from previous creditors that which their means had supplied, and retaining to himself the whole consideration which his contract was supposed to advance.

The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where the inadequacy of the price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage, to rescind the contract. So, when a person

borrowing money to relieve his necessities, is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment, by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, are sufficient evidence of unfair advantages to justify the interference of the court. We consider this a case of great exorbitancy of price, where the purchaser was deeply embarrassed, and where the vendor availed himself of that embarrassment to exact the bargain. We are therefore of opinion that the contract of purchase be rescinded: and that the mortgage remain a lien only for the money loaned, and interest.

STONE v. RUFFIN.

A sheriff cannot be required by the plaintiff to pay money made on execution before the return of the writ, and refusal to pay such money, is no ground for an amercement.

This was a writ of error to the judgment of the Court of Common Pleas of Hamilton county, on a motion to amerce the sheriff, in which judgment was given for the defendant. It was reserved in Hamilton county, and the case was as follows:

The notice to amerce recited a judgment and execution, *Ethan Stone, for the use, &c. v. Joel Williams.* It recited a levy and a sale upon execution, returnable to April term, 1824, a sale made on the 23d of February, 1824. A notice to the sheriff that the Bank of the United States were the real owners of the judgment; and a notice from them, that they would not receive paper of the Bank of Cincinnati in payment. A demand of payment, made on the sheriff, March 1, 1824, and a refusal to pay, except in paper of the Bank of Cincinnati for which the sale had been made.

The defendant put in an answer to the motion, alleging that it was no case for amercement; that there was no law authorizing the amercement, and relying upon the statute of limitations. The Common Pleas gave judgment for the defendant, to reverse which this writ of error was brought.

The cause was elaborately argued by Este and Fox, for plaintiff in error, and by C. Hammond and N. Wright, for defendant.

By the Court.

Upon examining this record, we find that the writ of execution was returnable to April term, 1824; that the sale was made in February, 1824, and the demand upon the sheriff, to pay over the money, was made March 1st, 1824. The demand thus made, is not one upon which the sheriff can be subjected, on motion, to amercement. He is not bound to pay over the money to the plaintiff, until the return of the writ. On the contrary, he ought to hold it, until the proceedings have been examined, and the sale confirmed by the court. The judgment must, for this reason, be affirmed.

DUDLEY, ET AL. v. LITTLE, ET AL.

JUDGES BURNET AND SHERMAN.

1826.

Upon a sale of land for taxes, an agreement among several that they will advance funds and one shall buy, so as to prevent competition, and afterwards divide the land among them, is fraudulent and equity will relieve against the sale.

The bill stated, that the complainants, as heirs at law of Israel Ludlow, were the proprietors of a tract of land situate in the county of Delaware, on which the taxes had not been paid. That at a sale of land for taxes, three hundred and seventy acres of the land in question, worth three dollars per acre, had been sold by the collector, and purchased by the defendant for thirty-three dollars and seventy-three cents. The bill charges, that a fraudulent combination had been formed by the defendant and sundry other persons, to purchase large tracts of land at the said sale, for the purposes of speculation; that it had been agreed, between the defendant and those who were to participate in the profits of the speculation, that the defendant alone should bid; that the other partners in the contract should advance their portions of the purchase money, and receive their share of the profits; and that, in pursuance of that fraudulent agreement, the defendant had purchased the land in question, and obtained for it a collector's deed. The prayer of the bill was to set aside the deed and restore the complainants, &c. The defendant demurred to the bill.

J. K. Cory, for the complainants. *Pettibone*, contra.

By the COURT.

A partnership, or contract formed for the purchase of land at a sale for taxes, is against the policy of the law; and if such contract or partnership be entered into for the express purpose of making such purchases, it is a fraud on the owner of the property, and the purchaser cannot obtain an available title.

Such combinations have, necessarily, a direct tendency to prevent competition, which it is the duty of the legislature, and the policy of the law to encourage. Over a sale of this description, the owner has no control—he cannot refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property. This being the case, any combination which has a tendency to reduce the price of the property, by preventing competition, must operate as a fraud on the owner. The effects of such combinations cannot be controled by any vigilance on the part of the owner.

It frequently happens, that large quantities of land are offered for sale on these occasions, in the absence, and without the knowledge of the owners; and if such combinations are permitted, all the persons present at the sale might form themselves into companies, and, by an agreement not to bid against each other,

might purchase in the whole of every tract offered, for the amount of tax due on it.

We do not mean to say, that partners cannot purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object; but that a partnership or combination cannot legally be formed, for the purpose of making such purchases. As this was evidently the fact in the case before us, the complainants are entitled to a decree. They must take it, however, on the condition of refunding the purchase money and interest, with the penalty of fifty per cent. allowed by law, and on the payment of cost.

SMILEY v. WRIGHT, ET AL.

JUDGES PEASE AND SHERMAN.

1826.

A widow who is entitled to dower, and is present at the sale of the lands under an order of court, and assents that the sale may be made free from her dower, in consequence of which the purchaser pays a higher price, is thereby barred from her dower, notwithstanding the purchaser had notice of her claim.

The bill states in substance that Joseph Lewis, the former husband of the complainant, Elizabeth, purchased parts of lots No. 174, 175, and 176, in the town of Steubenville, went into possession, made large and valuable improvements on them, that he paid the full amount of the purchase money, but had not obtained a legal title thereto, and died in the year 1807, leaving her his widow. The bill further states, that administration of the estate of said Lewis, was granted to Jacob Fickas, since deceased, who, in 1810, obtained an order of court to sell the said lots subject to the complainant's right of dower therein, for the payment of the debts due by the estate of Lewis. That said lots were shortly thereafter sold at public sale, and conveyed by the administrator to the defendant, Hartford, who has since conveyed them to the defendant Wright. The bill charges that Hartford and Wright, knew, at the time they respectively purchased, of the complainant's right of dower, and that in 1819, she demanded of the defendant Wright, who was then in possession, claiming title to the lots, to set off and assign her dower. The bill states as a reason why no demand of dower was made before 1819, that she was ignorant of her right, that Fickas, the administrator, was her brother, in whom she had the most perfect confidence, and that he always informed her she had no right in her husband's real or personal estate until the debts were paid, when she would be entitled to one third of the residue. The bill further charges, that Hartford has procured a legal title to the lots by a conveyance to him from the vendor of Lewis, and prays that dower may be assigned, and a decree for a just portion of the rents and profits.

The answers of the defendants admit the purchase of the lots by Lewis, his possession, the payment by him of a considerable part of the purchase money, his death, the administration granted to Fickas, the order of court to sell subject to the widow's dower, the sale and conveyance of the whole interest of Lew-

is, to Hartford, and his conveyance to the defendant Wright, and the demand of the complainant to have her dower assigned. The answers aver that about the time of sale, by the administrator, the complainant, Elizabeth, received a lot in the town of Steubenville, in satisfaction of her claim of dower, and at the time of sale, she agreed that the lots should be sold free from any claim by her for dower, she having relinquished her right.

Much testimony having been taken in the cause, it was brought to hearing on the pleadings and proofs.

Hallock and *Goodenow*, for complainants. *Wright* and *Coller*, for defendants.

By the COURT.

It is a peculiar feature of the law of Ohio, that the widow of a deceased person, is not only entitled to dower in the legal estate, of which the husband was seized, during coverture, but also, in any equitable estate which he may hold in lands at the time of his death. It is in virtue of the statutory provision endowing the widow with one third part of all the right or interest the husband had at the time of his decease, in any lands or tenements, that the complainants claim dower in the premises described in the bill. Lewis, the former husband of the complainant, Mrs. Smiley, had purchased the property of which dower is claimed, gone into possession, made valuable improvements thereon, paid a considerable part of the purchase money, leaving the balance, a debt due by his estate, which was subsequently paid by the administrator, without obtaining a conveyance of the legal estate. He had, therefore, although not a legal estate of inheritance, an equitable interest in the lots, of which, his widow at his death was entitled to her dower by the provisions of our statute. And that dower must now be assigned to her, in conformity to the prayer of the bill, if she has done no act since his death to divest herself of that right, or to bar her from enforcing it in equity.

Upon this part of the case two questions have been made. Did the complainant, Mrs. Smiley, receive from Fickas, the administrator of Lewis's estate, any compensation or satisfaction for, or in lieu of her dower?

Whether the circumstances attending the sale of the premises, of which dower is claimed, bar her in equity, on the ground of fraud, from claiming her dower from Hartford, and all others holding under him?

Upon the first question, whether the widow of Lewis received from Fickas, the administrator, any compensation in lieu of her dower, much contradictory testimony has been taken.

It is unnecessary to state the evidence relied upon by either party, on this point. The defendants claim, in their answers, that it was agreed between Fickas and the complainant, Mrs. Smiley, that she should receive a lot on Fourth-street, in Steubenville, and some materials for building, in lieu of her dower. That the lot was conveyed to her, and the building materials furnished. They have called on her, under a provision of the statute, by filing interrogatories, in the nature of a cross bill, to answer on oath, whether such an agreement was not made and executed. She denies by her answer, any such agreement, and states that she did not receive the lot on Fourth-street, and

and building materials, in satisfaction of her dower, but that Fickas retained the amount of the purchase money of the lot and materials, out of money belonging to the children of her husband, and due to her for their maintainance. This answer is supported by the testimony of the guardian of those children, who states he was present at the settlement, and that it was agreed that the amount charged by Fickas, for the lot and materials furnished by him, should be applied in paying her for supporting the children.

That some conversation took place, between Mrs. Smiley and Fickas, respecting her dower in the premises, is perfectly certain; but what that conversation was, or whether any, and if any, what agreement was made between them, is uncertain. The lapse of time, and the death of Fickas, who was the active agent in all the transactions mentioned by the witnesses, and who compensated Mrs. Smiley for her dower, if in fact she ever received a compensation, has involved the question in doubt and uncertainty. Sufficient appears to excite a suspicion of her having received something in lieu of her dower. Yet the evidence is not sufficiently clear and explicit, to induce a court of equity to decree against her claim, on the ground of her haivng received satisfaction.

The next question made is, whether the circumstances attending the sale of the premises to Hartford, are such as bar Mrs. Smiley, in equity, from claiming her dower. The evidence upon this part of the case is clear, explicit, and uncontradictory. J. Edgington testifies, that he attended the sale as the agent of Hartford. The property was put up, subject to the widow's dower, and that it was bid up to about two thousand four hundred dollars. Fickas, after the property had been cried for some time at that price, and it was evident no greater bid could be obtained, expressed his unwillingness to have it sold for that price, and, at his request, the biddings were suspended, to enable him to consult with the widow, and ascertain if she would agree to have the property sold free of dower. Fickas and the widow went into a back room, where they were engaged for some time in conversation, no part of which he heard. The witness was near the door of the room, and when they came out Fickas observed she had agreed to have the property sold free of dower. This was proclaimed at the front door by the crier; the biddings resumed, and the property struck off to witness, as the agent of Hartford, at about three thousand dollars. He would not have given over two thousand four hundred dollars, had he not have understood that the widow relinquished her dower. R. Moor's testimony is to the same effect. S. Salmon states, he was the auctioneer. The widow was present, and must have heard him cry the sale as free from her claim of dower, and that the property was sold as unencumbered by any right of dower. J. Worstell states, he was present at the sale. Mrs. Smiley was standing in the door, the auctioneer being on the step, when it was struck off, That he heard the auctioneer frequently state, that the sale was free of dower, while she was in a situation she must have heard him; and on one occasion replied to him she had no claim to dower.

It is apparent from this testimony, which is altogether uncontradicted, that after the suspension of the sale, it was understood by the persons attending, that the property was to be sold unencumbered by the widow's dower. That she was present, aiding by her acts and declarations, in confirming this opinion, and that

the purchaser was thereby induced to bid about six hundred dollars more than he otherwise would have given.

It is a well established principle in equity, that if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right; (16 *Ves.* 253. 4 *Munf.* 449. 11 *John.* 564. 6 *John. Ch. Rep.* 166) and the rule prevails, even against *feme coverts*, and persons under age. (9 *Mod.* 35. 6 *Ves.* 174. *Cory v. Girtchin*, 2 *Mod.* 40.)

It is contended, on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a court of equity, because she was at that time ignorant of her rights, nor can they be considered as a fraud upon the purchaser, as he had notice of her title.

It is unnecessary to consider whether a person, having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title, to the prejudice of a *bona fide* purchaser for a valuable consideration, as we are clearly of opinion that the evidence does not prove Mrs. Smiley's ignorance of her rights, at the time of the sale by the administrator. If she would avoid the effect of her acts and declarations, on the ground of being ignorant of her rights, she should at least raise a strong presumption of that ignorance, by the proof of facts and circumstances, from which it could fairly be inferred. The proof relied upon, is the answer of Mrs. Smiley to the interrogatories of the defendant, Wright, in which she states that "Fickas always told her that nothing would be coming to her until all debts were paid, and this she believed to be true, until about the time suit was brought;" and the testimony of Fleming, who states, that as late as 1817 he heard Fickas tell her she was entitled to the interest of one third of the proceeds of the estate, both real and personal, after all debts were paid. The answer of Mrs. Smiley is contradicted, in some material facts, by the testimony of a number of disinterested witnesses, and much weight cannot, therefore, be given to her statements. The declaration made to her by Fickas, in 1817, furnishes no ground to presume, that in 1810 she was ignorant of her right of dower. The legal presumption is, she was acquainted with her rights. The order of court was, to sell the lots, subject to her dower. They were advertised to be so sold, and the biddings proceeded for some time, with the knowledge of all present of the existence of this encumbrance.

The sale was suspended under the belief that if her claim of dower could be removed, a more advantageous sale would be effected. She was consulted, and it was proclaimed in her hearing, that the lots were to be sold free of her dower. The biddings recommenced, and the lots sold at an enhanced price. Under these circumstances the proof should be clear and strong, to justify the court in finding her ignorant of any right in the property.

It is also said, that Hartford had notice, at the time of his purchase, of her title, and therefore her acts and declarations could not tend to deceive him.

It is undoubtedly true that the agent of Hartford had notice, at the commencement of the public sale, that the lots were subject to the widow's dower, and his biddings were regulated by his knowledge of this fact. But during the progress of the sale, he was informed she had relinquished her right of dower, and she confirmed this information by her acts, and declarations. If she had

not in fact relinquished her right of dower, her standing by, permitting the property to be sold free of dower, without asserting her claim, was calculated to deceive, and defraud the purchaser, and did induce him to pay a much larger sum for the property than he would otherwise have given. He believed she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower, against a *bona fide* purchaser, for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment, or release of her dower, would be to aid her in the commission of fraud. The bill must be dismissed.

NOTE. This cause was afterwards submitted to the whole court, sitting at Columbus, upon a petition for a rehearing. After a full examination of the pleadings and proofs, a rehearing was refused.

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3 HAMMOND, 5.

DECISIONS IN BANK.

1827.

SHOTWELL, ET UX. v. SEDAM'S HEIRS.

Where the husband makes a devise to the widow, without stating that it is or is not in bar of dower, and the widow makes an agreement with the heir, reciting that it is in lieu of dower, and that she accepts certain things in satisfaction of dower, the widow is barred of dower.

This was a petition in chancery for dower, in certain premises described in the bill, situate in Hamilton county, and adjourned here for decision, by the Supreme Court sitting in that county. The facts material to the point decided, are as follows:

The complainant, Nancy Shotwell, was the wife of Cornelius R. Sedam deceased, and had subsequently intermarried with the complainant. The defendants were the heirs at law of Cornelius R. Sedam.

Cornelius R. Sedam made a last will which was duly proven and established after his death. By this will, he divided the premises in question, in a particular manner amongst his four sons, assigning the mansion house to his son Cornelius. The will also contained this direction or bequest: "My wife Nancy, so long as she remains my widow, to live in the house aforesaid, and to have her support from that part of the farm hereby bequeathed to my son Cornelius, during said widowhood." The residue of the testator's estate was bequeathed to the widow and children in equal proportions. The will was duly proven, but the widow did not within six months thereafter declare her determination to take under the will, and have the declaration entered of record in court. She remained in the Mansion House, and difficulties arising between her and Cornelius, they applied to the court of Common Pleas, to appoint persons to assess and determine the amount and manner of support to be received under the will.—Persons were appointed who made a report, upon which the following agreement was entered into between the widow and Cornelius:

Whereas, a certain last will and testament of Cornelius R. Sedam, deceased, bequeathes amongst other things therein named, as appears of record in the

court of Common Pleas, of Hamilton county, state of Ohio, to Cornelius Sedam a certain portion of land, composing and encompassing the buildings and immediate late residence of the testator aforesaid—And whereas, it is provided in said will, that Nancy Sedam, the widow of the said testator shall derive her support during her widowhood, from the said certain portion of land and residence aforesaid—And whereas, the said Nancy, widow, having elected at the opening and proving of said will, to abide and take by and under said will, *in lieu of dower*, be the said election matter of *record* or not—And whereas, the said court of Common Pleas, on the application and desire of the said Nancy Sedam and Cornelius Sedam, the parties contracting this agreement, seeing proper to appoint three disinterested persons to assess and set off the amount and manner of said support, agreeably to the will aforesaid—And whereas, the said three persons having met and reported an award as in their judgment conformed to the nature of their said appointment—And whereas, the said Nancy and Cornelius, parties to this agreement, understanding the said will and consenting thereto as aforesaid, and being willing and desirous to preserve mutual friendship and good will, do therefore agree with each other to construe the sum and substance of said award, as it particularly relates to the support of said Nancy, in the following manner, to wit: That so long as the said Nancy shall remain in widowhood, the widow of the said testator and no longer, she may occupy the east half of the Mansion House of said testator, together with the kitchen and yard attached thereto: also, may occupy one stable and the entry shed adjoining the said stable as now standing north east from the Mansion House: also, may she occupy as a garden, a certain lot of ground adjoining said stable: also, may she have the privilege of using water from the *cistern* and *well* now belonging to said Mansion House: also, may she have the privilege of raising and keeping stock as follows, of her own and for herself, and for no person or persons else, to wit: her own pork and poultry, *provided*, that not more than four hogs, (which may include one sow and pigs as one,) nor more than twenty-four fowls, (which may include and be composed of female fowls not enumerating their unweened young,) shall at any time run at large: also, one horse kind, two cows and six sheep; for which said horse, cows and sheep, she shall have the use of such range and pasture as the said Cornelius Sedam may be able conveniently to furnish, or as may be in common use by him for his own like stock: also, shall she have the privilege of taking fruit from the orchard, for her own use: also, for drying to the amount of three bushels when dried. The said Cornelius Sedam shall furnish the said Nancy, annually at her said residence, two barrels of cider, three barrels of apples, fifteen bushels of potatoes: also, three tons of hay, one hundred and fifty bushels of corn, two barrels of flour, twenty dollars in money and twenty dollars in groceries. She shall also have the privilege of procuring from the woodlands of said Cornelius Sedam, fire wood for her house use, provided she does not extend the same to such timber as may be fit for making rails, without the consent of the said Cornelius, provided also, the said Cornelius should prefer to deliver to the said Nancy, at her said residence, her necessary fire wood, in which case he may elect so to do. It is hereby further agreed that the said Nancy shall at no time assign, make over, or any how grant to any person or persons any part or portion of the aforesaid privileges.

In testimony whereof, the parties hereto, have set their hands and seals, this fourteenth day of March, in the year 1825, in the presence of witnesses.

CORNELIUS SEDAM, *Seal.*
NANCY SEDAM, *Seal.*

Witness, STEPHEN FEXTEN.

Not long after the execution of this agreement, the widow intermarried with Shotwell, in consequence of which the provision under it terminated. The bill was then brought for dower. The defendants resisted the claim on the ground that, the provisions of the will being incompatible with dower, the testator intended it as an equivalent, and the widow having accepted it could not afterwards claim dower. They also insisted that the agreement with Cornelius Sedam was an acceptance on her part of the stipulations of that agreement in lieu of dower, which was made upon good consideration, and having been executed by both parties, up to the time of the marriage, could not, in equity, be avoided by either party.

Harrison, for complainants. *Fox*, *Hammond* and *Storer*, contra.

By the COURT.

It is certainly a nice question, whether the devise in the will to the widow, would not, upon being accepted by her, operate to bar her dower, in the premises devised to others, and charged with her support. But this question it is not necessary to decide, because the court are very clearly of opinion that the subsequent contract entered into between the widow and Cornelius Sedam, constitutes an equitable bar to the dower claimed.

Whatever indulgence is shown to the acts of feme coverts, concerning their dower, there is no reason for treating the contracts of feme soles, where dower, in an estate of a deceased husband, is the subject of contract, in any other manner, than the contracts of other competent persons. In this case, the widow, with a perfect knowledge of the whole subject, and for the purpose of adjusting all difficulties, agreed to submit her rights, under the will, to the determination of mutual friends. They made an award, and after that award was made, she entered into a written contract with the other party, to carry the principle of the award into effect, upon data settled between themselves.

In this agreement, it is expressly recited, that she had elected to take under the will, whether said election was matter of record or not, and that such election to take under the will, was "*in lieu of dower.*" A respectable provision is secured to her by this agreement, besides what she takes under the general devise, being a full child's part, and she enters into the enjoyment of it. There is no pretence that she was ignorant of her rights, that any imposition was practised upon her, or that the contract itself was in any respect unequal. By her marriage she lost the benefit of it, but that being her voluntary act, cannot effect the obligation, or extent of the original contract.

It is urged that this agreement extends no further, than to settle what she was to receive under the will, and does not touch the question whether the bequest in the will, was in addition to, or in lieu of dower. The agreement itself refutes

this argument. It asserts expressly, that the arrangement is to be in lieu of dower. It was upon this basis, that both parties to the contract proceeded. And it cannot be permitted to one of them to take all that the contract gave, upon a state of facts admitted between them at the time, and then deny her own recitation of the facts, and set up a claim founded upon a directly opposite position. This would be to practice a fraud upon the heir, who agreed to do certain things, in the expectation that, by doing them, his estate was discharged of dower.

Another argument urged against this agreement being made to operate as a bar to dower is, that dower being real estate, can only be transferred by the legal mode of conveyance. This is not a tenable position. A man may divest himself of an estate which lies in action only, by doing such acts, and making such agreements as operate to bar his action, though no conveyance be executed. Thus, a controversy about title to real estate, may be settled by arbitrament and award; so it may by accord and satisfaction, and by other acts *in pais*. In the case of *Smiley and wife, v. Wright*, 2 *Ohio Rep.* 506, this court adjudged that a widow barred her recovery of dower by a parol assent that the administrator might sell the estate of her husband, discharged of her dower, upon the faith of which the purchase was made. So, in this case, the agreement, though not a conveyance of the estate, may be set up, in equity, to bar her recovery. Equity would enforce a specific performance were the defendant driven to seek it: and as the claimant of dower comes into equity for relief, her equitable rights are all open to be considered. We are of opinion that she is barred by the agreement, and her bill must be dismissed.

STATE OF OHIO *v.* WELLMAN.

In a recognizance to appear and answer, the words, "in case said party was legally imprisoned on said charge," are surplussage.

This was a sci. fa. upon a recognizance adjourned here by the Supreme Court of Cuyahoga county. The defeasance was in these words:

"If the said Joseph Kuln, shall personally appear at the next Court of Common Pleas, to be holden in and for said county, then and there to answer a charge of kidnapping, and to show cause why sentence should not be pronounced against him by said Court, and not depart without leave, in case the said Joseph was then legally imprisoned on said charge, then the recognizance to be void, &c."

The *sci. fa.* being served on Wellman only, he appeared and showed for cause, "that the said Joseph Kuln, at the time of the supposed entering into said recognizance, by the said Wellman, was not legally imprisoned on said charge, in said recognizance mentioned," and concluded with a verification. The prosecuting attorney demurred, and the Court of Common Pleas gave judgment for the plaintiff, from which the defendant appealed.

L. Case, for the plaintiff.

By the Court.

It is very clear that the plea is bad. The matters of fact which it was sup-

posed rendered the imprisonment illegal, ought to have been set out, so that the Court might judge of their sufficiency, if demurred to, or that the proof might be applied to them if they were traversed. As it stands, the plea alleges no fact to sustain the conclusion it asserts, that the party was not legally imprisoned; and were we to give judgment for the defendant, no person, from perusing the record, could tell upon what our judgment was grounded.

The qualification in the recognizance, that it was only to be valid in case the prisoner was legally imprisoned, can have no operative effect, and must be regarded as mere surplussage. If the party were illegally imprisoned, the law provided a means for his legal discharge, and when discharged the recognizance could not bind him or his bail, if these terms were not contained in it. If taken under any circumstances that could legally affect its obligatory force, the defendants could avail themselves, by way of defence, of such circumstances, though no reference were made to them in the recognizance. The terms inserted, cannot, therefore, either vitiate the recognizance, or enlarge, or restrict its obligation.

Judgment affirmed.

HUNT, ET AL. v. YEATMAN.

A judgment irregularly entered may be set aside at a subsequent term, on motion.

This was a writ of error, to the City Court of the city of Cincinnati, adjourned for decision here by the Supreme Court of Hamilton county. The case was this: The plaintiffs in error, prosecuted a scire facias, upon a mortgage against the defendant in the City Court, to March term, 1822, and at the same term a judgment was entered up against the defendant. At a subsequent term, upon the motion of the defendant, the judgment entered against him was set aside, and the cause continued. In 1824, the case was put to a jury, and the plaintiff's evidence being overruled by the court, they suffered a non suit. This writ of error was brought to reverse the judgment, or order setting aside the judgment originally given for the plaintiff.

N. Wright, for plaintiffs in error. *Storer*, contra.

By the COURT.

The power to set aside a judgment, for manifest irregularity in entering it, is exercised by all courts of justice. And this power is exercised, not merely at the term in which this judgment is rendered, but at a subsequent term. To alter or amend a judgment, otherwise regularly entered, is a very different thing from setting it totally aside for irregularity. The majority of the Court entertain no doubt, that the City Court might, in a proper case, set aside a judgment entered at a previous term. Whether they erred in the particular case before them, cannot be ascertained. As they acted upon matter *in pais* and not upon matter of record, and no bill of exceptions was taken, we cannot go further than to decide upon the general power. We see no cause for reversing the judgment, and it must be affirmed.

Judge BURNET dissented.

FOBES, ET AL. v. CANTFIELD.

An agreement to pay interest upon interest, after the interest has accrued is not usurious.

This case was adjourned from the county of Trumbull. It was a bill in chancery, to foreclose the equity of redemption, in mortgaged premises, or to have a sale to raise mortgage money. The facts of the case were as follows: In the year 1801, the defendant was indebted to the complainants as security for some friends who had become bankrupt, and executed his individual notes for the amount, payable at short dates, and bearing interest at the rate of six per cent. In the year 1807, the principal and interest being unpaid, an agreement was made that the interest should be cast to that date, and that from that time the defendant should pay interest upon the aggregate amount annually. In 1812, the whole still remaining unpaid, the defendant agreed to give the mortgage in question, to secure the payment, and agreed that simple interest should be calculated to 1807, and compound interest annually, from that time. The amount due upon this calculation was ascertained, and several notes with the mortgage given to secure the payment. And the question was, whether this was usurious under the laws of Connecticut, where the contract was made.

T. D. Webb and *J. C. Wright*, for the complainants. *Tappan*, contra.

By the COURT.

A sum of money due for interest, is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it, after it is due, cannot be deemed usurious. Courts have been indisposed to compute interest upon interests, where the contract between the parties is silent. But if when the interest is due and payable, and constitutes a then subsisting debt, the debtor ask to retain it, and pay interest upon the amount at the legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collecting a debt then actually due and demandable. Such was the case before us. In 1807, the debtor agreed that upon the principal and interest then due, he would pay the interest annually. This agreement he failed to perform. In 1812, he acknowledged the existence and obligation of the agreement, and settled the account according to it, and gave his notes for the amount, and the mortgage to secure the payment. If instead of giving the notes and mortgage, in 1812, he had when the amount was ascertained, paid it in money, he certainly could not have sustained an action to recover back what he now calls the usury. Neither can he now set it up to avoid the mortgage or to escape from the payment. It was but the compliance with his agreement to pay the interest annually, and did not put the party in the same condition he would have been in, had the interest been annually paid. For the receipt of the money might be worth more than the engagement to pay it. The contract was fair, free from injustice or oppression, and not touched by the statute. We are therefore of opinion that the complainants are entitled to a decree for the whole debt claimed.

STIVER v. STIVER.

Equity cannot review the errors of a Court of Law.

This was a bill in chancery, adjourned here for decision, by the Supreme Court of Montgomery county. The material facts of the cause were these: The defendant had prosecuted a suit at law against the complainant, who was an executor. The suit was commenced within the time, when the statute provides that, if a plaintiff sue an executor or administrator, he shall not recover costs. The case was carried by appeal to the Supreme Court, and there finally tried. The plaintiff in that case recovered, and in making up the record, a judgment was entered for damages and full costs against the defendant; the damages to be made of the goodsof the testator, the costs of the proper goods of the defendant. This was certified to the Common Pleas, and execution issued for the amount. At the next term the Supreme Court was applied to, to correct the judgment as to the costs which was not done. A suit was then commenced on the appeal bond, by the original plaintiff at law, to subject the security to the payment of the costs in question. This bill was prosecuted to enjoin the recovery, and brought by appeal into the Supreme Court.

Bacon, for complainant. *Stoddert*, for respondent.

By the COURT.

The single question to be decided in this case is, whether an error in rendering judgment in the Supreme Court, can be corrected by the Court of Common Pleas, or by this court on bill in equity? And we are of opinion that it cannot be so corrected. If the error be a judicial one, and has been committed by a court of the last resort, no means is provided for its correction, unless it can be corrected by motion, or upon writ of error, *coram nobis*. It is dangerous to attribute errors which the record imports to be judicial, to the Clerk. But if the court at law, where they are made, cannot rectify them without departing from established principles, that circumstance cannot give jurisdiction to a court of chancery. The bill must be dismissed.

GANO v. WHITE, ET AL.

An injunction against a judgment at Law does not operate as a release of errors.

This was a writ of error, brought to reverse a judgment rendered by the Court of Common Pleas of Hamilton county, in favor of the defendants as assignees of Riddle. The defendants in error pleaded in bar to the writ of error, certain proceedings in chancery, which they set out in their plea, and alleged that they operated as a release of errors, and to this plea the plaintiff in error demurred. The case was adjourned for decision here by the Supreme Court of Hamilton county. The facts of the case are as follow:

The plaintiff in error was indebted to Riddle in a considerable sum of money, for which he had given separate notes payable at different periods. One of

them had been assigned to the defendants upon which they had obtained the judgment in question, in June, 1823. Upon others of the notes, Riddle had sued, and also obtained judgments in May, 1823. The plaintiff in error, then defendant at law, filed a bill in equity against Riddle and against the present defendants in error, for the purpose of obtaining an allowance by way of set off, of sundry claims against Riddle. An injunction was allowed until final hearing, and, upon a final hearing, the injunction was made perpetual as to the judgment obtained by Riddle, but dissolved as to the judgment obtained by the defendants in error. The order of injunction contained no condition that the complainant should release errors at law, and no such release was made.

Storer, for plaintiff in error. *Este*, contra.

By the COURT.

The plea must be overruled. It has never been held that a bill in equity to enjoin a judgment at law, is of itself a release of errors. The execution of such a release is often, in some courts, perhaps always, made a condition of allowing an injunction. When that is done, the party proceeding upon his bill would be held to have executed the release, and precluded from reversing the judgment for error, although no release were in fact executed. But here there was no such order, and neither our statute, or any rule of court makes it necessary, that a release of errors, should precede the operation of an injunction. There is consequently no legal foundation to sustain the plea.

LOCKWOOD, ET AL. v. MILLS, ET AL.

Parties receiving separate allotments in the same tract of land are not tenants in common so as to claim partition of a surplus.

This was a bill in chancery, adjourned for decision here, upon bill and answers from the county of Huron. The object of the bill was to obtain the aid of the court to correct a partition made by the Directors of the Fire Land Company, of certain lands amongst the complainants and defendants. The case claimed by the complainants follows:

E. Lockwood and S. and H. St. John, with others, upon account of their claims, and John Cannon, upon account of part of his claim, had sec. 1, in town. 1, range 24, set apart to them, and to equalize the value, there was annexed to it part of a fractional township in these words: "to which section is annexed 1783 acres off the east end of the fraction 2783, lying between the north line of town 6, in the 22d range, and Sandusky bay, according to the mode of partition adopted by the Directors."

John Cannon had set to him upon account of other part of his claim, sec. 4, in town. 1, range 24, with an annexation in these words, "to which section is annexed five hundred acres of land, it being part of the fraction of 2783 acres, lying between the north line of town number 6, in the 23d range, and is to be taken next west of the annexation to section No. 1, in this town, leaving the remainder of said fraction, which has been already annexed to sec. 4, town. 1,

range 23." This last named section was set to other parties, and the annexation to it, in the book of classifications kept by the Directors, preceded those before stated, and is in these words; "to which section is annexed 500 acres of land lying on the west end of the fraction of 2783 acres, lying between the north line of town, 6, in the 23d range and Sandusky bay, according to the mode of partition adopted by the Directors." The complainants claimed as heirs of Lockwood and the St. Johns, and by intermarriage as part of the heirs of Cannon. The defendants claimed as purchasers of the rights of the other heirs of Cannon.

The fraction described as containing 2783 acres, out of which the three annexations were made, contained, in fact, about 3800 acres. The object of the bill was to obtain such partition as should assign to the annexation of 1783 acres, what was claimed to be its proportion of this surplus land.

The cause was argued by *Webb*, for complainants,

And by *F. D. Parrish* and *J. Mills*, for defendants.

By the COURT.

We are clearly of opinion that there is no character of tenancy in common between the owners of sec. 1, town. 1, range 24, and section 4, in the same town and range, and their respective annexations out of the fraction supposed to contain 2783 acres. These allotments were made by the Directors of the company for the express purpose of vesting in the respective claimants distinct and separate rights. There is no reason that can be urged to make them tenants in common of the annexations, which would not equally apply to the principal sections allotted to each. And this has never been pretended.

The original division of the fraction, from which the annexations were made, had no reference to any joint or connected interest between those amongst whom it was divided, and the mere circumstance that their separate interests were thus brought into the same vicinity, can give no joint or common character to those interests. The annexation, by acres, shows that so many acres was deemed sufficient to equalize the allotments made to each: and we conceive that the actual contents of the fraction can neither enlarge nor diminish the quantity annexed in this case, because the claim of each to his separate annexation, was distinct from, and independent of the other. If there had been a deficiency, each party entitled to the annexation, must have been satisfied in the order of his claim, and the one, who in point of law was last, must have been thrown upon the company for compensation, or bear the loss.

Independent of this, we are of opinion that those who claim the annexation to sec. 4, of town. 1, range 23, are directly interested in the decision to be made, and ought to be parties to the cause. If the other ground were not sufficient, we should be compelled to dismiss the bill for want of proper parties.

Bill dismissed on the merits.

GWYNNE, ET UX. v. THE CITY OF CINCINNATI.

A widow is not entitled to dower in lands given by her husband for a market house.

This was a petition in chancery for dower, in a market house, in the city of Cincinnati, and was adjourned for decision, here, by the Supreme Court of Hamilton county. The facts were these. John H. Piatt, in his lifetime, in conjunction with other owners of the property in the same square, agreed to open a way, or street through the square, upon which a market house was to be erected. This agreement was carried into effect under an ordinance of the city council, and the market house erected. It stood upon that part of the square given by Piatt, a space for a street remaining open on both sides of it. Piatt, in his lifetime, conveyed the property he owned in the square, and his wife joined him in the conveyance. It did not appear that any conveyance was made of the ground covered by the market house, by either Piatt or wife. Gwynne intermarried with the widow of Piatt, and brought the bill for dower.

Este and *Storer*, for the complainants. *Fox*, contra.

By the COURT.

The street, including the ground in question, was opened, and the market house established, by an agreement with the owners of the ground, and under an ordinance of the city council of Cincinnati. The whole space became subject to the same public regulations, as the grounds originally laid out in streets, and for other public uses and purposes. The claim of dower must stand upon the same principles that it would stand in any case to the ground thus appropriated. The counsel for the complainants, insist that it is a case to be distinguished from that of public grounds condemned for public uses; but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record, the streets become public highways, and the title to grounds set apart for public uses, is vested in the county for the purposes contemplated. The uses thus created, are inconsistent with the exertion of any private right, while the use remains: consequently all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this state, but, so far as we are informed, in other states also. A claim for dower in the streets of a town, or in the public jail, court house, or public offices, would be a novel one, and if sustained, could not be enjoyed without defeating the original purpose and present use of the grant. It cannot be admitted, for the same reason, that it is not admitted to a castle in England. It could yield nothing to the support of the widow, by a direct participation in the possession, without such an interference with the public right, to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible,

The bill must be dismissed.

ROE v. BANK UNITED STATES.

A writ of error may be prosecuted in the name of the casual ejector.

This was a motion to quash a writ of error, issued in the name of the casual sel ejector, after judgment against him by default, in a case where the tenant in possession did not enter into the consent rule. The writ of error was prosecuted by the person claiming the interest as landlord. The motion was made to quash the writ of error, and adjourned here for decision, from the county of Hamilton.

Storer, against the motion. *Fox*, contra.

By the COURT.

We are unable to perceive any reason for the doctrine that a writ of error cannot be sustained in the name of the casual ejector. He is not more a nominal person, nor less interested than the nominal plaintiff or lessee, in whose name the proceedings are conducted. The adverse claimant may be prejudiced in the progress of a suit as much as the plaintiff's lessor, and there seems to be just the same reason for one to be at liberty to use the name of the fictitious party as the other. The doctrine appears to have originated, and indeed to continue in mere *dicta*. We do not know that it has before been agitated in this state, and we feel at liberty to establish the principle as to us appears consonant with justice. The motion is overruled, and the cause remanded for further proceedings.

SMITH v. BING.

Where an obligation is made by principal and surety and the special bail of the principal are compelled to pay the money, the surety are responsible to the special bail for no part of the money.

This was an action assumpsit, for money paid, laid out and expended: plea non assumpsit. It was adjourned from the county of Gallia, and the facts of the case were as follow:

Bing, the defendant, had executed a bond with one Watkins, in fact as security, but that did not appear upon the face of the bond. Suit was brought against Watkins and Bing, in Virginia, and Watkins only arrested, and upon a return that Bing was not found, the suit abated as to him. Smith became appearance bail for Watkins, and was subjected to the payment of a large portion of the debt, and to recover this from Bing was the object of the present suit.—At the trial, Bing offered evidence that he executed the bond only as security for Watkins, without offering any proof that Smith, at the time he became bail for Watkins, had knowledge of this fact. The plaintiff objected to this evidence,

but it was admitted, and a verdict passed for the defendant. The plaintiff moved for a new trial upon the ground that the court erred in admitting the evidence.

Brasee and *Nye*, for plaintiff. *King* and *Vinton*, contra.

By the COURT.

The relation of principle and security, were the obligation itself imports a joint debt, is universally recognized by courts of justice, and parol proof admitted to establish its existence. In this case therefore, the evidence was properly received, unless the fact proved, did not constitute a legal defence.

It is urged for the plaintiff that the execution of the bond created a joint duty, which each obligor was bound to discharge, and the plaintiff having been coerced to discharge it for them has a remedy against each. But the conclusion does not follow the premises. When the plaintiff became special bail for Watkins, it was at the request of Watkins, and for his benefit alone. The defendant had no beneficial interest in it. The undertaking was personal for Watkins, and the party making it, can only look to him for compensation should he be prejudiced. He can acquire through his connection with Watkins, no interest against third persons, which Watkins himself did not possess. Had Watkins been security and Bing the principal, the payment of the debt by Watkins, would give him a legal right to demand it of Bing, and perhaps equity would, in such case, have permitted the bail to succeed to the right of Watkins, and recover of Bing. This would be no more than transferring to the bail the same rights which the principal would have had upon the payment of the money.— But, in the case before us, if Smith is allowed to charge Bing, he acquires upon a separate undertaking for Watkins, rights which Watkins did not possess.— We know of no principle of contract, or doctrine of equity, which would warrant a result of this character.

The case of *Exall v. Partridge*, 8 *D. & E.* 308, cited and relied upon by the plaintiff's counsel, is not analogous to this. There all the parties subjected, were originally liable for the rent as principal lessees, and the sub-contract between themselves could not change the nature of their liabilities to third persons. In this case if the debt had in in its origin been the joint debt of Watkins and Bing, and so existed at the time the bond was given, and by subsequent agreement between themselves, Watkins had assumed the payment of the whole, the cases would have borne some resemblance to each other, though it might not then follow, that the bail of Watkins could subject Bing. But the original liability of Bing, being only that of security, is a material circumstance in respect to the analogy, and places the two cases on totally different grounds. In our opinion, the claim of the plaintiff to subject the defendant is supported by neither precedent nor principle: the motion for a new trial is consequently overruled.

ZERBY v. WILSON.

The confessions of a party cannot be substituted in the place of a subscribing witness to a written agreement.

This was an action of assumpsit, founded upon a written agreement. At the trial before the Supreme Court of Richland county, the plaintiff offered the written agreement in evidence, and to prove its execution, offered parol evidence of the confession of the defendant, that he had executed it. There was a subscribing witness to the agreement, but he was not called, nor his absence accounted for. The court rejected the evidence, and a verdict passed for the defendant. The plaintiff moved for a new trial, on the ground of error in rejecting the testimony, and the decision of the motion was adjourned here.

H. B. Curtis, for plaintiff. *Purdy*, for defendant.

By the COURT.

The plaintiff relied upon a written contract, or lease in writing, not under seal, as the foundation of his action. By his plea, the defendant put the fact of executing, or making the writing, in issue, and the plaintiff to prove it, offered the confessions of the defendant in evidence, without calling the subscribing witness, or accounting for his omission to do it. The court overruled the evidence, and this motion is now made, upon the ground, that in so overruling it, the court erred.

No rule of evidence is better established, than that which requires the subscribing witness to a written instrument, to be produced when its execution is put in issue, and is to be tried. Or if he cannot be produced, to show some legal reason why this is impracticable, as a foundation for the admission of secondary evidence. The plaintiff's counsel rely on the case of *Hall v. Phelps*, 2 *John.* 451, as establishing and sustaining a different doctrine. It is unnecessary to say how far we should be governed by that case as an authority, did we consider it full in point, because we do not so consider it. In a subsequent case, decided in the same court, *Fox v. Reil*, 3 *John.* 477, the same question again came up, and the grounds of the first case, and the extent of the decision, are examined and explained in such manner, as much to weaken its authority.—*Hall v. Phelps*, was a case upon a promissory note: *Fox v. Reil*, was debt upon a bond. In the latter case, the confessions were rejected, and in giving the opinion of the court, Kent, Chief Justice, states distinctly, that he concurred in the decision in *Hall v. Phelps*, upon the ground that it was a case of commercial paper, and that the English rule was exceedingly inconvenient, when applied to that description of written obligation. He says, he recollects no case where it was ever applied to a specialty.

The case before us, is not a specialty, but it is not, nor does it bear any resemblance to commercial paper. It is a contract in relation to the realty: it conferred upon the lessee a qualified interest in land, and the solemnities of

execution are in their nature as important as the execution of a bond for the payment of money, or of any specialty, short of a deed for the conveyance of land. It is a case much more strongly assimilated to that of *Fox v. Reil*, than that of *Hall v. Phelps*, and we are of opinion, that it falls within the rule of the latter case. The evidence was properly rejected, and the motion for a new trial must be overruled.

HEIRS OF LUDLOW *v.* HEIRS OF KIDD, ET AL.

The Bank of the United States cannot remove a cause from a state to the circuit court under the act of Congress of 1789.

The heirs of Ludlow, having upon a bill of review, obtained the reversal of a decree pronounced against them, in favor of Kidd, *ante vol.* 2, 372, proceeded against the other parties who had become interested. The bank of the United States appeared, and presented a petition to remove the cause to the Circuit Court of the United States. The decision of the motion was adjourned here, by the Supreme Court sitting in Hamilton county.

Caswell, for the motion. *Hammond*, against it.

By the COURT.

The charter of the bank, contains no provision authorizing the removal of a cause, upon the application of the bank, from a State to a Circuit Court.—The 12th section of the judicial act of 1789, extends this privilege to parties who are particularly enumerated. The bank is not one of them, and cannot claim what the law does not provide for it.

Besides, the bank is one of many defendants. It has been the settled construction of the 12th section of the law of Congress, of 1789, that the privileged defendant could not extend his privilege to his co-defendant. In this case, there is no pretence that any of the other defendants are entitled to litigate the matter in dispute, in the Federal Court. The motion must be overruled.

STATE OF OHIO *v.* COM. PLEAS OF HAMILTON COUNTY.

This case came before the Court, upon a motion for a rule to show cause why a *mandamus* should not be issued, requiring them to certify to the Circuit Court of the United States, an action of ejectment commenced before them, in which the Bank of the United States had been admitted defendant, instead of the casual ejector. The motion was made by the bank, who had filed the petition, and tendered the security, but the Common Pleas refused to make the order.

Caswell, for the motion. *Hammond*, against it.

By the COURT.

This case involves the same principle decided in the case of *Heirs of Ludlow v. Bank United States, Kidd's heirs and others.* The motion must be overruled.

WILKINS v. PHILIPS.

Where one party to a writ of error is within the saving clause of the statute of limitations, the case is saved as to all the parties.

This was a writ of error to a decree in chancery pronounced by the Court of Common Pleas of Delaware county, on the 10th day of March, 1818. The writ was issued February 17, 1826. The plaintiffs in error, were the same persons, against whom the decree was pronounced, as heirs at law of John Wilkins, deceased, and were numerous. The defendant in error, pleaded three several pleas in bar, which were in substance the same, and presented the fact, that more than five years had elapsed between the rendition of the decree, and the emanation of the writ of error. To each of these pleas, the plaintiffs in error replied, that Catharine Wilkins, one of the plaintiffs in error, at the time of pronouncing the decree, was an infant, and remained an infant under twenty-one years of age, until, and after the time of suing the writ of error. To these replications, the defendant in error demurred, and the plaintiffs joined in demurrer. The question upon the demurrer was adjourned here for decision, from Delaware county.

O. Parish, in support of the demurrer. *Atkinson* and *Leonard*, contra.

By the COURT.

The case of *Marstiller and others, v. M'Lean*, 7 *Wheaton*, 156, was decided upon the authority of the case of *Perry and others, v. Jackson and others*, 4 *Term* 516. In this latter case, Lord Kenyon asserts, that it is the first time the question had been brought up for decision, whether, where the saving clause of the statute of limitations, protected only a part of those joined in the action, all the plaintiffs could claim its protection. It is decided against the protection, but upon grounds by no means satisfactory to us. The case was one of partnership, which we think, was sufficient, of itself, to have warranted the decision made. This is in part relied upon, and the decision is in part, put upon the ground of the grammatical construction of the statute. The Supreme Court of the United States, ground themselves upon this authority. Highly as we respect the opinions of this tribunal, we cannot adopt them, in the construction of our own statutes, where they are at variance with our own judgments. We consider the reasoning of the Courts of Connecticut and Kentucky, cited by the other side, as more consonant to the general advancement of justice. It is our opinion that, if any one of the parties who sue a writ of error, is within the proviso that takes the case out of the statute of limitations, the case is saved for all the parties The demurrer to the replication is overruled, and the cause remanded for further proceedings.

RHODES *v.* LINDLY.

A note payable "to A B or bearer, in good merchantable whiskey, at trade price," cannot be sued by an assignee or bearer in his own name.

This was an action of assumpsit, upon a note of hand given by the defendant, to Hezekiah Rhodes or bearer, promising to pay fifty dollars, at a day subsequent, "in good merchantable whiskey, at trade price." The declaration set forth, in terms, an assignment and delivery of the note to the plaintiff, and claimed to recover as bearer. The defendant demurred, and assigned as a cause of demurrer, that the note was not negotiable. The Court of Common Pleas in Trumbull county, gave judgment for the plaintiff, and the defendant obtained this writ of error, which was adjourned here for final decision.

Webb, for the plaintiff in error.

By the COURT.

At the common law, this paper was not assignable; neither is it assignable under our statute. The plaintiff admits this: but claims to recover, on the ground, that being made payable to *bearer*, any person, who is the actual *bona fide* owner, may maintain the action as *bearer*. Were it a note for money, this position would be a correct one. But that doctrine has never been applied to executory contracts for the delivery of property, or for the performance of any particular act.

The case of *Geddings v. Byington*, decided upon the circuit, at Ashtabula, 2 *Ohio Rep.* 228, is supposed to have settled this doctrine differently. This inference is deduced, not from the point decided, but from some remarks of the Judge in giving the opinion. These were only intended to apply to a note for the payment of money, made payable to a payee or bearer. It was only to that point that the attention of the Court was directed in argument. The negotiable character of the note, was not made a subject of enquiry by either party. The plaintiff in error, claimed a reversal, on the ground, that the right of the original payee did not appear, by the declaration, to have passed to the holder, by assignment, delivery or otherwise, and that ground being considered sufficient for the purpose, the judgment was reversed without further examination. In this case, the direct question is presented, whether such a contract as this, can be so transferred, as to authorize a third person to maintain a suit in his own name. Our unanimous opinion is, that no such right can be transferred. The judgment must be reversed, and judgment be given for the defendant.

RICHARDS *v.* FOULKE.

A justice who took an examination in a criminal prosecution, cannot in a subsequent action for malicious prosecution, testify to the facts sworn to before him.

This cause came before the Court, upon a writ of error to the Court of Common Pleas of Harrison county, and was adjourned for decision here, by the Supreme Court of that county.

The original action, was for a malicious prosecution, and the plaintiff in error, was the plaintiff in the cause. The plea was, not guilty; and at the trial, a bill of exceptions was taken, by the plaintiff, to the opinion of the Court, admitting certain evidence offered by the defendant, which is thus stated. "The plaintiff introduced Samuel Dunlap, Esq., the magistrate who received the complaint of the defendant against the plaintiff, issued his warrant, and recognized the plaintiff, as stated in the declaration, to prove the want of probable cause, who being sworn and examined in chief, the defendant offered to prove by said witness, on his cross examination, the facts testified by other witnesses than the defendant, on the examination by him held as a magistrate, on the complaint of said defendant, upon which, he ordered the plaintiff to be recognized." To this evidence the plaintiff objected: but the Court received it, and signed the bill of exceptions. There was a verdict and judgment for the defendant. To reverse which, the plaintiff brought this writ of error.

Goodenow and *Bostwick*, for plaintiff.

By the COURT.

The evidence admitted in this case, was clearly inadmissible. The witnesses who testified before the justice should have been called to testify to the facts that they narrated before him. His recollections of what they stated upon oath, was of inferior authority to their own statements to the jury. The question to be decided, was, not the guilt or innocence of the plaintiff, but whether there existed a probable cause for the prosecution commenced against him by the defendant. This the jury were required to decide, not upon the evidence given before the justice, but upon the facts of the case, and the defendant's knowledge of these facts. Of these facts they could best judge, by hearing the witnesses themselves. To substitute the relation of the justice, as to their testimony before him, was a violation of the plainest rules of evidence, that the best evidence within the power of the party should be given, and that secondary evidence shall never be admitted, unless it is made manifest, that that which is better cannot be obtained. The judgment must be reversed, and the cause remanded to the Court of Common Pleas for further proceedings.

WRIGHT v. BURCHFIELD.

If jurors separate, after agreeing upon a verdict, without leave, it is no ground for a new trial.

The misbehaviour of jurors, in a civil case, which would render it necessary to disturb the verdict, should be of such character as to evince bad intentions.

This cause was adjourned from Starke county, upon a motion for a new trial, by the defendant, on account of the misbehaviour of the jury. The misconduct complained of was this: The jury were sent out in charge of an officer. They agreed upon a verdict, but the Court, having adjourned, they wrote their verdict and then separated, without leave of the Court. In the afternoon, when the Court met, the jury came in, and gave the written verdict to the clerk, but it was not received or read. They were then called as in other cases, and rendered their verdict from the box. The motion was made for a new trial, on the ground of this misbehaviour.

Goodenow, in support of the motion.

By the COURT.

We think there is no sufficient reason to set aside the verdict in this case.—Nothing is more common than to consent that a jury may separate after they agree upon a verdict, and before it is rendered in court.

The sanction given by the parties and by the courts to this practice, is conclusive that it is not considered, in its nature, dangerous to the right administration of justice. Nothing of a miischievous tendency could be so frequently indulged towards a jury. It has never been thought safe, that jurors should be permitted to converse with strangers, before the verdict was given, or that one or more of the jurors should leave his fellows; or even that the jury should separate before they were agreed; unless some special order was made to that effect. But the mere consent of the parties has usually been received, to warrant such a separation as this. The misbehavior of jurors, in a civil case, which would render it necessary to disturb the verdict, should be of such character as to evidence bad intention, which is not pretended in the case before us. The motion for a new trial is overruled.

HOOVER *v.* MORRIS.

A written memorandum that the plaintiff will allow the defendant credit for a certain debt due to the defendant from a third person is not within the statute of frauds.

This cause was reserved for decision here, in Tuscarawas county. It was a motion on the part of the plaintiff, for a new trial, upon the following case:

At the trial, the defendant offered as a set off, a writing in the following words,—"I agree that Dr. Morris' account against Samuel Miller, amounting to about twenty-six dollars, shall be offset, and applied on my claims against Dr. Morris, now in suit, and that I will pay the same. Jacob Hoover." Upon this paper the defendant claimed the offset of twenty-six dollars. The plaintiff's counsel objected to the admission of the paper in evidence. But the Court overruled the objection, and the jury allowed the credit to the defendant. The plaintiff moved for a new trial, on the ground that "it was a promise to pay the debt of a third person; and that, therefore, the consideration ought to be in writing, as well as the promise."

Goodenow, for the defendant.

By the COURT.

The written memorandum, which was admitted in evidence, and the admission of which the plaintiff complains of as error, stipulates that a certain sum of money due from Miller to Morris, should be charged to the defendant and credited to Morris, in a particular transaction. The memorandum is silent as to the consideration upon which the agreement is founded. Nor is it necessary to the validity of the agreement that the consideration should be specified. It is nothing more than an admission, that a stipulated sum of money is due from the

plaintiff to the defendant, for which the latter shall have credit. It is not an undertaking to pay the debt of Miller, but an acknowledgment of a pre-existing liability to pay it. *Prima facie*, it was obligatory upon the plaintiff, and was therefore competent evidence. In this view of the case, which we deem a correct one, it is not touched by the statute of frauds. Motion for new trial overruled.

LESSEE OF DEVACHT v. NEWSAM.

In ejectment, the plaintiff may recover on a possessory title alone.

A tenant or those claiming under him cannot controvert the title of the landlord, but may show that it is determined.

This was a case adjourned, from Gallia county, upon a motion for a new trial, in an action of ejectment, where the jury found a verdict for the defendant.

At the trial the plaintiff gave in evidence, that he rented the lot in question, No. 59, in the town of Gallipolis, to one Cooper, by parol, in the year 1822, who took possession under the lease, and afterwards rented the same lot to the defendant, and put him in possession, under a like parol agreement to perform the conditions of the lease from Devacht the plaintiff's lessor.

The defendant then proved to the jury that in the year 1796, one Quieffe owned the lot, No. 59, and died in possession of it. That one Maguet, administrator of Quieffe, took possession upon his demise, and afterwards made an agreement with Devacht to exchange the possession of the lot, No. 59, with Devacht, for a lot owned by him, each to pay the taxes on his own lot, and the change of possession, to remain as long as it should be found mutually convenient. The possession of the respective lots was changed by this agreement until the death of Maguet, when Devacht enquired of the son and heir of Maguet, whether he was willing to continue the change of possession, who assented to it.

Newsam, on the expiration of Cooper's lease of 1822, refused to restore possession to Devacht, who prosecuted against him a forcible detainer, in which the jury found for the defendant. After this Devacht applied to Maguet to pay rent for the lot No. 59, which he refused to do, when Devacht told him, he should rent his own lot, occupied by Maguet, to some other person, and in May, 1824, did accordingly make a written lease to one Workman who took possession under it. Maguet, after the conversation with Devacht respecting rent made a lease to Newsam for lot No. 59, upon which he claimed to maintain his possession. To the admission of the testimony establishing these facts, the plaintiff's counsel objected at the trial, and the objection was overruled.

The plaintiff then offered evidence to prove that Quieffe was never the legal owner of the lot No. 59, and the plaintiff had been in peaceable possession for twenty-five years before the possession was divested out of him. But upon the suggestion of the defendant's counsel, the court rejected the evidence, and charged the jury that if they should find from the evidence that the agreement between Maguet and Devacht had been put an end to by the parties, and the possession restored to Maguet before the suit was commenced, the plaintiff could not recover. The verdict was for the defendant, and the motion for a new trial was

founded on the allegations that the court erred in receiving the evidence offered by the defendant, and in rejecting that offered by the plaintiff respecting the original title of Quieffe and the possession by himself, and that the verdict was against evidence.

Nye, in support of the motion. *Vinton*, contra.

By the COURT.

Both the plaintiff and defendant, in this case, claim upon a possessory title: neither of them pretend to be invested with the original right. The lessor of the plaintiff being in possession, made a lease of the lot for one year, and the defendant came into possession under the lease. The plaintiff therefore insists upon the benefit of the rule, that a tenant or person coming in under him shall not be permitted to dispute the title of the landlord or set up any objection to the right under which he entered. The defendant answers this position by claiming the benefit of another rule, equally well established, and forming an exception to the general operation of the first, which is, that where the landlord's title expires subsequent to the demise, the tenant may show that fact to defeat an ejectment by the landlord.

The plaintiff's counsel do not controvert the existence of the latter rule, but they insist that the evidence does not bring the case within it; because no right or possession is shown to have been in Maguet. We think otherwise. Maguet was in undisputed possession; Devacht contracted with him for that possession, and entered under him. The possession of Devacht was therefore the possession of Maguet, and after his death Devacht recognized the right of possession to have been cast upon his son, and again agreed with him to continue it. Parol evidence was properly admissible to explain the possession of Devacht, when that possession was not connected with any written title; As the possession of Devacht originated in parol, and was terminated by parol, no other evidence could exist to establish the one fact or the other. We conceive that there was no error in admitting the evidence.

The next error complained of is the rejection of the testimony offered by the plaintiff by way of rebuttal. Supposing the fact proved that Devacht entered under Maguet and held possession under him, proof that Quieffe had no title, could not be admitted, upon the very rule urged by the plaintiff himself. It would be to permit Devacht who held under Maguet to dispute Maguet's title. If the fact of Devacht holding under Maguet was not proven, then Quieffe's title was immaterial, because the plaintiff would be entitled to recover in virtue of his own possession. That part of the evidence opposed was properly rejected. With respect to the evidence offered of twenty-five years possession, that too was immaterial unless intended to establish a possession adverse to that of Maguet, which was not pretended, consequently it was rightly overruled.

It is alleged that as to the fact of the expiration of the estate or interest of Devacht, before the suit brought, the jury found against evidence.

The suit was commenced early in the year 1825. Nearly twelve months before this time, Devacht called upon Maguet to pay rent for the lot which he possessed as an equivalent for Devacht's possession of the lot No. 59, and notified him that if he did not agree so to pay rent that Devacht would rent his own

lot to some other person. Accordingly in May, 1824, he resumed the possession of his own lot, thus, by his own act, putting an end to the agreement for the exchange of possession. The law would not permit him in such a case as this, to violate his part of the agreement, and at the same time enforce it against the other party. He cannot be allowed to allege that such was his intention. The jury rightfully inferred that the agreement and the right under it was at an end. The motion for a new trial is overruled, and judgment given for the defendant.

BANK U. STATES v. SCHULTZ.

A second injunction in the same cause, upon new matter, cannot be allowed, if the matter subsisted when the first bill was filed.

A court of equity will not turn a plaintiff in an execution at law upon a fund manifestly not liable to satisfy his judgment.

The complainant cannot travel out of his bill to make a ground of relief.

This was an original bill filed in the Supreme Court of Hamilton county, and is between the same parties, and relates to the same transaction, and had the same object with that reported in vol. 2, 471.

In Oct. 1820, the defendant, Schultz, obtained a judgment against the Bank of Cincinnati, which operated as a lien upon the real estate of the Bank, from the 28th day of August, of that year. Execution was immediately sued out and levied upon real estate, which was valued at a sum sufficient to satisfy the debt, at two-thirds of the valuation. Executions to effect a sale were prosecuted with unremitting dilligence, to August, 1824, when the first valuation having been set aside and a new one made, the property levied on was sold for a small sum, leaving a large balance due upon the judgment. An *alias fi. fa.* was then sued out and levied upon property, sold and conveyed to the Bank of the U. States, in October, 1820. The Bank filed a bill and obtained an injunction to stay the sale, upon the ground that the property was not subject to the lien of the judgment. This injunction being dissolved and the bill dismissed upon a final hearing, Schultz was again proceeding to sell the property upon execution, when the Bank filed this bill and obtained a second injunction on the ground of a new equity, which was founded on an allegation, that subsequent to the sale and conveyance of the property in question to the complainants, the Cincinnati Bank owned lot 155, which ought to be first subjected to the payment of Schultz's judgment. The defendant answered and alleged, that the lot 155, had been so disposed of that it could not now be subjected to his judgment, and denying the equity of the bill. A statement of facts was agreed between the parties, from which it appeared that the lot 155, has been taken in execution as the property of the Bank of Cincinnati, upon a judgment rendered against it in August, 1821, and sold in virtue of the levy in October, 1822. The statement embraced several other pieces of property, but it is not material to the point decided to enumerate them. The cause was adjourned here for decision, from Hamilton county.

Caswell and *Fox*, for complainants. *Hammond* and *Storer*, for defendants.

By the COURT.

When a second bill is filed to obtain a second injunction, in relation to the same transactions, and between the same parties, it is not enough to allege new ground of equity, not suggested in the former bill. It must be shown that the new matter alleged, did not exist at the time the first bill was filed, or, that if it existed, it was unknown to the complainants. If this rule were not enforced, there might be no end to litigation. A bill might be filed and an injunction obtained, in succession, upon separate and distinct grounds, every one of which ought to have been included in the first bill. It is unnecessary to point out the inconvenience, vexation and injustice of such a practice.

In this case, the new ground of equity stated in the bill, existed when the first bill was filed, and existed in such a manner as to make it the duty of the complainants to be conversant with it. No allegation is made that they were ignorant of it. For this reason the new bill ought not to be sustained.

Again—The lot, No. 155, which it is charged, the respondent must first resort to, it appears has been seized in execution, and legally sold under a subsequent judgment. As Schultz did not set aside his levy under the act of 1822, he has, according to the decisions of this court, lost his lien against a subsequent judgment creditor. Were we to turn him round to pursue lot No. 155, it would be with a perfect knowledge that his pursuit would be unavailing.—This, a court of equity would never do. The property from which it is sought to remove the levy, is liable to the satisfaction of the judgment; that to which we are asked to transfer it is not. On this ground the prayer of the bill must be refused.

In the agreed case, facts are stated as to other property not specified in the bill. The respondent's counsel object to an investigation with respect to any other property than that stated in the bill. We are of opinion that this objection is well taken. It is, therefore, unnecessary to enquire into any thing further than the rights of the parties as to lot 155. The injunction is dissolved and the bill dismissed.

STATE OF OHIO *v.* HIBBARD.

This case was before the court, upon appeal from the Common Pleas of Athens county. It was an action of debt, to recover the tax assessed upon the defendant, as a practising attorney and counsellor at law. No argument was adduced on either side, and judgment was given for the plaintiff *sub silentio*.

STATE OF OHIO *v.* PROUDFIT.

This case was the same as the above, except that the defendant was a physician. There was no argument, and the judgment was for the plaintiff.

ROSS v. GILMORE.

Variance.

This was a writ of *sci. fa.* to revive a judgment rendered in the Supreme Court of Fayette county, in favor of the plaintiff, against the defendant. The defendant pleaded in bar, that after the rendition of the judgment, he prosecuted a suit in chancery, in the Common Pleas of Fayette county, and obtained a final decree, enjoining all further proceedings upon the judgment, concluding with a profert of the record. The plaintiff replied, that there was no such record, and upon this issue the cause was submitted, and adjournd here for decision.

The transcript of the record produced, in support of the plea, set out a bill in chancery, prosecuted by John Gilmore, against Thomas Ross, R. Curtain and A. Dillon. It charged that in August, 1799, the complainant executed to Dillon, three notes for money, payable, one 6th August, 1800: one 6th August, 1801: one 6th August, 1802: that after these bonds became due, the defendant Curtain, and the defendant Ross, had them in possession, and that suits were commenced upon them, and judgments recovered in Ross county, Ohio; that one of the notes had been paid, before the judgments were had, but that complainant could not prove the payment: that the complainant paid off said judgments, but that afterwards, 12th October, 1810, the defendant Ross, took advantage of complainant's indigence, and induced him to give a due bill for 71 dollars and 20 cents, with his son as security, for an alleged balance due on the judgments in Ross county: that suit was brought upon this due bill, and judgment recovered in Fayette county. The bill then alleged, that the judgment was obtained upon the due bill, because complainant could not prove that it was given for a balance due on the judgments in Ross county: made the usual suggestions, that relief could only be had in equity, prayed that each of the defendants might answer specially, to certain matters propounded, embracing the various allegations of the bill, as they related to each defendant. Relief was then prayed, in these terms:

"Your orator prays your honors enjoin said *proceedings* at law, until your orator can be heard on the equity side of this court, and on a final hearing, to enjoin said *proceedings* perpetually, free your orator from the judgment now in favor of said Ross, grant to your orator the writs of subpœna and injunction, for the purpose of obtaining the relief herein prayed for, and such further and complete relief, in the premises, as will meet your orator's case and the money paid said Ross, unless he show a right to it, order to be paid back to your orator, with" &c.

There was no appearance ever entered, or pleadings or answer put in. The decree was *pro confesso*, and in these words:

"It is therefore ordered and adjudged by the court, that the plaintiff's said bill, be taken as confessed, and the prayer thereof decreed accordingly, and that *said defendants*, be perpetually enjoined from further proceedings against said judgment at law."

Douglass, for plaintiff. *Bond*, for defendant.

By the COURT.

We are of opinion that the plea is not supported by the transcript of the proceedings, adduced to sustain it. The bill is very inartificially drawn. It sets out several judgments obtained in different counties, and in behalf of different parties. It prays that "*proceedings*" may be enjoined, without confining the prayer of any of these proceedings, specifically, or to any of the parties.—The decree is, that "*said defendants* be perpetually enjoined from further proceedings on *said judgment.*" We cannot say what defendant, or what judgment is referred to: consequently, we cannot say that the judgment, upon which the *sci. fa.* in this case, is founded, is the one. It might, with equal propriety, upon the terms of the decree, be referred to any one of them. The judgment upon this plea, must therefore be given for the plaintiff.

URBANNA BANK v. BALDWIN.

A judgment confessed during the return term upon process issued on the first day of the term, is a lien from the commencement of the term.

This case came before the court, upon a motion made by purchasers under Baldwin, to set aside a levy upon real estate, conveyed by Baldwin to them, and levied on, as liable to the judgment of the plaintiff. It came up on an agreed case, before the court of Common Pleas, of Clarke county, and was brought by appeal, to the Supreme Court, and adjourned here for decison. The facts were as follow:

Baldwin was indebted to C. and E. B. Cavalier, and they had commenced suit against him, to August term, 1820. After the commencement of the November term, Baldwin compromised with the Cavaliers, and conveyed them the estate in question, in payment of the debt, and their suit was dismissed. The deed bore date the 21st day of November, 1820. The term commenced upon the 20th of that month, on which day, the Urbanna bank commenced suit against Baldwin and others, by summons returnable forthwith. This summons was returned served, as to Baldwin and one other defendant, on the 25th, and not served as to the others. On the same day, declaration was filed and judgment confessed by Baldwin and the other party summoned. The suit was prosecuted to judgment against the other defendants, and various process issued, the particulars of which it is not material to state. On the 4th September, 1826, a *fi. fa. et lev. fa.* was levied upon the real property conveyed to the Cavaliers, and the motion was made to set aside the levy, by the Cavaliers, as parties interested.

Alexander, in support of the motion. *Anthony*, against it.

By the COURT.

The case may be a hard one, but the law is clear in favor of the plaintiff's lien. The suit was pending on the first day of the term, and when that is the

case, the judgment relates back to that day, no matter on what day of the term it was confessed. There can be no reason for the court to restrain the words of the statute in this case, that would not apply to every other. It does not follow, that the lien must extend to the first day of the term, if no process was then pending. It is sufficient, however, to decide that case, when it comes up for decision.

The motion must be overruled.

RICHARDS v. FOULKS.

In an action for malicious prosecution the declaration contained two counts, one alledged the commission of the offence on the day of 1824; the other on or about the 24th, of May, 1824. The affidavit containing the charge and stating the offence to have been committed on or about the 16th of May 1824, is admissible.

This was a writ of error. The original action between the same parties, was for a malicious prosecution. The declaration contained two counts. The one set forth that the defendant had falsely and maliciously, without probable cause, made complaint against the plaintiff, before a magistrate, and procured him to be arrested upon a charge of felony. The other set forth the same grievance, varied so as to allege, that the defendant made the complaint, and instituted the prosecution against the plaintiff and two others.

At the trial, the plaintiff offered in evidence, a certified copy of the affidavit, made by the defendant, at the commencement of the prosecution. In this affidavit, it was stated, that the alleged offence was committed "*on or about the sixteenth of May*, 1824." The first count of the declaration stated the charge to have been, that the offence was committed *on the—day—of in the year* 1824." The second count, that it was committed "on or about the 20th day of May, in the year 1824, last aforesaid." The court rejected the evidence, and the plaintiff excepted.

The plaintiff then examined one of the grand jurors, who found the bill of indictment, and after his examination in chief, the defendant offered to prove by him, on cross examination, what facts were testified before the grand jury, as well by other witnesses as by the defendant, in relation to the facts charged, and also, in relation to the character of one of the witnesses examined by the grand jury. To this evidence, the plaintiff objected, but it was admitted by the court, and an exception allowed. A verdict and judgment was given for the defendant, for the reversal of which this writ of error was brought and adjourned from the Supreme Court of Harrison county, for decision at Columbus.

Goodenow and *Bostwick*, for plaintiff in error.

By the COURT.

The declaration did not profess to set out in so many words the original affidavit made by the defendant. It only stated the substance in general terms. This was sufficient for all the purposes of justice. The particular day upon which it was alleged that the offence was committed, was not material for the

defendant's defence, and the paper offered in evidence comported substantially with the allegation in the declaration. It was not a case of technical nicety, but of substantial accordance. The paper ought to have been received in evidence, and it was error to reject it.

The other testimony was improperly received, as has been already decided in a case between the same parties. The judgment is reversed and the cause remanded to the court of Common Pleas for further proceedings.

POTTS *v.* RIDER.

An action of covenant will lie upon a lease in which the plaintiff describes himself as acting as agent, but covenants as in his own right, where the defendant enters and enjoys the premises.

This was an action of covenant adjourned here for decision from the county of Columbiana. The question arose upon the construction of the covenant, and was presented by a general demurrer to the plaintiff's declaration.

In describing the parties to the covenaat, at its commencement, these words were employed. "By and between Samuel Potts, *acting as agent for Nathan Harper & Co.*, of the one part, and John Rider on the other part, witnesseth." Throughout the whole covenant, all the stipulations were personal to Samuel Potts, and on his part personal to the defendant; and Samuel Potts executed the covenant in his own individual character.

The declaration alleged that the defendant had entered into the premises leased, and enjoyed them, and claimed to recover for the occupation.

The defendant demurred.

Coffin, in support of the demurrer. *Collin*, contra.

By the COURT.

There has been some diversity of opinion amongst us upon the question presented in this case: but a majority of the judges have come to the conclusion that the action may be sustained by the present plaintiff.

The defendant contracted personally with the plaintiff to do certain things, and accepted the personal agreement of the plaintiff as an equivalent. Of this contract the defendant has had the benefit. He entered and enjoyed the leased premises, and there is no justice in permitting him now to say that the contract was void. The recitation in the covenant that the plaintiff acted in the character of an agent, does not of necessity control the other parts of the agreement. The fact is inconsistent with the personal covenants between the parties, which assume for Potts a different character; and it were safer to consider the words in reference to the agency as surplussage, than to give them the effect of rendering void the contract. By adopting this construction, effect is given to every thing respecting which the parties contracted, and injury is done to no one. The demurrer is overruled, judgment entered for the plaintiff, and the cause remanded for further proceedings.

WATERS v. LEMON, ET AL.

Where a plaintiff appeals to the Supreme Court and recovers no more than in the Common Pleas, two judgments are entered; one for the plaintiff for the amount recovered, and the other for the defendant for costs on the appeal.

This was an action of debt, upon an appeal bond, given in a case where the complainant in chancery appealed from a decree dissolving an injunction. The Court of Common Pleas, of Brown county, gave judgment for the amount of the penalty, the plaintiff to have execution for ten dollars sixty-eight cents, the damages found by the court, and the costs. From this judgment the plaintiff appealed to the Supreme Court, and the case was reserved for decision here. In the case originally appealed, and in which the bond was given, the Supreme Court pronounced no other decree than that the appellant should pay the costs, which amounted to the sum, for which the Court of Common Pleas ordered execution to issue. This court decided in the present case, as the court of Common Pleas had decided; so that the appellant did not recover a greater sum here, than in the Common Pleas. The question was as to the judgment to be entered. And the court decided, that under the statute there must be two judgments; one, that the plaintiff recover of the defendant, the amount of debt and costs adjudged to him in the Common Pleas; the other, that the defendant recover of the plaintiff the costs upon the appeal, to be taxed in the Supreme Court, and two judgments were entered accordingly.

Collins and *Brush* for the appellees.

BURNET v. THE CORPORATION OF CINCINNATI.

An injunction may be allowed to stay a sale for taxes on city lots, assessed by the council of Cincinnati.

This case was adjourned for decision here by the Supreme Court, sitting in Hamilton county. It was a bill in chancery for an injunction to enjoin the sale, by the marshal of the city, of certain real estate, owned and possessed by the complainant, for a city assessment of a tax, to improve the streets.

The bill set out the title and possession of the complainant, and the nature and character of the assessment made by the city council, alleging that it had not been made in accordance with the charter and ordinances, but was illegal and void, and prayed an injunction to stay the sale, until the matters should be heard and adjudged of in equity. The injunction was allowed in the Common Pleas. The defendants demurred to the bill, which was dismissed *pro forma*, and brought to the Supreme Court by the complainant on appeal.

Storer, in support of the demurrer.

V. Worthington and *N. Wright*, contra.

By the COURT.

The bill, in this case, represents, that under a proceeding altogether illegal and void, but nevertheless under legal color, the defendants are about to sell a part of the real estate of the complainant, and prays the interference of the court, in the exercise of its chancery powers, to restrain them by injunction. The demurrer, and the argument in support of it, admit the truth of the allegations, and deny that this court can aid the party. If this be a tenable position, it results, that public officers, having authority to operate upon the property of their fellow citizens, must be permitted to proceed, however illegal, unjust or oppressive their conduct may be. It follows, too, that the property of a citizen may be exposed to sale, under circumstances that render it impossible for the parties to know whether a title can pass or not. Thus involving great hazard to all concerned, and perplexing the titles to real estate, for no beneficial purpose to any person whatever. If such be the rule of the law, we must so administer it. But nothing short of a series of repeated adjudications, would be sufficient to demonstrate that the law is so settled.

The authorities which have been referred to, do not lead to the conclusion insisted upon by the defendants. They all proceed upon the principle, that in very many cases, this court may interpose to prevent mischief, and to protect individuals in the enjoyment of their rights. Where aid has been decreed, it has always arisen from the circumstances of the particular case. And the confusion and seeming contradictions in the cases, are occasioned by the dicta of the judges, and not by any confliction in the principle decided.

In regard to real estate, it is well established, that chancery may interpose by injunction, to prevent what is considered as destruction. But destruction in the sense used, does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value. In a city, the sale of part of a lot for assessments, may often be very destructive to the interest of the proprietor, though no title passed by such sale. A cloud would be cast upon the title, which litigation only could remove, and until removed, the property might be valueless to the owner, subject too, during the period of litigation, to additional assessments and embarrassments.

When an assessment of a tax is made, and its legality disputed, the uncertainty attendant upon the final result, puts the estate upon which it operates in imminent jeopardy. If no title pass by a sale, the party has remedy at law. He can defend his possession: but if the title do pass, he is remediless altogether. A mode, therefore, of deciding the question before any right is affected, is safest for all parties. It was upon this ground, the court entertained jurisdiction in the case of *The Bank of the United States v. Shultz*, from which, in principle, this case is not distinguishable.

The defendants concede that if a sale were made, this bill might be sustained under our statute. To sustain it now, is clearly within its letter. A claim is set up, not to enter in and enjoy under title, but to create a title under which an-

other may so enter. Setting up a claim to dispose of the title, is "*setting up a claim thereto,*" which are the terms employed in the statute. The case is clearly within the mischief to be remedied, as it is within the words of the law. The power to interpose, might be safely grounded upon the statute alone. But we think it stands upon the general principles that govern the court, with respect to injuries to which no other adequate remedy can be extended.

Consequences that might ensue, in respect to the collection of revenue, furnish no reason why the court should not interpose. The application for an injunction, is addressed to the sound discretion of the judge who allows it, and there is no reason to apprehend that it will be allowed upon trivial grounds. The case of *The Bank United States, v. Osborn and others*, 9 *Wheat.* 738, is a case directly in point, of enjoining the collection of a tax. That case was most earnestly litigated, and yet the counsel who resisted the injunction, did not attempt to maintain, that the jurisdiction could not be sustained, on the ground that it interfered with the collection of the revenue.

We overrule the demurrer, and send back the cause, at the suggestion of the defendants, for further proceedings.

HEIRS OF SULLIVANT *v.* THE COM. OF FRANKLIN CO.

A deed to County Commissioners for a lot on which to erect a jail, though defective as a convey ance, is good as a licence to enter and possess for the purposes specified.

This cause was adjourned here for decision, from the Supreme Court of the county of Franklin, on a motion for a new trial.

In the month of April, 1808, Lucas Sullivant and wife conveyed in lot, No. 25, in the town of Franklinton, to the commissioners of the county, for the time being, by name, and to their successors in office. The writing intended for a deed contained, besides the operative terms of conveyance, this proviso: "Provided, however, and this conveyance is made on this express condition and no other, that the jail or prison house, when built shall be built on said lot, No. 25." The jail was erected upon the lot, and continued there and was used as a jail when this suit was brought. But in 1826, the Legislature removed the seat of justice from Franklinton to Columbus, and, in the summer of 1827, a new jail was erected there. The deed from Sullivant and wife, though signed and sealed and acknowledged before a justice of the peace, was not attested by any subscribing witnesses. The heirs of Sullivant brought the ejectment, and on the trial, the cause being submitted to the court, a *pro forma* judgment was entered for the defendants, and the motion made by the plaintiff, for a new trial, upon a case agreed.

Leonard, for plaintiff. *Ewing*, contra.

Byt the COURT.

It is unnecessary to decide upon the various points of learning discussed by the counsel, in this case. A license to enter and occupy lands may be given in writing, without any of the formalities of a deed of conveyance. A possession

taken under a license from the party is a good defence in an action of ejectment. The writing purporting to be a deed, in this case, authorized by an inevitable implication, the commissioners, for the time being, to enter and erect the jail. It also authorizes the commissioners and their successors to hold and use the lot in question, while occupied as a jail. It has been so used and occupied. No attempt has been made to use it for any other purpose, up to the commencement of this suit. No right of entry, for a departure from the license has accrued to the heirs of Sullivant. The motion for a new trial must be overruled.

JOHNSON v. STEDMAN.

Proof of general reputation, and acting as constable, is competent evidence.

This cause came up on a motion for a new trial, adjourned here from the county of Meigs. It was an action of trespass for taking and converting goods. The defendant pleaded, that he was a constable, and that an execution was put into his hands to be levied, by virtue of which he took the goods in question, as the property of the defendant, in execution, the now plaintiff. Upon this plea, issue was joined. At the trial, the defendant, to establish the fact that he was a constable, offered parol evidence, and no other, that he acted and officiated as constable of the township, at the time the levy was made. The plaintiff objected to the admission of this evidence, but the court received it, and a verdict passed for the defendant. A motion was made for a new trial, upon the ground that improper testimony was admitted; maintaining that the actual appointment in writing, and other requisites, should be produced in evidence.

Nye, for plaintiff. *H. Stanbery*, contra.

Opinion of the Court by Judge HITCHCOCK.

The question now presented to the court, was considered at the last term in the case of *Barret v. Reed*, (2 *Ohio Rep.* 409,) but, inasmuch as there was some difference of opinion, and that case was decided upon a different point, was left undetermined.

But one serious objection is made to the admissibility of the evidence, received on the trial of the issue in this case. It is this: that if such testimony is received, the rule, "that the best evidence which the nature of the thing admits, and is capable of, must always be given," will be violated.

This rule is founded in wisdom, and consistent with obvious reason, and ought not to be departed from upon light or trivial grounds. Its true meaning is, that no such evidence shall be introduced, as, in the nature of things, supposes greater or better evidence in the power of the party producing it. If there be such greater or better evidence, and the party fails or refuses to produce it, a presumption arises that if produced it would operate against him. Such being the presumption the lesser evidence shall be excluded.

This rule however is general, and not without exceptions. Not only copies of public records and proceedings, but under peculiar circumstances, copies of private instruments of writing are given in evidence. It is a common practice to receive parol evidence of the contents of a deed, or other instruments of wri-

ting, where the deed or instrument itself is lost, or is in the possession of the opposite party, if notice has first been given to produce it. These instances are but few, among the many which might be named, to show that the general rule is not so unbending that courts will not dispense with a strict adherence to its letter, in order to arrive at substantial justice.

Constables in Ohio, are township officers, although in some few instances, they may serve process in any part of the county. They are elected by the people at their annual township elections, and any person elected and refusing to serve, is subject to a penalty. Within ten days after the election, the individual elected is to take an oath of office, which oath may be administered by the township clerk, or any other person having general authority to administer oaths. In addition to this, before entering on the duties of his office he must give a bond with one or more sureties, to be approved of by the trustees of the township, for a sum not exceeding two thousand dollars, payable to the state of Ohio, conditioned for the faithful discharge of those duties. The election, the giving of bonds, the approval of the sureties, the administration of the oath of office, ought to be noted by the township clerk in his book of record. This would undoubtedly be done, should the clerk and every other officer concerned, do their duty. The constable, however, receives no certificate or other written document, to prove his official character and qualifications. The best evidence "the nature of the thing admits of," to prove this official character, would undoubtedly be the township records, provided these records had been properly kept. Experience, however, teaches us, that in many parts of the country, these records are so loosely kept, that we are from necessity, compelled to resort to evidence of a secondary nature.

Under these circumstances, does either policy, justice, or law, dictate that in cases like the present, we should strictly adhere to the rule "that the best evidence which the nature of the thing admits, and is capable of, shall be given?"

So far as it respects third persons, there is no doubt on the subject. Where such persons are interested, it is believed to be the practice of all courts, to permit them to prove that an individual who claims to be a public officer, is such *de facto*, without requiring them to prove that he is such *de jure*. The great danger which will result from adopting the same rule of evidence, where the officer himself is a party, is not readily conceived. There is a difference, it is true, between the two cases. Every man who undertakes to exercise the duties of an office, ought to know whether he is legally qualified, while this knowledge cannot be supposed to extend to others. This difference of circumstances, however, is not so great as to require a difference in the rule of evidence.

In deciding this question it may not be improper to turn our attention, for a moment to the nature of those suits, in which constables or other ministerial officers are parties. In some cases the principal question is, whether the party is, or is not, an officer *de jure*. But such cases are not of frequent occurrence. Were it otherwise, it might be expedient to adopt a different rule of evidence. It is believed, however, that in ninety-nine cases in a hundred, this is a question of secondary importance. The object more generally is, to determine the right of property, the legality of process, the validity of an arrest, or something of a similar nature. In most of these cases, to require of the party claiming to be a public officer, proof that he had complied with every requisite of the law, to

qualify him to act, would be attended with unreasonable inconvenience to him, without any commensurate advantage to his opponent.

In the case before the court, the *real* question in dispute, was, not whether Stedham was a constable, but whether the house which was the subject matter of litigation, was the property of Johnson, the plaintiff, or the property of Hollingsworth. Under these circumstances, the evidence was properly received. It was sufficient for the purposes of this case to prove that Stedham was a constable, *de facto*.

The principle here decided is supported by high authority. In the case of *Potter v. Luther*, (3 *John.* 431) the Supreme Court of the state of New York say, "it is a general rule to admit proof by reputation, that a person acts as a general public officer or deputy." In *Berryman v. Wise*, (4 *Term* 336) the Court of King's Bench, in England, decided, that in the case of all peace officers, justices of the peace, constables, &c. it was sufficient to prove that they acted in these characters, without producing their appointment. This to be sure was the expression of Justice Buller, but from an examination of the case, I am satisfied it was the opinion of the whole court. So in *Esp. Digest*, 783, it is laid down that cases similar to the one under consideration, are exceptions to the general rule "that the best evidence, &c. must always he given."

Upon the whole, we are of opinion, that the motion for a new trial must be overruled, and judgment entered on the verdict.

TRUSTEES OF JEFFERSON TP. *v.* TRUSTEES OF LETART TP.

A minor obtains a settlement, in the township where his father was legally settled, and can by no act of his own whilst a minor, obtain a legal settlement elsewhere.

This was an action of debt under the statute, in which a verdict was given for the plaintiffs, and a motion made for a new trial, on the following state of facts.

In September, 1823, the parents of the pauper resided and had a legal residence in Lebanon township, in Meigs county. At this time the father died, and the mother, with her children went to reside with her father in Lebanon township, where she remained until July, 1824, when she married again and removed with her children, except the pauper, and with her husband into Virginia.

In April, 1824, the pauper being about 17 years of age, left his mother, and went into Letart township where he remained working for his support until October, 1825, when he left that township. In December, 1826, he came into Jefferson township, Adams county, where he was taken sick, and became a township charge. Upon his recovery in March, 1827, he was sent by the trustees of Jefferson township, to Letart township, and a demand made for the expenses incurred in taking charge of him, and his removal. The jury gave a verdict for the plaintiffs, and the motion was made for new trial, the decision of which was adjourned by the Supreme Court sitting in Meigs county.

Nye, in support of the motion.

Opinion of the court by Judge HITCHCOCK.

This action was brought by the plaintiffs to recover the amount of monies expended in the support and removal of Edmund Jackson, a pauper, charged to have been legally settled in the township of Letart. It is different from the case of *Wayne v. Stock Township*, decided at the present term, in one particular. In that case the pauper is supposed to have been of full age; in this he is admitted to have been an infant under the age of twenty-one years. Whether this can make any difference, or whether such an individual can by his own residence, merely, gain a legal settlement, is the point to be determined.

The 4th section of the act for the relief of the "poor," speaks of "any person or persons" &c. in general terms without reference to age or sex. Indented servants, legally brought into the state, and married women are expressly provided for, but nothing is said about infants or children. It is perhaps a misfortune that the statute is not more explicit. Still we apprehend that there is no difficulty in arriving at the intention of the Legislature. We have no doubt it was understood and intended that the legal settlement of children should follow that of their parents. It is not believed that by the word "person," as used in this section of the statue, any other person was intended than such as have arrived at the years of discretion. Such as, so far as age is concerned, were capable in law of contracting and being contracted with. Such as have a legal right to remove from place to place, and were free from the superintending control and guardianship of others.

To prove the correctness of this construction of the statute, nothing more is necessary than a consideration of the absurdity to which we should be held by a different decision. If the legal settlement of the child does not follow that of the parent, it might and frequently would so happen that the legal settlement of the child would be in one place, while that of the parent would be in another. And a case might be presented where there are many children, that the settlement of the parent and each one of the children would be in separate and distinct townships. Will it be for a moment believed, that such is the policy or meaning of the law? If such is the law, children of the same family in their tender years, may be separated from their natural guardian, the parent, and from each other, and a statute which is entitled, "an act for the relief of the poor," may be made to operate most oppressively upon that class of the community.

An examination of the other parts of the same 4th section of the act, will tend to fortify the construction of the court, "any person or persons residing one year in any township in this state without being warned," &c. Now the warning pre-supposes that the person warned has a legal power or right to leave the township. But what right has an infant to remove? Does the law authorize such an individual to abandon or leave his father? The parent is bound both by the laws of nature and the laws of the land, to provide for and take care of his infant child, and in return is entitled to the services and control of the child. This rightis so perfect, that unless, in extraordinary cases, it cannot be interfered with. Let it not be said that this is one of those extraordinary cases. The legislature have not in this section of law undertaken to interfere as it respects

the relative duties and rights of parent and child. It must be remembered that the overseers of the poor are not to wait until a person becomes chargeable before they warn him to depart. The apprehension that he may at some future, period become chargeable, is sufficient to justify, nay to require of them the performance of this duty. If then the warning pre-supposes a right in the individual concerned to remove from the township, it follows of course, that an infant cannot with propriety be warned, because the infant has no legal right to remove, where such removal would separate him from or place him beyond the reach of his natural guardian. Inasmuch, then, as the overseers of the poor cannot with propriety warn an infant to depart the township, it would be unjust to say that the infant by residence, merely, shall gain a legal settlement.

In the case before the court, the pauper, it is true, at the time he went to reside in the to township of Letart, had no father living. This however cannot vary the case. Samuel Jackson, the father, was last legally settled in the township of Lebanon. In virtue of the settlement, Edmund Jackson, the son, was legally settled in the same place. By no length of residence in any other township, previous to arriving at the age of twenty-one, could he gain any other legal settlement. Having been reduced to poverty during his infancy, the township of Lebanon was chargeable with his support.

Under this construction of the statute, the question reserved must be decided in favor of the defendants, and in pursuance of the terms of the agreed case, the verdict of the jury must be set aside and judgment entered against the plaintiffs.

COMMISSIONER OF INSOLVENTS *v.* WAY, ET AL.

A bond of an Insolvent debtor is valid, though it does not in terms follow the statute.

When the commissioner of Insolvents fails to advertise, and the party appears at a subsequent term in good faith, and obtains a discharge, the condition of the bond is saved; though a specified term for his appearance be named in the condition.

It is the duty of the commissioner to cause the proper advertisement to be made.

This was an action of debt upon a bond given by the defendant Way, and the other defendants, to the Commissioner of Insolvents. The condition inserted, was, that Way, who was the applicant for the benefit of the insolvent act, should "appear at the next May term, of the court of Common Pleas, of Belmont county, and not depart without leave." The declaration set out the bond and the condition, and alleged as a breach, that the defendant, Way, did not appear at the next May term, &c. The defendants demurred to the declaration, and also pleaded five special pleas, which were put to issue also, on demurrers, replications and rejoinders, which it is not material to state. The object of all the pleas, was to present for decision this fact, that the commissioner of insolvents, did not advertise the application to be made at the May term, but did at a subsequent term, when the defendant, Way, appeared, complied with the requisitions of the law, and obtained the certificate under it. The case was adjourned here for decision from Belmont county.

Genin and *Kennon*, for the defendants.

Goodenow and *Hubbard*, contra.

Opinion of the court, by Judge HITCHCOCK.

The bond which is the foundation of this action, was given pursuant to the requisitions of the "act for the relief of insolvent debtors," passed the 23d of February, 1824. The 8th section of that act relates to those, who are arrested or are in custody, upon mesne or final process. Of such persons a bond is required, the condition of which is specific in the law, and the bond now in suit, was intended to be in compliance with this requisition. The condition does not literally conform to the statute, inasmuch, as the statute requires it to be that the insolvent shall appear at the term of the court, at which the application for the benefit of the act may be made, whereas, the condition annexed to this bond, provides for the appearance of the defendant, Way, at a specific term of the court of Common Pleas, viz: "the next May term, and that he shall not depart the court without leave." This variance, however, is not so great as to invalidate the bond. It is not material. The "next May term" of the court, was the term at which the application for the benefit of the insolvent act, should regularly have been made. In fact I incline to the opinion, that the specific term of the court, at which the insolvent is to appear, should in such cases be named. Without determining this point, however, it is sufficient, for the purposes of the present case, to say, that by the execution of this bond, the insolvent, substantially complied, so far, with the law.

Whenever the legislature undertake to act upon a particular subject, and in the course of legislation, deem it necessary to require the execution of a bond, specifying the condition to be annexed to such bond, it is impossible correctly to settle the rights of parties, originating in or growing out of such bond, unless we look to the whole law, and ascertain specifically, the intention of the law-making power. In fact, the bond becomes a part of the law, and must be construed in connexion with it. The object of the legislature in requiring a bond from the insolvent debtor, was to secure the party at whose suit the insolvent should be arrested, against any fraud which might be practised by a defendant, in attempting to release himself from arrest, under the pretence of taking the benefit of this act. If the insolvent acts with good faith, and either obtains a certificate of discharge, or surrenders himself a prisoner to the proper officers, the bond, to use the words of the statute, "is cancelled." In other words, the insolvent by obtaining a certificate of discharge, or by surrendering himself to the proper officer, substantially complies with the condition of his bond, and discharges himself, and his securities from liability.

Way, the defendant, did not appear at the May term of the court of Common Pleas, as he was bound to do by the letter of the condition of his bond. If the bond stood alone, and was to be considered without reference to the statute, under which it was executed, here was a breach of the condition; the bond itself become absolute, and the liability of the defendants is fixed. Under the impression that this is the legal effect of the non-appearance of Way, at that term of the court, this suit was commenced.

The defendants however, undertake to excuse themselves, and after demurring to the declaration, have filed several pleas in bar. The fourth of these pleas is the one to which the attention of the court has been principally turned. To this plea there is a general demurrer, and the question is as to its sufficiency. This plea alleges in the first place, that the commissioner of insolvents, did not, previous to the May term, 1826, at which the defendant, Way, was bound to appear, give the necessary notice required by law, of his intention to apply for the benefit of the insolvent act. It is to be observed that the notice not having been given, the application could not be made, of course the appearance would have been nugatory. If under these circumstances Way and his securities are made liable, it is not so much on account of any neglect of his, as on account of the neglect of a public officer. It is the duty of the commissioner of insolvents, to give notice of the *intention to make application* for the benefit of the act. I am aware that an attempt has been made in argument, to show that this is the duty of the insolvent; but the court think otherwise. The 4th section of the act provides that this shall be done by the commissioner, and there is no other provision of the law expressly interfering with this. To subject third persons to a penalty in consequence of the neglect of a public officer, is not consistent with justice; still we do not undertake to say, that had the plea stopped here, it would have been sufficient.

The plea however alleges, that subsequent to this, to wit: after the May term, and before the September term, 1826, notice was given that the defendant, Way, would make his application at the September term, and that Way did appear at that term and obtained a certificate of discharge, &c. From this it appears that the defendant Way, so soon as he could consistently with the law, make application for the benefit of the insolvent act, did appear and obtain a certificate of discharge. Why then should he or his securities be made liable on this bond? Neither he nor they have been guilty of any neglect. Every thing, the security of which the law, by requiring the bond, intended to provide for, has been performed. The insolvent for aught that appears has acted with perfect good faith, the certificate has been obtained, and the bond itself is "*cancelled*," or satisfied.

The plea therefore is sufficient, and judgment must be rendered accordingly.

LESSEE OF ALLEN v. J. R. PARISH.

Copies of deeds, made by disinterested persons, of good character and under circumstances that creats no suspicion of fraud, may be received in evidence where the orginal is lost.

Evidence relating to different points of fact may be given to the jury *en masse*.

The provision, in the Act of Congress of April 7, 1798, for the relief of the Refugees, "that no claim under this law, shall be assignable, until after report made to Congress, as aforesaid, and until the said lands be granted to the persons entitled to the benefit of this act," does not prejudice a conveyance made before a patent is granted.

The act of Congress of Feb. 18, 1801, operated *per se* as a grant to the Refugees.

The act of 1795, establishing a recorder's office, intended to enforce the recording of deeds executed within the territory under the penalty of being adjudged void against a subsequent purchaser without notice.

A deed, if properly executed is good between the parties, though not recorded.

Where a grantor, having an equitable interest, conveys with general warranty, and a patent for the same land is afterwards granted to him, the patent enures to the benefit of his grantee and the grantor and those claiming under him are estopped to claim the land.

This case was adjourned for decision here by the Supreme Court of Franklin county. It was a motion for a new trial, made by the plaintiff, in an action of ejectment, where a verdict had been taken without argument, for the purpose of considering and deciding various points of evidence arising in the cause.

The motion was argued at bar, by

Hammond and *Wilcox*, for the plaintiff. *Baldwin* and *Ewing*, for the defendant.

Judge BURNETT's opinion.

The application for a new trial in this case, has been argued with great ability by the counsel on both sides. The view they have taken of the question, naturally leads to an examination of the following propositions.

1st. Did the court err in admitting the defendant's testimony, in the form in which it was offered and received?

2d. Was the testimony submitted to the jury, sufficient to prove the legal execution of the deed for the premises in question, by John Allen to his son George?

3d. If the execution of the deed be proved, did it pass the legal estate in the premises, to the grantee?

1st. The testimony objected to, and admitted by the court, consisted of a copy of a deed from John Allen, to G. W. Allen, found on the notarial book of R. C. Shannon, dated in October, 1801, attested by two witnesses, acknowledged before the said Shannon, as a justice of the peace, and purporting to convey all the right and title of the grantor, in the premises in question: also, a deed of mortgage from G. W. Allen, to Langdon, under whom the defendant claims, for the same premises. Also, sundry depositions going to show, among other things, that at the time the copy of the deed bears date, Shannon was a notary and a justice of the peace, in the state of New-Hampshire, where the transaction took place: that the entry on his notarial book, is in his own hand writing: that he was a man of good character, and that he died a short time previous to the commencement of the present suit. That the persons whose names are found on the notarial copy, as subscribing witnesses, were living in the neigh-

borhood, at the date of the deed: were men of good character, and were both dead before this suit was commenced: that J. Allen, the grantor, had declared that he had executed such a deed to his son: that G. W. Allen, and some of of his co-heirs, had made similar declarations, as to the deed: that about the time the deed appears to have been executed, to G. W. Allen, John Allen was at Portsmouth, endeavoring to obtain credit for his son, G. W. Allen, and spoke of pledging his Ohio lands for that purpose. That R. C. Shannon resided, and kept his office at Portsmouth: that afterwards, in September, 1805, George W. Allen, mortgaged the same lands to Langdon, and acknowledged the deed before the same R. C. Shannon, at Portsmouth, which original mortgage was produced, duly authenticated, but at the time of its date, John Allen was deceased.

The first objection taken to this evidence, by the defendant's counsel, is, that it was offered and admitted in mass, when it ought to have been dissected, and each part offered separately, to support the particular point to which it might apply, in the following order: 1st, to prove the existence: 2d, the execution: 3d, the loss: and 4th, the contents of the deed.

Although this is the natural order, in which the parts of the general proposition arise, and are usually established, yet I have never seen a rule which required such a careful separation of the evidence, as is here contended for. In many instances, it would be impossible to observe such a rule. Evidence relating to two or more points, may be so blended in the same transaction, as to render a separation impossible; nor do I discover any inconvenience that could arise from the submission of the whole evidence at once. Such a course does not interfere with the rule of evidence, that the points must all be made out or sustained in their natural order, because, when the evidence is spread before the jury, their attention may be directed to the different points, in succession, for the purpose of ascertaining whether they are all sustained or not; and if not, the defendant will be entitled to the same benefit, as if the testimony had been offered by parcels, and there had been a failure in supporting one or more of the points. It is not pretended that the jury were misdirected, or that they were not informed that it was necessary for the defendant to prove the existence, the execution, and the loss of the deed, to their satisfaction, before he could prove its contents. The fact is, that the case was put to the jury, on that ground, and they must have found the evidence sufficient to sustain all the points.

The next inquiry under this branch of the case, is, was the testimony, or any part of it, improperly admitted, for the purpose for which it was offered. And here it may be premised, that the deed, in question, did not belong to Langdon, the mortgagee, or to the defendant who claims under him. It was of right retained by Allen, and has been under his control, and subject to his disposal. It was his duty to have it recorded in the proper office, and the omission to do so, is not chargeable to the defendant. It may be the result of a determination to suppress the deed, for the purpose of defeating the mortgage, and of saving the property for the benefit of the Allen family. It is also a circumstance worthy of notice, that the claim now set up by Allen's heirs, has been suffered to sleep more than twenty years, and until the officer before whom the acknowledgment appears to have been taken, and by whom the entry was made on the notarial book, and the subscribing witnesses to the deed, are all dead. The defendant is, therefore, reduced to the necessity of proving his case in the best manner he

can, and may avail himself of any advantage, to which the rules of evidence founded on general necessity, entitle him.

The parts of the testimony objected to by the plaintiff are, 1st. The declarations of John Allen. 2nd. The declarations of G. W. Allen and his co-heirs: and 3d. The copy of the deed on the notarial book.

First—As to the parol declarations of John Allen. I am aware that parol evidence is not sufficient to create a title to real estate, or to transfer a title; but it is sometimes proper and necessary to strengthen, or explain transactions, from which, either the existence, or the transfer of title may be inferred, and for that purpose it was offered in the present case. The depositions disclose a variety of facts, which it is not necessary to recapitulate, but which, taken in connection, were relied upon by the defendant, as evidence of the execution of a deed for the land in question, by John Allen, to G. W. Allen. It was to strengthen this evidence, that proof was offered of the declarations of John Allen, that he did execute the deed, at the time, for the purpose, and in the manner alleged. These parol declarations of Allen, are not considered as having affected his title in any way—they were not offered for that purpose, but to confirm and give greater certainty to the facts, from which the actual execution and delivery of the deed was inferred. In *Watson's lessee, v. Criss*, (11 *John.* 437) which was cited to show that this evidence was improperly admitted, the plaintiff had made out a perfect title, under John Richardson. The defendant produced a deed from William Richardson, to himself, and then offered to prove that John Richardson had told his mother, that he had conveyed the premises to his father, William Richardson, which was overruled, because there was no evidence of the existence of a deed, nor was there any thing from which it could be inferred. Now from the reason given, this case may be considered an exception to a general rule; for as the declarations were rejected, because there was no evidence tending to show the execution of a deed, it seems to follow, that where there is such evidence, the declarations are to be admitted. In the case of *White's lessee, v. Cary*, (16 *John.* 304) the declarations of the defendant were liable to the same objection. It was not pretended that she had conveyed her estate in the premises—there was no evidence to that effect. The declarations she had made, could not be considered as amounting to any thing more than an expression of her own opinion, as to the legal operation of the deed under which she held. But the court put the case entirely on the ground of the statute to prevent frauds and perjuries, and rejected the evidence, because it was *in defiance of that statute*, so that the ground of the decision, has no bearing on the case in hand, because the deed in question, and the declarations in relation to it, were alleged to have been made in 1801, and the statute against frauds and perjuries, was enacted for the first time, in the state of Ohio, in 1810. In the case of *Jackson, v. Bard*, (4 *John. Rep.* 230) cited by defendant, it was ruled that the declarations of a person, while in possession, as to his title, are good evidence against himself, and all persons claiming title under him.

In *Young's lessee, v. Vradenbergh*, (1 *John. Rep.* 159) it was decided that the declarations of one, who had given a deed with warranty, though not admissible to sustain a title derived from such deed, might be given in evidence, to show in what character, or with what intent, such person entered and held possession.

In *Waring, v. Warren*, (1 *John. Rep.* 340) the court decided that the decla-

rations of a tenant, were never received in evidence, to support his title, though they might be received against it.

In *Fearn, v. Taylor*, (3 *Bibb*. 363) it was alleged, that the deed from the patentee to the appellants, had been lodged in the Clerk's office, to be recorded, and that it had been burnt with other papers in the office. The facts being sworn to, the court admitted the acknowledgment of the grantor, as evidence of the execution of the deed. The cases cited from 4 *Binney*, relate to the effect of the recital in the deed of mortgage, from G. W. Allen, and sufficiently show that his heirs, so far as they claim under the title of their father, as one of the heirs of John Allen, are estopped by the recital, but I do not see that they have any bearing on the title of the lessor of the plaintiff, who claims as a co-heir with G. W. Allen, and cannot be affected by his admissions. But I shall not pursue the authorities cited to this point any further. It appears to me, that these declarations of John Allen, were a part of the *res gestæ*—that they are connected with the transactions which led to the execution of the deed, and which are relied on, in part, as evidence of its existence.

I am inclined to consider the evidence of the declarations of G. W. Allen, and of the other co-heirs, as improperly received to prove the existence of the deed; but admitting it to be so, there was sufficient proof without it, and we do not grant new trials because improper testimony has been admitted, when it was merely cumulative, and when the jury must have found the fact, as they have done, without it. The object of new trials, is substantial justice, and if that has been obtained, it is not common to set aside verdicts on objections *stricti juris*.

The copy of the deed, on the notarial book of Shannon, would not be legal evidence, by itself. The notary had no authority to record the deed, neither could a copy from his book, or the book itself, be received in evidence of its existence, or its contents, unaccompanied with other proof; but after a sufficient foundation had been laid, from which to infer its existence, the copy on the notarial book, accompanied by such facts as were proved in connection with it, might be admitted as auxiliary evidence.

The doctrine laid down in 1 *Starkie on Evidence*, 46, 47, which was cited by the plaintiff, does not sustain his objection. That writer gives it as a general rule, that mere oral assertions, or a written entry, by an individual, that a particular fact is true, cannot be received in evidence: but he cites a number of cases, where entries possess an intrinsic credit, and are admissible in evidence; as for example, where the entry is in itself a fact, and is part of the *res gestæ*, the objection ceases. He confines the objection to entries, having no tendency to illustrate the question, except as mere abstract statements, detached from any particular fact in dispute, and depending for their effect, entirely on the credit of the person who makes them. But he lays it down, expressly, that if any importance can be attached to an entry, as a circumstance which is part of the transaction itself, deriving credit from other circumstances, independent of the writer, it is admissible. This was the fact, in the case before us. The notarial entry was not offered as a mere abstract statement, or fact, depending for its credit on the character of Shannon, but as a circumstance having an intrinsic relation to other facts and circumstances cotemporaneous, pointing to the execution of the deed, and relied on by the defendant, as making out a case from which the actual execution of it might be ascertained. It was one of several

facts in the transaction, which the defendant was attempting to prove. The acknowledgment of the deed was necessary to its completion. It was proper to acknowledge it before Shannon, as a justice of the peace, and he being a notary at the time, it was natural, though not necessary, to record it among his notarial proceedings. These circumstances, with many others stated in the depositions, form the transaction, which the defendant was attempting to establish.

The authorities cited to this point are numerous, and seem to confirm the inference I have drawn, from the doctrine laid down by *Starkie*. I will refer to one of them only. *Warren, v. Greenville* (2 *Stra.* 1129, where it was held that an entry on an attorney's debt book, after his death, was admitted as a circumstance, material to show a surrender, there being no reason to believe it was made for the purpose of evidence; and it will be found, on examination, that the reasons given by the court, apply with much force to the case in hand.

2d. The second general proposition, is: was the evidence sufficient to prove the legal execution of the deed, by the elder Allen? It will be recollected here, that the fact of the execution has been found by the jury, on evidence, which in the opinion of the court, justified that finding. Our present enquiry therefore, is, whether the manner of the execution was legal, and whether the matter in the deed was sufficient to pass the title, on the supposition, that the grantor had power to make it? This leads us to examine the law of the North-Western Territory, relating to the sale and conveyance of real estate, by which it will appear, that there has never been a time, either before, or since the establishment of the state government, when we had not a law of some kind, prescribing the mode of such sales and conveyances.

The ordinance of Congress, of July, 1787, for the government of the North-Western Territory, was the first legal enactment, touching the right of property, in the territory, after it had been ceded by the commonwealth of Virginia. It authorized real estate to be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, and attested by two witnesses. It also required the deed to be acknowledged, or proved and recorded within one year after proper magistrates, courts and registers, should be appointed for that purpose. And it was declared to be the law of the territory, till altered by the Governor and Judges, who were vested with legislative powers.

The provision relating to the acknowledgment, proof, and recording of deeds, evidently required further legislation; accordingly, we find, that in June, 1795, the Governor and Judges adopted a law from the Pennsylvania code, establishing a Recorder's office. The 8th section of that law, re-enacts so much of the ordinance on this subject, as was suspended by the proviso. It is silent, as to the signing, sealing, delivery, and number of witnesses. It requires the acknowledgement, or proof, to be made before a judge of the General Court, or of the Court of Common Pleas, and the deed to be recorded in twelve months, and if not so recorded, it renders the deed void against any subsequent purchaser, for valuable consideration, who shall have his deed first recorded. The law of 1798, made no alteration in the former laws, except that of extending the power of taking acknowledgments, to justices of the peace. Neither of these enactments contained any provision expressly relating to deeds executed out of the territory.

In 1802, it was represented to the General Assembly of the territory, by the

Governor of the State of Connecticut, that many deeds and conveyances of land, lying within the territory, had been executed in that state, under an impression that their jurisdiction extended over the district commonly called the Connecticut Reserve. On this application a law was passed in January, 1802, declaring in substance, that all deeds and conveyances of land lying within the territory, which had been executed in any other state, or territory, and acknowledged, or proved according to the laws and usages of such state, or territory, "should be effectual and valid in law, to all intents and purposes, as though the same acknowledgements had been taken, or proof of execution made, within this territory, and in pursuance to the acts and laws thereof, and such deeds so acknowledged, or proved as aforesaid may be admitted to be recorded," &c. The section contains a proviso, "that such deeds and conveyances, so executed, acknowledged or proven, be recorded within two years after the passage of this act." It also contains a provision in favor of such deeds, within the purview of the act, as had been recorded prior to that time.

The deed in question purports to have been executed in the state of New-Hampshire, in October, 1801, having the signature and seal of the grantor, the attestation of two witnesses, and an acknowledgment before a justice of the peace, which was in strict conformity with the laws and usages of that state, as well as with the ordinance and laws of the territory. But it is contended that in as much as it was not recorded in the county where the land was situate, within two years, it is void under the proviso above stated. This inference cannot be correct, for neither the act of 1802, nor the one to which it is a supplement, contains any other penalty, for an omission to record a deed, than that it should be void, as to subsequent purchasers, in certain cases. Such an omission does not affect the deed as between the parties themselves. If it has been executed and acknowledged, or proved, in the mode prescribed, it is valid and obligatory on the grantor, whether recorded or not. If it had not been recorded within the time prescribed, the title of the grantor might be defeated, by a subsequent *bona fide* purchaser, for valuable consideration, but not by the grantor or his heirs.

The evident intention of the proviso, was to give an extended time for recording deeds, made out of the territory, and to save those which had been executed a year or more, without being recorded, from the legal consequences of such an omission; but there is nothing in the proviso from which it can be inferred, that the legislature intended to make the omission more penal, in this case, than in others. The law of 1795 required all deeds to be recorded in one year. The law of 1802, required deeds executed within the territory, to be recorded in six months, whilst it gave two years in favor of those that had been executed out of the territory; but it did not, in either case, change the consequences of an omission to record, within the stipulated time.

The proviso has no relation to the validity of the deed, as between the parties. It relates, altogether, to the acknowledgment, and it enables the grantee, by obtaining the acknowledgment, to make the deed effectual, as well against subsequent purchasers, as against the grantor.

The conclusion therefore is, that this deed, having been executed, and acknowledged in New Hampshire, according to the laws of that state, is valid, under the act of 1802, and that the omission to record it, does not affect its va-

lidity, as to the grantor, or his heirs. Another objection to the deed is, that it does not profess to convey the title of the land, and that it can be considered only as a contract to convey. The deed itself furnishes a sufficient answer to the objection. It describes the property, represents truly the situation of it as to the title of the grantor, and then grants, bargains and sells to the grantee, his heirs and assigns forever, all the right and title, which the grantor then had, or might thereafter have in the premises; and contains the usual covenants of general warranty. It was the opinion of the court, at the trial, that this was an executed and not an executory contract, and that it conveyed the whole right of the grantor, and I have not discovered any thing in the argument, on this motion to show that opinion erroneous.

The objection seems to be predicated chiefly on the fact, that the deed appears on its face, to have been executed before the issuing of the patent. If it should be admitted, that a patent was necessary to vest such a title as could be conveyed by deed, and that for the want of a patent, the fee did not pass at the time the deed was delivered, still the objection would not be tenable. Within a few months after the execution of this deed, a patent issued to the grantor, the legal effect of which, was to perfect the title of G. W. Allen, the grantee. By the uniform course of decision, both English and American, the grantor was estopped by his deed, from setting up a title under the patent, neither could his heirs, nor any person claiming under him, question the title of the grantee, on the ground, that the patent was subsequent in date to the deed. If the heirs were at liberty to recover the land, because the deed from their ancestor preceded his patent, they would become liable, in consequence of such recovery, to an action on the covenants in the deed, and it is to prevent this circuity of action, that they are rebutted by the deed and warranty of their ancestor.

In the case of *Bond's Lessee v. Swearengin* (1 *Ohio Rep.* 402) this court prevented the heirs of Massie, to whom a patent had issued, after the death of their ancestor, but founded on his equitable title, from questioning the title of one, to whom the ancestor had conveyed in his life, by deed with general warranty, on the principle that they took by descent, and were in the same situation, as if the patent had issued to their ancestor, in his life.

This doctrine of estoppel and rebutter, is too well settled to be questioned, nor has the learning and research of the plaintiff's counsel been able to convince me, that it is not strictly applicable to the deed in question.

Third. The last general proposition, is, whether the deed, admitting that its execution has been sufficiently proved, has passed a legal title to the grantee.

The origin of Allen's claim to the land in question, is found in the resolutions of Congress, of April 23d, 1783, and 13th April, 1785, for remunerating the refugees from Canada and Nova Scotia, by grants of land.

In conformity with those resolutions, Congress passed an act on the 7th April, 1798, designating the persons who should be entitled to remuneration, and providing for ascertaining the quantity of land, to which each individual was entitled, to be reported to Congress. The act contains a proviso in these words, "that no claim under this law shall be assignable, until after the report made to Congress, as aforesaid, and until the said lands be granted to the persons entitled to the benefit of this act."

On the 13th February, 1801, Congress passed an act regulating the grants of land appropriated for the refugees from Canada and Nova Scotia. The first section of this act, directs the surveyor general to cause certain fractional townships, which are particularly described, to be subdivided, and declares that they are set apart and reserved for the purpose of satisfying the claim above referred to. The second section directs the manner in which the locations shall be made and provides for granting the patents. The third section fixes the quantity of land to which each person shall be entitled, and declares, that John Allen shall be entitled to twenty-two hundred and forty acres. The deed to G. W. Allen, it will be recollected, was made in October, 1801, and the patent to John Allen, issued in April, 1802. On this statement it is contended that the proviso in the act of 1793, prohibited the deed under which the defendant claims, and rendered it inoperative.

In giving a construction to a prohibitory statute, it is always safe to look at the mischief against which it was intended to guard. Congress had seen the sacrifices made by the officers and soldiers of the revolution, in disposing of their land warrants, before an appropriation was made to satisfy them, and while their value was wholly unknown. When the act of 1793, was passed, the refugee claims were in a similar but more uncertain state. It was not known what quantity of land they would receive; when they would receive it; where it would be situated, or what might be its value. In this state of things, the proviso was a prudent restraint, intended to operate until the uncertainty should be removed. The words of the proviso are, "that no claim under the law, shall be assignable, until after report made, and until the lands be granted."

The claim given by that law, was indefinite and uncertain as to the persons who might be entitled to it, as well as to the quantity, quality, situation, and value of the land; and while the claim rested on that law, Allen did not attempt to dispose of it. But afterwards the report required by the proviso, was made to Congress, and the law of 1801 was passed, which ascertained who were entitled to land; what number of acres each individual should receive and in what particular townships it was located. That act also set apart the land and directed the issuing of the patents. When the law of 1798 passed, the claim of no individual had been recognized. No person had any right but that of petitioning for a gratuity, and the proviso operated on claims of that character; but before the date of Allen's deed, the claim had been reduced to a right of ascertained value, the object of the proviso had been accomplished, and the land might be considered as having been granted within the meaning of the act of 1798, so far at least, as to remove the restriction in the proviso.

For certain purposes the law considers that as done, which ought to be done. A grant, and a patent, which is the evidence of a grant, are not the same thing, though both may be necessary to form a perfect title. A patent is not always necessary to perfect a grant. Government may dispose of their property, and pass the fee by statute, and although a patent was directed in this case, Congress had done the last act, on their part, to perfect the title. No further legislation was necessary for that purpose. It is true, that an individual cannot grant real estate, or pass a title without the formalities of a deed.—The cases, however, are not analagous, nor does it follow as a consequence, that government has not made a grant, because they have directed a patent which has not issued. I am aware, that at the date of Allen's deed, the lot

which was to regulate the location, and assign to each his land in severalty, had not been drawn; but this could not prevent the statute from operating as a grant. The lottery, and the right of choice that ensued, was in the nature of a partition, prescribed by Congress, to be made after the passage of the act, and could not diminish or increase the interest granted by the act. Should it be admitted, that the townships reserved, contained more land than had been granted to these refugees, still the nature of the grant is not charged, as the title to the residue remained in government, and continued to be theirs, after the grantees had made their selections in pursuance of the statute, and had obtained their lands in severalty. The amount of these objections is, that government had not granted all the land contained in the appropriated townships, and that the grantees had not ascertained the metes and bounds of their several tracts. But it is no objection to a conveyance, that the premises are held in common with government, or with individuals, the whole interest of the grantor being conveyed.

If it had been the intention of Congress, to require more to be done, than was effected by the act of 1801, before the assignment could be legally made, they would most probably, have used the term patent, instead of grant, in the proviso which creates the restriction.

Another view that may be taken of this question, is, that the prohibition operated on the property, and not on the person, and may be assimilated to common law provisions of the same character: as for example, by the common law, a *chose* in action cannot be assigned, yet such an assignment, so far from being attended with a forfeiture, is protected in equity, and in some cases, at common law. The act affixes no disability to the person, nor does it provide any penalty, or forfeiture, in case of an assignment. The words of the proviso, are, "no claim under this act, shall be assignable, until," &c. The restriction, therefore, is on the claim, or the thing claimed, and cannot be viewed in the light of a disability, attaching to the person, as infancy, coverture, or the like, nor does this conveyance stand on the ground of an act prohibited as being against public policy or good morals. There is not any thing in the transaction itself, or in its consequences, that can affect either. It is rather like a restriction in a contract, which may be insisted on, or abandoned by the party who has imposed it. As if a person covenants to sell and convey a tract of land, provided, the covenantee does not assign it. If the covenantee does assign, the covenantor may refuse to convey; but if he does not insist on the condition, but conveys the land, the conveyance will be good. (2 *Sarg. Roll*, 507.) So here if the conveyance was made, before the restriction was removed, government might have taken advantage of it; but they did not choose to do so. They waived the restriction, by perfecting the title, and have left the common law to do its office, as between the patentee, and his grantee.

By the deed to G. W. Allen, no forfeiture was incurred, and if there had been, it would not have altered the case, for the forfeiture must have been to the government, and could not affect their right to convey, or impair the validity of their patent. But if neither of these grounds be tenable, the defendant must be protected by the doctrine of estoppel. The lessor of the plaintiff, as one of the heirs of John Allen, is bound by his covenant of general warranty, in the

deed to G. W. Allen, under whom the defendant claims. Privies in blood, as the heir, are bound by and may take advantage of estoppel. (*Co. Lit.* 352,)

There is nothing, I apprehend, in the form or the matter of this deed, that can prevent the operation of this doctrine. The grantor professes to convey all his right and title to a specific quantity of land, and covenants that he will warrant and forever defend the title. Now if that instrument did not covey a title, either in consequence of the restriction in the proviso, or otherwise, the grantor was liable on his covenant, and so must be his heirs. If the lessor of the plaintiff then, be permitted to recover in this action, he will, in consequence of that recovery, be liable to an action on the covenants in the deed, under which the defendant holds; and so a circuity of action must be produced; but wherever that consequence would follow a recovery, by an heir against the deed and covenant of his ancestor, the heir is rebutted.

Motion overruled.

JUDGE SHERMAN'S *opinion.*

The questions made upon the motion for a new trial in this case are, whether the evidence offered of the existence, execution and contents of the alleged deed, from John Allen to G. W. Allen, was admissible, and if so, whether the said deed was duly executed, and if it were, whether it was not void as against a statute of the United States.

The first objection taken to the testimony, is, that it was offered and received in mass. It is, unquestionably, the better course, where a deed is alleged to be lost, or destroyed, to give evidence in the first place, of its execution, as this comes in lieu of its production, when in possession of the party: and regularly to pursue the chain of testimony, by giving secondary proof of its due execution, loss and contents. But these facts are not so intimately blended together, and have such a mutual relation to, and dependence upon each other, that it is difficult, and many times impossible to separate the proof, one part from the other.

The existence of a deed not produced, can rarely be shown without some evidence of its execution and contents: and it is sufficient if it appear by direct proof, or fair inference, that a deed, under which the party claims, once had an existence, was duly executed, and has been lost or destroyed, to let in proof of its contents. It is not to be expected in every case, nor is it necessary, that direct testimony should be given to establish each link in the chain of proofs peculiarly applicable to it, as a distinct and independent fact. When, as in this case, depositions have to be taken in a distant country, it is usual and proper that the witness should state, in one deposition, his knowledge of the existence, execution, loss and contents of the deed. Courts have presumed the existence of an ancient deed, from the fact of there being a copy, and of course such copy must have been the only evidence of the existence, execution, and contents. (*Phil. Ev.* 401—3.) In this case the deed, under which the defendant claimed, was executed (if it ever existed) in 1801, in New Hampshire. The grantor, grantee, witnesses, and justice of the peace, who took the acknowledgment, being all deceased, that direct proof of the execution of the deed, which in ordinary cases might be required, cannot, in this, be expected. There must be proof of the existence and execution of the deed; but if that proof is blended with, and of

fered at the same time, and in connexion with evidence of the contents of the deed, the testimony is not thereby rendered inadmissible.

The next question is, as to the competency of the declaration of John Allen, the grantor, to prove the existence and execution of the deed to G. W. Allen. The plaintiff claims as one of the heirs at law of John Allen, and insists that he died seized of an estate of inheritance, in the premises in controversy, which descended to her and her co-heirs; she, therefore, stands in the same situation as John Allen would, had he brought an ejectment during his life; she claims under, as well as through him, and any testimony competent against him, is equally so against her. That the declarations of John Allen would have been good against him, to show the existence of a deed alleged to be lost, is, I think, clear, both upon principle and authority. It is the declaration of a party, made directly against his own interest, and the truth of which he must have known. The declarations of deceased tenants, have been frequently admitted, to show that they held as tenants, and the recitals in a deed, against the party making the recital, and those claiming under him. These declarations were made about the time the deed was executed, and repeated subsequently; nor did the grantor, John Allen, after the excution of the lost deed, exercise any acts of ownership over the premises, but spoke of having conveyed his Ohio lands to his son. If upon no other ground, yet upon the principle of necessity, these declarations would, in this case, be admissible, to show the existence and execution of the lost deed; for, in considering this question, we must assume the deed to be lost. The subscribing witnesses and justice of the peace, who took the acknowledgment, are shown to be dead, and the deed lost, so as almost to preclude the possibility of proving their hand writing to the lost instrument, or that of the grantor. The deed being executed in a distant country, and never placed on record in Ohio, shows that it must have been difficult, if not impossible, to find any person, who had ever seen it, and was acquainted with the hand writing of any of the persons who subscribed it. Under such circumstances, the declarations of the grantor, as to the existence of a deed, divesting him of his estate in the premises, was the best evidence the nature of the case admitted of, and could have reasonably been expected to be in the power of the party. The case of *Jackson ex dem White, v. Ann Cary*, (16 *John.* 304) cited and relied on by the plaintiff's counsel, bears no analogy to this case. The plaintiff there offered the parol declarations of the defendant, that she had no other interest or title in the lands in dispute, than what was given by a certain deed, and that, by the legal construction of that deed, she supposed she had a life estate in the premises, and nothing more. The court say that the declarations of the defendant respecting the title, avail nothing; that parol proof has never been admitted to destroy or take away title, and that the defendant cannot be divested of what appears to be a complete legal title by her parol declarations. Here the declarations of John Allen were not offered either for the purpose of divesting him of a legal title, or showing that he never had title, or the extent of his interest in the premises, by his construction of a certain deed, but to prove a fact, the existence and execution of a deed, alleged to be lost, which it is competent to show, by parol proof. The distinction is obvious between giving to the parol declarations of a party, that he has no title to lands, the effect to divest him of what appears to be a complete legal title, and, admitting the declarations of the party as evidence of a fact, which, from its very nature, must be shown, by the testimony of witnesses.

The declarations of the co-heirs of the lessor of the plaintiff, were permitted to go to the jury as corroborative proof of the existence of the deed from John Allen to G. W. Allen. After hearing the argument, (for none was submitted at the trial,) and looking into authorities applicable to this point, in the cause, the court entertain doubts of the competency of this testimony; but from the view they have taken, it is not necessary to determine the question of its admissibility. These declarations were received, as corroborating other proofs of the existence and execution of the deed. They were not, nor could be used, for any other purpose, as they did not tend, in the least, to establish any other fact in dispute between the parties. They were in the strictest sense, cumulative to the other proofs, showing the existence of the deed, from John Allen to his son, and upon a careful revision of that testimony, the court are of opinion, that the jury would not only have been warranted, but must have felt themselves bound to find the existence and execution of that deed, although the declarations had not been received in evidence. The testimony going to prove those facts, was, unexplained and uncontradicted, full and ample, independent of the declaration of the co-heirs. The granting of a new trial, rests in the sound discretion of the court, and generally, when incompetent testimony has been received, the court will award a new trial, if the verdict be against the party objecting to such testimony. This rule, like all general rules, is subject to some exceptions, as when the matter in dispute is of trifling amount. So in this case, when the trial has been had before a full court, and the testimony objected to, if improperly admitted, is merely cumulative, and without it, the jury would, in the opinion of the court, have been bound to find the fact as they did, a new trial will not be granted. It would answer no valuable purpose, as upon the second trial, the finding of the jury must be the same, as respects the existence and execution of the deed, from J. Allen to G. W. Allen, although the court should then be of opinion, that the declaration of the co-heirs of the lessor of the plaintiff, could not be received in testimony.

The next question is, whether the original book of R. C. Shannon, a notary public, is, under the circumstances of the case, competent evidence to prove the contents of the deed from John Allen to G. W. Allen. When a deed is lost and the subscribing witnesses dead, it is impossible, in most cases, to produce proof of their hand-writing to the attestation, by persons acquainted therewith, and who had seen the deed. The usual rules of authenticating deeds must from necessity be dispensed with, in such cases, and evidence admitted of such collateral facts as will furnish a fair presumption of the execution or contents of the lost deed. The cases are numerous where the entries in the books of deceased persons have been admitted as evidence. (2 *Strange*, 1129. 2 *Bur.* 1071. 4 *Term.* 514, 669. 7 *East.* 289. 10 *East.* 109. 2 *Campl.* 305, 379. 15 *Mass. Rep.* 381.) In *Lessee of Reece, v. Robson*, (15 *East.* 32,) Lord Ellenborough, in speaking of the entries of charges made by a deceased attorney, in his books, showing the time when a certain lease, perhaps for a client, was executed, observes. "The ground upon which this evidence has been received, is, that there is a total absence of interest in the person making the entries, to pervert the facts, and at the same time a competency in them to know it."—In the late case of *Buller v. Michell*, (2 *Price*, 299,) it was held that a book purporting to be a leger-book of the abbey of Glastonbury, preserved among the muniments of the

Marquis of Bath, the owner of some estates, formerly belonging to the abbey, though not of the form in question, and which contained among other things, a copy of the endowment of a vicarage, by the abbey, might be used in evidence.

The court, after stating the ground on which the original document would have been evidence, observe, that search had been made, and the original could not be found, and if they should shut their eyes to this sort of inferior evidence, in cases where no other could be found, they would constantly do injustice.—The copy was presumed to be correct, as no motive appeared to make it otherwise, and that such an original document did once exist was inferred from the copy found in the old leger. In *Nichols v. Webb*, (8 *Wheat.* 326,) the Supreme Court of the United States, held that the books of a notary public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment and notice of non-payment of a promissory note, although those acts were not strictly official, since, say the court, he acts as a public officer and is clothed with public authority and confidence. In *Garwood, v. Dennis*, (4 *Bin.* 314) the Supreme Court of Pennsylvania admitted, in evidence, the copy of a deed alleged to have been lost, taken from the records of Newcastle county, Delaware, although the deed had not been so executed as to entitle it to have been recorded, in the state of Delaware, and, of course, could not be considered as a record giving publicity and affecting purchasers; but from the improbability that the recorder would have placed it upon record, without having seen and carefully compared it with the original, from which a fair presumption might arise that such original did once exist. The notarial book of Shannon offered and received, in this case, contains the entry, or copy of a deed, purporting to have been executed by John Allen, to G. W. Allen, at Portsmouth, New-Hampshire, on the 8th of October, 1801, attested by two witnesses, the next day acknowledged before Shannon as a justice of the peace, and recorded the same day in his notarial book. It is accompanied with depositions showing the good character of Shannon; that he was at that time a justice of the peace and notary public; that the entry of the deed as well as many pages before and after it, are in his hand writing, that the persons purporting to be witnesses were residents of Portsmouth, in October, 1801, that J. Allen, whose residence was in Eastport, in Maine, was at Portsmouth, about that time, said he was about to convey his Ohio lands to his son G. W. Allen. and afterwards observed he had conveyed them; that G. W. Allen was residing at that time, in Portsmouth, and that Shannon, the persons purporting to be witnesses to the deed, and both the Allens are since deceased.

There is no direct or positive testimony that the copy contained in the notarial book of Shannon, is a true copy of the original deed; but there is a strong chain of circumstantial testimony to prove its correctness. The existence of a deed, between these parties, had been previously shown, and that deed, if not destroyed, was in the hands of those claiming adversely to it. The copy was made by the judicial officer, who took the acknowledgment of the grantor, and who, consequently, must have known that it was a genuine deed, was copied by him in his notarial book, at the time it purports to have been made, as is apparent from the date of the prior and subsequent entries, and recorded by him, in his official capacity, as notary public, though not regularly in the line of his official duty. We are satisfied that the book of the notary public, under the cir-

cumstances and connected with the other proofs, in the case, was admissible as presumptive evidence of the contents of the deed, from John Allen to G. W. Allen, the existence and loss of which had been previously shown, although this copy was not made, by an officer authorized by law to record deeds, nor its correctness proved by the oath of any person who had compared it with the original.

Deeds to convey lands, or any other instrument, in any way affecting the title of real estate, must be executed in the manner prescribed by the laws of the country, where the lands are situate, and if the deed from John Allen to G. W. Allen fails in any essential required by law, to make it a valid conveyance, it should not have been admitted to the jury. The objection is, that the act of the territorial government, of 1795, adopted from Pennsylvania, entitled "A law establishing the Recorder's Office;" (3 *vol. Ter. L.* 133, *O. L. L.* 301,) required all deeds to be acknowledged or proved, before certain judicial officers of the territory, and recorded in the county where the lands are situate, and that the deed from J. Allen to G. W. Allen was not acknowledged, proved, or recorded in the manner prescribed. The ordinance of '87, points out the mode in which real estate in the territory shall be conveyed, until the Governor and Judges shall adopt laws providing therefor, and it was not until 1805, after the state government had gone into operation, that any act was passed for the avowed purpose of regulating the manner of executing deeds for lands. The laws of '95, '98, and 1802, being obviously, as well as professedly for the purpose of providing for the acknowledgment and recording of deeds. The law of '95, after providing for an office of record in each county, the appointment and qualifications of a recorder, enacts that "all deeds and conveyances which shall be made and executed in this territory, of, or concerning any lands, &c. shall be acknowledged by one of the grantors, or proved by one or more of the subscribing witnesses, before one of the Judges of the General Court, or one of the justices of Common Pleas, of the county where the lands do lie, and shall be recorded," &c.; "and every such deed, which shall not be acknowledged or proved, and recorded as aforesaid, shall be adjudged fraudulent and void, against any subsequent purchaser for valuable consideration." This statute was evidently intended to enforce the recording of deeds executed within the territory, under the penalty of their being adjudged void against a subsequent purchaser, without notice. It is limited, by its terms, to deeds executed within the territory, and to those deeds, although not acknowledged or recorded, full effect is to be given, as between the parties and all others, except subsequent purchasers for a valuable consideration. It would be a forced construction of the law to give it the effect of rendering invalid all deeds for lands situate within the territory, even between the parties, unless executed and acknowledged within the territory. It was the policy of the territory, to facilitate, rather than prevent the sale and conveyance of lands, by non-residents, and the expression of the law should be clear and unequivocal to justify a court in so construing it, as to require all conveyances of land to be executed within the territory. Deeds acknowledged or proven, in the manner pointed out by the law, may be recorded, and the grantee thereby acquires a sure protection against any subsequent conveyance by the grantor. But the law does not prescribe a mode of executing deeds conveying lands. It leaves that provision of the ordinance of '78, untouched, and

it is by virtue of that ordinance, that signing by the grantor, and attestation by two witnesses, was as neceseary as sealing, to give validity to a deed conveying real estate. The act of 1802, relates to deeds executed out of the territory. The first section, (the only one at all applicable to the case) provides that deeds, out of the territory, that have been, or that may be acknowledged, or proven, may be admitted to record, in the counties where the lands are situate, provided such deed be recorded within two years from the passing of the act. Its effect is to extend the protection afforded by the grantor, by recording his deed, to cases not provided for by the act of '95. The deed, if properly executed, is good between the parties, although not recorded: if acknowledged and recorded within the limited time, it would be good against subsequent purchasers, for valuable consideration, without notice of such senior deed. The courts of Pennsylvania, from whose code the law of '95 was adopted, have, it is believed, uniformly held, that the deed, as between the parties, was valid without acknowledgment, but could not be admitted to record so as to protect the purchaser against a subsequent *bona fide* conveyance. (5 *Ser. and Ra.* 252. 2 *Lord Ray.* 47. 2 *Bin.* 562.) By the 3d section of the act of 1805, providing for the execution and acknowledgment of deeds, it is enacted, that all deeds before that time executed, for lands within this state, that had been proven or acknowledged accordiding to the laws of the state where executed, should be valid and effectual in law, and might be recorded in the proper county. The deed from John Allen to G. W. Allen, if the notarial copy be taken as correct, was executed and acknowledged in strict compliance with the requisitions of the ordinance of '89, the act of the Ohio Legislature, of 1805, and the law of New-Hampshire (the state where it was executed) in force at the time of the execution, acknowledgment and delivery of the deed, as appears by a duly certified transcript of the laws of that state, relating to the execution and acknowledgment of deeds.

It is also objected, that admitting the deed from J. Allen to G. W. Allen, to have been duly proven and executed, so as to convey lands in the state of Ohio, yet it conveyed no estate, and was in its origin void, as against a statute of the United States; and if not void, would operate only as a covenant to convey, and not as a conveyance.

The act of Congress. of April 7, 1798, entitled an act for the relief of the refugees from the British provinces of Canada and Nova Scotia, after providing that the Secretary of War should give notice to persons having claims under certain resolutions of Congress, to transmit to the War Office a true account of their claims; pointing out the mode of taking the necessary proof, constituing a board to examine the testimony, and give their judgment what quantity of land ought to be allowed to each claimant, and report thereon to Congress, contains this proviso: "that no claim under this law, shall be assignable, until after report made to Congress, as aforesaid, and until the said lands be granted to the persons entitled to the benefit of this act."

By an act of Congress, passed February 18, 1801, the Surveyor General was directed to cause certain fractional townships to be subdivided into half sections of 320 acres each, and it was directed, "that the said lands be, and they are hereby set apart and reserved, for the purpose of satisfying the claims of persons entitled to lands, under the act entitled an act, for the relief of the refugees," &c. The 2d section provided for the location of the lands, and directed

that the patents for the lands thus located, should be granted in the manner directed for military lands. The 3d section provided, that each person therein named, should be entitled to the quantity of land set against his name, among whom, J. Allen was named, as entitled to 2240 acres. After the passage of the act of 1801, and before the locations had been made, or the patent issued, J. Allen conveyed all his interest in the lands so set apart and reserved, to G. W. Allen, with covenants of seizin, quiet enjoyment and warranty; and the question is, whether such deed be inoperative and void, as against the statute of the United States.

Before the act of '98, for the relief of the refugees, the practice had become common, of assigning the claims which individuals had upon the bounty of government, although the resolutions and acts promising the bounty, contained provisions intended to guard against such transfer. The proclamation of '63, required the personal application of the officer or soldier, for a grant of land promised therein, yet these claims were frequently assigned, and the assignment held to vest at least an equitable interest. (3 *Dall.* 425.) A resolution of Congress, of the 20th of September, 1776, the first offering a bounty in land, provides "that Congress will not grant lands, to any person or persons claiming under the assignment of an officer or soldier." The object of Congress was to encourage officers and soldies to serve in the army during the war, by the promise of a bounty in lands, to be granted to them personally, as a provision for their support. Yet such was the condition of the officers and soldiers, that many of them were compelled to assign their claims upon the bounty lands, to furnish the means of immediate subsistence, and such assignments were recognized by Congress, by the act of '88 directing the Secretary of War to issue warrants for bounties of land to the officers and soldiers, and their assigns. It is a part of the history of the country, that claims of every description, growing out of the war of the Revolution, were constantly assigned, and Congress, in many instances, had, previous to the act of '98, containing the proviso in question, recognized the right of the assignee. It was not, therefore, in consequence of any general principle or policy of the previous legislation of Congress, that the proviso in question was introduced; but the reason of it is found in the character of the claims described in the statute. The board of officers instituted to examine the testimony of the claimants, were to report to Congress what quantity of land ought to be allowed to the individual claimants, "in proportion to the degree of their respective services, sacrifices and suffering, in consequence of their attachment to the cause of the United States," and, upon such report, Congress was to determine with what quantity of land they would reward each claimant. A claim more definite and uncertain, can scarcely be imagined. It was for services, sacrifices and suffering, that the refugees were to be rewarded, after deducting any previous compensation they might have received. A claim so uncertain in amount, could never be assigned for a fair equivalent consideration. The refugee, until report made, and the lands granted, would not know the extent of the bounty he should receive, and therefore, could not know or ascertain its value; and the purchaser, if a purchaser could be found, must guard himself against probable loss, by the smallness of the sum he would pay. The proviso in question, was, therefore, probably introduced into the act to guard against gambling in these uncertain interests, and to prevent the objects

of public bounty, from parting with their claims for an inadequate consideration, as well as to relieve the officers of government from the labor and responsibility of examining and determining the fact and validity of assignments. Whatever was the intent of Congress, in introducing the proviso into the act, it is at least, doubtful, whether, by any fair rule of construction, any other or greater effect can be given it, than a direction to the officers of government, to disregard all assignments, in examining the claims and issuing patents, leaving the effect of such assignments, as between the claimant and third persons to be determined by the principles of the common law, applicable to claims capable of being made the subject matter of a contract. In such a case, when the claim was of land, and the assignment by deed, with covenants of warranty, the assignor or grantor, would be estopped by his covenant, from avering that he had, at the time of the assignment, no interest, or no assignable interest in the thing granted. The proviso was not intended, nor can it be construed to operate upon the person of the claimant, rendering him incapable, in law, of making any contract respecting his claim, and bears no just analogy to the cases to which it has been assimilated, in the argument of conveyances by an infant, *non compos*, or Indian, whom the law holds *inops consillii*, and incapable of binding themselves by deed. But so far as it can have any effect, as between the claimant and third person, it must be because it operates on the estate, the subject matter of the gift, making the donation of land depend on the condition, that the claimant does not assign his claim, before the lands should be granted. In this view, the interest which the refugee would have in the bounty land, would depend upon a condition that he should not assign, before he obtained a grant. A breach of this condition by the claimant, would be a forfeiture of his claim to the bounty land, of which the government might take advantage by refusing to issue a patent; but a coveyance by deed, by the claimant, although it might involve a forfeiture to the government, of his claim, would nevertheless be good as against him, by estoppel. *Plow.* 234, 430, 434. 2 *Serg. and Ra.* 507.)

But it is unnecessary to determine what would have been the effect of the proviso if the conveyance from J. Allen to G. W. Allen, had been made before the act of February 18, 1801, as we are of opinion that that act amounted to a granting of the lands, within the true intent and meaning of the proviso in the act of '98. It has already been observed that the restraint imposed upon assignments, until "lands be granted to the persons entitled," was intended to guard against the mischiefs resulting from speculating in claims of so uncertain a character: and the expressions used should, if possible, receive such a construction as will effectuate the intent of congress, without continuing the restriction, after the reasons which induced its imposition had ceased to exist. The act of 1801 removed every objection to the free alineation of this property, that could have influenced congress in imposing the restriction. The persons entitled are named, and the number of acres which each claimant should receive, as the bounty of congress, was fixed, by that act. A tract was selected from that immense body of land then owned by the United States in the Western country, and set apart to satisfy those claims. A mode was pointed out by which the ministerial officers of government were to cause locations to be made, and

patents were, without any further act of the legislature, to issue for the lots so located.

The terms grant and give, are frequently used by congress in the same sense, and when they could not intend a patent to issue for the lands so granted or given. By the ordinance of May 20, 1785, lot No. 16 of every township is "reserved" for the use of schools, and by the ordinance of '87 the same lot is "given" for the same purpose, and lot 29, "given" for the purpose of religion. In the act of April 20, 1802, "it is enacted that section No. 16, in every township shall be granted," for the use of schools. And these expressions frequently occur in the acts of Congress providing for the support of the gospel and schools; and in none of these cases, was it ever in the contemplation of the legislature, that patents should issue for these lots in order to vest in the state, or township, a right to use them, for the purposes for which they were given. The words of the proviso in the act of '98 "granted to such persons," are more appropriately fitted to express the general appropriation or grant of lands to satisfy the claims of refugees collectively, than the issuing of a patent to the individual claimant. If the individual grant, or patent had been intended, a more appropriate expression, "granted to such claimant," or other words peculiarly applicable to the individual refugee, and not to the whole body of the claimants, would have been used. Some other legislative act, beside the law of '98, was evidently contemplated, for a report of the claims was to be made to congress, by the board constituted to examine the testimony; and without such act, the claimants could never receive the promised bounty. The provisions of the act of '98, taken tagether, furnish grounds for fairly infering that the legislature, when they used the expression "granted to the person," had in view the setting apart and appropriating a tract of land from the great body of the lands then owned by the United States, to satisfy the claimants, after their claims had been ascertained, and fixed: an act necessary to be done thereafter by congress, to carry into effect their previous resolutions and laws.

The term granted is here used, in the same sense as given. A bounty in lands was promised to be thereafter given to the refugees. By whom was this gift to be made? By congress, the only body that possessed the power of bestowing the promised bounty upon the claimants; and it is to their future contemplated legislative act of confering this bounty that this proviso refers, and not to the ministerial act of issuing the patent. The act of 1801, having fixed the quantum of land to which each claimant was entitled, and set apart and reserved a tract, in which each claimant's land was to be located, may well be considered as a granting act of a legislature, for the land bestowed upon the refugees, within the meaning of the proviso in the act of '98; and the provision that patents shall be granted, as directory to the proper ministerial officers, to issue the customary and proper evidence of the title of each claimant, to the lands granted him by that act.

The deed from John Allen to G. W. Allen cannot be considered as a mere covenant to convey. It has all the requisites of an absolute conveyance, and was certainly understood as such by the parties. The circumstance that it does not contain any specific description of the section, or tract of land intended to be conveyed, will not so change the force of terms, which it is admitted would otherwise convey a fee, as to make them operate only as a covenant to

convey. The deed recites the grantor's claim to the land under the act of 1801, and conveys "all the right title, and claim," which he had, or might thereafter obtain, with covenants of seizin and warranty. The description of the estate conveyed is sufficiently definite and certain, taken, as it must be, in connection with the recitals in the deed, to which the words of description refer. No one can doubt, after looking into the deed, that it was the intention of J. Allen to convey all the interest he had acquired in the refugee lands by the act of 1801; and the words he used are sufficient to effectuate his intention, by passing to his grantee his estate.

John Allen having, at the time he executed the deed to G. W. Allen, an interest in the refugee lands, which he was not prohibited by law from selling, and having conveyed with covenants of general warranty, the subsequent issuing of a patent to him for the land now in controversy, in fee and in severalty, will enure to the benefit of his grantee, and he is estopped; and his heirs, to prevent circuity of action, are rebutted by his covenants, from denying that he had title to the particular tract described in such patent.

EARNFIT v. WINANS.

Under the execution law of 1824 the priority of lien is lost, if the execution is not proceeded upon, according to the provisions of that act, although the defendant was surety, and execution against him was delayed by order of the court under the statute authorising such order.

This case came before the court, by adjournment from Warren county, upon a *certiorari* to the court of Common Pleas, brought to reverse an order for appropriating money between the claims of different judgment creditors. It was argued by CORWIN, for Earnfit, and G. J. SMITH, for Winans.

Opinion of the court, by Judge BURNET.

The question to be decided in this case is, which of the parties is entitled to a sum of money, made on execution, each having a judgment and a levy on the property sold, prior to the sale. The facts in the agreed case, as far as it is necessary to notice them, are these: In August, 1820, Winans obtained a judgment against Adams as principal, and Hollingsworth as security, and in November following, issued an execution, which was levied on a lot of ground, No. 294, the property of Adams. As the statute requires the property of the principal debtor to be exhausted, before execution can be levied on the property of the security, Winans could not make a levy on the property of Hollingsworth, till the property of Adams was sold. In May, 1823, the above lot, No. 294, was sold by the sheriff, on an execution in favor of Dunlevy, against Adams, issued on a judgment rendered in November, 1819. This judgment having a preferable lien to that of Winans, the money arising from the sale, was paid to Dunlavy. Winans then set aside his levy, made as above, and issued a new execution, and on the 4th of August, 1823, caused it to be levied on lots No. 272, 274, 276 and 278, as the property of Hollingsworth, the security.

In June term, 1822, Earnfit obtained a judgment against Hollingsworth, and on the 15th of April, following, caused an execution to be levied on four lots, being the same on which Winans afterwards levied, as stated above. These lots have been sold by the sheriff, and the question is, which of the parties is entitled to the money.

Winans has the oldest judgment, but he did not levy on the property in question, within a year from the date of his judgment.

Earnfit has the oldest levy, and his levy was made within a year after the entry of his judgment; he will therefore be entitled to the money, on the principles settled in the case of *Shuee* v. *Ferguson*, at the present term, unless the statute restraining a levy on the property of a surety, till after the property of the principal is exhausted, can protect him.

This case is very clearly within that part of the 17th section, of the act of 1824, which postpones the lien of judgments, on which execution shall not have been levied before the expiration of a year. And as the legislature have, by express enactment, in the same section, excepted from its operation, a number of cases, in which judgment creditors may be restrained by law, from obtaining a levy immediately after the rendition of judgment, and have not included the case before us, the legal presumption is, that they did not intend to provide for it, or to save it from the operation of the section.

As the saving clause is special, and states distinctly the cases to be protected by it, the court cannot, by any rule of construction, enlarge it for the purpose of embracing other cases than those enumerated.

The order of the Court of Common Pleas, therefore, must be reversed, and the cause remanded, with instructions to appropriate the money to the judgment of Earnfit.

SHUEE, ET AL. v. FERGUSON, ET AL.

To take a case out of the operation of the 17th section of the execution law of 1824, a levy must have been made on the property in question, within a year after the rendition of the judgment; and a levy on other property, though within the year, will not save the lien, as to the property not levied on.

If there are several judgments, and the property in question has not been levied on within the year, under either of them, they stand on an equal footing, and the judgment creditor who first takes out execution, and causes a levy to be made, will have the preference.

If execution on an older judgment has not been levied on a particular piece of property, within the year, and an execution on a junior judgment has been levied on that property, within the year, the junior judgment must have the preference, though a levy may have been made, on the same property, under the older judgment, before the levy was made on the junior judgment.

This case was adjourned for decision here, from Warren county. It came before the court upon a *certiorari* to reverse an order of the Court of Common Pleas, distributing certain monies, made upon execution against the defendants. Besides the plaintiff in the case, the Bank of Lebanon, and Bank of the United States were all interested. The Common Pleas made an order for paying the money to the Lebanon Bank. All the others sued out writs of *certiorari*.

T. R. Ross argued for Bank United States.

G. Smith for Hansburger and Sellers, in right of the Bank of Lebanon.

A. H. Dunlevy, for Shuee and Emlin.

Opinion of the Court by Judge BURNET.

It appears from the agreed case, that the Sheriff of Warren, holds in his hands a surplus of seven hundred and forty dollars, made on execution against Wm. Ferguson, subject to the claims of other judgment creditors. Motions were made in the Court of Common Pleas for this surplus, on behalf of the assignees of the Lebanon Miami Banking Company. On behalf of the Bank of the United States. On behalf of Thomas Shuee, and on behalf of Jeremiah Emlin, being separate judgment creditors of the said Ferguson. The Court of Common Pleas ordered the money to be paid to the assignees of the Lebanon Bank, on the supposition that they had the oldest and the best lien. Each of the applicants took a writ of *certiorari*, to set aside that order, on the ground that it was erroneously made.

The facts by which the priority of lien, of these judgments, is to be determined, are these.

The Bank of the United States obtaided a judgment against Ferguson and others, on the 8th January, 1822, in the Circuit Court of the United States, and on the 20th August, 1823, caused an execution to be levied on a quarter section of land of the defendant, Fergusons, by the sale of which, on an older judgment, the surplus money in question has been made.

The Lebanon Banking Company obtained a judgment against Ferguson and others, in August, 1823, but never have caused an execution to be levied on the land in question.

Hansburger and Sellers, in May, 1823, obtained a judgment by attachment against Ferguson, as a debtor of the Lebanon Bank, and also obtained an assignment on the judgment in favor of that bank, against Ferguson, and on the 23d December, 1826, caused an execution to be levied on the land in question.

Thomas Shuee obtained a judgment against the same defendant, on the 24th December, 1825, and caused an execution to be taken out and levied on the land in question, on the 23d December, 1826.

J. Emlin obtained a judgment against the same defendant, on the 24th December, 1825, and caused an execution to be taken out and levied on the same land, on the 23d December, 1826.

The question of preference, among these creditors, depends on the 17th section of the act of 1824, regulating judgments and executions, which is in these words: "That no judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide judgment creditor.*"

In *McCormick, v. Alexander*, (2 *Ohio Rep.* 65) it was decided, that that section was not inconsistent with the constitution, and that it must be applied, as well to judgments which had been rendered before its passage, as to those which might be rendered afterwards, and that, although a levy had been made on a

judgment, after the expiration of a year, and before the act of 1824 took effect, yet the lien should give way to a junior judgment, levied within the year, and before the levy made on the older judgment. This decision brings all the judgment creditors who have applied for the money in dispute, within the operation of the act of 1824, although some of them had made their levies, before that act took effect.

In giving a construction to the statute in question, for the purpose of settling the matter in controversy between these parties, the court have decided the following points.

First—To take a case out of the operation of the 17th section of this act, a levy must have been made on *the property in question*, within a year after the rendition of the judgment. A levy on *other property*, though within the year, will not save the lien, as to the property not levied on.

Second—If there are several judgments, and the property in question has not been levied on within the year, under either of them, they stand on an equal footing, and the judgment creditor who first takes out execution, and causes a levy to be made, will have the preference.

Third—If execution on an older judgment has not been levied on a particular piece of property within the year, and an execution on a junior judgment has been levied on that property, within the year, the junior judgment must have the preference, although a levy may have been made on the same property, under the older judgment, before the levy was made on the junior judgment. The lien of the junior judgment, on all property not levied on under the older judgment within the year, must continue for one year from its date, to the exclusion of the older judgment, provided the junior judgment was rendered, before the levy was made on the older judgment. A levy on the older judgment, though after the year, if made before the date of the junior judgment, will have the preference.

On this construction of the statute, it follows, that the Bank of the United States has the preference. Their levy is the oldest, and it was made before the rendition of either of the judgments, on which levies were made within the year; and if their process had issued from a state court, this court would direct the surplus money in question, to be paid to them, but as we have no control over the process, or officers of the Circuit Court, and cannot compel satisfaction to be entered, on judgments rendered by them, we do not feel authorized to order a payment on this judgment. The practice of directing the application of money, in cases like this, in a summary way, is intended to save time, and litigation, and the propriety of exercising it, depends on the power of the court to see that justice is done to all parties. This they cannot do, when the person to whom the money is to be paid, is not within their control.

Next in order of preference, are the judgments of Shuee and Emlin. Their levies were made within the year, and before the levy of Hansburger and Sellers, which was not made till the expiration of more than three years after the date of their judgment. These creditors, therefore, would be entitled to the surplus, in proportion to the amount of their judgments, if the claim of the Bank of the United States was out of the way, but as that judgment has the preference, this court will not direct the sheriff in a matter in which, he may incur a personal risk.

The order of the Common Pleas, however, must be reversed, and the cases remanded.

BROWN v. FARRON.

A certificate of the relinquishment of dower is sufficient, if it contain a substantial enumeration of the acts required by the statute, though the words be not followed.

An inveterate practice for a series of years will not be departed from.

This was a bill in chancery for the assignment of dower, against a person claiming under the alliance of the husband. The wife had joined in the deed of alienation, and the case turned upon the validity of the following acknowlrdg- ment:

"Before the undersigned, within and for the same county, personally appeared David Brown, and Catharine Brown his wife, who being made acquainted with the contents, and being examined separate and apart, the wife from the husband, acknowledged the above indenture to be their voluntary act and deed, for the uses and purposes therein mentioned."

The case was adjourned here for decision from Hamilton county.

Brooks and *Hammond*, for complainant. *Fox* and *Storer*, contra.

Opinion of the Court by Judge BURNET.

The complainant sets up a claim of dower, in a lot of ground in the city of Cincinnati, of which her husband was seized in fee, during coverture, and which he sold, and conveyed to the defendant, for a valuable consideration, by deed, bearing date, December, 1818. The deed was signed and sealed by the complainant, and by her husband, and attested by two subscribing witnesses.

An acknowledgment was made at the bottom of the deed, in the following words. "State of Ohio, Hamilton county, ss: Before me the undersigned, a justice of the peace, within and for said county, personally appeared David Brown and Catharine Brown, his wife, who, having been made acquainted with the contents, and being examined separate and apart, the wife from the husband, acknowledged the above indenture, to be their voluntary act and deed, for the uses and purposes therein mentioned. In witness," &c.

The deed was executed in December, 1818, after the act of 1805 was repealed by the act which took effect in May, 1818, and which was in force at the time of the execution and acknowledgment. This statute provides, that the deed shall be signed and sealed by the husband and wife, and shall be acknowledged before two subscribing witnesses, who shall attest the same. It also provides, that it shall be acknowledged before a judge, or justice of the peace, who shall examine the wife separate and apart from her husband, and shall read or otherwise make known to her the contents of such deed, and if upon such examination, she shall declare, that she voluntarily, and of her own free will and accord, without any fear or coercion of her husband, did, and now doth acknowledge the signing and sealing thereof, the said judge or justice shall certify the same, &c.

It is contended on the part of the complainant, that this acknowledgment is not in conformity with the requirements of the statute, and that it does not for that reason, bar her right of dower in the premises.

Some of the objections taken to this acknowledgment, do not require to be specially reviewed; as for example, that the magistrate has not signed it officially, and that the signing and the sealing do not appear to have been acknowledged, either before the witnesses, or before the justice. To the first of these objections, it is sufficient to say, that the magistrate has described himself, in the body of the certificate, as a justice of the peace, which renders it unnecessary to add his title of office to his name.

The second objection is not strictly correct in point of fact. The signing and sealing, was acknowledged before the subscribing witnesses, at the time of the execution, who have attested the same as the statute directs, and the instrument was acknowledged by both husband and wife, to be their voluntary act and deed, before the magistrate, which could not be the fact, unless they had signed and sealed it; for signing and sealing are indispensably necessary to create a deed. This declaration therefore, is a virtual and substantial acknowledgment of the signing and sealing, both of which are required, by the statute, to create a deed.

The third objection is, that it does not appear from the certificate, that the wife acted without any fear or coercion of her husband. It is true that those words are not contained in the certificate, but the justice certifies, that she acknowledged the deed to be her voluntary act, and if voluntary, it could not have been done under the influence of fear or coercion. The term voluntary, is defined to be, acting without compulsion, acting by choice, willing, of one's own accord. The declaration of the wife then, on her separate examination, excludes the idea of fear or force. If she executed the instrument willingly, of choice, and of her own accord, as her admission before the justice imports, she could not have been under the influence of fear, much less of coercion. An act done in consequence of fear, cannot be done willingly, and of choice. The one unavoidably excludes the other, so that the magistrate, although he has not used all the words given in the statute, has taken one, which includes the substance of all the others.

The next objection is the want of a declaration, that the wife did acknowledge the deed before the subscribing witnesses, and that she does acknowledge it before the justice. The statute does not, in terms, require such a declaration. The counsel have considered the sentence to which this objection relates, as eliptical, and have supplied the omission in their own way. I am willing to admit, that the passage is susceptible of the construction they have given it, though the provision would be perfectly useless, as the attestation of the subscribing witnesses furnishes evidence of the first acknowledgment, which it is their duty to hear, before they affix their names to the deed. But it is subject to a more serious objection. Cases may arise in which a *feme covert* signs and seals a deed, involuntarily, yet without objection, but with a determination not to acknowledge it before a justice. On further information and reflection, her objections may be removed, she may become, not only willing, but anxious to complete the conveyance, by a full and free acknowledgment before a justice of the peace, but on the construction contended for, she cannot do it without

affirming a deliberate falsehood. Now it is not presumable, that the act was intended to prohibit the completion of deeds, under such circumstances, or to require it to be done at the expense of the truth; and yet this must be the consequence, if the alleged omission in the law, be supplied in the manner proposed. It does not appear distinctly from the statute, what the term did, relates to; whether to the acknowledgement before the witnesses, to the signing and sealing, or to any thing else. The sense will be complete and equally, if not more useful, by reading, that she did sign and seal the deed, and now doth acknowledge the signing and sealing thereof; and this construction is favored by the consideration that no other part of the section, requires a declaration from the wife, that she did sign and seal. If this be the correct reading of the eliptical clause, it is contained substantially in the certificate of the magistrate, as we have before seen.

It will not be seriously contended, that the magistrate is bound to use the same language that he finds in the statute. The legislature have not undertaken to prescribe a form of acknowledgment, that is to be literally pursued. If the certificate contains the substance of the law, though in the language of the officer, it is sufficient. On any other principle, it is a matter of doubt, whether the records of the state contain a solitary deed, with a valid acknowledgement. it is, however, safe and prudent, to adopt the language of the act, with but little, if any variation, and yet it would be attended with destructive consequences, to consider such an adherence, as essential to the validity of an acknowledgement.

It may then become a question then, how far the magistrate may deviate from the words of the act. I would answer the inquiry by saying, that *his* certificate must contain the substance of every thing required by the law. No substantial part of the provision, can be dispensed with. It must appear expressly, or by irresistible inference from the language of the certificate, that the wife was acquainted with the nature of the deed, that she was examined apart from her husband, that she acknowledged the deed, and admitted that it was her voluntary act, in such terms as necessarily excluded the influence of fear, or coercion.

When the legislature were providing this mode of conveying real estate, by *femes covert*, in lieu of the common law method, by fine, they must have had two objects in view; first, to simplify the transaction, and secondly to protect the wives of the grantees against the exercise of an improper influence, by their husbands; and if the requirements of the law are substantially adhered to, these objects will be accomplished, although the officer does not literally pursue the language of the statute. If it would have been proper, at any time to require such an adherence, it is certainly too late to require it now. A different practice has prevailed since the first establishment of the territorial government, which cannot be corrected without incalculable mischief, and if it had been the opinion of the court, when they were considering, and deciding this case, that the words of the statute ought to be literally copied, and that such should have been the course from the beginning, they would have resorted to the maxim, *communis error facit jus*, rather than encounter the consequences of shaking the title to an indefinite portion of the state. No law can require the correction of an error in its construction, which has long existed, and has been generally

acquiesced in; Lord Coke says, not even *Magna Charta*. But I do not feel the necessity of resorting to this maxim. The law, as to the form of the certificate, is directory, though, as to its substance it is imperative. The one may be varied; the other must be adhered to. It evidently appears from the certificate on this deed, that the wife was examined apart from her husband, that she was made acquainted with the contents of the deed, that she acknowledged the deed, and admitted it to be her act, and that she acknowledged it to be voluntary on her part. These statements, in substance, embrace every thing required by law, and virtually negative the existence of every thing which the law was intended to prevent. If she understood what she was doing, and in the absence of her husband, admitted that she had done it, and that she did it voluntarily, which implies the absence of fear, or coercion, her rights have had all the protection which the law intended to afford, and she cannot be permitted to revoke her deed, for any defect in the form.

I am aware that the mode of conveyance by *femes covert* given by our statute, is a substitute for the more difficult mode of conveying by fine, in open court, evidenced by the record, and that it was intended to afford equal security to the parties concerned; and I admit, that no construction of the statue can be correct, that necessarily impairs that security. The acknowledgment therefore, must be by the wife in person, in the absence of her husband, before an officer named in the statute, and must be evidenced by his certificate on the deed itself, in an official form. This exposition of the law, while it admits some latitude of inference from what the certificate actually contains, excludes the right of resorting to parol testimony to supply an omission. If any essential part be not distinctly stated, or fairly inferrable from other facts that are stated, the defect cannot be remedied, whatever may be the consequence.

In considering this case, I have felt it my duty, in accordance with the views of the court, to place it principally on the considerations arising from the policy and practice of the state, as far as they are sustained by the principles of law. It will be found, however, on examination, that the cases cited from New York, Pennsylvania and Maryland, by the defendant's counsel, go the whole length of sustaining the doctrine maintained in this case.

The bill must be dismissed.

DECKER *v.* DECKER.

A devise of a tract of land, "free and clear from any incumbrance except as hereinafter mentioned" with a limitation over in case the devisee die without issue, followed with directions that in consideration of the devise, J. D. should pay at different periods to different persons. Held, that J. D. is only personally liable for the sums appointed to be paid in his life time. The amount falling due, after the death of J. D. is a charge upon the land devised.

This cause was adjourned here for decision from Pickaway county. It was a bill in Chancery, and the object was, to obtain the true construction of a will. The facts involved in the cause, are as follow:

In 1815, John Decker, by his last will and testament, devised to his son, Jacob Decker, 895 acres of land, at the estimated value of 8350 dollars, "free, and clear from any incumbrance, except as hereinafter mentioned;" in consideration of which devise, he requires the said Jacob, to pay to seven of the children of the said John Decker, the sum of £444 8*s*. 10*d*. Virginia currency, each, in payments of £100 per year; the first payment to be made to the eldest son, on the 1st day of May, 1816: the second, to the next son (the devisee) on the first of May, 1817, and so on, until payments of £100 each, had been made to all those seven; and in the next course of payments, commencing with the eldest son, and going on in the same routine as before, the whole payments were to be settled up. But out of the first payment to each of those heirs, was to be deducted the amount advanced to them by the testator, in his life time. To his two unmarried daughters, Elizabeth and Rebecca, he required the said Jacob, to pay $1000 each, on their marriage day, which was to be holden as one of the yearly payments, directed in the will, and was to postpone the payment which would be then due, to the next of the seven first named children, and the residue of $650 each, was to be paid to the said daughters, in their proper place, among the other payments. The will further provides, that if the devisee, Jacob Decker, should die without issue, that then the estate devised to the said Jacob, "after the rest may have their legacies, shall revert back to the rest of my children and their heirs, to be equally divided among them." In 1823, Jacob Decker died without issue, having paid up to the several heirs, all, that by the terms of the will, became due in his life time. Having disposed by will, of his own estate, and made complainant his executor, this bill is filed, to settle the rights of the executors of the two estates, under the wills. There are no facts in dispute. The principle involved in the construction of John Decker's will, being settled, the parties can adjust the estates.

Ewing, for complainant. *Scott* and *Grimke*, contra.

Opinion of the court, by Judge BURNET.

This appears to be an amicable suit, for the purpose of obtaining a construction of the last will and testament of John Decker, as a guide to the parties, in settling the estates which they severally represent.

The question presented, is, in some respects, a novel one, and it is not easy to determine with certainty, to what class of cases it properly belongs; whether to that which would make the legacies a charge on the land, or to that which makes them a charge on the person, or to the third, which considers them as a charge on the person, in respect to the land. If they are chargeable on the person, it must be because the testator has devised an estate in fee; for when the devise is of a life estate, the charge is on the land, and not on the person, for an obvious reason, because the estate might terminate, before the devisee derived the least benefit from it; and it certainly must terminate with his life. The consequence is, that the value or quantum of the estate, which is the consideration of the responsibility of the devisee, is to be taken into the account, as one of the guides, by which the rules of construction are to be applied.

A devise of the fee, has been considered as sufficient to show an intention in the testator, to create a personal charge, while a devise of any inferior inter-

est, as an estate for life, is taken to indicate an intention to charge the land, and not the person of the devisee.

In construing wills, it is an universal rule, that they are to be expounded favorably, and according to the intention of the devisor. When his intention can be ascertained, it shall prevail, however defectively it may be expressed.

In the will before us, John Decker does not declare, in terms, whether his son Jacob, on accepting the devise, shall become liable to the payment of the legacies, as a personal charge, or not. It is true, that in consideration of the devise, he requires him to pay the legacies to his brothers and sisters, and if we were confined to this part of the instrument, in ascertaining the will of the testator, we should be apt to conclude, that the legacies were a charge on the person. The language is sufficiently strong and explicit, to sustain that interpretation; but the whole instrument must be examined. One part may explain another, and it is from the operation of the whole, that the parts are to receive a construction. On looking into the will, then, we find, that these legacies are made payable by instalments, and become due, at different and remote periods. The testator does not profess to give Jacob a certain unqualified fee, in the land; but on the event of his death, without issue, the whole estate is limited over, in fee, to his brothers and sisters, including the legatees, to be equally divided between them. The land devised, is estimated in the will, at $8350.— The legacies to be paid, nominally, exceed that sum, but are subject to a deduction of certain payments, made to the legatees, by the testator in his life, which are not stated. It is, however, understood, that the difference between the value of the devise, and the sums to be paid, was the estimated proportion of the estate, intended for the devisee, so that if he had received a fee simple in the land, and had paid the legacies, he would have realized nothing more than his proper share of his father's property. By the estimate of the devisor, the fee of the land was a fair consideration for the sums to be paid by the devisee; and his liability to pay, was founded, and should depend, on the fact of his receiving such an estate. In 1823, Jacob Decker died, leaving a widow, but without issue, having paid all the legacies that had become due, previous to his death, at which time, the land, by the limitation in the will, passed to his brothers and sisters, including the legatees.

This is a concise view of the substance of the will, and of the situation of the parties, and on these facts, the question arises, whether the separate estate of Jacob Decker, shall be held liable to pay the residue of the legacies, or, whether they attach to, and follow the land.

We are bound to admit, that the devise to Jacob, was intended for his benefit, and the will must receive such a construction, as will not interfere with that intention. This rule precludes the inference of the defendant's counsel, that the testator intended to secure two things: first, that Jacob should pay the legacies: and secondly, that the estate should be limited over to his other children. On this supposition, the devise was not only not beneficial, but would operate unjustly and iniquitously. It would in fact, be a devise by the father, of the separate estate of the son, to the amount of the legacies. Jacob would pay the legacies of his father, while, by the provisions of the will, they were enjoying, in fee, the estate out of which the payments were to be made, and which was to him, the consideration of his liability to pay. This would be the result of

the construction, which the defendants give to the will, in opposition to the admitted principle, that any construction is to be rejected, by which the devisee would be injured, and not benefitted by the devise. On this ground, it has been held, that if land be devised to a person on his paying, or, so that he pay, or, on condition of his paying a sum of money, without words of perpetuity, he shall not be considered as taking a life estate merely, but an estate in fee, because a life estate might determine, before the profits of the land amounted to the sum paid, in which case, the devise would be injurious to the devisee.—(6 *John. Rep.* 192.) On the other hand, it is held, that if the payment be expressly charged on the land, the devisee shall take a life estate, because, in that case, he can in no event, sustain a loss. Now, by the application of the same rule, and by a parity of reasoning, the payment of these legacies, cannot be considered, at this time, as a charge on Jacob personally, because it is settled, that he took by the will, only an estate for life, and by holding him liable to pay the legacies, which amount probably, to seven-eighths of the value of the land, he would be greatly injured by the devise.

The estate which Jacob took by the will, does not depend on construction. The limitation over, is express and positive, admitting of no doubt. The only ground, therefore, for construction, that can be occupied by the court, to give effect to the intention of the testator, is that which relates to the payment of the money, and the nature of the charge which it creates. The testator does not declare it to be personal, and the defendants claim it to be such, altogether on grounds of construction, but in violation of the rule we have just noticed.

So long as there was a possibility, that the devisee could derive from the will, an estate in fee, he continued to pay the legacies in good faith, to an amount far exceeding the value of any advantage he can have received, from the temporary occupation of the land. On the ground then, that the devise was intended for his benefit, his estate ought not to be further responsible.

It appears to me, to follow as a consequence, from this doctrine, that wherever the question, whether a legacy to be paid by a devisee, is a personal charge, or not, is not expressly settled by the words of the will, but depends on construction, a personal charge cannot be inferred, unless the operation of the will be such, as to secure to the devisee, the advantage which is the consideration of such a charge, which, in this case, is a fee simple in the land devised. The question then arises, has Jacob Decker derived such an estate from his father's will? The defendants do not pretend that he has. Under the limitation of the will, his estate terminated with his life, and from the moment that fact was ascertained, the legacies ought not to be considered as a personal charge, whatever might have been the construction, while the possibility of a fee, was compatible with the limitations of the will. That possibility, now has ceased. The operation of the will has been, to give Jacob a life estate only, and the responsibility of his representatives, should be that which is created by such an estate.

As the intention of the testator, is the polar star by which we are to be guided, it may not be amiss to remark here, that it is impossible to examine this will, without coming to the conclusion, that the testator intended to secure to Jacob,

at least an equal share of his estate, with his other children; but such an intention, is wholly inconsistent with the construction claimed by the defendants, as we have already seen.

But aside from these considerations, it appears to me, that the intention and will of John Decker, may be collected from the language of the limitation, which provides, that if Jacob should die without issue, the estate, "after the rest may have their legacies, shall revert back to the rest of my children, and their heirs, to be equally divided among them." That is, if Jacob shall die without issue, the estate shall go to the rest of the children, after such of them, as are entitled to legacies, unpaid, shall have received their legacies. Now, if it was intended, that Jacob should pay the legacies in any event, the payment, after his death, would not have been made a condition of the limitation. The estate would have passed immediately, and without condition, to the other children.: but they are to take it after the payment of the legacies is complete. They must take it, therefore, *cum honere*, or not at all. A devise made to a person, and his heirs, after paying a sum of money, implies a payment by the devisee, and the money to be paid, is a charge on the thing devised. Now, in this case, the limitation over, is to the rest of his children, meaning all, except Jacob, after the rest may have their legacies, meaning by the term rest, such of the legatees, as should not have received their legacies, prior to the death of Jacob. Of course so much of the legacies as remained unpaid, and had not become a personal charge on Jacob, at the time of his death, is secured, and by the terms of the limitation over, is made a charge on the land.

But another view may be taken of this question, which will lead to the same result. The devise is made to Jacob, "free and clear of any incumbrance, except as herein after mentioned." This exception relates to the legacies, and to the limitation over, both of which, are to be regarded, in ascertaining the rights and responsibilities of the devisee, because the devise, is in terms, made subject to them both. When the will was made, and when it took effect by the death of the testator, Jacob had no issue, and it was uncertain whether he ever would have any. It was, therefore, a matter within the calculation of the devisor, that the limitation would probably have its intended effect, and that Jacob's interest might prove to be an estate for life only. With that impression on his mind, making the devise subject, not only to the legacies, but to the limitation over, he has virtually left the question, as to the nature of the charge of the legacies, an open one, to be decided, when the extent of the incumbrance on the devise, should be ascertained. And I confess that I do not see any incongruity or inconvenience, resulting from this arrangement of the testator. If he had said in terms, what he has said by implication, and what is certainly a fair interpretation of his will, that Jacob should pay the legacies as they became due, during his life, and that if he should die without issue, the residue should be a charge on the land, no person would have doubted his meaning, or questioned his right to make such a disposition of his property, and if the rules of interpretation, lead to that construction, it is the same thing, as if the will had contained it, in express words.

It has been remarked before, that this is a novel case. It is in some respect a case, *sui generis*, to be settled by the application of general principles, without the aid of adjudications, but keeping in view the intention of the testator,

and the principles by which devises are construed, we are satisfied, that the legacies did not continue a personal charge, after the possibility of an estate of inheritance, had determined, by the death of the devisee, and that from that time they have been a charge on the land, in the hands of the legatees, to whom it was limited over by the will. Or, in other words, that these legacies were intended by the testator, to be raised out of the land, and were not to be a personal charge, till they should become due, and that they should then attach to the person, who might have the estate by the will.

The consequence of this opinion, is, that the representatives of Jacob Decker, can not be required to pay any part of the legacies, which had not become due, and payable at the time of his death.

TRUSTEES OF WAYNE T'P. v. TRUSTEES OF STOCK T'P.

A person gains a legal settlement in a township, though warned on the first settlement, if the warning is not repeated every year.

This was an action of debt for monies paid in support of a pauper, and was brought for the purpose of obtaining an adjudication, which of the townships were chargeable with the support of the pauper. It was an amicable suit and was prosecuted upon an agreed case, and adjourned for decision here, by the Supreme Court, sitting in Harrison county.

The material facts are as follow: Previous to the year 1821, the pauper resided with her father in Wayne township, Jefferson county, and had obtained a legal residence there. In April, 1821, her father removed and settled in Stock township, Harrison county, and carried the pauper with him. On the 10th day of July, 1821, the overseers of the poor of Stock township, warned the pauper to depart, which warning was repeated on the 8th of June, 1822, and 14th of December, 1823, and again within one year from the last warning. On the 8th of October, 1825, the overseers of the poor of Stock township, transported the pauper to Wayne township, and left her there; when, by order of the trustees of Wayne township, she was sent back to Stock, and again, on the 31st of October, sent by the trustees of Stock to Wayne, where she had since been supported; and this action was instituted to recover the money expended in her support, and to decide upon which township she was chargeable.

Leavit, for plaintiffs. *Beebee*, for defendants.

Opinion of the court, by Judge HITCHCOCK.

Such is the situation of our country, that this court is rarely called upon, to give a construction to the "act for the relief of the poor." While the people of older states and communities, have been oppressed with heavy taxes for the support of paupers, we have been measurably free from this burthen. So fertile is the soil, and so various are the modes of employment, that with a reasonable share of industry, and economy, almost any individual, arrived at the years of discretion, possessed of health and sound intellect, may obtain a comfortable subsistence in Ohio. None but the unfortunate need claim the support of public charity. The time, however, must and will arrive, when questions of great im-

portance to the community, growing out of the poor laws, must be settled, and it is desirable they should be settled correctly.

The general principle pervading the law, is, that every pauper shall be supported by the township where he or she may have been last legally settled. We are now called upon to give a construction to the 4th section of the before named act. This section provides in what manner a person may gain a legal settlement. As the question is important, it is to be regretted that the counsel employed in the case, should not have given it a careful examination, and submitted to the court an argument containing the result of their investigations. This, however, has been neglected. I have not had recourse to the statutes of all the different states of the Union relative to this subject, but so far as my examination has extended, I find no law similar to our own. Of course, we can expect to derive but little aid from the decisions of courts in our sister states.

This section of the statute provides, "that any person or persons (other than those hereinafter provided for) residing one year in any township in this state, without being warned by the overseers of the poor, for said township, to depart the same, shall be considered as having gained a legal settlement, in such township." "That every indented servant, legally brought into this state, shall obtain legal settlement in the township, where such servant first served his or her master, or mistress, the space of twelve months." That "every married woman, during coverture, and after her husband's death, shall be considered as legally settled in the place where he was last legally settled; but if he shall have no known place of legal settlement, then she shall be considered as legally settled in the place where she was last legally settled before marriage." The subsequent parts of the section, point out the manner in which a person likely to become chargeable is to be warned to depart the township, and the proceedings in addition to such warning.

It is to the first clause of the section, that our attention is now turned, and the question which arises is, can a person who has been warned to depart the township, gain a legal settlement in the same township, by residing therein one year after such warning, the warning itself not having been repeated? In favor of the opinion that a repetition of the warning is unnecessary, it may be urged that it is required by neither the spirit, or express letter of the statute, and that it would be inconvenient to the township officers. That a repetition of the warning would be inconvenient to the township officers, is not denied; nor is it pretended that such proceeding is required by the express letter of the statute, that is, that it is required in so many words, but the spirit and policy of the law, seem clearly to render it necessary. Ohio is a new state, and policy dictates that in her different acts of legislation, she should go great lengths to encourage emigration. This cannot be done effectually, unless the terms upon which a legal settlement may be gained, are made easy. Under this impression, the law under consideration was undoubtedly enacted. By its provisions it is more easy to gain a legal settlement, than in most, if not all the older states of the Union. But were we to say that a man once having been warned to depart the township, could never thereafter gain a legal settlement in the same township, this policy of the law would be defeated.

Such construction too, would in many cases, cause manifest injustice. By the first clause of this section, it is residence, and residence alone, by which a

person acquires a legal settlement. A person who had been once warned to depart, could not by any subsequent act of his own, of the township, or of its officers, gain this privilege. He might accumulate any amount of property, might hold any office, might be severely taxed, and contribute largely for the support of the poor, still, it would make no difference. Eventually, misfortune might overtake him, his property might be swept away, himself reduced to poverty, and in his old age he might need for his subsistence, aid, similar to that which he had so liberally bestowed on others. Whence is he to derive this aid? Not from the township where he has spent most of his days, where he has accumulated and expended his property, whose poor he has assisted to support, where are his friends and acquaintances. From this township, some forty or fifty years before, he was warned to depart, and there he has no legal settlement. He must be removed to the place where he was last settled, there to linger out the small remains of life among strangers.

By adopting this construction, we should not only defeat the policy of the law, but measurably contradict the letter. The words are, " any person or persons residing one year in any township in this state, without being warned," &c. not from the time of his first arrival; of this nothing is said. It seems to contemplate one year's continued residence, without reference to the time when. It may be immmediately after the first arrival; it may be at any subsequent period. And if the overseers of the poor, having once warned, fail to respect that warning, the individual concerned, may well conclude, that they, as well as the other citizens of the township, are satisfied that he should gain a legal settlement among them.

Upon the whole, we are clearly of the opinion, that under the statute in question, the continued residence for one year in a township, without being warned, is sufficient to gain a legal settlement. It is not sufficient that the warning shall have been once given; it must be repeated, so that at no one period, there shall have been this continued, uninterrupted residence.

This principle being decided, there is no difficulty in applying it to the case under consideration. Mary Endsly, the pauper, was originally settled in the township of Wayne. She removed, in company with her father, to the township of Stock, in the spring of the year 1821. At this time we must suppose she was of full age, as nothing to the contrary appears from the agreed case. From this latter township she was warned to depart, 10th of July, 1821, which warning was repeated on the 8th day of June, of the succeeding year. She still continued to reside in the township, and was not again warned to depart until the 14th of November, 1823. Here then was a continued residence of more than one year, without interruption, by a warning to depart, by means whereof, she gained a legal settlement, and this township is chargeable with her support.

Judgment must, therefore, be rendered for the plaintiffs.

JUDGE BURNET'S *dissenting opinion.*

The statement of facts, on which this case was submitted, presents but a single question, whether a person "who will be likely to become a public charge," and who has been legally warned by the overseers of the poor of the township,

into which he removes, within the term prescribed by the statute, can afterwards acquire a settlement in that township, by being suffered to reside therein, a year after such warning, without being warned a second time. Or, in other words, whether it is the duty of the overseers to repeat the warning, from time to time, so as to prevent an interval of twelve months between such warnings.

That part of the statute which relates to this question, is in the following words: "That any person or persons, residing one year in any township in this state, without being warned by the overseers of the poor for such township, to depart the same, shall be considered as having gained a legal settlement, in such township. And the overseers of the poor, on receiving information that any person has come within the limits of their township to reside, who will be likely to become a township charge, shall issue their warrant or order to any constable of the township, commanding such constable, to warn such person to depart the township." The first branch of this section provides how a person moving into a township, may acquire a legal settlement therein; and the second prescribes the duty of the overseers, on receiving information that any suspected person has come to reside within the limits of their township. By the first, a residence of one year, without being warned, gives a settlement. This, I apprehend, relates exclusively to the first year of their residence. If a person shall reside one year in any township; that is, if he shall come into a township and reside therein, one entire year year thereafter, he shall at the expiration of that year, acquire a settlement, unless he shall have been warned in the interval, but if he shall have been warned within that year, the law gives him no right. It does not provide for a second term, within which he may aquire a right by residence, under any circumstances.

By the common law, paupers have no claims on public officers, or public funds. They are to depend on private benevolence, and the charity of well disposed christians. The right of receiving a support from the township treasury, is given by the statute, and it can be claimed in those cases only, which come clearly within the statute. The period from which the time of residence that will give a settlement, must be calculated, is the day on which the pauper came into the township to reside, and the question whether he acquires a settlement, or not, depends on the fact, whether he is, or is not warned, within that time. If he is not warned, he acquires the right; but if he is, he does not acquire it.—The warning within the year, excludes the right, and the possibility of subsequently acquiring it.

If the question be asked, did this pauper, after she removed into Stock township to reside, remain there a year without being warned? the answer must be she did not; she was warned before the year expired. This being the fact, her subsequent residence, in my view, has nothing to do with the case. On being once legally warned, it was proper for her to return to the place of her last settlement. Her subsequent residence in the township, though permitted, was at her peril, and instead of securing to her privileges under the law, subjected her to the penalty of being removed by force, when the proper period for so doing should arrive. In the mean time, she was an intruder, and in that character acquired no rights.

The object of the law, was the protection of townships from the charge of supporting persons, who have no legal claims on them, and at the same time, to

apprize such persons, that they cannot acquire a legal claim to support, by continuing to reside in the township; for which purpose, the first warning within the year, is altogether sufficient.

The second branch of the section, which relates to the duty of the overseers, requires them to give but one notice or warning, and it fixes the time when it becomes their duty to give that warning. They must do it, on receiving information that a person, who is likely to become chargeable, has come within their township to reside, and they are not required under any circumstances to repeat it. When it has once been given within the time designated, the officers have discharged their duty, and nothing more is required of them, until the suspected person becomes a public charge. Then, and not till then, it is made their duty to remove him. In the interim, he may remain where he is, but always liable to be removed, when he ceases to have the means of self support.

If a repetition of the warning had been intended, it would have been provided for. If at the expiration of a year from the first warning, the pauper is to be considered as having come again into the township, and if a knowledge of his continuance by the overseers, is to be considered as fresh evidence of that fact, the legislature ought to have said so, and should have made it the duty of the officers to repeat the warning, in proper season. But as the law now stands, if they have warned the pauper once, within the time prescribed, it is made their duty to remove him, when he shall become chargeable, whether more or less than a year has elapsed, since the warning was given; there is no limitation as to time.

It appears to me, that the construction put on the first part of the section, is inconsistent with the only construction that can be given to the concluding part of it. We are required to construe the statute, so that every part may stand, if it be possible, and one part of the statute frequently points out the construction that must given to another. The first part of the section in question, is carelessly drawn, but taken in connection with the concluding part, the meaning of it is apparent. Residing one year, must mean a year from the time when a suspected person first comes into the township to reside, and with this qualification, the case presents no difficulty.

It is generally admitted that the sense of a statute is not changed by transposing the parts of it. In this case, it appears to me, that the parts of the fourth section are not placed in their natural order. By changing the order, the section will read thus: "The overseers of the poor, on receiving information that any person has come within the limits of their township, to reside, who will be likely to become a township charge, shall issue their warrant, or order, to any constable of the township, commanding said constable forthwith to warn such person to depart the township, by reading said warrant, &c.; and any person or persons residing one year in any township in this state, without being warned by the overseers of the poor to depart the same, shall be considered as having gained a legal settlement in such township." On this reading it seems to be evident, that the gaining of a settlement is the consequence of not being warned within a year after the person first moves into the township, that being the only warning required, and consequently the only one referred to, and on this supposition, it must follow, that a warning within the year, excludes a settlement.

McARTHUR v. NEVIL, ET AL.

Construction of entries.

This was a bill in chancery, by a junior patentee, against one in possession, under an elder patent, to obtain title and possession of certain lands, in Pickaway county. The case involved many important questions connected with the construction of a series of entries. It was adjourned here for decision from the county of Pickaway, and very elaborately argued by

Leonard, for the complainant.

Scott, *Grimke* and *Murphy*, for the defendants.

Opinion of the court, by Judge BURNET.

The pleadings and exhibits present a number of questions, which have been argued by counsel, at considerable length, but which the court have not thought it necessary, either to consider, or decide. Our attention has been directed to two questions only, which seem to embrace the merits of the case.

1st. The effect of the several surveys made at different times, on the entry, in the name of Tench, assignee.

2d. The true construction of Rose's entry, No. 441, on which all the subsequent entries, including those in dispute, connected with it on the river above, must necessarily depend.

These questions are to be decided on the following facts. In August, 1787, one Lawson made an entry, No. 439, on the Scioto River, beginning at a point, on the bank, eight miles above the mouth of Paint creek. On the same day, Blair made an entry, No. 440, of one thousand acres, beginning at Lawson's upper corner, on the river, running up the river four hundred poles, wen reduced to a straight line, thence at right angles from the general course of the river, and with Lawson's line, for quantity. Rose made an entry, No. 441, of one thousand acres, on the Scioto river, beginning at the upper corner of A. Blair's entry, No. 440, on the bank of the river, running up the river four hundred poles, when reduced to a straight line; then at right angles from the general course of the river, and with Blair's line for quantity.

Caines then entered one thausand acres, beginning at the upper corner of Rose.

White entered two thousand acres, beginning at the upper corner of Caines.

Coleman entered one thousand acres, beginning at the upper corner of White.

Jordan entered one thousand acres, beginning at the upper corner of Coleman.

Galt, under whom the defendants claim, entered one thousand acres, on the Scioto river, beginning at the upper corner of Jordan's entry, No. 449, on the

bank of the river, running up the river four hundred poles, when reduced to a straight line, thence at right angles to the general course of the river, and with Jordan's line for quantity.

Biddle then entered one thousand acres, beginning at the upper corner of Galt.

John Tench, assigaee, under whom the complainant claims, then entered twelve hundred acres, part of military warrant, 2377, on the Scioto, beginning at the upper corner of C. Biddle's entry, No. 452, running up the river five hundred poles, when reduced to a straight line, thence from the general course of the river, at right angles, and with Biddles line for quantity.

These entries were all surveyed in 1793, by a deputy, regularly appointed, and most of them have been settled, and improved many years.

In 1807, 800 acres, of the entry in the name of Tench, assignee, were withdrawn, and located, and surveyed, on other lands.

In 1809, 400 acres, residue of the above entry of Tench, assignee, were again surveyed by D. McArthur an authorised deputy, in such form that the length of the survey, was 526 poles, and its breadth 124 poles.

In 1823, the same 400 acres, were again surveyed by D. McArthur, in two separate surveys, so as to include a part of the survey of Biddle, and a part of the survey of Galt, which now belongs to the defendants.

From a correct diagram of Blair's entry, 440, it appears that he has three corners on the Scioto river, one at each extremity of his base, and one where his back line intersects the river.

Rose surveyed from the uppermost, or third corner on the river, and all the subsequent entries, including that of the complainants, have been surveyed in conformity with it.

The complainant now contends, that the beginning corner of Rose, is the second corner of Blair, on the river, at the upper extremity of his base.

The county surveyor has reported, that the entry of Rose, cannot be laid down, or surveyed from that corner as a beginning.

The entry in the name of Tench, was made on a military warrant, granted to Doctor Trezvant, who, it is said never assigned to Tench, or authorized an entry in his name.

The complainant claims by assignment from Wallace and Woodbridge, who claimed as assignees of Trezvant, and deny the right of Tench.

Without stopping to examine the validity of the assignments on either side, I shall take it for granted, they are regular, and that the complainant has acquired a valid right to the entry in the name of Tench, assignee.

1st. The first enquiry then is, what is the effect of the different surveys, that have been made on the entry in the name of Tench, assignee.

The complainant alleges that Tench, having made the entry in his own name, without authority, must be considered as a trustee for him. He therefore affirms the entry, and claims the benefit of it, but contends, that the first and second surveys were made without authority, and that the only authorized survey, is the one made by his direction in 1823. It is difficult to account for the fact, that this entry was permitted by the principal Surveyor, without evidence of an assignment. But taking it for granted, that the entry was obtained by the practice of a fraud on the officer, or in consequence of his negligence

and inattention, yet, as the complainant has sanctioned it, after it was surveyed, and recorded, in the name, and as the property of Tench, it would seem that he has recognized the power by which both the entry and the survey were made.

In addition to this, it is in proof, that the surveys of 1793, and 1809, were made by regular and authorized deputies; it is therefore to be presumed, that they were made legally, and on proper authority. The officers were acting under the obligation of an oath, and on their personal, and official responsibility. In the absence of all proof, therefore, we are to take it for granted, that the person having the control of the warrant, directed the survey, and that it was executed in conformity with such direction.

The objection to these surveys, seems to rest on the supposition, that Tench ordered them. But there is no evidence of that fact. If Tench had not the control of the location, as it is contended, the survey may have been directed by Trezvant, or some other person, who had an interest in the land, or a power to manage it. On any other supposition it would be impossible to sustain half the surveys that have been made in the district; and when it is remembered that the first survey was made many years before the existence of the complainant's right, and before the alleged assignment by Trezvant to Wallace, we can readily understand why it is, that this complainant has no knowledge of the transaction. His want of information, however, does not change its character. Trezvant has never disavowed it, nor is there any proof that it was made without his authority. Wallace certainly knew the situation of the location before he purchased, and that he was bound by all the steps that had been legally taken, towards the completion of the title, and yet he has shown no disavowal of the survey, either by Trezvant, or Tench. The inference from this fact, in connection with the credit which must be given to the official acts of a sworn deputy, is irresistible. As the case is presented, I cannot discover any difference between the validity of the entry, and that of the survey. They rest on the same ground, depend on the same evidence, and must stand or fall together. If the absence of testimony be sufficient to condemn the survey, the entry must share the same fate, for they must be presumed to have been made by the same person, or at least under the same authority. The distinction between them, which counsel have endeavored to make, does not appear to me, to have any foundation to support it. The whole process of consummating a title, from the emanation of the warrant, to the granting of the patent, is one transaction, though consisting of different parts; and the assignee of a warrant, takes it in the state of process towards a complete title, in which it is found, at the time of his purchase, but with the same right of the original holder, to disavow any step that may have been taken illegally, or without authority. Such illegality, or want of authority, however, is not to be presumed, nor is it to be admitted, on the bare assertion of the assignee, who must have been a stranger to the transaction, at the time it took place. The law presumes that to be legally done, which is done by an officer, vested with competent authority, and on the supposition, that the first survey was made by such an officer, the assignee is bound by it, though by a fair construction of the entry, it might have justified a different survey. This survey of 1793, does dot conflict with the survey of the

defendants, which includes the land now in dispute, and being the survey by which the complainant is bound, he cannot take any thing by his patent, which is founded on the survey of 1823.

2d. The second question is, what is the correct construction of Rose's entry, No. 441, on which the position of Tench's entry must depend.

Rose calls for the upper corner of Blair's entry, on the river, as his beginning. It is necessary, therefore, to ascertain that corner.

The complainant contends, that it must be the upper corner of Blair's base, line; but according to my apprehension, it is the upper corner of his entry without reference to any particular line. In most cases, where both ends of a base line terminate at points on a water course, and the call is to run back for quantity, the upper corner on the base, will be the upper corner of the entry, on the river; but it may happen, that by a sudden bend in the course of the stream, the third corner of the entry, is the upper corner on the river. The base line alone, does not constitute an entry. It must be taken in connection with the other calls. An entry is neither more, nor less, than a location, and when we speak of an entry, we mean a tract of land, with defined, though unsurveyed boundaries, that must necessarily have more than two corners. The calls of Blair's entry; places two of his corners on the river, with certainty, but it necessarily includes two other corners, which may, or may not be on the river. A valid entry must be certain and precise, and must contain the means of ascertaining its boundaries in order that others may locate the adjoining land with safety. This entry is admitted to be good. It must therefore, contain the means of ascertaining all its corners with certainty. This being the case, it is a natural conclusion, that Rose, in making his entry, ascertained the situation of Blair's entry, without which, he must have located at random, and might have called for the same land which Blair had previously entered. In ascertaining the situation of that entry, he certainly knew, that no part of it could lie, or be intended to lie, on the east side of the river; and that although the second line, as called for, might cross the river, yet the entry could not include land, or have a boundary, or a corner, on the east side; but the river would become its boundary, from the point where the line should cross, and, consequently, that its uppermost corner on the river, would be the point where that line, or the next called for, should cross, for the last time. A protraction of this entry, shows, that the second line crosses the river, and terminates out of the military district; and that the third line re-crosses, and continues a considerable distance within the district, before it terminates. On examining this diagram, if the question be asked, what is the real entry, or location of Blair? the answer must be, so much of the land within its lines, as is on the west side of the river; or, in other words, the land bounded by the river, from the beginning to to the termination of the base, and from the termination of the base, to the point wherethe back line intersects the river, and by that line, and the line called for in Lawson's entry. The boundaries of the location being ascertained, another question arises. How many corners has it, and where are they situated? The eye discovers at once, that it has four corners; one at the commencement, and one at the termination of the base; one at the point where the back line intersects the river, and one at the point where that line intersects the line of Lawson. If this exposition be correct, the upper by which I understand the uppermost corner of

Blair's entry on the river, is his third corner, and is found at the point where his back line intersects the river. Assuming that corner as the beginning of Rose, it will be found, that Tench's entry does not interfere with Galt, and that the survey by which Tench now claims, does not include any part of land covered by his entry.

In construing entries, the intention of the locator, should not be disregarded, when it can be ascertained. Although it may be inartificially expressed, it should be made the rule of construction, as far as possible. The evident intention of Rose, was to begin on the river, at the point where the boundary of Blair should leave it, for the last time. On this supposition, he has appropriated the vacant land contiguous to Blair; but on the complainant's construction, he has attempted to appropriate the land covered by him. As the complainant has surveyed for him, at least nine hundred and fifty, of his thousand acres, are within the lines of Blair; and this result must have been evident, to the eye of the locator, when he made the entry. From the termination of Blair's base, the Scioto changes its course. Its bed then becomes about parallel with his second line; so that a person on the ground, would naturally conclude, that the third corner of Blair, would be on the river, and he would perceive at once, that by calling for the termination of his base line, for a beginning, and thence up the river, for the base of his own entry, he would unavoidably cover the principal part, if not the whole, of that entry, instead of making it a boundary, as he intended. Here then, we have the reason why the county surveyor could not lay down, or survey the entry of Rose, from Blair's second corner. It was because Rose's base, would be precisely the second line of Blair, and he would run back for quantity, directly through Blair's entry, and include almost the whole of it. In addition to this, it should be remembered, that the whole chain of entries, from Lawson to Tench, which seem to have been made on the same day, have been surveyed about thirty years. That they have been occupied and improved fifteen or twenty years, and some of them more: that Rose's survey commenced at the third corner of Blair, and that the whole chain of subsequent entries, including Tench's, were surveyed in conformity with it. These facts show, not only the intention of Rose, but the construction which has been put upon his entry, as to its beginning corner, by all the locators above him. Tench's location, claimed by the complainant, stood on a survey, made by an authorized deputy, in conformity with the construction now given, from 1793, till 1823, when the complainant ordered a new survey, by which Tench's location is moved down the river, about 800 poles, and made to interfere with the surveys of Biddle and Galt, as they were executed in 1793. If this construction prevails, the whole chain of surveys must be removed, from the ground on which they were made, and the occupants must lose their improvements, notwithstanding the construction given by Rose, to his entry, is in conformity with established rules, consistent with its own terms, and in accordance with the common understanding of those, whose locations are connected with it.

If it was the intention of Rose, to call for the entry of Blair, as a boundary, without interfering with it, his object could not be attained in any other way, than by taking his uppermost, or third corner, on the river, as a beginning.

In *Evans v. Manson*, (1 *Bibb*, 5,) the court say, that a locator, calling to join a claim, shall not be intended to interfere with it. In *Lipscom v. Grubbs*, (3 *Bibb*, 400,) the same rule is given. The court there, rejected a call to run

north, because it produced a repugnance, by making the entry interfere with a location called for. They decided, that the locator meant to say *south*, but by mistake, said *north*; that the idea could not be entertained, that he intended to lose 400 acres, by including the claim he had called for, and which he had thereby admitted to be superior to his own; that the whole entry should be taken together, to ascertain the most probable, fair, and rational meaning of the locator, and that subsequant locators, from a just construction of the entry, might understand the mistake. Now, in the case before us, by assuming the corner on Blair's base line, as a beginning, Rose, not only interferes with the entry which he calls for as a boundary, but includes at least 950 acres of it, and will not cover more than forty or fifty acres of vacant land, when he intended to locate 1000 acres; but according to the construction by which he has surveyed, he saves his call for Blair as a bounbary, prevents all interference, and obtains his quantity of land. No person can mistake this meaning, for a moment. The locator next above him, clearly understood, and surveyed his entry accordingly, and those adjoining, for an indefinite extent, have understood, and surveyed in the same way. The complainant himself, or those under whom he holds, have also surveyed on the same principle, and acquiesced in it, for nineteen years.

From the loose manner in which entries have been made in this district, as well as in Kentucky, great latitude has been taken, to make the language used conform to the intention of the locator. In the case of *Massie v. Watts*, (6 *Cran.* 157,) the Supreme Court admit the necessity of establishing rules, to save locations that would otherwise be defective, for want of that degree of certainty, which is required for the safety of subsequent locators, and they decided the case, on the principle that they were bound to support the entry, if, by any reasonable construction, it could be supported. In speaking of the possible result of *Massie's* construction, the Chief Justice says: "Powell's back line would probably terminate on the river, in which event, that would be his upper corner, on the Scioto, which is called for, as the beginning of O'Neal's entry." Now the diagram of Blair's entry and survey, returned by the county surveyor, shows, that his back line does terminate on the Scioto, above his base, consequently that must be his upper corner, on the river, which is called for by Rose.

From this view of the case, it follows, that whether the complainant was bound by the survey of 1793, or not, a proper construction of the entries on which his own depends, will place his location entirely above the limits of Galt's survey, as it is now claimed by the defendant s.

The bill, therefore, must be dismissed.

LESSEE OF ALLEN v. O. PARISH.

Lands mortgaged since June 1805, must be sold upon execution issued on a judgment upon *sci. fa.* in the manner prescribed by the execution law in force, at the time of the sale.

Where lands are sold upon execution without appraisement, and no objection is made at the return of the execution, the sale, if to a stranger, is good.

This cause came before the court upon a motion for a new trial, made by the plaintiff, in an action of ejectment, and was adjourned from Franklin county.

The plaintiff claimed title as heir at law, under his father, G. W. Allen, who deduced title from John Allen. The defendant, to protect his possession, gave in evidence a deed of mortgage G. W. Allen to John Langdon, dated September 18, 1805, and offered also in evidence certain judicial proceedings had in the county of Franklin, where the lands lie, upon the mortgage, under which the lands were sold by the sheriff on execution, and conveyed to Line Starling. He also offered in evidence, a deed of quitclaim from Langdon, the mortgagee to Line Starling, dated since the commencement of this suit. The plaintiff's counsel objected to the evidence of sheriff's sale, because the defendant did not show that the lands were valued by appraiser's according to law, as adjudged to be necessary in the case of *Patrick v. Ousterout*, (1 *Ohio Reports*,) and he objected to the deed from Langdon, upon the ground that a judgment having been rendered against Allen, on the mortgage, the estate of Langdon was at an end, and the judgment and legal process under it, to sell the land, the mortgagee's proper remedy. But the Court received all the evidence objected to. The motion for a new trial was grounded upon an alleged error in admitting this evidence.

Hammond and *Wilcox*, for plaintiff. *Baldwin* and *Ewing*, for defendant.

Opinion of the Court by JUDGE SHERMAN.

This case depends upon the title of the defendants to the premises in controversy, and that title upon the sufficiency of certain proceedings had upon a mortgage from G. W. Allen, the ancestor of the lessor of the plaintiff, and from whom both parties derive title, to J. Langdon, dated September 18, 1805. At the February term, 1809, of the Court of Common Pleas, for the county of Franklin, a judgment was obtained upon *sci. fa.* upon this mortgage, and execution sued out against the mortgaged premises, a sale made thereof by the sheriff, who conveyed to the purchaser, L. Starling, by deed, dated July 11th, 1809. There was no appraisement of the value of the mortgaged premises, recited in the sheriff's deed, or produced upon the trial. There were a number of questions made by the counsel, on the motion for a new trial, but the Court have deemed it necessary to consider but two: Did the statutes in force at the time these proceedings took place, require an appraisement of the mortgaged premises; and if so, was such appraisement essential to the validity of the sale.

The act for the recovery of money, secured by mortgage, of February 12th, 1805, which was in force at the time the mortgage from G. W. Allen to Langdon was executed, and at the time all the proceedings thereon were had, provided, that upon final judgment being entered upon the mortgage, "a writ of *levari facias* might issue, by virtue of which, the mortgaged premises should be taken in execution, and disposed of in the same manner and under the same regulations, that lands,or tenements are, or may be, by law disposed of for the satisfaction of judgments." It is contended, that this provision of the law, requires the sale of mortgaged premises to be conducted in the same manner, and under the same regulations prescribed by law, for the sale of lands in satistfaction of judgments in force at the time of executing the mortgage, or suing out the writ of *scire facias*. But this is a construction which neither the words of the

law, nor the intent of the legislature will warrant. The expression, "the mortgaged premises shall be disposed of," as lands "are or may be by law," refers to the time of the disposition by sale of such mortgaged premises. It is the disposition of the mortgaged lands under the writ of *levari facias*, that the legislature is providing for, and they direct the manner of that disposition to conform to the laws that may happen to be in force for the sale of lands in satisfaction of judgments, at the time of such disposition.

It has been repeatedly held, that the law in force at the time of a sale of lands upon execution, must control the manner of proceeding, by the officer in conducting such sale, and not the law in force at the time of the rendition of the judgment, except those cases specially provided for by statute. It has been the uniform policy of our mortgage laws to require all lands mortgaged since the first day of June, 1805, to be sold in the manner prescribed by law, for the disposition of real estate by execution, in satisfaction of judgments in force at the time of such sale. Mortgages executed prior to the first of June, 1805, are, by another statutory provision, to be proceeded on, and the money secured thereby, recovered in the manner directed by the laws in force at the time of the execution of such mortgage. But in 1805, the legislature, for all mortgages thereafter executed, instead of specifically directing the manner of proceeding to sell the mortgaged premises, after judgment upon *scire facias*, provide therefor, by adopting as the course of proceeding, the laws "that are or may be" in force, for the disposition of lands in satisfaction of judgments; and this provision has since remained unchanged. The object was to prescribe a uniform mode of selling lands upon execution, whether the lands were mortgaged, levied on by the officer, or delivered up by the judgment debtor, and was intended as well for the safety of the officer, as the benefit of both judgment debtor and creditor. The execution law subjected the officer to a very severe penalty for any neglect or omission of duty, and prescribed a summary and rigorous manner of enforcing that penalty, upon the supposition that his duty was so plainly marked out, he could not in any case, with ordinary care, mistake it. The *levari facias* does not recite the date of the mortgage, and the officer has no means of ascertaining that fact, but by the examination of the record in court, (a duty never imposed on him) yet, in all cases, he must ascertain it in order to execute the writ, if the sale must, as is contended by the defendant, be conducted under the execution law in force at the time of giving the mortgage. The true construction of the mortgage act of 1805, is, that the sale of the mortgaged premises, by virtue of the *levari facias*, shall be conducted in the same manner, and under the same regulations required by the law for the sale of lands upon judgments, in force at the time of such sale; and not under the law in force at the time the mortgage was executed, or any proceedings had thereon anterior to the sale; and it is understood, that the practice in most parts of the state has conformed to this construction.

The judgment and execution law in force at the time the sale of these mortgaged premises, was made by the sheriff, under the *levari facias*, required that all real estate levied on by an execution, should be appraised and not sold for less than two thirds, or one half of such appraised value, as it might happen to be improved or unimproved.

The next, and most material question is, whether a sale of lands upon execu-

tion, is valid without an appraisement. This is the first time this question has been brought before the whole Court for argument and determination, and had it not been for the decision in the case of lessee of *Patrick v. Ousterout* (1 *Ohio Rep.* 27) I should have felt no difficulty in coming to the conclusion, that the want of an appraisement of real estate, would not render the sale by the sheriff, void, so as to vest no title in the purchaser. It having been held in that case by two of the judges of this court, that the appraisement constitutes an essential part of the proceedings in the sale of lands under an execution; our respect for that opinion as well as the importance of the question, has induced us to examine with great care the point, and a majority of the Court have found themselves under the necessity of saying that in their opinion, the sheriff's deed will vest in the purchaser, not being a party to the judgment, a good and valid title to the lands levied on by, and sold under the execution, although no appraisement of the premises had been made.

The general principle by which the validity of sales upon execution is to be tested, is laid down by the Supreme Court of the United States, in *Wheaton v. Sexton* (4 *Wheat.* 503.) It is there said the purchaser depends upon the judgment, the levy, and the deed; all other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or no return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return. Substantially the same doctrine has been recognized in the courts of most of the states, when lands are sold upon execution, to satisfy judgments. (2 *Bibb*, 402. 3 *Bibb*, 217. 8 *John.* 366. 16 *John.* 537. 2 *Bin.* 40.)

It is the well settled doctrine of the English courts, that the irregularity of the sheriff's proceedings, in sales, will not vitiate the right of the purchaser, provided he had an execution authorizing him to, and he did in fact levy and sell. The purchaser must look to see there is a judgment, upon which to found an execution; that an execution has been issued, and a levy made, but is not bound to inquire into the regularity of all the ministerial acts of the sheriff, before or after the sale.

It is certainly true, that the legislature might make an appraisement of the land, essential to the validity of the sheriff's deed, as they can impose any condition or restriction upon those alienations of estates that derive all their efficacy from statutory regulations. But as the legislature, when they subjected real estate to be levied on and sold, in satisfaction of judgments, were acquainted with the principles of the common law, applicable to sales by sheriffs, under execution, it must be presumed they intended those principles to apply to the sale of lands, unless a different intent is clearly expressed; or necessarily results from the provisions of the statute.

In order to ascertain whether that intent has been manifested by the legislature, the court have not confined their attention to the act regulating judgments and executions, in force at the time this sale took place, but have examined all the subsequent statutes thereon; as they all, much as they differ in other particulars, contain the provision for the appraisement of lands, and direct that no sale thereof shall take place for less than a certain proportion of the appraised value. A clear expression of the intent of the legislature, that such appraisement was essential to the validity of the purchaser's title, found in any one of

the numerous acts made upon the same subject matter, would greatly assist in giving, if not entirely controling, the construction of the same provision in the other acts. This examination has shown, that from 1808, the provisions of the different acts regulating the appraisal, sale and conveyance of land, by virtue of an execution, have been very uniform, especially considering the great number of acts the legislature have found it expedient to pass, upon the subject of judgments and executions.

It is admitted, that the legislature have not in any of the judgment and execution laws, declared in so many words, a sale of lands by the sheriff under an execution, void, if made without appraisement; but it is said, that by force of the proviso in the first section of the act of 1808, and contained in substance in all the subsequent execution acts, such appraisement is made a condition precedent to the sale, and essential to its validity. A majority of the Court, however, after the most careful examination of the several statutes, are unable to give this construction to the proviso, as in their opinion, it would have the effect to render it inconsistent with some, and entirely defeat other material provisions of the same statute. The act of Feb. 22, 1808, amendatory to the act of 1805, regulating judgments and executions, provides "that if execution be levied on lands, and the officer levying such execution shall call an inquest, of five reputable freeholders, and the inquest shall on oath or affirmation return to said officer, under their hands and seals, an estimate of the real value of said estate, upon actual view of the premises;" that the officer shall forthwith deposit a copy of the appraisement with the clerk who issued the execution, and sell the same agreeably to the provisions of the act of 1805; then follows the *proviso in* question: "provided, that no tract of land that has improvements thereon, shall be sold for less than two thirds, nor any tract of land without improvements thereon, for less than one half of the returned value by the inquest." A statute should be so construed, that the several parts will not only accord with the general intent of the legislature, but also harmonize with each other; and a construction of a particular clause, that will destroy or render useless, any other provision of the same statute, cannot be correct. No word ever should be rejected, if the statute will admit of a rational and consistent construction without it. And in order to arrive at a correct interpretation of the proviso in question, it will be necessary to consider its connection with all those provisions of the acts regulating judgments and executions, with which it has a direct and immediate relation. They all form part of the same system, and should be so construed, that each distinct provision may have its proper effect, and the objects the legislature had in view in enacting the law be accomplished.

The construction contended for, by which a sale by the sheriff would be void, without any appraisement, cannot receive any aid from the circumstance, that the clause of the statute relied on, is in form of a proviso. A proviso is generally used in a statute to qualify, limit, or restrain the operation of general terms contained in a previous part of the section, or act, and not to introduce a distinct and independent proposition. The section in which this proviso is found, is in all the statutes directory to the officer levying an execution on land. He shall call an inquest of five freeholders; he shall return a copy of the appraisement to the clerk's office, "and immediately advertise and sell such real estate;" then follows the proviso, "that no tract of land shall sell for less," &c.

The natural office of the proviso here, would seem to be, to limit the general terms used in the direction to sell, to cases where such sale could be effected for one half, or two thirds the appraised value, as the case might be. Whether this be the proper office of the proviso here, or not, it certainly would have been entitled to more weight in the present question, had it been found in those sections of the statute, declaring the effect of a sale of land, on execution by the sheriff, and the extent of the interest the purchaser acquired by such sale, in a section acknowledged to be directory to the sheriff of his duty.

It is also worthy of observation, that the ninth section of both acts of 1805, and 1810, forbid, in as positive terms, the sale of lands without advertisement, as the proviso in question does without appraisement, the words being, "and no lands shall be exposed to sale on any writ of execution, until public notice by advertisement shall have been given," &c. It has never I believe, been supposed, that it was essentially necessary to sustain a title under a sheriff's deed, to show, that the sale of the land was advertised, the length of time, and in the manner directed by the statute. This section has ever been considered as directory to the sheriff, and any failure or neglect of his to comply with the directions it contains, might subject him to a penalty, or an action, at the suit of the party injured, but would not render his deed to a purchaser void. And every argument derived from the supposed positive enactment of the legislature, as well as of interest or policy, that can be urged for requiring the appraisement as essential to the validity of the title of a purchaser at the sheriff's sale, applies with equal force for requiring the public notice of the time and place of sale, directed by the statute. In case the sheriff neglects either of these directions, the creditor or debtor, or both, may be seriously injured, but they have their remedy against the sheriff; or by an application in proper time to the Court, proceedings under the execution may be arrested. If the officer, having the execution, and the purchaser combine together to defraud the parties to the judgment, the sale will be void upon other principles, and the officer subjected to a penalty.

If the appraisement, by five freeholders under oath, was intended by the legislature, as essential to the validity of the sheriff's deed, they would, it is presumed, have provided some mode of preserving the evidence of such appraisement, for the benefit of the purchaser. The only provision of the statute looking to such preservation, is that directing the sheriff, before he proceeds to sell, to return a copy of the appraisement to the office of the clerk of the court issuing the execution. There is no direction in any of our statutes to the clerk, to record the copy, or place it on file among the papers in the cause, to note it on his execution docket, or make any other disposition of it, or even to preserve it. It can scarcely be believed, that the legislature intended by the proviso in question, that the purchaser at sheriff's sale, should be bound to show an appraisement under oath, of five freeholders, whenever the legality of such sale was called in question, and yet make no provision for the preservation of the inquest, or the safe keeping of the copy delivered to the clerk, or even for its admission in evidence, when it might happen to be preserved. The original inquest is left in the hands of the officer for his security, the copy is delivered to the clerk, not upon the return of the execution, but before the sale, that the creditor, debtor, and all persons desirous of purchasing, may ascertain the proceedings of the

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officer, and the appraised value of the lands, and regulate their conduct accordingly.

The legislature, in all the general acts regulating judgments and executions, have directed the officer selling land, to make to the purchaser a deed for the lands so sold; and have directed, that the sheriff's deed "shall recite the writ or writs, and the judgment or judgments, or the substance thereof, by virtue whereof the said lands" were sold. The legislature, by directing this recital, evidenced their knowledge of the necessity of there being a judgment and execution to sustain the sheriff's deed; and it was, apparently, their intention, that the deed should contain on its face, a reference to those facts, upon which its validity must depend. If they had supposed, that by the same act requiring these recitals, they had made the appraisement as essential to the purchaser's title, as a judgment, they would, it seems to me, have directed the officer making the deed, also, to recite such appraisement; especially, as they had not provided for the original being placed on record, in any public office, or for the preservation and making evidence of a copy.

The legislature, in each of the several judgment and execution laws, have also declared the effect of a sheriff's deed, without limiting it to those cases, where all the directions of the statute have been complied with. "The sheriff, who, by such writ or writs of execution, shall sell the lands, &c., so levied upon, shall make to the purchaser, as good and sufficient a deed of conveyance, for the lands, &c., so sold, as the person against whom such writ of execution was issued, might have made for the same; and such deed shall vest in the purchaser, as good and perfect an estate in the premises therein mentioned, as was vested in the defendant, at or after the time the lands became liable to the satisfaction of said judgment." The purchaser is to have as perfect an estate in the lands sold by the sheriff, as the defendant had; provided, the sale had been made under an execution levied upon said lands. The levy of an execution upon the lands, and a sale by the officer, are considered essential to the purchaser's acquiring the same estate in the land, that the judgment debtor had; and when they had taken place, the sheriff's deed was to vest in the purchaser, as good a title as the defendant could have made at any time, at or after judgment. The legislature, in adopting and adhering to this provison, for it belongs to all our general judgment and execution laws, do not appear to have contemplated any other essential requisite, to the validity of the sheriff's deed, than a judgment, execution, levy and sale, by the proper officer; for it cannot be admitted, that in declaring upon what a sheriff's deed should be founded, and its effect, that they would wholly have omitted one, and only one requisite, of an effectual and valid conveyance, or any reference to it. If the legislature intended to place the appraisement, judgment and levy, upon the same footing, of being equally necessary to the purchaser's title, that intent would have been manifested, by some mention of, or reference to, the appraisement, in those parts of the statute providing for the deed to the purchaser, and its effect upon the estate of the judgment debtor. The expression of the statute just quoted, would, probably, have been, that "the officer who, by such writ of execution, shall sell the said lands, so levied upon" and appraised, "shall make to the purchasers," &c. The fact, that in a number of different parts of the statutes, where the levy and sale are provided for, and their effect declared, no mention is made of the appraise-

ment, would be sufficient to show, the legislature did not intend, by the proviso in question, that the sale should be void without appraisonment.

By the 21st section of the judgment and execution law, of 1810, (and there are corresponding enactments in all the subsequent execution laws,) the sheriff, or other officer, having an execution in his hands, "who shall neglect or refuse to sell any lands, &c., or shall neglect to call an inquest of five respectable freeholders, &c., shall be amerced in the amount of the debt, damages and costs, with ten per cent. thereon, to, and for the use of the plaintiff or defendant, as the case may be;" and the same section, further provides, a summary mode of obtaining said amercement, by either party; and that execution issue, in the name, and for the use of the plaintiff or defendant, as the case may be, against the body, goods, lands, &c. of such officer; saving to both parties, the right of proceeding by attachment against the officer, at their election.

There is no provision for amercing the sheriff, for selling lands without judgment or execution, or levy; nor for conveying to a pretended purchaser, when in fact, there had been no sale, for then would all be inoperative and void, and would in a legal sense, work injury to no one. But it is for omitting to do, what by law, he was bound to do; or by proceeding in a manner different from that prescribed by the statute, and which, nevertheless, be operative, as between the parties, that he is so amerced.

He is to be amerced, "for neglecting to call an inquest," in the amount of the debt, and ten per cent., upon the motion of the judgment debtor, whose lands have been sold without valuation. The sale is absolutely void, the title still remaining in the judgment debtor, and the purchaser taking nothing by his deed, if the effect contended for by the plaintiff, is to be given to the proviso; and yet, for this void act, working no injury to the defendant, but a benefit, so far as the amount of the purchaser diminishes his debt, he is to amerce the sheriff in the full amount paid by that debt, and ten per cent. thereon. It would be doing injustice to the legislature to suppose, that the intended the sale of land upon execution, by a sheriff without appraisement, to be absolutely void, when at the same time, they subjected him, for making such sale, to so severe a penalty. If such sale be void, the parties would not be injured thereby. The judgment debtor would lose nothing, the creditor might be subjected to a short delay, but his lien upon the lands would still remain, and yet these parties, or one of them, can subject the sheriff to this penalty, for an act almost harmless, as to them, while the purchaser who has paid his money, and acquired no valid title, and the only one materially injured, is without remedy or redress. Courts of law, are not warranted in giving such a construction to the acts of a legislature, as must necessarily work injustice, and be fraught with injurious consequences, unless the intent of the legislature that they shall be so understood, is manifest and clear beyond any rational doubt. The legislature probably intended, the provision requiring an appraisement of real estate, and that it should not be sold for less than a certain proportion of the appraised value, as a majority of the court understand it, as directory to the officer having the execution, making it his duty, to cause such appraisement, and forbidding him under a penalty, from selling for less than the statutory price; but as between the purchaser and all others, leaving the validity of the sale to depend upon the

same principle, and to be tested in the same manner it would, had not the statute required such appraisement.

It is certain that the legislature intended that all lands upon which an execution had been levied, should be fairly appraised at their just value; and they made it the duty of the officer having such execution, to cause such appraisement to be made; and for a neglect of this, or any other duty, he was liable to the party injured thereby. They did not expect that lands would be sold upon execution, for less than one-half or two-thirds of their appraised value, and they made it the interest of the officer who had a controul over the sale, to see that it was in all things conducted according to the direction of the statute. The failure or neglect in advertising, or causing an inquest to be held, of the value of the land, subjected him to a penalty to the amount of the judgment, with ten, and at one time twenty-five per cent. addition, to be imposed and collected in a summary manner, as well as his liability to an action, at the suit of the person injured.

The legislature believed that they had insured the faithful discharge of the duties imposed upon sheriffs, as they must always be influenced thereto, by the most powerful of motives, that of self-interest; and that neither policy or justice required, that the innocent purchaser should be subjected to loss, by the neglect of a public officer, over whose acts he had no control.

The policy of appraising lands levied on by execution, in satisfaction of judgments, and requiring them to sell for a certain proportion of the appraised value, was early adopted, and since constantly adhered to in Ohio. It has been found, as it was expected, beneficial on the whole, to both creditor or debtor. To creditor, by preventing the debtor in the name of a friend, from purchasing a large estate for a trifle, leaving the debt unsatisfied, and removing many of the inducements the debtor had to cover up his estate, and prevent it from a forced sale for what it would bring; to debtor, by preventing the sacrifice in a time of a general scarcity of money, of his real estate, for a sum greatly below its just value. In many instances, it has retarded the collection of debts, especially where the sum was large, and thereby produced incovenience, and sometimes embarrassment to the creditor; but its effect has been, to eventually secure a more certain, though tardy payment of debts, than could, in a country like ours, with limited pecuniary means, have been expected, if lands were sold upon execution for whatever sum might happen to be bid. This policy of protecting real estates from being sacrificed at sheriff's sales, has been sufficiently protected, without subjecting an innocent purchaser to certain and irremediable loss, when the officer has neglected his duty.

But the judgment debtor is not compelled to rely alone upon the liability of the officer for his remedy, ample and expeditious as that is made by statute. If the sheriff should attempt to sell without appraisement or advertisement, a judge's order might easily be obtained to stay all proceedings on the execution until the sitting of the Court, when the sheriff might be punished for attempting to abuse the process of the court, if such should be the fact, and his proceedings set aside, for irregularity. And in cases where the sale had taken place, but the money not paid over to the creditor, or a deed delivered to the purchaser, the Court might interfere, and set aside the proceedings on the execution as irregular, as they could then place the parties in the same situation they

were before the irregularity took place. There are many ways under our laws and practice, in which upon proper application, a Court could effectually interfere to prevent a sale of lands not appraised, from being perfected by the execution and delivery of the sheriff's deed.

Protection against wrong, from the hands of ministerial officers, as well as redress for injuries sustained, is abundantly furnished by law, and it must be for the neglect of the judgment debtor, if his lands are ever sold without the requisitions of the law being strictly complied with. But when the judgment debtor, who ought to be vigilant, if he will enjoy his privileges, and protect his rights, stands by and suffers the sheriff or other officer to sell his lands, after judgment, execution and levy, receive the purchase money, and execute, and deliver a deed of conveyance to the purchaser, such sale is not vitiated, nor the deed void, for want of an appraisement, or on account of a defective appraisement. The judgment debtor's remedy is against the officer for neglect of duty; and to him he must look for redress, for the injury he has sustained.

If the view, which a majority of the court have taken of the judgment and execution acts, prior to the law of 1824, be incorrect, and the true construction of those acts should require an appraisement of lands, as essential to the validity of a title, derived under a sale by the sheriff, the mischief, resulting from such incorrect decisions, must be small, and there is no danger of its inducing carelessness, or inattention, on the part of sheriffs. By a provision of the judgment and execution law of 1824, the court to which an execution shall be returned, upon which lands have been sold, shall carefully examine the proceedings of the officer, and if they are satisfied that the sale has been conducted in all respects according to the provisions of the act, they shall cause an entry thereof to be made upon their journal, with an order to the officer to make to the purchaser a deed. The sheriff may retain the purchase money, until his proceedings have been approved of by the court, and this court have decided the deed of the sheriff inadmissible in evidence, without it be made in pursuance of an order of the court.

These provisions of the statute are admirably adapted to protect the rights and interests of the judgment creditor and debtor, as well as the purchaser at sheriff's sale, and so long as courts carefully examine into the regularity of the sheriff's proceedings, upon the levy, appraisement, advertisement, and sale, there is no danger of injury being sustained, by any of the parties interested.

It will probably produce, ere long, the desirable effect, of making titles derived under sheriff's deeds, equal in public estimation, to those derived either from individuals or the United States.

Dissenting opinion of Judge BURNET.

I concur most cheerfully in the decision made by the court in this case, but my conclusion has been derived from different premises.

I am satisfied that the payment of the money by Starling, under whom the defendant holds, and the quitclaim deed from Langdon, the mortgagee, ought to be treated as a transfer of Langdon's interest in the mortgage. The day of payment had passed, the mortgagee had a right to the possession of the mortgaged premises. The defendant may be considered as in possession under the mortgage, and in strictness of law, he has a perfect legal title, which cannot be

disturbed but by a bill to redeem, which is a distinct subsequent procedure, in which relief may be granted, or denied, according to the circumstances and equity of the case. The proposition stated in argument, that a judgment on *sci. fa.* merges the mortgage, may be admitted in cases to which it properly applies, and where there are no circumstances to counteract it. The law abhors multiplicity of action, and where one remedy has been resorted to with success, it usually restrains a resort to another, to accomplish the same purpose. In *Reedy v. Burgent*, (1 *Ohio Rep.* 157,) cited by plaintiff, the remedies were considered as concurrent, not as auxiliary. The object was to obtain two distinct judgments at law, for the same debt, which was supposed to be inadmissible under the statute, but it cannot be inferred from that case, that the judgment so merged the mortgage, as to prevent an assignment, or to prohibit an ejectment to recover the possession, or a bill to foreclose the equity of redemption. A proceeding by a *sci. fa.* is like an action of debt, on the bond which accompanies a mortgage, it may bar a second action to recover a judgment for the same debt, without restraining an assignment, or affecting the auxiliary remedies. In the case of *Jackson v. Delaney*, before the court of Errors (13 *John.* 538) judgment had been obtained on the bond accompanying the mortgage, and revived by *sci. fa.* and yet it was held that the heir of the mortgagee was a trustee for the children to whom the beneficial interest had been devised, and that they might use his name to recover the money, or to foreclose the mortgage, or to gain the possession; and in the same case (11 *John.* 414) before the Supreme Court, it was held, that the lessor of the plaintiff, who had purchased and taken possession by virtue of a sheriff's deed, on a sale under a judgment, for the money secured by the mortgage, could not be treated as a stranger by the motgagor, and that although the proceedings to recover, might be insufficient to support the sale by the sheriff, to the lessor, yet as a claimant under the representatives of the mortgagee, he ought not to be disturbed in his possession. A judgment, therefore, for the mortgage debt, does not produce such a merger of the mortgage, as to prevent subsequent proceedings, or to restrain a purchaser circumstanced as the present defendant is, from a recourse to the rights and powers of the mortgagee, for his protection. It is not necessary to controvert the position taken by the plaintiffs, that the mortgaged estate cannot be separated from the debt, and that the payment of the debt extinguishes the mortgage, because the facts of the case do not render that doctrine applicable. It is true, that when Starling paid the money, he supposed he was discharging the debt, and securing to himself the legal title, but on the supposition that the sale was void, his calculations were erroneous. The money was paid by mistake; he acquired no title; the consideration failed, and he had a right to retain the money. The debt then, was not extinguished, and Starling had a right to appropriate the amount paid by him, to the purchase of an interest in the mortgage, and to protect himself under it. The quitclaim deed, as it has been called, is carelessly, and inartificially drawn, but the circumstances of the case, when taken in connexion, show the intention of the parties, and what ought to be its legal operation. No person can doubt for a moment, that it was Starling's intention to protect himself against the consequences of a supposed illegality in the sheriff's sale. That could not be done by any arrangement with Langdon, other than a purchase of his interest in the mortgage. All

contracts are construed with reference to the intention of the parties. The release of Langdon cannot operate to any valuable purpose, if it be considered as intended to convey any interest in the land, distinct from the debt, for the security of which, the mortgage was given. But we know that it was intended to accomplish some valuable object, and the purpose for which it was designed, ought not to be lost, if by any construction in the power of the court, such a consequence may be prevented. One of the many maxims given by Lord Coke, is *cex semper intendit quod convenit rationi.* It may then be asked, what does reason and common sense dictate, in a case like this. Is it that Langdon's deed shall pass for nothing, or that it shall be taken in connection with the payment of the money, as the consideration of the transfer of some valuable right vested in Langdon as a mortgagee? I should say the latter. And I confess that I see no other way in which that deed can operate, but as a conveyance of Langdon's interest in the mortgage, in consideration of his being permitted to retain the money paid by Starling, which, otherwise, he would be liable to refund.

This subject presents many points, some of which, are both interesting and difficult. It is not my intention, however, to enter on a formal discussion of any of them, but merely to state the grounds on which my assent is given to the decision of the Court, which is, that the payment of the money by Starling, whatever may have been the original object of it, is not now to be considered as an extinguishment of the mortgage debt, but the consideration of the conveyance of such an interest in the mortgage, as will protect his possession in the present suit.

In relation to the appraisement, two questions are presented. First. Did the law relating to this mortgage, require an appraisement of the land before the sale?

Second. If it did, does the omission of the appraisement vitiate the sale?

First. The mortgage to Langdon was executed in 1805. The judgment on it was rendered in 1809. The act under which the proceedings were had, was passed in 1805, and provides "that the mortgaged premises shall be taken in execution and disposed of in the same manner, and under the same regulations, that lands are, or may be by law disposed of for the satisfaction of judgments." I take it to be the true construction of this act, that whenever the sheriff receives an execution on a judgment, rendered on a mortgage, he must proceed in all respects, as is directed by the act regulating the sale of land on ordinary judgments, that may happen to be in force at the time when the execution is put into his hands.

The execution on this mortgage, came to the hands of the sheriff in 1809. The law of 1808, regulating judgments and executions, was then in force, the first section of which, provides, that if execution be levied on land, the officer shall call an inquest of five reputable freeholders, and the inquest shall, on oath or affirmation, return to said officer, under their hands and seals, an estimate of the real value of said estate, on actual view of the premises. This being the act by which the sheriff was to be governed, the first question admits of no doubt: it was the sheriff's duty to cause the lands to be appraised.

Second. On the second question, I am so unfortunate as to differ from the majority of the court. It is their opinion, that that part of the law, which re-

lates to the appraisement, is directory to the shertff, and that an omission to attend to it, will not be fatal to the title of the purchaser, unless the exception be made before the execution of the sheriff's deed.

The impression made on my mind, by the most careful attention that I have been able to give the subject, is, that the appraisement is a condition precedent, without which, the sale is absolutely void. The statute, after requiring the sheriff to cause the estate to be appraised, as above, proceeds, "and the said officer, receiving such return, shall forthwith deposit a copy thereof with the clerk of the court where such writ issued, and immediately advertise and sell such real estate, agreeably to the provisions of the ninth section of the above recited act, provided, no tract of land that has improvements thereon, *shall be sold* for less than two thirds, nor any tract of land without improvements thereon, for less than one half of the returned value by the inquest." The ninth section referred to, relates to the time and manner of advertising. It is here made the duty of the officer, to return a copy of the appraisement, before he is permitted to advertise; and his power to sell, is subject to the proviso, or condition, that the sale be made for not less than a certain amount of the appraised value. The prohibition to sell for less than that amount, is as positive as language can make it, and must qualify and control the direction previously given.

If the act had given an unqualified power to sell, and had then pointed out the mode of proceeding, including the appraisement, it might have been considered as directory to the officer. But admitting that it was the design of the act, to make the appraisement a condition precedent, and not a direction, merely, it would be difficult to select terms better adapted to the purpose, or to give them a better collocation.

I do not discover any thing in the 21st section of the act of 1810, which authorizes the court to amerce the sheriff, at the instance of either party, for proceeding to sell without appraisement.

It provides, among other things, that if the sheriff shall refuse to sell: or shall neglect to call an inquest: or shall refuse to pay the plaintiff all money made for his use: or shall refuse to pay to the defendant, any surplus that may remain, after satisfying the execution, he shall be amerced, &c. for the use of said plaintiff or defendant, as the case may be. The three first omissions, are injurious to the plaintiff alone, and therefore, entitle him to move against the sheriff. The first is injurious, by delaying the collection of the money, which cannot be effected without a sale. The second is injurious, by delaying the sale, for without an appraisement, the sale cannot legally be made: and the third is injurious, being an illegal detention of the money. The fourth, is an injury to the defendant, and for that, and that only, he may move against the sheriff. The provisions of this section, are separate and distinct, neither of them relating to a sale without appraisement.

In considering this question, it should be borne in mind, that at common law, lands cannot be sold on execution. The authority of the officer to sell is derived, altogether from the statute, and it will not be pretended, that the legislature had not the same right to prescribe the terms and conditions of the sale, which they had to authorize the sale itself.

It was the policy of the English law, to protect real estate from such sales, and when our legislature saw proper to change that policy, they did it under limitations and restrictions. The case stands thus: the language of the com-

mon law, is, lands shall not be sold on execution. The language of our statute, is, they may be sold; provided, they are first appraised, and then sold for not less than a certain proportion of the appraisement. The statute does not subject them to sale, nor give the officer a power to sell, till they are appraised; of course, before the appraisement, they remain as they were, at common law, and cannot be sold.

Ohio is essentially and necessarily, an agricultural state. It has therefore, been her policy, to guard against the ruinous consequences of sacrificing real property, by forced sales; and without such a guard, the cultivators of the soil, who form a large majority of our population, could not have been easily induced to change the common law, in this particular.

It may perhaps, be said, that the construction given by the majority of the court, puts it in the power of every defendant, to avail himself of this guard. But how often does it happen, as was the fact in the case now under consideration, that judgments are obtained against non-residents and infants, who have no notice; and that executions issue against residents, when absent from the state, who have no knowledge of the proceedings, till it is too late to object.

It will be recollected, that by the law of 1805, the sheriff was not directed to summon appraisers, unless the defendant requested it. The consequence was, that persons absent from the state, or unacquainted with legal proceedings, lost the benefit of the provision, to remedy wh ich, the inquest was directed in all cases; and it is worthy of enquiry, whether the construction now given, does not subject the present law to the same difficulties and objections, which were complained of in the act of 1805, to remedy which, this law was, in part, intended.

THE HEIRS OF GILL *v.* TOWLER.

Construction of an entry.

This cause was adjourned from the Supreme Court of Green county. The complainants, holding under the eldest entry and survey and the junior patent, claimed to recover the land in dispute, against the elder patentee, and the case turned altogether upon the construction of the complainant's entry, the locative calls of which, were as follows: "Beginning at the lower back corner of John Jamieson's survey, No. 387, running with his line, to the line of John Woodford's heir, survey No. 548, thence with Woodford's to the corner of John Stoke's survey, No. 390, and with Stokes' line, to the beginning." The entry was for 200 acres, and the patent for the same quantity, the calls of which, except that the courses and distances are specified, are the same, as those of the entry. The defendant claimed, under a junior entry, which covered part of the land included in Stokes' survey; and in extending over Stokes' line, called for as a boundary of the complainant, interferes with him.

By protracting the complainants entry and survey, according to the locative calls, as connected with the surveys, which are made the boundaries, the actual quantity included would be 156 acres. But by actual measurement, on the ground, according to these calls, and there was no interference or dispute about

them, it contains 247 acres. The quantity in dispute between the parties in this suit, was thirty-eight acres.

In specifying the courses and distances, in the survey and patent, an error was made, which prevented the survey from closing; but the calls of the entry, as to the boundary, were not departed from.

Alexander, for complainant. *Collet*, for defendant.

Opinion of the Court by Judge BURNET.

The complainants claim under an entry in the name of Stubblefield, in the following words: Beverly Stubblefield, enters two hundred acres of land, on part of a military warrant, No. 1203, on the waters of the Little Miami, beginning at the lower back corner of John Jamieson's survey, No. 387, running with his back line, to the line of John Woodford's survey, No. 548, then with Woodford's line, to the corner of John Stokes' survey, No. 390, and with Stokes' line to the beginning.

The defendant claims a part of the same land, on a junior entry, on which he has obtained the eldest patent.

The location of the complainants, covers a tract of land, in a triangular shape, formed and bounded by the three surveys called for in the entry. The location has been surveyed agreeably to the calls of the entry, and a patent has issued, but subsequent in date, to the patent of the complainants. It is alleged in the answer, that Stubblefield's entry and survey, appropriate more land than the warrant covers, but it is admitted, that its calls are precise and certain, that the objects called for, were notorious at the time of the entry, and that it is good for the quantity of land which the locator had, or ought to appropriate. The case, therefore, as presented by the pleadings, would seem to depend on a matter of fact, whether the calls of the entry, as they exist on the records of the surveyor's office, do, or do not include more than two hundred acres.

The course and the length of each of the three lines which Stubblefield calls for as his boundary, have been ascertained, and a protraction has been made, from which it appears, that his location on paper, conveys less than two hundred acres; he has, therefore, professed to enter the quantity named in his warrant, but by the course and distance of his lines, as they are recorded, has actually entered less. The ascertaining of this fact, it was supposed, would settle the controversy, but I understand the defendant's counsel, as contending in their argument, that if the courses and distances, as described in the entry, contain the precise quantity of land expressed, and intended to be appropriated, yet if the lines and courses were notorious, and are ascertained by actual survey on the ground, to contain a greater quantity of land, than is expressed in the warrant, the entry does not appropriate the whole land within its boundaries, but that in such case, the quantity of land which the locator is entitled to, shall be laid off on each line, as a base, and that the locator shall be considered as covering only so much of the land as is common to all the surveys. This rule, or mode of surveying, has been established in Kentucky, for the laudable purpose of sustaining locations, that would otherwise be void; but I understand that rule, as applying to cases where the calls of the entry, professedly include too much land, and not where the excess is owing, either to some inaccuracy in the course,

or in the measurement of the lines. The error of a surveyor, in placing his corners at a greater distance from each other, than he intended, or in placing them somewhat out of the course he is calling for, so as to make the entry, by a survey on the ground, include too much land, has never been considered, as affecting the validity of the location; if it did, by far the largest number of entries, in the district, would be void. If a locator will venture to call for notorious, sensible objects, without attempting to ascertain the distance between them, and by so doing, appropriates too much land, this objection will apply. Such was the fact in the cases reported in 3 *Bibb, and* 1 *Marshall.* But in this case the locator called for lines of surveys, which had been previously measured. The length and course of those lines, was stated on the record; he called for them as they were stated, and by those calls, the entry is ascertained to include less land, than the warrant entitled him to. It appears, however, from a correct re-survey, that those lines, or some of them, are, in fact, longer than the recorded distance; and it is owing to this circumstance, that the location contains more land, than the warrant was issued for.

There is but one fact that can distinguish this case, in any degree, from an ordinary case of surplus, ascertained by a re-survey, which is this: that the entry calls for lines and corners that existed, and were known, when the location was made; and the only question arising on this fact, is, whether the locator had a right to rely on the recorded length of those lines, as they had been ascertained by former surveyors, or, whether he was bound, at his peril, to re-measure, and correct any error that might exist. If the latter be insisted on, the proposition amounts to this: that an error in distance, which does not injure the location of him who committed it, shall be fatal to a subsequent locator, to whom it was not known, and who has innocently relied on the correctness of a public record.

On principle, the objection urged against Stubblefield, applies with more force, to the surveys of Jamieson and others, for which he calls; because the error increases the quantity of land in their surveys, beyond the amount of their warrants, in the same manner that it does the land of Stubblefield, and this consequence results from their own inaccuracy. The defendant does not pretend, that those surveys are injured by their surplus. But why not? It is because it appears of record, that the owners professed to take the quantity they were respectively entitled to, and no more; and because we are bound to attribute the variance, or excess, to the ordinary inaccuracy of measuring through a forest. The same excuse may be offered for the complainants, and with more propriety.

The fact, whether Stubblefield's entry includes too much land, or not, so far as it is to affect the legality of the entry, must be determined by the courses and distances, as they are found on record, and not by the re-measurement of the ground.

We do not distinguish between a call for course and distance, ascertained by the locator who makes the call, and a call for the recorded course and distance of an existing survey, ascertained by a former locator. In either case, the validity of the location, as far as quantity affects it, must be ascertained by the calls, and not by re-measurement.

If this view of the subject be correct, the case is not within the decisions cited from Kentucky, and the elder patent of the defendants, cannot prevail over the prior equity of the complainants.

BACKUS v. McCOY.

A covenant of seizin in a deed, when the covenantor is in possession claiming title is a real covenant running with the land.

But where the covenantor is not in possession, and the title is defective, it is broken as soon as made, and never attaches to the land, being in the nature of a personal covenant.

Seizin in fact at the time of the covenant made, is sufficient to sustain it.

The rule of damages under a covenant of seizin is the consideration of money and interest.

This cause was adjourned for decision here, by the Supreme Court, sitting in Franklin county, and came up for decision upon the cause of action, set out in the declaration.

It was an action of covenant, and the breach alleged in the declaration was that of the covenant of seizin, without alleging any eviction, or specifying any damage sustained by the intestate, in consequence of the alleged defect of title.

The defendant pleaded in bar, that the premises in question were seized and sold in execution, on a judgment against the intestate, in his life time, and conveyed by the sheriff's deed to the purchaser, before any damage was sustained by the intestate. The replication averred, that the alienation was made without the consent of the intestate, and for a sum less than the fair value. The defendant demurred generally.

Elving, in support of the demurrer. *Wilcox* and *J. R. Swan*, contra.

Opinion of the Court by JUDGE SHERMAN.

This action being brought to recover damages for a breach of the covenant of seizin, in a deed from the defendant, McCoy, to the plaintiffs' intestate, the counsel have not confined themselves to the question necessarily growing out of the demurrer, but have argued the general questions of when, under what circumstances, and to what extent the grantor, in a deed, is liable under the covenant of seizin. This covenant is one of very general use in conveyances of land in this state, and it is important, that all persons should understand its nature; the liability of the grantor thereon and the security the grantee thereby acquires. This being the first time an action founded on this covenant alone, unconnected with covenants of the grantor's right to sell for quiet enjoyment, or against encumbrances, has come before the whole Court for adjudication, we have not confined ourselves to the determination of those questions alone, arising from the demurrer.

The covenant of seizin is made for the benefit of the grantee, in respect of the land. It is not understood as a contract, in which the immediate parties are alone interested, but as intended for the security of all subsequent grantees. It is usually extended in terms, to heirs and assigns, as well as executors.

If it can justly be considered as a real covenant, it will be annexed to, and run with the land, and either go to the assignee, or descend to the heir, so long as the estate, such as it may be, to which the covenant is annexed, is in possession of the covenantee, or those claiming under him. But if the covenant of seizin, is strictly a personal covenant, as it respects the course in which it shall go to the representatives of the covanantee, and must be broken, if at all, the moment the deed is executed, it can neither go to the assignee, or descend to the heir. The right of the grantee in such case, would be a mere right of action, for the recovery of damages, and upon his death would go to his personal representatives.

The English authorities, though not numerous on the covenant of seizin, show that so long as the grantee, or those claiming under him, remain in possession of land, the covenant of seizin, will attend, and run with the land, and that the heir or grantee, if evicted by paramount title, can recover upon this covenant. In *Coke's Entries*, 111, *cited* 4, *John. Rep.* 74, a case is reported, in which it was held, that the heir might sustain an action on the covenant of seizin, or having been evicted after the death of his ancestor, who entered in his life time, and died seized. In *Lucy v. Livingston*, (1 *Vent.* 175, *S. T.* 2 *Lev.* 26,) which was an action by the executors; on the covenant, for quiet enjoyment, the breach assigned, was, that the plaintiff's testator, was evicted in his life time. It was held by the court, "that the eviction being to the testator, he cannot have an heir or assignee of this land, and so the damages belongs to the executors, for they represent the person of the testator." In the recent case of *Kingdon, executor, v. Nottle*, (1 *Maule and Sel. Rep.* 355,) the court held, that the covenant of seizin, was a real covenant, running with the land, and would pass with the estate, to the assignee, or devolve on their heir: and that the executor could not sustain an action, without showing an eviction, or some special damage sustained by the testator. In *Kingdon v. Nottle*, (4 *Maule and Sel.* 53,) the devisee brought his action upon the same covenant, and recovered; the court repeating the same doctrine, that the covenant of seizin is a real covenant, and runs with the land. In *King v. Jones, et. al.* (5 *Term*, 418,) the grantor covenanted that he would make further assurance upon request of the purchaser. The ancestor of the plaintiff requested further assurance, which was refused; when he died, and his heir, the plaintiff, was afterwards evicted, by title paramount, and it was held, that the heir could sustain an action; that it was a covenant running with land, and the ultimate damage not being sustained, in the life time of the ancestor, the covenant with the land, devolved upon the heir: The decision was affirmed on error, in the Court of the King's Bench, (4 *Maule and Sel.* 188.) It seems to be well settled by these recent decisions, that when the heir or assignee, acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the reality, and where he has been evicted by paramount title, he is the party damnified, by the non-performance of the grantor's covenant, and for such breach, may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seizin, as a real covenant, attendant upon the inheritance, it will form a part of every grantee's security, and make that, which otherwise, must be either a dead letter, or a means of injustice, a most useful

and beneficial covenant. A dead letter, when an intermediate conveyance has taken place, between the making of the covenant, and the discovery of the defect of title, and the covenantee refuses to bring suit. A means of injustice, when after the covenantee has sold and conveyed without covenants, he brings and sustains an action, on the ground that the covenant was broken, the moment it was entered into, and could not, thereafter, be assigned. When lands are granted in fee, by such a conveyance as will pass a fee, and the grantor covenants, that he is seized in fee, we can perceive no objection, legal or equitable to this covenant, as well as the covenant of warranty, passing with the land, so long as the purchaser, and the successive grantees under him, remain in the undisturbed possession and enjoyment of the land.

We are aware, that the Supreme Court of New York, have taken somewhat of a different view of this covenant; but highly as we respect the decisions of that court, and much as we now regret to differ from them, in opinion, we feel bound to express the result of our own judgments, in every case submitted to our consideration.

The Supreme Court of Massachusetts, (2 *Mass. Rep.* 433,) have held, that a seizin, in fact, of the gantor, at the time the deed was executed, was a sufficient compliance with the covenant of seizin in the deed. This determination, appears to us, to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land, at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seizin is not broken, until the purchaser, or those claiming under him, are evicted, by title paramount. He has a seizin in deed, as contradistinguished from a seizin in law, sufficient to protect him from liability, under his covenant, so long as those claiming under him may continue so seized. Actual disseisin, or the actual adverse possession of the lands of another is the commencement of a right, which, by lapse of time, may ripen into a perfect title, in the disseisor or possessor: and during the time that the grantee of such disseisor, remains in the undisturbed possession, of the lands, by reason of the conveyance of such disseisor, he cannot maintain an action, upon the covenant of seizin. No breach of such covenant will have taken place, if the grantor was seized in deed at the time of the conveyance, however that seizin may have been acquired. If the grantor, at the time of executing this conveyance, was in possession of the land, either as disseisor, or under color of title, it cannot be said, that he was not seized of an estate in the premises. When the grantor is not seized, either in deed or in law, at the time of conveying, the covenant of seizin must be broken, at the moment of executing the deed containing it; and becomes thereby, a mere *chose* in action, and no longer annexed to, or passing with the land. This is the case, when the grounds are vacant, and the grantee has no title. But when the grantor is, at the time of the conveyance, in possession, under color of title, claiming a fee, the covenant of seizin, is a real covenant annexed to the land, and passes with it to the heir or assignee, until he who has the paramount title, may assert it, and evict the person in possession, when it becomes a mere claim to damages, to be enforced by him who has been evicted, and like any other, when in action, no longer assignable at common law.

The rule of damages, under a covenant of seizin, where a breach has been shown, is the consideration money and interest. It is the value of the land, as ascertained by the parties, and the money comes in lieu of the land, lost by the non-performance of the covenant. Damages cannot be awarded, either for the increased value of the land, or the improvements made. In the latter, the legislature have provided an ample remedy, in favor of the occupying claimant: and awarding the former, would in many cases, inflict a severe penalty on grantors, in good faith, having perfect confidence in their title to the lands they conveyed. If the grantor has practised any fraud, in the sale, the grantee may have his remedy, by an action on the case, in the nature of a writ of deceit. It is not unfrequently the case, that in conveying large tracts of land, especially in the Virginia military district, the grantor is seized, in the manner he covenants, of part only of the lands sold, and by means of interfering claims, defective entries, or other causes, he has no valid title to the residue. The measure of damages in such a case, is the same proportion of the consideration money and interest, as the value of the lands of which the grantor was not seized, is to the value of the whole; the consideration money being considered the value of the whole premises.

The pleadings in this case having terminated in a demurrer to the plaintiff's replication, has made it necessary to look into those pleadings, with reference to the principles governing the covenant of seizin, and the breaches assigned.

The replication is clearly bad, and is not attempted to be supported. The plea is equally bad: it neither denies nor confesses, and avoids the want of seizin of the defendant, of the lands, at the time of the conveyance, the breach assigned in the declaration; but avers, that, before any actual damages had been sustained, the lands were sold and conveyed by the sheriff, upon execution, as the property of Backus, the intestate. The declaration avers, generally, a want of seizin by McCoy, and this averment being unanswered by the plea, it must be taken, that McCoy, at the time of executing the conveyance, was neither seized in law or deed, of the premises conveyed, and of course, the covenant was broken, the moment it was entered into, and could not thereafter be assigned by the sheriff's deed, nor descend to the heirs of Backus, but must, with all other *choses* in action, pass to the personal representatives. The plea and replication, both being insufficient, there must be judgment for the plaintiff.

CASS v. ADAMS, ET AL.

That goods are taken in execution and are undisposed of is a good plea in bar to an action on an appeal bond.

The Court in Bank after intimating an opinion upon a general demurrer will permit it to be withdrawn and the pleadings amended.

This was an action of debt upon a bond given to perfect an appeal from the court of Common Pleas, to the Supreme Court. The declaration recited the condition of the bond, and set out, that upon the appeal, in the original case, judgment was rendered for the appellee, for a specific sum, which remained unpaid.

The defendants pleaded, that after the judgment rendered, in the case appealed, and before the commencement of this suit, the plaintiff sued out a writ of *fi. fa.* and put it into the hands of the sheriff, who levied it upon the goods of the judgment debtor, to a large amount, and returned such levy upon the writ of execution. To this plea the plaintiff demurred. The court of Common Pleas overruled the demurrer, and gave judgment for the defendants, and the plaintiff appealed to the Supreme Court. The decision of the cause, was adjourned here from Muskingum county.

Goddard, for the defendants. *Silliman*, contra.

By the COURT.

The appeal bond is given expressly to secure the payment of the sum that may be recovered upon the appeal, and we incline to the opinion, that whatever can be deemed a legal satisfaction of the judgment, is a bar to an action on the bond, although the money is not actually paid. The arrest of the defendant upon a *ca. sa.* is a satisfaction, though no money be paid. So is the levy of an execution upon goods, or land, whilst the levy is in force, and undisposed of. These principles are well settled. And the circumstances of our peculiar law, when the levy was made, does not vary the case, because the debtor could only avail himself of the benefit of that law, by giving security, which is substituted for the goods in the sheriff's hands, and leaves the principle the same, where such bond is not given, as though the law did not exist. If the bond had been given and the goods restored, that might be an answer to the plea, as might any other legal disposition of the levy, leaving the judgment unsatisfied. But the demurrer admits the levy to be in force and effect, and consequently admits the judgment satisfied.

This opinion being suggested, at the request of the plaintiff's counsel, leave was given, to withdraw the demurrer, and reply to the plea.

TREASURER OF PICKAWAY v. HALL.

The heir cannot sustain an action against the security on an administrators bond until the administrators accounts are settled with the court, or the plaintiff's right established by a judgment against the administrator.

A person who sues as heir must show himself such in his declaration.

This was an action of debt, upon an administration bond. The plaintiffs set out in their declaration, all the proper facts, showing the granting of letters of administration and executing the bond, by the defendant's testator, as security for the administration. They then set out the bond and condition, and assigned as breaches, that the administratrix, generally, did not perform the duties required by law: that she did not return a true inventory; did not return an accurate statement of sales, and of monies received and paid out: that she had not presented her account for settlement, nor paid to the parties entitled, the moneys due to them, but had wasted the goods, &c. that came to her hands. And also that the administratrix had neglected and refused, though often reques-

ted and demanded, particularly on the 30th March, 1827, to pay the said Nicholas and Rebecca, said Rebecca being one of the heirs of Joseph Glaze, dec'd. the proportion of monies before that time, come to the hands of the administratrix, to which said Rebecca, as heir at law was entitled. To this declaration, there was a general demurrer, which was overruled by the court of Common Pleas of Pickaway county, and the defendant appealed to the Supreme Court, and the cause was adjourned here for decision.

Olds, for defendant. *Doane*, contra.

By the COURT.

The security in an administration bond, is not the proper person to adjust the rights of parties interested in the administration. He can know nothing of the true state of the accounts, or of the conduct of the administrator, and cannot be the most suitable person to litigate or defend them. It is therefore, that it would seem most proper to hold him only responsible where the right of the claimant has been judicially established, either by settlement with the court, or judgment in an action, direct against the administrator. We do not think the English or New-York authorities, cited by the plaintiff's counsel, sustain the position he takes. And we consider it much the safer doctrine, to require proceedings, first against the administrator himself, and only allow a resort to the security, when nothing is to be contested but the question of payment.

We are equally clear, that the plaintiff's declaration is defective upon the second ground of exception. Under our law if the intestate leave a widow, and no child, the widow takes the whole personal estate, and thus as heir, would be entitled to an account for the whole. If the plaintiff claim as heir, he must show how he makes himself so, that his rights may judicially appear to the court, and the proportion of the estate due to him be ascertained.

Judgment for the defendant.

HARDING *v.* TRUSTEES OF NEW-HAVEN TOWNSHIP.

An individual can sustain a suit against a township.

A suit may be brought against a corporation before a justice of the peace.

For township liabilities an action lies against the "Trustees of the Township" without naming them.

This cause came before the court, upon a writ of error, to the court of Common Pleas, and was argued by

Orris Parish, for plaintiff in error.

Opinion of the Court, by Judge BURNET.

The plaintiff had been employed to support a pauper, chargeable on New Haven Township, at a stipulated price. Having performed the contract on her part, and payment being withheld, she instituted a suit against the Trustees of the township, before a justice of the peace, and recovered a judgment for the amount due. The defendants removed the proceedings by *certiorari*, to the Common Pleas. A number of reasons were assigned for setting them aside.—

Those on which the case turned, were,

First. That no suit can be sustained by an individual against a township.

Second. That a township being a body corporate, cannot be sued before a justice of the peace.

The Court of Common Pleas gave judgment that the record be quashed, annulled, and held for nought; and that plaintiffs in *certiorari* recover their costs.

The case has been removed to this Court by writ of error The errors relied on by the plaintiff, present four questions.

First. Can a suit be sustained against a township by an individual.

Second. Can a township, being a body corporate, be sued before a justice of the peace?

Third. If a justice have jurisdiction, may the suit be brought in the name of the Trustees, or must it be in the name of the Township?

Fourth. Was it the duty of the court, having quashed the proceedings, to retain the cause for a hearing on the merits?

First. The act for the incorporation of townships (*Sec.* 1) provides in general terms, that "they shall be capable of sueing, and being sued." It does not designate the persons by whom suits may be brought, nor does it exclude any from bringing them. It makes no discrimination. The right of maintaining a suit is general, and may be improved by an individual, a company, or a corporation. This objection, therefore, was not well taken, and cannot be sustained.

Second. The second ground taken in support of the judgment of the Court below, is, that a body corporate cannot be sued before a justice of the peace. In support of this position, it is contended, that the jurisdiction of justices was designed by the legislature, to extend only to causes requiring a personal appearance, and in which the defendant is sued in his own right. (2 *Bac.* 11. 1 *N. Y. Term. Rep.* 191. *Way, v. Carey, ib.* 594, *Jones. v. Reid*, are relied on to support the doctrine.

The fifth section of the act defining the duties of justices of the peace, declares, that in civil cases, their powers shall be co-extensive with their townships and that their jurisdiction in all such cases shall extend, under the limitations and restrictions therein contained, to any sum not exceeding one hundred dollars. The limitation referred to, is in the fifty second section, which has no reference to the case before us. That section contains the only limitation im-

posed on the jurisdiction of a justice, and it does not restrict it in cases where corporations are parties.

But this question seems to be put at rest, by the first section of the act, providing for the incorporation of townships, which declares, that "they shall be capable of sueing and of being sued, pleading and being impleaded, in any court of law or equity in this state." The justices court was established before the passing of this act. It was in existence at the time, and is clearly embraced in the terms that are used. In order to render the case of *Way v. Carey*, applicable, it ought to have been shown, that the statutes of Ohio, and of New-York, in relation to the jurisdiction of justices of the peace, are substantially alike. This, however, is not done. On the contrary, we must presume, from the language used, that they are substantially variant. We have no objection to the principles laid down in the case of *Jones v. Reid*, that inferior jurisdictions should be confined strictly to the authority given them; and that while liberality is exercised in reviewing their proceedings, as far as respects regularity and form, they should be held strictly to the limits of jurisdiction, prescribed by the statute. But at the same time, we feel no disposition to encroach on the powers that are expressly given them. The inconvenience that may attend the exercise of particular jurisdictions, or the want of efficacy in the means prescribed, to execute judicial decisions, belong to the legislative department. They have given to the Supreme Court a general power over all other judicial tribunals of this state, but in matters of jurisdiction clearly given, we have no discretion, nor can we restrain the exercise of it, unless it is manifestly unwarranted by the Constitution.

Third. The third enquiry is, can a suit be brought in the name of the Trustees, or must it be in the name of the township? Statutes creating corporations, usually give them corporate names, and authorize them to sue and be sued by the name so given. Hence the general rule, that in suits by or against corporations, the corporate name must be strictly adhered to. Our statute incorporating townships, enacts, that the townships which have been, or that shall hereafter be laid off, shall be bodies politic, and corporate; and that they shall be capable of sueing and being sued, &c. It does not give them corporate names, nor does it direct by what names suits shall be commenced and carried on, for or against them.

The fifth section of the act for the relief of the poor, under which the claim of this plaintiff originated, directs, that when persons become chargeable in a township, in which they have not gained a settlement, the overseers of the poor of such townships, shall remove them to the township where they were last legally settled; and that the overseers of the poor of such townships, shall receive and provide for them; and that the township in which they have gained a settlement, shall pay the overseers of the township which have supported and removed them, all reasonable charges, &c.; and on a refusal, may be compelled by an action of debt, brought against the trustees of said township; and the trustees of each and every township are hereby empowered to sustain said action against the trustees of any other township in this state. In this section, the phrases, "the township, the overseers of the township, and the trustees of the township," seem to be used promiscuously, as synonymous expressions. On the removal of a pauper, the township to which he is removed, is made liable

to the overseers of the township from which he is removed, and on default of payment, the trustees of the one township may maintain an action against the trustees of the other.

The statutes, to say the least of them, are not as explicit as they might be; but the most obvious construction of them seems to be, that the suit should be brought against the Trustees, and not against the township by its name. It was not intended to render these corporations liable in some cases, by process against their trustees, and in others by process in a different name, and as the fifth section directs suits for the benefit of townships, to be brought against the Trustees of other townships, the conclusion seems to be, that that should be the form of the process in all cases. The effect of the judgment, or the extent of its lien, will be the same whether it be brought against the township, as the defendant, or against the trustees. In either case, the rights of the corporation alone, will be bound to answer the amount.

There is not any thing in the nature of the case, or in the proceedings to be had in it, incongruous with the rule here adopted. The suit may be carried on to final judgment in either way, with equal facility, and with equal conformity to the rules of pleading. Had the legislature given appropriate names to these corporations, or directed by what name, or style they might sue and be sued, it is as probable that they would have adopted the one form as the other, and as far as their preference is indicated by the law, it is in favor of the mode now adopted. The Trustees are the persons by whom the business of the township is principally conducted. They manage their funds, and generally represent them in all their concerns Tnere seems, therefore, to be a *propriety in designating* them as the persons by whom, and against whom, legal proceedings are to be carried on, in cases affecting the rights of townships. But this branch of the case presents another question, involving at least an equal difficulty.

Is it proper to sue the trustees, as such, by their individual names, or by the general appellation of "the Trustees of the township?" The suit must be considered as brought against the corporation which has perpetual succession; if, therefore, it be brought in the name of the Trustees, they ought to be designated in such a way, as to represent the corporation, with its incident of uninterrupted succession. There should not at any stage of the proceedings, be an incongruity between the form and the substance, or between the form of designating the party, and the real party. If the same Trustees could be co-existent with the corporation, there would be less impropriety in naming them. But this is impracticable. They are liable to be changed every year. This circumstance is sufficient to show, that it is not only unnecessary, but improper to set out the names of the Trustees.

We have always treated the proceedings of justices of the peace with great liberality and indulgence, and have referred their irregularities, as far as possible, to form, so as to admit of amendment, whenever it could be done, without violating any established rule of law or practice. On this point, there has not been any adjudication, or any established or uniform mode of proceeding. Suits have been brought, and judgments rendered in both forms, in cases in which the question was not raised. The names of the Trustees, as they appeared on the transcript of the justice, may be considered as surplusage, and may be erased without affecting the sense and meaning.

In many cases where defendants are sued as administrators, the naming of administrators, is considered to be surplussage, and judgment rendered against them *de bonis propriis*. This transcript shows, that the suit was commenced against "Fisley, Barrey, and Palmer, Trustees of New Haven township." The manifest design of the plaintiff, was to sue the corporation, and from what has been just stated, the process should have been against the "Trustees of New Haven township;" so that an erasure of the names will leave the transcript as it ought to have been, in the first instance, and as it was the intention of the party, that it should be, when she applied to the justice for process. If it be said, that this is an unusual extension of the privilege of amendment, we refer the objector to the consequences that would follow, were we to require of justices, the same attention to regularity and form, which has been considered necessary in the proceedings of courts of record. The fact is, that this Court has always taken great latitude of discretion, in deciding upon the proceedings of inferior tribunals of limited jurisdiction, except on questions involving their right of jurisdiction, and we have done so from a conviction, that a different course, would not only destroy their usefulness, but render them in a great degree deceptive and mischievous. Continuing to act on this principle, the names of the Trustees are considered as surplussage, and subject to be amended at any time. The Court of Common Pleas, therefore, erred in quashing the proceedings of the justice.

The opinion already given, renders it unnecessary to consider the last point, though it would seem at first view, that if the opinion of the Court below, could have been sustained, on other grounds, that objection could not have prevailed. For if the magistrate had not jurisdiction of the case, or if the township was not liable to answer to the suit of an individual, no valuable purpose could be answered by retaining the cause, and further proceedings would only have produced unnecessary cost.

Judgment reversed.

LESSEE OF HOLT'S HEIRS *v.* HEMPHILL'S HEIRS.

A deed from the collector of taxes, does not transfer the title, without proof that the land was listed, taxed and advertised and that the person making the sale was legally authorized to sell.

After a survey is recorded, the claimant cannot destroy the tax lien of the State.

Mere intruders cannot question the validity of a patent under which the plaintiff in ejectment claims.

A descent cast does not bar an ejectment in Ohio.

Actual entry is not necessary to perfect a title, the delivery of a deed gives a possession.

This cause was adjourned for decision here, by the Supreme Court of Ross connty. It was elaborately argued, by

Leonard, for the plaintiffs. *Scott* and *Sill*, for the defendants.

Opinion of the Court by Judge BURNET.

The plaintiff claims under a patent regularly granted by the United States, which covers the land in dispute. He must therefore recover, unless the defendants can show a better title in themselves, or that the plaintiff's right is barred by some other cause.

The facts of this case, are concisely these: In August, 1787, Thomas Boyer, entered the land in controversy. In August, 1789, he withdrew 200 acres of it. In November, 1793, the residue of his entry was surveyed: the word error, being written on the margin of the record of the survey. On the 17th March, 1807, the whole of the residue of the entry was withdrawn, and the land virtually abandoned by Boyer. In April, 1805, Hemphill obtained a collector's deed for the land, as having been sold for taxes, on which he entered: died in possession, in 1821, and was succeeded by the defendants, his heirs at law. On the 17th March, 1807, Holt's entry was made, Hemphill being then in possession. This entry was soon after surveyed, and patented in 1809.—Neither Holt nor his heirs, have at any time been actually seized of the premises, or any part of them. It also appears, that Holt's warrant had been entered and surveyed on other lands, and then withdrawn, before it was entered on the land in question.

The defendants contend, first: that the legal title has passed to them by the collector's deed.

Second: that after an entry has been surveyed and recorded, the warrant is merged, so that the entry cannot be withdrawn, or the warrant located on other land. From which they infer, that Boyer's location remains valid, and that Holt's entry, survey and patent, are void.

Third: That by the death of Hemphill in possession, a descent has been cast which takes from the lessors of the plaintiff, their right of entry, and puts them to their real action.

First: It is very certain, that the defence cannot be supported on the first ground, as nothing has been shown to sustain the deed. It does not appear, that the land was even listed: or that any tax was due and unpaid; or that it was advertised for sale: or that the person who signed the deed, was authorized to collect the tax, and to sell the land, in case of non payment. These facts, are all necessary to support the deed; without them, it cannot be known, that the land was liable to be sold: that the person who executed the deed, had power to do so: or that the laws relating to the sale, have been substantially followed by the agents concerned.

In deciding on tax titles, great strictness has always been observed, and less latitude given, than in proceedings on judgment and execution. A collector, who sells land for taxes, must act in conformity with the law from which he derives his power; and the purchaser is bound to enquire, whether he has done so, or not. He buys at his peril, and cannot sustain his title, without showing the authority of the collector, and the regularity of the proceedings. In these cases, the maxim *caveat emptor* applies.

This doctrine is maintained in *Stead's executors v. Course*, (4 *Cran.* 412.) It will also be found in 4 *Bac.* 461, where it is said, that a title derived from a

statute, must pursue the statute strictly. For these reasons the collector's deed cannot be admitted as evidence of title.

Second: On the second ground, the defendants rely on the acts of Congress, of 2d March, 1807, and 13th May, 1800, and on the land laws of Virginia, and the cases that have been decided under those laws. This branch of the case, has been argued with great zeal and ingenuity, by both sides, and has received from the court, all the attention it seems to merit, in the estimation of the counsel.

The act of second March, 1807, was intended to quiet titles, and prevent litigation in the Virginia military district. It does not seem to regard, or affect any pre-existing right of withdrawal. It guards the survey claimed by a locator, against a subsequent entry by another locator. Any right of withdrawal that might have existed, prior to the passing of that act, is not taken away by it. It was not intended to restrain persons from abandoning their land, whether surveyed, or not; but to protect them after survey, from disturbance by third persons, who might attempt to locate the same land. In short, the great object of the proviso was, to save defective locations, after patent, or survey, and in that point of view, it may be regarded as one of the most salutary provisions, contained in the statutes relating to these lands.

The act of May 13th, 1800, does not appear to affect the case. The second section, which has been referred to, contains no prohibition. It merely gives the right of re-locating a warrant, after eviction, which could be done by the laws then in force, in cases where the eviction happened, after the location had been carried into grant.

Without settling in what case a warrant might be withdrawn, and re-located, by previous laws, it declares in general terms, that, after eviction it may be re-located, in every case; that is, as I understand it, whether the claim which has been lost, stood on entry, survey, or patent.

It is contended, that as this act gives the right of withdrawing and re-locating, after an eviction, and in no other case, it must be evident that Congress did not intend to give the right, and have therefore excluded it, in the case before us; because no eviction has taken place. But this mode of reasoning, will carry us further than counsel are willing to go; for if a fair interpretation of the act, excludes a surveyed entry where there has been no eviction, it must exclude a naked entry, under the same circumstances: for it makes no distinction.

The statute of Virginia, of May, 1779, referred to in the argument, is not very explicit. The prohibition which it is said to contain, is rather inferable, than direct. Warrants are declared to be good and valid, till executed by survey, after which, it is contended, they merge, and become *functus officio*. This construction, seems reasonable, and has been given by the courts of Kentucky, as appears from the case of *Withers v. Tyler*, (4 *Marsh.* 173,) where it was decided, that a survey made and recorded, by proper authority, was an extinguishment of the warrant. The same principle was held, in *Taylor v. Anderson*, (3 *Marsh.* 501.) The case of *Taylor's Lessee, v. Myers*, (7 *Wheat.* 23;) so much relied on by plaintiff's counsel, does not seem to clash with the case of *Withers v. Tyler*. The principle settled by the Supreme Court, in that case, is, that a locator cannot be compelled to consummate a title once begun; he may forfeit it, or abandon it, provided he does not thereby, affect the rights of others.

The question, whether a warrant which had been entered and surveyed, could, after a withdrawal, be entered and surveyed elsewhere was not presented.

The case settles the right of Boyer, to relinquish his location, as far as his interest is concerned; but it does not decide the point, whether Holt's second location, on the land in question was valid or not. But whatever may be the construction of the statutes referred to, as to the parties themselves, I do not hesitate to say, that after the survey of an entry has been recorded, it is not in the power of the claimant to destroy the tax lien of the state, or to avoid the effect of a sale, regularly made by the collector, for the non-payment of taxes.

It may with some plausibility be said, that as the warrants were withdrawn, and the lands first located, restored to the common mass of vacant territory; no injury has been done to government, and but little if any, to the holders of unlocated warrants.

The course pursued by these parties, will not eventually give them more land than they are entitled to; o that the principal objection, apart from that which the land laws are supposed to present, is as to the right of a second choice, or the exchange of land once selected for other land of a better quality. Should this be permitted, it would not operate fraudently on the government, nor could it strictly be said to be a fraud on other warrant holders; as would be the fact, if they were now claiming their first locations, and thus attempting to secure more land than their warrants called for. Under such circumstances, I should consider the second entries as unauthorised by the land laws of Virginia, and a direct fraud on the government, and the holders of unsatisfied warrants. But it is admitted by the agreed case, that both parties have abandoned their first locations, so that the main objection depends on a question *stricti juris*: a technical construction of the statute law, on the subject. It is the opinion of the Court, however, that the rights of these parties may be ascertained and settled, as far as they are necessarily involved in this controversy, on grounds which do not impose the necessity of giving an interpretation to the land laws as to the validity of a new entry, after the abandonment or withdrawal or abandoment of a prior surveyed entry, on the same warrant.

If the heirs of Boyer were contesting the validity of the withdrawal of these warrants, or if the defendants had connected themselves with Boyer's title, either by purchase from him, or under the tax laws of the state, the case would wear a different aspect, but as it now stands, they must be considered as intruders. They cannot be allowed to question the validity of the plantiff's patent, and this furnishes all the evidence that is necessary, to so much of the argument, as relates to the illegality of the withdrawal, and the necessity of proving, that, if legal, it was made on sufficient authority.

Third: In considering the third and last ground taken by the defendants it will be proper to bear in mind, that Hemphill entered in 1805, on a claim of title under a collector's deed: that Holt's location was not made till 1807: that he never had an actual seizin of any part of the premises, but that they have been constantly held by an adverse seizin, under claim of title. On these facts, the question is made, whether by the descent cast on the heirs of Hemphill, at his death, the entry of Holt's heirs is tolled.

It is a well known principle of the common law, that if a person seized of the inheritance of a corporeal hereditament dies, by which it descends to his heir, the right of entry is tolled by the descent, which is cast on the heir, and the claimant, for his neglect to enter on the ancestor, who knew his title better than the heir who came to the estate, by act of law, is put to the remedy of an action against the heir. It is laid down by *Blackstone* as a general rule, that no man can recover possession, by mere entry on lands on which another hath by descent. But to this rule their are exceptions; as where the claimant has been under some disability, as infancy, coverture, and the like, or where the tolling of the entry would leave the claimant without any remedy whatever, which I apprehend, would be the fact, in the case before us. By the rules of pleading n real actions, the demandant must allege in his count, that he or his ancestors, were seized, and took the esplees, or products of the land. The facts of the case show, that neither Holt nor his heirs, could support these material averments of the count, in a real action.

They could not, therefore, sustain such an action. The patent, connected with the facts of the agreed case, gives them only a title of entry, and having but a title to enter, and no remedy by action real; the descent does not toll the entry, for if it did, the law would bar their right, by leaving them without any remedy. (*Co. Lit.* 240, *a. n.*) It has been alleged by one of the counsel for the defendants, that the case of *Green v. Liter*, (3 *Cran.* 244,) establishes a different doctrine; but it does not appear so to me. The court say, in that case, that an actual seizin, or seizin in deed, is necessary to maintain a writ of right; but that such a seizin, may, in some cases, be proved, without shewing an actual entry under title, and perception of the esplees. This is perfectly consistent with the course of decision which has prevailed in this court. We have always held, that a complete title may be created, without an actual entry, and where the grantee may never have been within hundreds of miles of the property granted. The delivery of the deed, has been considered as giving possession, in contemplation of law, and the grantee is presumed to have entered, unless that presumption is rebutted by facts, wholly inconsistent with it, as when the premises, at the time of the grant, are in the actual seizin of a third person, claiming title adverse to the grantor. In such a case, it would be a contradiction in terms, to say, that the grantee has a constructive seizin in deed; nor do I discover any thing in the case of *Green v. Liter*, from which it can be inferred that a constructive seizin is to be presumed under such circumstances. The most that can be said, is, that the grantee has a title to enter, on which he may maintain an ejectment. It seems unreasonable to say, that he has such a seizin in deed, as is required to support a real action.

The principal points decided by Judge Story, are, that there may be a constructive seizin in deed, without an actual entry, and that when such a seizin has been proved, the perception of the esplees follows, as a necessary inference of law. But I do not discover, from any of the cases put by the learned judge, by way of illustration, that such a seizin in deed, as he speaks of, can be presumed, where the grantee has never entered on any part of the premises, and where the whole tract granted, is in the actual possession of an adverse claimant, holding under a claim of title. These being the facts of the case, we are now deciding, I conclude, that it is not affected by the case of *Green v. Liter*, as

has been supposed. The doctrine there laid down, is safe and salutary; and the reasons assigned, in support of it, are peculiarly applicable to this state, on account of the large quantity of waste and unsettled land which it contains, and the multitude of sales that are made of such land. On these occasions, it would be a burdensome and useless toil, to require the parties to repair to the premises, which may cost them a journey of several days into a wilderness, either for the actual performance of a ceremony, long since obsolete, or to lay the foundation of a legal presumption, that it has been performed. And that I may not be misunderstood on this important point, I repeat, that I do not consider a formal livery of seizin, as practised in former times, or an actual corporeal entry, as being at all necessary to consummate a title, or to vest a seizin in deed, in any case, where the premises are vacant, or occupied by a person holding under the grantor, or otherwise, without claim of title. In all such cases, the execution and delivery of the deed, vests the seizin, completes the title, and puts the grantee in the same situation, as if he had made a formal entry, and received the twig and turf from the hand of the grantor. But in this case, if Holt, or his heirs, had been actually, as well as legally seized, and had taken the esplees of the land, which would entitle them to their real action; and if a descent had been cast under those circumstances, although at common law, it might toll their entry, and bar an ejectment; yet I apprehend, it would not have that effect in this state.

I do not now recollect any adjudication in the courts of Ohio, in which it has been decided, in what description of cases, lands and tenements may be recovered, by the action of ejectment; but from the practice which has prevailed since the passing of the limitation act of 1804, it would seem, that the action of ejectment, has been considered as a proper remedy for the recovery of real property, under all circumstances. Although, neither that act, nor those which have since been passed, can be considered as prohibiting real actions; yet there is reason to conclude, and such appears to have been the prevailing opinion that by a fair interpretation of those acts, the writ of ejectment may be used in all cases in which the writ of right can be sustained at common law.

I shall not, at this time, attempt an analysis of those statutes, to ascertain their construction, but will only suggest, that they mention no form of action for the recovery of real estate, but the ejectment: that they give but one period of limitation to such actions, and that the ejectment is so connected with the substance of the provision, as to apply equally to the recovery of possession, title, or claim to land. The inference is, that by our present practice, an ejectment may be resorted to, for all the purposes of a real action, and may be sustained either on a right of entry, or a title to enter, and that the casting of a descent, would be no bar in this case, should it be admitted, that the facts in evidence, do not take it out of the rule by which an entry is tolled.

It may be proper, further to observe, that the patent is an appropriation of the land, and vests a legal title, and that the defendants, having failed to support the collector's deed, cannot, in this form of action, avail themselves of any equity that may be supposed to exist in their favor. Cases may be found, in which patents have been impeached at law, for causes existing before they were issued; but this is not one of that character, nor does it come within the class of

cases in which patents have been held void at law, for having issued without authority, or against the provisions of a statute.

The defendants' counsel, aware that their defence would be subject to this objection, have cited several authorities to show, that their case may be considered as an exception; but the authorities do not sustain them. It is a plain case, of an attempt to evade a legal title, by an alleged equity.

LESSEE OF LUDLOW'S HEIRS *v.* McBRIDE.

Prior possession by an ancestor claiming title, is sufficient to enable the heir to recover in ejectment, against a subsequent possession of less than twenty years without title.

Under the law of 1795, for settling intestates' estates, the orphan's court could not direct sales of land by administrators, lying out of the county, where the court sat.

This was an action of ejectment, to recover lot, No. 110, in the town of Hamilton, Butler county. The plaintiffs having proved themselves children and heirs at law, of Israel Ludlow, deceased, and that they were infants at the time of his death, which occurred in January, 1804, gave further evidence, that in the year 1803, their ancestor, Israel Ludlow, was in possession of a large tract of land, including the lot in controversy, and having laid out on it the town of Hamilton: that he died in possession: and that the land was subsequently taxed in the name of his heirs, and the taxes paid by his executors, from funds belonging to the estate: and that, in 1812, the defendant, McBride, entered into possession of the lot, under an alleged purchase from the executors of Ludlow.

The plaintiffs here closed their testimony, when the defendant's counsel insisted, that the evidence did not make a case upon which the plaintiffs could recover, and ought to be overruled. But the court expressed their opinion, that the testimony made a *prima facia* case for the plaintiffs, and therefore must be submitted to the decision of the jury.

The defendant then offered in evidence, a transcript, duly certified, of certain proceedings of the Court of Common Pleas, of Hamilton county, consisting of an order, made on the application of the executors, at May term, 1804, in these words:

"Administrators of Israel Ludlow, deceased, exhibit an account current, of said estate. John Ludlow and James Findlay, two of the administrators, sworn, and pray an order to sell real estate, to satisfy the debts, &c. Court grant the prayer of administrators, excepting and reserving the farm and improved lands, in Cincinnati, together with the houses and lots in Cincinnati."

And also, of an order of the same court, made at August term, 1805, but when made, directed to be considered as made at May term, 1805 in these words:

"On application of the administrators of Israel Ludlow, deceased, to extend the order for the sale of real estate, to discharge the debts of the deceased, Court authorize administrators to sell the houses and lots in Cincinnati, and any other property, except the mansion house and farm, in the country, so that the sale does not amount to more than 10,000 dollars."

In connection with these orders, the defendant offered in evidence, a deed to himself, from the executors of Ludlow, for the lot in dispute. To the admis-

sion of this evidence, the plaintiffs objected, and the court sustained the objection. A verdict was found for the plaintiffs, and the defendant moved for a new trial, on the ground, that the court erred, in considering the evidence of title given by the plaintiff, sufficient to put the defendant on his defence, and in rejecting the evidence offered by the defendant. The decision of this motion, was adjourned to the whole court at Columbus.

Benham and *Este*, in support of the motion. *Garrard*, contra.

By the COURT.

Several points have been made and argued, in this case, which we deem it unnecessary to examine, or decide. Most of these involve matters interesting to persons not parties to the case, which must necessarily arise and be determined, in suits now pending for property, to a large amount. Until those parties are fully heard, we wish to form no opinion that may affect their rights, where it is not necessary to decide the case before us. And it is not necessary to do so, in this case.

It is contended for the defendant that the court erred, in instructing the jury, that the possessory title given in evidence by the lessor of the plaintiff, was sufficient to warrant a verdict for the plaintiff, in the absence of all proof of title to the premises, in the defendant. The correctness of this instruction, depends upon that evidence. It was in proof that in 1803, Israel Ludlow, the plaintiffs' ancestor, was in possession of the premises, claiming them as his own; that he died in 1804, leaving the plaintiffs, his children, and heirs at law, all minors: that the administrators of his estate, paid the tax out of the funds of the estate, and in 1812, sold the premises, as the property of the estate, in their character of administrators, to the defendant, and put him in possession, the plaintiffs then being minors.

The doctrine is now too well settled to be disturbed, that a prior possession is presumptive evidence of title, and unexplained or uncontradicted, is a sufficient title to recover upon, in ejectment, against the mere intruder. The authorities upon this point are numerous, and decisive, both in the English and American courts. It is not necessary that there should be a continued possession for twenty years, to furnish this presumption of right. Such possession, when both adverse to all others, and continued, rises at length into right, even against the legal owner of the fee, if once within the protection of the statute of limitations. And, when continued for less than twenty years, may prevail as a presumptive right, until rebutted by proof of prior possession, right of succession, legal title, or other evidence, sufficient to defeat such presumption. In cases where no other evidence of title than possession, is given by either party, the prior possession must prevail, especially when connected with an assertion of ownership, unless such prior possession has been abandoned, or the subsequent possession been continued, until protected by the lapse of time, and the statute of limitations.

Prior to 1803, Israel Ludlow, the ancestor of the plaintiffs, was in possession of a large tract of land, of which the lot in dispute formed a part, laid out upon it, the town of Hamilton, made donations of lots, which were accepted, sold

other lots to individuals, who entered and improved; and being thus in possession, Israel Ludlow died in 1804. By his death, his estate, whatever it might be, in the lot in question, and his possession of it were cast upon his heirs, and they are to be regarded as having the possession by virtue of the descent cast upon them. This possession upon which the plaintiffs relied, was not a mere constructive possession, such as every owner of unsettled land is supposed to have; but the actual seizin, the *possessio pedis* of their ancestor, transferred to them by operation of law, and continued for them, by the administrators, as evidenced by their acts, until the defendant entered in 1812. The charge of the court, that the possession made out in proof, by the plaintiffs, must prevail over the defendant's subsequent possession, which was not protected by the lapse of time, and the statute of limitations, in the absence of all evidence of title in either party, was correct.

The next error complained of, is the rejection of the evidence offered by the defendant, to show a sale by the administrators to the defendant, and a conveyance in conformity with that sale. This evidence consisted of transcripts of certain orders made by the court of common pleas of Hamilton county, in the years 1804, and 1805, authorising the administrators of Ludlow, to sell his real estate, for the payment of his debts. The competency of this evidence, depends upon the legality of a sale of the lot in question, under these orders. If they conferred no power to make the sale, no right could be created in the defendant, or divested out of the plaintiffs by it.

At the time these orders were made, there had been no state legislation, upon the subject of selling the lands of an inestate to pay his debts; and much doubt is entertained, whether the Court of Common Pleas, who are vested with jurisdiction of probate and testamentary matters, had authority in any case, to direct a sale of the lands of an inestate to pay his debts. If this power was vested in them, it was in virtue of the territorial law of 1795, providing "*for the settlement of inestates' estates.*" and of the jurisdiction over inestate and testamentary matters, conferred upon them by the state law of April, 1803, first organizing the judicial courts.

The law of 1795, specifies the cases, in which the Orphans' Court may direct an administrator to make sale of an inestates' real estate, and prescribes the manner of directing and effecting such sale. The terms employed in conferring this power, are these: "that it shall be lawful for the administrator or administrators of such deceased, to sell and convey such part or parts of the said lands or tenements, &c. &c., as the Orphans' Court of the county, where such estate lies shall think it fit to allow, order and direct, from time to time." This authority is given by the law, subject to a proviso, that the Orphan's Court shall not "allow or order any inestates' lands or tenements, to be sold, before the administrator requesting the same, doth exhibit two or more true and perfect inventories, and conscionable appraisements of all the intestates' personal estate whatsoever; as also, a just and true account, upon his or her solemn oath or affirmation, of all the intestates' debts, which shall be then come to his or her knowledge, &c. &c. then, and in every such case, and not otherwise, the court shall allow such adminsitrator to make public sale of so much of said lands, as the court, upon the best computation they can make of the value thereof, shall judge necessary," &c. The law further provides, that "the court shall order

so many writings, to be made by the clerk, as they shall think fit to signify, and give notice, of such sales, and of the day and hour when, and the place where, the same will be, and what lands they are, and where they lie, which notice shall be delivered to the sheriff or constable, in order to be fixed in the most public places of the county or city, at least ten days before sale."

If it be admitted that the several courts of Common Pleas, under the state government, in 1804, and 1805, were invested with the same power and authority, over the lands of an intestate, that were vested in the orphans' court, under the Territorial Government, by the law of 1795, the question then arises, what was the extent of the powers conferred upon the Orphan's Court? So far as the courts of Common Pleas were invested with jurisdiction over the subject matter upon which they may have acted, their decisions and orders are final, and conclusive, if not reversed for error. They cannot be impeached collaterally; nor will this Court enquire whether all the statutory provisions, preliminary to make the decision, or order, have been complied with. If the Court of Common Pleas of Hamilton county were clothed with power to make an order, to sell the lot in question, and in the exercise of that power, have ordered it to be sold and conveyed, their act is conclusive upon the parties. The grounds and proofs upon which they proceeded are not examinable in this case. The correctness of the opinion given, rejecting the evidence, depends upon these two questions. Had the Court jurisdiction over the subject matter? Have they exercised that jurisdiction?

By the law of 1795, the power over an intestates' real estate, is in express terms limited to the lands within the county where the court is. "The Orphans' Court of the County where such estate lies," is authorized to order or allow a sale. The estate previously mentioned in this section, and the only one to which the terms "such estate" can apply, is the lands and tenements which the administrator may be authorized to sell and convey. This authority is to be conferred by the Orphans' Court, and its exercise is limited to lands within the county, where the Court sits. The power, or what is but another mode of expressing the same thing, the jurisdiction of the Orphans' Court over the lands of an intestate, is thus limited, in express terms, by the law creating it, to "such estate," that is, such lands and tenements as lie in the county. It can by no safe rule of construction, be extended to granting administrators authority to sell the intestates' lands wherever they may be situate. Administration might have been taken out in a county where the intestate had no lands, although he owned a large real estate in other and distant parts of the state. In such a case, the court possessed no competent means of ascertaining the various facts, which they are required by law to ascertain, in making the order for sale, except by exparte affidavits. They could make no computation of value upon safe grounds; they could not know what was the most profitable part of the estate, to reserve it; they could exercise no control over the ministerial officer required to give the notice. The terms of the law, confine the court to estates within the county; the obvious policy of the law calls for the same restriction.

It is argued, that the term "estate," embraces all the intestate, wherever situate, and that the Orphans' Court of the county where part of it lies, is authorized to proceed upon the whole, as one entire thing, especially the Orphans' Court of the county where the intestate resided and made his home. This con-

struction, would be adopting a flimsy fiction, to controul a plain and palpable fact. The real estate of an intestate, consists of as many distinct estates as he owned separate parcels of land. His estate, though joint, or entire in the whole, is separate and divisible in the parts. The law in question so treats it, for it directs a sale of so much of said lands, and directs a reservation, till the last, of the most "profitable part of the estate," thus parting the estate in express terms.

Another objection to this construction, is, that where the mansion house was in one county, and the principal, but least profitable part of the estate, in another county, the power to direct a sale, might be vested in the court of a county, where none of the lands sold, would lie, because the lands situate in other counties, would sell for a sum sufficient to discharge the debts.

The Orphans' Courts were peculiarly domestic. They were established in each county, and were supposed to as they did in fact, possess peculiar facilities, for acquiring correct information of the condition of intestates' estates, within their jurisdiction. Much was intended to be confided to their discretion, because their proceedings were *ex parte*, and in most cases, operated upon, and affected the rights of infants. They were not empowered to controul the title to intestates' lands without the county, for the reasons already stated. Their jurisdiction was sufficiently broad, when allowed upon *ex parte* application, to control the sales of lands within the county, without adopting a forced construction, against the plain and obvious meaning of the words of the law, to extend that jurisdiction over all the lands of an intestate within the state. We are satisfied it was not the intention of the law of 1795, thus to extend the power of the Orphan's Court; and that by no just interpretation, can it be made to give them jurisdiction over lands out of the county, in which they acted.

The property in controversy, was not situate in Hamilton county: the title to it was not affected by any order made in the Orphan's Court, of that county, had such order, expressly contained authority to sell it. Where there is no legal power, an attempt to act, can be followed by no legal consequence. But the orders are in general terms, and as the court had clearly no jurisdiction, except over land in Hamilton county, we are bound to suppose there was no intention to extend it beyond that county. This construction, is perfectly consistent with the terms of the orders. Full effect is given to them, without including any lands, but those within the county; and we avoid the conclusion, that the court undertook, or intended to transcend their jurisdiction. In this view of the case, we consider, that the orders for the sale offered in evidence, did not extend to the lot in question, and consequently, there was no error in rejecting them.

The validity of the orders, for any purpose, and the effect of subsequent laws upon them, which have been discussed in the arguments, are thus rendered immaterial to the decision of this case, and for the reasons assigned in the commencement of this opinion, have not been considered. The motion for a new trial is overruled.

THE TRUSTEES OF SECTION 16 v. MILLER.

JUDGES HITCHCOCK AND BURNET.

1827.

The surety is not bound when the plaintiff, by his own act, prevents the principal from performing his contract.

This was an action of debt. The declaration contained a count on a recognizance of bail, and also a count on a bond. To the first count there was no defence. As to the second count, the defendant relied on a proviso contained in the condition of the bond.

The facts are these: One Crocket, took a lease on part of the school section, and to secure the performance of his covenants, gave a bond, with the defendant, Miller, as his security. The condition of the bond, contained a proviso, that if the lessee should complete the improvements required by the lease within the period of four years, then, and in that case, the defendant, Miller, should be bound for the rent of the first year only. The suit on the bond, was brought to recover the rent for the second, third and fourth years. The recognizance was given for the rent of the first year.

The plaintiff gave in evidence, the recognizance of bail, to support this first count, and the bond, to support the second. The defendant then proved, that after the expiration of the lease, the rent not being paid, the trustees proceeded according to the provisions of the statute, to dispossess the lessee, which was done before the expiration of the term of four years, allowed for the completion of the improvements. He then called a number of witnesses, for the purpose of showing, that the improvements were completed by Crocket, before he was dispossessed; on which a question arose, whether the evidence was not superfluous, on the ground, that as by the terms of the contract, the defendant was to be discharged from his liability, provided, the improvements were made by the lessee, within the term of four years, and as the plaintiffs had dispossessed him before the expiration of the time they could not be allowed to exact from the defendant, the penalty of a non-performance, admitting that the improvements had not been made.

By the COURT.

When Miller became security for Crocket, he relied on his ability to perform the condition, within the time stipulated. He had, by his contract, a right to the benefit of the whole term. Although the labor might not have been completed, when he was turned out of possession, it does not follow, that it would not have been done, if the plaintiffs had not put it out of his power to proceed.

It is no answer to the objection, that the statute made it the duty of the trustees, to proceed as they did. They have, no doubt, been influenced by considerations of duty; but if in the discharge of duty, they have prevented the performance of a condition, on the non-performance of which, a penalty was to

attach, they must submit to the consequences. It is immaterial to the defendant, by what motives they were influenced. The consequences to him are the same. He stipulated for a conditional liability, or, for a liability to be discharged on the performance of certain conditions, in a given time, and he was entitled to the whole of that time, to perform those conditions, or to cause them to be performed. If he who is to be benefitted by the performance of a contract, is the cause why it is not performed, the contract is dissolved, and the party bound, is discharged from his obligation, and will be in the same situation, as if he had performed it.

This rule of law applies with great force to cases where improvements are to be made on real estate, and the party for whose benefit they are to be made, prevents them from being done, by dispossessing the party bound, or by preventing him from entering on the premises. Here the trustees re-entered: removed Crocket, and leased the land to a third person, who took possession, so that neither Crocket nor the defendant could enter, for the purpose of performing the condition, without being liable to an action of trespass.

The rule which governs the case, is just and equitable, and the case itself, is illustrative of the oppression that might be practised, were it otherwise. By the terms of the bond, the obligors had the whole term of four years, to make the improvements. They had a right if they saw proper, to defer them till the last year. Of course, the condition was not broken, nor was the right of performing it, forfeited, when the trustees made it unlawful for the defendants to proceed any further. From the testimony already heard, it appears that the improvements were nearly, if not entirely completed, before the possession was changed; and it is a fair inference, that they would have been finished in good faith, if Crocket had not been dispossessed. We mention this, merely to show, that there was no disposition on the part of the defendants, to evade their duty, and that if it has not been fully performed, the blame lies at the door of the plaintiffs.

On the intimation of this opinion, the plaintiffs abandoned their second count, and took a verdict for the amount of the recognizance, being the rent for the first year.

SINNARD v McBRIDE.

JUDGES BURNET AND SHERMAN.

1827.

Assumpsit does not lie for mesne profits accruing after the date of a demise in the declaration of ejectment.

This case was submitted, on a statement of facts, agreed to by the parties, from which it appears, that in 1817, the plaintiff recovered certain premises in an action of ejectment, against John N. Cumming, since deceased. In 1823 McBride administrated on the estate of Cumming, and in 1824, the present, action of assumpsit was brought against McBride, as administrator of Cumming, to recover the mesne profits.

The defence is placed on two grounds. First: that this form of action cannot be sustained. Second: that if it could be sustained in other respects, it is now barred by the statute of limitations.

Collet, for the plaintiff. *Sargeant*, contra.

By the COURT.

We do not consider the authorities cited for the plaintiff, as sufficient to sustain his action. They seem designed to show the hardship of the case, and the reluctance with which the king's bench decided against the meritorious claim, on a technical objection, rather than to support the present action. In the case of *Hambly v. Trotter*, on which the plaintiff most relies, Lord Mansfield considers the question in reference to those actions, which survive or die, on account of the *cause* of action; and those which survive or die, on account of the *form* of action. If the claim can be considered as originating in contract, express or implied, the action survives: but not so, if it be a tort, or arises *ex delicto*, supposed to be by force, and against the peace. In the case submitted, there is no question as to the propriety of the form, in which the suit is brought. Assumpsit will lie against an administrator, on matters arising in the life of the intestate; but the real question is, whether this form of action can be maintained, on the facts in the agreed case. The premises occupied by the intestate, have been recovered in an action of trespass and ejectment. The term for which rent is demanded, is subsequent to the demise laid in the declaration. The proper remedy is, therefore, trespass for the mesne profits; but as the action, in that form, does not survive, it is contended, that the court ought to sustain it in its present form, to prevent failure of justice. This we would do, most willingly, if the law would permit it. But the plaintiff has elected to treat Cumming, as a trespasser, from the day of the demise; he cannot, therefore, in the language of Justice Ashhurst, "blow hot and cold at the same time," by treating his possession, as that of a trespasser and a lawful tenant, during the same period. He cannot recover in ejectment, and then recover for use and occupation, for the time subsequent to the day of the demise. It is admitted, that there has not been any contract between Sinnard and Cumming.—Cumming entered without the consent, and against the will of Sinnard. He was considered, and treated as a trespasser, from the time of his entry, as appears from the record, and on that ground, the possession was recovered from him. There is not only a want of matter showing an agreement, but there is the proof of facts which estop the plaintiff from presuming it.

The action of assumpsit, is often sustained, where there is not, in fact, any agreement between the parties. The proper action against a common carrier, is on the custom of the realm, which is for a tort, but after the death of the carrier, assumpsit may be maintained against his representatives. So trover, which is for a tort, is the proper remedy against one, who unlawfully converts the goods of another to his own use, but after the death of the wrong doer, assumpsit, for the value of the goods, will lie against his executor, but this must be, where the facts are such, that an agreement may be presumed.

It seems to be well settled, that after a recovery in ejectment, assumpsit will lie for the mesne profits, anterior to the date of the demise, but not for the time

subsequent to the demise. The reason of the distinction is evident. In the former case, the presumption of a contract is not excluded: in the latter case, it is. A man cannot hold by agreement and as a trespasser, at the same time; though for a part of the time, he may hold by agreement, and for the residue, as a trespasser.

It is not stated, in the agreed case, at what time Cumming entered, but it was taken for granted, in the argument, that the demise was carried back to the day of the entry, for which time, we are of opinion, that rents and profits cannot be recovered in this action.

As the case is disposed of on this point, it is not necessary to consider the question arising on the statute of limitations.

Judgment for defendant.

THOMAS *v.* MOLIER.

JUDGES BURNET AND SHERMAN.

1827.

An award to deliver books, papers, and accounts, a small chest and wearing apparel is too indefinite to be sustained.

A motion was made in the court of Common Pleas, to make a submission a rule of court. The motion was overruled and judgment entered against the applicant for cost. A bill of exceptions was taken to the opinion of the court, and a writ of error brought to reverse the judgment. The errors assigned, are:

First. The court ought to have made the submission a rule.

Second. The motion was rejected without assigning reasons.

Third. It was erroneous to give judgment against the applicant for cost.

The case was argued by

Thomas R. Ross, for plaintiff in error.

By the COURT.

It appears from the proceedings, that the award directs Molier, to pay Thomas forty-six dollars, and twenty-five cents, and cost. It orders Thomas to deliver to Molier, all the books, papers, and accounts; together with a small chest and wearing apparel, not otherwise disposed of, on the thirty-first July, 1826, and which he, the said Thomas, might then have had in his hands, belonging to the said Molier.

The award is entirely too vague, and uncertain. It contains nothing specific, but the payment to be made by Molier, on which Thomas is to deliver up books, papers, accounts, a small chest, and some wearing apparel; but what books, papers, and accounts, or how much, or what description of wearing apparel, is altogether uncertain; and the award contains nothing by which that uncertainty can be removed.

The object of arbitrations, is to put an end to litigation, by ascertaining the rights of the parties, and for this purpose, the award must be so explicit and descriptive that the right and duties of each party, are no longer matters of doubt or dispute.

If specific articles of property are to be delivered, they must be so described, that when a delivery, or an offer to deliver is made, it may be known whether the articles are the same that the arbitrators intended or not.

Every thing that is required to be done by Thomas, in this award, is indefinite. A tender of any thing in the form of books, papers, and accounts, and of any articles of wearing apparel, would be a literal performance.

But this is not all. The arbitrators have not ascertained the fact, whether any of these articles are to be delivered or not. This is to depend on another fact, not determined, that is, whether there was any of them on hand, in July, 1826.

From this view of the case, it is evident, that the court of Common Pleas did not err in refusing the rule, and having refused it, the applicant was liable for cost.

The court were not bound to give the reasons of their opinion, and in omitting to do so, they have not acted erroneously.

Judgment affirmed.

REYNOLDS v. REYNOLDS.

JUDGES BURNET AND SHERMAN.

1827.

The complainant charges in his bill, that in March, 1826, he gave his promissory note to his father, for one hundred dollars, payable in July, 1812, for the purchase money of fifteen acres of land: That in 1819, he purchased of his father a wagon, and gave his note for the further sum of seventy dollars: That in 1815, his father commenced a suit against one Delancy, and employed the complainant to conduct and manage the said suit, as his attorney in fact: That in the management of that suit, he laid out and expended large sums of money, exceeding, in the whole, the amount of the notes given by him, as aforesaid. That after the death of his father, and after the services and disbursements before mentioned, the administrators of his said father, commenced suit against him, on the notes given as above: That at the trial, he offered evidence of his demand, by way of set off, but that the jury refused to allow him his full credit, and rendered a verdict against him for one hundred and two dollars. The bill prays for an injunction, and for relief.

The defendants demurred, and the case was submitted without argument.

By the COURT.

We are not often troubled with a case so perfectly destitute of equity, as the one before us. The facts on which the bill is predicated, were not only a proper

defence to the suit at law, but it is admitted by the bill, that they were all submitted to, and decided on by the jury, and the amount of the verdict shows, that the claim was allowed, as far as the jury believed it to be correct. If injustice was done, the remedy was by moving for a new trial, or by an appeal.

Bill dismissed.

BLISS *v.* ENSLOW.

JUDGES BURNET AND SHERMAN.

An application to set aside the levy of an execution is addressed to the sound discretion of the court and is subject to revision in the Supreme Court.

It appears from a bill of exceptions attached to the record, that a motion had been made to set aside a levy made by a constable, on a horse, saddle, and bridle, the property of Bliss, on the ground that he was a private in a company of cavalry, organized under the laws of the state, and that the articles levied on, were by law exempt from execution.

The court below, refused the motion, and allowed a bill of exceptions.

BRUSH, for the plaintiff, insisted, that the decision of the Common Pleas was erroneous, and relied on the act regulating the militia, particularly the 14, 15, 16, 19, and 23d sections.

By the COURT.

The motion to set aside the levy, was addressed to the sound discretion of the court below. They were at liberty to grant or reject it. If they were satisfied that the property was protected from execution, they had power to set the levy aside, but if they entertained doubts on that question, or on any connected with the subject, it was their prudent course to overrule the motion, and leave the party to his remedy by suit. If the court had been satisfied, which seems to have been the case, that the property was exempt, yet they might have believed, from other circumstances, that it was not prudent to decide the case in a summary way, on exparte testimony. If the applicant was injured, he had a remedy by suit and it was discretionary with the court under all the circumstances of the case, whether they would leave him to that remedy, or relieve him on his motion. Other persons were also concerned, whose rights the court were bound to respect, and whose safety might have required time, and an investigation before a jury.

But we disclaim the right of controlling the discretion of the court of Common Pleas, in a case like this.

Independent of these considerations, it does not appear, that the Common Pleas have done any act of which the plaintiff complains, and which this court can reverse. They have refused to make an order. If they were bound to make that order, the remedy of the party injured is not by *certiorari*.

WILSON v. APPLE.

JUDGES BURNET AND SHERMAN.

1827.

In slander the defendants may give in evidence in mitigation of damages, facts which do not amount to a justification.

This was an action of slander. The words laid in the declaration are: you are a thief: you have stolen geese. The defendant pleaded the general issue, and at the trial, offered to prove, in mitigation of damage, that the plaintiff had driven away from one Benjamin Wilson, a flock of geese belonging to the said Wilson. This evidence was objected to, and overruled. A bill of exceptions was taken, and a writ of error brought to reverse the judgment.

Moorhead, for plaintiff.

By the COURT.

Although the evidence rejected, does dot seem to be very material, yet, as the fact offered to be proved, might, at the time of the speaking of the words, have had some influence in misleading the defendant, he had a right to prove it, for the purpose of reducing the malice.

There is a difference between a justification and an excuse. The one goes to the right of recovery, the other, to the amount to be recovered. For the purpose of showing malice, the plaintiff may prove the speaking of words not charged, if they be not actionable, and with a view of extenuating malice, the defendant may prove, under the general issue, any circumstances connected with the transaction, tending to show, that he had probable ground for believing the truth of the words.

In estimating the damage, the degree of malice is always to be considered. Any circumstance, therefore, tending to show, that the defendant spoke the words, under a mistake, or that he had some reason to believe they were true, is entitled to consideration, and is proper evidence to be received in mitigation. What effect this evidence might have, we know not, nor is it necessary to know. We are satisfied it was legal, and that the defendant had a right to use it, for the purpose for which it was offered.

The judgment, therefore, must be reversed, and the cause remanded for further proceedings.

INMAN v. JENKINS.

JUDGES HITCHCOCK AND BURNET.

1827.

A former recovery cannot be proved by parol.

A former recovery cannot be given in evidence under the general issue of non-assumpsit.

This case was brought up by writ of error. It appeared, from the record, that the plaintiff below, commenced his action as assignee of a promissory note, before a justice of the peace. The cause was appealed to the Common Pleas. The plaintiff declared in the common form, and the defendant pleaded the general issue, without notice.

At the trial, the defendant attempted to prove a former recovery, and for that purpose, offered parol testimony to establish the following facts: that before the commencement of the present suit, an action had been brought before a justice of the peace, and a judgment rendered on the same note, and that the docket of the magistrate containing the judgment, had been lost or mislaid. The evidence was objected to, overruled, and a bill of exceptions taken.

The error relied on, was the rejection of the evidence, stated in the bill.

The case was argued by

Thomas, on the part of the plaintiff.

By the COURT.

The evidence offered in the court below, was properly rejected, for two reasons. First: it was not competent for the defendant to prove a former recovery by parol. The circumstance stated, in relation to the loss of the docket, does not take the case out of the general rule. The objection to that kind of testimony, and the uncertainty and danger to be apprehended from it, is still the same. The docket might have been lost or mislaid by accident; or, it might have been put out of the way, by design, to lay the foundation for parol testimony. In either case, the consequences are the same.

The evidence is not the best the nature of the case admits of; nor is it such as the law requires.

Salutary rules must not be dispensed with, because cases may arise in which they are found to be inconvenient.

But, independent of this ground, we are of opinion, that by our practice act, this defence could not be set up, under the general issue, without a notice. Although it has been considered by this court, that the act does not require a notice of every matter, which, if specially pleaded, would be a good bar; yet we think the defence attempted in this case, does require it. Such has been the practice, and we do not recollect a case, in which a former recovery has been proved, under the general issue, without a notice.

Judgment affirmed.

LESSEE OF MATTHEWS *v.* THOMPSON, ET AL.

The Five Points.

The defendants relied on a title derived from a sheriff's deed. It appeared, that in the year —— Matthews voluntarily confessed a judgment, in good faith on the appearance docket of the court of Common Pleas, for the county of Belmont, which referred to a prior judgment against the plaintiffs, in the Supreme Court, for a debt for which they were bound as the sureties of Matthews.

The judgment so confessed, was entered without process, or pleadings, and it was made a question, whether it had been entered in term time, or in vacation.

The execution on this judgment, referred also to the judgment in the Supreme Court.- The levy returned by the sheriff, was on one hundred acres of land, in section four, town. seven, range four, without further description. The deed purported to convey to the purchaser, all the right of the defendant, in a particular tract, within the section, which it was insisted, contained more than a hundred acres. There was also, a want of formality in the proceedings generally.

The deed offered in evidence by the defendant, was objected to, on the ground, that the judgment, execution, levy, and deed, were all illegal and void.

The following points were resolved by the court, and the cause was sent back to the county of Belmont, for trial, at the next term:

First: These proceedings took place at an early period; before any system of practice had been established by statute, or by rules adopted for that purpose. The court that ordered the judgment, had jurisdiction of the subject matter, and the officers had power to perform the acts which they did. It would, therefore, be unreasonable, to expect the same regularity and technical precision, which would be required at the present day, and the proceedings ought to be viewed with an indulgent eye.

Second: The objection to the want of process and pleadings, cannot be sustained. Judgments confessed in person, or by power of attorney, in open court, are valid without process; and as an issue is not required in such cases, the pleadings may be dispensed with. It is, however, necessary that the judgment should be entered in term time, which fact may be ascertained, by inspecting the docket and the entry.

Third: The execution is certainly informal. It ought not to have referred to the judgment in the Supreme Court; but we are of opinion, that the words Supreme Court, may be stricken out, as surplussage, and the writ will then contain the substance of a good execution.

Fourth: The levy endorsed on the execution, is defective. It is stated to have been made on one hundred acres of land, in section, four, town. seven, range four, with no further description. The return ought to have been so specific, as to enable the purchaser to ascertain the land which he purchased, with certainty. This defect, however, may be supplied by parol testimony.

Fifth: The variance between the levy and the description in the deed, may also be explained by parol. If the levy was actually made on the tract contained within the boundaries set out by the deed, and that fact was known and understood, at the time of the sale, no injustice has been done. An innocent purchaser, under such circumstances, ought not to suffer, by the careless manner in which the officer has stated his proceeding, if in point of fact, they have been substantially correct.

NOTE.—At the next term of the court in Belmont, the cause stood for trial, but the counsel for the plaintiff entered a discontinuance.

LONG v. HITCHCOCK.

JUDGES BURNET AND SHERMAN.

1827.

In slander, the death of the defendant, abates the suit.

This was an action of slander, in which the plaintiff obtained a verdict and judgment in the Common Pleas. The defendant gave notice of an appeal, and perfected the appeal bond within the time directed by the statute, and died before the return of the transcript to this Court.

Tracy, for the plaintiff.

By the COURT.

The cases cited in support of the motion are not applicable. There is no similarity between the appeals to which they refer, and the appeal given by our statute. The defendant, in this case, had perfected his appeal, before his death. When that was done, the verdict and judgment were vacated, and the cause was considered as transferred to this court, for trial on its merits. The death of the party, under these circumstances, produced the same effect, as if the verdict had been set aside, on motion in the court below, and a new trial granted; in which case there is no doubt, but that the suit must have abated by the subsequent death of the defendant. If the defendant had died after the notice, and before the appeal was perfected; or if the appeal had been irregularly taken, the verdict and judgment would have remained in force, and if a transcript, in such a case, had been sent here, the motion might have been proper. But the case now stands, as if there had been no trial, and as the cause of action does not survive, at common law, and is not saved by the statute to prevent the abatement of suits, the motion cannot be granted

Suit abated.

BROWN v. BRABHAM, ET AL.

JUDGES HITCHCOCK AND BURNET.

1827.

Payment.

This bill was filed for the purpose of compelling payment of a balance claimed to be due, on the partnership accounts between the late firms of Sutherland and Brown, and of McCullom, Butler and Landon.

The account of Sutherland and Brown, on the dissolution of their partnership, had been assigned to Brown. A settlement was afterwards had between Brown and McCullom, by which the balance due to the former, from the firm of

McCullom & Co. was ascertained. All the parties to the transaction, except Sutherland, are deceased. Most of them were insolvent, and the persons who administered on their estates, are most of them dead, and several of them insolvent.

The object of the bill is to require payment of the aforesaid balance, from Brabham, surviving administrator of McCullom.

Sutherland having assigned his interest to the complainant, has disclaimed.

Brabham relies on the statute of limitations, and on a receipt from Brown, for a draft on General Porter, in favor of Butler, and endorsed by him to Brown.

Stoddart and *Bacon*, for complainant. *Smith*, for defendant.

By the COURT.

It is not necessary to examine many of the grounds that have been taken and relied on in the argument. It appears to us, that Brown's receipt is decisive of the matter in controversy. That receipt was given in 1811, after the settlement, referred to in the bill, had been made. It acknowledges that Brown had received, on account of the balance now claimed, a draft for six hundred and eighty dollars, drawn on Porter, in favor of Butler, and endorsed by him.

A number of objections have been made to the allowance of this receipt. It is contended, in the first place, that the proceeds of the draft have never been received by Brown. This seems to be the fact, but as he constituted Butler his agent, to collect the money, by whom it was received, and misapplied, he cannot avail himself of this objection. A payment to Butler was in effect, payment to the complainant, whose agent he was, and it does not rest with him to charge the defendants with the consequences of his own misplaced confidence.

It is said, in the second place, that the draft was Butler's private property, and that being indebted to Brown in his private, as well as in his partnership capacity, he had a right to direct the money to be applied on either account. This is not denied, but so far as there is evidence on this point, it goes to show, that the draft was assigned for the purpose of extinguishing the partnership debt, but if not, there is no evidence to show that Butler directed it to be otherwise applied; and if no directions were given, the house had a right to credit it to either account, and he has applied it to the partnership account. The receipt given for the draft, specifies that application, and was received without objection. Butler did not dispute it in his life, nor has it been disputed since, by any person legally representing him, and certainly, the complainant, who made the application, cannot now be allowed to question it.

Again. It is said that Brown used due diligence by employing a confidential agent, as he had a right to do. This is admitted, but as that confidential agent, collected the money, it is the same thing to the defendant, as if Brown had collected it himself. The amount of the draft exceeds the balance due on the settlement, and extinguishes the whole debt. It is not necessary, therefore, to consider any other point made in the cause.

Bill dismissed.

STREET v. FRANCIS.

JUDGES BURNET AND SHERMAN.

1827.

An appeal does not lie from the Common Pleas on an application to redeem lands sold for taxes It seems that a certiorari is the proper remedy in such cases.

This was an application from a decision of the court of Common Pleas, on an application for the redemption of land, sold for taxes.

The appellee moved to dismiss the appeal for want of jurisdiction.

Brush, for the appellant,

By the COURT.

The practice of removing causes from the Common Pleas to this court, for the purpose of a second trial on the merits, has been created by statute. It is a proceeding unknown to the common law. It cannot therefore be extended beyond the plain and obvious import of the statute.

The appeal is given from judgments and decrees, rendered in the court of Common Pleas. In every case of an appeal security must be given for the amount of the condemnation money, and cost in the Supreme Court. The statute also directs, that all cases appealed, shall be tried on the pleadings made up in the Common Pleas, unless on good cause shewn, the parties are permitted to amend their pleadings. These provisions, evidently relate to cases of a different character from the one before us. The right of appeal is given in the statute which regulates the practice of the courts, in cases that are conducted according to the course of the common law; and the terms made use of clearly show, that the provision applies only to suits in which there are plaintiffs and defendants, and in which pleadings are filed, and issues joined, according to the course of the common law. It has never been considered as extending to cases, in which a summary jurisdiction has been granted to the Common Pleas, by particular statutes. In such cases, we never sustain an appeal in this form, unless it has been allowed by the statute which creates the jurisdiction. In this case, the statute does not provide for, or allow of an appeal. The decision, therefore, of the Common Pleas on the merits, is final. This court has an undoubted right to examine such proceedings on *certiorari*, and so far as the merits are exhibited in the record of the proceedings below, to see whether the court has decided correctly, and if not, to set the matter right.

ABBOTT v. HUGHES, ET AL.

JUDGES BURNET AND SHERMAN.

1827.

A plaintiff having mistaken his defence at law cannot be relieved in equity.

The complainant states in his bill, that in February, 1823, he made his note to the defendant Hughes, for one hundred dollars, payable in twelve months either in legal claims on the said Hughes, or in produce: that before the note became due, he purchased a note, given by said Hughes, to one Walker, for one hundred dollars, payable in August, 1823, for the purpose of discharging his own note, and offered it to Hughe's, who informed him, that he had assigned the complainant's note, to the defendant Miller, to secure the payment of forty dollars: that Miller having left the note with Gilliland, he called and informed him, that he was ready to discharge it, by the delivery of Hughes note to Walker which was refused. After this, Miller put the note in suit. The complainant pleaded the facts as above: the plaintiff demurred to the plea: the court sustained the demurrer, because the plea did not aver an offer to assign the note purchased of Walker. The complainant, by leave, amended his plea, by an averment of that fact. On the trial, he failed to prove that he had so offered to assign, and a verdict and judgment were rendered against him. The object of the bill, is to enjoin that judgment. Miller has answered; the bill has been taken *pro confesso* as to Hughes, and the cause is submitted to the court without argument.

By the COURT.

The facts set out in the bill, are fully supported, but it is very evident, that the remedy of the complainant was at law. The purchase and tender of the note, given by Hughes to Walker, was a legal discharge of his own note to Hughes. It was not necessary for him to assign that note. By the operation of the contract, the purchase of the note from Walker, was for the benefit of Hughes the maker, and intended to extinguish it. It was in fact, a payment on behalf of Hughes, and nothing more was necessary, than an offer to deliver it, as a cancelled note.

It is a general rule, that after a trial at law, the defendant cannot sustain a bill for relief, in equity, on facts which would have been a good defence at law. If the complainant had refused to amend his plea, and had suffered the case to take its course, he might have been put right, either by appeal, or writ of error; but having abandoned his legal defence, he is without remedy, so far as Miller is concerned. His interest, however, does not extend to the whole note. He is seeking to recover a part of the amount, for the benefit of the defendant, Hughes, by whom the bill is confessed, and who certainly has no just or equitable claim on the complainant. Under these circumstances, it would be against equity and good conscience, to suffer the assignee to collect that part of the judgment. As far as his own interest is concerned, he must be permitted to enforce the judgment. But as to the residue, or so much of it as is to be applied to the use of Hughes, a perpetual injunction must be awarded.

DIXON, ET AL. *v.* EWING.

JUDGES BURNET AND SHERMAN.

1827.

A creditor, by releasing the property of the principal taken in execution, exonerates the security.

The bill states, that the complainants joined in a title bond to Ewing, as the securities of one Foot, for the conveyance of a tract of land. They had no interest in the transaction. Foot failed to convey the land. Ewing brought suit, and obtained a judgment for one hundred and ninety-two dollars and fifty cents. Execution was taken out on the judgment, and levied on some personal property, belonging to Foot. The property so levied on, was afterwards discharged from the execution, and returned to Foot, by order of plaintiff's attorney, without the knowledge or consent of the complainants.

The answer admits the facts in the bill, but denies that the property was restored to Foot, by the direction of the defendants.

The case was submitted on the briefs of counsel.

By the COURT.

As Foot was the principal debtor, and the complainants were his sureties, the judgment creditor was bound at least, to let the law take its course, without interfering to exempt the principal debtor, or to relieve his property, in such a way, as to increase the risk, or eventual loss of the securities. It appears, that property belonging to Foot, had been taken in execution, by which the judgment might have been, in part, discharged; and although Foot's insolvency was notorious, this property was given up by order of the plaintiff's attorney, who must have known, that by doing so, the entire debt would fall upon the sureties. This has been the result, and the question is, whether a judgment creditor, can release the property of his principal debtor, after a levy, and then enforce the collection of the entire judgment, against the sureties. We are of opinion that he cannot, and that these complainants are entitled to a credit on the judgment, for the value of the property so surrendered or relinquished. We do not say that Ewing was bound to pursue the principal to insolvency, before he came on the sureties; but that he had no right to interpose for the protection of the principal, or his property, by discharging either from the debt, to the injury of the sureties; and that having done so, the loss must be charged to his own account, and not to the complainants. The case is not varied, by the allegation, that the defendant did not, in person, authorize the release. He is bound by the acts of his attorney.

The question, is not what degree of diligence is required, or what degree of negligence may be permitted, in the judgment creditor, in relation to the safety of the sureties, but how far he may be allowed to injure them by his direct acts. Our statute for the relief of bail and sureties, is a beneficial one, and although this case as it now stands, is not within its letter, it is within its spirit, at least, so far, as injurious preferences are attempted.

But we are disposed to put the case on the ground of fraud. The release of Foot's property has operated as a fraud on the complainants, by taking from the means of protection on which they must have relied, and which alone, could have induced them to incur the responsibility. They, no doubt, relied on the ability of Foot, to perform his engagement, or to answer the consequences, and any proceeding by the judgment creditor, which has a direct tendency to defeat the calculation, cannot be viewed otherwise, than as a fraud.

After the property of the principal was in the hands of the sheriff, the sureties had a right to the benefit of it. The judgment therefore, must be enjoined as to the value of the property relinquished.

LESSEE OF McCOY v. GALLOWAY.

JUDGES BURNET AND SHERMAN.

1827.

Upon a question of boundary, neighborhood report cannot be received to contradict record evidence.

Course and distance must yield to natural objects, when, and when not.

The parties agreed to dispense with a jury, and the cause was submitted to the court on the testimony.

Corwin and *Collet*, for the plaintiff. *F.* and *H. Dunlevy*, for defendant.

By the COURT.

The lessor of the plaintiff, has the first entry, and the eldest patent, he must, therefore, recover, if his patent covers the land in the possession of the defendant, or any part of it.

The south-west, or beginning corner of Russel's survey, under which plaintiff claims, is sufficiently established. The south boundary line, running east from that corner, is also proved. The plaintiff's patent, calls to run from the beginning, east, two hundred sixty-six and two-third poles, to a sugar and ash. He now claims by a line, four hundred and eighty poles, to a hickory, beach and oak. His third corner called for, is two beeches and an ash. The corner which he now claims, is two hickories and a beech.

It is in evidence, that when the defendant made his entry, he went to the beginning corner of Russel, and traced his south boundary, for the purpose of ascertaining the lines of his survey, but not being able to find any corner answering the calls of his location, he run from the beginning, the distance called for by Russel, and made a corner, from which he made his own entry.—Russel's survey contains the quantity called for, without interfering with the entry of the defendant; but the corner he now wishes to establish, will include the whole of the defendant's entry. Some of the witnesses say, that the corners now claimed by the plaintiff, have been considered in the neighborhood, for many years, as the original corners of Russel's survey. It also appears,

from the connected plat, that, the two hickories, and beech claimed by the plaintiff, as his third, or north-east corner, must have been made as a corner for Muhlenburgh's survey, of eleven hundred and twenty acres, and not as a corner for the survey of Russel. This appears to be the substance of the testimony, as far as it appears to be in any way material, and we are clearly of opinion, that it does not establish either the second, or third corner of Russel's survey, without which, it is impossible to say, that his patent covers any part of the land claimed, or occupied by the defendant. The attempt to establish those corners by reputation, might have been successful, if the testimony did not contradict the presumption arising from the neighborhood opinion, that has been stated. It is evident that the persons who considered them as belonging to the plaintiff's survey, must have been ignorant of the calls of that survey. If they had known that the south-east corner was a sugar and an ash, and the north-east corner, two beeches and an ash, they could not have believed that the hickory, oak and beech, in the one case, and the two hickories and beech in the other were those corners. If corners can be identified, and proved by such evidence, the record testimony which the land laws have provided for, must yield to neighborhood reports, and certainty and precision must be dispensed with.

When corners are lost, they may be proved by reputation. Witnesses may be examined to show that a corner once existed: That it has been destroyed, and that it corresponded with the call of the entry, or survey; but they cannot be allowed to substitute one corner for another, or to contradict the evidence which is of record. They cannot change a sugar tree to a hickory, or an ash to a beech.

The length of the first line, and the number of acres contained in the entry, are strong corroborating circumstance in support of the conclusion, that the corners claimed, are not the corners called for. By the survey, Russel's south line is two hundred sixty-six poles, and a fraction of a pole; that line as he now claims it, is four hundred and eighty poles, almost double the distance in the patent, and the quantity of land which he demands, exceeds the quantity for which he has a patent, in the same proportion. These facts we admit, are not conclusive. In the Virginia military district, it generally happens, that the lines are longer, and the number of acres greater, than the calls of the patent, but it rarely happens, that the discrepancy is so great, as in the present case; and although these facts would not be sufficient to reject a corner, in other respects sufficiently proved, yet they afford a sufficient ground to reject a claim for a corner, supported only by neighborhood opinion, and particularly so, when that opinion contradicts the survey.

The fact that the hickory, ash, and beech, are in the line of Muhlenburgh's survey, and are called for as a corner for that survey, in the absence of all proof that such a corner belongs to Russel's survey, confirms the conclusion heretofore drawn.

It is admitted, that course and distance, must give way to natural objects, but this rule has its limits, and must be used with sound discetion. When a natural object is distinctly called for, and satisfactorily proved, it becomes a land mark not to be rejected, because the certainty which it affords, excludes the probability of mistake, while course and distance, depending for their correctness on

a great variety of circumstances, are constantly liable to be incorrect. Difference in the instrument used, and in the care of surveyors and their assistants, must lead to different results. Hence it is, that this rule has been established. But in the case before us, the natural objects called for, have not been proved. If the plaintiff had established his sugar and ash corner, in, or near, the direction of his first course, and the hickory and beech corner, in, or near, the course of his second line, those corners must have been sustained, although they might have varied from the course and distance in the patent, provided that variance were not too great to be ascribed to the causes just mentioned. But when the corner claimed by a party, has no similitude to the one he has made, and recorded as his land mark, he cannot aid himself by resorting to this rule.—He must be governed by the converse of it, that when there is not an object called for, and proved, varying from his course and distance, he must make his corner, where course and distance lead him.

Other grounds were taken in the argument, but we consider it unnecessary to pursue them. The plaintiff has failed to establish his second and third corners, and is therefore, confined to his course and distance, which do not interfere with the land claimed, and possessed by the defendant.

Judgment for defendant.

HARLAN v. READ.

JUDGES BURNET AND SHERMAN.

1827.

Partial failure of the consideration of a note cannot be taken advantage of at law.

This was an action of assumpsit on a promissory note, for two hundred and fifty dollars, payable in February, 1826. Plea non assumpsit. The plaintiff gave the note in evidence, and rested his cause.

The defendant examined several witnesses, by whom it appeared, that he had purchased a farm from the plaintiff, received a title bond, and taken possession; and that the note in question, was given for a part of the purchase money. He further offered to prove, that before he made his contract, he went with the plaintiff to examine the property: That he examined it in part, and as to the residue, relied on the representations of the plaintiff: That the property did not answer the description given of it: That it was of less value, and that in equity and good conscience, he ought not to be required to pay the whole amount the note. This testimony was objected to.

By the COURT.

To avoid the payment of a note in a suit at law, on the ground of fraud, the fraud must extend to the whole consideration. We have no rule to ascertain the extent of the partial injury sustained by the misrepresentation complained of. The jury cannot make a new contract for the parties. They cannot

establish for them a price, or value different from the one agreed. There is no doubt, but that a vendor who sells by a description, is bound to make it so, and in this case, if the vendee was deceived by a misrepresentation, he might have refused to execute his contract. He might have filed a bill to avoid it, but in place of doing this, he has affirmed it. He has taken possession, with a full knowledge of all the facts, and has paid a part of the purchase money. Under these circumstances, whatever relief he may be entitled to elsewhere, he cannot avail himself of his proposed defence, in the present action. We know that courts of common law, as well as courts of equity, may relieve against fraud, in any form in which their modes of proceeding can reach it; but it does not follow, that a party who has acquiesced in a fraud, and thereby sustained a partial loss, may set that up as a defence to an action, brought on a note, for the consideration of a contract. Such a course, would not only be inconvenient, but would lead to uncertain results. It would burthen the jury unnecessarily. Plaintiffs would be perpetually liable to be taken by surprise, and much of the time of the court would be wasted by unprofitable disputation. Attempts have often been made to set up this kind of defence, but it has always been rejected.

STRUM *v.* CUNNINGHAM.

JUDGES HITCHCOCK AND BURNET.

1827.

An award is bad unless it show, that the arbitrators met at the time and place specified in the submission.

This was an action of slander, brought to issue in the Common Pleas, and then submitted to arbitration. Bonds were executed in conformity with the statute, by which the submission was to be made a rule of the court of Common Pleas. The arbitrators awarded, that the defendant should pay to the plaintiff, the sum of six-two dollars: that the suit then pending, should be discontinued, and that the parties should execute mutual releases.

On motion before the Common Pleas, the submission was made a rule. The defendant took a bill of exceptions, and brought a writ of error, to set aside the rule.

Several errors were assigned. But the error chiefly relied on, was, that it did not appear from any of the proceedings, that the arbitrators had met at the time and place required by the submission.

Bacon, argued for plaintiff. *Chaplain*, for defendant.

By the COURT.

The statute authorizing and regulating arbitrations, requires, that the arbitration bond, shall specify some time and place, at which the arbitrators shall attend, to hear and determine the matters in dispute. The bonds executed in

this case, contain such a provision, but it does not appear that it was observed. For any thing we can discover, the arbitrators might have met at another time, or at a different place, and the award may have been *ex parte*. The same motive which induced the legislature to require, that a time and place should be agreed on, and stated in the submission, requires also, that the agreement in that respect, should be strictly observed. They have not trusted to parol proof of this part of the agreement, but have directed that it shall form a part of the submission, and for the same reason, the performance of it should appear from the award. Buwhether parol proof be admissible or not, for this purpose it must appear from some part of the proceedings, that the auditors did meet, at the time and place agreed on. As this does not appear, the rule must be set aside, and the cause remanded for further proceedings.

HUBBLE v. PERRIN, ET AL.

JUDGES HITCHCOCK AND BURNET.

1827.

Equity will not lend its aid, to subject the separate property of a partner, to the payment of partnership debts, while the joint property of the firm is unexhausted.

The bill was filed under the 59th section of the act, directing the mode of proceeding in chancery.

The complainant alleges, that the defendant, Perrin, was formerly a partner in trade, with one Gibbs. That the firm of Perrin & Gibbs, contracted sundry debts, which remained unpaid on the dissolution of their partnership; that they are possessed of real estate in the county of Champaign: that several judgments were obtained against the firm, on which executions were taken out and levied on the said real estate: that one of those judgments is in favor of the complainant: that the property levied on, is wholly insufficient to satisfy the judgments: that no other property of the said firm, or of either of them, can be found: and that the defendant, Hinkle, as clerk of the Supreme Court, has in his hands, the sum of three hundred dollars, paid by virtue of a decree of this court, for the use of the defendant Perrin. The prayer of the bill, is, that the money so held, may be applied in payment of the debt due to the complainant.

Perrin, by his answer, admits the partnership, and the judgments; but he sets out and describes several tracts of land, belonging to himself separately, and a house and lot, belonging to the firm of Perrin & Gibbs, which are liable to be taken by the judgment creditors. He admits the money in the hands of Hinkle, to be his, but insists, that it ought not to be applied in payment of partnership debts, while there is partnership property undisposed of.

Anthony, argued for the complainant. *Mason*, for the defendant.

By the COURT.

The facts stated in the answer, are substantially made out by the exhibits. It appears, that there is real estate belonging to the late firm of Perrin and Gibbs,

which the complainant may resort to, if the property already levied on, should prove insufficient. This being the fact, the bill cannot be sustained. The statute authorizes a judgment creditor, to resort to the chancery side of the court, to reach property, or money, in the hands of third persons, when the defendant has not real or personal property, sufficient to satisfy the judgment, which can be taken in execution. This provision was made, to prevent a failure of justice, and is to be resorted to, only in cases of necessity. That necessity ought to be apparent, to give jurisdiction to this court. On the point, whether the facts, on which the jurisdiction of the court depends, must be specially stated in the bill, or not, there has been, and still is, a diversity of opinion among the members of the court. But it is presumed, there can be but one opinion, whether the facts must not be fully made out, at the hearing, in order to sustain the bill. In this respect, we think there has been a total failure, on the part of the complainant. He admits, that he has an execution levied on real property, not yet disposed of, the proceeds of which cannot now be known, and it is in proof, that there is other property not levied on.

But there is another objection to the relief prayed. Equity will not lend its aid, to subject the separate property of a partner, to the payment of partnership debts, while the joint property of the firm is unexhausted. That is the proper fund for the payment of partnership debts, and must be resorted to, before the separate funds of the partners can be reached, through the agency of this court.

Bill dismissed.

THE COMMISSIONERS OF CLERMONT *v.* LYTLE.

JUDGES BURNET AND SHERMAN.

1827.

The Judges of the Common Pleas, are not disqualified by interest to try a cause, where the commissioners of the county are a party, and money the subject of controversy.

This case was certified from the Common Pleas, on the ground, that associate the judges were citizens of Clermont county, and as such, interested in the event of the suit.

By the COURT.

This case is not within the original jurisdiction of this court. It has been sent here, on a supposition, that the associates are interested, and that therefore, there was not a sufficent number of disinterested judges of that court, to sit on the trial. The only interest which they have, is common to every citizen of the county, and if it be sufficient to disqualify them, it would sustain a challenge to the array and to the competency of every witness residing in the county. We are of opinion, however, that the interest is not sufficient to produce these embarrassing consequences. The claim of a few hundred dollars, by a county containing twenty thousand inhabitants, cannot create an interest to disqualify a judge, a juror, or a witness. We find many cases, in which citizens of towns, counties and states, have been admitted as competent witnesses, of

behalf of such town, county, or state. In *Cumming, v. Pinkham*, (*Adams*, 353,) it was ruled, that an inhabitant of a town, was a competent witness, though the town was a party in interest, and called him to testify in its favor. In *Bloodgood, v. Jamaison*, (12 *John.* 285,) it was decided, that an inhabitant of a town, liable to be taxed for the support of the poor, is a competent witness for the plaintiff, in a suit, for a penalty, to be applied to the use of the poor of that town. In *Orange, v. Springfield*, (1 *South.* 186,) an inhabitant of a township was a witness, in a question of a settlement of a pauper. In *Shenck, v. Corshen*, (1 *Cox*, 189,) it was decided, that an inhabitant of a county, or township, was a competent witness, in a suit, in which such county, or township, was interested. In *Connecticut, v. Brandish*, (14 *Mass.* 296,) it was decided, that in an action by a state, in the courts of another state, an inhabitant of a state suing, is a competent witness, for the plaintiff. Other cases might be referred to, were it necessary, but we are satisfied, that the Common Pleas of Clermont county, is the proper tribunal to hear and decide this cause, and that this court has no right to take jurisdiction of it. It must therefore, be remanded.

WILSON v. DELARACK, ET AL.

JUDGES BURNET AND SHERMAN.

1827.

When the administrators of an intestate deny by their answer the allegations in the bill, the allegations must be proved.

The bill states, that McManus executed a mortgage to the complainant, Wilson, to secure the payment of a sum of money, and afterwards sold the mortgaged premises to the defendant, A. Delarack, subject to the mortgage. That a part of the purchase money was left in the hands of A. Delarack, to be applied in discharge of the mortgage: That A. Delarack delivered goods to Wilson at different times, to the amount of one hundred and ninety-two dollars: That a settlement afterwards took place, at which the amount was ascertained: That an agreement was then made, that the sum should be credited on the mortgage; but the mortgage not being present, that Wilson should give to A. Delarack, his note for the amount, which should be afterward endorsed on the mortgage, and the note cancelled: That in pursuance of this agreement, Wilson gave his negotiable note to A. Delarack, who shortly after assigned it to his father, M. Delarack, without consideration, and to defraud the complainant. It is further stated that M. Delarack has obtained judgment against the complainant, for the note. The bill prays for a perpetual injunction, and that the amount due on the note, may be applied as a credit on the mortgage. The insolvency of A. Delarack is also alleged.

The answer of A. Delarack, admits his purchase from McManus, subject to the mortgage, and also, the delivery of the goods, the execution of the note by Wilson, and the assignment of it to M. Delarack, but denies the agreement, that the amount should be credited on the mortgage, and avers that the assignment of it to his father was *bona fide*, and for a valuable consideration.

The administrators of M. Delarack answer, that they are ignorant of the principal facts alleged in the bill. They admit the assignment of the note to their intestate; they believe it was made in good faith, and for a valuable consideration. They deny fraud, and claim the judgment to be legally and equitably due.

Dunlevy and *Collet*, for complainant. *Sergeant*, for defendant.

By the COURT.

The fraud charged in the bill, is denied in the answers, and is not sustained by the testimony. It appears from the exhibits that the complainant has obtained a judgment on his mortgage for the amount due, by virtue of which, the mortgaged premises have been sold, so that A. Delarack has lost the property, and the money he has paid on it, and the object of this bill is, in effect, to require of him a further payment. To do this, a very clear case ought to be made out.

If A. Delarack, either at the delivery of the goods, or the execution of the note, agreed that the amount should be credited on the mortgage, and if the note was given on the faith of such an agreement, it was a fraud in him afterwards to assign it, and so far as his interest is concerned, the agreement ought to be enforced.

On the supposition that the facts in the bill are true, the delivery of the goods created no debt on the part of Wilson, and the note being given for a special purpose, could not be assigned, without a breach of faith on the part of the payee; but the difficulty is, that the complainant does not sustain his case. The answers deny the equity of the bill. The testimony in support of the bill, amounts to nothing more than strong presumption, which is rebutted by presumption, on the other side, equally strong.

If the goods were delivered as a payment on the mortgage, a receipt would have answered the purpose much better than a note; or if a note was preferred, why was it made negotiable, and why did the complainant take a judgment for the full amount of the mortgage, without giving credit for the goods.

If these matters can be satisfactorily accounted for, still, as the bill is denied, the complainant was bound to sustain it by testimony sufficient to over balance the answer. This he has not done. The testimony as to the agreement, is vague and uncertain, and leaves it about as probable that it was not made, as that it was.

This being our view of the case, it is not necessary to examine it in reference to the rights of M. Delarack the assignee.

Bill dismissed.

WAGGONER v. SPECK, ET AL.

JUDGES HITCHCOCK AND BURNET.

1827.

Lands occupied by the permission of the owner under a parol agreement that the occupation shall continue during the life of the occupant, cannot be subjected in equity to the debts of the occupant.

The bill charges, that Waggoner has recovered a judgment against Speck, in the Common Pleas of Montgomery county: that he holds another judgment against Speck by assignment: that no property can be found, on which the executions on those judgments can be levied: that Speck purchased a lot from Cooper in his life, which he improved, and now lives on; and that he refuses to take a deed for the said lot, with a view of keeping it out of the reach of his creditors. The bill prays that the lot may be sold, and that the heirs of Cooper may be required to make a title to the purchaser. The defendant, Speck, denies that he purchased or paid for the lot, or that he has any title to it, legal or equitable. He admits that he is in possession of the lot; alleges that he took possession by the permission of Cooper, who promised that he would permit him to occupy it during his life; and that Cooper had said, at different times, that he intended to give the lot to the daughter of the defendant.

The heirs of Cooper have answered, that being infants of tender years, they have but little knowledge of the matters in the bill: that they have understood and believe, that the defendant, Speck, never purchased the lot: that he occupied it by the indulgence of their father, but that he has no right to it, legal or equitable.

Stoddart, for the complainant. *Bacon*, *Smith*, and *Lowe*, for the defendants.

By the COURT.

It appears from the testimony, that the defendant, Speck, has occupied the lot in question several years, and that he has improved it; but there is no evidence of any contract between him and Cooper for a purchase, nor does it appear, that any payment has been made, either on account of a purchase, or of a lease. Several of the witnesses state, they have heard Cooper say, he would let Speck live on the lot during his life, and that he intended to give it to his daughter, Nancy, and it is evident that Speck relied on such a promise, when he took possession, and made his improvements; but these facts and circumstances make out a different case from that which is stated. The discrepancy is so great as to render it impossible to give relief in any form, under the present bill.

The objection relied on in the argument, that the contract, if any existed, was not in writing, would not of itself, necessarily, bar the complainant from the relief which he seeks. It has become the settled construction of our statute for the prevention of frauds and perjuries, that the delivery of possession is such

a species of part performance as may take a case out the statute, when the effect of it, is not controled by other facts connected with the case.

Bill dismissed.

MOORE *v.* BEASLEY.

In an action for use and occupation, the tenant having enjoyed the premises cannot question the title of the landlord.

Nil habuit, cannot be plead where the landlord has been in possession.

A parol lease and possession delivered, is not within the statute of frauds.

This was a writ of error, to reverse a judgment rendered in the Common Pleas. It appeared from the record, that the plaintiff below, brought an action of assumpsit, for use and occupation. The defendant pleaded the general issue, with notice, that he would offer evidence to prove that the premises for which the rent was claimed, were not the property of the plaintiff. At the trial, the plaintiff proved, that he leased the property to the defendant for one year, for twenty dollars: that at the time of the agreement, there was a conversation on the subject of continuing the lease for a longer term: that the defendant took possession in 1820, under the above renting, and has continued to occupy the premises ever since: and that the plaintiff had been in the habit of leasing the same premises to different persons, for fifteen, or twenty years.

The defendant, under his plea and notice, offered in evidence, a grant of the premises to C. Wallace, made in 1824, and a sale from Wallace to himself. This testimony was objected to, and overruled.

The defendant then moved for a non suit, on the ground, that the contract was void, under the statute against frauds and perjuries, which was overruled.

He then moved the court, to instruct the jury, that the case was within that statute, which was also refused, and bills of exception were taken. A verdict and judgment were rendered for the plaintiff, and a writ of error taken to reverse it, on the matters stated in the bills.

Brush, for the plaintiff in error. ***Hawes***, for the defendant in error.

By the COURT.

The circumstances under which Moore entered and occupied, made him a a tenant from year to year, at the rent agreed upon for the first year, and he is liable to Beasley for rent, at that rate, in an action for use and occupation unless he can avail himself of one of the grounds, set up by way of defence, in the court below, the rejection of which, is now assigned for error.

The first ground, is, that the defendant below, was not permitted to prove a title in himself, acquired, after he had occupied the premises several years, in the character of tenant to the plaintiff. From the earnest manner in which this point was argued, we have been induced to give it a serious consideration, and although it has been our uniform course, to reject evidence of this character, under a conviction, that the principle was well settled, that a tenant who has enjoyed the premises to the end of his term, without interruption, cannot be per-

mitted to question the title of his landlord, we have carefully examined the authorities cited, and the course of reasoning by which the counsel endeavored to apply them. The doctrine in 1 *Pow.* 152, is, that if one make a lease to another, and the lessor has then no interest in the land leased, it is a good plea, for the lessee to say, that the lessor had nothing in the lands, at the time of the lease. The doctrine is taken from *Coke Lit.* 47, (*b.*) where the commentator gives the reason of the text, which is this: "that in every contract, there must be *quid pro quo*, for *contractus est quasi actus contra actum*, and therefore, if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing, for which he should pay any rent, and in that case, he may plead, that the lessor *non dimisit*, and give in evidence the other matter. This commentary seems too plain to require illustration. It cannot be affirmed that a person has nothing in land, which he has had in possession fifteen or twenty years; nor can it be said of a lessee, that he hath not *quid pro quo*, or any thing for which he should pay rent, after he has received possession from his lessor, and enjoyed without interruption, during his term. The plaintiff's counsel, seems to consider a person as having nothing in land, unless he has a perfect legal estate, but such, we apprehend is not the meaning of the law, a mere possessory title is sufficient. The tenant who has enjoyed his term uninterrupted, has received the full consideration of his promise, and cannot afterwards plead *non dimisit*, or *nil habuit.* In *Chettle v. Pound*, (1 *L. Ray.* 746,) which was debt for rent, it was ruled that if the plaintiff had been in possession, though but tenant at will, the defendant could not give *nil habuit* in evidence, without having been evicted. An eviction in this case, is not pretended. The tenant occupied without molestation of any kind, to the end of his term.

In *Watson v. Alexander*, (1 *Wash.* 351,) the court say: the declaration charges enjoyment of the property, by the appellants during the term for which the rent is claimed, which is sufficient to maintain the action. On the whole, we are compelled to say, that our opinion remains unchanged; we still think, that a tenant cannot be allowed to question the title of his landlord, from whom he has received possession, after he has enjoyed his term without interruption.

The second error relied on, depends on the construction of the statute, for the prevention of frauds and perjuries. This court has decided, as often as the question has been made, that part performance may take a case out of that statute, and that delivery of possession, on a parol lease, is sufficient for that purpose.

There was, in this case, not only a delivery of possession to Moore, but an enjoyment by him, of every thing for which he contracted. On the part of Beasley, the contract was fully performed: it does not, therefore, come within the design of the act.

The case of *Wilber v. Paine*, (1 *Ohio Rep.* 252,) he may be considered as settling this point.

Judgment affirmed.

MASTERSON v. BEASLEY, ET AL.

JUDGES BURNET AND SHERMAN.

1828.

The authority of a person claiming to act as agent, for applicants to redeem land sold for taxes, is not a matter to be questioned by the purchaser, on certiorari after the recognition of such power by the common pleas.

The validity of the title of the applicant cannot be called in question on an application to redeem.

The applicant must shew that he, or those for whom he professes to act, are in some way connected with the title, as by deed, descent, contract, of possession under claim of title, either of which will be sufficient. So also an equitable title or naked possession.

This case was brought before the court at the last term, by appeal. The appeal was dismissed on the ground that the statute, under which the order was made, did not authorize such a proceeding, and that the right of appeal given by the practice act, was confined to adversary proceedings, conducted according to the course of the common law and did not extend to summary proceedings authorized by particular statutes.

The case has since been brought up by *certiorari*.

It appears from the record, that in November, 1826, an application was made by N. Beasley, as agent of the minor heirs of N. Massie, to redeem a tract of land sold for taxes. To support the application, Beasley produced the certificate of the Auditor of State, showing, that 100 acres of land charged with taxes in the name of John Jonett, had been sold to the plaintiff, (Masterson,) on 29th December, 1823, for the sum of $5—being the amount of taxes, penalty and interest, due thereon, for the years 1821, 1822 and 1823. He also produced the Auditor's receipt showing that the money had been deposited on the 20th December, 1825, for the redemption of said land as the statute directed. It was also proved that the applicants had given the notice required by law. Whereupon it was adjudged by the Court, that the applicants were entitled to redeem.

The transcript contained a bill of exceptions, taken by Masterson, setting out the notice, the publication, the certificate, and receipt of the Auditor—the patent to the heirs of Massie, and the deposition of Wm. Creighton, Jun. Esq. stating the heirship and ages of the applicants. It also sets out a deed offered in evidence by Masterson, executed by the Marshal of the District of Ohio, conveying the land in question to one Charles Johnson, by virtue of a judgment and execution, in the circuit court of the United States, against the applicants, as heirs at law of N. Massie, deceased. On this testimony Masterson objected to the application, on the ground that the evidence was not sufficient to sustain it. The objection was overruled and an order of redemption was made.

The reasons assigned for reversing the order were:

First: There is no proof of the right or title of the said Beasley, as agent of the said heirs, to the said land, or to redeem the same.

Second: There is not any proof in said record or proceedings, of the agency of the said Beasly, to apply for said redemption as such agent, according to the act of assembly.

Third: The said Masterson gave evidence, that the title was not in the said heirs of said Massie, or said agent, and that therefore, they had no right of redemption.

Brush for the plaintiff, in arguing the case, relied on two grounds.

First: That Beasley did not show such an agency as entitled him to make the application in the name of the heirs.

Second: That the legal title was in Johnson, and not in Massie's heirs; and, therefore, that no application to redeem could be sustained in their names, or for their benefit.

By the Court.

The law for the redemption of land sold for taxes is equitable in its provisions, and ought to receive a liberal interpretation. It provides for the security of the purchaser, and protects his right in any event. If the land be redeemed, the purchaser's money and interest must be refunded in all cases, and if the applicant has not been under any legal disability, he must pay fifty per cent. in addition, and must also pay for any improvements which may have been made by the purchaser. Such being the conditions of a redemption, the purchaser cannot complain, nor can he expect a rigid construction of the statute against the applicant.

An examination of the record, certified from the Common Pleas, shows that the proceedings, on the part of the applicants, have been technically correct.

The question whether Beasley, was legally authorized to represent the minor heirs of Massie, does not in any degree affect the merits of the case, nor does it concern the rights of the purchaser. The court below were satisfied with the evidence of his authority. The guardians of the minors have not questioned it, nor can the purchaser be permitted to do so. As the redemption is made in the name, and for the benefit of the heirs, there is no ground for apprehending the improper intermeddling of a stranger. It is a matter of but little moment, in what way the agent derives his power. He acts, as an attorney in fact, and if his authority is not disputed by his principal, no other person has a right to complain, because none other have been injured. The purchaser of the tax title, must receive every thing to which the law entitles him, before the order for a redemption can be operative.

The second error assigned, is not exactly true in point of fact. The sale by the Marshal, does not necessarily show that the heirs of Massie have been divested of their legal title. The validity of that sale depends on the legality of the judgment and subsequent proceedings, which the heirs are at liberty to contest, and having this privilege, they must be permitted to protect themselves and their possessions against others. If this objection, to the right of redemption by the heirs, should prevail, their right to contest the title claimed under the Marshal, would be of but little use, for, whatever might be the result of such a contest, their title would be lost by the collector's sale.

But the statute does not require the person, who applies to redeem, to show a legal title in himself. The only provision on that subject is, that if, on examination, it shall appear to the Court, that the claimant has a legal right to redeem such land, or any part thereof, the Court shall adjudge the same to him, &c. It is no part of the duty of the Court to decide questions of title on applications like this. They are to enquire whether the party has a right to redeem, and not whether he has a perfect title to the land. In the Virginia Military District, where the land in question is situate, it may happen that one person claims under a junior entry not carried into grant, while another has the possession, and a patent on an elder entry, each party believing himself to have the better title. In such a case, it would be difficult to decide who had the right to redeem, if the construction of the plaintiff be correct. In a court of law the Patent must prevail. In a Court of equity, the person holding the junior entry might prevail.

This and similar cases will show the embarrassment to which the Court of Common Pleas, may be exposed, if they are to decide questions of title on applications of this kind.

A stranger having no interest in the land, will not incur the trouble and expense of redeeming it in his own name, nor his own right; but if such an attempt should be made, it could not succeed, because it is confessedly the duty of the Court, to require satisfactory evidence of a right to redeem.

The applicant must show that he, or those for whom he professes to act, are in some way connected with the title to the premises, as by deed, descent, contract, or possession under claim of title, either of which will be sufficient.

An equitable title, or a naked possession, may give a legal right of redemption under the statute, which was not intended to require investigations of title, further than may be necessary to prevent impertinent applications.

This being our view of the subject, it follows that the proceedings, and the order of the Court below, must be affirmed.

DECISIONS IN BANK.

1828.

WEYER *v.* ZANE.

A judgment of a court of competent jurisdiction, though rendered in a form of proceeding unknown to our practice, and apparently without service of process, cannot be treated as a nullity while unreversed.

This was a *scire facias*, to revive and have execution of a judgment recovered by the plaintiff, against the defendant, in the Court of Common Pleas of Belmont county, at December term, 1813. The *scire facias* recited, that at the December term, 1813, a judgment was recovered against Anthony Weyer, then Sheriff of Belmont county, upon a motion to amerce, at the suit of Sterling Johnson for not collecting and paying the amount of an execution put into his hands, at the suit of Johnson, *v.* Zane. The *scire facias* then proceeded to recite, that at the same term, the said Sheriff "obtained a judgment against Samuel Zane and Elisha Woods, the substance of which is as follows, to wit: Upon a forthcoming

bond, for the delivery of property to satisfy an execution against Samuel Zane, in favor of Sterling Johnson, for the sum of two hundred and fifty-four dollars seventy-nine cents, with interest from the 19th day of August, 1813. And on motion of the plaintiff by his attorney, and it appearing to the court, that the plaintiff had this day been amerced in consequence of the defendants failing to deliver the property they had bound themselves to do, to satisfy the execution aforesaid: whereupon it is ordered and adjudged by the Court, that the plaintiff recover of the defendants the sum of five hundred and ten dollars, in damages, and his costs about his suit expended, which judgment is this day rendered for the plaintiff's security, in consequence of being amerced, and is to be satisfied by the payment of the sum the plaintiff is amerced in." The *scire facias* proceeded to suggest, that Woods was deceased, and that the amount of the judgment on amercement v. Weyer, remained unpaid, and prayed that Zane might be summoned, to show cause why the judgment should not be revived and execution had against him.

The defendant demurred generally to the *scire facias*, and pleaded other pleas. In the Court of Common Pleas, judgment was given for the defendant, The plaintiff appealed to the Supreme Court, and the case was adjourned here. upon the question on the demurrer alone.

By the COURT.

The demurrer assumes, that the judgment set forth in the *scire facias*, is so utterly irregular, as to be absolutely void and of no effect. We cannot adopt this opinion. The court that rendered it, was a court of competent jurisdiction over both parties and subject. However summary their proceedings, or however irregular, the solemn judgment of a competent and authorized tribunal cannot be treated as a nullity. There is an explicit and formal judgment, and, although the proceedings upon which it is predicated, may be unknown to our jurisprudence, still, as in all other judgments, they are not open for enquiry, except in a regular mode of re-investigation on writ of error or *certiorari*. It is seldom that the error complained of, is, in the manner of rendering the judgment itself. Generally, it is founded on some of the intermediate matters, for mistake in which it is supposed that the judgment stands upon an incorrect conclusion, with respect to facts or principles. There is no substantial distiction between this and other cases, that we can perceive. The demurrer must be overruled and the cause remanded for hearing on the pleas.

SPURK v. VANGUNDY.

If the defendant in error die after assignment of errors and joinder it is not necessary to make his representatives parties but the court will proceed to judgment.

This was a writ of error, adjourned here for decision from Pickaway county. The declaration was in covenant, upon a covenant of seizin, in a deed for the conveyance of land, and contained no averment of an eviction. The cause was tried in the court of Common Pleas, October term, 1826, and a verdict

and judgment given for the plaintiff, to reverse which, this writ of error was brought.

After the assignment of errors, and the joinder in error, the defendant in error died.

Ewing, for plaintiff in error.

The court proceeded to judgment, and upon the authority of the case of *Backus' adm'rs. v. McCoy, ante*, 211, reversed the judgment.

GIST *v.* LYBRAND.

When the maker of a note removes from the state where he resided at the time of making it, the holder is not bound to make a demand of the maker to charge the endorser.

Where the endorser resided nine miles from the city and spent part of his time in the city, receiving letters and messages at a particular place, in the rout of a letter carrier, and proof given that notice of non-payment was put into the post office of the city directed to the endorser; after a verdict for the plaintiff a new trial was refused, though no proof was given to the jury that the city post office was the nearest to the residence of the defendant.

This cause was adjourned from the county of Knox, and came up for decision on a motion, for a new trial, made on behalf of the defendant.

It was an action upon the case against the defendant, as the endorser of a promissory note, made to Lybrand by Richard Ware, dated Philadelphia, August 4, 1818, payable twelve months after date, and endorsed by the defendant to the plaintiff, before it became due.

One count averred, that when the note became payable, diligent search was made, for Ware to demand payment of him, but he could not be found, and thereupon the said note was protested for non payment, and notice thereof to defendant. Another count stated, that after the endorsement, and before the note became payable, Ware secretly absconded from Philadelphia, and fled to parts unknown; and when the note became due, diligent enquiry was made for Ware to demand payment of him, but he could not be found, of which the defendant had notice.

The defendant pleaded the general issue.

Upon the trial, the defendant's counsel objected to the admissibility of the evidence offered by the plaintiff, to excuse the want of a personal demand upon Ware, the drawer, and also, to the evidence offered by the plaintiff, to prove notice of non-payment to the defendant, the endorser. Both these objections were overruled by the court, and it was for the alleged mistake of the court in these particulars, that a new trial was claimed.

First: As to the demand, the evidence offered by the plaintiff was the following:

First: JOHN WARNOCK deposed, that he was well acquainted with Ware; prior to August, 1819, deponent was deputized to serve a warrant on Ware, for a debt of ninety-six dollars seventy-eight cents: went to Ware's house in Philadelphia: Ware was not to be seen: deponent called to him, and Ware replied that he was not to be seen by any person on business. Shortly after,

this deponent heard it publicly said, that Ware, had absconded, and had deserted his place of residence to avoid his creditors, and had gone to the college, in Virginia. Deponent afterwards saw Ware casually, in Philadelphia, and made demand of payment of said debt, for which he had the warrant: Ware stated he was unable to pay, and before deponent could get out process, Ware suddenly left the city: has recently understood he (Ware) was in New-York.

Second: WILLIAM BOZARTH was acquainted with Ware, who was a house carpenter, and kept an iron-mongery store, in Market street, above Ninth, Philadelphia. Some time in the year 1818, called at this store and enquired for Ware, and the person in the store informed him that Ware had gone away, he did not know where, but believed to the south; shortly after heard, as a matter of common report, that Ware had absconded, and different statements were made as to the place he had gone to. Some time in 1819 or 1820, deponent met Ware in the street, Ware could have been then but a short time in the city: has not since seen him in the city; has heard that he passed through the city within two years, on his way to New-York: thinks it was during the year 1818, that Ware left the city.

Third: PETER L. BERRY was well acquainted with Ware, and being his bail, was very desirous of finding him before he left the city, but was unable to do so. Ware left the city clandestinely, and deponent considered him as having absconded: does not exactly recollect the time Ware went away: thinks it was about ten years ago, (July, 1827.) Deponent always believed he left Philadelphia, and went away to avoid his creditors.

Fourth: JACOB RHEIM was acquainted with Ware whilst he resided in Philadelphia. On the 5th of January, 1819, Ware was still residing in the city, and left it in the spring or summer following, to go to Virginia. He has been absent from the city ever since, except that he was once seen by the deponent, a year or two afterwards, in the city. [A written notice is exhibited in the deposition of this witness, which he states to be in Ware's hand-writing, and signed by Ware. It is dated 24th April, 1819, at Chester, in Delaware county, and is a notice by Ware to his creditors, that he has applied to the Common Pleas for Delaware county, for the benefit of the insolvent law, and that Monday, the 10th May, 1819, was the day appointed for the hearing of the petition.] Deponent was informed by Ware, that it was his intention to go to Virginia, to assist in building Jefferson college, and that the job would detain him several years.

Fifth: JOHN C. EVANS. Ware left Philadelphia some time after the beginning of May, and before the month of August, 1819.

Second: As to notice to Lybrand, the endorser, of non payment, the evidence is:

First: JOSEPH S. RANDALL, in August, 1819, was a clerk to Peter Lohra, notary public, in Philadelphia. On the 7th August, 1819, (as deponent knows by a memorandum made by him at the time) by the direction of Mr. Lohra, he put into the post-office of Philadelphia, separate notices for Richard Ware and George C. Lybrand, of protest of the note mentioned in the declaration. (The note and protest are identified by witness, and exhibited in his deposition.)

Second: JOHN C. EVANS. Lybrand left Philadelphia in the year of 1818 or beginning of 1819, deponent thinks the latter, and has continued to reside at a

distance from Philadelphia since. When in Philadelphia, he lived, as deponent believes, with his mother, in Eighth street.

Third: GEORGE MASTERS. Prior to August, or September, 1818, Lybrand resided in Market above Ninth street, Philadelphia, where he kept a hard-ware store. On the 7th of May, 818, deponent went to live on a place belonging to said Lybrand, in Roxboro township, about nine miles from Philadelphia, as a tenant of Lybrand's. In the month of August or September, of that year, Lybrand came to live on the farm, and continued to live there two or three years. He followed no business there, was frequently in the city, and directed deponent if he should have occasion to see him, during his absence, to call for him at his mother's in Eighth street; deponent frequently saw him at his mother's; Lybrand did not put up in the city, at any other place, and there deponent was frequently directed to call, on business for Lybrand; was in the habit of bringing things from that place to Lybrand, and on one occasion, particularly, he recollects carrying a note or letter to him.

Fourth: DAVID WATSON. (Two depositions of this witness.) *First:* Is, and has been, since 1810, a letter carrier, for a district in the city of Philadelphia; several years ago, was in the habit of receiving letters from the post office addressed to George C. Lybrand, these letters were left with Lybrand's mother, in North Eighth street, Philadelphia; this practice of leaving Lybrand's letters with his mother, continued for two or three years; for several years, last past, deponent does not recollect having received any letters for Lybrand; during the time he was in the habit of carrying Lybrand's letters to his mother's, heard no complaint of any miscarriage; from the practice of the post office, any letters addressed to Lybrand, would have been carried to his mother's; does not recollect ever to have seen Lybrand.

Second deposition: In the year 1818, deponent carried letters addressed to George C. Lybrand, to the store which Lybrand then kept in Market street; does not recollect of carrying any letters to Lybrand previously to April, 1818; deponent cannot state at what time Lybrand left the store, in Market street, but afterwards deponent was in the habit of carrying letters for him to his mother's, in Eighth street; after some time deponent understood he had left Philadelphia, and from that time, has no recollection of any letter being left for him, in the post office; whatever letters came at any time for him after he left the store, were taken to his mother's and there left; deponent recollects the person of George C. Lybrand; deponent recollects after Lybrand left the store, his mother's was the place pointed out by Lybrand, at which letters to him were to be left, but cannot state this positively; cannot state the year Lybrand left Philadelphia.

W. W. Irwin, for defendants. *H. Stanbery*, contra.

By the COURT.

We all concur in opinion, with the Supreme Court of the United States, upon the first point, in this case. In the case of *McGruder v. the Bank of Washington*, (6 *Wheat.* 140) cited by the plaintiff's counsel, they have settled, that the removal of the maker of a note, after it was made, and before its maturity, into a

different state, from that where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether a demand should be made, at any other place, is not made a point, or adjudicated upon in that case. But it seems to us a clear consequence of the decision, that such demand is unnecessary. The fact of removal commits the endorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note, in the note itself. In this case, the evidence to prove the removal, was admissible, and the jury found the fact of the removal: The verdict cannot be disturbed on this point.

Second: The second ground urged for a new trial, is, that the testimony received to prove that the notice was given to the defendant, of the non-payment of the note, was not admissible for that purpose. It is fully proved, that the defendant resided a part of his time in the country, nine miles from the city, and a part, at his mother's, in the city. But transacted no regular business at either place. Notice of the protest was put into the post office in the city, from whence a letter carrier distributed letters, who testified that he had carried letters to Lybrand, from the post office. The proof is also clear, that Lybrand had directed letters and other matters of business, to be left for him at his mother's. There is no evidence in this case, whether there was a post office nearer to his country residence, than that of the city, and the counsel for both parties contend that this omission is in their favor. But, as the question is presented to us, we do not consider the fact very material. All the evidence received, was properly admissible. Its sufficiency to charge the defendant might depend upon the facts. Proof that there was a nearer post office, would have been a sufficient answer to it, before a jury. But this, instead of rendering it originally inadmissible, would be defeating it by counter proof. Its operative effect, not its admissibility, depended upon that fact. And its operative effect, not its admissibility, depended upon that fact. And its operative effect too would depend entirely upon the light in which the other facts might be considered by the jury. Should they be satisfied from the testimony, that the notice actually reached the defendant, or that he was, in the city, at the time the notice was put in the post office, and receiving letters by the carrier, the fact of a nearer post office, would be considered wholly immaterial. It is therefore very clear, that the testimony was properly admitted. Its effect is not now before us, and it is unnecessary to express any opinion upon it.

New trial refused, and judgment on the verdict.

DABNEY v. MANNING, ET AL.

Where a power is given by will to an executor to sell lands when in his opinion a sale can be made to good advantage, and the proceeds devised to children as they come to age, such power is connected with a trust and the executor is entitled to the possession of the lands.

When lands are sold on proceedings in partition subsequently reversed, the purchaser who entered under such sale is not liable in trespass, for acts done while the decree was in force.

This was an action of trespass for breaking and entering the plaintiff's close, and was adjourned here for decision from the county of Trumbull upon a special case.

The plaintiff was executrix of the last will of N. G. Dabney, deceased, which had been duly proven and recorded, and the executrix had accepted the trust under it, and qualified. The will contained the following bequest:

"I do will and ordain, that my executors hereinafter named, do sell my farm, on which I now reside, containing one hundred and sixty-eight acres, whenever, in their opinion, they can do the same to good advantage."

By other provisions in the will, the proceeds of the sale were devised to be distributed amongst the testator's wife and children; to be paid to the latter as they arrived at the age of twenty-one. The plaintiff, who was named executrix, was the wife of the testator. The other person named executor in the will, declined to accept the appointment.

The plaintiff adduced no other title or evidence of right of possession, but that contained in this devise.

The defendants set up a defence upon the following foundation. The heirs at law of N. G. Dabney, were some of them infants: One, who was of full age, (the executrix not having sold the estate,) filed a petition for partition, in the Court of Common Pleas of Trumbull county, where such proceedings were had, that the court made an order for the sale of the land, it being reported incapable of division. The order appointed N. Scott to make the sale, in these words: "It further appearing to the court here, that there is no administrator on the estate of N. G. Dabney, it is ordered by the Court, that N. Scott be appointed administrator to make distribution of the avails of said lands, &c. &c. It is also ordered by the Court here, that an order issue to the said administrator to sell the land, in the petition described, at public vendue." &c.

Under this order, Scott proceeded to sell the land; the defendants became the purchasers, and Scott made them a conveyance, in which no reference is made to the judicial proceedings under which he acted. He describes himself as "administrator to sell the lands and tenements of Nath. G. Dabney, late deceased," and, in the covenant of title, he recites his power thus; "I, the said Nehemiah, in my said capacity as administrator to sell the lands and tenements of N. G. Dabney, late deceasad, do, for myself, my heirs, &c. that at, and until the ensealing of these presents, I am, in my said capacity as administrator, well seized of the premises, as a good indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written." Under this deed the defendant entered and took possession. Subsequent to the sale and conveyance, a writ of error was brought, on the proceedings in partition, and the order of the Court of Common Pleas, directing the sale, was reversed. The defendants then abandoned the possession.

Upon this state of facts, two questions were raised for decision.

First: Had the plaintiff such possession of the premises, as that she could maintain an action of trespass for an unlawful entry upon it?

Second: Can the defendants protect themselves under the purchase from Scott?

P. W. Burr, for plaintiff. *Metcalf* and *Loomis*, contra.

By the COURT.

The testator in this case, directed his executors to sell his real estate, whenever, in their opinion, they could do so to good advantage. He devised the proceeds of sale, to be paid in shares to his wife and children; and appointed the payments to the children to be made when they should respectively become of age. We cannot consider these provisions as giving to the executors a mere naked power to sell the land; because they confide a discretion as to the time of making the sale to good advantage; and because they are entrusted with the charge of the proceeds, until the time appointed for paying it to the legatees. The executrix had an interest in the performance of the trust thus confided to her, and she had also an interest as one of the devisees of the proceeds. For the preservation of these interests, the law entitled her to the possession of the land, from which they could not be separated. The title certainly descended to the heir, while the trust remained unexecuted, subject to be divested by the execution of the power. But the right of possession did not descend with the title; that passed with the will for the better enabling the executors to effect the objects of the testator. We are consequently satisfied, that the plaintiff has such right of possession, as enables her to sustain this action.

The laws of this state provide, that where lands descend in parcenary to heirs, some of whom may be of full age, and some minors, those of full age, may petition for partition: and the power of hearing and determining upon this petition, is conferred upon the courts of justice. If, upon certain proceedings, it shall appear that the lands cannot be partitioned to advantage, power is given to the courts to direct a sale, and to distribute the money.

The proceedings and judgments of the courts, in a petition for partition, must, like judicial proceedings in all other cases, bind both parties and privies, while they remain unreversed, however erroneously they may have been conducted.

In this case, the court of Common Pleas clearly were invested with jurisdiction over the subject, and between the parties. Whether such interest descended to the heirs of Dabney, as entitled one of them to demand partition, was a judicial question, which that court were competent to decide. It naturally arose in the cause, and the decision of it concluded all concerned until reversed. The adjudication upon every other fact in the cause, was of the same character.

It is urged, that by law the court are, in case of a sale being ordered, directed to require that the sale be made by the sheriff, and that, in this case, they appointed another person to make it. But this error could not have the consequence of taking away their jurisdiction, nor of rendering the sale void. They were authorised to direct a sale, by one person, and they directed a sale by another. There is no just analogy between such a case, and one where the Court adjudge that to be done, which the nature of the action does not warrant, as adjudging that a defendant make a conveyance for land, or receive a beating in a personal action.

The judgment or decree, in the proceeding for partition, does not pretend to constitute Scott administrator for any other purpose, than perfecting the objects of that decree. The sale made by him was approved by the Court, and the deed made accordingly, although it does not specially refer to the proceedings in partition as its foundation. The defendants purchased under the order of sale, and received their deed in confirmation of that purchase, and took possession under it. For the irregular proceedings of the Court, or of the person acting under its authorities, the defendants were not responsible. Whilst the decree remained in force, the plaintiff was divested of title, and the defendants invested with it. They committed no trespass by entering, for they entered under authority of law; and that they cannot be made trespassers by relation, stands as strongly upon anthority, as it does upon the principles of good sense, common honesty and justice. It is for the possession thus obtained and continued, and abandoned with the destruction of the foundation upon which it stood, that this suit is brought. It is our opinion, that it cannot be sustained, and that the law of the case is with the defendants, for whom judgment must be given.

WINTHROP *v.* HUNTINGTON, ET UX.

When a person enters upon land under color of title, pays taxes, makes improvements, as owner, and is afterwards ejected at law, he cannot sustain a bill in equity for compensation and reimbursement against the rightful owner.

This cause was adjourned for decision here, from the county of Huron. The case was this: Winthrop, the original complainant, had derived title to a tract of land, in Huron county, under an order of sale, made by the Orphans' Court of Connecticut. Huntington's wife was the heir at law, and, in an action of ejectment, had recovered possession of the lands, on the ground, that the Court directing the sale, had no jurisdiction, to direct a sale of the land in question, as adjudged, by the Court, in the case of *Nowler, Douglass and others, v. Coit,* (1 *Ohio R.* 519.) Winthrop and those under whom he claimed, had proceeded as owners to partition the lands, which, at the time of sale, were held in common, by the Fireland company, so called, had taken possession in 1807, and improved the lands, by reducing them to cultivation, and by the erection of buildings, and had also paid the taxes. In 1816 the respondents commenced their ejectment, in which they finally recovered. Winthrop then filed the present bill in Chancery against them, claiming to be re-embursed the expenses of partition, the amount of money paid for taxes, and a compensation for the performance of these acts, and preserving the land. The answer admitted the principal facts, alleged in the bill, but denied that they gave the complainants any right. It set up other matter, in avoidance of the claim. But, as that matter was not considered in deciding the cause, it is deemed unnecessary to notice it in the report.

Whittlesey and *Newton*, for the complainant. *Webb*, contra.

By the COURT.

The complainant in this cause having been ejected from land claimed by him, as owner, in consequence of a recovery against him at law, has filed this bill, seeking to be considered as trustee for the respondents, in all that he did, to improve and preserve the lands in the character of absolute owner. The grounds upon which it is attempted to sustain this pretension are, that inasmuch as the identification of the land, was the act of the complainant, and that identification is recognized by the respondents, as to this they admit an agency. And as the improvements and payments of taxes, were for the benefit of the respondents, equity may well consider these acts, as performed in the character of agent, so as thus to be enabled to do justice to the parties.

We have carefully examined and considered the arguments advanced in support of these positions; but we find nothing in them to warrant us in giving to the acts of a party, a character directly contrary to that, in which those acts were performed. As a matter of fact, it is indisputable, that the complainant did not act as the agent of the respondents, in any one of the matters, in respect to which he claims compensation. He took possession of the land, not to preserve it for the respondents, but to occupy and improve it for himself. With this object, and for this purpose, he labored and paid money. And when the respondents asserted their right, he controverted it, and compelled them to establish it by a judicial proceeding. There is no allowable legal fiction, by which the Court can so change the character of a transaction, as to convert an adverse pretension into an agency for him whose right is resisted.

It is true, the respondents have adopted the partition of the land as they have found it. But this conduct is no recognition of the agency of the complainant. It was competent for the owner to take the lands, in the place they were assigned to him, by others who had claims, whether the assignment was so made as to conclude him or not. This mere act of acquiescence, can have no legal or equitable relation to the person on whose claim the assignment was made, and must be considered entirely independent of every one concerned.

The complainant acted in all that he did, as a volunteer. It is impossible to give him any other character. And there is not only no case, there can be no principle, in which a mere volunteer can maintain a suit, in law or equity, for compensation; although there are many cases, in which the party may be benefitted by such interference, and in which an award of compensation would seem to be just. Nevertheless, were it once permitted, that one man could volunteer his services to another, and coerce compensation, it would subvert the fundamental doctrines of contract, and open a door for incalculable mischiefs and litigations. The complainant's counsel are too sensible of this, to assert that a mere volunteer can recover; hence, they attempt to establish an agency in their client, and do not seem to perceive, that to convert a volunteer into an agent, against the consent of the alleged employer, is but maintaining the principle abandoned, in different terms, differently applied.

The answer given by the defendant's counsel, to the use made of the case of *Nosler, Douglass and others*, v. *Coit*, is decisive upon its analogy to this case.

Nothing is more common, than for Courts of Equity, in decreeing a complainant the relief he seeks, to impose terms upon him, which could not be asserted against him, in an original bill, at the suit of the respondent. It is an ordinary principle of proceeding in equity, and results from the well known maxim, that he who asks equity shall do it, or be denied the equity he asks. In that case, the complainant asked the Court to quiet his title against claimants, under a sale, similar to that through which the complainant claimed in this case. And the Court proceeded to decree in his favor, upon the condition, that he should repay the taxes advanced, and remunerate the party for his trouble in making the payment. And the decree is predicated upon the common principle, without an intimation that an original bill would have been sustained for that object. In this case, the complainant reposed himself upon his adverse right, until adjudged against him: and then, in direct contradiction of his former pretension, seeks to come before this Court in a new character. Were we to sustain this bill, it could only be on a principle, that would entitle every person who took possession of lands belonging to others, supposing he had title, after he was ejected at law, to come into equity for aid and remuneration. This would certainly be an entire new branch of equitable jurisdiction, to which we are not disposed to be the first to assent.

It is not the mere fact of a recovery in ejectment, that excludes the defendant from relief here: but it is the principle upon which that relief is sought, between which, and permitting a mortgagor to redeem, after the mortgagee has recovered at law, we can perceive no analogy.

There is no weight in the suggestion, that the respondents slept over their rights. They were not barred at law, and in equity the rule is not varied.—There is not even a suggestion that they practised any fraud, in permitting the complainant to proceed in his improvements, and payment of taxes. Upon the ground of fraud only, could a Court of Equity interfere, where the statute of limitations does not apply at law, or by analogy, in this Court.

The bill must be dismissed.

GIBBS *v.* CHAMPION.

A specific performance will be decreed where the vendee tenders the whole purchase money at the time the second installment falls due, though he failed to pay the first installment at the proper time.

Equity will decree damages where a vendor disables himself to convey the land.

This case was adjourned here for decision, from the Supreme Court, in the county of Cuyahoga. It was a bill in equity paying the specific performance of a contract, for the sale, and conveyance of a lot of ground, in the city of Cleaveland. The facts of the case are as follow:

On the first of May, 1825, the complainant agreed to purchase of the respondent, the lot in controversy, for the sum of two hundred and fifty dollars. One half to be paid on the 26th January, 1826, the other half to be paid on the 26th of July, 1826; for the payment of which sums, he gave the defendant his two separate negotiable notes; and written contracts were entered into

between the parties, by which it was stipulated, that the complainant should be entitled to, and come into immediate possession, at which taking possession, he should pay, or secure the payment of twenty-five dollars, part of the purchase money, and the defendant agreed to convey the lot, upon the *payment of the purchase money as it became due*, and the complainant covenanted to pay the purchase money as it became due, and also to pay the taxes.

At the time the contract was made, Champion had not the legal title to the lot. But had a contract with L. Case for the purchase of it, which facts were known to the complainant. Possession was not taken, nor the payment of twenty five dollars made or secured, in the month of May, 1825, and in the month of July of that year, the respondent addressed a letter to the complainant, requesting him to take possession, and declaring, that if he failed to do so, he would consider the contract as abandoned. The possession was not taken nor the money secured, neither were any steps taken towards the completion of the contract, by the complaint until the 26th of July, 1826, when the last payment was due; at which time the whole amount of purchase money and interest was tendered, and a deed demanded. In the mean time the respondent had sold the lot to another person, whose situation was that of an innocent purahaser without notice. The bill prayed a specific performance, or other proper relief.

Willey, for the complainants. *Case*, contra.

By the COURT.

This was a very clear case for relief. The conduct of the complainant was not such as to give the slightest reason, to suppose he meant to abandon the contract. The covenant to take possession in May, was intended for the complainant's benefit. And this failure to do it, worked no prejudice to the respondent. The non-payment of the first instalment of the purchaser's money, at the day, seems to be the sole ground for refusing a performance. The whole purchase money was tendered, when the second and last instalment became due, with the interest due on the first. We know no case, where a neglect to pay the first payment, so promptly remedied by a proffer to pay the first and second together, with interest, has been held such a neglect and abandonment of the contract, as to excuse the performance on the part of the vendor. We cannot regard the contract to pay, a condition precedent, authorizing the recission of the contract upon a failure. And if we should so consider it, there is no proof that the respondent proceeded upon this ground. He held the contract and the notes, though payment of the first instalment was not made. He never offered to return them, and certainly took no steps, which could have operated to exonerate the complainant from his liability. The agreement remained executory, and in full force when the tender was made, and the respondent then ought to have executed it.

If the title was in him, we should be bound to decree a specific performance. As it is not, but has passed into hands where it cannot be reached, we can only decree compensation. This compensation, we are of opinion, is the difference between the purchase money, and the value of the unimproved lot, at the time the party entitled himself to a conveyance, by tendering the purchase money.

For the purpose of ascertaining this difference, the cause is remanded back to the Supreme Court of Cuyahoga county, and referred to a master to take an account upon the principle here suggested.

LESSEE OF TAYLOR *v.* BOYD.

A decree in chancery for the conveyance of land, if a deed be not executed within the time limited by the decree, operates as a conveyance, subject as between the parties to a reverting of the title by a reversal of the decree.

Where the complainant in such case, conveys the land in good faith, before the citation on error is served, a reversal of the decree does not affect the title of the purchaser.

This case was adjourned here from the Supreme Court in Ross county, and came before the Court upon a case agreed.

Taylor, the lessor of the plaintiff, being seized in fee of the premises in dispute, John Boyd, the father of the defendant, prosecuted a bill in Chancery against him to obtain a conveyance of them, upon which a decree was made, that Taylor convey to Boyd, within a given day, or that the decree operate as a conveyance. Taylor made no conveyance, and after the time limited for making it by the decree had expired, John Boyd conveyed the premises to the defndant, having in the mean time taken possession, under the decree. Before the conveyance from J. Boyd to A. Boyd was executed, Taylor had sued a writ of error, to reverse the decree obtained by Boyd against him. It was issued and the bond given, but it was not served until after the conveyance was executed, and Abraham Boyd, had no actual notice that such a writ was sued out. Upon hearing of the writ of error, the decree directing a conveyance was reversed. The question presented for decision was, whether, under the circumstances, the title of Abraham Boyd was affected, by the reversal of the decree, upon which it was founded.

Sill and *Leonard*, for defendant.

By the COURT.

Upon the state of facts, in this case, James Boyd, by virtue of the decree in chancery, in his favor, and under the provisions of the act regulating proceedings in chancery, obtained an absolute legal title to the lands in dispute.—Whilst invested with this title, he entered into the possession. The title conferred by the decree was exactly that which Taylor, the defendant in chancery, had, when the decree was rendered; and this title was as perfect, in James Boyd, under the decree, as it was in Taylor before the decree was pronounced. Boyd's power to alien was as full and ample as any other owner's could be, subject, however, to be divested of the estate by the same power that invested it in him.

The foundation of this title was the decree in chancery that conferred it. So long as that decree remained in force, the title could not be impeached by Taylor, or any person claiming under him, by conveyance made, pending the

suit in chancery, or after the decree. But what is the effect of the reversal of that decree.

It is urged that the decree, having the same effect as a deed, being, in fact, an operative conveyance, its effect must be the same, as if a deed had actually been made under the decree. In such case, it is maintained, that a reversal of the decree would not divest the title. Without deciding what would be the effect of a deed, in such a case, as between the parties to suit themselves, we are fully prepared to say, that as between the parties, a reversal of the decree, which confers the title, actually divests it, and re-invests it in the person where it rested before the decree was made.

When the decree of reversal is pronounced, the parties concerned are all before the Court. The title vested by the decree is declared no longer to exist, and it would seem perfectly competent for the court at once to do justice between them. Why should the successful party be driven to a new bill to revest himself with the title? Surely the great objects of justice are full as well attained by considering the reversal a re-vestment of title, and, in that respect, placing the parties as they stood before the original decree was pronounced. It is the most expeditious, the cheapest, and therefore, as we think, the most proper remedy. If the decree can be reversed, and the bill dismissed, upon the opposite doctrine, the complainant thus turned out of Court would nevertheless have obtained the whole object of his bill. And the defendant, after a final adjudication, in his favor, would have to prosecute a new bill to obtain relief against the effects of a decree in a suit decided in his favor. This would be a strange anomaly in judicial proceedings, and one which ought not to be introduced, without some strong necessity.

Again, if on the reversal, the Court retain the cause, and on final hearing, a second time find the complainant entitled to a decree of the land, what form of decree is to be made? It cannot be that the defendant convey, for the doctrine insisted upon, assumes that he has no title in him. It must be a decree confirming a title in the defendant, which he obtained under the reversed decree. Upon what principle of reason, or enactment of legislation, would this kind of decree stand?

But the most difficult and important point in this case, is as to the effect the reversal upon the rights of third persons, legitimately and innocently injured. After the time limited in the decree itself had transpired, and the decree became an absolute title, the party thus invested with title and in possession of the land, sold and conveyed to a third person, who stands before the Court as an innocent purchaser for a valuable consideration, without notice. Can his rights be divested by a reversal of the decree upon which his title was originally founded? We are of opinion that they cannot be so divested.

When James Boyd conveyed to Abraham Boyd, he had a complete title, which it was competent for him to transmit by conveyance, in the usual mode. In making this conveyance, he divested himself of title, and invested it in Abraham Boyd, the defendant, who reposed himself upon the solemn and final decree of a court of competent jurisdiction, then in full force and of unquestionable validity. By this act of conveyance, made in good faith, James Boyd put an end to his power over the land. He could not resume his interest in it, without the consent of his grantee, and no decree subsequently made, in the suit, or in

any new suit growing out of it against James Boyd, could affect an interest which he had not, in the subject. This consequence, upon the premises here assumed, seems to be conceded by the counsel for the plaintiff. But he argues that the conveyance cannot be treated as one made in good faith, because, as he insists it was made *pendente lite*. If this position be correct, the result contended for necessarily follows. For a conveyance of a subject in litigation, made pending the litigation, is universally treated as made in bad faith, and as universally held not to change the rights of any of the parties.

It is argued that the writ of error was sued out, and bond given upon it, before the making of the conveyance, and that consequently the suit was pending. On the other hand it is acknowledged that no citation had been served on the defendant in error, and there is no pretence that either the grantor or grantee knew that the writ of error was pending. We are of opinion, that, until the service of the citation, a writ of error is not to be considered as pending so as to affect strangers as a *lis pendens*. This, we think, is not only in accordance with good sense and fair dealing, but is also according to the best authority.

It is contended that a writ of error is but the continuance of the original suit, or like a bill of revivor, or an appeal, reinstates the suit, and refers all parties and things involved to its first commencement. We do not concede, that such, in all cases, would be the consequence of a bill of revivor or of an appeal. But in this case, we think the analogy does not hold. In the obvious nature and character of the proceeding, a writ of error is a new and original suit. Original process issues in it, and must be served to bring the adverse party into Court. The relative character of the parties is changed: new pleadings are made up, and a final judgment upon it, though it may operate upon the original cause, is nevertheless a termination of the new suit or process in error. We do not meddle with the nice distinctions, by which a writ of error has been treated as a defensive proceeding, and a continuance of the cause in which the party alleged he had been prejudiced, by an erroneous judgment. Though this proposition has been urged, *arguendo*, in the most respectable tribunal of our country, we are not apprised of any case where it is made a ground of decision. We adhere to the doctrine that the writ of error is a new suit, and can only affect parties or strangers from the service of the citation. The judgment must therefore be for the defendant.

HEIRS OF ST. CLAIR, ET AL, v. SMITH, ET AL.

It is error on a bill of revivor, to decree against infant defendants, until a guardian ad litem, be appointed, accept the appointment and either appear or be served with process.

When the bill and answer set up matter of account as a foundation of a trust, it is erroneous to decree for the complainant without a full account taken.

It is error to direct infants to convey with special warranty.

Upon a bill to set up a trust in real estate, part sold and part unsold, and for an account of the proceeds, if a sum of money be found due to the complainant, it is error to assign him land in severalty, in payment.

This cause was adjourned for decision here, from the county of Butler. It was a bill of review prosecuted to reverse a decree obtained against the com-

plainants by the defendants, in the court of Common Pleas of Butler county. The bill of review was filed in the Common Pleas, and certified to the Supreme Court for decision, in consequence of the incompetency of the Court of Common Pleas to try it, two judges of that Court being interested in the cause.

The original bill was filed by James Smith against Arthur St. Clair, in his lifetime. It charged that, in the year 1801, Smith and St. Clair purchased sec. 16, containing 640 acres, and fractions 21, 27, 27, containing 889 acres, all lying contigious, in the township and range east of the meridian, in Butler county, in partnership, at two dollars per acre. The purchase was made of the government, upon the usual terms of paying one fifth in hand, and the remainder in three payments of two, three, and four years. That Smith paid one half of the first instalments, and St. Clair the other half. That improvements were made on the lands, and the expense of both, especially in erecting a saw mill, and preparing a race and dam for the erection of a grist and saw mill, which by a freshet in the river were swept away. It is also charged that in 1801, Smith settled on and improved the fraction 21, as for a permanent residence, and made permanent improvements on it. The bill further alleges, that the payments not being made according to the requisitions of the law, it was thought best to forfeit the lands, and re-enter them; and that an agreement was made that they should be forfeited and entered by St. Clair, in his own name for the use of both. That, in pursuance of this agreement, the forfeiture took place, and St. Clair entered the lands in his own name, in the year 1807, made the payments and obtained the patents. That in 1812, St. Clair sold one half the entire section for 2000 dollars, and in 1816 sold the other half for 1800 dollars, and a part of fraction 21, for 2116 dollars; all which money he received. The bill further charges, that when St. Clair advanced the purchase money to the government, he was indebted to Smith upwards of 2000 dollars, for advances in the erection of the mill works swept away in 1801, and that St. Clair, at various times, after the last entry in the lands, recognized Smith's joint interest, in conversation with him. All the principal allegations of the bill were repeated in special interrogatories, and it concluded with a prayer that St. Clair convey to Smith an interest in the lands unsold, and for general relief.

The answer admitted the original purchase in partnership, and the failure to complete the payment. It denied all the other allegations of the bill; claimed that the complainant was largely indebted to the respondent, and exhibited an account; and put interrogatories to be answered by the complainant. These interrogatories were never answered, and the complainant pleaded the statute of limitations, to the items of account submitted by the respondent.

The bill was filed in 1817. After answer filed, and depositions in part taken, St. Clair died, and Smith filed a bill of revivor, making St. Clair's heirs, who were all infants, and his administrator parties. David Wade was appointed guardian *ad litem* for the heirs. He never appeared or answered. There was nothing in the record to show that he was notified of, or accepted the appointment. Nor did it appear that process of any kind had been served upon him, on the bill of revivor. There was no account taken between, nor any partition decreed of the land. But a final decree was made, assigning the complainant a specified part of the land unsold, estimated in the decree at 2329 dollars, and

directing the administrators and heirs to pay to him 481 dollars 75 cents;—and after this decree, the land assigned to Smith had been purchased by the defend ant Miliken. The heirs were also decreed to convey with covenants of warranty.

Many errors were assigned as grounds of reversal: but the report will be confined to those specially noticed by the Court, as the ground on which they proceeded.

1. The guardian *ad litem*, appointed for the minors, was not cited to appear, and did not appear and answer or make defence.

2. The Court proceeded to make a decree, without an account being taken between the parties.

3. The decree assigns the complainants a specific portion of the lands claimed to be held in common, to be held by the complainant in severalty, without the right being ascertained and partition made according to law.

4. The heirs were decreed to convey with covenants of warranty.

Fox, for the complainants in the bill of review.

T. Corwin and *Collet*, contra.

By the COURT.

The object of filing a bill of revivor is to bring the parties, to be affected by the decree, before the Court. If these parties be of full age it is indispensable that they be served with a process to appear, or voluntarily enter their appearance. Without one or the other no proceedings can be regularly had against them. If the defendants in the bill of revivor be minors, a guardian *ad litem* must be appointed for them, who must accept the appointment, and who must be brought before the Court, as in other cases, by his voluntary act, or by process. When the defendants in a bill of revivor appear, they may abide by the answer of the deceased defendant, or answer for themselves. If the deceased defendant have not answered, the new defendants must answer, or a decree *pro confesso* be taken against them, before a final decree can be pronounced. This is the only correct course of practice, as is fully established by the authorities adduced on the part of the complainant, which are in conformity to the practice in our own courts.

In the case before us, the defendants in the bill of revivor were all minors but the administrator. For these minors a guardian *ad litem* was appointed. But there is nothing in the record to show that he ever accepted the appointment, or appeared or was notified to appear. No act seems to have been done by him. No answer is filed, no election to abide by the answer of the ancestor is made, no rule or order taken to obtain an appearance or answer. The final decree against the heirs is thus made against parties not in Court, and who, upon no principle of justice ought to be precluded by that decree. The fact that the ancestor had answered, does not vary the case. If that answer concluded them without their being heard, they must nevertheless be in Court to be bound by the decree. There is therefore error in this particular in the decree, for which it must be reversed.

In both the bill and answer, various matters of account were introduced, and

claimed and contested between the parties. Smith claimed, that St. Clair was indebted to him for monies advanced, for partnership purposes, in erecting mill-works upon the lands in question. And it was in part, at least, upon this indebtedness of St. Clair, that the bill sought to raise a trust for Smith, in St. Clair's last purchase of the land. St. Clair, in his answer, denied that he owed Smith any thing, and insisted, on the contrary, that Smith was largely his debtor. This question of indebtedness, ought to have been settled before a decree was pronounced, charging St. Clair as a debtor. For conceding that the trust was established, St Clair could not be required to pay to Smith any part of the profits arising on the sales of the lands, if Smith were indebted to him, as claimed, upon other accounts. Until an account was taken of all the money transactions set forth in the bill and answer, no correct decree could probably be made. It could not be material, whether this account was taken by a master, or by the Court themselves. But it does not appear to have been taken at all, and the data upon which the counsel for the present defendants place the decree, admits, that all transactions were disregarded, except such as related to the last purchase, and to the sales of the land. This was erroneous, and supplies another ground for reversing the decree.

Upon the hypothesis assumed in the bill, St. Clair was debtor to the complainant, for one half of the profits received upon the lands sold, and was trustee for him, for one undivided half of the lands unsold. There is nothing in this state of the case, that would give to the complainant a lien for the moneys due, upon the land unsold. In this respect, both as against St. Clair and his creditors, the debt would stand upon the same foundation with other debts, and a decree should have been made against the administrator, only for the amount. And against the heirs, partition should have been decreed, as in the ordinary case of a tenancy in common, originating in a trust and decreed in equity. The decree, in this case, setting apart a portion of the land to the complainant, in severalty, cannot be supported on any known or safe principles.

The direction that the infants shall convey with warranty, is also erroneous. Infants are not capable in law, of making covenants to bind themselves. A Court of Equity cannot decree them to do it. The decree is not the less erroneous, that it has operated no prejudice.

For these reasons, the decree is reversed, and the cause is retained, and remanded to the Supreme Court of Butler county, for further proceedings.

WAYMIRE *v.* STALEY, ET AL.

Priority of lien.

This was orginally an application to the Court of Common Pleas of Montgomery county, to distribute moneys made upon execution, by the sheriff, amongst different claimants. It was brought before this Court by *certiorari*, and adjourned here for decision, from the Supreme Court sitting in Montgomery county. The case was this:

At February term, 1823, Andrew Staley obtained judgment against Daniel Yount, for five hundred and five dollars fifty-four cents, debt and costs. *Fi. fa.*

issued March, 1823, and returned staid, by plaintiff's order, and was regularly issued to each succeeding term, and returned in the same manner, until March, 1825, when it was returned levied upon various chattels, and on a writ of *vendi. ex.* to June, 1825, one hundred and forty-nine dollars sixty-two cents, was returned made. A new writ of *fi. fa.* was issued to November, 1825, March and July, 1826, returned nothing found; and upon a writ issued November, 1826, a levy was made upon lands, out of which, the money in the sheriff's hands was made.

David Halloway, at March term, 1824, recovered two thousand one hundred and forty-eight dollars ninety cents, debt and costs, against the same debtor. A *fi. fa.* issued November, 1824, was levied upon real estate, which was valued, and the writ returned not sold for want of bidders. A *vendi* issued to May term, 1825, was returned with the same endorsement. At the same term, the valuations were set aside, and a new valuation was ordered, which was had, upon a *vendi*, issued to October term, 1825, and a return endorsed of one thousand six hundred and seventy-nine dollars twenty cents, made by a sale of the property, which sale was confirmed by the Court. New writs of *fi. fa.* were issued to May and September terms, 1826, and returned nothing found. A writ, dated October, 1826, was levied on the property, which was sold for the money in the sheriff's hands to be distributed.

At November, 1824, James Mendenhall recovered a judgment against Yount, for two hundred and twenty-four dollars fifty cents, debt and costs. In June, 1825, *fi. fa.* issued, returned to November term, levied on a lot of land, and sold for twenty-three dollars, and nothing found to levy further. Similar and successive writs were issued to all the terms, in 1826, and returned in the same manner. A *fi. fa.* issued October, 1826, was levied upon the same land with the other writs enumerated, and a part of the money was claimed to satisfy this judgment also.

October term, 1826, Dodd and Parkinson recovered a judgment against the same debtor, for one hundred and thirty-eight dollars twelve cents, debt and costs. A writ of *fi. fa.* was issued to the first term in 1826, and returned nothing found. Another writ of *fi. fa.* was issued in October, 1826, which was levied on the same property, and claimed also, to be paid out of the proceeds of the sale.

At February term, 1826, the executors of Waymire obtained their judgment for one hundred and fifty-five dollars thirty-two cents. Execution issued to May and September terms of the same year, and returned nothing found. Another *fi. fa.* issued in October, and was levied as the others, and the proceeds claimed as in the other cases. All these latter writs were dated on the same day, October 26, 1826, but that in favor of Halloway, was first put into the hands of the sheriff.

Stoddart, for Waymire, Staley and Mendenhall. *Holt*, for Halloway.

By the Court.

This case is decided, we conceive, by the judgments of this Court, in the cases of (*M'Cormick v. Alexander, and Patterson v. the Sheriff of Pickaway.*) Waymire's judgment is the only one, of all who contend for this money, that

was levied on the property in question, within the year. By the 17th section of the act of 1824, a preference is secured to it, because none of the other judgments were levied on this property, within one year from the time they were rendered. In *Patton's case*, it is settled, that a levy upon other property, does not take the case out of the provisions of the 17th section, and we are satisfied it is rightly settled. In the same case, it is settled, that the 4th section of the act, only applies to cases, where the liens of the contending parties are equal, and does not touch a case, where upon other principles, one party has a preferable lien. Waymire must, therefore, be first satisfied.

No one of the other judgment creditors having levied execution upon the property in dispute, within twelve months from the rendering of their judgments, their liens are equal; and Halloway having put his execution first into the sheriff's hands, has thereby obtained a preference next to Waymire, under the provisions of the 4th section. Between the others, an equal distribution must be made.

RICHMOND v. PATTERSON, ET AL.

A declaration upon a note need not set forth a liability, promise, &c.

Double replications to a plea is no ground of error after verdict, finding both true.

Copies of records from another state, though sworn to, are not admissible as evidence, unless it be shown that the original records are kept under authority of law.

This cause came before the court upon a writ of error, and was adjourned here for decision from Jackson county.

In the original suit, J. and A. Patterson declared upon a note in writing, in these words—"that the defendant on the 30th day of August, 1818, by his note in writing, of that date, duly executed, promised in ninety days after date to pay to the plaintiffs fifty three dollars, without defalcation," as by said note to the Court shown appears.

The defendant pleaded *non assumpsit* and infancy. To the latter plea the plaintiffs replied, first, traversing the infancy. Secondly, that the articles for which the note was given, were necessaries suitable to the defendant's condition. Issues were joined, and on the trial a verdict was found for the plaintiffs on them all.

At the trial a bill of exceptions was taken by the defendant's counsel, to an opinion of the Court, rejecting a deposition offered by them. This was the deposition of the town clerk of New Milford, in the state of Connecticut, proving the correctness of a copy from the records of that town, showing the entry of the time of the defendant's birth.—The Court decided that it was inadmissible as evidence, without further proof, than it contained within itself, of the law of Connecticut with respect to keeping such records, as that of which this purported to be a copy.

The plaintiff in error assigned for error.

That the declaration did not aver that the note was given for any, or what consideration.

That there were double replications to a single plea.

That the deposition was erroneously rejected.

Brazee, for the plaintiff in error.

By the COURT.

In the case of *Mors v. M'Cloud*, it is distinctly stated that the mode of declaring pursued in this case, is in accordance with a long established practice, which the Court were not at liberty to disturb. We adhere to that opinion, so that the exception to the declaration cannot be sustained.

As to the double replications, a majority of the Court think it now too late to take an exception to them. Each contained a good answer to the defendant's plea, and both are found, by the jury, to be true. There must be some strong ground indeed, to induce us to reverse the plaintiff's judgment, because it appears that he has two valid answers to the defence set up, when either one would be sufficient for him.

Had the defendant wished to confine the plaintiff to one answer to his plea, he should have objected to the double replications before the trial, when the Court would have compelled the plaintiff to confine his proof to one, and ordered the other to be struck from the record. By waiving this and going to trial, the fact has been found that both replications are true. Under these circumstances, it is too late to disturb the verdict. It is to prevent confusion at the trial, that duplicity in pleading is prohibited. The exception must be taken in season to effect this object, or it is too late.

The deposition was properly rejected. Until proof was adduced that the record copied was kept under the authority of law, it was nothing. A sworn copy of a private paper is nothing without proof of the original being executed. So the copy, in this case, was inadmissible, until it was proven that the paper copied and alleged to be a record, was legally entitled to that character. In the absence of this proof, the deposition was rightly rejected. The judgment of the Court of Common Pleas must be affirmed.

McCOY v. THE CORPORATION OF CHILLICOTHE.

A bill in chancery to obtain a perpetual injunction against collecting a tax assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, cannot be sustained, even if the law authorizing the tax be unconstitutional.

This was a bill in chancery, to enjoin the collection of a tax, assessed by the corporation of the town of Chillicothe, upon the complainant's mercantile capital. The bill set forth, that the complainant was an importer into the town of Chillicothe, from Philadelphia, New-York and Baltimore, semi-annually, of merchandise to a large amount, a great proportion of which, had been imported from foreign countries. That the merchandise thus imported by him into the state of Ohio, was immediately exposed to sale, either by wholesale or retail, as best suited his convenience and customers: That he also purchased, in New-York, Philadelphia and Baltimore, commodoties, the manufacture of those cities, and of the states of New-York, Pennsylvania and Maryland, or which had been previously imported into those states, from other states of the American union; That he was also a purchaser at Pittsburgh, in Pennsylvania, and at New Or-

leans, in Louisiana, of like commodoties, all of which he imported into the state of Ohio for sale, which, with a very small portion of the products and manufacture of the state of Ohio, constituted his stock of merchandise, upon which he transacted business as a merchant.

The bill further stated, that the mayor and commonalty of the town of Chillicothe, on the 21st of May, 1827, had passed an ordinance, declaring, amongst other things, that the capital stock of merchants, employed within the corporation, should be subject to taxation, for corporation purposes; and that by a subsequent ordinance, the tax of two mills on the dollar, of the capital stock of merchants, should be assessed and collected for the year 1827. The bill further stated, that the complainant's capital stock had been rated at twenty thousand dollars, and assessed accordingly, and that the corporation were about to collect the amount, by distress, through the instrumentality of its officer, who was also made defendant. This collection, it was alleged, was contrary to law, and against equity, and prayed an injunction to stop it. The injunction was allowed by an associate judge of the Court of Common Pleas, of Ross county. The corporation answered, setting out their authority under their charter, and the laws of the state, to assess the tax in question, which they alleged was legally assessed, and setting forth the ordinance assessing the same, and asserting the legal right to collect the amount assessed upon the defendant. The answer admitted the general character of complainant's importations, except as to the amount of the products and manufactures of Ohio, admitted the intention to collect the tax, and denied the equity of the complainant's bill. The collector answered, by a reference to the answer of the corporation, and by admitting his intention, to collect the tax, until restrained by injunction.

Some testimony was taken, as to the character of the stock, showing the proportion of it that was of the produce and manufacture of Ohio. But as this fact has no connexion with the point decided, it is unnecessary to report it.

Upon a final hearing, the Court of Common Pleas dismissed the bill, and the complainant appealed to the Supreme Court. The cause was adjourned here for decision from Ross county.

Grimke, for complainant, *Leonard*, contra.

By the COURT.

The facts, set out in the bill and answer, present the ordinary case of a proceeding to collect a tax, assessed for the single purpose of revenue. The collection is to be made in the common manner, by the sale of the personal goods of the party. There is no allegation or pretence that, to make the collection by distress, would, in any extraordinary manner, prejudice the complainant. Neither is there any suggestion that the parties complained of are insufficient to respond in damages, for the injury they are about to commit, should it be unauthorized by law. No circumstances distinguish the case from one of a common trespass, except, that the act sought to be enjoined, is about to be committed under color of law. In a mere matter of simple trespass, a Court of Equity has not yet interfered by an injunction. This is agreed upon both sides, and we are too well satisfied with the doctrine, as it is now settled, to make a precedent for disturbing it.

The proposition that chancery may interfere by injunction to prevent a multiplicity of suits, has no application, that we can perceive, to this case. If the tax was levied by distress, one action at law would settle the right and secure to the party his redress. If, notwithstanding, another tax were levied, it would be the subject of a single suit. The separate repetition of trespasses, laying a ground for separate suits, between the same parties, is not that description of multiplicity of suits which induces equity to interfere. Where many parties and different rights are involved in the same transaction, all of which cannot be legally adjusted without several suits, this state of things is sometimes held a sufficient ground for chancery to interfere. And we are by no means satisfied that what is said, by way of argument, in the opinion, in the case of *Osborne v. Bank U. S.*, warrants the conclusion that equity should take cognizance and jurisdiction between two individuals, where one apprehended as series of trespasses would be committed upon him, for each one of which, if perpetrated, the law give him a full and adequate remedy.

The bill proceeds upon the hypothesis that the law authorizing the assessment of tax, in question, is unconstitutional, and therefore can confer no authority. But this does not make a case for chancery jurisdiction. Whatever may be the principal question, in a cause, the attendant circumstances must be such as to give the court jurisdiction of the subject, or between the parties, before it can be considered or decided. If the ground assumed in the bill is correct, then the collection of the tax is a trespass, and, without the assistance of other facts than are here alleged, the remedy is at law, not in chancery. In the case of *Osborne v. Bank U. S.* the jurisdiction was sustained evidently upon the ground that the trespass apprehended, if permitted, would operate to the destruction of the Bank. The undistinguished object of the act to be enjoined, was to destroy the franchise. For this, the court were of opinion, compensation, in a verdict and judgment for damages, would not be a full and adequate remedy, and therefore the preventive remedy of injunction became necessary. This case does not resemble that in any of its features, but the single one that, in both cases, the collection of a tax was the subject in controversy. We think the jurisdiction cannot be sustained upon safe and proper principles. The bill is dismissed on that ground, the other branch of the case not having been considered.

BELL v. BATES.

In an action of assault and battery and false imprisonment, if the damages assessed are under five dollars, the plaintiff can recover no costs.

This was an action of trespass, assault and battery, and false imprisonment. On the trial the injury found a verdict for the plaintiff, and assessed his damages to one dollar seventeen and a half cents. The trial was had before the Supreme Court in Champaign county. The plaintiff moved for judgment for costs, and the motion was adjourned to be decided by the court in special session.

Mason, in support of the motion.

Opinion of the court by Judge HITCHCOCK.

There were no costs, *eo nomine*, at common law, although in actions sounding in damages, a practice prevailed, of allowing to the plaintiff, in the assessment of the damages, a sufficient sum to remunerate him for his necessary expenses. But, in consequence of the hardship which a plaintiff must sustain, in expending large sums of money for the purpose of obtaining his right, for which he would have no amends, the statute of Gloucester (6 *E.* 1 *Cap.* 1) was passed, allowing costs in certain cases. The subject was frequently, at subsequent periods, before the Parliament of England, and such provisions made as justice and necessity seemed to demand.

In this state, costs, as a general rule, have ever been allowed to the party recovering judgment. The amount to be taxed, however, has been varied from time to time, the whole being regulated by statute. In order to decide the question, in the present case submitted to the court, it is unnecessary to refer to any of those statutes, except such as are now in force, and have a bearing upon the subject. Those parts of the statutes which do bear upon this question, are the 76th section of the act organizing the judicial courts and regulating the practice, commonly called the practice act, the 52d and 56th sections of the act, defining the duties of justices of the peace and constables in criminal and civil cases.

The practice act determines the jurisdiction of the court of Common Pleas, and the 67th section provides, "that in all actions for libel, slander, malicious prosecution, assault, or assault and battery, action on the case for a nuisance, or against justices of the peace for misconduct in office, if the jury on the trial of the issue, or on enquiry of damages, shall find or assess the damages under five dollars, the plaintiff shall not recover costs." By the act defining the duties of justices of the peace, jurisdiction is conferred on those officers, in all civil cases, where the matter in controversy does not exceed one hundred dollars, except such cases as are expressly excepted. The 52d section enacts, "that nothing in this act shall be construed or understood, to extend to actions of trespass with force and arms, for assult and battery, for malicious prosecution, or actions against justices of the peace for misconduct in office, except in cases provided for in this act, actions of ejectment, brought to obtain the possession of lands and tenements, actions of replevin, actions of slander, actions on contracts for real estate, or where the title of land is called in question, except for trespass on real estate, and provided for in this act." Here we have a list of actions in which justices of the peace have no jurisdiction; in all other cases their jurisdiction is complete. with the limitation before stated as to the amount in controversy. The 56th section of the same act provides, "That if any person or persons, shall commence or proseeute any suit, for any debt or demand made cognizable before any justice of the peace, in any other court than is authorized and directed by this act, and shall obtain a verdict therein for debt or damages, which, without costs, shall not amount to one hundred dollars, or more, he, she or they, so prosecuting, shall not recover any costs in such suits, any law to the contrary notwithstanding."

The action in the present case is an action for assault and battery, and false imprisonment. It was commenced in the court of Common Pleas, and the jury assessed the plaintiff's damage at one dollar seventeen and a half cents. The plaintiff insisted that the action for false imprisonment is an action known to the law, as separate and distinct from the action of assault and battery; and inasmuch as it is not named in the 67th section of the practice act, therefore he is entitled to full costs, although the damages assessed are under five dollars. To this it may be answered, that if the action of false imprisonment is not named in the 67th section of the practice act, neither is it named in the 52nd section of the justice act; and, if the position of the plaintiff, as to the nature of his case, be correct, the cause of action is clearly within the jurisdiction of a justice of the peace. It follows that the plaintiff is placed in this dilemma. If the cause of action is within those specified in the 67th section of the practice act, he is not entitled to costs, not having recovered damages to the amount of five dollars. If the cause of action is not included among those named in that section, then it is within the jurisdiction of a justice of the peace, not being excepted in the 62nd section of the justice act; and he is precluded of his right to recover costs, by the 56th section of that act, the jury having assessed his damages at a less amount than one hundred dollars.

Judgment must be entered upon the verdict, for the amount of damages assessed, exclusive of costs.

BURROWS v. VANDEVIER, ET AL.

A writ of certiorari lies from the supreme court direct to inferior jurisdictions but will not be allowed except in extraordinary cases.

An order for a county road forty feet wide is erroneous.

This was a was a writ of certiorari, addressed to the commissioners of the county of Warren, requiring them to certify their proceedings, upon the application of the defendants, in establishing a county road. The plaintiff in certiorari, was a landholder through whose lands the road was established.

The application was made to the commissioners on the first Monday of March, 1824, when the usual order of view was made. At the June term 1824, the viewers and surveyor made their report, in favor of establishing the road. No objections were made, and upon two readings of the report the commissioners made an order to establish the road, and directing the supervisor to open it forty feet wide. In 1828 this writ of certiorari was issued, and adjourned here for decision from Warren county.

T. R. Ross, for plaintiff. *T. Corwin*, for defendants.

By the COURT.

It is objected that this writ ought to be dismissed, because this is not a case in which the exercise of a sound discretion requires that it should be allowed. It

is admitted that the court possesses jurisdiction to award it, in a case like this; but urged that it ought not to be sustained, because the plaintiff in certiorari had a more easy and expeditious remedy, in the court of Common Pleas. We assent to the justness of this argument, but under existing circumstances we have concluded to sustain the writ in question. As the jurisdiction is conceded, and no rule had been laid down with respect to cases in which it would be exercised, we are not willing to turn the party out of court, in whose case a rule is first to be made known to operate in other cases. Hereafter we shall not sustain a writ of certiorari direct to any inferior jurisdiction, where the court of Common Pleas have power to act, unless the case be attended with some extraordinary circumstances; and these must be of a highly imperative character, or the party will be sent first to the Common Pleas—which, in ordinary cases, is the most appropriate tribunal.

Numerous errors are assigned in the proceedings of the commissioners, in establishing the road and directing it to be opened. But as we agree to reverse the order, upon a sing e point, it is deemed unnecessary to notice any other.

After the first application for this road, and before the order passed for establishing and opening it, the law for opening and regulating roads and highways was changed. Although the new law contained no provision for the continuance and completion of applications, pending when it took effect, we are satisfied that it so operated upon them as to preserve them in the condition in which it found them. So far as the repealed law was their foundation, they must be sustained under that law. But all that remained to be done, when the new law took effect, must be in conformity to the provisions of that law.

The act of February 26, 1824, provides expressly that "all county roads shall be sixty feet wide." This order directs the road, which is a county road, to be opened forty feet only in width. It is consequently in conflict with a positive legal provision. And for this cause is reversed.

HAY v. OUSTEROUT.

A tender after suit brought, before a justice, of the amount due and the costs then accrued, is a bar to a recovery of further costs.

The court may conform a verdict to the intention of the jury without consulting them.

This was a writ of error, adjourned here for decision, from the county of Fairfield. The case was this: The defendant in error, commenced a suit against the plaintiff in error, before a justice of the peace. After the suit was commenced, the defendant in that suit, tendered to the plaintiff, one dollar and fifty cents, with the costs that had accrued. This sum the plaintiff refused to accept, and proceeded to a trial before the justice, who gave judgment against the defendant for two dollars. From this judgment the defendant appealed to the Court of Common Pleas. The plaintiff filed his declaration in *assumpsit*, containing the common counts. The defendant pleaded the general issue, and gave notice that he should rely upon the tender made when the suit was pending before the justice, with whom, the money tendered was deposited.

Upon the trial the jury returned a verdict, in these words: "*We find for the plaintiff in the sum of* $1 50*: tender was good, offset might have been plead in the suit before squire Rush.*" After the jury were discharged and without any consultation with them, the Court directed the verdict to be entered as follows: "*We find for the plaintiff in the sum of one dollar fifty cents, and that the amount of the debt due, and all the costs thereon, was tendered by the said Ousterout, to said Hay, in manner and form as the same is charged in the notice given by defendant.*"

A bill of exceptions was taken, to thus modelling the verdict, and the court of common pleas gave judgment for the plaintiff, for the damages found by the jury, and costs, to reverse which this writ of error was brought.

Irwin, for plaintiff in error. *Ewing*, for defendant in error.

By the COURT.

The jury have found, that after the commencement of the suit, the whole amount of the debt which they find to be due, was tendered to the plaintiff, with the costs that had then accrued, as charged in the notice. This is finding a tender and refusal, which, upon settled principles, precludes the party from recovering the further costs that may be incurred, by continuing to prosecute the suit. If the verdict, as directed to be recorded by the Court, can stand, the judgment is clearly erroneous as to costs, and so far, must be reversed.

It is urged against the verdict, that it involves more than the verdict as returned, by the jury, fairly warrants. But we do not think so. The general terms "*tender was good*," is, in substance, the same with those recorded. The tender could have no validity to defeat the plaintiff's action, unless accompanied by a refusal. The expressions used by the jury, denoted that they had found the tender, and the matters connected with it, to be, as alleged in the notice. And it was proper for the Court to conform the verdict to the clear intention of the jury. Nothing more was done here; and there was no error in doing thus much. The judgment must be reversed as to the costs, and as to the damages, affirmed.

NOTE.—The Hon. Jacob Burnet being elected a Senator in Congress, resigned his office of Judge of this Court, at this stage of the business. The subsequent causes, were all decided by the three remaining judges—Pease, Hitchcock and Sherman.

TUPPER v. TUPPER.

An action of debt on simple contract was not barred by the statute of limitations previous to the act of 1824.

This cause was adjourned here from the county of Washington. It was an action of debt, and the declaration contained three counts. One for money had and received of the plaintiff's testator in his lifetime; one upon an account stated with the plaintiff's testator in his lifetime; and one for money had and received for the use of the plaintiffs, as executors. The two first counts alleged the money to have been due May 1st, 1813; the third laid it to have been due Dec. 1st, 1820. The writ is dated October 31, 1826. The defendants pleaded several pleas, and amongst them, the statute of limitations, to which the

plaintiffs demurred. The demurrers were sustained in the Court of Common Pleas, and the case taken to the Supreme Court by appeal.

The cause was elaborately argued by

H. Stanberry and *Vinton*, for the plaintiffs. *Ewing*, for the defendants.

By the COURT.

The question presented by these demurrers has been long since considered as settled. The statute of limitations of 1804, and all subsequent statutes up to that of 1824, on the same subject, are silent as to the limitation of an action of debt, founded on simple contract. And where the indebtedness was evidenced by any matter, not properly a subject of book account, it has been considered as not within the statute. This construction has prevailed so long that it ought not now to be disturbed; more especially as the act of 1824 must very soon operate so as to prevent all the mischiefs which it is supposed may result from the omission in the previous acts. The subjects of the present action do not appear to be matter of book account. The demurrers therefore are well taken, and must be sustained. Another objection was made in argument, to the plaintiff's recovery. It is urged that an action of debt is not maintainable against executors and administrators on simple contract. The uniform practice of this state has been otherwise. It was not sustained, in such cases, in England, for a technical reason; but that reason, the wager of law, never obtained with us.

Judgment that the demurrers be sustained, and the pleas overruled. The cause remanded to be tried on the other pleas.

LESSEE OF LUDLOW'S HEIRS v. BARR.

A plaintiff in ejectment may recover against a disseisor on a possessory title alone, where the defendant sets up no title.

Where a plaintiff in ejectment relies on his possessory title alone, and the defendant shows a paper title in himself, and the plaintiff then shows a better paper title than the defendant's in a stranger, but in no way connects himself with it, he cannot recover.

This cause came before the Court upon a motion for a new trial, made by the plaintiff, the decision of which motion was adjourned here from Hamilton county.

At the trial the plaintiff opened his case by proving that his lessors were the children and heirs at law of Israel Ludlow, deceased—that so early as the year 1795 or 1 96, Ludlow was in possession, claiming as owner, the land being in woods. That he continued in possession to his death, in the year 1804. That afterwards his widow took possession, and built a house on it, which she occupied up to the year 1814; when the defendant entered, claiming to have purchased from the administrators of Ludlow.

The defendant then gave in evidence a deed from John C. Symmes, the original patentee of the Miami purchase, to the administrators of Ludlow, dated December 1810; in which it was in substance recited, that the conveyance was made in confirmation of a sale to Ludlow, and in trust that the administrators,

under the direction of the Court, should sell the land and apply the proceeds to the benefit of Ludlow's estate. He also gave in evidence a deed from the administrators of Ludlow to himself, dated August 10, 1811, reciting that it was made in execution of the trust created by the deed from Symmes.

The plaintiff then gave in evidence a deed from Symmes to Jonathan Dayton, for the same lands, dated May 31, 1796, and the book of original entry, made with Symmes, showing that Dayton entered the land in 1788, and parol proof that Ludlow took possession of the land so early as 1792, or 1793, claiming to be a purchaser from Dayton. He also gave in evidence a deed from Dayton for the west half of the same section, dated June, 1796, in which he calls to bind on the east by the land of Israel Ludlow, being the same land now in dispute.

During the trial the admissibility of the evidence was strongly opposed, in every instance, by the adverse party.—And the whole being received by the Court, they directed the jury to give a verdict for the defendant, allowing the plaintiff to move for a new trial, on the grounds of receiving improper evidence, charging against law, and finding a verdict against evidence. The motion was accordingly made, and adjourned.

Garrard and *Hammond*, in support of the motion. *N. Wright*, contra.

By the COURT.

The first point presented in this case is, can ejectment be maintained on a possessory right only? It has been decided by this Court that it can, against a disseizor, who shows no right at all, or none better.

The second point to be decided is, were the deeds from Symmes to Ludlow's administrators, and from them to the defendant, admissible to defeat the possessory right, on which the lessors of the plaintiff founded their claim to recover? The original title of Symmes is universally admitted; consequently, a paper title from him is *prima facia* evidence of better title than mere possession, and was rightly admitted.

The third question presented is, does the deed from Symmes to Dayton rebut the defendant's evidence or fortify the plaintiff's?

Although it rebuts the defendant's title, yet it, at the same time, defeats the plaintiff's right to recover. The order of introducing the evidence may be likened to a case of special pleading, and, in that view, this part of the proof, when offered by the plaintiffs, is a departure. The plaintiffs set out by claiming a right by possession only. This the defendant met and answered, by producing a paper title in himself. The plaintiff then proposes to show a better title in a third person. This is clearly a departure from his first claim, and no way fortifies it. But the plaintiff replies that he connects himself with the title thus adduced, and holds under it. Where is the evidence of this? In what character did Ludlow hold under Dayton? If as a disseizor his case is no better. If as a tenant at will, ejectment can hardly help him. If as a purchaser, where is the evidence of his purchase?

It is argued that Ludlow's claiming to hold as a purchaser from Dayton, raises a presumption in his favor. A man cannot raise a legal presumption, in his own favor, by his own act merely, to the prejudice of others. Nor can we

presume a deed to have existed from his possession and claiming title, unless the possession is continued until the statute of limitations comes in to aid him. If the presumption of a grant can be raised in this case, without any evidence of payment to Dayton, or without any acts, or acknowledgment of Dayton, to fortify such presumption, what is there to prevent the same presumption arising in favor of every squatter who gets possession and claims to be a purchaser, and holds possession twelve or fifteen years. There would be no need of resorting to the statute of limitations, for protection of possession, when the doctrine of presumption would aid much sooner. The statute must then be the only rule in presuming title.

In this case the lessors of the plaintiff, by showing a paper title in Dayton, paramount to their possessory right, without connecting themselves with Dayton's right, shew the right of possession in Dayton, and not in themselves, and therefore cannot recover.

ROSS v. CORWIN, ET AL.

This cause was adjourned here for decision from the Supreme Court of Warren county. It was a bill in chancery alleging fraud in the execution of a trust created by the complainant in the defendants, to secure them as his endorsers. The bill answers, and depositions are very voluminous, and as a question of fact, upon testimony, was alone involved, the Court deemed a report of the whole case unnecessary. The cause was argued at great length, by G. J. Smith for complainant, and T. Corwin for the defendants. The bill was dismissed with costs.

CHURCHILL v. KIMBLE.

In slander, separate sets of words may be laid in the same count. Quere, whether the substance of the words only may be charged.

This cause came before the Court upon a writ of error, to the Court of Common Pleas of Lawrence county, and was adjourned here for decision. It was an action for defamatory words, in which the defendant, in error, was plaintiff. The declaration commenced with the usual recitals, and proceeded to state the defamatory words as follow, alleging that the defendant "spoke and published of and concerning the plaintiff, in substance the following false, scandalous, and defamatory words: that is to say,"—setting out the words spoken,—"and the said Solomon of his further malice did then and there, in the presence of *diverse* good people, falsely and maliciously speak, publish and declare, of and concerning the plaintiff, in substance, that she was, &c."—again setting out the words used. In this manner five different sets of words were enumerated, as for one count. There was a second count, which was withdrawn, or a *nolle prosequi* entered upon it, before trial. There was then a third count, containing four different specifications of words, in different terms, but charged in the same manner as in the first count. Plea, "*not guilty.*" General verdict for the plain-

tiff; damages, 1195 dollars. Motion for a new trial overruled. Motion in arrest of judgment also overruled. Judgment for plaintiff, and writ of error.

Two errors were assigned and relied on: 1st, That it was not sufficient to set forth the substance of the words. 2nd, That each set of words constituted a separate count; and some of the sets, taken separately, were not actionable.

King and *Allen*, for the plaintiff in error. *Brasee* and *McConnel*, contra.

By the COURT.

It is not controverted but that, in each, of what the counsel for the defendant in error admit to be two counts, there is at least one set of actionable words. If it can be permitted to embody different, distinct, and separate allegations, in one count, then it becomes unnecessary to decide upon the first point made, with respect to the validity of charging in the declaration the substance of the words only. We conceive it is the better opinion, that different sets of distinct words may be charged in one count. And we are inclined to adopt this opinion from respect to the precedent in Lilly. No work upon the subject is of higher authority; and the precedent cited fully sustains the declaration in this case. The case of *Tillotson and Cheatham* is undoubtedly against it: but that case is not authority here. We can only receive it as the opinion of a respectable judicial tribunal. When we receive it as such, we cannot shut our eyes to the fact, that the Supreme Court of the state decided differently in the same case, and that the chancellor delivered an argument against the principle of the decision. It was a case decided between adverse political partizans, by a party tribunal; and so far as we can see, by a party vote. Under these circumstances, we cannot allow it to control our own judgment.

Without committing ourselves to any positive opinion as to the manner of charging the slanderous words, we take the occasion to say, it is safer to set them out as spoken, and not rely that to recite the substance is sufficient.

The judgment must be affirmed.

COX *v.* HILL, ET AL.

Where process is issued against several defendants, and is served upon part only, and returned not served as to the others, the attorney employed by those served with process, enters an appearance for all, without the knowledge of the defendants not served; held, that in a bill for contribution by those served, the others are not concluded by the judgment.

The attorney in such case is a competent witness.

This was a bill in chancery, adjourned here for final hearing from Pickaway county. The bill was originally filed in the Court of Common Pleas, and upon a hearing there dismissed. The complainants appealed from the decree of dismissal to the Supreme Court.

The bill charged that the intestate, in his lifetime, together with the defendants, signed a call for the Rev. Wm. Jones, a minister of the gospel, to minister for them, and stipulated to pay him a certain annual compensation. That Mr. Jones accepted the call, and officiated for them several years. That finally

his compensation being largely in arrear, he commenced a suit against those who gave the call, including the intestate, and the defendants and others, now removed, insolvent and deceased, and recovered a judgment against them for four hundred and fifty-five dollars, seventy cents debt, and fifty-two dollars twenty-two cents costs; of which sum the intestate paid two hundred and sixteen dollars and thirty-four cents, and the object of the bill was to obtain a rateable contribution of the other defendants. Those who answered denied that they had signed the original call of Mr. Jones; denied that they were served with process in the suit at law, and denied that they authorized the attorney who entered an appearance, or any attorney to appear for them. One defendant admitted knowledge of the suit and his liability, but alleged he had paid two hundred and forty dollars of the judgment, much more than his rateable proportion.

The payment by the intestate was fully proved. The attorney who entered the appearance, testified that he was employed only by the intestate and two others named, neither of them a defendant in chancery, who denied employing him. That some of those who employed him requested him to appear for the whole, but cannot say that it was the intestate. He testified also that the defendants in chancery none of them employed him to appear, except those of the three named. His veracity was impeached.

The respondents alleged that the attorney was insolvent, and they could have no redress in compensation against him, as to which the proof was not explicit.

Dean, for complainants. *Folsom & Douglas*, contra.

By the COURT.

The complainant comes before us seeking equitable relief against the defendants, upon the ground, that they are equally liable with himself, to pay the money which he has actually been compelled to pay. This liability the defendants controvert. But the complainant contends, they are precluded from disputing his claim by the joint judgment against them all at law. The first question to be determined is, whether it is competent for the defendants to show that they were not actual parties to, and did not make defence against, the suit at law.

It is not pretended on either side, but that the judgment as between the parties, plaintiff and defendants, is conclusive. The matter debated is, whether, as between the defendants themselves, it is equally conclusive. And we are of opinion that it is not.

As between the defendants to a suit, nothing is adjudicated by a joint judgment against them. Their joint liability to the plaintiff is established, as between him and them, and nothing more. Who of the defendants ought to pay the debt, or in what proportions they should contribute to pay it, remains to be settled between themselves, and must remain open for controversy.

If each defendant is actually before the court, and makes defence, it may be that, as between each other, the original liability is established. But this cannot be admitted, in a case where the complainant in equity was before the court, an actual defendant, and the defendants in equity were put before the court by

the act of the complainant himself, and the proceedings had without their knowledge. Were this permitted, very little effort would be necessary to fix individuals with unheard of liabilities. It cannot be controverted, but that, in case of a judgment against joint obligors upon a bond, if are paid the whole and brought his bill for contribution, it would be competent for the other to prove that he was originally only a security, and therefore not liable. So in case of a judgment against one of two obligors, and payment coerced, in a suit against the other for contribution, the execution of the bond must be proved.

The defence set up here is, that the defendants never signed the original call, and were not in fact parties to the judgment, except by the procurement of the complainant. This defence, it is said, impeaches the judgment collaterally, which is not allowable. On the contrary, we are of opinion that it does not affect the judgment at all, as between the parties to it. It is but showing a reason why it is not conclusive between others, who were co-defendants in it, and whose relative rights were not settled by it.

The defendants, who resist their present liability, were brought before the court by the attorney employed by the complainant, without their knowledge or consent, and judgment passed against them before they knew a suit was pending. This fact is established by the testimony of the attorney himself. In bringing these parties before the court, he acted as the agent of the complainant; and, if not by his direct procurement, it was in consequence of the character conferred upon him, by appearing as attorney for the complainant, who, if conusant of the fact, is equally culpable with the attorney. Be that as it may, the connexion between those who improperly caused the appearance to be entered, as too intimate to permit the acts of any one of them to conclude those who, by their agency, were made parties. In this light we regard the judgment as collusive, and consequently it proves nothing against the defendants in this case.

It is objected that the fact of the collusion is proved only by the testimony of the attorney, who was inadmissible upon account of interest, and whose veracity is impeached. The interest of the witness is only that of every agent, or every person who assumes to act as an agent. Between parties affected by his acts, he may be called upon to prove his agency, or to prove the fact that he acted without authority. The decision founded upon his testimony cannot be given in evidence to affect him, if an action be brought against him with respect to his conduct. And the fact, that to speak the truth may disclose matter whereon to ground a civil action against him, furnishes no excuse from testifying in his own mouth, much less can either party make it an objection to his testifying. We do not consider his testimony discredited by the impeaching evidence. He is corroborated by many circumstances, as well as by the oaths of the defendants, in their answers, which is in no respect answered or impeached.

Independent of the judgment against them, there is no proof that the defendants, now before us, ever subscribed the call to Mr. Jones, on which the judgment is founded. They all deny it positively, or qualifiedly. The complainant does not show that he is entitled to the relief sought, which, as the case stands, it is incumbent on him to do. The bill is dismissed as to those defendants who have answered, and is continued, as to those in default.

WELLS, ET AL. v. WILSON, ET AL.

A manufacturing association is a joint stock company, subject to the law of partnership, and its officers may without special authority, bind the company for a loan of money; as between the members themselves the stock may be assigned so as to discharge the assignor, though the mode prescribed be not pursued, if the company receive and treat the assignee as a partner, and cease to regard the assignor as such.

This cause came before the court, by an appeal, on behalf of the defendants, from a decree against them in the court of Common Pleas, and was adjourned here for decision from Jefferson county. It was a suit in chancery, between the members of "*the Steubenville Manufacturing Company*," the object of which was, to settle and adjust the rights and liabilities of the members, and close its concerns. The bill, answers, exhibits and depositions, are very voluminous: but the material facts, upon which the decision was grounded are abstracted from them, and occupy much less space. They are as follows:

In the month of August, 1812, the company was first organized and commenced operations. In conformity with the provisions of the original articles of association, the stock was extended on the 9th of April, 1814, and then consisted of thirty-eight shares of five hundred dollars each, which was then held by the following named persons, who are here arranged as they stand, complainants and defendants.

Complainants.		Defendants.	
B. Wells,	1 share,	H. Wilson,	1 share.
W. Wallace,	4 "	J. Galbraith,	2 "
D. Larrimore,	2 "	D. Hoge,	2 "
J. G. Henning,	1 "	W. Hamilton,	2 "
J. C. Wright,	1 "	S. Patterson,	6 "
J. Abrahams,	1 "	T. Henderson,	2 "
Thos. Patton,	1 "	J. Larrimore,	2 "
	—	S. Hunter,	2 "
	11	J. Wilson,	2 "
		R. Carrel,	1 "
		A. Moderwell,	3 "
		T. M'K. Thompson,	2 "
			—
			27

After this new arrangement, the copartners agreed upon additional articles for their government, under which a board of directors, a president, a secretary, and a treasurer, were chosen to manage the affairs of the company; by whom, and their successors duly chosen, the business was subsequently conducted. Among the provisions of the articles, the following, treated as the third of the new articles, is the only one necessary to be inserted:

"The stock shall be transferrable on the books of the company, to be kept by the secretary, in such manner as to entitle the assignee to all the rights and privileges, and to subject him to the liabilities and penalties, as the assignor:

Provided, that no share of stock shall be transferred or assigned until the same shall have been offered to the company, at one of their meetings, and an offer thereof made to them, that they may purchase the same for the use of the company, if they please: And provided, also, that no transfer shall be made, until all calls previously made by said company, on each share proposed to be transferred, shall have been paid into the treasury."

The stock was all called in and paid, and the amount invested in ground, buildings and machinery, for a steam mill and cotton factory. In June, 1815, the directors commenced borrowing money for the use of the company, and before the 6th of June, 1819, had incurred a debt exceeding fourteen thousand dollars, which was finally increased to about nineteen thousand, when the company found it impracticable to do further business.

With a view to a dissolution of the company, some part of the members, in June, 1819, filed a petition against the others, in the court of Common Pleas for Jefferson county, praying for partition of the real estate. An order for partition was made, and a report that the property could not be divided was also made, upon which the court directed a sale. At this sale B. Wells became the purchaser, as it was understood, in trust for the parties interested.

On the 6th of June 1814, Galbraith transferred his two shares to J. Larrimore. And early in April, 1815, Galbraith transferred his two shares to Moderwell. Neither of these transfers were made in the manner prescribed by the articles; but the company permitted Moderwell to represent them as owner. No debts were incurred at the time these sales were made.

On the 6th of June, 1816, Hunter sold his shares to Moderwell. On the seventh of the same month, Hanse and J. Wilson sold their shares to Moderwell also. These transfers were not formally entered on the books; but the company admitted Moderwell to represent them. At this period the company was indebted to the banks above fourteen thousand dollars, borrowed for its use, by a part of the complainants, upon their own personal credit.

In the month of August, 1816, Hoge sold his shares to Gray, but did not transfer them on the books. Gray was never recognized as the owner by any act of the company.

Carrol, December 20, 1816, sold to Kells, but without transferring on the books. Kells was, however, upon one or two occasions, received to act with them as members.

When the transfers were made to Larrimore, Moderwell, Gray and Kells, they were all considered responsible and solvent men. And the master commissioner, who took the account in the cause, reported the real estate owned by the company, then worth a greater sum than the debts at that time due from them.

Subsequent transfers were made by Kells and Gray, to persons notoriously insolvent, who again transferred to others, none of whom ever acted as members of the company. Patterson was dead, Henderson and Moderwell were insolvent, and the complainants were personally liable for a debt of about nineteen thousand dollars, upon account of the company. They filed the bill in the Court of Common Pleas, praying that the real property purchased by Wells might be decreed a trust, and sold for the payment of the debts: and that con-

tribution might be decreed amongst the other co-partners, to pay the balance of debts due upon account of the company.

The defendants, Galbraith, Hamilton, H. and J. Wilson, Hunter, Hoge and Carrol, each answered, and by their answers denied their liability. They insisted, that by the transfer of their stock, and the acceptance of their assignees, as owners, by the company, their responsibility ceased. They denied the authority of the directors to borrow money, and render the individuals of the company liable for the repayment; and they insisted that the sale of the real estate upon partition, was made subject to the payment of all the debts; and that the purchaser, one of the complainants, consequently became charged with them. In point of fact, the evidence did not sustain this latter position. The Court of Common Pleas, by an interlocutory decree; directed the sale of the real estate for the benefit of the company, which was effected at ten thousand dollars, and confirmed. Upon the final hearing, that Court dismissed the bill as to Hamilton, Galbraith, and Kells, and the other defendants, except Henderson, Carrol, H. Wilson, J. Wilson, Hunter, Hoge, Thomson and Moderwell, and decreed these latter defendants to contribute for the payment of the debts, charging upon all the solvent partners the proportion otherwise chargeable upon Henderson and Moderwell. From so much of this decree as charged them with contribution, the defendants appealed. The complainants did not appeal from that part of the decree, which dismissed their bill as to certain defendants. All parties acquiesced in the sale of the real property; so that in this Court the only questions agitated were, the liability of the defendants, as partners, and the authority of the directors to bind the company for loans.

Goodenow and *Hammond*, for complainants. *Hallock*, contra.

By the COURT.

We entertain no doubt but that the extension of the stock of the original company, in April, 1814, and the regulations subsequently entered into for managing its affairs, were obligatory upon all the parties. And as all the matters litigated arose subsequent to that event, they must be decided by the rules and regulations made under the new organization. The power to borrow money for the use of the company, and to bind the members to repay it, results necessarily from the power to contract. It seems inherent in all trading companies, unless specially restrained in the articles of association.

The real question before the court, and the only one of importance to the parties, is, whether the complainants can hold the defendants, Galbraith, Hamilton, the Wilsons, Hunter, Carrol, and Hoge, to be members of the company, as amongst themselves, and claim contribution of them to make up the losses sustained? The application to charge them is made to a Court of Equity; and the facts and circumstances, upon which it must be decided, though involved in voluminous papers, are, in truth, confined to a narrow compass. The partners agree amongst themselves that each one shall be authorized to sell out his interest in the company, and substitute in his place a new partner, whom the others are bound to receive, upon complying with certain previous conditions. He shall first offer his stock to the company, and he shall secondlypay up so much

of it as shall have been called for. These two conditions being performed, every member had an absolute right to transfer his stockon the company books, and the company were bound to receive his assignee, and look to him for all subsequent liabilities.

When the company were in full operation, in June, 1814, Galbraith transferred his stock, and his assignee was received and acted with as a member. In April, 1815, the same facts occurred as to Hamilton. At this period no debts were incurred. In June, 1816, Hunter and the Wilsons transferred their stock, and their assignee, previously a member of the company, was received to represent their shares. From this period no one of the sellers took any part in the business of the company, nor were ever treated by the acting and officiating members as partners. When Hunter and the Wilsons sold their stock, the company were indebted, and part of the complainants were personally and individually liable for the debts. But the company property was estimated at a larger sum than the debts due. And the assignees, who under the assignment became members, at least in equity, were also solvent in their circumstances. The company proceed in their business, associate with the assignees as members, until the company itself, as such becomes insolvent; and until the assignees become individually insolvent: and then, after a lapse of more than four years, set up a claim that the defendants, so long disregarded as partners, are to be treated as members, for the purpose of compelling them to share the loss. And this claim they ask a Court of Equity to enforce, upon the ground that the assignments were not formally made, and therefore do not technically and legally divest the interests of the defendants. This certainly is not the ordinary and natural office of a Court of Equity.

It is admitted in argument, indeed it could not be controverted with any hope of success, that the assignments in this case were operative in equity, and would entitle the assignees to share the profits, and to a division of the stock. Suppose that suddenly after those transfers were made, the business of the company had created great profits, and the assignors had refused to make the transfers on the books of the company, and the company had refused to recognize the assignees, or pay to them their dividends—can it be doubted that a Court of Equity would have decreed relief! Suppose that after notice of the informal transfer, the assignors had become insolvent, and the company had persisted in paying them dividends, would not a Court of Chancery have decreed a transfer, and compelled the company to recognize the assignees as members, and account to them for the dividends paid out?

Suppose, again, that the creditors of the company, at the time of the transfer, or at a subsequent time, had subjected the assignors to the payment of a portion of the debts, upon the doctrine now set up by the complainants, that they remained legally members of the company—would not a Court of Equity give them relief, upon the very ground that, in equity, they had ceased to be members, had ceased to have any chance to share the profits, had ceased to act, and that others had been received in their places?

Again, suppose that, in 1817, a suit at law had been brought against the company, for a debt contracted in 1817, and the assignees were made defend-

ants, and the assignors omitted, would that matter avail in a plea in abatement? Would the informality of the assignment be held to counteract the conduct of all the parties, and to fix their rights in contradiction to their own proceedings and acknowledgments? On these points we entertain no doubts ourselves, and we conceive there is little room for any one to doubt.

It would, obviously, be most unjust, that those who sold out of a profitable concern, or out of one which, though losing, was still solvent, whose assignee was solvent at the time, and was received and treated by the company as a partner, should afterwards be made a partner to subsequent insolvency, by a mere informality in making the contract. If this may sometimes occur at law, we can conceive no case, in which a Court of Equity should be made an instrument to produce such a result. And such must be the result, if we give the aid which the complainants now ask of us.

But we do not consider that there is any such defect in the transfers, as requires the aid of chancery to perfect them. The form or mode prescribed by the articles was intended to confer upon each member the absolute right to transfer his stock, and dissolve the partnership, as to himself and the other partners. This provision is not to be regarded as precluding the company from admitting assignments in a different mode, either by positive resolution, or by tacit acquiescence. They have, in the case before us, recognized the assignees as their partners, by acting with them; and they have recognized that the assignors were no longer members, by ceasing to consult with them. And this conduct, on their part, concludes the complainants.

It is urged in argument, that a certain part of the complainants, who have individually made themselves liable for the debts of the company, may be considered as creditors. But that, we think, cannot mend their case. They cannot merge the character of partners in that of creditors. And we are by no means satisfied that creditors, who became so with a perfect and full knowledge of all the circumstances, would be aided, in equity, to charge the assignors of the stock. Had it been the intention of the complainants, who were individually liable for the debts due, when Hunter and the Wilsons transferred their stock, to look to them for contribution, notice ought then to have been given them of such intention. If there were then no such intentions, the claim cannot now be set up. It would be a fraud to conceal the intention in the first case; and there is no principle for originating a claim, upon subsequent matter, which was not contemplated, when the transactions, out of which it arises, took place.

We hold therefore, that Galbraith, Hamilton, Hunter, the two Wilsons, and Carrol, are discharged. For it is in proof, that Kells was recognized by the company as the assignee of Carrol. There is not satisfactory proof that the company ever received Gray as the assignee of Hoge; the latter must consequently be held liable. No appeal having been taken by the complainants, from so much of the decree as dismissed the bill as to Kells, he is not now before the Court.

LESSEE OF BISBEE v. HALL.

Where an injunction is allowed to stay execution levied on chattels, the sheriff is bound to restore the chattels to the owner.

Where a bidder at sheriff's sale refuses to pay the money, the sheriff is not bound to return "money made," and prosecute the purchaser.

Before the act of 1824, the assignment of a lease, tested by one witness, was good.

Where a party puts a witness upon his voir dire, as to his interest, he cannot afterwards except to him, on the ground of interest.

It seems that leases for ninety-nine years may be sold on execution as chattels.

This cause was adjourned from Hamilton county, and came before the Court upon a motion for a new trial, made by the defendant.

On the trial, the plaintiff, to deduce title to himself from Adam Moore, made when both parties claimed, gave in evidence a lease from A. Moore to Joseph B. Robinson, for ninety-nine years, reserving a yearly rent, with clauses of re-entry for non-payment of the rent: with an assignment, endorsed on the back, from Robinson to T. Levinsworth, attested by one witness only. A judgment in favor of Ethan Stone, for the use of the bank of Cincinnati, against H. Flint, David Thatcher, Seth M. Levinsworth, and James H. Looker, for two thousand one hundred and thirty-five dollars and forty-three cents, rendered at the May term, 1816, and connected with this a *fi. fa. et lev. fa.* execution to November term, 1816, directed to Hosbrook, then sheriff, but he having gone out of office, the writ came into the hands of the coroner, who makes the following return: "I have levied on a farm as the property of Hezekiah Flint, lying near Mill creek, and about two miles from its mouth, containing eighty acres, or thereabouts, binding on the north by Thomas Graham, on the east by land owned by David E. Wade and the heirs of William Betts, on the south by the land owned by the heirs of Israel Ludlow, and on the west by Jacob Burnet and ——— Coleman; it being the whole of said farm, claimed and owned by said Flint. November 22nd, 1816. Wm. Butler, coroner."

A *venditioni exponas* to March term, 1817, which is returned by the coroner, endorsed "March 29, 1817: The within described farm was bid off to Robert Boal, as agent for John H. Piatt, and the articles of sale not being complied with, the property remains on hand for want of buyers."

At the return term of the last writ, an entry was made on the minutes of the Common Pleas (and was in evidence) in the following words: "Ethan Stone for the use, &c. v. Hezekiah Flint, and others. On motion, by W. Corry and I. G. Burnet, to set aside execution; motion granted, and execution set aside in this cause, 27th March, 1817."

A *fi. fa. et lev. fa.* to July term, 1817, which was returned by the sheriff endorsed in the following words: "Stayed by a writ of injunction after a levy had been made on personal property, to wit, a small stock of merchandise, the right to which was claimed by Samuel P. Anthony, which was tried by a jury of five freeholders, (naming them,) who adjudged the right of said property to be in David Thatcher, the said property was advertised for sale, and before sale re-delivered to the within named D. Thatcher."

An alias *fi. fa. et lev. fa.* to September term, 1819, returned endorsed as

follows: "August 4th, 1819, levied on part of lot, no. 167, at the corner of Walnut and Fifth streets, being fifty feet in front on Walnut street, and one hundred feet deep on Fifth street, with the improvements thereon. The right and title of Seth M. Levinsworth is intended to be taken, which is a lease for ninety-nine years, subject to a ground rent of one hundred and fifty dollars per annum.—Not sold for want of bidders."

A *venditioni exponas* to December term, 1819, returned endorsed as follows: "November 3rd, 1819. I have this day offered the within property for sale, at outcry, or auction, and sold it to Samuel R. Allen for the sum of one thousand and fifty dollars, which money has not been received, the said ——— refusing to comply with the terms of sale."

An alias *venditioni exponas* to April term, 1820, returned endorsed as follows: April 4th, 1820. I have this day sold the within described property, at public auction, to Ira White, for the sum of one hundred and seventy dollars, no person bidding more."

The plaintiff then gave in evidence a deed from Richard Ayres, sheriff, to Ira White, dated the 16th day of May, 1820, for the property in question. Also, a deed from White to Bisbee, the lessor of the plaintiff, dated 25th December, 1824, containing a covenant to warrant and defend the premises against all persons claiming under him.

The plaintiff having closed his testimony, the defendant moved the Court to overrule it, as insufficient to show title in his lessor. This motion the Court refused to sustain.—The defendant then gave in evidence a lease from Adam Moore, for the same premises, for ninety-nine years, dated January, 1825; together with proof that Adam Moore had duly entered for the non-payment of rent, and enforced the forfeiture. To rebut which proof, the plaintiff offered in evidence, Ira White, the grantor to their lessor. The defendant objected, but the Court overruled the objection.—The defendant then caused Ira White to be sworn on his *voir doir*, and objected to his competence, and the motion was again overruled, and White examined. The jury found a verdict for the plaintiff, and the defendant moved for a new trial, on the grounds that the Court erred: 1st, In not overruling the evidence offered by the plaintiff. 2nd, That the Court erred in admitting Isaac White as a witness. 3rd, That the verdict was against evidence.

Fox, in support of the motion. *Storr*, contra.

By the COURT.

The first ground assigned for a new trial rests upon exceptions to the title of the plaintiff's lessor. And the first objection is, that the execution issued to November term, 1816, was levied upon lands of one of the defendants, and until that levy is disposed of no second *fi. fa.* could issue. The plaintiff's answer to this is, that in March, 1817, this execution and levy were set aside. And upon an examination of the order of court relied upon, we are satisfied that such was the fact. That objection, therefore, is not supported by the facts in the cause.

A second objection is, that on the execution to the July term, 1817, there is a return of a levy upon personal goods of one of the defendants. But it is a

part of that return, that the sale was stayed by an injunction, and the goods re-delivered to the owner.

This we deem a sufficient answer to the objection. It was lawful for the sheriff, upon the service of the injunction, to re-deliver the goods to the owner. The injunction bond was substituted for the plaintiff's security. For the sheriff to retain the goods might enforce a great loss upon him, or upon the defendant, by the natural decay of the goods, by their accidental loss, or by the charge of keeping them, as in the case of live stock. The case is very different from that of a levy on land, which is not perishable, and where the debtor's possession is not divested by the levy.

The sale to Allen, on the execution to November term, 1819, it is maintained, was a disposition of this property, so that a second sale could not be made. The return shows that Allen refused to complete the contract, by paying the money. We incline to the opinion, that, if the purchaser refused to complete the contract, by paying the money, the sheriff was not bound to make himself liable, by returning an actual sale, and trusting to a recovery against a purchaser. But, without deciding this point, we do not hesitate to say, that if the parties to the execution took no exception, at the time, and a new *vendi* issued without objection, the writ was not void, and third persons cannot now so treat it.

The assignment of the lease from Robertson to Leavenworth was valid though tested by one witness. The law of 1805, respecting conveyances, did not extend to leases for terms of years. Two witnesses, therefore, were not required. The law of 1824 is more comprehensive, in its terms, and requires leases to be attested as other conveyances of real estate.

The defendants having put White upon his *voir dire*, cannot afterwards object to him on the ground of interest. Besides, the judges who presided at the trial think well of his testimony. The same judges also report that, upon the question of fact submitted to the jury, the question was fairly before them, upon such grounds as do not admit of the interference of the court to grant a new trial, as in case of a verdict against evidence. Motion overruled and judgment for plaintiff.

NOTE.—The foregoing opinion is drawn from notes furnished by Judge Pease. Nothing is said, in them, upon the point, whether a lease for ninety-nine years of real estate, could be sold as a chattels on execution. But as the validity of such sale was indispensable to sustain the plaintiff's title, the legitimate inference seems to be, that the court considered leases liable to be seized in execution, and sold as chattels. Otherwise a new trial would have been granted.

REPORTER.

LESSEE OF GRAY v. ASKEW.

The execution law of Feb. 1805, did not authorize a sale of decedents lands on a judgment against executors or administrators and there is no course of practice or current of decisions warranting such sales.

The Governor and Judges of the Territory in adopting the laws of other states did not necessarily adopt the practice of the courts of those states, under such laws.

This cause was adjourned here for decision, from the Supreme Court of Hamilton county. It was an ejectment, and came before the Court upon a case agreed.

The lessor of the plaintiff claimed under the devisees of Luther Kitchell, deceased, who died in Hamilton county, in the year 1805, having made a last will, and appointed W. Brown and P. Kitchell his executors. The will was duly proved and the executors qualified. At the time of the testator's death, he was indebted to Calvin Kitchel, who brought suit against the executors, and at August term, 1806, of the Court of Common Pleas of Hamilton county, recovered judgment. Execution issued to December term, upon which the sheriff endorsed "*nulla bona*," and made a levy, and in December, 1806, sold the lands in question. The defendant claimed under the purchaser from the sheriff, and was in possession of the land.

Garrard, for the plaintiff. *Wade*, contra.

By the COURT.

The sale of the decedent's real estate, in this case, must be sustained, if at all sustainable, upon one of two grounds. It must be shown that the statute law of the state authorized it, by a fair construction of its terms, or that a course of judicial decision, has so sanctioned the mode of proceeding as to give it the authority of law. If either of these two grounds can be satisfactorily established the sale is valid; if neither are tenable it is inoperative.

The judgment was rendered in August 1806, the sale took place in December of the same year. The act of February, 1805, "defining the duties of administrators on wills and intestates' estates, and providing for the appointment of guardians," was the only statute then in force, defining the powers, duties, and liabilities of executors and administrators. It gave no power or control to either, over the lands of a deceased person. But, in all its provisions, limited their functions to the control of their personal estate. The defendant's counsel does not look to the law, regulating the duties of executors and administrators, for authority to effect the sale. He attempts to deduce it from the general law, "regulating judgments and executions," which was then in force, passed February 16, 1805. We will examine the provisions of this law, and endeavor to ascertain whether they contain any thing to warrant the sale of a decedent's lands, upon a judgment against his personal representative.

The first section provides, "that all lands, tenements, and real estate, shall be liable to be levied upon and sold by execution, to be issued on judgments,

which may hereafter be recovered in any Court of record within this state for the debt, damages, and costs due and owing on such judgment."

If these terms were to be taken, in the unlimited sense of their expression, they might be interpreted to subject *all lands* to the payment of *any judgment*. The injustice, as well as the ridiculous absurdity of such an interpretation, puts it out of the question. The legislature only meant to declare, that the real estate, of a debtor, should be liable to be seized in execution for the satisfaction of his debts. In what case, and under what circumstances it should be so seized, was to be subsequently provided for by law. And in the succeeding sections of the act, it is distinctly shown, that it is only the real estate of the defendant, in the judgment, that is made liable for its satisfaction. The second section confines the lien to "the lands, tenements, and real estate of the defendant." The third, fourth, and fifth sections settle the right of preference between several plaintiffs, having judgments against the same defendant. The 6th section provides, " that any execution to be levied on lands, tenements, or real estate, shall command the officer to whom it is directed, that of the goods and chattels of the party against whom it is issued, he cause to be made the moneys contained in said writ, and that for wants of goods and chattels he cause the same to be made of the lands and tenements, and real estate of the defendant." The seventh section provides, " that the sheriff shall immediately after receiving such writ, levy on the goods and chattels of the defendant, to satisfy the moneys contained in the writ: but if goods and chattels be not found, the sheriff shall endorse on the writ, the words *nulla bona*, and forthwith levy the said execution on the lands, tenements and real estate of the defendant, of which said defendant was seized, at or after the first day of the term in which said judgment was obtained."

We can conceive of no process by which, according to the established form of proceeding against executors or administrators, the lands of a decedent can be reached, in virtue of these provisions, upon an execution against either. An exposition of the forms of pleading, and of judgments against the executor or administrator, seems to place this in a clear light.

In an action against an executor, if he have funds in his hands to pay the debt, the judgment against him is, that the plaintiff recover his debt, to be levied of the goods and chattels of the deceased, in his hands to be administered. If on execution upon such a judgment *nulla bona* be returned, the proper step is, to proceed personally against him for a *devastavit*, in which case, judgment goes against the person of the executor and subjects his individual estate, and, if necessary, ultimately, that of his security. On a judgment in this form, no execution could issue, to reach the decedent's land, conformable to the provisions of the law.

Again: If the executor plead *plene administravit*, and the plea be found for him, the judgment is, that the plaintiff recover his debt, to be levied of the goods and chattels of the decedent, that may hereafter fall into the hands of the executor. If the plea be found against him, the judgment goes against him personally. It is beyond all doubt, that no execution could issue upon either of these judgments, by which the decedent's lands could be touched consistent with the law then in force.

Further: Should the executor plead that he had fully administered all the goods and chattels in his hands to be administered, and should the plaintiff reply, that the decedent died possessed of real estate, would not such a replication be manifestly bad? The executor has no power over the real estate. He cannot convert it into assets, and consequently, cannot be made liable upon account of it. An issue joined upon such a replication, would be an immaterial one, and upon a demurrer, judgment must be given for the defendant. If the lands of the decedent, in 1806, were assets in the hands of the executor, they must have been, in some form, a matter of investigation, and liable to be rendered subject to the judgment in the case, by a direct adjudication. Unless this was the case, a strange anomaly would exist. On a judgment against an executor, property could be seized in execution, and made liable to its satisfaction, in which the defendant had no interest, and respecting which, he could be called to no account. There is nothing in the law that indicates an intention, on the part of the legislature, to introduce this absurd anomaly. But, as we think, much that indicates the contrary.

When suit is brought against an executor, he is, emphatically, and to every intent and purpose, the defendant. In his hands the goods and chattels of the deceased are so far his own, as to be properly levied upon in an execution on a judgment against him as executor. But this can, with no color of justice, be alleged of the decedent's lands.

The sixth section of the act which provides for levying the execution on land, is very particular in directing how it shall issue. "Any execution to be levied on lands, tenements or real estate, shall command the officer" to make the money of the goods and chattels, and for want of goods, "of the lands, tenements and real estate of the defendant." Under this law, could an execution issue on a judgment against an executor, commanding the officer to make the money of the goods and chattels, in his hands to be administered, and for want of such goods and chattels, of the lands, tenements and real estate of the decedent? Such an execution would not be sustained by either the terms or the spirit of the law. But the decedent is not the defendant, and the estate of none but the defendant is made liable.

There is the same difficulty in proceeding under the seventh section. If no goods be found, the officer is directed to endorse *nulla bona*, and levy, "on the lands, tenements and real estate *of the defendant*, of which the *said defendant* was *seized*," at or after the judgment. The executor never was *seized* of the real estate of the decedent. He cannot, any more than the decedent, be made to unite in himself the double character of the defendant to the judgment, and the party *seized* of the estate. It is for such a case, and for none other, that provision seems to be made. The terms of the law, in connection with the forms of proceeding, exclude the interpretation that it was intended to authorize the sale of a decedent's real estate, upon an execution against his personal representative: for all that is here said of an executor, applies with equal force to an administrator. This conclusion might be justified by other arguments, drawn from the inconvenience in settling the estate of a decedent, the confusion that would be introduced into the forms of business, and the mischiefs likely to result to the heir. But it is not now deemed necessary to do so.

The next enquiry is, as to the practice of the Courts, and course of decisions upon this subject. It is alleged, that from the adoption of the law subjecting real estate to the payment of debts, from the Pennsylvania code, in August, 1795, the practice prevailed, of selling a decedent's lands, upon judgment and execution against his personal representative. That this practice has acquired the sanction of the law, and that the act of 1805 is substantially the same, in its provisions, and consequently subject to the same construction.

We recognize, to its full extent, the doctrine that, where the law has been declared by an uninterrupted current of decisions, it is not to be disturbed or unsettled, so as to break up the foundations of titles acquired under them. We admit too, that a rule of property should be preserved, which rests upon a long and an inveterate course of practice, although apparently founded in no sound reason whatever. But it does not follow, from these admissions, that the practice of attornies, clerks and sheriffs, in one section of a state, subject every where to the same laws; and a practice of some dozen years continuance, is to be regarded as law, in the particular section where it prevailed. It is very certain, that in some few instances, the real estates of decedents were sold upon judgments against executors or administrators, during the territorial government, and at some times and in some places since. There is no proof before us, that this practice ever received the sanction of the territorial or state Courts where it prevailed. If the question were raised and decided, some notice of it could be found upon the minutes of the courts, no matter how loosely kept. And those who seek to make it a rule of property, on this ground, surely ought to produce some evidence of what they allege. If nothing more can be said, than that it passed *sub silentio*, it has no claims to favor on the ground of decisions. The Supreme Court of the United States, in *Telfair v. Stead's ex'r.* (2 *Cranch.* 418.) proceed expressly upon the evidence they had received, of the construction given by the Courts of Georgia, to the English statute. And this is the principle of all decisions, from the earliest times to the present. It is not enough, that the question passed unnoticed, it must have been decided. A construction must be given by the Courts themselves. So it was in *Keen v. Delaney*, (5 *Cranch.* 32.) The judges of the Supreme Court had taken acknowledgments of deeds for almost a century, when the power to do so was first questioned. The chief justice there says: "The Court cannot doubt, that the Courts of Pennsylvania consider a justice of the Supreme Court within the act." Here we doubt about the decisions or the practice, with the approbation of the Courts, which are alleged, and no proof is offered, except the fact of the sales: that is, the irregular practice itself, is adduced to sanction itself. Besides: A partial course of decision or of practice, known only to some of the Courts and in some parts of the country, and of no longer existence than ten or fourteen years, has never yet been esteemed as fixing a rule, which should be sustained against the plain letter of the law.

But another argument of construction is urged. The law of 1795, was adopted from the Pennsylvania code, and the Courts of that state have adjudicated, that under it, the lands of a decedent may be sold on execution, upon a judgment against a personal representative. With the law it is insisted, we adopted the construction of the Pennsylvania Courts.

When a statute has been for a time, in force, and certain terms used in it, are of ambiguous import, to which a fixed and settled construction has been given, it is rational to conclude, that a legislature acquainted with the interpretation they had received, when they employ the same terms, intended to adopt their received interpretation. This is a rule of construction, resorted to for the purpose of ascertaining the intention and meaning of the legislature. To give any force to this rule, the terms to be interpreted must be of doubtful import, and the legislature employing them, must be shown to have understood distinctly what was their settled interpretation. In the case before us, neither of these facts exist. There is nothing in the terms of the Pennsylvania law, which indicates an intention of the enacting power, that the lands of a decedent should be sold on judgments and executions against his personal representative, in all places where the personal goods were insufficient, or without reference to that fact. It is true, as shall be hereafter shown, there are provisions in that law, which might naturally lead to an interpretation of it, very different from that of our territorial or state enactments: but still there is no ambiguity of expression. There is no reason to warrant the inference, that the Pennsylvania interpretation was known to the governor and judges. To be sure, the Governor was a citizen of that state, but he was not a lawyer, and was not particularly conversant with the municipal jurisprudence of the state. The judges were natives of other states, whose vocations had never led them to become particularly acquainted with the laws of Pennsylvania. It seems to be straining too much to receive the interpretation of the Pennsylvania Courts upon this ground.

Again: Where a practice has grown up under a statute, in a particular and sovereign jurisdiction, it is no just inference, that, if another sovereign jurisdiction engraft the same statute, into their code, they intended to engraft, also, into their practice, the practice founded upon it, in the jurisdiction from whence it was taken. The provisions of the statute, may be well adapted to the institutions of the government adopting it. The practice founded upon it may be adverse to these institutions; and these facts must enter into the determination, whether the construction is to be adopted or not. This rests upon the decisions of Courts and cannot be deduced from the mere fact of enacting the statute. Had the question arisen whilst the Pennsylvania statute was in operation, had it been submitted to the general Court, and had they decided, that with the statute we had adopted the practice under it, we would not now feel at liberty to say that the practice was not adopted. But the mere fact of making such sales, unaccompanied with any proofs that the Courts acted upon them, other than that of total silence, does not place the question upon this ground.

It is urged in argument, that the statute of Pennsylvania, and those of the territorial legislature of 1802, and of the state legislature of 1805, are in terms substantially the same. We do not think so.

An analysis of the act of 1805, so far as relates to this subject, has already been given. The first five sections are almost a literal transcript of the territorial act of 1802. The exposition made of the provisions of those sections, when compared with the Pennsylvania law, shows that a very different system was contemplated. The first difference is, that the Pennsylvania law is, obviously, in the nature of a supplement, providing for subjecting real estate, where "no sufficient personal estate can be found." The laws enacted here, contem-

plate an entire system, providing for all cases of sales upon execution. Hence, the provisions, in detail, which emphatically confine the executions to operate upon the property of the defendant, in such manner, as to exclude all possibility of touching the lands of decedents, upon a judgment against his executor or administrator. Without, however, dwelling upon those, there is one essential variance, between the two enactments, that, in our opinion, subverts completely the position, that they are substantially the same.

After declaring, that for want of personal goods, real estate should be subject to the payment of debts, and providing for the extent in cases where the rents would pay the debt, in seven years, the Pennsylvania law directs, "that if the clear profits of such lands or tenements shall not be found, by inquest of twelve men, to be sufficient within seven years, to satisfy the debt or damages in such executions, or, if before the extent be out, any other debts or damages shall be recovered against the same debtor or defendant, *his heirs, executors, or administrators*, which, with what remains due upon such extent, cannot be satisfied out of the yearly profits of the lands or tenements so extended, within seven years; then, and in every such case, the sheriff or other officer shall, accordingly, certify the same upon the return of such executions, whereupon a writ, or writs of *venditioni exponas* shall issue forth, to sell such lands and tenements, for, and towards satisfaction of what shall remain due upon such extent; as also, towards satisfaction of all the rest of said debts or damages, in manner as is hereinafter directed, concerning the sale of other lands."

This law, which passed in 1704, is understood to have been substituted for a law passed four years preceding, which subjected "*all lands of debtors to sale, on judgment against their heirs, executors or administrators.*" Under the first law no doubt could be entertained that the lands of a decedent could be sold on execution against his personal representative. It became the duty of the Courts to frame their judgments and executions so as to carry the law into effect. The form of the judgment of course would be, that the plaintiff recover his debt, to be levied of the goods and chattels unadministered, and for want of such goods and chattels, of the real estate of which the decedent died seized. The writ of execution would conform to the judgment. Both would be founded upon the law, and clearly sustainable upon principle.

The law before us, omits this provision, and in the first instance, gives no substitute. But it nevertheless contains provision for selling the decedent's estate, on a judgment against his executor or administrators, in cases where the rents are not sufficient to pay the debts in seven years.

The first proposition of the law is, there shall only be a sale, where the rents for seven years, are not sufficient to liquidate the debts. If they be found insufficient, or, if after the extent, other judgments be rendered against the debtor, "*his heirs, executors or administrators,*" which, with what is due on the extent, cannot be satisfied out of the rents, in seven years, upon a return of these facts, on execution, a *vendi.* shall issue to sell, upon account of the whole. Here is an express provision for selling the decedent's real estate, upon judgments against his personal representative. And when this provision is combined with that of the law of 1700, there is no difficulty in accounting for the Pennsylvania practice. But our statutes of 1802 and 1805, contain no similar provision; and

even if the construction contended for, had been given to the Pennsylvania law, it must have been abrogated by the territorial law of 1802.

It is admitted in argument, that the practice of selling the real estate of the decedent, upon judgments against his personal representative, is without any analogy to support in it the common law. It is admitted, that it stands, at best, upon a doubtful construction. The dissenting opinion referred to by the defendant's counsel, contends for nothing more. It is admitted, the practice was of only a few years duration, and confined to a portion only of the territory of the state. With these admissions before us, and with the clear view we entertain that the construction is not tenable, upon any safe or sound principle, we cannot consent to recognize its obligation. We consider that the judgment and execution, conferred upon the officer no power to sell the lands in question. Consequently, his acts could not divest the devisees of their estate, under the will.—Judgment must accordingly be for the plaintiff.

NOTE BY THE REPORTER.

For the purpose of ascertaining, as far as practicable, the extent of the practice, alleged to have existed, in the first stages of the government, of selling the lands of a decendent on judgments against executors or administrators, I have carefully examined the records preserved in the clerk's office of Hamilton county. All that remains of the records of the old General Court is here preserved. The writs, pleadings, and executions may principally be found. There is also a volume made up of dockets of original writs, cases for trial, and very meagre minutes of the business transacted. There is no record made of any of the proceedings.

After an attentive perusal of this volume of dockets and minutes, I can find only ten judgments rendered against executors or administrators from the commencement to the termination of the Court. During this period it sat at Cincinnati, Vincennes, Marietta, and Detroit. I can find no vestige of any motion or decision in respect to an execution against executors or administrators.—None in any case, except one concerning the the distribution of money ,Nor do I find, on examining the executions themselves, any indication that questions had arisen upon them, respecting the propriety of levying upon the lands of a testator or intestate, upon judgments against the executor or administrator.

The judgments exist in the briefest possible notes. Thus, in the case of *Taliaferro v. P. Porter, administrator of George Porter*, out of which the case of *Porter and MacArthur*, (*Ohio Rep. vol.* 1, 99,) arose, the following is all that the minutes present:

"*Nicholas Taliaferro*

v.

Peter Porter, administrator of George Porter dec. Judgt. &c. IN DEBT.

Debt.	933 33
Interest.	102 66
Costs.	18 61
	1054 60"

In some of the earlier cases, the judgment against the personal representative contains, *in addition* to the abbreviation "*judgt.*" these words, "*of the goods to be administered.*" The executions, in some cases, issued direct against the executor or administrator; in some the exigent was to make the money of the goods and chattels of the deceased, and for want thereof, of his lands. The minutes and papers contain nothing to evidence any permanent and established practice. On the contrary they exhibit a mass of confusion, as perplexing as can any where be found.

I have also carefully looked over the records of the court of Common Pleas, from its earliest organization in the county, up to August term, 1806. These are comprised in six large folio volumes, containing, not all, but the principal of the judgments rendered. Some, confessed without process or pleadings, are not included in it. During this whole period of time, I have found but

seventeen judgments recorded as rendered against executors or administrators. Two of these were rendered before August, 1775; six of them after the commencement of 1805.

The earliest judgments are rendered against the executor or administrator personally, and were so entered up to November term, 1795. From that period, to January term, 1805, the judgments are all technically correct, "to be levied of the goods and chattels of the decedent, in the hands of the representative, to be administered." No judgment is rendered to subject the lands of the deceased. At Nov. term, 1797, in the case of *Abbot v. Manning, adm'r* the regular judgment was entered, and, upon return of no goods to levy, a *sci. fa.* was issued against the administrator, to charge him for a *devastavit*, and, at August, 1498,a technical judgment was rendered against him *de bonis propriis*. At January term, 1805, upon a *scire facias*, against executors to revive a judgment rendered in the lifetime of the testasor, judgment is entered that the plaintiff have execution direct against the executors, as if they were original defendants, in their own rights, and such seems to have been the form of the judgments for several succeeding years.

In the case of *Kitchell v. executors of Kitchell*, in which the land in controversy between Gray and Askew was sold, judgment was entered, August, 1806. The following is an exact transcript of all that is to be found, in the clerk's office, concerning it, except the execution.

"Calvin Kitchell, Esq.
v.
M. Brown and Pearsy Kitchell, Executors, &c. } *Debt—500 dolls., &c.*

Service acknowledged, amicable suit. I acknowledge judgment for the amount of the notes, and interest to-wit: 411*D.* 42*C.*

Costs taxed, 8 48

Manassah Brown.

Fi. fa. et. lev. fa. issued."

The execution runs that "of the goods and chattels of Luther Kitchell, dec'd. in your biliwick you cause to be made 411 dolls. 12 cents, which Calvin Kitchell lately recovered, &c. against M. Brown and P. Kitchell, Executors of said Luther, with 8 dolls. and 48 cents costs, &c. whereof the said executors are convicted, if so much goods and chattels of said executors can be found, and if not, then that you cause the same to be made of the lands and tenements of the said executors."

The judgment and execution are but common specimens of the loose manner in which the proceedings of these courts were conducted. I add one other, upon account of its peculiar character.

The executors of Isaac Felty, dec'd. at Feb. term 1801, commenced an action in their character of executors, against John Orbison. At August term, 1801, the cause was discontinued for want of prosecution. Afterward, to October term 1804, Orbison sued a writ of sci. fa. against the executors, to appear and show cause why execution should not be awarded against them, for the costs.—No cause being shown, the following judgment was entered:

"Therefore it is considered by the court that the said John Orbison do recover against the said Thomas and Mary, executors, &c. their original costs, to twenty-eight dollars and twenty cents, and also fourteen dollars and twenty cents for his damages, as well by reason of the detention of said costs, as for his costs and charges by him about his suit in this behalf expended, and he have execution thereof, &c."

Upon this judgment execution issued reciting and commanding as follows:—"that of the goods and chattels of Thomas Gibson and Mary Depriest, executors of Isaac Felty, dec'd. in your bailiwick, you cause to be made forty-two dollars and eighty-seven cents, which John Orbison recovered, &c. Whereof the said Thomas and Mary are convicted, as appears to us of record. Therefore it is considered that the said John have his execution against the said Thomas and Mary executors aforesaid if so much goods and chattels of the said Thomas and Mary, executors aforesaid can be found, &c. and if not, then that you cause the same to be made of the lands and tenements of the said Thomas and Mary executors aforesaid, &c."

This execution was levied upon a part of the real estate of the testator Felty, in virtue of which it was sold, and lost to the heirs. No principle of any known law could be thought of, to authorize a sale of lands to pay costs created by executors. Yet long after the Pennsylvania law had ceased to have effect in Ohio, this sale unauthorized by it, or by any existing law, was effected. The facts here stated are collected and published, that the bench and the bar, in other parts of the state, may be the better enabled to understand the extent, nature and character of a practice, which has been much talked of, as having settled a rule of law obligatory upon the courts.

WILLS v. COOPER, ET AL.

This cause was adjourned here for decision, from the county of Brown. It was a bill of review, seeking to review and reverse the decision rendered in this cause, by this court, in their session of December, 1825. (2 *Ohio Rep.* 124.) The defendants demurred. After hearing argument, the court adhered to their former opinion, and the bill of review was dismissed.

GREENE v. DODGE, ET AL.

A general judgment cannot be amended at a subsequent term so as to make it special.

This is the same cause reported 2 *Ohio Rep.* 430. It now came before the court upon a motion to amend the judgment, entered generally for the defendants, at December term, 1826, and enter it specially, as predicated upon a defect in the declaration.

Ewing, in support of the motion. *Goddard* and *Nye*, contra.
Motion refused.

STATE OF OHIO v. COLERICK, ET AL.

In a suit against the sureties of a sheriff, the judgment in an action for a false return against the sheriff, is admissible as prima facia evidence of the amount recovered, though the sureties had no notice of the pendency of the suit against the sheriff.

This cause came before the Court, by adjournment from Knox county. It was an action of debt against Colerick, who had been sheriff, and his securities. The declaration was on the obligatory part of the bond. Plea conditions performed. Replication setting out a judgment against Colerick, as sheriff, at the suit of the plaintiffs, for a false return on an execution sued out by them, upon a judgment in their favor, and put into his hands to be executed. To this replication the defendants demurred. Upon argument, the Court overruled the demurrer, and neither party demanding a jury, proceeded to assess the damages, in doing which, no evidence was offered or given, but the record of the judgment against the sheriff. The defendants moved for a new assessment of the damages, upon the ground that this evidence was not admissible. And this question was adjourned here for decision.

Silliman, in support of the motion. *Goddard*, contra.

By the COURT.

We take the distinction to be, that where the sureties have notice of the suit, and may, or do make defence, the judgment against the principal is conclusive

against them. Where such notice is not given, the judgment against the principal is *prima facie* only. It may be impeached for collusion, or for mistake. But, until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered. This Court have so ruled in the case of *Commissioners of Brown v. Butt.*, (2 *Ohio Reports*, 347.) And we see no reason to be dissatisfied with the opinion then given. In this case no evidence was offered by the defendants. The motion for a new assessment of damages is overruled.

ROGERS ET AL. *v.* ALLEN.

An assignment to trustees, by an insolvent debtor in Pennsylvania, under the laws of that state, does neither pass the legal title to the trustees, nor create an equity, to be enforced in chancery, to lands situate in Ohio.

This cause was adjourned here for decision, from the county of Clermont. It was a bill in chancery, making the following case.

Allen, the defendant, became insolvent, in the state of Pennsylvania, and, in taking the benefit of the insolvent law of that state, made an assignment to the complainants, as Trustees of all his property, both real and personal. Among thn property surrendered, in his schedule, was a tract of land, in Clermont county, Ohio. The trustees made a sale of this land, and the purchaser took possession. Allen brought an ejectment and recovered. This bill was brought by the trustees, reciting the facts of the case, alleging that the other property assigned, was insufficient to pay the debts of Allen, and praying a decree to sell the land in Clermont, for the benefit of the creditors. The defendant demurred.

T. R. Ross, for respondents. *A. H. Dunlavy*, contra.

By the COURT.

The Supreme Court of this state decided, in the case of *McCullock's Heirs v. Rodrick*, that the assignment of an insolvent's effects, under the laws of Pennsylvania, did not vest the trustees or assignees with the legal title to lands in Ohio. We are entirely satisfied with that decision. In order to give effect to such assignment, where lands situate in a different state are included, the insolvent should be held to make a formal deed of conveyance to the trustees. If this is not done, no title passes.

The bill here assumes that the assignment created an equity in the complainants, which a Court of Chancery should enforce. But we can perceive no principle upon which this doctrine can be safely founded.

It is a well settled doctrine that a commission of bankruptcy, vests in the trustees the personalities, whether situate within the jurisdiction that grants the commission or not. (4 *John. Chy.* 460.) It seems to be equally well understood that these commissions do not affect real property, out of the jurisdiction where they issued. It is so adjudged in the house of lords, in 1814. (2 *Dow.* 230.) And this doctrine stands upon the clear principle that real estate, in every country, can only be affected or transferred according to the municipal law. As, in this case, no title passed at law, we do not see any principle upon which an equity can be created to be enforced here. The bill must be dismissed.

PARKER v. WALLACE.

If the complainant in equity seeking a conveyance from the elder patentee, have no patent when the bill is filed, he is entitled to a decree if he have a patent at the time of the hearing.

A senior entry upon a resolution warrant surveyed and patented conformably to the laws of congress, may be aided in equity against an elder patent on a junior entry.

This cause was adjourned here for decision from the county of Brown. It was a bill in chancery to obtain, from the defendant, the legal title to a tract of land, upon the ground that the complainant owned the superior equity, although the defendant had obtained the eldest patent.

The facts as they were made out in evidence were as follow. The complainant claims under an entry, made in the name of Josiah Parker, on the 11th of January, 1788. The warrant upon which the entry was made, issued to Josiah Parker, in virtue of a special resolution of the Legislature of Virginia, and was of that class usually denominated "resolution warrants."

The evidence upon which it was founded, showed, that in October, 1775, Parker was appointed a major in the 5th Virginia regiment on continental establishment, where he served until August, 1776, when he was appointed lieutenant colonel. In April, 1777, he received a full colonel's commission, under which he served to August, 1778, when he resigned. After his resignation he was in active service with the militia, upon every invasion of the state, until the arrival of the Count de Grasse. The resolution directing the warrant to issue in virtue of these services, passed Nov. 18, 1778. The warrant bears date the 21st of the same month.

The survey upon which the patent issued was dated June 14, 1826, and the patent issued February 1, 1827. A witness testified that he was present more than twenty years previous, when Lucas Sullivant, a deputy surveyor under Richard Anderson, the principal surveyor, surveyed Parker's whole entry, of which the land in question was part. The complainant had been many years in possession, and made improvements. The defendant's entry was made July 23d, 1823,—surveyed and patented 12th April, 1824. Having the eldest grant, the defendant recovered in an ejectment at law. The complainant filed his bill 3d March, 1826, for a conveyance, and obtained an injunction. A question was made in the bill, and answer as to the identity and notoriety of the location, upon which much testimony was taken. The court upon the proof, decided this point for the complainant. It being a mere matter of fact, dependant upon familiar and well established principles, it is deemed unnecessary to introduce it into the report. The final decision turned upon the validity of the resolution warrant to appropriate the land, and the propriety of its being aided to do so by a court of equity.

M. Marshall, for complainant. *Scott*, contra.

By the COURT.

The exception that the complainant's bill is prematurely filed, because he

was not invested with a legal title at the time of filing it, is, in our opinion, untenable. It is, we think, sufficient to warrant a decree in his favor, that the patent to him has issued when the decree is pronounced, if the other facts in the case entitle him to a decree.

The equity of the complainant rests upon his elder entry, finally surveyed and carried into grant, under the laws of the United States. The defendant denies that, that entry can be sustained, because it is not founded upon a warrant issued in the ordinary way, for services performed in the Virginia line, upon continental establishment.

Whilst the territory within which these lands lie, was the property of the state of Virginia, and subject to her jurisdiction, she engaged, so early as October, 1776, to bestow land bounties upon those who should engage in the military service of the revolutionary war. The date of the original engagements of 1776, 1778, have not been preserved in the published codes of Virginia, and consequently are not found in our own collection of land laws. In May, 1779, a general law was passed providing for granting warrants to those entitled under the laws, and describing the evidence upon which the grant should be made. It would seem that the case of Parker did not come within these general provisions, and therefore, a special resolution was passed, directing a warrant to be issued to him, as for services performed in the Virginia line, upon continental establishment. The evidence adduced, in this case, shows that he performed very nearly three years' service in that line, and that he performed other approved military services, in the commonwealth of Virginia, upon account of which the special resolution was adopted.

The same legislature that voted the resolution, at the same session, passed the law reserving the lands between the Miami and Scioto rivers to satisfy the military bounties the state had engaged to her citizens. And, at the same session, the law was passed consenting to cede the territory north west of the Ohio to the United States upon the terms proposed by congress. On the 11th of March, 1784, the deed of cession was executed and accepted. This deed contains a provision that the land between the Miami and Scioto rivers should be appropriated, if necessary, to satisfy the *legal bounties* so engaged. The terms of the reservation are as follow: "That, in case the quantity of good lands, on the south east side of the Ohio, upon the waters of Cumberland river, and between the Green river and Tennessee river, which have been reserved by law for the Virginia troops upon continental establishment, should, &c, prove insufficient for their legal bounties, the deficiency shall be made up to the said troops, in good lands to be laid off between the Scioto and the Little Miami, on the north west side of the Ohio river, in such proportions as have been engaged to them by the laws of Virginia."

At the time this reservation was stipulated and made, Parker held his warrant under the resolution, for services actually performed as one of the Virginia troops upon continental establishment, and it seems to us that his case is fairly covered by the terms of the reservation. He was entitled under the laws of Virginia, as Virginia had herself decided, and he was in possession of the appropriate evidence of his right. That right was not less predicated upon the laws of Virginia, because the evidence of it issued in conformity to a resolution, instead of a general law. The services actually performed, were the

foundation upon which it rested, the consideration upon which it issued, and it stood as fairly upon the law, as any other case whatever. We see no principle to distinguish it from the great mass of claims to be satisfied out of lands reserved. But if any difficulty existed on this ground, it seems to have been entirely removed by the legislation of congress on the subject.

The act of March 3, 1807, fully recognizes the validity of these resolution warrants, so far as they were issued upon resolutions passed previous to the cession from Virginia to the United States. The proviso of the first section of that act must be understood as relating to warrants issued upon resolutions adopted subsequent to the cession. Rights confirmed at the time of the cession are not contemplated by it. For it would be highly unjust and improper that congress should institute an inquiry into the validity of individual rights, completely vested when the right of the United States accrued.

The second section of the act of March 1, 1823, revives the act of March 3, 1807, and gives four years from the 4th day of January, 1823, to return the surveys and obtain the patents on location upon resolution warrants. Within this period the survey was made and returned. So that, according to the provisions of the act of Congress, the title has been consummated in the complainants. The patent obtained by the defendant upon a junior entry, stands upon no better footing than if the complainant's entry was on a warrant issued in the ordinary manner, for services performed in the Virginia line upon continental establishment. The case is not analogous to an entry predicated upon a warrant for services in the state line.

In the cession to the United States, no reservation was made in favor of those to whom bounties were engaged, for military services in the state line. Consequently they were excluded from making location in the reserved territory, N. W. of the Ohio. But those claiming under resolution warrants, for services performed, in the Virginia line, upon continental establishment, were included in the reservation, and their rights are not distinguishable from others, in whose favor, the reservation was made.

By deciding that the entry of the complainant is a good and valid entry, which entry ought to be sustained against an elder patent founded on a junior entry, we do not impeach the decision of the Supreme Court of the United States, in the case of *Miller v. Kerr*, cited by the defendant's counsel. And in respect to this case, it is pertinent to remark, that from the doctrine advanced in *Hoffnagle v. Anderson*, decided at the next subsequent term, it may well be doubted whether that Court were entirely satisfied with their resolution in the former case.

It is evident that the title of the defendant, commenced in 1823, when the complainant was in actual possession, was originated with a view to speculation alone. It is not an accidental confliction of title, where the latter locator honestly supposed he was appropriating unappropriated lands. In this state of the case, he is entitled to no favor in a Court of Equity. He stands upon his legal rights altogether. And these are to be decided upon with the severest scrutiny, into their absolute obligation. All equitable considerations operate in favor of the complainant, whom, we conceive, entitled to a decree for the conveyance asked by the bill.

GAVIT *v.* CHAMBERS, ET AL.

The owner of lands situate on the banks of navigable streams is entitled to the beds of the rivers to the middle of the stream.

This was a writ of error brought to reverse the judgment of the court of Common Pleas, of Sandusky county, and adjourned here for decision. The plaintiff in error, was the plaintiff in the original suit; which was an action on the case for erecting a dam over the Sandusky river, and flowing back the water in the bed of the river upon the plaintiff.

At the trial, the plaintiff proved that he owned certain lands bounded by the river, and situate on its western bank. He also proved, that by the erection of the dam, the water was flowed back in the bed of the river, opposite the lands of the plaintiff, so as to stand four feet deep on a stone quarry, in the bed of the river, between the plaintiff's land and the middle of the stream. It was proved that, in making the original surveys, the river was intersected by the lines, but the area of the river to high water mark, subtracted from the integral survey, and only the lands on the shores paid for, to the United States, by the purchaser. It was also proved, that the plaintiff was in possession of the land claimed, and had used the stone quarry in the bed of the river, before the erection of the dam, and notified the defendants not to raise their dam, so as to flow the water back upon him.

The Court of Common Pleas charged the jury that the plaintiff could set up no right, in consequence of owning the lands on the shore, to the use or ownership of the bed of the river, adjacent to such lands. The plaintiff excepted to this charge, and the jury gave a verdict for the defendant, upon which the court rendered judgment for him, to reverse which, this writ of error was brought.

Platt Brush, for defendants.

By the COURT.

The question presented for decision, in this case, is, has the proprietor of lands bounded on a navigable stream, a separate and individual interest or property, in any portion of the bed of the river.

The cession to the United States, of the lands within the territory of which Ohio is now a part, was made subject to no condition with respect to navigable streams. But in the first frame of government, commonly called the *ordinance*, which is fundamental in its character, it is stipulated that "navigable waters leading into the Mississippi and St. Lawrence, shall be common highways, and forever free" to all the people of the United States. The legislation of Congress, for the disposition of the lands, has strictly conformed to this stipulation The lands within the beds of navigable rivers, have not been sold to individuals as land to be paid for. And whether the rivers have, or have not been made boundaries of surveys, the land usually covered by water, has been deducted

from that upon which the purchase money was charged. This, it is argued, is a fact conclusive to establish the position, that the individual purchaser acquires no right or title to the bed of the river adjoining the lands. But we do not think it properly attended with such consequence.

It is, we conceive, vitally essential to the public peace, and to individual security, that there should be distinct and acknowledged legal owners for both the land and water of the country. This seems to be the principle upon which the common law doctrine was originally settled, that where a stream was not subject to the ebb and flow of the tide, it should be deemed the property of the owners of the soil bounding upon its banks. The reason upon which this rule is founded, applies as strongly in this country as any other. And no maxim of jurisprudence is of more universal application, than that where the reason is the same, the law should be the same.

If, in the case before us, the owners of the lands bounded on the banks of the Sandusky river, does own the fee simple in that stream, subject only to the use of the public, who does own it, and what is its condition? The ordinance reserves nothing but the use. No act of congress makes any reservation in relation to the beds of rivers. We find no provisions but those of the ninth section of the act of 1796, which are confined to reserving the use of navigable rivers, and to declaring the existence of the common law doctrine, in respect to streams not navigable.

A river consists of water, bed and banks. At what point does the right of the owner of the adjoining lands terminate? On the top, or at the bottom of the bank? At high or at low water mark? Does his boundary recede and advance with the water, or is it stationary at some point? And where is that point? Who gains by alluvion, who looses by direptions of the streams? No satisfactory rules can be laid down, in answer to these questions, if the common law doctrine be departed from; and if it be assumed, that the United States retain the fee simple in the beds of our rivers, who is to preserve them from individual trespasses, or determine matters of wrong between the trespassers themselves? It cannot be reasonably doubted, that, if all the beds of our rivers supposed to be navigable, and treated as such by the United States, in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste, would fall into endless broils amongst themselves, and involve the owners of the adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage. The United States would be little interested in preserving either the peace or the property, and, indeed, would be powerless to do it, without an interference with the policy of the state, as unsuitable for the Union to exercise, as it would be inconvenient, if not dangerous to state sovereignty.

We do not believe that it was the intention of the United States, to reserve an interest in the bed, banks or water of the rivers in the state, other than the use for navigation to the public, which is distinctly in the nature of an easement, and all grants of land upon such waters, we hold to have been made subject to the rule of the common law, which, in this case, is the plain rule of common sense. And it is this: He who owns the lands upon both banks, owns the entire river, subject only to the easement of navigation, and he who owns the land

upon one bank only, owns the land to the middle of the river, subject to the same easement. This is the rule, recognized not only in England, but in our sister states. (20 *John.* 90. 17 *John.* 195. 3 *Caines*, 319. 2 *Conn. Rep.* 481.) The case in 20*th Johnson*, is full and clear in point. There is nothing in the trust vested in congress, and executed by them, and nothing in the manner of executing it, to warrant the establishment of a different principle here. The charge of the court of Common Pleas, was, in our opinion, erroneous, the judgment must therefore be reversed, and a *venire de novo* awarded.

YOUNG, ET UX. v. McINTIRE.

Where there is a devise to the widow of "one half of all the personal property" and a subsequent devise to the widow of "one half the profits of the real estate for life" and a devise to a daughter after the death of the widow of "the profits of all his stock in a certain company for life" and a further devise to the heirs of the daughter of "all the stock aforesaid"—Held, that the stock did not pass under the devise of "personal property."

This was a bill in chancery, brought to compel the assignment of thirty five shares of stock, in the Zanesville canal and manufacturing company, which the complainants claim under the will of John M'Intire, deceased. The bill states, that M'Intire in his will devised to the complainant Sarah, one half of the personal property of which he should die possessed, except his clock, and directed that the personal property should be valued by three men chosen for that purpose by his executors; and that the will further directed that the said Sarah should make choice of the same if she thought proper, if not, that the whole should be sold and one half the proceeds paid to her.

The bill alleged the decease of M'Intire, the proof of the will, and the qualification of the executors, and their taking upon them the execution of the will, and obtaining possession of his entire estate. It claimed that the complainant Sarah was entitled to one half of the seventy shares of stock owned by M'Intire, in the stock of the Zanesville canal and manufacturing company, and prayed a decree that the executors transfer it to them, the said Sarah having since intermarried with the complainant David.

The answer admitted the will, the devise, and that they took upon themselves the executorship, and received a large amount of property, and submitted to the court, upon a case stated, whether the complainants were or were not entitled to a transfer of the stock.

The facts of the case, as agreed by the parties, were as follow. M'Intire owned a tract of land which he agreed to sell to the company for stock. The stock agreed upon as the capital of the company was 70,000 dollars, to be divided into one hundred and forty shares of 500 dollars each. Of these shares seventy were subscribed by M'Intire, to be paid in the land. The other seventy were subscribed by others to be paid in money. The agreement was, that M'Intire's shares should draw dividends only upon so much of each as should be actually paid in upon each of the other shares. That so soon as the other shareholders should pay in the one half of their shares, and give security for the payment of the residue, M'Intire should convey to the company the

land sold, with the entire privileges of the water. Under this contract the company took possession of the ground, and commenced their works, in the lifetime of M'Intire, but did not entitle themselves to a conveyance, until long since his death. The conveyance has been made by the executors. The complainant Sarah, who was the wife of M'Intire, agreed to take under the will, and received one half the personal estate, except this stock, agreeably to the directions of the will.

The material provisions of the will are these:

"In lieu of my wife's full dower at law, I give, devise and bequeath to her, absolutely, the one half of all the personal property I may die possessed of, except my clock, which is not to be sold, but remain in my dwelling house so long as it shall go." "All my personal property is first to be valued by three men, chosen by my executors. Then my wife Sarah is to make her choice of the one half, or should she not take the one half, the residue is to be sold and she is to get the money arising from the sale."

The use of the mansion house is then given to his wife, and the executors are authorized to sell certain lands and pay his debts with the proceeds. Then the will proceeds:

"After which debts are paid, my executors are to pay to my wife Sarah annually during her life, the one half of the rents, interests, and profits of all my estate, both real and personal." "The money arising from the sale of my real and personal estate, after the payment of my debts, as aforesaid, is to be by my executors vested in stock, in the Zanesville Canal and Manufacturing Company." Some legacies excepted.

Directions are then given for the sale of real estate, after the death of his wife, and investing the money in canal stock, "*As my other money is ordered to be invested.*" And the will proceeds:

"I give and bequeath to my daughter, Amelia McIntire, at the death of my wife, my mansion house, with the premises before described, provided she leaves heirs of her body. Also, I give and bequeath to her and the heirs of her body, and their heirs forever, all the rents, issues, interest and profits of all my Zanesville Canal and Manu. Co. Stock, which are to be paid to her annually, during her life, by the President and Directors of said company, on her own personal application and no otherwise. She is not at liberty to sell, under the pain of forfeiture, any part of said stock, nor is the same ever to be liable for the payment of her debts which she may contract, or which her husband, should she marry, may contract. Should she leave an heir or heirs of her body, then at her death, the house aforesaid to be vested in them in fee simple, and ALL THE STOCK AFORESAID, to do with as they may think proper."

Sillinan, for the complainant. *Goddard*, contra.

By the COURT.

The first clause of the will would doubtless be sufficient to vest the widow with one half the canal stock, were there no other provisions in the will in direct repugnance to it. The stock is personal property, notwithstanding it is connected in some manner with the realty. But if we decree one half this stock to the widow, we inevitably defeat what appears to have been the great and leading design and intention of the testator.

That it was not intended to comprehend the canal stock in the bequest of "*personal property*," is manifest from almost every part of the will. In the first place the "*personal property*" included is all to be valued by three men, and the widow, upon such valuation, is to take the half. If she does not take it, it is to be sold and the proceeds paid to her. That it was not intended to subject the canal stock to sale, is indisputable. Because the proceeds of the personal and real estate are to be invested in canal stock, and the widow is to receive "*one half of the rents, issues, interests, and profits of* ALL *the estate.*" Because, too, it is subsequently provided, that after the decease of the widow the daughter shall receive ALL the rents, issues, interests and profits of ALL the canal stock; and that the heirs of the body of the daughter after her death, should have, ALL *the stock aforesaid.*" It is impossible to give the widow *half* and the daughter *all.* And we cannot reasonably suppose that any such absurd intention was entertained by the testator.

Throughout the whole will, a marked distinction is made between the canal stock, and ordinary personal property. The intention to extend the amount, and to preserve it for the use of the wife and daughter, during their lives, is clear and manifest. And this intention must be defeated, if the canal stock was included in the first devise to the wife, as part of the personal property to be divided.

It is urged that the canal stock, being legally personal property, the devise of it is in express terms, and an express bequest is not to be defeated by implication. But whether is that devise more express, which is supposed to comprehend the stock in the general term personal property? or that which specifically names the stock, and bequeaths the profits of ALL the whole, to the daughter? Surely the terms of the latter devise are at least as specific as those of the former. There is no implication, or inference necessary to understand them.—And the intention to give them effect is too clear to be mistaken or disputed. The widow claims upon general terms, and seeks an interpretation contrary to the evident intention. The daughter claims upon a bequest in express terms of the specific subject—and her claim comports with the whole intention. If the two bequests be absolutely repugnant, the latter must prevail. If they are not so repugnant, they must be reconciled, by deciding that the widow took a life estate in the profits of one half the stock, and the daughter a life estate in the profits of the whole, subject to the widow's right in half,—the whole remainder to the heirs of the body of the daughter, or to the charitable uses. In either case the complainants must fail.

Bill dismissed.

GILMORE *v.* MIAMI BANK, ET AL.

When a creditor summonses the debtors of his debtor, to an excessive amount, the debtor may apply to the court to compel the complainant to select whom he will hold, and in default of his making such selection, the court will assign who shall be holden, and discharge the residue.

If no such application be made all the defendants remain bound.

This cause came before the Court, by adjournment from the county Hamilton. It was a bill in chancery, under the fifty-ninth section of the law "direct-

ing the mode of proceeding in chancery." The Miami Bank was the principal debtor, and the object of the bill was to subject certain debtors of the bank, to the payment of the money due the complainants. Their whole claim, when the bill was filed, amounted to about thirteen thousand dollars. The aggregate of debts due to the bank, from the debtors summoned, amounted to about forty-five thousand dollars. W. H. Harrison made no objection to his liability. J. Burnet answered, that, when served with process, in 1824, he was indebted to the Miami Bank, in the character of endorser. That the evidence of this debt had been long before pledged with the bank of the United States, as collateral security, for the payment of a debt due from the Miami bank to that institution, and that, in the month of March 1825, he had paid the amount to the bank of the United States.

Hunt, Riddle, Piatt & Co. alleged that the debt due from them to the bank, was paid in, after bill filed, by Martin Baum, a partner, not made defendant in the bill, and that consequently such payment was available for them against the complainants. As the decree is only against the defendants here named, it is deemed unnecessary to notice the defences of the other defendants.

It was fully proved that the alleged payment from Martin Baum, of the debt of Hunt, Riddle, Piatt & Co. was by a discount, in the Miami bank, of his individual note, endorsed by other members of the company.

The case was argued by

Hammond and *Storer* for complainants. *V. Worthington* for Burnet.

The Court ruled that when a creditor summoned the debtors of his debtor, to an excessive amount, the debtor should apply to the court to compel the complainant to select whom he would hold, and, in default of his making such selection, the Court would assign who should be holden, and discharge the residue. That if no such application be made, all the defendants remain bound. That, if pending the suit, the summoned debtors make payment to the principal debtor, they must be held liable to the complainant *sub modo*. He who last paid to be first liable. It was also held that Martin Baum, not being made a party to the suit, could not affect the rights of the complainants, unless the matter had been regularly pleaded in abatement of the suit. The decree entered was in the following form, which is inserted as a document which may be useful to the profession, as a precedent, in future cases.

" This cause came on to be heard upon the bill, answer and exhibits, and arguments of counsel, which being seen and heard, the court are of opinion, that the complainants are the legal owners of the judgment in the bill mentioned, rendered in favor of Samuel Sullivan, treasurer of the State of Ohio, against the President and Directors of the Miami Exporting Company, and are entitled to recover of the defendants last named, the sum now due thereon, amounting to twelve thousand five hundred and eighty six dollars, and twenty three cents, being the principal and interest due on said judgment, up to the 18th day of December, instant. The Court are also of opinion that the complainants are entitled to recover of the defendants, the President and Directors of the Miami Exporting Company, the amount of the judgment, rendered at March term, 1824, in the bill mentioned, which with interest to the 18th of December, pre-

sent amounts to three thousand nine hundred and sixteen dollars eighty cents. The aggregate thus due to the complainants from the said defendants, the President and Directors of the Miami Exporting Company, being sixteen thousand five hundred and three dollars seventy three cents. The Court are further of opinion, that the complainants are well entitled in equity, under the statute in that case made and provided, to have a decree and execution against the debtors of the said defendants, the President and Directors of the Miami Exporting Company, parties to this suit, as is prayed in the complainant's bill, and therefore the Court proceed to decree, in respect to the other named defendants, as to the Court here seems just and according to equity; as to the defendant, George N. Hunt, it being suggested to the Court, that he hath departed this life, since the filing of the bill, and his representatives not being made parties to this cause, as to him is considered to be abated.

As to the defendants, Woodward and Stitt, the Court are of opinion, that there being a just judgment at law against them and their creditors, rendered before the commencement of this suit, for the debt due from them to the President and Directors of the Miami Exporting Company, they cannot be charged in this bill; the court do, therefore; award, order and decree, that as to the said Woodward and Stitt, the bill be dismissed. As to the defendants, Jesse Hunt, Riddle, Longworth, Bechtle, Findlay, Spencer, Sloo, and the administrators of J. H. Piatt, it appears to the Court, that the defendants, Longworth, Bechtle, Findlay, Sloo, and the administrators of J. H. Piatt, are in default for answer as to whom, the Court proceed as upon their confession of the matter in the bill stated: but it appears to the court, that the administrators of J. H. Piatt, deceased, cannot properly be joined in a decree against the other defendants, partners, in the firm of Hunt, Riddle, Piatt, & Co. It is ordered, adjudged, and decreed, that as to the said administrators the bill be dismissed: and the Court are further of opinion, that the debt due the defendants, the late firm of Hunt, Riddle, Piatt, & Co., to the defendants, the President and Directors of the Miami Exporting Company, at the time of the filing of this bill, is subject to the debt due the complainants as claimed by them. The Court are further of opinion that the debts due from the defendants, Harrison and Burnet, to the President and Directors of the Miami Exporting Company, at the time of filing the complainants' bill, are subject and liable to the payment of the debt due the complainants, as allowed by them: and by consent of the complainants, the bill as to the defendants, Green and Guilford, and George W. Jones, is dismissed without prejudice. The defendant Harrison having failed to answer the complainant's bill; it is ordered, adjudged, and decreed, that, as to him, the bill be taken as confessed, and it appearing to the Court, from the testimony of Oliver M. Spencer, that on the 8th day of May last, there was due from the said Wm. H. Harrison, to the President and Directors of the Miami Exporting Company the sum of eleven thousand five hundred fifty five dollars, eight thousand dollars whereof was principal debt, the additional interest upon which sum, to the 18th day of December, instant, is two hundred ninety dollars, the Court do therefore award, order, and decree, that the complainants recover of the defendant, Harrison, the sum of eleven thousand eight hundred and forty five dollars, for the making of which, with interest, the said complainants shall have execution against the said Harrison, as upon a judgment at law, together with

the costs of execution; and it is further ordered, that the amount, when paid, shall be credited upon the sum hereby decreed to be due to the complainants from the defendants, the President and Directors of the Miami Exporting Company, and shall also constitute a credit in favor of said Harrison, against the debt due from him to said company. And it appearing to the Court, from the testimony taken in the cause, that, at the filing of this bill, the defendants, Hunt, Riddle, Piatt and Co., were indebted to the defendants, the President and Directors of the Miami Exporting Company, a sum which on the first day of May 1826, amounted to nineteen thousand forty seven dollars twenty eight cents, the Court do award, order and decree, that the complainants recover of the defendants, Jesse Hunt, James Riddle, and Nicholas Longworth, Henry Bechtle, James Findlay, Oliver M. Spencer, and Thomas Sloo, jr., the said sum of ninethen thousand forty seven dollars twenty eight cents, for the making of which, with interest, the said complainants shall have execution against the said last named defendants, as at law, together with the costs of execution; and it is hereby ordered that, until the sheriff shall return upon the execution to be issued under this decree, against the defendant Harrison, that he can find neither goods or chattels, nor lands, whereof to levy the amount of said execution against said Harrison, the Clerk shall endorse upon the execution against the said defendants, Hunt, Riddle, Longworth, Bechtle, Findlay, Spencer, and Sloo, that it is to be levied only for the sum of four thousand six hundred and fifty eight dollars seventy three cents, and interest thereon from the date of this decree, and cost of execution. But, if at any time, the sheriff shall return upon the execution, against the defendant Harrison, that he cannot find goods, or lands whereof to levy, then no such endorsement shall be made, but the clerk shall endorse on said execution, the amount actually due upon the entire decree hereby made in favor of the complainants, and the sheriff shall levy such amount with interest and costs only. And it further appearing to the court, from the admission of the answer of the defendant Jacob Burnet, that at the filing of the bill in this cause, the said Burnet was indebted to the defendants, the President and Directors of the Miami Exporting Company, a sum, which on the 18th day of March, 1825, amounted to nine thousand eight hundred and six dollars, the Court do award, order, and decree, that the said complainants, recover of the defendant Burnet, the sum of nine thousand eight hundred and six dollars aforesaid, for the making of which, together with the costs of execution, the complainants shall have execution as upon a judgment at law, and it is hereby ordered, until the sheriff shall return upon the execution, to be issued under this decree, to the defendants, Hunt, Riddle, Longworth, Bechtle, Findlay, Spencer, and Sloo, that he can find neither goods nor lands whereof to levy the amount of the said execution, no execution whatever shall be issued upon this decree against said Jacob Burnet, and after such return be made, if execution be issued against the said Burnet, the clerk shall endorse the sum remaining due to the complainants, upon the entire decree hereby rendered in favor of the complainants, and the sheriff shall levy of the said Burnet such amount, with interest and costs of execution, and no more. And it is further ordered and decreed, that the said sum of sixteen thousand five hundred and three dollars and seventy three cents, with interest thereon when paid; whatever of the said defendants it may be levied, shall be in satisfaction of the two judgments in the

bill mentioned, and the court do further award, order, and decree, that the complainants recover of the defendants, the President and Directors of the Miami Exporting Company, their costs in the Prosecution of this suit expended. And it is further ordered that the clerk of the Supreme Court for Hamilton county, upon receiving a transcript of this decree duly certified, enter the same upon his journal, and proceed upon application of the complainants to issue execution as in this decree directed.

STATE OF OHIO *v.* SHERMAN, ET AL.

The official bond of a commissioner of insolvents may be prosecuted against him and his sureties, before the creditor has established his debt by judgment against the commissioner.

This was an action of debt, upon a bond given by the defendant Sherman, as commissioner of insolvents, and by the other defendants, as his sureties.—The declaration set forth the bond and the condition: and assigned as a breach, that whilst Sherman officiated as commissioner, one Turner, applied for the benefit of the act for the relief of insolvent debtors—that a relief was granted, and a large amount of property transferred to the commissioner, which he proceeded to sell and convert into money—and received the sum of five thousand dollars. But that, after the sale, the commissioner wholly neglected to advertise a meeting of Turner's creditors, as required by law. It was then averred, that Stone was, at the time of the insolvency, and from that time to the commencement of the suit, a creditor of Turner, for money paid, laid out and expended, at his special instance and request.

And, for further breach of the condition, the declaration alleged, that afterwards the commissioner received notes and money to a large amount, arising from the sale of said Turner's property. But did not, at the expiration of six months, or at any time thereafter, or at any time since, make distribution according to law, amongst the creditors. The whole concluded with the usual averment, that an action had accrued, &c.

The defendants demurred generally; and the cause was adjonrned here for decision from the Supreme Court of Washington county.

H. Stanbery, argued in support of the demurrer.

S. F. Vinton, against it.

By the COURT.

We conceive that the argument for defendant, proceeds upon a totally mistaken view of the case. It assumes that the commissioner of insolvents stands, in relation to the parties interested, and their claims in the same condition as an executor or administrator. That, in relation to the effects of the insolvent, he may sue or be sued in the same manner as the personal representative of a deceased party. If this assumption was correct, the argument founded upon it would be conclusive. But we do not consider it as sustainable upon the statute.

The second section of the law defines the powers of the commissioner.—He is to take charge of all property, including the credits of the insolvent.—He is empowered to sell and dispose of them, and distribute the proceeds. He is also empowered "to determine and adjust all controversies that may arise in the settlement of such estate, by comprise or arbitration; and may prosecute and defend any suit" he may deem necessary. Suits pending at the time of assignment, shall not abate. "Any new suit which may be commenced, shall be brought in the name of said commissioner, or in the name of the insolvent as the case may require."

We do not understand this section of the law as subjecting the commissioner to any action, in behalf of a creditor, upon account of the transactions of the insolvent, previous to the assignment. Suits pending, when the assignment is made, are to proceed as if no assignment had been made. New suits are to be brought in the name of the commissioner, or in the name of the insolvent, as the case may require. This provision does not, in our opinion, refer to suits against the insolvent, or against his estate. It relates solely to cases where the insolvent, or the commissioner, in his right, brings a suit. If a chose in action, not assignable by the statute upon that subject, be delivered to the commissioner; or if a claim to property, for which trespass or trover only would lie, be delivered to him, and an action became necessary for the recovery, then suit must be brought in the name of the insolvent. But if notes or bills of exchange be delivered and assigned, then a suit in the name of the commissioner would be the proper one. Or if a cause of an action accrue, under the proceedings of the commissioner himself, then suit could only be brought in his name.

With respect to claims against the insolvent, existing at the time of assignment, the law does not contemplate the commencement of a new suit to adjust them. The fifth section, amongst other things, provides for this case. The last proviso of the section, is in these words: "Any dispute or contest arising between said commissioner and any creditor of said insolvent, relative to the settlement of said creditor's claim, may be appealed to the next court of Common Pleas, *by said creditor*, on his giving a written notice to said commissioner to that effect; which notice shall state the particular cause of exception or complaint; and said court shall settle, and determine, and adjust, the same in a summary way, without pleadings."

If any difficulty arise between the commissioner and a creditor, as to the justice or the amount of a claim against the insolvent, it is to be settled as here pointed out, and not by suit against either the insolvent or the commissioner.—The proposition, therefore, that no creditor can entitle himself to an action against the securities of the commissioner, until the debt against the insolvent is established, by a judgment, seems to us wholly inadmissible.

The fifth section of the law, directs the commissioner to sell the insolvent's effects upon credit, and to take notes, with security, giving a limited credit. It then provides that, *immediately after the sale*, he shall call together the creditors, and settle and adjust the irclaims. It also provides, that, at the end of each succeeding six months, he shall continue to make distribution in money or property, as it may come into his hands. Until a meeting of the creditors was called for settling and adjusting their accounts, it could not be known that any dispute

or contest would arise between a creditor and a commissioner. The failure to call this meeting was a palpable breach of the bond: For upon such call depended the periods of future accountability. The defendant's argument not only requires a suit to be brought, which the law does not contemplate, but its unavoidable consequence is, to suspend the liability of the parties in the bond, until such suit should be determined. An absurdity which nothing but the clerest statutory provision could induce the court to recognize.

The demurrer is overruled, and the cause remanded for further proceedings.

TULLIS *v.* SEWELL.

Assumpsit will not lie on an award made in pursuance of a submission by specialty.

This cause was adjourned here for decision, by the Supreme Court sitting in Champaign county. It was an action of assumpsit upon a submission and an award. The declaration set out a submission, without specifying whether in writing or by parol, and set out an award in writing. Plea non-assumpsit.—The submission produced at the trial was a covenant under seal. And whether assumpsit could, in such case, be maintained, was the question reserved for decision.

Mason, for defendant. *James*, contra.

By the COURT.

It is objected, by the defendant, in this case, that the submission being by specialty, cannot be given in evidence to support an action of assumpsit. In answer to this objection it is urged that the action is founded upon the award, and not upon the submission. That it is sufficient in declaring to set forth the award, and state in general terms that the parties made the submission, and that the award not being under seal, assumpsit may well lie upon it.

The answer to this argument is, that the award of itself imposes no obligation on the parties. Without their act of submission the arbitrators could possess no power over them, or their business, consequently it is not the award, but the submission, that is the foundation of the action? If the submission were not averred, the declaration would be as defective as if it failed to set out the award itself.

The liability of the defendant originates in the contract of submission that necessarily must precede the award. It is from this contract that the arbitrators derive their authority, as judges whose decision is to bind the parties. By it they must be governed in their proceedings. A departure from its stipulations renders their decision inoperative, being void for defect of power to act. It is the submission, therefore, that is the foundation of the right claimed by the plaintiff, and it is only in virtue of the submission, that the subsequent proceedings have a binding force. The action originates in the submission, and ought to correspond in character with it. If it is by deed the remedy should be by

debt or covenant. If by parol, or writing not under seal, it may be by assumpsit.

It is asked, if the submission is by parol, and the award under seal, what is the action. The reply is, that assumpsit may, in that case, be well sustained. The seals of the arbitrators are not the seals of the parties, and can impose no obligations upon them as such. The contract that binds them is by parol, and the remedy must conform to that contract, and cannot be varied by the fact of the arbitrators adding or omitting seals to the award.

In assumpsit upon an award the general issue, non-assumpsit, necessarily puts the fact of the submission in issue. It would be an anomaly in pleading, that the making of a deed should be put in issue by such a plea. Yet this is inevitable, if assumpsit can be maintained in such a case. The great object of pleading would be defeated. Neither the declaration, nor the plea would present the real foundation of the action. It would come before the court collaterally, without direct affirmance or denial by either party. When the declaration is in covenant, it must recite a submission by deed, and when it is in debt, and the submission is by deed, it should so recite it. The defendant could then plead no other general issue, that would control the submission, but *non est factum*, for the plea of *no such award*, would admit the submission, so that, in the proper form of action, the regular modes of pleading would be preserved, whilst in the mode now attempted it would be wholly subverted. This alone is a decisive argument against the present action. In the opinion of the court, principle and precedent both concur in conducting to the conclusion, that the action is erroneously conceived.

Judgment must be for the defendant.

MIAMI EXPORTING COMPANY v. TURPIN, ET AL.

Equity will not enforce the lien of a judgment against the real estate of a debtor who dies after judgment.

The existence of the lien, as well as the method of enforcing it, is purely a matter of law.

This case was adjourned here for decision, from the Supreme Court in Hamilton county. It was a bill in equity, to which the defendants demurred generally. The material facts alleged in the bill, were as follow:

At December term, 1814, of the Common Pleas of Hamilton county, the Miami Bank obtained judgment against Hopkins and Halley for 1500 dollars. After suit commenced and process served, but before judgment rendered, Hopkins left the state and has not since returned. After judgment execution issued to April term, 1815, which was returned, "*staid by plaintiff's attorney.* Another execution issued to August, 1815, which was returned with the same endorsement. No other execution ever issued. In 1816, Halley died intestate, and administration was taken on his estate. The administrator, in 1817, sold, as the real estate of Halley, the land which the bill seeks to subject, under the order of Court, for the payment of the debts. The sale was effected subject to the lien of the Bank judgment, and it is so expressed in the administrators' deed.

Ruffner, the purchaser, entered into possession, who sold to Pultney, and Pultney to Turpin, who is in possession. The money arising from the purchase, was distributed to other creditors, no part was offered to, or received by the Bank. Nothing further was done until February, 1826, when the present bill was filed. The bill charges, that the money is still due to the Bank, that Halley's estate is insolvent, that the administrator and his securities are insolvent, and that the complainants have no remedy, but by enforcing the lien of the judgment upon the lands, and they pray a decree to that effect.

Storer and ***Hammond***, in support of the demurrer. ***Guilford***, contra.

By the COURT.

The bill seems to proceed upon the hypothesis, that the purchaser from the administrator, under the circumstances of this case, took the property, as it would have descended to the heir, subject to the judgment lien. As it contains no allegation of a contract on the part of the purchaser to discharge the lien, none that a portion of the price of the land was left in his hands, for that purpose, it can only be sustainable upon the general ground stated. It is unnecessary for us now to say whether this is, or is not a correct position. Let it be conceded, and it seems to us that the inevitable consequences must be, that the complainants are not entitled to the relief they seek for The lien could have been enforced at law. By a *scire facias* against the heir, and purchaser, sued in proper time, the lands could have been subjected to sale in satisfaction of the judgment. Whether the administrators' sale, taken with the circumstances that attended it, operated to destroy the lien, was a question triable at law, upon the *scire facias*. If it cannot still be tried in this manner, it must be in consequence of the negligence of the complainants to assert their rights. And it is a novel proposition that a Court of equity may be rightly called upon to assert them. The lien, if it exist, is a legal lien. And an existing lien, created by a judgment at law, may be enforced at law. If it once had existence and is lost, equity cannot restore it. The reasons assigned in the bill, why proceedings cannot be had at law, are not substantial. That the proper parties, defendants, are absent, makes no difference. The return of two *sci. fas.*, *nihil* would be tantamount to a service. That the debtors, the administrator, and the administrator's securities, are all insolvent, can confer no new rights upon the complainants, either as to the lien itself, or the privilege of resorting to a Court of equity to set it up or to enforce it. A Court of chancery does not acquire jurisdiction, merely because process at law cannot be executed, nor does the fact of the insolvency of the parties, of itself give it jurisdiction. We can perceive but a single question in this case. And it is—have the complainants a lien upon the property, named in the bill, to secure the payment of their debt? The lien claimed, is not an equitable lien, founded upon trust, and originating in contract. It is a legal lien. Whether it exist or not, is a purely legal question. If it exist, the law that gives it life is competent to effect its objects. Chancery, therefore, cannot interfere. On this ground we dismiss the bill.

CRICHFIELD v. PORTER.

A party, for whom an attorney appears in court without authority, is not concluded by the acts of the attorney.

When no process is served on a defendant, and an attorney enters an appearance for him without authority, and judgment is rendered against him, the court rendering such judgment may set it aside at a subsequent term.

The party in such case has an adequate remedy at law and equity will not interfere.

This cause was adjourned here for decison from Athens county. It was a bill in chancery, the object of which was, to obtain a new trial in a case where judgment had been rendered against the complainant here, who was defendant at law.

The bill states that the defendant, John Porter, of Athens county, in April, 1824, commenced an action of trover before a justice of the peace in Athens county, against Amos Thompson, Joseph McMahon, and the complainant. No notice was given to the complainant, by summons or otherwise, of the pendency of the suit. The case was afterwards appealed, and at the trial term a judgment had against the complainant alone, for fifty-nine dollars damages, and forty-seven dollars eighty-one cents costs of suit. This was at the September term, 1824, of the Common Pleas for Athens county. Execution issued upon this judgment against complainant, to the sheriff of Licking county, Ohio; twenty-four dollars made January, 1825, by sale of his personal property. That complainant was resident in Licking county during the pendency of suit, had no notice of it, and was never served with process. An attorney at law, who was employed by the other defendants, but not by complainant, filed a plea for complainant through mistake. That complainant has a meritorious defence to the action. Prayer for a return of the money made, perpetual injunction of the judgment, and for general relief.

To this bill there is a demurrer.

S. F. Vinton, and *A. Nye*, for complainant. *H. Stanberry*, for defendant.

Opinion of the Court, by Judge SHERMAN.

The questions made upon the demurrer to the bill of the complainant, are: First, Do the facts stated in the bill furnish any ground to interfere with the judgment at law, sought to be enjoined. Second: If the complainant is entitled to relief, whether a Court of chancery is the proper tribunal to afford it.

Upon the first question, the defendant contends that the complainant is bound, by the act of the attorney, although unauthorized, and (1 *Salk.* 86—88. 1 *Bibb.* 89. 6 *Mod.* 16. *and* 5 *Mod.* 205.) are cited, in support of this proposition. These authorities show the liability of an attorney to the person, who has sustained damages through their neglect or misconduct; and some of them recognize the doctrine that his acts are conclusive upon the person for whom he has appeared, unless the attorney is insolvent, or in suspicious circumstances. They appear to be founded upon reasons of policy, that, as the attorney is a sworn

officer of Court, he is himself responsible to the person for whom he appears: and the opposite party is in no fault, and has no adequate means of ascertaining the authority of the attorney, he ought not to be delayed or injured by the unauthorized act of such attorney, if he is of sufficient ability to respond in damages to the person for whom he undertook to appear. This reasoning is certainly plausible, and worthy of some consideration, but does not furnish any sufficient ground why one of the most obvious and well settled principles of law, as well as justice, should be departed from. That no person is to be bound by the act of a stranger, in whom he has vested no authority, or reposed any confidence, and over whom he can exercise no control. The admission and oath of an attorney is for the safety and advantage of a suitor, but does not of itself authorize him to appear in any cause. His authority to appear is essentially derived from the party, and dependant on him for its continuance; and although it is not the practice of our courts, in ordinary cases, to require the attorney to produce either a warrant or other authority from the suitor, before he is permitted to appear, yet its production may be, and, under certain circumstances, undoubtedly would be, required by the court. Courts act on the presumption that the attorney is authorized by the party, and it is in virtue of this authority that he is permitted to appear and prosecute, or defend, not merely because he is an officer of Court, admitted by them, and sworn to discharge his duty.

There are many officers, in our country, admitted to act as such, and sworn to a faithful discharge of their duties, by public authority, who derive their power, in each particular case, from the individual for whom they act. The office of an auctioneer is of this kind. They are appointed, commissioned, and sworn, by the officers of government, and no one will pretend that they could sell or transfer the property of an individual, without or against his consent, and yet any argument derived from considerations of public policy or convenience, in favor of considering the acts of an unauthorized attorney conclusive upon the suitor, applies with equal force, in so considering the acts of an unauthorized auctioneer, upon the persons interested.

The mischief that might follow, from holding that the acts of the unauthorized attorney are conclusive upon the person for whom he appears, would induce the Court to hesitate long before they would establish such a rule. It would, in some degree, subject the property of every individual, in the community, to the mistakes or malice of a particular class of men.

If the doctrine contended for by the defendant was now fully recognized by the English courts,—and it appears from the cases cited to have been at one time,—it could not long have remained a rule of decision, as we find a number of cases, in their reports, where parties have obtained relief against the acts of unauthorized attornies. In the case of *Robson v. Eaton*, (1 *Term. Rep.* 62.) Lord Mansfield expressly states the doctrine, that a party to a suit is not bound by the act of an attorney not employed by him; and decided, that when, as in that case, the defendant had paid money to the attorney, who had brought a former suit, and appeared for the plaintiff, he was liable to pay it over again, if it appeared the attorney was not employed by the plaintiff. In *Denton v. Noyes* (6 *John. Rep.* 298.) the Supreme Court of New York held, that judgment obtained against the defendant not served with process, in consequence of the ap-

pearance of an unauthorized attorney, was not conclusive upon the defendant; and the proceedings were reversed, and he was permitted to make defence.

Whatever formerly might have been the rule of the English courts, their practice would now seem to be, not to consider the act of an attorney conclusively binding, unless he is employed by the person for whom he appears, (3 *Shaw Rep.* 166 *Archb. Plead.*) and the decisions of the Courts in the United States, when the point has been made, has been in accordance with such practice, so far as they have fallen under my observation. Plaintiffs may sometimes suffer inconvenience by the appearance of an unauthorized attorney for the defendant; but courts, to avoid this evil, ought not to run into the opposite extreme of subjecting the interest and rights of such defendant, to the uncontroled acts of a stranger, neither employed nor trusted by him. In affording a remedy to a defendant so situated, courts will be careful to protect the plaintiff in any right he may have acquired, and interfere only so far with the judgment or other proceedings, as may be necessary to afford the defendant an opportunity of making defence.

The second ground of demurrer to this bill is, that whatever relief the complainant is entitled to, should have been sought in the court rendering the judgment, and not in Chancery.

It is an unquestioned principle, that a Court of Equity will not interfere, when the party seeking their aid can have the same relief in law as in equity; and the court are of opinion, that this principle applies to, and must govern this case.

There is nothing in the bill shewing that the complainant *could not obtain* the same relief, upon motion to the court rendering the judgment, that he now seeks by his bill in equity. The ground taken in the bill for the interference of a court of equity is, that the complainant was not served with process in the suit at law, and that an attorney of the court, without his knowledge, or any authority from him, appeared for him, pleaded and went to trial; whereupon a verdict and judgment was obtained against him. There is no pretence of any fraud or collusion on the part of the defendant, the plaintiff at law, that he *had* any knowledge of the attorney's not being authorized, or that the trial, on his part, was not fairly and properly conducted. If, upon these facts being shown to the Court rendering the judgment, they were competent to set it aside or suspend it, and let the complainant, the defendant at law, in to make defence—he had complete and adequate remedy at law, and Chancery will not entertain jurisdiction. And this Court does not doubt but that it was fully competent for the court at law to afford the complainant, upon motion, all the relief he could obtain in a court of equity. The jurisdiction of Courts of law, in setting aside judgments improperly obtained, or suspending their operation for a time, has been too long exercised, is too reasonable in itself, and attended with too many beneficial effects, to be now seriously questioned. It has become one of the regular, plain and accustomed remedies of a court of law, to afford full and adequate relief against a judgment irregularly or improperly obtained when there has been no fault or negligence on the part of the judgment debtor.

In the case of *Denton v. Noyes*, before cited, the Supreme Court of New York, in a case very similar in its principal features to the one now under consideration, suspended, on motion, the operation of the judgment, and permitted

the defendant to plead, leaving the judgment to stand as a security for the plaintiff, in case he should upon a future trial obtain a verdict. They proceeded upon the principle, that now almost uniformly governs courts in giving relief in cases of this kind, that of doing right and justice between the parties. The relief which is now given by Courts of law, upon motion, is equitable in its character, extended upon equitable terms, and so framed as to protect the rights of one party, without sacrificing, or jeopardizing those of the other. It may be afforded in the Court rendering the judgment with more facility, and more certainty of doing justice, than in a distinct tribunal, and the party injured can then obtain all the relief he is justly entitled to, without subjecting the other party, against whom there is no complaint, but having, as he supposed, in due course of law, obtained a judgment in his favor, to the delay and expense of a chancery proceeding. There may be cases where, from the fraud or collusion of the party obtaining the judgment, or from peculiar circumstances, it may be proper that a Court of equity should entertain jurisdiction and afford relief, but there is nothing in this bill showing that the complainant has not complete remedy at law, by application to the Court rendering the judgment.

It has been contended, by the counsel for the complainant, that the principles recognized, by this Court, in the case of *Atkinson v. Commissioners of Pickaway county*, (1 *Ohio Rep.* 375,) would prohibit the court of Common Pleas from either setting aside, or suspending the judgment previously rendered by them, unless it was done at the term it was rendered. This court decided in that case, that the Court of Common Pleas could not, at a term subsequent to the *rendition* of a judgment, amend it in a substantial and material part. In the report of that case, the reasons upon which the decision was founded, are not very fully stated. For some years anterior to 1823, Courts were expressly authorized by statute to amend their judgments. At the revision of 1824, this provision was omitted, by the legislature, and as the Court believed, intentionally, and not from inadvertence, as the bill proposed by the committee of revision, and sanctioned by both branches of the legislature, providing for the amendment of judicial proceedings was the same as the former law, with the exception that the power to amend judgments was omitted. The power of Courts to amend their records, in matters of substance, after the term in which final judgment was rendered, is not a part of the ancient common law, nor were the Court aware that the Courts of any of the United States exercised this power over the records of their judgments, unless given them by statute. Courts have supplied omissions and defects in their records by entries of judgments, or other proceedings *nunc pro tunc*, but this bears but little analogy to amending the record of a judgment perfect on its face, so as to make its operation and effect essentially different from what it originally was.

Our peculiar system of jurisprudence seemed to require that the Court of Common Pleas should not possess the power of amending judgments in matters of substance, after the term in which they were rendered. It has been the uniform policy of our laws, to give to a party dissatisfied with the judgment of the Court of Common Pleas, the privilege of appealing to the Supreme Court, within a short time after the term, and thereby vacate the judgment and have another trial upon the merits. But if a judgment with which the party was satisfied

may, after the period for his appealing has elapsed, be amended in substance so as greatly to increase his liability, as was the case cited from 1 *Ohio Rep.* 375, he will be bound by it, without the benefit of an appeal, or a second investigation, by a superior tribunal. It is the same as respects writs of error. A judgment may be rendered in the common pleas against a defendant and the proceedings evidently be erroneous, and yet the party consider it of too little importance to sue out a writ of error within the time limited by statute, and if, after the expiration of the period, the judgment may be so amended as greatly to enhance the amount, the party would sustain serious injury, without any remedy either by writ of error or appeal. But these objections do not exist, nor can these inconveniences ever result from the Court of Common Pleas exercising jurisdiction in setting aside, for irregularity a judgment previously rendered The cause will then stand as if no judgment had ever been entered, the issue made by the parties will be tried by the proper forum, the judgment of the Court given, and either party can avail himself of his right of appeal, or writ of error as he may be advised. A party cannot by this course, be deprived of any right or privilege granted him by law. The delay and additional expense being the only loss or inconvenience he can suffer. The Court are of opinion, that the complainant had adequate remedy at law, and for this reason, the demurrer must be sustained.

ROBINSON v. NEIL.

A declaration upon the covenant of warranty, under the statute concerning covenants real, must aver an eviction.

This was an action of covenant, adjourned from the Supreme Court of Franklin county.

The declaration contained two counts. The first set forth an indenture, made the 7th October, 1822, between the defendant of the one part, and the plaintiff of the other part, by which the defendant conveyed to the plaintiff, for the consideration of five thousand dollars, a certain inlot in the town of Columbus; after reciting the indenture the plaintiff further stated, "that in and by the said indenture it was further witnessed, that the said William did covenant and promise, to and with the said James, his heirs and assigns, that the said premises thereby conveyed were free and clear of all incumbrances, and that he, the said William, would warrant and truly defend the same unto the said James, and unto his heirs and assigns forever, against all claims whatsoever, which said last mentioned covenant of the said William, contained in the said indenture, by virtue of the statute of the state of Ohio, entitled, an act declaring the law in certain cases of actions upon covenants real, and for other purposes, passed the 2nd January, 1815, has the force, effect, and operation of a covenant, that he, the said William, was, at the time of the making said indenture seized of a good and indefeasible estate in fee simple, in the aforegranted premises. And the said James in fact saith, that the said William was not at the time of

the making said indenture, nor hath he been at any time since, seized of a good and indefeasible estate in fee simple, in the aforegranted premises, but on the contrary thereof, certain other persons, at the time of the making the said indenture, and continually from thence until the present time, had and still have, lawful right and title to the said premises, contrary to the form and effect of the said indenture, and of the said last mentioned covenant therein contained, operating as aforesaid by virtue of the statute aforesaid."

The second count was the common count upon a covenant of seizin. The defendant craved oyer of the indenture and made it part of the record. The indenture contained, in fact, no covenant of seizin, nor other covenant except those specified in the first count, to wit: the covenant against incumbrances, and the common covenant of general warranty.

The defendant pleaded, First: *Non est factum.* Second: That the premises were free and clear of all incumbrances, and that defendant had well and truly warranted and defended, &c. Third: That defendant was seized of an indefeasible estate in fee, &c. Fourth: That the plaintiff, on the 7th October, 1822, (the same day on which the deed in the declaration mentioned was executed,) in consideration of five thousand dollars, sold and conveyed to the defendant the same inlot, by deed, with full covenants of seizin, general warranty, &c. Fifth: That on the same 7th October, and before the plaintiff had sustained any damages, the plaintiff, by deed of mortgage, to secure the payment of three thousand dollars, sold and conveyed said inlot to the defendant, with full covenants of seizen, general warranty, &c. Sixth: That a *scire facias* was issued on said mortgage, a judgment had, and the premises were sold, before this action was brought, to the defendant, for a sum not sufficient to satisfy the judgment, &c. Seventh: In the seventh plea the defendant set forth the mortgage mentioned in the sixth plea, and averred that the condition had not been complied with, and that the mortgage money was yet unpaid, &c. whereby the estate became absolute at law, &c.

The plaintiff took issue upon the first and third pleas, and demurred generally to the second, fourth, fifth, sixth, and seventh.

Wilcox and *Hammond*, for defendant. *Ewing*, contra.

By the COURT.

The doctrine settled at this term, in the case of *Administrators of Backus v. M'Coy*, decides this case. Judgment must be for the defendant.

BARR v. HATCH, ET AL.

Equity will aid the defective execution of a power, where the contract is fair, and the power bona fide delegated.

A stranger, who purchases at a sheriff's sale, can protect himself in the same manner and to the same extent, that the judgment creditor could, had he purchased.

A conveyance by a debtor of his whole estate, whilst a suit is pending against him, is not absolutely fraudulent, but circumstances may be admitted to explain and justify the transaction.

Where the vendor retains the possession of lands sold after the deed is executed and recorded, upon a verbal understanding to pay rent, the transaction is not per se fraudulent as against creditors.

A stipulation that the vendor will re-purchase the lands at the same price, within twelve months, at the option of the purchaser, is not evidence of a secret trust for the benefit of the vendor.

Where a debtor before judgment conveys lands bona fide in satisfaction of a pre-existing debt, and executes a defective conveyance, the equity of the purchaser is superior to that of the judgment creditor, and a court of chancery will compel the judgment creditor, if he obtain the legal title under the judgment, to convey to the purchaser.

This cause came before the Court, upon adjournment from Hamilton county. It was argued by WADE and HAYWARD, and N. WRIGHT, for the complainant, and by HAMMOND and BENHAM for the defendant Hatch.

Opinion of the Court, by Judge SHERMAN.

The complainant sets up an equitable title to a house and lot, in the city of Cincinnati, for which the defendant, Jerusha Hatch, heretofore recovered a judgment, in ejectment, against him in this Court, (1 *Ohio Rep.* 390,) and seeks a conveyance of the legal title, and a perpetual injunction of that judgment. The questions, which have been made, necessarily lead to an examination of the facts of the case. The Miami Exporting Company, on the 18th June, 1821, were indebted to the complainant, then a resident of Baltimore, about fifteen thousand dollars, for the notes of the Co. before that time deposited with them. And William Barr and John Sterrett, then the general agents of John T. Barr, with authority to collect and receive his debts, but without a special authority to take lands, and one of them a director of the Co., agreed with the board of directors, to take the house and lot in question, with other real estate, for ten thousand seven hundred and sixty dollars, it being all the lands then owned by the Company in fee. On the same day, the board of directors, by a resolution, authorized and directed O. M. Spencer, their president, to execute a deed in fee simple, with covenants of general warranty, to the complainant, for the real estate so sold, and Spencer did, the same day, in pursuance of that resolution, execute a deed of conveyance for the land, which was immediately recorded, and the complainant's agents gave a check for the amount of the consideration money, and thereby discharged so much of the debt owing by the Company, to J. T. Barr. At the time this arrangement took place, the Miami Exporting Company were justly indebted to the state of Ohio, about nine thousand dollars, and legal process had been served on them, by which it was expected that judgment would be, as in fact it was, obtained, at the June term of the Supreme Court, commencing on the 15th. Upon this judgment execution issued, was levied on the house and lot in controversy, and sold to the defendant, Jerusha

Hatch, on the 25th November, 1821, for 250 dollars. At the time of the sale upon execution, the agent of the complainant attended and gave notice to the agent of the defendant, J. Hatch, and others present, that the complainant owned the property and had a deed therefor from the Miami Exporting Company. The company continued in the possession of part of the house, it being their banking house, from the sale to Barr, to August, 1823, without any written lease, but under a parol agreement with the agents of complainants as to their rent.

At the time the order to execute a deed was made, by the board of directors, they authorized their president to execute a bond to complainant, that if he should re-convey the property within one year, they would place the amount of the consideration money to his credit upon their books.

In July, 1823, the defendant J. Hatch, commenced an action of ejectment for the house and lot in question, against the complainant, and recovered judgment, in consequence of the defective execution of the deed to the complainant, by the agent of the Miami Exporting Company.

It is shown that a fear that the property might be sacrificed, by sale upon execution, under the judgment about to be obtained by the state, was a moving cause with the Company, for entering into the arrangement for the sale to Barr.

The general principle that Courts of Chancery may supply any defect in the execution of a power, whether that defect arises from mistake, accident or ignorance, is not questioned. Whenever the intention to execute a power is sufficiently manifest, but the execution is defective, or it has not been executed according to the terms, or in the form prescribed, equity will correct the mistake or supply the defect. When nothing has been done, or attempted to be done, toward the execution of a power, equity, in general, will not interfere, unless the instrument creating the power shall have vested or recogized, in third persons, rights to secure which the execution of the power is necessary. If the attorney or agent has attempted to execute the power, but has done it defectively, the party claiming under it, cannot avail himself of it, at law, equity interposes its aid, upon the broad principle of relieving against accident or mistake.

It is also a well settled rule, that when an intrument, intended as a deed to convey lands, has not been so executed as to pass the estate, or vest a legal title, equity has considered it a contract for a deed, and decreed, if the consideration has been paid, the title to be perfected.

Upon either of these grounds the complainant would be entitled, as against the Miami Exporting Company, to the relief sought. Nor do they resist it, as they have neglected to answer, and permitted the bill to be taken as confessed against them. The defendant J. Hatch, (the only defendant who has answered the bill,) however contends that the sale to Barr, by the Miami Exporting Company, was fraudulent and void as against their creditors, and that her equity is equal to Barr's, and a Court of Chancery will not deprive her of any legal advantage she may have fairly obtained.

There can be no doubt that the defendant, J. Hatch, under the judgment in favor of the state, can protect herself in the same manner, and to the same extent, that the judgment creditor could, had he purchased. If the sale to Barr was fraudulent and void, as against the judgment creditor, it is fraudulent

and void as against the purchaser at sheriff's sale, under such judgment. Any other rule would compel the judgment creditor to become the purchaser, or deprive him of the benefit of his judgment and execution. No prudent person would purchase, at sheriff's sale, property previously conveyed by the judgment debtor, however apparent or gross the fraud attending such conveyance might be, if he was to be separated from the rights of the judgment creditor, and could not avail himself of them to protect his purchase. It is true, as has been stated in argument, that the purchaser, under execution, holds as purchaser, and not as judgment creditor. But he holds with the benefit of the judgment lien. If a debtor alien his lands, with the intent, and for the purpose of defrauding his creditors, such alineation, as against such creditors, is void, and the estate is considered as remaining in the debtor for all purposes beneficial to the creditor.

It may be attached, if the debtor absconded; is subject to the lien of a judgment; and is in every way liable to be appropriated to the payment of the creditor, in the same manner as if no conveyance had been made. The purchaser at sheriff's sale acquires all the right, title and interest, in the land which the debtor had at the commencement of the judgment lien; is vested with the rights of the creditor; entitled to the same relief, and can protect his title against the frauds of the judgment debtor in the same manner, and to the same extent, that the judgment creditor might have done had he purchased. (2 *John. Ch.* 36.)

It is contended that the circumstances attendant upon, and connected with the sale to Barr, show that it was fraudulent as to the creditors of the *M. Ex. Co.*, and the defendant insists that the proofs establish the following fact, upon which she relies either as badges of fraud, or as amounting to fraud in law:

First: That it was in the intention of the parties to hinder or delay the state in the collection of this debts.

Second: That the grantor was largely indebted in a suit pending, and judgment about to be obtained at the time of the conveyance.

Third: The conveyance was of all the estate of the debtor liable to execution.

Fourth: The grantor remained in possession after the deed, and contrary to its terms, and upon no obligatory or definite lease.

As the question of fraud must, in a great degree, depend upon a minute and careful examination and comparison of the proofs and exhibits in the cause, and upon giving to each circumstance its due weight, it can scarcely be expected that the court should detail each particular fact that may have influenced their judgment, especially when there is no probability that a case attended with the same circumstances will again occur. Such a detail would be tedious as well as useless. It will be sufficient to notice the prominent facts and circumstances.

First. It is said that it was the intention of the parties to hinder and delay the state in the collection of its debt. If the proofs of the case clearly made out the fact, that the sale to Barr was a contrivance to delay or obstruct the state in the collection of its debt, it would be difficult to avoid the conclusion that it was fraudulent. But we are not satisfied that such was the intent of the parties. Spencer, the president of the company, states in his testimony,

that a fear that the property might be sacrificed by a forced sale, under the judgment about to be obtained by the state, was one moving cause for the bank to make the sale to the complainant.

It appears that his agents knew of the pendency of the suit, and one of them was then a director of the company. On the other hand, it is clearly shown that the company were then, and had been for a long time, largely indebted to Barr, who was anxious to obtain payment, which they were unable to make in cash; that his agents offered to take the property at its full cash value, and did, in fact, allow about eight thousand dollars for the house and lot now in dispute. The agents of Barr endeavored to secure the debt due him, but there is no circumstances warranting the belief that they were influenced by the wish to hinder or delay the state. The Miami Exporting Company were then in such a situation that they could not reasonably expect to retain the property, and if it should be exposed to sale, for what it would command, in cash, as it necessarily must have been, upon the judgment in favor of the state, there was a moral certainty, considering the situation of the country at that time, that it could bring but a small portion of its actual value.

That the company should fear a sacrifice of a great part of the value of the property, if sold upon execution, is probable, and that they should be influenced by that fear to accept the proposition of another creditor to allow them the full value, is equally probable, and does not indicate a fraudulent intention, to hinder or delay the state in the collection of its debt. The sale to Barr might, and probably did, produce the effect of delaying the state, in the collection of its debt, but it does not appear that that was the object the company had in view. Their intention appears to have been, to make the best disposition in their power of their property, for the payment of their debts, and we can perceive nothing immoral or unjust in an individual, or corporation, so circumstanced that their property must soon be sold for what it will bring in cash, conveying it to a creditor for its full value, although moved to make such conveyance by the fear of, or the wish to avoid, sacrifice. It is not every disposition of his property, by a debtor, that produces the effect of hindering or obstructing the creditor in the collection of his debt, that is fraudulent; but it is the intent with which the disposition is made, that gives a character to the transaction. If the object of the parties be to obstruct or hinder the creditor, and a conveyance is made for this purpose, such conveyance is fraudulent and void, although a full consideration be paid. But such fraudulent intent ought to be clearly shown, especially when the conveyance is made to a creditor, in satisfaction of a just debt, and for a full consideration. In *Wills v. Franklin*, (1 *Bin.* 513,) it was held to be neither immoral or unfair to prevent a creditor, after suit brought, from obtaining a priority by his judgment. In *Hendrick v. Robinson*, (2 *John. Ch.* 283,) the chancellor, after citing and examining many of the English cases on the subject, comes to the conclusion that a debtor, in failing circumstances, may make a deed or assignment to one creditor of all his property, although it produces the effect of delaying or hindering all other creditors, when such was not fraudulent in its inception or intention.

It is also contended that the grantor, being largely indebted, and a suit pending ready for judgment, at the time of the conveyance to Barr, furnishes strong evidence of fraud. It was said in *Twyne's case*, (3 *Coke* 80,) and has since

been repeatedly recognized, that the pendency of suit, at the time of making sale of goods, was a badge of fraud. This, like every other badge, or indicium of fraud, while it remains unexplained, is a circumstance from which courts are warranted in presuming there is some concealed or secret trust, in favor of the vendor; or that it is a mere contrivance to cover up the property from the creditors. Pendency of suit does not of itself make any alienation by the debtor void, but when such alienation is of all, or nearly all of the debtor's property, it may furnish a strong presumption that such sale was mere pretence and contrivance to avoid payment. When the sale is made to a creditor, in payment of a debt, admitted to be justly due, and for a full and fair price, and the debt discharged, all the presumption of fraud arising from the pendency of suit by another creditor is removed. In this case the testimony clearly shows that the sale to Barr was not made with the intent of withdrawing the property of the company from the payment of their debts, but for the purpose of discharging to the full amount of its value, the claims of perhaps a favored creditor.

Third. The same observations are applicable to the objection that the conveyance was of all the estate of the debtor liable to execution. This is also, as is said in *Twyne's case*, a mark or sign of fraud, a circumstance from which, if unexplained, Courts are warranted in presuming that the sale was made for the use of the vendor, and to conceal the property from creditors; but when all the circumstances attending the sale, show that the intent of the parties was legal and honest, that the property sold was not of greater value than the debt discharged, all presumption of fraud arising from the fact that the conveyance embraced all the estate of the debtor liable to execution, is repelled. There is a class of cases in the English reporters where their Courts have held that an assignment, by a person subject to their bankrupt laws, in contemplation of bankruptcy, of all or nearly all of his effects, is a fraud, upon those laws, as a contrivance to avoid their effect. These decisions go upon the ground that creditors trust to those laws for an equal distribution in case of the misfortune of the debtor; that the whole object of those laws is to secure the management of the property of an insolvent debtor, by third persons and to insure a *pro rata* distribution, and that both of these objects would be defeated, by permitting a debtor, on the eve and in contemplation of bankruptcy, to give priority to one or more creditors, by assigning his effects. Yet there an assignment is held valid, if made at the solication of a creditor, to pay or secure a just debt, although a debtor was at the time insolvent, and contemplated an act of bankruptcy, and the effect is to prevent an equal distribution of the property of the insolvent debtor, thereby defeating the policy of the bankrupt laws. Those cases, and the principles upon which they are decided, have no application where bankrupt laws are unknown, and neither Courts of law or equity possess the power of preventing a failing debtor from giving preference to particular creditors, when there is no fraud or collusion. But the sale to Barr was not a general transfer of all the property of the company, but a conveyance of certain parcels of real estate, being all then owned by them in fee. There is no evidence of the amount or value of the personal property if any, then owned by the company, or the amount due them upon note, bond or mortgage. The fair presumption is, that it was collectively of much greater amount than the judgment in favor of the

state. Banks do not usually, even if not prevented by statute, vest any great portion of their funds in real estate, nor do the holders of bank paper ordinarily look to such property as furnishing the means of payment. By the provisions of certain statutes of our legislature, in force at the time the state obtained judgment, all debts due a bank—notes and every other description of property owned by them could be reached by legal process, and their whole funds in the hands of their agents or officers, and all mortgages and trust estates held by them, could be subjected to the payment of their debts. It cannot, therefore, be justly said that the conveyance to Barr was of all the property of the company liable to execution, when they possessed funds to a great amount liable to be taken, at the option of the creditor, by a special legal process, and sold or appropriated for the satisfaction of his demand.

It is contended that the conveyance of the house and lot now in question, by the Company, and remaining in possession after the deed contrary to its terms, and upon no obligatory or definite lease, is a fraud *per se* against the creditors, and as to them the estate did not pass by the deed. It is unnecessary, in this case, to inquire, whether retaining possession of chattels after sale by a debtor, is as to creditors a fraud *per se*, or merely evidence of a fraud, to be considered in connection with all the other circumstances, to ascertain whether there was fraud in fact. There are numerous highly respectable authorities on this question, directly conflicting with each other, but I have not been able to find a case, where it has been judicially determined that a sale and conveyance of lands was to be deemed absolutely fraudulent in law, against creditors, because the grantor retained possession after the deed. It is true, there is a *dictum* of Lord Rosslyn's to that effect, in the case of *Bates v. Graves*, (2 *Ves. Jun.* 292,) but it was no way material to the decision of the cause, nor is any authority cited, or reason given to support it: and the observation of the Chancellor, if reported correctly is merely used *arguendo*. In *Halbirth v. Sands*, (2 *John. Ch.* 46,) Chancellor Kent relied on the fact of the grantors remaining for many years in possession, without paying rent, and making improvements, among the other circumstances of the case, as evidence that the sale was fraudulent; but it does not appear to have occurred to the counsel or court, in that case, that the grantors retaining possession of the lands, after the sale, was a fraud *per se*. The reasons given, why the possession of goods by the vendor, after the sale, should be considered as a fraud *per se*, are, that the public have no means of ascertaining the ownership of goods, but by the possession, and that the vendor, if the goods are left in his possession, will be enabled thereby to obtain credit and impose upon the community.

But the reasons fail when applied to lands, the title of which does not rest, in parol, nor is it evidenced by possession, but can only be conveyed by deed executed in a particular manner, which the grantee, if he would insure his title, must place upon record, in a public office, open to the inspection of the world. Nor, can any serious apprehensions be justly entertained, that the grantor of lands, by retaining possession will be thereby enabled to obtain a false credit. That the possession of real estate, by the grantor, after an absolute conveyance, may justly be considered as a circumstance tending to raise the presumption of fraud, is undoubtedly correct; but that it does not of itself amount to fraud, and thereby vacate the conveyance, and prevent the estate

had been executed by the parties, in the terms and at the time intended or agreed.

In *Wadsworth v. Wendell*, (6 *John. Ch. R.* 224.) Kent, chancellor, decided that an instrument purporting to be a conveyance by a soldier, of his bounty lands, but which, in fact, had no seal affixed, and was executed before the issuing of the patent, was defective as a legal conveyance, but passed the interest of the grantor in equity, and entitled the grantee to relief against a subsequent purchaser who was chargeable with constructive notice of such defective conveyance. In this case, the chancellor, after reviewing many of the authorities, states the doctrine as too well established, and too just in itself to admit of any doubt, that a defective conveyance binds the lands in equity, against the heir of the grantor, any subsequent voluntary grantee, or subsequent purchaser, with notice of the equitable title of the plaintiff. In *Sugden on Vendors*, 481, it is stated as the result of all the authorities, that a purchaser, by a defective conveyance, will be assisted in equity against heirs or assignees of a bankrupt, all persons claiming with notice, and creditors who did not rely upon the land as their primary security, though they have obtained an advantage at law. It is undoubtedly true, as a general principle that, when the equity of the parties is equal, Courts of Chancery will not interfere to deprive either party of a legal advantage he may have obtained but this rule is only applicable when the equity of the parties is not only equal, but is such as is known and recognized, in Courts of Chancery: and by this rule, so understood, the rights of the parties to the property in dispute, must be tested.

The equity of Barr, on the day the defective deed was executed and delivered to him, was that of a purchaser of the property in question, for a full and fair price, entitling him to a perfect conveyance, while the equity of the state was that of a general creditor of the grantor, seeking satisfaction of his debt, an equity that attached itself to no particular part of the property of the debtor or gave the creditor any interest in, or lien upon the land of such debtor; and would not be recognized in this Court, unless special circumstances rendered it necessary to resort here to aid in enforcing payment. It cannot therefore, be justly said, that the equity of the parties was equal, on the 8th of June, 1821, or that the complainant acquired by his purchase, no other equitable rights than those of a general creditor. Anterior to that time, both the state and the complainants were general creditors of the Miami Exporting Company, having no specific lien upon any property, and their equity, if equity it can be called, was to have payment of their debts: but on that day the complainant became a purchaser, and was, thenceforth, in equity, vested with the rights resulting from this new relation, although the conveyance to him was so defectively executed, as not to pass the legal estate. The defendant, J. Hatch, having purchased at sheriff's sale, under a judgment, the lien of which, commenced, subsequent to the conveyance to the complainant, and with a knowledge of that conveyance and its contents, is not entitled, in good conscience, to retain the legal advantage he acquired by the sheriff's deed, against the elder and superior equity of the complainant.

I have not thought it necessary to consider what would have been the effect of the claim of the complainant, if, instead of becoming a purchaser, he had

taken a mortgage, as collateral security, so defectively executed, that he could he could not avail himself of it at law. There is certainly a difference between that case and the one before the Court; but whether that difference would prevent the Court from correcting the mistake, or supplying the defect in the execution of such mortgage, as against other creditors of the mortgagor, I will not pretend to say. In case a mortgage had been given, the relation of debtor and creditor would have subsisted between the parties: the debt would have remained, upon which suit might be brought, judgment obtained, and other property of the judgment debtor taken in execution; but by the purchase made by the complainant, ten thousand seven hundred and sixty dollars of his debt was paid and extinguished, and as to that sum, the Company no longer remained his debtor.

Decree for complainant, &c.

HEIRS OF LUDLOW *v.* KIDD, ET AL.

Lis pendens, is constructive notice to a purchaser.

Where a bill filed by infants was dismissed on the final hearing, and the decree of dismissal was afterwards reversed on bill of review; held, that purchasers, after the decree of dismissal, and before the filing of the bill of review, are not pendente lite purchasers.

A term for 999 years renewable forever, though a leasehold estate, may be protected in equity.

This cause was adjourned here for decision from Hamilton county. The case is sufficiently stated in the opinion of the Court.

Garrard, Hammond and *Storer*, for the complainants.

Fox, Caswell, Starr and *N. Wright*, for the respondents.

Opinion of the Court, by Judge SHERMAN.

The complainants, the heirs at law of Israel Ludlow, deceased, in 1811, being then infants, filed their bill against Kidd and Williams, to obtain the legal title to a lot in the city of Cincinnati. In 1817, the Supreme Court upon the hearing dismissed the bill upon the merits, the plaintiffs still continuing minors. In 1825, and within the time allowed them by statute, after attaining full age, they filed their bill of review, upon the hearing of which the decree of dismisal was reversed, and the cause continued for hearing. In 1827, after the decree of reversal, a supplemental bill was filed, making the Bank of the United States, Shaw and others, defendants, all of whom, except the Bank of the United States, have pleaded, that after the original decree, and before the filing of the bill of review, they severally purchased, for valuable consideration and without notice, several parts of the lot claimed by the plaintiffs. The Bank of the United States have answered, that after the original bill of plaintiff's was dismissed, and before the filing of the bill of review, Kidd then having the legal title to part of said lot, leased it to Smith & Loring, for 999 years, renewable forever, at a certain yearly rent; that Smith & Loring for a valuable consideration assigned and transferred their interest to the Bank, and that neither Smith &

Loring or the respondents had notice of the claim of the plaintiffs. Those pleas, and the answer of the bank, have been set for hearing without replication, upon the ground that the matter alleged does not constitute a defence to the relief sought by plaintiffs, and they insist—

First: That the purchases were made *lis pendens*, and consequently are affected with notice.

Second: That as to the leasehold estate, a lessee for years cannot protect himself against the right owner, by showing that he was a purchaser for a valuable consideration without notice.

The principle that the purchaser of the subject matter of a suit *pendente lite*, acquires no interest as against the plaintiff's title, whether legal or equitable, is too well established to be now questioned. Such sale as against the plaintiff is considered a nullity, and he is not bound to take any notice of it. The decree of the Court binds the property in the hands of such purchaser, although he is no party to the suit, and paid a full price for it, and had in fact no notice of the pendency of the suit, or the claim of the plaintiff. He is chargeable with constructive notice of the pendency of such suit, so as to render his interest in the subject of it liable to its event. This rule may sometimes produce individual hardship, in its application to a purchaser, for a full consideration, and without actual notice: but if it were not adopted and adhered to, there would be no end to any suit. The justice of the Court would be wholly evaded, by aliening the lands after subpœna served, and the suitor subjected to great delay, expense, and inconvenience, without any certainty of at last securing his interest. It is for these reasons, reasons founded on public utility, and general convenience, that the Courts of Equity of England and of the United States, whenever the question has been made, have uniformly held that he who purchases during the pendency of a suit, is chargeable with constructive notice of the rights of the parties litigant, and bound by the decision that may be made against the person from whom he derives title. This rule adopted by the Courts of Equity from necessity, and in imitation of the common law, that when the defendant in a real action aliens after suit brought, the judgment in such real action will overreach such alienation, is yet considered as against a real and fair purchaser without actual notice, as a hard rule, and Courts gladly avail themselves of any defect in the pleadings or proofs of the plaintiff, to prevent its operation upon such a purchaser. *Sorrell v. Carpenter*, (2 *P. Williams*, 482.) This rule of constructive notice does not extend beyond the termination of the suit, and therefore it has been frequently held that a final decree is not notice of the matters in controversy, and intended to be settled by such claim.

All the purchases were made, after the decree of the Supreme Court, in 1817, dismissing the original bill of the complainants, and before the filing of the bill of review, in 1825, it becomes important to enquire whether there was, during that interval of time, such a *lis pendens*, as to charge the defendants with constructive notice? For if there was, their pleas must be overruled, and their interests abide the event of the suit between the original parties.

The complainants contend, that the decree of dismissal, in 1817, whatever were its terms, cannot be considered as final, it being against infants. But as conditional, and subject to re-examination and correction, after they attained their age, and if this is not so, that the bill of review afterwards filed, is so con-

nected with the original suit, that it will, by relation, be considered as pending, from the filing of the original bill, so as to effect intermediate purchasers with constructive notice.

By a provision of our statute, bills of review must be filed within five years after making the decree complained of, except in certain specified cases, of which infancy is one. A minor being allowed five years after he attains full age, to bring such bill. But a decree which puts an end to the suit, has not heretofore been considered the less final, because it was subject, within a limited time, to be reversed, upon a bill of review. The argument for complainants is, that the statute giving the infants a day after they became of age, to file a bill of review, is to be taken as part of the decree itself, and considered as if the privilege was contained on its face; and that the legal effect thereof, is, that it remains a matter *pendente lite*, until the rights reserved by the decree are extinguished. I do not consider it at all important to determine, in this case, whether the statute is to be so blended with the decree, as to be considered a part of it, for if the decree had, in terms, reserved to the complainants, the right of showing cause against it, after they arrived at age, it would not have had the effect of continuing the cause until that period. A decree to be final, need not conclusively settle and determine all the questions litigated or rights involved in the suit, between the parties, but it must put an end to that particular suit. The decree of dismissal in the original suit, has all the requisites of a final decree. It is so in its terms: it is rendered upon final hearing: the Court adjudicate upon the equity of the parties, and find that equity in favor of the defendants, and that the complainants are not entitled to the relief which they seek, and decree a general dismissal of the bill, with costs. Nothing is reserved or left for further determination by the Court, but the whole controversy between the parties is disposed of, and a final end put to that particular cause, and I cannot perceive that the decree being against infants, at all changes its character, or alters its effect as to third persons.

The master of the rolls, in the case of *Bishop of Winchester, v. Beaver*, (3 *Ves.* 314) in speaking of the infant heir of a mortgagor, observes he may be foreclosed: that a decree can be rendered against him, and he can do nothing but show error: that the person in whose favor the decree is, can "go to market with the mortgaged lands, and the purchaser is only liable to be overhauled in the account."

It is however said, that when the decree upon the original bill is opened or reversed, upon a bill of review, the cause proceeds upon the original pleadings, and is to be considered as pending from the service of subpœna, in the original suit, so as to effect all persons with notice. No judicial decision has been cited by the counsel; and the court have not, in their examination, been able to find any, where precisely this question has been determined. The complainants have, however, referred the court to two cases which they think are analogous, in principle, to this. The case of *Martin v. Styles*, cited by chancellor Kent in *Murray v. Ballou*, (1 *John. Ch.* 578,) and by the master of the rolls in *Bishop of Winchester v. Paine*, (11 *Ves.* 200,) from Lord Nottingham's Prologomina of Equity. The case is thus stated by chancellor Kent: "The bill was filed in 1640, and was abated by death in 1648; and a bill of revivor was filed 1662, and the purchase was made in 1651; and yet as the purchase was, by relation

of the bill of survivor, made *pendente lite*, the purchaser was held bound." And observes, that he does not cite the case with approbation; and that it afterwards came on in a new shape, and is reported in 1 *Ca. in C.* 150. The master of the rolls, in the case in 11 *Ves.* 200, observes, upon the facts of the suit then before him, that the suit was pending when the mortgages were executed; but if the mortgagees had acquired their title during the abatement of the suit, there would have been great difficulty in charging them with notice as *pendente lite* purchasers, although there was an instance of its having been done; and he refers to, and cites the case from Lord Nottingham's Prologomina. The case in 1 *Ch. Ca.* 150, said by Chancellor Kent to be the very case, in a new shape, is reported as an original bill between *Wm. Style*, plaintiff, and *Wm. Martin, et al*, defendants; and the facts are detailed with great minuteness. If the case, as reported in 1 *Ch. Ca.* is correct, and the facts were as they are therein stated, the question supposed by Lord Nottingham to have been decided, that a purchaser for valuable consideration, made after the abatement of the suit, and before the bill of survivor, will, after survivor, by relation, be deemed as made *pendente lite*, could not have arisen.

The plaintiff, Wm. Style, never could, under any circumstances, have claimed the protection of the court as an innocent purchaser for valuable consideration; for his title was as devisee under the will of Sir Humphrey Style, the defendant in the original suit. It appears, also, that the suit was in full prosecution at the time the title of Wm. Style accrued, and the civil war, and the infancy of some of the parties are stated, by the Lord Keeper as a sufficient excuse for the subsequent delay and procrastination; and the purchaser *Wm. Style, (if* a devisee can at all be considered as a purchaser in equity, entitled to protection as such,) was not a party to the suit cited from Lord Nottingham. The doctrine supposed to have been holden in that case, that a purchaser for a valuable consideration, after the abatement of the suit by the death of one of the parties, and before revivor, is nevertheless after revivor, by relation to be considered as a purchaser *lis pendens*, does not appear to have been at all involved in the suit, is contrary to the rule that the doctrine of relation shall do no wrong to strangers, violates the principle adopted by Lord Bacon, and ever since adhered to, that suit must be in full prosecution, has never been sanctioned by any subsequent decision, or maintained by any judge with approbation. The Court would not, perhaps, under these circumstances, find much difficulty in coming to the conclusion, if it were necessary to determine the question, that the case from Lord Nottingham, is not a conclusive authority, that a bill of revivor so relates back to a suit abated by the death of one of the parties, as to bind an intermediate purchaser for valuable consideration without actual notice. But if it be admitted, that the decision stated by Lord Nottingham, is correct, it does not bear such a striking analogy to this case, as will clearly furnish a rule of decision for this. The abatement of a suit by the death of a party, is not a final end to it. The bill of revivor is for the purpose of bringing before the Court some person responsible for costs, and who is capable of conducting the suit; and when it has done this, it has performed its office.

The suit, in all except the name of one party, is the same as before abatement, and goes on to final hearing in the same way as if the death had not taken place. There is no decision of the Court, except that the cause stand revived:

no adjudication on the rights of the parties, merely an order that the heirs or representatives of the deceased party, or other proper person, be permitted to proceed with the cause. It is not, in substance, the commencement of a new suit, but a proceeding in the old one rendered necessary by the death of one of the parties, and may be assimelated in its effect and operation to any of those numerous delays which often occur in the progress of a chancery suit, either from the course of the practice of the Court, or the neglect of the parties. But in this case, there was a decision of the Court upon the rights of the parties, and a final decree pronounced, putting an end to the cause, and so long as that decree remained unreversed, it was conclusive upon the parties as to the matters determined. In the case of abatement and subsequent revival, there is a formal termination, but substantially a mere continuance of the suit, while in such a case as this, there is both in form and substance, a final decree, putting an end to the cause, though that decree was, as in every other case, liable to be reversed upon a bill of review.

The other case relied on by the complainants, as analagous in principle to the present, is the case of *Stackpole v. Gore, et. al.* in the house of lords, (1 *Dows. R.* 19.) It appears by the report of that case, that a decree was obtained in 1733, by fraud and collusion, between a tenant for life and others, without making the remainder man a party for the sale of certain mortgaged lands.—In 1796, immediately after the tenant in tail became entitled to the possession of the premises, he filed a bill to set aside the decree, and the sales under it.—In 1801, the bill was dismissed by the chancellor of Ireland, and an appeal taken to the house of lords.

After the decree of the chancellor dismissing the bill, part of the property was encumbered with portions and jointures, by a marriage settlement. Upon the appeal, the decree of dismissal was reversed, and a decree given in favor of the plaintiff, the tenant in tail, against the purchaser, under the decree of 1733, on the ground, that he not only knew of, but largely participated in practising the fraud, by which the decree for a sale was obtained. Lord Redesdale, in giving his opinion in the house of lords, and it is the only part of the case at all applicable to this, observes: "One of the cases was, however, rather stronger than the rest; it was a marriage settlement made after the dismissal of the bill, by Lord Clare, but still it was a transaction *pendente lite*, since it was still a question for their lordships' consideration, whether the bill was rightly dismissed, and the party thus having notice, must take the settlement, subject to all its legal and equitable consequences, such a circumstance would not be allowed to intercept the course of justice."

Appeals in chancery proceedings, from an inferior to a superior tribunal, have been long established in our system of jurisprudence, and one of familiar and daily occurrence in our practice, and it has never been supposed that the appeal was any thing other than a proceeding in the original cause, and that a purchaser, after a decree in the Common Pleas, was nevertheless liable to be affected by subsequent proceedings, upon appeal to the Supreme Court, should the decree be there reversed or altered. The appeal has the effect of continuing the cause and suspending or vacating the decree of the inferior tribunal, until the cause is heard in the appellate court.

The appellate jurisdiction of the house of lords, in England, in chancery cases, is very similar to that exercised in this state, by the Supreme Court, and the manner of effecting an appeal, and the consequences therefor, are, in many respects, not unlike ours. A petition of appeal must be signed by counsel, and presented to the clerk of the house, within fifteen days after the decree is pronounced, if the house be then in session, and the party appealing must enter into a recognizance in the penalty of two hundred pounds, to pay such costs to the opposite party as the Court shall direct, and is then permitted to take out a caveat to stay the signing and enrolling the same. Upon the hearing of the appealed cause, no new evidence is admitted; differing thus from our practice; and the decree of the lords is sent to the Court of Chancery to be carried into execution. It is, in fact, a re-hearing of the cause by a superior tribunal, and not the institution of a new proceeding, to get rid of a former final decree. If an appeal be taken from the rolls to the chancellor, and from the chancellor to the house of lords, it is, in its progress through these various tribunals, the same suit pending and undetermined, and we cannot perceive any analogy it bears to a bill of review, to reverse a decree signed and enrolled, for errors apparent on its face, brought many years after the decree complained of was pronounced.

The decree dismissing a bill generally puts an end to that suit; the parties are no longer in Court, nor is the cause any further under the control or subject to the direction of the Court, and the circumstance that the decree was against infants, who have a right, by statute, to have that decree re-examined, after they attain their age, nor the fact that the decree is afterward reversed, upon a bill of review, will not have the effect of continuing the original suit, so as to overreach intermediate purchasers, and subject them to the operation of the rule, that he who purchases a right then under litigation, is chargeable with notice, and bound by the decree that may be rendered against the person from whom he derived title.

The case of *Kittley v. Lamb*, (2 *Chan. R.* 404,) quoted and recognized by Lord Redesdale, in *Bennet v. Hammill*, (2 *Sho. and Laf.* 566,) although it involved no question of notice, is an authority to show that a bill of review cannot, by relation, be so connected with the original suit as to affect intermediate acts done in good faith. That was a bill praying that a certain sum of money, in the hands of trustees, might be laid out for the benefit of the plaintiff. The bill was dismissed, and afterwards the trustees paid the money to the other party who claimed it. On bill of review the former decree was reversed, yet the Court determined that the trustees, who relied on the decree of dismission signed and enrolled, were protected in the payment they had made, and that the plaintiff must look to the person to whom the trustees paid it, on the ground that the decree, while it remained in force, bound the rights and justified the trustees, though they paid it voluntarily and without suit.

I have not noticed the argument presented by the defendant's counsel, that the original bill having been dismissed, generally is to be considered as equivalent to a decree establishing the equitable as well as legal title of Kidd and Williams to the lot in dispute, at least as against the complainants, and that the defendants may be considered as purchasers, under a decree, because I have deemed it unnecessary, and that the question did not properly arise in this

case. The general principle that a purchaser under a decree shall not be affected by error in the decree, and that he has a right to presume the Court has properly investigated and decreed the rights of the parties, is readily admitted as correct, but it only applies to sales made under and by the decree of the court.

In this case there was no decree for a sale, nor any conveyance directed, or other act ordered to be done, to perfect the legal title. The defendants in the original suit, having the legal title to the lands in dispute, and the Court find the complainants had no equitable rights superior, made the only decree which, in such a case, could be made, that is dismissing the bill. A purchaser from these defendants, in tracing the title from the first patentee to them, would find nothing to direct his attention to that decree, as their title was independent of it, and he could not therefore be presumed to have advanced his money on the faith due to a decree of the highest judicial tribunal. Nor have I conceived it at all necessary to consider whether, when a decree directing the title of an infant to lands to be conveyed, which by our laws has the effect and operation of a conveyance, shall be afterwards reversed by a bill of review by the infant, an intermediate purchaser who must necessarily trace his title through such decree, can be charged with notice of the rights of the infant, so as to deprive him of the protection given to an innocent purchaser.

The only remaining question is, whether the Bank of the United States are innocent purchasers, in the possession of that part of their premises, which they hold as assignees of a term for 999 years, renewable forever. It is said by the counsel for complainants, that it is indispensable to this defence that the party should claim the fee simple estate, and should fully pay the consideration money. In order to sustain a plea of purchasser for valuable consideration without notice, there must be an averment that the purchase was made from a person seized, or pretending to be seized, in fee, and that the purchase money has been truly and fully paid. But I know of no case going the length of deciding that the purchaser must claim a fee simple estate to avail himself of this plea. If a person seized, or pretending to be seized, in fee of lands, lease them for a term of years to another, who assigns his interest to a third person, such third person, as well as a lessee, is a purchaser entitled to protection in the enjoyment of his estate however small, if he otherwise bring himself within the rule. But whatever may be the technical rules applied to the plea of an innocent purchaser, or whatever averments may be necessary to sustain it, they have no application to the same defence made by answer. A plea of innocent purchase with all its necessary averments, is intended, not only to protect the defendant in the possession of that which he holds, but to prevent the chancellor from exercising jurisdiction to deprive him of any advantage he may have at law however obtained, or take any step, or afford any aid, against him. *Jerrard v. Saunders*, (2 *Ves. Jun.* 254.) But when he defends himself by answer, he must make out a case, showing that in equity and good conscience, his claim to protection, is equal to the complainants to relief, to prevent the Court from interfering against him.

There are many cases where Courts of Equity have protected *bona fide* purchasers of leasehold estates, and of goods assigned, and endorsers of bonds, notes, bills of exchange, bills of lading, &c. in the possession and legal

right they have obtained, without notice of adversary claims. The cases of *Sorrel v. Carpenter*, (2 *P. Wms.* 482,) *Tolland v. Stanbridge*, (3 *Ves.* 485.) *Nugent v. Gifford*, (1 *Atk.* 463,) were cases where the defendants protected themselves as innocent purehasers of leasehold estates; and the same doctrine is recognized in *Le Neve v. Le Neve*, (3 *Atk.* 646,) although the purchaser of a leasehold estate, in that case, was chargeable with notice, and of course could not protect herself.

The case of the *Attorney General v. Backhouse*, (17 *Ves.* 283,) cited and relied on by the complainant's counsel, furnishes an apt illustration of the doctrine of Courts of Equity upon this subject. In that case it appeared that the trustees of a charity, seized in fee, in that character, of some lands, demised them in 1775, to J. Goad, for eighty years. Goad, in 1776, rented part of the premises to Gurney for 64 years. Goad died in 1799, and his executors sold the residue ot the household premises, by auction to the defendant, Backhouse. Gurney's lease was sold by his representatives, and finally came to the defendant Shepherd, who claimed in his answer, that he was a purchaser for valuable consideration, without notice of any fraud, [in the original lease from the trustees, and asserting, that neither Gurney nor his assignees had notice of the lease, under which Goad derived title. The chancellor, after laying down the rule, that to sustain a plea of purchase for valuable consideration without notice, there must be an averment that the party purchased from a person seized, or pretending to be seized in fee, goes on to show, that the lease by the trustees to Goad, may be such an abuse of the charity estate, *as to render it void*, and observes, that "if, therefore, the transaction between Goad and the charity, can be avoided, yet Gurney" (the under lessee) "having given a fair consideration, and held undistributed possession from 1775 to 1803, sales and mortgages having taken place without question, for a period of thirty-five years, the interest of the charity itself, upon all reasonable and equitable principles, requires no more, than that I should transfer to the charity the interest acquired under that bargain." And he refuses to set aside the interest which Gurney acquired by his lease, and protects the sub-lessees, who have given a fair consideration in the interests they had acquired, merely directing them to pay the rent to other persons, than those to whom they had contracted to pay it, if it should appear on the enquiry which he directed, that the charity ought to receive it. In the case of *Nedfearn v. Forrier, et. al.* (1 *Dows. R.* 50,) upon appeal to the House of Lords, it was held, that a latent equity in a third person, should not defeat a *bona fide* assignee of a right, without notice; and the same doctrine is recognised by chancellor Kent, in *Murray v. Lylburn*, (2 *John. Ch.* 441.) The cases of assignment by operation of law, as assignees of Bankrupts, form an exception to this rule, such assignments passing the right, subject to all equities, and the assignments being in the same plight and condition as those from whom they were derived.

In this case it appears that Kidd, at the time he leased part of the lot to Smith and Loring, was seized, or pretended to be seized of a legal estate in fee to it; that neither Smith and Loring, or the Bank, at the time they respectively purchased, had notice of the claim of the complainants; that valuable improvements had been made by them, whereby the property is greatly enhanced in

value, and that the Bank paid a large sum to Smith and Loring for the leasehold estate. Under such circumstances, a Court of Equity cannot interfere and deprive them of their interest in the property, in favor of a latent equity, unknown to them when they purchased. The most the Court could do, would be to follow the example of Lord Eldon, in the case of the *Attorney General v. Backhouse*, before cited, ordering these defendants to pay to the complainants, the annual accruing rent, instead of the person to whom they contracted to pay it, if, upon the final hearing of the cause against Kidd's executors, the Court should be of opinion, the complainants were entitled to it.

The complainants having asked leave to reply to the pleas and answer if the Court should be of opinion that the matter contained in them was a defence to the relief sought, and that the complainants are not entitled to relief against the defendants, upon the pleadings they will be permitted, under the circumstances, to file such replications as they may be advised.

THE HEIRS OF LUDLOW *v.* JOHNSON, ET AL.

There was no law in the territory north west of the Ohio, authorizing executors or administrators to sell the real estate of decedents, previous to August, 1795.

Where a court of competent jurisdiction makes an order for the sale of real estate by an administrator, such order cannot be questioned collaterally; it will protect a purchaser, though unadvisedly or erroneously made.

Under the act of 1803, organizing the judicial courts, the courts of common pleas had jurisdiction to order the sale of the real estate of a decedent.

The act of February, 1804, defining the duties of executors, &c. did not repeal the law of 1795, authorizing courts to direct the sale of real estate, but the law of 1795 was repealed by the general repealing law of February, 1805.

An order of the court authorizing an administrator to sell real estate for the payment of debts, made while the court had jurisdiction, but not entered of record, cannot be rendered valid by a nunc pro tunc order, made at a subsequent term, and after the jurisdiction and power of the court terminated.

A nunc pro tunc order cannot be founded upon parol proof of what was ordered to be done at a previous term.

The granting of letters of administration does not confer upon the creditors such a lien upon the real estate of the intestate, as to preclude the legislature from repealing the law authorizing the sale of real estate for the payment of the debts.

This cause was adjourned here for decision, by the Supreme Court in Hamilton county. It was an action of ejectment, brought by the heirs of Israel Ludlow, deceased, to recover part of lot, number one hundred and three, in the city of Cincinnati. The plaintiffs claimed as heirs at law of Israel Ludlow, and upon the trial of the cause, they shewed that he was seized of the premises in fee, by a deed dated August 21st, 1795, from John C. Symmes, the patentee: that he died intestate the 21st of January, 1804, leaving the plaintiffs his heirs at law: that at the time of his death they were all minors, and remained under that disability until a few years since.

The defendants, to support their possession, shewed that on the 2d of February, 1804, letters of administration were granted on the estate of Israel Lud-

low, to James Findlay, John Ludlow, Sinens Pearson and Charlotte C. Ludlow. They then offered in evidence, a deed from the administrators to Andrew Dunseth, under whom they claim title, and in connexion with the deed, transcripts of the following order of the Court of Common Pleas of Hamilton county and state of Ohio, made, May term, 1824. "Administrators of Israel Ludlow, deceased, exhibit an account current of said estate. John Ludlow and James Findlay, two of the administrators sworn, and pray an order to sell the real estate to satisfy the debts, &c. Court grant the prayer of the administrators, excepting and reserving the farm and improved lands at Cincinnati, together with the houses and lots in Cincinnati." And the following order made at August term, 1805: "On the application of the administrators of Israel Ludlow, deceased, to extend the order of the sale of the real estate to discharge the debts of the deceased, the Court authorized the administrators to sell the houses and lots in Cincinnati, and any other property except the mansion house and farm in the country, so that the whole does not amount to more than $10,000—*This order to be considered of May term.*"

The counsel for the defendant, also gave in evidence the testimony of two of the persons who were judges of the Court of Common Pleas of Hamilton county, in August, 1825, who testified that at May term, 1805, a parol application was made, to extend the order for the sale of Ludlow's real estate, and the Court directed the order to be recorded, but it was entirely omitted, and for this reason, the order was made *nunc pro tunc*, at August term following.

The counsel for the plaintiffs objected to the deed and orders *going in* evidence to the jury. The Court sustained their objections and *overruled the testimony*; a verdict was returned for the plaintiffs subject to the opinion of the Court upon a motion for a new trial.

N. Wright and *Benham*, in support of the motion.

Garrard and *Hammond*, against it.

Opinion of the Court, by Judge HITCHCOCK.

The questions presented to the Court for consideration, in the present case, if not in themselves peculiarly difficult, are unpleasant to act upon, inasmuch as they involve the construction of some of the earliest legislation of the territorial and state authorities, and render it necessary to decide upon the validity of some of the acts of our courts in the infancy of our government.

To prepare laws, which shall meet the exigencies of a people collected not only from every state of the Union, but also from almost every country in the civilized world, is no easy task. People coming together in this manner, and forming a new society, will entertain different views of policy, according to the prejudices which they have imbibed in the different countries from whence they emigrated. When to this circumstance is added the consideration of the limited nature of that power, which was delegated to the first legislative authority in the territory north-west of the river Ohio, it is not surprising that there should be some apparent inconsistency in their acts.

It is much to be regretted that the only evidence we have, of the construc-

tion given to early statutes by the Courts, at or about the times these statutes were adopted, or passed, is derived from their records and from loose tradition. Unfortunately, as is too often the case in new communities, those records were loosely kept, and the tradition, with respect to their practice, is so contradictory as to be entitled to but little reliance. Cotemporaneous construction is of vast importance in deciding questions arising under statutes; but we cannot learn that the principal point, now in controversy, was ever before submitted to any court, in the territory or state, for determination.

The title of the lessors of the plaintiff, to the premises in litigation, is perfect and must prevail, unless that title has been destroyed, or has passed from them in consequence of the proceedings attempted to be proved by the defendants.

The defendants claim title under purchasers, at a sale, made by the administrators of Israel Ludlow, in pursuance of an order of the court of Common Pleas of Hamilton county, acting as a Court of probate of Orphans' Court, entered at the August term, 1805. The validity of this title must depend principally, and perhaps entirely, on the solution of the question, whether the Court of Common Pleas had power or jurisdiction, to make this order. For which purpose it is necessary to examine carefully the pre-existing and various statutes on the subject, of the settlement of the estate of deceased persons, as well as many other statutes, which may bear upon the question, and assist the court in coming to a correct conclusion.

It has been strongly argued, that, from the first existence of a civilized government in the territory, which now constitutes the state of Ohio, lands and tenements, have been assets in the hands of administrators for the payment of debts. The argument to sustain this position is managed with much ingenuity. The principle, however, is unknown to the common law. By that law administrators have no concern with, or control over real estate, and in those states of the Union, where they possess this power, it is in consequence of statutory regulations. So far as they have ever had any controul over real estate, so far as it has been, in their hands, assets for the payment of debts, in this state, either under the territorial or state government, it is in consequence of positive enactment. Let us then ascertain, when the principle was first introduced, as a part of our system of law.

It is not found in the ordinance of Congress, "for the government of the territory of the U. States, north-west of the river Ohio." This ordinance was passed on the 13th of July, 1787, and was ever considered as the fundamental law of the territory. It provides for the appointment of a governor and three judges, to whom legislative power is delegated, until the organization of a general assembly, which is to take place "so soon as there shall be five thousand free male inhabitants, of full age, within the district." The general assembly was organized, in 1799, after which, the legislative power of the governor and judges ceased. The power of the governor and judges, while they possessed it, was very much restricted, as appears by the following quotation from the ordinance. "The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the dis-

trict, until the organization of the general assembly therein, unless disapproved by congress, but afterwards the legislature shall have authority to alter them as they think fit."

Soon after the passage of this ordinance, the territorial government went into operation, and so early as 1788, the governor and judges commenced their legislative duties. It will be readily conceived, that from the restrictions under which they labored, it must have been extremely difficult to establish a consistent code, suited to the wants and necessities of the people. In consequence of this difficulty, they did, in some few instances, enact and publish, original statutes, to complete what they deemed to be a proper system of laws. Those original enactments, were considered to be of doubtful authority.

Although the ordinance provides for the manner in which estates of intestates shall descend and be distributed—in which wills shall be made and executed—in which lands and tenements shall be conveyed; yet it contains no provision on the subject of the settlement of estates of deceased persons. This is left to be provided for, by future legislation.

On the 30th of August, 1788, the law "establishing a Court of Probate," was published. The power and jurisdiction of the Court are defined. Nothing, however, is said, with respect to the real estate of a deceased person, nor had that Court, by its organizing law, any jurisdiction over this description of property; and in fact, after a careful examination of all the statutes of the territory, we have been unable to find any one previous to 1795, authorizing an administrator to sell real estate, or making such estate assets in his hands for the payment of debts. Counsel for the defendants, urge the Court to infer its existence from certain expressions used in a statute passed or published, August 1st, 1792, entitled "an act empowering the judges of probate to appoint guardians to minors and others." In the third section of this act, power is given to the guardians of "idiots, lunatics, *non compos* or distracted persons" to pay the debts of such persons "out of their personal estate, or in case that be insufficient, then out of the real estate, in such way and manner as executors and administrators may, or shall by law be authorized to discharge the debts of deceased persons, when the personal estate of such deceased person shall be found insufficient." This is said to be an express recognition of a law, although it is admitted that no such law can be found.

That there may be, and are, cases in which a statute which can neither be found in the statute book, nor of record in the proper office, should be presumed or inferred is not controverted. But it can only be done under peculiar circumstances. Where, from great lapse of time, or from extraordinary accidents, there is strong reason to believe that a statute may have been lost; and where from a uniform and long continued practice, it may reasonably be supposed that statute once existed, it may be proper to infer it. In England, where government has existed for centuries, there can be no doubt that many statutes have been lost by time and accident, the principles of which are still adhered to, and have been incorporated with, and constitute a part of the common law. Indeed some writers go so far as to insist, that the whole system of the common law is built upon such statutes. But what peculiar circumstances are there to justify the court in making the inference insisted upon by counsel, in the present case?

The lapse of time is not so great as to furnish a reasonable presumption, that the statute may have been lost; for it is now but about forty years since the first organization of the government. Nor is there any pretence that, previous to the year 1795, the practice prevailed of authorizing administrators to sell real estate. So far as the practice prevailed subsequent to that period, it was justified by the law of that year. It must be recollected, that, under both the territorial and state governments, it has been the uniform intention to print every statute of a general nature, and this intention has been carried into execution, unless it be with the exception of the law which the Court are called upon to infer. It is strange indeed, that a law containing such important principles, should be the only one that has never appeared in print. Under these circumstances, to infer a law, as is proposed, would seem to me to savor too much of giving a forced construction to sustain a favorite and pre-conceived opinion, or to enable us to get over a hard case.

It is said that unless such inference is made, the legislative authority which published the law of 1792, must stand chargeable with absurdity. This conclusion by no means follows. Full effect may be given to that act without resorting to presumption or inference. Guardians are authorized to sell real estate, in the same manner that "administrators may or shall by law be enabled," &c. The words may or shall as here used, do not necessarily import that the governor and judges supposed that administrators then had power by law to sell real estate. They more properly refer to future legislation, to provisions which might subsequently be made on this sobject. Had the intention been to refer to an existing law, the word *are* would more naturally have been used. I am aware, that Courts in construing statutes, never ought to criticise upon words, or the grammatical construction of sentences. The intention of the legislature is the great point to be ascertained, and this intention when once discovered, must be followed, whatever may have been the form of words, or phrases, in which it is expressed. But when you can, by giving to words or sentences, their ordinary import, carry into effect a statute, they ought to receive this interpretation, especially when by extending or varying this import the enacting power will appear to have acted absurdly. Had there been a law in the statute book, authorizing administrators to sell real estate, I should at once have said, it was the intention of the governor and judges to refer to that law, together with such others as might subsequently be passed on the same subject. But I cannot, merely from the use of the words before cited, infer the existence of such a law, and then say these words refer to it. It is more reasonable, more consistent with sound construction, to say, that reference is had to future legislation.

From an examination of our statutes, it is apparent, that both the territorial and state legislatures have been in the habit, when referring to the provisions of an existing law, as the rule, according to which certain things which are, by the referring statute, required to be done, shall be done and performed, by making use of words *is or are*, most generally, if not universally. Thus in the act of 1805, for the recovery of money secured by mortgage, the mortgaged premises are to be taken in execution, and disposed of, in the same manner, and under the same regulations that lands or tenements "are or may be by law, disposed of for the satisfaction of executions." The same mode of expression

is made use of in the law on the same subject, passed January 2d, 1810. So in the act of January 15th, 1805," for the appointment of guardians to "lunatics and others," an act in part, upon the same subject with the one now under consideration, guardiars are, by the second section, authorized, in case of a deficiency of personal property, to pay debts, "out of the real estate, in such manner as executors or administrators, are by law enabled to discharge the debts of deceased persons."

It is unnecessary however, to go further in this examination. The existence of the law in contemplation cannot be inferred, and the Court are clear in the opinion, that previous to 1795, there was no law in the territory, making real property assets, in the hands of administrators for the payment of debts.

In that year the orphans' Court was created; and on the 16th day of June of the same year, a law was published, adopted from the Pennsylvania code, which took effect on the 1st day of August, entitled, "a law for the settlement of intestates' estates." The 7th section of this law, enacts, "if any person or persons shall die intestate, being owners of lands or tenements within this territory, at the time of their death, and leave lawful issue to survive them, but not a sufficient personal estate to pay their just debts, and maintain their children, in such case, it shall be lawful for the administrators of such deceased person, to sell and convey, such part or parts of said lands or tenements, for defraying their just debts, maintenance of their children, and for putting them apprentices, and teaching them to read and write, and for the improvement of the residue of the estate, if any there be, to their advantage, as the orphans' Court of the county where such estate lies, shall think fit to allow, order, and direct, from time to time." In the subsequent section of this act, regulations are made with respect to the manner in which real estate is to be sold. It is to be done upon proof made to the orphans' Court, that there is a deficiency of personal property, and, in pursuance of an order of that Court, after due and proper notice given. No other law, containing in any respect, similar provisions, was passed until 1808. The act of January, 1802, for the distribution of insolvent estates, directs that the property, "both real and personal" of the insolvent shall be sold according to law; plainly referring to the law of 1795, which was the only one then in force on the subject.

Whether the law of 1795, which clearly gives authority to administrators, under certain circumstances, to dispose of the real estate of intestates, was repealed before 1808, remains to be hereafter considered.

On the trial of this cause upon the circuit, the defendants offered in evidence the orders of May, 1804, and August, 1805, made by the court of Common Pleas of Hamilton county, in connection with the testimony of two of the judges of that Court, relative to the manner in which the latter order was made. This Court overruled the evidence, and whether it was proper so to do, depends upon the solution of the question, whether the Court of Common Pleas had power to make the latter order, in other words, whether that Court had jurisdiction of the subject matter.

If the Court of Common Pleas, acting as a Court of Probate, or orphans' Court, had jurisdiction, an end is put to the question; the evidence ought to have been received. We cannot enquire collaterally whether that jurisdiction was properly exercised. The order may have been unadvisedly or erro-

neously made, but the purchaser has innocently acquired rights of which he cannot be divested, so long as it remains unreversed. Under our present existing laws, real estate cannot be sold for the payment of the debts of a deceased person, until it is ascertained that there will be a failure of personal assets.

The Court of Common Pleas must be satisfied of such failure, before it can, with propriety, order a sale. Yet when a sale has been made, and its validity is questioned, this Court will go no further back than to inquire, whether it was ordered by competent authority. So far as the interests of the purchaser are concerned, we consider such orders equally available as judgments. The former can be no more impeached collaterally, because there was an abundance of personal estate to have satisfied all debts, than the latter can by showing that the evidence under which they were recovered was insufficient.

We are aware, that by adhering to this principle, great injustice may many times be done to heirs, for it is too often the case, that those who attempt the settlement of estates are regardless of all other interests than their own. The consequences to be apprehended, are not equally dangerous, as those which would follow a different course of decision. While lands are sold for the payment of the debts of the deceased persons, every inducement should be held forth, to encourage purchasers to give the full value of what they buy. And nothing can have a greater tendency to produce this effect than to afford them, when they have purchased a reasonable protection. There is no good reason, why those who purchase from an administrator, should not be viewed with the same favorable eye with those who purchase from sheriffs. In either case, it is proper that the order or judgment should remain final and conclusive upon all parties concerned, until set aside, annulled or reversed.

An attempt has been made to infer the power of the Court of Common Pleas, to make the order in question, from the extent of their jurisdiction in other matters. That Court possesses very general common law, and chancery jurisdiction, and many other matters are confided to its care. But, when acting upon those matters, the Court must act strictly according to the powers conferred. When acting upon questions relative to roads and highways, for instance, that Court is as much restricted by the statute as the county commissioners, when acting on the same subject. When acting as as a Court of probate, or orphans' Court, the same rules must be observed, in ascertaining the extents of its powers as if it possessed no other jurisdiction whatever; and while thus acting, it is a Court of limited jurisdiction. If this principle seems to be departed from, in any measure, in giving the same effect to orders of sale, which are given to judgments, we can only say that such course is justified by the policy of the law and necessity of the case.

Had the Court of Common Pleas power or jurisdiction to make the order of August, 1805? If it possessed this power, it was in virtue of the act of 1795, "for the settlement of intestates estates;" for it is clear that this was the only law previous to 1808 under, or by virtue of which, an executor or administrator could be authorised to sell real estate. This brings us to the consideration of the question, whether this was in force at the time the order was made.

On the part of the plaintiff it is contended, that this law is virtually repealed by the judiciary act of 1803. Or rather, that it ceased to have any effect, inasmuch as the powers confided by its provisions to the Orphans' Court, are not, expressly, transferred or granted to any other Court.

The first section of the third article of the Constitution of the State of Ohio, provides, that "the judicial power of this state, both as to matters of law and equity, shall be vested in a Supreme Court, Courts of Common Pleas for each county, in justices of the peace, and in such other courts as the legislature shall from time to time establish." In the subsequent section of the same third article, provision is made, that the several courts shall have jurisdiction *in such* cases as may be specified by law. Hence, it is manifest that, although the constitution provides, that there shall be a Supreme Court, and Courts of Common Pleas, yet it was not the intention of the framers of that instrument, to organize those courts, or confer upon them any specific jurisdiction. They are merely made capable of receiving jurisdiction. Their organization, the extent of their power, the nature of their duties, and the manner in which this power and those duties are to be exercised and performed, are all left to be provided for by future legislation. The fifth section of the same article provides, however, that the Courts of Common Pleas, in the several counties "should have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law." By a fair construction of this clause, any law which shall confer probate and testamentary jurisdiction on any other court, than *the court of* Common Pleas, would be in contravention of the constitution. *Still, the manner* of exercising this jurisdiction must be declared by statute.

That no inconvenience might be experienced, in changing from a territorial to a state government, the schedule to the constitution provides, among other things, that the laws of the territory, then in force, and not inconsistent with that instrument, with but one exception, shall continue in force and have full effect, until repealed by the legislature.

By the act of 15th April, 1803, "organizing the Judicial Courts," the Court of Probate and Orphans' Court are expressly "*abolished.*" The seventh section of this act, relates to the jurisdiction of the courts of Common Pleas, and enacts that "they shall have power to examine and take the proofs of wills, to grant administration on intestates' estates, and to hear and determine all causes, suits and controversies, of a probate and testamentary nature, to appoint guardians for minors, idiots and lunatics, and to call such guardians to an account."

The twenty-sixth section enacts, "that the Supreme Court, and Courts of Common Pleas, agreeable to their respective jurisdictions, shall take cognizance of all judgments, causes and matters whatsoever, whether civil or criminal, that are now depending, undetermined, or unsatisfied, either in the General Court, Courts of Common Pleas, Courts of Probate, or General Quarter Sessions of the Peace; and the said Supreme Court and Courts of Common Pleas, respectively, are hereby authorized and required, to hear and decide upon the said matters, as fully and completely, as if the said causes had originated in the said Supreme Court or Courts of Common Pleas."

From these provisions, taken in connection with the Constitution, it is clear, that the legislature intended to transfer to the court of Common Pleas, the business of a probate or testamentary nature, then pending in the Orphans' Court or courts of Probate, to be completed in the same manner, and under the same regulations, it would have been completed in those courts, had they continued without any change of jurisdiction.

But in the settlement of the estates of persons who should die, what law was to govern? By what rule would the Court be regulated, in the appointment of administrators, in requiring bonds, and in the discharge of other duties incumbent on them, as a Court, having the sole jurisdiction over probate and testamentary matters? By what rule would administrators be guided in the settlement of estates? Unquestionably by the law of 1795. This was continued by the constitution, and was the only one, or the principal one, in force on the subject. Not a part only, but the whole law remained obligatory. It is true, the Courts of Common Pleas are not expressly authorized to direct administrators to sell real estate, but as the law authorizing such sale was still in force, and as this was the only Court having charge of the settlement of estates, it is proper to give the statute of 1803, such a construction as to confer upon it the same powers as were possessed by the orphans' Court, under the law of 1795. Such was the construction given to the law, at the time, so far as we can gather any thing from contemporaneous practice, and we are not disposed to question the propriety of that construction.

It is further insisted, that the law of 1795 was repealed by the act of February 18th 1804, "defining the duties of executors and administrators, on wills and intestate's estates."

The law in question is not expressly repealed by the last cited act. If repealed at all, it is done by implication. When the provisions of two statutes are so far inconsistent with each other, that both cannot be inforced, the latter must prevail. But if by any fair course of reasoning the two can be reconciled, both shall stand. When the legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No Court will, if it can be consistently avoided, determine that a statute is repealed by implication. The act of 1804, repeals expressly "all laws and parts of laws contrary to the provisions of this act." What parts of the law in question are "contrary to the provisions of this act?" This act relates to the personalities alone, of the deceased individual whose estate is to be settled.

It provides the manner in which this description of property shall be disposed of. So far it repeals the law in question. Nothing is said however concerning lands and tenements. Full effect may be given to it, in all its parts, and still those parts of the law of 1795, which relate to real estate, remain in force. There is nothing inconsistent, nothing contradictory. The two statutes may stand together, making a consistent system, constituting real, as well as personal property, assets in the hands of administrators. From these considerations, we are not prepared to say, that the law in question was repealed by the act of February 18th, 1804.

The next point made by the plaintiff's counsel, is, that the law in question

was repealed, if not before, at the first session of the third general assembly of the state, or the session of 1804—5.

First: By an act defining the duties of administrators on wills and intestate's estates, and providing for the appointment of guardians," passed, February 1st, 1805, or if not then,

Second: By "an act repealing certain laws," passed, February 22d, of the same year. Both these acts, like most of the other laws of the same session, took effect on the first day of June, next after their passage.

It must be recollected, that at this session, the legislature took upon themselves, the task of re-enacting and revising all the laws of a general nature, so as to bring together those in force, and form a system of statutes, suitable to the exigencies of the state. It may be well too, further to bear in mind, that the legislation of the state, shows, that when the legislature have attempted a revision of the laws, one great object has been to collect and embody, in one statute, all those laws and parts of laws, on the same subject, which had been previously enacted, and which it was intended to continue in force.

The act of 1805, "defining the duties of administrators," &c. points out the duties of such persons, authorizing the sale of personal property, unless otherwise directed, by administrators and executors, specifies the manner in which sale shall be made, requires administrators to account, and provides for the distribution of such goods and chattels as shall remain after the payment of debts. Every step which shall be taken by an administrator, from the time of his appointment, until he shall have discharged his duty, by *paying over* and delivering to the creditors and heirs, all the property which *shall have come to* his hands, or possession, in fact, until, so far as he is concerned, the estate is completely settled, is distinctly marked out. And yet not one word is said about real estate. This description of property, the administrator is neither authorized to sell, or otherwise interfere with.

The eleventh section of this act, after repealing certain laws by their title, repeals "all laws on the same subject." The act of 1804, already considered, repeals all laws contrary to its provisions, this, all laws upon the same *subject*. One of the primary objects which the legislature had in view, in the passage of this act, was to provide for the "settlement of intestate estates." It would seem impossible then to resist the conviction, that inasmuch as the law of 1805, repeals all laws on the subject of that law, it repeals the law of 1795, which is upon the same subject. The words used, taken in connection with the subject matter, would seem to be equivalent to a repeal of that law by its title. The view, however, which the Court have taken of the repealing law of the 22nd of February, 1805, supercedes the necessity of a difinite decision upon this point.

The first section of the last named statute, enacts, "that all laws adopted or passed by the governor and judges, prior to the first day of September, *in* the year of our Lord one thousand seven hundred and ninety-nine, and now in force in this state, be and the same are hereby repealed." The same section contains a proviso, "that nothing in this act contained, shall be construed, so as to affect in any manner, any suit or prosecution, now depending, and undetermined, but the same shall be carried on to final judgment and execution, agreeable to the provisions of any of the said laws, under which the suit or prosecution may have been commenced, and the practice of the Courts."

The policy of the general repealing law has been questioned by the counsel for defendants, and the legislature treated with some considerable degree of severity, for its enactment. Whether the law be politic or impolitic, whether its provisions be strictly equitable or otherwise, are considerations which must not operate with the Court, in determining its effect. It is our duty to declare, not to make the law. To do this correctly the ordinary rules of construction must be adopted, and the meaning of words, sentences, and phrases, must not be distorted, in order to sustain a favorite opinion. The great object in the construction of all statutes is to ascertain the intention of the enacting power, and the rules to be observed for this purpose, are simple and too well known to need repetition. This intention having been ascertained, the Court which refuses to carry it into effect, must be regardless of its duty.

A careful examination of the legislative acts of the general assembly, during the session of 1804—5, shows most clearly that it was a leading motive, or intention of that body, to abrogate or repeal all the laws passed or adopted by the governor and judges. Almost every one, and perhaps every one, with the exception of the one in question, is repealed specifically. Yet, as if fearful some one might have escaped their notice, they pass the general repealing law, now under consideration. Why this feeling should have prevailed, why they should have been so solicitous to effect this object, it is not necessary for us to enquire. If the intention is manifest, that is all we should be anxious to know upon the subject.

"All laws adopted or passed by the governor and judges, prior to the first day of September, in the year of our Lord one thousand seven hundred and ninety-nine, and now in force in this state, be, and the same are hereby repealed." These words are clear, precise, specific. No man of ordinary capacity could mistake their meaning. There is nothing uncertain, nothing ambiguous, nothing doubtful. There is in fact, no room left for construction. The law in question, was adopted by the governor and judges, prior to the first day of September, 1799. The intention to repeal it is as clearly manifest, as if it had been named by its title. There is no way to escape this conclusion, except by adopting a train of reasoning, which would go to convince the great body of the community, that there is even more uncertainty in the law, than what is now generally apprehended. The counsel for the defendant, however, labor with much ingenuity and seeming confidence to convince the Court, that although the law in question, may have been included by the general terms of the repealing law, yet that it was not the intention of the legislature to repeal it, but that it should still remain obligatory and in force. The great burthen of the argument, however, would seem to be calculated to produce conviction, that the repeal ought not to have taken place, rather than that it did not take place.

In the first place, it is urged that the general practice of the Courts, in the state, immediately and constantly after this repealing law took effect, shows the understanding to have been, that the law in question was still in force.—We, without hesitation, recognize the principle, that the general practice of Courts goes far, and is very conclusive evidence to establish the contemporaneous construction of statutes, and such contemporaneous construction we should be disposed to adhere to, although it might be difficult, after a lapse of years, to ascertain why it had been given. But the fact, that an order substantially

like the one of August, 1805, was made in one or two cases, or even in two or three different counties, is not sufficient to establish a general practice. Such general practice is denied, and there is not that evidence that it ever prevailed, which would justify the Court in varying, on this account, from that, which appears to be a proper construction of the law.

Had there been a judicial construction given to the statute soon after it was entered, and had that construction been acquiesced in, and adhered to, it would have been conclusive upon the subject. We cannot find however, that any such construction has been given, and it is believed that this is the first instance, in which the question has been presented to any Court, in the state, in such shape as to require a decision. So far as we can ascertain any thing about judicial construction heretofore given, it is to be derived from the order in question.— And from an examination of that order, in connection with the circumstances disclosed, in the case, I have no doubt that the Court of Common Pleas, acted under the impression, that the law of 1795, was repealed. That Court did not, at the time, suppose it possessed the power to authorize administrators to sell real estate. It will be found extremely difficult, under any other impression, to account for their proceedings. After the May term, in which it was pretended the order was in fact made, no proceedings had been had, no sale had been effected, in truth, no attempt had been made to sell. The estate remained as it was before that term. If the law had remained unchanged, an order of sale, to take effect from August, would be equally available and equally advantageous to all concerned, as one to take effect from May. *Had there been* a sale in virtue of the parol or pretended order of May, had an *innocent purcha*ser acquired rights, this would have been a plausible and perhaps sufficient reason why the entry of August, should be directed to be considered as of the May term previous. This is said upon the supposition that the jurisdiction had continued the same. But no single step had been taken to carry that order into execution. Under these circumstances, I can arrive at no other conclusion, than that the Court acted under the impression, that the law in question, was repealed, and that they possessed no further power over the real estate of a deceased person. Entertaining this opinion, but believing that justice required the appropriation of real estate for the payment of debts, and perhaps, feeling that there had been, on their part, some little neglect of duty, the direction was given, to have the "entry considered as of May term," no doubt at the time, being entertained of the propriety of the proceeding.

Let it not be supposed that any corrupt or improper motives are imputed to the members of that Court. Nothing could be further from my intention.— The testimony of one of them, shows what had been done at the previous term, and the motives by which they were actuated, in this proceeding. This testimony, although it is conclusive to remove any unfavorable impression, which might by possibility have been entertained, with respect to the integrity of that Court, in this proceeding, was not competent for the purposes for which it was introduced and was properly overruled. That Court is a Court of record, and its orders, judgments, and decrees, must be proved by the record itself.

"An act for the distribution of insolvent estates," passed February 1st, 1805 is cited, to show that it was not the intention of the legislature, by their general

repealing law, to repeal the law in question. This, like the repealing act, took effect on the first day of June next after its passage. Upon an examination of its contents, it must appear somewhat doubtful, whether its provisions extend merely to personal estate, or both real and personal. The legislature seem to have contemplated the distribution of the whole estate among creditors in proportion to their several demands.

The widow's right of dower is secured and in strict legal parlance this interest grows out of, or is attached to real estate. This circumstance strengthens the opinion, that real property is to be distributed. Still the law does not expressly mention real estate. It contains no provision describing the manner in which it should be disposed of. Whether it shall be done by the "trustees," or the "administrators," whether by order of court or otherwise. Nor is reference made to any other law as a guide in this respect. When we examine the law of January 31st, 1802, for the distribution of insolvent estates, which is repealed by the act now under consideration, and compare that law with this, it must be manifest that there is great uncertainty with respect to the intention of the legislature. The act of 1802, authorizes and directs that the judges of probate whenever the estate of any deceased person shall be insolvent, and after certain enumerated claims are satisfied, "shall order the residue of the estate, both real and personal, the real being sold according to law, to be paid and distributed to and among the creditors" according to the terms of, and under the directions contained in this law, "in proportion to the sums unto them respectively due and owing, saving unto the widow, if any there be, her right of dower in the lands and tenements." The same law provides that the orphans's court, may, upon the prayer of a majority of the creditors, order the sale of such lands and real estate as may be set apart to the widow for her dower, subject to her interest therein; and if such lands should not be disposed of in this manner, then after the death of the widow they are to be sold, and the avails distributed among the creditors, "in proportion to their several demands, which shall have been proved and allowed," according to the provisions of the act.

If it was the intention of the legislature, by the law of 1805, now under consideration, to subject the real, as well as personal estate of the insolvent to sale, by the administrator or by the "trustees" for the payment of his debts, it is strange they should not have made an express provision for it. The law which was then before them, and which they were about to repeal, was, as we have just seen, full and explicit.

Still in this act they are cautious about saying any thing in direct terms with respect to the real estate, and it is only by implication that we can be induced to suppose they had it in contemplation. After mature deliberation, it would seem to me, that a careful comparison of the statute now under consideration, with the one which it repeals, instead of having the effect which is contended for by the defendants, would have a tendency to lead the mind to a contrary conclusion. It would rather furnish additional evidence of an intention, on the part of the legislature, in the session of 1804–5, to withdraw from executors, or administrators, the power of interfering with real estate, and to leave the law, in this respect, as it was previous to the adoption of the statute of 1795.

The Court do not authorize me, however, to say, that by the law now under consideration, it was not the intention to subject the real estate of a deceased

insolvent to the payment of his debts, through the instrumentality of his administrators. But if such was the intention, the act was very imperfect and defective. These imperfections and defects could not be supplied by the Court of Common Pleas acting as a Court of Probate, nor will they justify this Court in refusing to give effect to another statute with respect to the meaning of which there does not appear to be any doubt.

The counsel for the defendants further contend, that it is manifest from the act of 1805, entitled "an act for the appointment of guardians, to lunatics and others," that it could not have been intended to repeal the law in question. The second section of this statute contains a provision that in failure of personal estate, the guardian of an "idiot, *non compos*, lunatic, or insane person," shall be authorized to discharge the debts of such person, "out of the real estate, in such manner as executors or administrators, are by law enabled to discharge the debts of deceased persons, when the personal property is found insufficient." Here, the principle seems to be recognized that, at the time of the passage of this act, there was a law in force, authorizing administrators to dispose of real estate, and such appears to have been the fact. The law defining the duties of administrators, &c. already considered, was passed on the first, and the general repealing law on the second day of February, subsequent to the date of the statute now under consideration. The inferences, however, which are drawn from the above cited expressions, used in this act, cannot be acquiesced in by the Court.

When in one statute a reference is made to an existing law, in *prescribing* the rule or manner in which a particular thing shall be done, or *for the purpose of* ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purposes for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose, the law referred to, is, in effect, incorporated with, and becomes a part of the one in which the reference is made, and, so long as that statute continues, will remain a part of it, although the one *referred to*, should be repealed, such repeal would no more affect the referring statute, than a repeal of this latter, would the one to which reference is made. Such references are common in our legislation, and a slight examination will shew, that this is the effect intended to be produced. We will take, for instance, the several laws for the recovery of money secured by mortgage.

In the 6th section of "a law subjecting real estate to execution for debt," adopted from the Pennsylvania code, on the 15th of August, 1795, provision is made for the recovery of a debt thus secured. After judgment a *levari facias* is to issue, upon which the mortgaged premises are to be seized and sold. In executing the writ the officer is to be governed by the same rules as in executing similar writs in other cases.

On the 26th of January, 1802, the subject was before the territorial legislature, and an act passed, "providing for the recovery of money secured by mortgage." This act, like the 6th section of the law "subjecting real estate to execution for debt," directs that commencement of proceedings on a mortgage, may be by *scire facias;* and, after judgment is recovered, execution is to be issued and levied on the mortgaged premise. In the sale of these lands, the of-

ficer is to be governed by the same rules in giving notice, as "is or may be required by law, for the sale of other real estate taken in execution."

Here let it be remembered, that although the same legislature on the 19th of January, the day before this mortgage law was passed, passed "an act regulating executions," by which the before cited law, "subjecting real estate to execution" was repealed, in neither of these laws was there any provision for the appraisement of lands. They were to be sold for what they would bring.— But the act of February 16th, 1805, "regulating judgments and executions," makes an entire and important change in this respect. Under this law, lands, although subject to execution, must be appraised, and cannot be sold for less than two thirds their appraised value. Thus, the first law on the subject, passed by the state authority, contains this new principle, a principle which has been found by experience, from that day to this, to be highly beneficial, and which I trust will not now be expunged from our statute book, whatever other changes may take place. But to return to the mortgage laws.

On the 12th of February, 1805, the state legislature passed an act bearing a similar title with the one last referred to, on this subject, repealing that statute as this was itself repealed by another act on the same subject, on the 2d of January, 1810, which act still continues in force. Both these last acts, in directing the mode of proceeding after the recovery of judgment, have this provision, "on which a writ of *levari facias* may issue, by virtue whereof the mortgaged premises shall be taken in execution, and disposed of in the same manner, and under the same regulations, that lands and tenements are, or may be by law disposed of for the satisfaction of judgments." The repealing part of the law of 1805, has no saving clause as to mortgages executed prior to the time of its taking effect, but the money secured by them, is to be recovered in the same manner with that secured by mortgages executed subsequent to that time. To remedy this defect, the legislature on the 20th of January, 1807, passed a supplemental act, providing "that all money secured by mortgage prior to the taking effect of the law now in force, entitled an act for the recovery of money secured by mortgage," be, and the same is hereby made recoverable, in the same manner that money secured by mortgages was made recoverable, by the laws in force, at the time such mortgage was executed, any law, usage, or custom to the contrary notwithstanding." A similar provision is contained in the general mortgage law of 1810.

It has been already shown that money thus secured, previous to 1805, was to be recovered, partially at least, according to the execution laws of 1795, and 1802, having reference to the time when the mortgage was executed. Those execution laws were repealed in 1805, by the judgment and execution law of that year. Now by the passage of this supplemental act, those laws are revived; but to a short extent. Not as a law of the land. Not as a rule to govern in all cases, where money shall be made upon execution. But for the purpose merely, of enabling the mortgager to recover his money, according to the law in force at the time he took his security. Adopt the principle contended for by the defendants and it would follow, that those laws are still in force, and that lands may still be sold on execution, without appraisement, contrary to the settled policy of the state for more than twenty-five years. In like manner, the law in question may have been continued in force by the act of the 15th of Jan-

uary, 1805, so far as to enable the guardian of an "idiot, *non compos*, lunatic, or insane person," to sell real estate for the payment of debts of such persons, but not a law for the "settlement of intestate estates, or in other words, the law in question, was incorporated with, and became a part of this latter act.

It is not denied that a law may be revived or continued in force, merely by being referred to, in another statute, so as to require that the same effect should be given to it as was intended by its original enactment. But this, indirect mode of legislation, is not often resorted to, nor ought legislative acts to receive such a construction, as will give them this effect, unless such appears clearly to have been the intention of the legislature. In the present case, a contrary intention seems to have governed that body; and it is impossible for the Court to come to any other conclusion, than that the law in question was repealed, from and after the first day of June, 1805.

Another point made by the counsel for the defendants is, that admitting the law in question to have been repealed, the order of August term, must be effectual inasmuch as the entry is directed to be "considered as of May term, 1805."

The power of Courts to adopt the practice of entering orders, judgments, and decrees, *nunc pro tunc*, is recognized. But had their been any, the least doubt on the subject, the numerous authorities cited by counsel would have removed it. It is many times necessary for the attainment of justice, and, when properly exercised, should be favored. Although the power of a Court to adopt this practice, is admitted, there is more difficulty in determining the effect which shall be given to such order, judgment or decree. There can be no doubt, than such an entry may operate so as to save proceedings which have been had before it is made. For instance, a judgment is actually made at one term, but through mistake or negligence is not entered of record. Subsequent to the term, the plaintiff, under the impression that the business had all been correctly transacted, prays out execution. The property of the judgment debtor is levied upon and sold to a *bona fide* purchaser, who parts with his money in good faith. In such case, the Court may with propriety, enter a judgment to be considered of the term, in which it was actually rendered, and should have been entered. Such proceeding should be for the furtherance of justice. It would do no injury to the parties concerned, and would secure the rights of an innocent purchaser. So in the present case, had there been a sale in pursuance of the pretended order of May term, and had the jurisdiction remained the same, the Court might, with propriety, have made the *nunc pro tunc* order of August. But there had been no sale nor attempt to sell. Under such circumstances, how is such an order or judgment to be considered with respect to subsequent proceedings? Shall it operate as an order or judgment of the term when actually entered, or of a preceding term? Take the case of the term before supposed. It is actually entered at the August term, although to be considered, as of May, and no execution issues until after August. Is this to have the same effect, to all intents, as a judgment of May term? If so, it operates as a lien upon the lands of the debtor from the first day of that term, and an innocent purchaser who had bought between May and August, after having made an examination to ascertain whether their was or was not any lien upon the lands, would be defeated of his purchase. Will it be said, that such purchase would to all intents operate as a judgment of May. Judgments operate

as liens upon the lands of the debtor, from the first day of the term in which entered, and no person buying subsequent to that period would be protected under the plea that he was an innocent purchaser without notice.

Again: If such a judgment was to have the same effect to all intents, as if actually entered in May, the party against whom it was rendered would be deprived of his right of appeal. This right is secured by statute, the party appellant giving bonds, within thirty days after the term, in double the amount of the judgment. The bond could not be given before August, for there would be no judgment of record, no means of ascertaining the amount. And if given after August it would be too late, more than thirty days after the May term, of which the judgment is to be considered, having expired. This consideration induced the court in the case of *Goforths' administrators v. Hezekiah Flint*, to decide that so far as respects the right of appeal, at least, a *nunc pro tunc* judgment must be considered as a judgment of the term when actually entered.

But aside from all these considerations there is to my mind, an insuperable objection to giving this order the effect wished for by the defendants. This is strictly a question of power. Had the court of Common Pleas power, had they jurisdiction to make the order in question? Could they in any shape act upon the subject matter? It is not sufficient that they might once have had jurisdiction, that they might have had it in May for instance, but the jurisdiction must still remain when the act is done. Turn whatever way we can, view the question in whatever position it has been, or can be presented, still the fact remains, and is proved by the record itself, that the order was actually made in August. The Court, it is true, attempt to give it effect by directing that it shall "be considered as of May." But this adds nothing to its validity, unless when the direction is given, the jurisdiction remains as it was, at the time, from which the order is directed to be considered. When jurisdiction over any particular subject is withdrawn from a Court, the effect is the same as to that subject, as if the Court itself was abolished. It will hardly be contended, that a *nunc pro tunc* entry could have been made by the direction of those, who once constituted the Court of Probate, or Orphans' court, subsequent to the judiciary act of 1803, which "abolished" those courts, which would be of any validity. Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed, while they possess the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subjects. To decide differently, would be to adopt a principle, by which a court would be enabled to retain a jurisdiction once possessed, and exercise that jurisdiction contrary to the will of the legislature, merely by making *nunc pro tunc* entries. Such a principle must be fraught with infinite mischief.

This court have now original and exclusive jurisdiction in cases of divorce and alimony. But should the law conferring this jurisdiction be repealed, it cannot be admitted that we could continue to exercise this jurisdiction by decreeing divorces *nunc pro tunc*. If it could be done for one year or term, it might for an indefinite length of time. There can be no doubt such decrees would be *coram non judice* and void. Equally void must be the order of the court of common Pleas, in the present case, its jurisdiction having ceased

when the order was made. Whatever might have been the effect had the jurisdiction remained, under existing circumstances it can be of no avail.

It is said, however, that the order in question was actually an order of May term; and had the court been abolished upon the close of that term, it would have remained obligatory, and might have been proven by parol. The Court of Common Pleas, whether acting as a Court possessing common law jurisdiction, or as a Court of Probate is a Court of Record. The proceedings, orders, judgments, decrees of such Courts, do not rest in parol. It is by their records they speak—and there is but one mode, as a general rule, known to the law, by which their acts can be proved, and this is by the record itself. True, there are cases where after the loss or destruction of a record, you may prove its contents. In such case all has been done by the Court which could be done—a record, which is the legal evidence to prove its acts, has been made. The rights of all parties concerned are fixed, and those rights ought not to be effected by time or accident. But before the contents of a record can be proved, it must be shewn that it once existed and has been lost by time or accident. This shews that the evidence is not introduced to prove the proceedings of a Court as resting in parol, but as they once existed of record. But to introduce parol testimony to prove the proceedings of a Court of Record, and then substitute this testimony for the record itself, would be a novel proceeding. It would be equally absurd to sustain an action of debt upon bond, upon proof that the defendant promised to make such an instrument as is set forth in the declaration, although the fact should be admitted, that the instrument was never executed.

The difficulty in the present cases arises from the circumstances that there is no evidence to shew that an order was made in May. The parol testimony is incompetent for the reason just stated, and the order of August is incompetent because made by a court having no jurisdiction over the subject matter, upon which it was acting.

Another point made, is, that the order in question is but an extension of the one of May, 1804, and must be considered as a part of the same. This suggestion leads to the necessity of an examination of the order last named. It is in these words: "The administrators of the estate of Israel Ludlow, deceased, exhibit an account current, and pray the court to issue an order for the sale of real property to defray the debts due from the estate, &c. John Ludlow and James Findlay, sworn in court, the court order so much of the real property sold, as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." In virtue of this order, what real estate could be sold? Let us assimilate it to a grant, and certainly it cannot be construed to embrace any other property than would be embraced in a grant containing similar or equivalent words. A grants to B all his real estate except a farm and improved lands near a certain place, together with the house and lots in that place. Circumstances might be such as to raise a doubt with respect to the farm and improved land near the place named, but there would be none as to the lots in the place. These are expressly excepted from the operation of the grant, and whether improved or otherwise, can make no difference. It is equally clear that the lots in Cincinnati were excepted from sale by the order now under consideration. And so it was consid-

ered by the administrators, and the court; otherwise the order of August would neither have been applied for, nor made.

This appears to have been a separate and distinct proceeding, carried on for the express purpose of subjecting the town lots and some other property, not embraced in the former order, of sale. It has no further connection with that order than as relates to the description of the property. If this proceeding can be assimulated to a "suit or prosecution," it is a new suit or a new prosecution.

Another point made is, that if the law in question was repealed by the general repealing law of 1805, still it could have no effect upon the administration of Ludlow's estate, inasmuch, as letters of administration were granted thereon, before the latter law took effect. If this position be tenable, it must be, either because, by the grant of letters of administration, administrators acquire rights which can neither be taken away nor varied by legislative enactment; or because creditors, by the death of their debtor, acquire an interest in his estate, which must be satisfied according to the laws in force at the time of his death. It is not believed that either such rights or interests have been acquired.

Whether it be good policy to change an administration law so as to affect an estate already in the course of settlement, may be questionable, but it is not a question for the court now to determine. We are not, however, prepared to say, the legislature have not the power to do it.

It has been done not unfrequently, and the propriety of the course never questioned to my knowledge, in any of the courts of the state. The administrator acts in virtue of powers conferred on him by the statute law, and those powers may be varied as the exigencies of the country require. So long as he governs himself by the laws in force, he can sustain no injury. At no time has he any interest in the property of the intestate, except as trustee for those who have claims upon the estate as creditors or distributees. This trust is not conferred upon or reposed in him by the creditors or distributees, but by the law itself.

Creditors do not by the death of the debtor, acquire any rights to his property, which must necessarily be satisfied in any specific manner. It is proper that their claims should be paid, and with our present ideas of right and justice, we should say, that the real as well as personal estate of the deceased, ought to be applied for that purpose. In some other countries, however, different opinions prevail, and in our own state, it is manifest, there was a time, when this description of property could not be appropriated for this purpose through the agency of administrators. Whether there was any other mode by which it could be reached, it is not necessary now to enquire.

The doctrine is sometimes advanced, that the creditor by the death of his debtor acquires a species of lien upon his property. The nature of this pretended lien I could never fully comprehend. It seems to be something that is indescribable. He undoubtedly has a right to the satisfaction of his debt so far as there is property, which gives a claim that ought to be preferred to that of heirs or distributees. But the manner, in which the property shall be disposed of to give him this satisfaction, must depend upon the law in force at the time he attempts to obtain it. It has long been the policy of this state that judgments should operate as liens upon the lands of the debtor. This lien does not attach in consequence of any natural or conventional right, or in consequence of any

influence of the judgment in itself considered, but in consequence of positive legislative enactment. Upon this principle it has been decided, that the law giving the lien might be varied or repealed subsequently, so as to effect subsisting judgments. With equal propriety might alterations be made in the law relative to the settlement of intestates' estates, even where the estate is already in a course of settlement.

The view which has been taken of the case renders it unnecessary to determine what is to be understood by the words "suits and prosecutions," as used in the proviso of the repealing law, or what effect the repeal shall have upon sales made by the administrator in pursuance of the order of May term, 1804. There can be no doubt but that many difficulties must be overcome in order to arrive at a correct conclusion upon either of those points, but it will be soon enough to solve those difficulties when a case is presented rendering it necessary.

Upon the whole, the court are of opinion that, previous to the year 1795, there was no law in the territory authorizing administrators to sell the lands and tenements of an intestate.

That the law of 1795, "for the settlement of intestate estates," was the first law giving this authority, and the only one previous to June, 1808.

That this law was repealed and ceased to have effect from and after the first day of June, 1805.

That the order of the Court of Common Pleas of May term, 1804, directing the administrators of Israel Ludlow to sell a part of the real estate of said Ludlow, for the payment of debts, did not embrace the premises in controversy.

That the parol testimony offered to prove an order of sale at the May term, 1805, is incompetent.

That the order of said Court of Common Pleas, at the May term, 1805, was *coram non judice* and void. And

That the lessors of the plaintiffs could not be divested of their title in consequence of any act done in pursuance of that order.

Of course the testimony offered by the defendants was properly over-ruled, and judgment must be entered for the plaintiff.

4 HAMMOND. 5

LESSEE OF LUDLOW'S HEIRS *v.* PARK.

When a case is reserved on the circuit, the facts material to its decision, must be drawn up in writing, approved by the court, filed with the papers and transmitted to the court in bank.

An order of court authorizing an administrator to sell real estate, made after the sale, cannot be given in evidence to sustain such sale.

A new trial will not be granted because the court gave a wrong reason for rightly rejecting testimony.

An order of court authorizing administrators to sell real estate, with certain exceptions, cannot be given in evidence to sustain a sale of part of the excepted lands.

Upon a motion for a new trial on the ground of newly discovered testimony, such testimony must be disclosed that the court may exercise a sound discretion in granting or refusing the motion.

This was an ejectment tried before the Supreme Court, in Hamilton county, in which a verdict was found for the plaintiff, and a motion was made by the defendant for a new trial, which motion was adjourned here for decision. The case upon the trial appeared as follows:

The plaintiff proved that the lessors were the heirs at law of Israel Ludlow, who died in Jan. 1804, intestate. A deed from J. Cleves Symmes to Israel Ludlow, for the premises in dispute, was adduced in evidence, with proof of the possession and occupancy of Ludlow until the time of his death. The premises were a twenty-seven acre out lot claimed to be within the plat of the city of Cincinnati. An official copy of the town plat was given in evidence, on which the premises were designated. It was also proven that the premises had been improved, by clearing, enclosing and cultivation, in the life time of Ludlow. Upon these proofs the cause was rested by the plaintiffs.

The defendant then offered in evidence a deed, from the administrators of Israel Ludlow, to himself, for the same premises. This deed bore date on the 21st day of December, 1810, and recited that the administrators had, on the thirtoenth of that same month, sold the premises conveyed, under an order of the Court of Common Pleas of Hamilton county of December Term, 1810. It was conceded that the sale was in fact made, on the day recited in the deed. A certified copy of the order of sale was produced, in the following words:— "17th December, 1810. Petition of the administrators of Israel Ludlow, dec. &c. for to sell real estate to satisfy the demands, &c. which this Court grant." The plaintiff's counsel objected to the admission of this deed and order in evidence, on the ground that, the order, authorizing the sale, being made subsequent to the sale itself, and that fact appearing upon the face of the deed, the sale and conveyance were inoperative for defect of authority in the administrators to make a sale. The Court sustained the objection, and rejected the deed and order.

The defendant's counsel then offered in evidence an order of the Court of Common Pleas of Hamilton county, of May Term, 1804, in the following words:—"The administrators of the estate of Israel Ludlow, dec. exhibit an account current, and pray the Court to issue an order for the sale of the real

property, to defray the debts due from the estate, &c. John Ludlow and James Findlay sworn in court. The court order so much of the real property sold, as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." The plaintiff's counsel objected to this order being received in evidence, because the premises in question, being improved lands near Cincinnati, or a lot in Cincinnati, were not embraced by it; and also because the law in force when the order was made, was repealed in 1806, and no law substituted for it empowering the courts to order the sales of decedent's estates, until 1808. This order was also rejected by the court, and no evidence being given to the jury, divesting the title of the plaintiff's lessors, a verdict was rendered for the plaintiff, under the direction of the court.

The defendant's counsel moved for a new trial, and assigned the following reasons:

1st. The verdict is against law.

2nd. The verdict is against evidence.

3d. The court rejected legal and proper evidence, which ought to have been given to the jury.

4th. The defendant has discovered new and material evidence since the trial.

The newly discovered evidence consisted of an old copy of the plat of Cincinnati, in which the twenty-seven acre out lots were not marked as a part of the town.

The questions arising on the motion for a new trial, were adjourned for decision to the special session, at Columbus. At the time of adjourning the cause, no statement was made and approved by the court, presenting the state of the case, and the questions to be discussed and decided. When the counsel came to prepare their arguments, the counsel for the defendants alleged they had been directed by the court, to argue only a single point, viz: "*Whether any other order could be shewn than that recited in the deed.*" This the plaintiff's counsel denied, and insisted that the whole case was open for discussion, as presented by the facts stated to have transpired at the trial. The cause was argued by N. WRIGHT and CASWELL & STARR, upon this point, and by HAMMOND & GARRARD upon the whole case.

Opinion of the Court by Judge HITCHCOCK.

The practice of the Court requires, that when a cause is reserved for decision at the special session, a statement shall be made in writing, and filed with the papers in the cause, shewing the particular point or points to be litigated or determined. If the question reversed arises upon the sufficiency of the pleading, such statement is unnecessary. Nor is it required in chancery proceedings, where the evidence is in writing, and with the pleading submitted to the court. But where the court is supposed to have erred in the admission or rejection of evidence in the course of a jury trial, which supposed error is made the foundation of a motion for a new trial; or where the court, in the course of such trial, reserves questions for subsequent consideration, such statement is peculi-

arly necessary. Without it, it may many times be difficult to arrive at a satisfactory conclusion. The statement should be drawn up by the counsel excepting to the opinion of the court, submitted to and approved by the court, and filed away by the clerk. This having been done, no room is left for subsequent altercation. The propriety and necessity of this course of practice, is clearly evinced in the present case. No statement in writing was made, consequently the counsel differ as to the precise question reserved. Contrary statements are exhibited, with a view to satisfy the court as to this point. From our knowledge of the gentlemen concerned, we have not the least doubt but that they state the circumstances as they understood them, when these circumstances transpired, but it is manifest there must have been some misapprehension.

The case now comes before the court on motion for a new trial. The motion is grounded upon a supposed error in the court upon the circuit, in the rejection of certain evidence offered by the defendant; and upon the fact that the defendant, since the trial, has discovered evidence material to the issue. Other reasons are assigned in the record, but they do not appear to be relied upon, not being even referred to in argument.

On the trial of the cause to the jury, the defendant offered in evidence a deed to himself, from the administrators of Israel Ludlow, purporting to convey the premises in controversy. The deed bears date the twenty-first day of December, 1810, and recites the fact that the sale was made on the thirteenth day of the same month. At the same time the order of sale of the seventeenth of December, 1810, was offered in evidence to show the power of the administrators to sell.

The recital of the deed states that the sale was made in pursuance of this order. The evidence thus offered was objected to by the counsel for the plaintiff, the objection sustained, and the evidence overruled. In rejecting this evidence the court decided correctly, unless the doctrine can be maintained, that an order of the Court of Common Pleas, authorizing an administrator to sell the real estate of his intestate, will have so far a retrospective operation, as to legalize a sale made prior in point of time to the order itself. An attempt will hardly be made to sustain a principle so absurd. In fact, I do do not understand that there is any complaint in consequence of the rejection by the court of this order.

The defendant next offered in evidence the order made by the Court of Common Pleas at the May Term, 1804. This evidence was objected to for a variety of reasons. It was urged that inasmuch as it appeared from the recital in the deed, that the administrators, in making the sale, and the defendant in purchasing, looked to the order conferring authority upon the administrators to sell. It was further urged that the order of May, 1804, did not embrace the premises in dispute, and if it did, then that that order ceased to operate from and after the repeal of the law of 1795, "for the settlement of intestates' estates." The Court sustained the objection, and overruled the evidence. In deciding the question, an opinion was expressed that the defendant, by the recital in his deed, must be precluded from giving in evidence any other order than that of December, 1810.

Counsel for the defendant contend, that the case was reserved, not so much for the purpose of determining whether this evidence was properly rejected,

as for the purpose of determining whether the opinion thus expressed is consistent with law; and insist that if it is not, a new trial should be granted. On the other hand, it is insisted for the plaintiff, that the whole case is before the Court, and if, for either cause assigned, the evidence ought to have been rejected, then that the motion for a new trial should be overruled. From the recollection of the judge who presided at the trial, as well as from the nature of the case, we are induced to believe that the counsel for the defendant must have misunderstood the Court. In the trial of a cause, a particular item of evidence is offered and objected to for a variety of reasons, one or more of which are sufficient to show that the evidence is improper. The Court in assigning reasons for the rejection of the testimony, express an opinion upon some one point, which cannot be sustained upon legal principles. It is unreasonable, it is contrary to every day's experience to suppose, that upon a motion for a new trial, the court will confine themselves to the consideration of the opinion thus expressed. The only proper enquiry in such case is, was the evidence properly rejected, and that without regard to the particular reasons assigned by the Court when it was rejected. Any other course would lead to manifest injustice. It would be trifling with the rights of the parties.

We come now to the consideration of the question, whether the court mistook the law in refusing to admit the order of May, 1804, in evidence. That order is in these words,—"the administrators of the estate of Israel Ludlow, deceased, exhibit an account current, and pray the Court to issue an order for the sale of the real property to defray the debts due from the estate, &c. John Ludlow and James Findlay sworn in court. The Court order so much of the real property sold as will meet the said demands, except the house and lots in Cincinnati." In offering this evidence, the defendant could have no other object in view, than to sustain his title, by shewing an authority in the administrators to make sale of the premises in dispute.

The administrators might have had authority to sell all the real property of the intestate, with the exception of this identical land, and it could avail them nothing. The object to be effected by the sale, is expressed in the order. It was to enable the administrators to pay the debts due from the estate. It is true the amount of these debts is not stated, yet the order is general to sell "so much of the real property" as will "meet the said demands." No specific property is referred to as that which shall be sold, but all the real property "except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati," are in effect subjected to sale. It would seem that there could be no difference of opinion with respect to the construction to be put upon this order: that there could be no doubt with respect to the property to be sold, or with respect to that exempted from sale.

It is the same import as it would have been, if couched in these words: "The Court order so much of the real property sold as will meet the said demands, *Provided*, the administrators shall not be permitted to sell the farm and improved lands near Cincinnati, nor the house and lots in Cincinnati." The "farm and improved lands," as well as "the house and lots," are exempted from sale.—Such is the manifest intention, and such the construction which would be put upon it by any individual examining the order itself, without being influenced

by any controversy connected with it. Ingenuity of counsel may possibly enable them to give it some other construction; but the Court must collect the intention of the tribunal from which it emanated, by giving to the words and terms used, their usual and appropriate signification. Will it be said it was the intention of the Court to authorise the sale of "the house and lots," or of all the "improved lands" except the farm, or of such "lots" as were not improved? Before I can be satisfied of this, I must be satisfied that the Court did not understand the meaning of language.

The "house and lots," the "improved lands," the "lots" whether improved or not improved, are real property, exclusive of that saved by the exception, and after having given this general authority, it is not to be credited that the Court would proceed to specify "the house and lots," &c. But for the exception, these would have been condemned to sale, by it they are exempted.

The same construction was put upon this order in the case of the *Heirs of Israel Ludlow v. C. & J. Johnston*, (3 *O. Rep.* 578.) That case was repeatedly argued, having been before the Court for years. Every point necessary to decide the case was fully considered, and after much deliberation determined; and the decision upon each point fully concurred in by all the members of the Court present when the case was finally disposed of. It may not be improper to say further, that the Court as at present composed are fully satisfied with the decision of that case. Such being the fact, we shall do nothing to disturb in any one particular the principles there settled.

This construction being put upon the order of May, 1804, it is necessary to consider whether that order would be competent evidence to prove, or as conducing to prove, an authority in the administrators to sell a lot or "lots in," or "the farm and improved lands near Cincinnati." It is argued, that although the order might have been insufficient to sustain the defendant's title, still it was competent evidence. Why? Because, it is said, there might by possibility have been some other evidence offered to show its relevancy. Such other evidence was not offered, and not having been offered, we are not to presume its existence; the legitimate presumption is, that it does not exist. At any rate, the Court must decide upon what was, not upon what might have been offered. Testimony irrelevant to the matter in issue is incompetent. Proof of power to sell one tract of land, no more conduces to prove a power to sell another, than proof of the sale of one tract, conduces to prove the sale of another. The Court from which the order in question emanated, could not confer a greater authority upon the administrators of Ludlow, to dispose of his real estate, than what Ludlow himself might have conferred, in his lifetime, upon an agent, by letter of attorney.

No one will contend that an authority, given to an agent to sell one tract of land, authorises him to sell another. Suppose Israel Ludlow in his lifetime, owning lands in the counties of Warren and Hamilton, had made an attorney authorising him to sell lands in Hamilton. The attorney, in virtue of this order, would most assuredly have no right to interfere with the lands in Warren. But suppose he had sold lands in Warren, and controversy should now arise between the heirs of Ludlow and the purchaser. Will it be said that the power of attorney authorising the sale of the Hamilton lands would be competent evi-

dence to prove, or as conducing to prove, an authority to sell the lands in Warren, and consequently to sustain the title of the purchaser? To my mind it is most clear it would not. So far as respects the Warren lands, the power of attorney would be a dead letter.

It would be the same as if no such power had ever been made. It would have no relevancy to the matter in controversy, of course would be incompetent evidence. I should as soon think, upon a question respecting the title to land in Hamilton county, of receiving in evidence a deed conveying land in a different county, there being in no shape or manner any allusion, in the deed offered, to the land in controversy.

The same principle must apply to the order of May, 1804. In virtue of that order, the administrators of Ludlow claimed the authority to sell, and did sell, certain lands. In that order no allusion is made to "the farm and improved land near Cincinnati," nor to the "lots in Cincinnati," any further than to exempt them from sale. And it would be strange that this order should be received in evidence to prove an authority to do an act which it expressly provided should not be done. If, then, the premises in controversy are within the exception contained in the order, as construed by the Court, the evidence was properly overruled, being irrelevant to the matter in dispute.

Whether the premises are within the exception, remains to be considered.—And here it may not be improper to remark, that in determining whether the Court erred in rejecting the evidence, we must take the case as then presented, without reference to the evidence said to have been newly discovered. Most, if not all the towns which have been laid out in this state, have been surveyed into in and out lots, both, however, being considered as constituting parts of the town. On the 6th of December, 1800, the General Assembly of the Territory passed a law "providing for recording town plats," requiring among other things, that the map or plat to be recorded, should "set forth and describe" the lots intended for sale, by their progressive numbers, &c. In practising under this law, it has ever been the custom to "set forth and describe" both in and out lots upon the recorded plat.

In pursuance of the provisions of this law, the town plat of Cincinnati was recorded. At an early period, town property was withdrawn from taxation for state purposes, and subjected to taxation for county purposes. In levying the county tax, both in and out lots were by statute made liable. All these circumstances go to show that, by our policy, out as well as in lots have been, and are to be, considered as lots in town. An authority to sell lots in town, would authorise the sale of either kind. An exemption of lots in town from sale would exempt either kind. When this cause was in trial to the Jury, the record plat of Cincinnati was before the court. Upon that plat the premises in controversy are "set down and described" as an out lot in the town. In truth it *did not* appear to be controverted that such was the fact. It was so considered by the court, and correctly, according to the evidence then before them. The premises then being a lot "*in*" Cincinnati, and within the exception of the order of May, 1804, that order did not authorise the administrators of Ludlow to make sale of this land; on the contrary, it, in effect, prohibited such sale. It is irrelevant to the matter in controversy between these parties, consequently incompetent evidence, and was properly rejected by the court.

Whether the opinion incidentally expressed by the court, as to the effect of the recital in the defendant's deed, was or was not correct, we do not undertake to determine. It is unnecessary inasmuch as for the reasons already assigned the evidence was properly rejected. Nor shall we express an opinion as to the effect of the repeal of the law of 1795, upon the order of 1804. This presents an important question, and as we are informed that much property depends upon its determination, we are the more anxious to hear every argument which can be urged, before it shall finally be decided.

I now come to the consideration of the motion as founded upon the discovery of new and material evidence. Motions for new trials are addressed to the discretion of the Court, and unless founded upon some supposed error of the Court, will be granted or refused, as the justice of the case may seem to require. A jury may decide against strict law, or against the weight of evidence, and still substantial justice may have been done. Under such circumstances a Court would be unwilling to disturb their verdict. When the motion is grounded upon the discovery of new and material evidence, our practice requires that newly discovered evidence should be disclosed. This is required that the Court may be enabled to form an opinion, whether, by the introduction of such evidence, a different verdict ought to be obtained. In considering the motion, the Court will not inquire, whether, taking the newly discovered evidence in connection with that exhibited on the trial, a jury might be induced to give a different verdict; but whether the legitimate effect of such evidence would be to require a different verdict. In the trial of issues in fact, the Court judge of the competency, the jury of the credibility and effect of testimony.

But after verdict, when the motion for a new trial is considered, the Court must judge not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, a jury ought to have come to the same conclusion they have done, it would be worse than useless to grant a new trial. The effect would be to add to the expense of the litigation, and delay parties in obtaining their rights. On the trial of this cause, the evidence shewed the premises, in controversy, to be a "lot in Cincinnati." The design in introducing the new evidence is to prove that such is not the fact. But would the legitimate effect of this evidence be, to require a different verdict? The premises, if not "in" are certainly near Cincinnati. On the trial they were proved to have been improved prior to the date of the order of May, 1804. By the terms of that order, "improved lands near," as well as "lots in" Cincinnati, are exempted from sale. The introduction of the newly discovered evidence, therefore, taken in connection with that exhibited on the trial, could not avail to sustain the defendants title. There would be the same want of evidence to show an authority in the administrators to make sale of the premises. It would be useless, therefore, to have a new trial.

The motion is overruled, and judgment must be entered on the verdict.

FOWBLE v. RAYBERG, ET AL.

Previous to the act of February, 1824, where a sheiff in office had levied a fi. fa. upon real estate, a vendi. might issue to the same person after his office expired, and a sale made by him would be valid.

Where a return was made on a vendi. by the late sheriff, to December, 1810, that he had sold certain lands previously levied upon, and this return, at December term, 1812, the old sheriff being dead, was ordered to be so amended, on motion of his representatives, as to state, that the property was unsold for want of bidders, and at February term, 1828, this order of amendment was rescinded, on motion of the purchaser at the first sale, and an order made upon the sheriff to execute a deed; held, that these proceedings were regular.

Where land has been sold by a former sheriff who makes no deed till his office expires, the deed must be made by the next sheriff.

Certiorari to the Court of Common Pleas in Hamilton county. On the 5th day of September, 1810, an *alias* or *pluries venditioni exponas* issued from the Court of Common Pleas of Hamilton county directed to Aaron Goforth, late sheriff of Hamilton county, at the suit of Rayberg and Taylor *v.* Fowble, returnable to the December term, 1810, of said Court of Common Pleas. The *vendi.* was returned, with the following endorsement:—"Received this execution 5th September, 1810. On the 8th of December, 1810, I sold the within described land to Christopher Walker, and have made the money. Aaron Goforth, late sheriff."

On the 1st of March, 1828, during the February term, Fowble, by his counsel, moved the Court of Common Pleas to set aside this execution, and all subsequent proceedings thereon. Upon the hearing of this motion, the following facts were proven or admitted, as appears from a bill of exceptions annexed to and made part of the record. It was proven that, on the 21st September, 1808, Rayberg and Taylor recovered a judgment in the Supreme Court against Fowble, for $1,155 53 damages, $8 71 costs in the Court of Common Pleas, and $11 29 costs in the Supreme Court, which judgment was certified to the Court of Common Pleas for execution. It was further proven, that prior to the 5th September, 1810, several executions had issued upon this judgment directed to Goforth while sheriff of Hamilton county. That, on the 21st of September, 1808, a writ of *fi. fa.* was issued, thus directed and returnable to the December term of that year. This writ was returned with the following endorsement made by the sheriff:—"I have levied upon one hundred and six and one third acres of land in N. E. corner of section 25, of township 3, and second fractional range; also, ninety-four and three-fourth acres in section 25, township 3, and second fractional range, which remains unsold." This land was subsequently sold under the *vendi.* of the 5th September, 1810. It was further proved, that on the 1st of May, 1809, a *vendi.* was issued, upon which the sheriff made the following return:—I have held enquiry, and property of the annual rent of $454,62 2-3, and of the value of $4426,62 2-3 as appraised, by inquisition hereunto annexed." It was admitted that Goforth went out of office on the 7th of April, 1809, and had not been sheriff since; and it was proved that on the 8th December, 1810, he was a member of the Senate of this state, soon after which time he died. Previous to his death, no deed was made to Walker conveying

the property sold. It was further proved, that at the December term, 1812, of the Court of Common Pleas, on the application of William Corry, one of the administrators of the late sheriff Goforth, it was ordered that the return made on the 8th December, 1810, to the *vendi.* of the 5th September, be amended, and that the return should be "property on hand for want of bidders." In pursuance of this order, the following amended order was caused, on the 8th May, 1813, to be entered on the same execution: "By virtue of an order of the Court of Common Pleas for December term, 1812, on hearing the representatives of the late sheriff, to amend the said return by returning property on hand for want of bidders, the same is hereby amended accordingly." Subsequent to the amended return, another *vendi.* issued, returnable to the August term, 1813, but on this execution no return had been made. It was further proved, that on the 26th of February, 1828, the amended return so made by William Corry, was, on motion of Christopher Walker, ordered by the Court of Common Pleas to be set aside, vacated and held for nought, the return originally made by the late sheriff reinstated, and that a deed be made to Walker for the land, agreeable to the return made by Goforth on the 8th December, 1810, it being proven that the purchase money had been paid but no deed made. It was also proved, that previous to the act of 1824, "defining the duties of sheriffs, &c. in certain cases," it had been the invariable practice of the Court of Common Pleas in Hamilton county to direct executions to the person, as late sheriff, who had been sheriff, and who had commenced proceedings by levy, &c. but had not finished before the term of office expired. The Court of Common Pleas, after a full hearing, refused to set aside the execution, and overruled the motion of Fowble.

The case now comes before this court upon a supposed error of the Court of Common Pleas in overruling this motion. The errors assigned are in substance—

That the execution was improperly directed, being directed to the late sheriff, whereas it should have been directed to the present sheriff.

That the amended return was improperly set aside and vacated.

That the deed was improperly ordered, after the intervention of so great a length of time after the sale, to wit, fifteen years.

Caswell & Starr, for plaintiff. *Wade*, contra.

Opinion of the Court, by Judge HITCHCOCK.

Previous to the act of 1824, "defining the duties of sheriffs and coroners in certain cases," it was a point frequently mooted among the members of the bar in this state, whether a sheriff, after the expiration of his office, could do any official act; although I am not aware that the question was ever submitted to, or decided by, any of our courts. (*6th Bac.* 161.) In England it seems to have been considered that a sheriff, having levied upon goods, and going out of office, might proceed to sell under a *vendi.;* and if the sheriff returned on the *fi. fa.* that he had seized goods of the value of the debt, and actually paid part of the debt after his term of office expires, he might sell without a *vendi.* If he neglected, a *distringas* issued to compel him to sell and bring in the money, or to compel him to sell and deliver the money to the new sheriff to bring into Court.

But although a *vendi.* might issue to a sheriff after he was out of office, the *fi. fa.* having been levied by him while in office, still I apprehend this practice was not uniform. By the 9th section of the statute of 3*d George* 1, *chap.* 15, provision is made for settling the fees or poundage between a preceding and subsequent sheriff, where the *fi. fa.* is levied by the one, and the *vendi.* issued to the other. (6 *Bac.* 161.) It is true this refers to process out of the exchequer.

As lands, in England, are not subject to sale on execution, we cannot expect to find, in the reports of that country, any decided case precisely in point, although there may be those which are somewhat analogous. There is a difference as to the effects of a levy upon goods and upon lands. Goods when levied upon are taken, or ought to be taken, into the possession of the sheriff, and so far become his property that he may maintain an action if they are taken from him. If of sufficient value to satisfy the debt, and, if lost through his carelessness, he will be liable to the creditor, and may be made to pay the debt. The land, however, remains in the possession of the defendant, and in that possession he cannot be disturbed until it is sold. Nor could the officer be called upon to pay the debt until that event had taken place. For these reasons there would seem to be more propriety in directing the *vendi.* to the new sheriff where the *fi. fa.* was levied upon lands, than where it was levied upon goods. The goods might be retained, or may have been lost by the old sheriff, and thus never have come to the possession of the new one, while the lands would remain in *statu quo.* Still, if the execution be "an entire" thing, and that it is we have no disposition now to controvert, we can see no serious objection to adopting the rule that "he who begins shall end it," as well where lands as where goods are to be sold. At any rate, we must say that the English authorities, so far as they are analogous, seem to favor this practice. Such practice prevails in New York. In that state it has been decided, that a deputy sheriff may complete a sale and make a deed after the principal is out of office, provided the levy was made before. (3 *Com.* 89.)

In this state there was no express statutory provision upon the subject until 1824. We have endeavored to ascertain the practice before that time; for after all I cannot but consider it a mere question of practice. So far as respects the interests of the judgment debtor, if his property must be sold on execution to satisfy the judgment, it is pretty much immaterial whether it is sold by one sheriff or another. Either would be anxious to get for it all it would bring, and if it be real estate, it cannot, at any rate, according to our policy, be sold for less than two thirds of the appraised value. It was the practice of the general Court of the territory to issue the *vendi.* to the officer who made the levy, and that practice was continued, in Hamilton county at least, under the state government. In that county, which is the most populous in the state, and in which the general Court did more business than in any other, this course was invariably pursued, as appears from the case under consideration, until the act of 1824. Into how many counties this practice, after the organization of the state government, extended, we know not, but we do know that in some other parts of the state it was different. Probably in most of the counties the *vendi.* was directed to the sheriff in office at the time of the date of the writ. Neither course is without authority to support it. It is certain that a practice pursued in any one county for a great length of time does not make it legal. But where

it has prevailed for more than thirty years, as is the case with the one under consideration, in the county of Hamilton, this Court will not be disposed to interfere with it, unless it palpably violates some well established rule of law.—The mischief that would result from adopting a different course cannot be foreseen. That it would be extremely great, cannot be doubted.

Although previous to 1824 there was no express enactment upon this subject, still there might have been other statutes bearing upon it. The several laws "regulating executions" and "regulating judgments and executions," seem to be of this character. From the enactment of the law of January 19th, 1802, "regulating executions," to the present time, a principle has been contained in our statutes authorizing the successor of a sheriff, or other officer, who had sold lands and was incapable of making a deed, to make a deed under the order of the Court from which the execution issued, and providing that the deed thus made should be equally valid, as if made by the officer who made the sale. The law of January 19th, 1802, was enacted by the General Assembly of the Territory, at which time the general Court was the highest judicial tribunal of the country.

It has already been remarked, that the practice of that Court was to issue the *vendi.* to the same officer who made the levy. (*O. L. L.* 334.) The 12th section of this statute provides, "that if the sheriff or other officer, who hath made or shall make sale of lands, tenements, or real estate, by virtue of an execution against the same, shall abscond, or be rendered unable, by death or otherwise, to make a deed for the same, it shall be lawful for any succeeding sheriff, or other officer of the county," to make a deed, under the direction of the Court from which the execution issued, the other provisions of the same section being complied with. This act, however, says nothing as to what officer the *vendi.* shall be directed. It does not interfere with the then existing practice in this respect. This same principle is re-enacted in the 13th section of the law "regulating judgments and executions," passed by the State Legislature, Feb. 16th, 1805, and, with but one exception, in precisely the same words. It is again introduced into the act upon the same subject, of the 25th January, 1810, and of which act it constitutes the 16th section. (*O. L. L.* 348.) It is again introduced as the 17th section of the act "regulating judgments and executions," enacted January 31, 1816. (16 *Stat. Laws* 170.) It constitutes the 2nd section of the act of the 24th February, 1820, upon the same subject. (18 *Stat. Laws* 188.) In all the different statutes there is no material variation in the mode of expression. In all of them the provision is, "that if the sheriff or other officer," &c. "shall abscond, or be rendered unable by death or otherwise to make a deed," &c. On the 1st February, 1822, the legislature enacted a new law upon the subject of "judgments and executions," in the 13th section of which we find the same or a similar provision authorizing a "successor" to make deed. (20 *Stat. Laws* 68.) But there is a change in the phraseology as to the contingency upon which it may be done.—This provides "that if the term of service of the sheriff or other officer, who hath made or shall make sale," &c. "shall expire, or if the sheriff or other officer shall abscond, or be rendered unable by death or otherwise to make a deed," &c. then the deed may be made by a "succeeding sheriff," &c. In the previous statutes it was made necessary to make an application to the Court for an

order upon "the successor" to make a deed, where the officer making the sale had absconded, or where he was unable to make it. Under this statute it was necessary to do it, where "the term of service" of the officer making the sale had expired. Now I can see no more impropriety in permitting a sheriff who has sold land upon execution, to make a deed of conveyance after his term of service has expired, than in permitting him to sell on *vendi.* or otherwise under similar circumstances, and, it would seem to me, that, under the statute of 1822, it would have been most proper to issue the *vendi.* to the sheriff in office on the day of its date. Whether this would be absolutely necessary, I do not undertake to say.

This statute, however, has nothing to do with the present case. The land was sold under the law of 1810. These statutes are referred to merely for the purpose of shewing, that up to the year 1822, the Legislatue, in their frequent legislation upon the subject of executions, have said nothing which would lead to a uniform practice in the direction of writs of *vendi.* It was left to the discretion of the Courts. And even after the statute of 1822 above referred to, the practice continued the same as before, different in different parts of the State. To remedy this evil, the legislature, in enacting the law "defining the duties of Sheriffs," &c. passed the 25th February, 1824, provided, among other things, in the 8th section, that "no *venditioni exponas* shall hereafter be directed to or executed by, any sheriff whose term of office may have expired," &c. Since that law, the practice has been uniform throughout the state; before it was variant. From all the consideration we have given the subject, we are not prepared to say that the *vendi.* of the 5th September, was improperly issued in being directed to the late sheriff, or that it was improperly executed by the officer to whom it was directed.

The question next to be considered is, whether the court of Common Pleas erred in setting aside and vacating the amended return. It does not seem to be controverted, that a sheriff or other officer may, by leave of the Court, amend his return? Nothing is more common in practice, and no injury is done to the parties litigant, so long as the return, when amended is consistent with truth. If a false return is made, the party injured has a remedy by action. The order of the Court of Common Pleas vacating the amended return, in the present instance, is complained of, not so much because such order was made, but because it was made after so great a length of time had elapsed. Although the order was to set aside and vacate an amended return, or more properly speaking to vacate an order previously made by the same court, thereby reinstating the return originally made by the officer executing the process, still I do not perceive that it materially varies from ordinary amendments of returns.

I know of no law fixing upon any length of time as an absolute bar to motions for leave to make such amendments. The amendment may be made after the term of office has expired. (6 *Bac.* 160.) In the state of New York it has been decided, that after a lapse of twenty years no judicial proceedings whatever ought to be aside for irregularity. (7 *John.* 556.) In South Carolina it has been said, that it would be dangerous to set aside such proceedings twelve years after judgment. (2 *Ray.* 338.) Which of these rules shall we

adopt? If we take the New York rule, then the motion was made and the vacating order entered within the time; if the South Carolina rule, then it was not within time. The opinions of the Courts of other states are entitled to much consideration, and will, I trust, by this Court, always be treated with respect. But before they can be received as conclusive upon us upon a question of practice, there must be a conformity of decision in the courts of the different states whose practice is referred to. Now the decisions above referred to and they are cited by the counsel for the plaintiff, do not shew this uniformity. Motions to set aside any judicial proceeding, or to amend any return, should undoubtedly be made within reasonable time. In New York, if it be done within twenty years, it is well; but in South Carolina it must be done within twelve. The inference I draw from this diversity is, that there is no positive rule of law upon the subject. Much, nay every thing, must be left to the sound discretion of the court. A court should unquestionably be more cautious in permitting an amendment, after a great lapse of time, than where the transactions are fresh, and the circumstances may be supposed to be more fully within the recollection of the officer making the amendment. It cannot but be seen however, that the present case is somewhat peculiar in its circumstances. The sheriff had returned that he had sold the land and made the money. This return remained upon the execution during his lifetime, but after his death it was amended at the suggestion of his administrators.

If the court were satisfied that the order for this amendment was improperly made, it was within their discretion to vacate it, thereby leaving the return upon the execution as it was left by the officer to whom it was directed, and by whom it was executed. The question now to be considered, is not whether this Court, under similar circumstances, would have done as was done by the Court of Common Pleas, but whether that Court, in the exercise of their discretionary power upon this subject, have violated any principle of law. We do not perceive that they have.

It is farther alleged that the Court erred in ordering a deed after the lapse of fifteen years from the time of the sale.

The law "regulating executions," passed the 19th January, 1802, and which has already been referred to, provided, that if any sheriff or other officer, having sold land, should "abscond, or be rendered unable by death or otherwise, to make a deed of conveyance for the same," &c. then "the successor" of such sheriff or other officer might, under the order of the court from which the execution issued, make a deed to the purchaser, which should, to all intents, be equally valid as if made by the officer making the sale. The same principle has been contained in all the statutes upon the same subject, and there have been no less than seven of them, beside amendatory acts, from that time to the present. In the present case the execution was issued from the court of Common Pleas. It has been proven to the satisfaction of that court, that sale was "fairly and legally made," and that the vendee "had paid the purchase money." The fact that the purchase money had been paid, constituted, on the part of Walker, a strong equitable claim, and the proof introduced, was such as, in contemplation of the statute, would require of the Court, in ordinary cases, to make the order. It certainly is not a little extraordinary, that the business should have rested for so great a length of time. Nothing seems to have been

done in it from 1812 to 1827. This circumstance would undoubtedly make the court more astute in the examination of the testimony, still as the statute makes no provision as to the time within which the order shall be made, we cannot say that this circumstance of itself would be sufficient to render the order, when made, illegal.

It has been urged in argument, that the deed thus to be made, should be made by the *immediate* successor of the officer making sale. But is this a fair construction of the statutes on the subject? To the court it would seem that it is not. It is true, that all the statutes "regulating executions" up to the year 1822, speak of "the *successor*" as the person who shall make the deed, in case the officer making the sale shall be unable to make it. The definite article "*the*" being made use of, perhaps a strict grammatical construction would confine the power of making deeds, to the immediate successor of the officer making the sale. Courts, however, do not seek principally for grammatical construction in ascertaining the meaning of statutes. It is their duty to carry into effect the intention of the enacting power, although, in so doing, the rules of grammar may be violated. To arrive at this intention, perhaps there is no rule of more general application than this: to "consider the old law, the mischief, and the remedy." Suppose we apply this rule to the statute of January 19, 1822. I speak of this statute, because it is the first in our statute books which authorizes "*the successor*" to make deeds where his predecessor had made sales, and because since that time there has been no change upon the subject, certainly not before 1822. What then was the old law when this statute was enacted? The officer who made the sale, must make the deed. What was the *mischief*? The officer who made the sale might "abscond, or be rendered unable by death or otherwise" to make the deed, consequently the purchaser must lose the benefit of the purchase, and if the purchase money had been paid, must also lose the purchase money. What is the remedy? In case of the inability of the officer who made the sale to make the deed, any individual who may subsequently hold the same office, may, under the direction of the court from which the execution issued, make the necessary deed and conveyance, which shall have the same effect "to all intents" as if made by the officer making the sale. Adopt the construction contended for by the plaintiff's counsel, and the mischief resulting from the old law would be but partially remedied. The *immediate* "successor" of the officer making the sale, might, as well as his predecessor be "rendered unable by death or otherwise," to make a deed. He might, in fact, vacate his office before a term of the court from which the execution issued, should intervene, in which the necessary order could be made. The intention of the legislature must have been to secure to the purchaser the benefit of his purchase, and this intention could not, in every case, be carried into effect, were the construction insisted upon by the counsel for the plaintiff to prevail. However *it might* have been under the laws previous to 1822, the act of the 1st February of that year, "regulating judgments and executions," places the question beyond a doubt. The thirteenth section of that act provides, that if the officer making the sale, shall be incapable of making a deed, then "it shall be lawful for *any* succeeding sheriff or other officer to do it." 20 *Stat. Laws*, 74. The same phraseology is used in the statute of February 4th, 1824, (22 *Stat. Laws*, 113,) under which statute the deed in the present case was ordered.

It has been further urged, that the *vendi.* and the proceedings under the same, were irregular, inasmuch as there was no endorsement of *nulla bona* upon the writ of *fi. fa.* Had this been the fact, a difficult question might have been presented. But we are satisfied from a careful examination of the record in this case, no question is presented as to the necessity of such endorsement. Counsel have been led into an error, by confounding the case of *Fowble v. Walker*, decided at the present special session, with this case. In that case, it is true, it was proposed to show that there was no endorsement of *nulla bona*, but the Court of Common Pleas rejected the evidence as coming in at too late a period. In the present case, it does not appear whether such endorsement was or was not made.

Upon the whole, we are not prepared to say that there is any thing erroneous in the decision of the Court of Common Pleas; the same must, therefore, be affirmed.

FOWBLE v. WALKER.

Where a party is in court when an order is made affecting his interest, and he makes no objection, he cannot, of right, be heard upon a motion to rescind such order.

This case came before the court in Hamilton county, and was adjourned for decision at this special session. The record discloses the following facts:—On the 21st of September, 1808, Rayberg and Taylor recovered judgment against Fowble for one thousand one hundred and fifty-five dollars fifty-three cents, damages; eight dollars seventy-one cents costs, in the Court of Common Pleas, and eleven dollars twenty-nine cents costs in the Supreme Court. On the 21st of October, 1808, a writ of *fi. fa.* issued to the sheriff of Hamilton county, returnable to December term of the same year. On this execution the sheriff, Aaron Goforth, returned:—"I have levied on one hundred and six and one-third acres of land in N. E. corner of section twenty-five, township three, and second fractional range. Also, tynine-four and three-fourth acres in lot twenty-five, township three, second fractional range, which remains unsold." On the first of May, 1809, a *vendi.* issued, upon which the sheriff made the following return:—"I have held inquiry, and property of the annual rent of four hundred and fifty-four dollars sixty-two and two-third cents, and of the value of four thousand four hundred and twenty-six dollars sixty-two and two-third cents was appraised by inquisition hereto annexed."

On the 5th of September, an *alias vendi.* issued, directed to Aaron Goforth, late sheriff of the county of Hamilton, on which the sheriff made return that he had sold the property to Christopher Walker on the 8th day of December, 1810, for two thousand nine hundred and seventy-six dollars. This return was signed by "Aaron Goforth, late sheriff." Goforth died soon after, and before any deed was made. At the December term, 1812, of the Court of Common Pleas, on the application of William Corry, one of the administrators of the late sheriff Goforth, it was ordered that the return made on the 8th of December, 1810, should be amended, and it was accordingly amended to read as follows:—"Property on hand for want of bidders." Subsequent to this, another *vendi.* was

issued, but no return made. Here the matter rested, until December term of the same court, 1827, when a motion was made by Walker, for an order to the present sheriff, to execute a deed on the return made by the late sheriff Goforth, upon the execution of the 5th September, 1810, and also to vacate the order and amended return, made at the instigation of the administrator of Goforth, at the December term, 1812. This motion was continued to the February term, 1828; and at that time, to wit: on the 26th day of February, it being proven that the purchase money had been paid, the Court, upon examination of the whole case, made the following order:

"William Rayberg and William W. Taylor, v. Jacob Fowble, executor, No. 59, to December term, 1810, on judgment as follows:—Damages, one thousand one hundred and fifty-five dollars fifty-three cents; cost, C. P. eight dollars seventy-one cents, S. C. eleven dollars twenty-nine cents. Interest from 21st September, 1808. On motion, the Court set aside the amended return made on the above execution, by the administrators of Aaron Goforth, deceased, and reinstate the former one, and order the said amended return to be held for nought, and that all the subsequent proceedings had by reasons of said amended return, be also set aside and held for nought. Jacob Burnet sworn and examined.

The Court having carefully examined the proceedings of Aaron Goforth, Esq. late sheriff of Hamilton county, on the above execution, order it to be entered of record; they are satisfied that the sale of the property therein described, on the 8th December, 1810, to Christopher Walker, for the *sum of two* thousand nine hundred and seventy-six dollars, has been, in *all respects, in* conformity with the statute. It is therefore ordered by the Court, that John C. Avery, Esq. sheriff of Hamilton county, make and execute a deed to the purchaser accordingly; and from testimony exhibited, Court are satisfied that the proceeds of the sale have been regularly paid over."

On the following day, to wit, the 27th day of February, 1828, Fowble made a motion in the same court, to set aside and vacate this order, which motion was continued over to the 6th day of March and then over-ruled, the Court refusing to sustain the motion, on the ground, that opportunity had been offered to show cause why the order should not have been granted, but that none had been shown.

When the motion was over-ruled, Fowble, by his counsel, tendered a bill of exceptions, which was sealed by the Court. The bill of exceptions, discloses among others, most of the foregoing facts. It also shows, that while the motion of Walker was pending, Fowble was in court, that Goforth, when the sale was made, had ceased to be sheriff, that other judgments were recovered against Fowble, executions upon which were in the hands of the sheriff at the same time with the execution in favor of Rayberg and Taylor, that it *did not* appear, that there was an endorsement of *nulla bona*, upon any of the writs of *fi. fa.* &c.

The case now comes before the court, on a writ of *certiorari*, to reverse the decision of the Court of Common Pleas, on the motion submitted by Fowble.—Various errors are assigned, but it is deemed unnecessary to state them specifically.

Caswell and *Starr*, for plaintiff. *Wade*, for defendant.

Opinion of the Court, by Judge HITCHCOCK.

Notwithstanding the variety of facts which are spread upon the record in this case, and the variety of errors assigned, it seems to the Court, that the principles upon which it must be decided, are confined to a very narrow compass. Had the plaintiff shown cause against the motion which resulted in the order of the 26th February, 1828, while that motion was pending, had the Court of Common Pleas adjudged the causes thus shown insufficient, and had the plaintiff tendered a bill of exceptions, spreading the same facts upon the record, as they appear upon the decision of his own motion of the 27th February, the question presented would have been different, and probably of more difficult solution. We should then have been under the necessity of inquiring into the validity of that order. The arguments of counsel, as well as the assignment of errors, seem to be predicated upon such a state of case. An examination of the record shows an entirely different case. It is the proceedings and decision upon the motion of the 27th February, made by Fowble himself, and not upon the motion made by Walker, at the November term, 1827, of the Court of Common Pleas, which is said to be erroneous. Fowble, although in court, did not show cause against the motion first above referred to, he made no objection to the order, he lay back until the order was made, and subsequently submitted his own motion to the court, to set aside or vacate this order. The only question which can now be examined is, whether the court erred in refusing to sustain this motion.

Motions of this description, or those somewhat similar in their nature, are frequently made, and are always addressed to the sound discretion of the court. By sound discretion, I do not mean an arbitrary discretion, but such a discretion as may be exercised without the violation of any principle of law. Parties, not unfrequently, in the progress of a cause, lose advantages in consequence of their own negligence or laches, to which they may or may not be restored on motion, at the discretion of the court. If restored, it must be upon such terms as the court think proper to impose. Motions to set aside nonsuits or defaults, for new trials, to amend pleadings, &c. are within every day practice, and it is discretionary with the court to grant or refuse them. Where, however, an advantage has been lost to a party in consequence of sheer negligence, it is rare indeed, that a court will on motion grant relief. For instance, a defendant neglects to plead, and suffers judgment to go by default. It must be an extraordinary case, that will induce the court to set aside the default, unless the defendant offers some plausible excuse at least, for his neglect.

The motion of Fowble is not so far dissimilar to those referred to, but that the same principle ought to govern in the settlement of it. Had he had no day in court, he would have appeared under more favorable circumstances. But he had a day in court, and it was owing to his own laches that he was deprived of a full investigation. He neglected to shew any cause against the motion of Walker, until that motion was disposed of by making the order of 26th February. He made no excuse for this neglect, and on account of this neglect, the

court not only refused to sustain, but over-ruled his motion of the 27th February. It was within the discretion of the court to grant or refuse it, and we are not prepared to say, that in the exercise of that discretion, any principle of law was violated, that any error was committed.

The decision of the Court of Common Pleas is affirmed.

BUSTARD v. DABNEY, ET AL.

Equity will not aid a creditor to subject the real estate of an intestate, where the heirs and representatives are non-residents, and where no letters of administration have been taken out in this state.

The creditor has a complete remedy at law.

This was a suit in chancery adjourned here for decision from the county of Clermont. The bill charges that Oliver Fowler died indebted to complainant: that he left a will, which was duly proven and recorded in the state of Virginia, where he died: that administration with the will annexed, was granted to John B. Dabney, who assumed the execution of said trust: that complainant brought suit against him in the County Court of Campbell county, Virginia, and at the November term of said court, in the year 1825, recovered a judgment against him for two thousand and seventy-six dollars seventy-four cents, and six per cent. per annum interest on two thousand dollars of said sum, from *July 11th*, 1821, and on seventy-one dollars ninety-one cents, from April 27th, 1822, and costs of suit. The bill further alleges, that no part of said judgment has been paid, and that the administrator has no assets in his hands out of which to pay it. The bill then charges, that the decedent or testator died seized of certain tracts of land in the county of Clermont, describing them, and which are particularly described by the survey. The bill makes the administrator, widow, and heirs, parties, and prays that the lands may be sold to pay this debt and costs. The defendants are all non-residents. The infant heirs who are defendants, have filed their answer by Thomas Morris, their guardian, *ad litem*. All the other defendants have failed to answer, and are in default.

Benham, for complainant.

Opinion of the Court by Judge HITCHCOCK.

In all cases where application is made for the extraordinary interposition of a Court of Chancery, in granting relief, the first enquiry which presents itself is, whether the complainant has plain, complete and adequate remedy at law. If he has such remedy, he must seek it through the courts of law. It is not sufficient for him to shew that he is entitled to redress, he must show that he is entitled to it, in the manner and in the court in which he seeks to obtain it.

Our laws are different from those of England, and some of our sister states, on the subject of the settlement of estates. The only privileged debts with us, are those contracted in the last sickness of a decedent, and for funeral charges. All others are to be paid in equal proportion. To adopt any course of proceed-

ing which would interfere with this principle, would have a tendency to defeat the policy of the law.

By the constitution itself, the Court of Common Pleas is vested with the "jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians," &c. *Art* 3, *Sec.* 5. Every legislative provision which is necessary, has been made for the settlement of estates. The rights of creditors, as well as all others interested, are well secured. The first section of the act defining the duties of executors and administrators," (22 *Statute Laws*, 125.) prescribes the duty of the Court of Common Pleas, in the appointment of administrators, where any resident of the state may die intestate. If the widow or next of kin will not accept the trust, then any creditor of the intestate, who will apply, may be appointed. Provision is made in the same law, directing the course to be pursued, should a will subsequently be discovered and proved in court. From such time, the powers of the administrator must cease, but his acts previously performed, are obligatory. The 24th section of the same act provides for the appointment of administrators, upon the estates of such persons as shall die leaving property real or personal within the state, such person not having been a resident of the state. And further, that the same "rules and regulations" shall govern as in other cases.

Pursuing the provisions of this law, the complainant has complete and adequate remedy. He *is* a "creditor," and, if no other person will do it, may take letters of administration. His interest would be as well secured, by adopting the course prescribed by this statute, as it would be, were the court to sustain the present bill. Should the bill be sustained, the court would give the complainant no advantage over the other creditors, but would see that the avails of the property was distributed among them, in proportion to their several demands. In making a distribution, we should look to, and be governed by, the general law for the settlement of estates.

It has been urged in this case, that the decedent left a will, of course, that it would be improper to apply for letters of administration. This circumstance, however, can be no objection. Unless the will is produced, the Court of Common Pleas of the county where the lands lie. has an undoubted right, and is, upon application, bound to grant letters of administration. If the will be produced, then letters may be granted with the will annexed. In either event, the complainant secures his object, of subjecting the lands to the payment of debts.

It is further urged, that the complainant being a creditor, although he *might* take letters of administration, still is not bound to do it. True, he is not. The law will not compel him to assume the trust. But when that law has provided a "plain and direct" remedy, this Court will not interfere, to give the complainant a different one, merely to gratify his caprice. He may either accept the remedy prescribed, or abandon his claim.

If there were no remedy at law, this Court would not hesitate to take jurisdiction, but inasmuch as there is, the bill must be dismissed with costs.

STEELE v. LOWRY, ET AL.

Where a deed of trust is executed by the grantor and recorded, and the grantee agrees to accept the trust, there is a sufficient delivery of the deed.

Where a deed of trust conveys property to be held by the trustee and disposed of, as the grantor shall direct, for the benefit of the issue of a contemplated marriage, the property thus conveyed enures to the benefit of such issue, though the grantor die, without directing a sale.

If an administrator take goods on replevin as the property of his intestate, from the possession of a person who is not the owner, and on the trial judgment is rendered against him, equity will decree an assignment of the judgment for the use of the real owner of the goods.

This was a bill in chancery, sent here for decision from Montgomery county. The principal object of the suit was, to obtain the legal construction of a deed of trust, made by Sophia Lowry, deceased, of whom the defendant, Lowe, was administrator, and the other defendants her late husband, and her children by him, and by a former marriage. So much of this deed, as is material to a right understanding of the points decided, is as follows:

"This indenture, made the fourth day of January, 1822, between Sophia Cooper and James Steele," &c. The indenture, after reciting that Mrs. C. had property, goods, &c. that came to her from Mrs. Z. and a former husband, and that a marriage was intended between her and one Fielding Lowry, witnesses, that she "gives and grants all her goods, rights, credits, &c. *in trust*, that the said James Steele, shall dispose of the same, whenever, in the opinion of the said Sophia, declared in writing, a reasonable price can be obtained for the same, and shall vest the proceeds in the purchase of lands within the state of Ohio, to be conveyed in fee simple, to the child or children of her, the said Sophia, to be by him, Lowry, begotten, share and share alike; and in case the said Sophia shall die without issue, then to the heirs of the said Sophia in fee. And in further trust, that the said Steele shall permit the said Sophia to have use and occupy the said goods until, in the opinion of said Sophia, a reasonable price can be had for the same."

The bill states, that the marriage took place, and issue was born living to wit. Fielding Lowry, jr. Mrs. Lowry died in May, 1825, without any declaration and having in possession the personal property specified in the deed. The defendant, Lowe, was appointed her administrator, and took an inventory of the goods, &c. found in possession of Lowry the elder, who declined to deliver possession to Lowe. Lowe, who considered the property assets to which he was entitled, prosecuted a writ of replevin, and judgment was rendered against him, in favor of Lowry, sen. for the sum of one thousand four hundred and thirty-six dollars thirty-one cents. The bill claims that the administrator shall pay the debts of Mrs. Lowry, and prays that the residue may be paid to the complainant, for the benefit of her heirs general, and an injunction to prevent the collection of the judgment recovered by Lowry, sen. against Lowe.

The answer of F. Lowry, sen. denies that the trust deed was ever delivered to the complainant, but states that it was left in the hands of the defendant, and there remained until the death of his wife. He claims the property in his

own right, as having been reduced to his possession during coverture, or in right of his infant son, issue of the marriage. The answer of P. P. Lowe, the administrator, admits the principal allegations in the bill, and wishes the business amicably settled. There are interrogatories filed which do not materially vary the above facts. The infants answer by guardian.

The testimony of Henry Bacon, who drew the trust deed, shows that the facts were known to Lowry, sen. who advised the course. Steele was not present when the deed was executed by Mrs. C., but had been consulted, and agreed to be trustee. The deeds were executed, and directed by the grantor to be put on record, and delivered to the complainant.

Upon this state of the case, three different claims were set up to the personal property enumerated in the deed of trust.

First: F. Lowry, sen. the husband, claimed, that the deed was inoperative, and the property vested in him, by possession in right of his wife.

Second: F. Lowry, jr., claimed, that the entire interest was secured to him, unless the proceeds were necessary for the payment of debts.

Third: For the children of Cooper it was claimed, that the trust enured for the benefit of the heirs general of the grantor.

The administrator also claimed, that the proceeds should be applied to the payment of the debts of the grantor, his intestate, whether incurred before or after her marriage.

Stoddart, *Collet*, and *Corwin* for complainant. *Crane*, contra.

By the COURT.

It is said, that delivery is either actual, by doing something and saying nothing, or verbally, by saying something and doing nothing: or it may be, by both. So a deed may be delivered by him who makes it, or by any person of his appointment or authority precedent, or assent, or agreement subsequent. *Shep. Tou.* 55. A deed delivered in trust, for the grantee, is sufficient. 2 *Mass. R.* 449. If a deed is read and not formally delivered, but left in the same place, this is a delivery in law. *Crok. Eliz.* 6 *Co. Lit.* 360. Here the grantee had consented to accept the trust, and the grantor with the knowledge, consent, and approbation of her intended husband, executed the deed, and directed it to be recorded and delivered. The testimony leaves no doubt of the delivery according to the strictest formalities of the common law. 1 *J. C. R.* 250.

This deed passed the entire estate to the trustee, for the benefit of the issue of the intended marriage, and for want of issue, then to their heirs general of the grantor, reserving the use of the personal property, and a discretion in the donor, as to the time of the sale of the estate. The reservation of power was to direct the sale, whenever, in her opinion, a reasonable price could he obtained. The terms of the reservation would probably embrace the whole estate, both real and personal. The principal object was to turn the personal into real estate, for the proceeds were to be invested in lands in this state.—This discretion was a mere division of the trusts for the more effectual security of the issue. Where there is a clear intention, that a person shall take, and

the mode only is left to the party, that is a trust, which shall never fail by non-execution, or inability of the trustee to exercise it. *Brown v. Higgs*, 5 *Ves.* 495.

It would be most unreasonable, that the *cestui que use* should lose the whole estate, because the discretion of directing the time of sale was prevented by the death of the trustee. If the principle should be admitted, that there was a resulting trust, by the non appointment of the grantor, the effect would be a distribution of the estate among the heirs general of Sophia Lowry, expressly contrary to her intention. She has declared, in her deed, this distribution shall not take place, unless she should die without further issue.

The case of *Cook v. Brooking*, (2 *Ves.* 51.) was very much like the one under consideration. Mallock devised fifteen hundred pounds to S. and J. Snow, to be disposed of upon secret trust, revealed to S. Snow, who declared in writing, they should, of the profits, maintain the testator's daughter, Anne, then married and in case she should survive her husband, she was to have the whole sum; but, in case she died in the lifetime of her husband, then the fifteen hundred pounds were to go to his daughter L. in such shares and proportions as Anne should advise. Anne died in the lifetime of her husband, and made no appointment.

The court held, that this was not a resulting trust, and distributed the money amongst the children of L. *per stirpes*. Whether we consult the obvious intention of the donor, or the principles of law applicable to the case, the result is the same, that here is no resulting trust to the heirs of Sophia Lowry, in consequence of her death without declaring her opinion, that the time had arrived when a reasonable price could be obtained for the property, secured to the issue of the marriage. The complainant, therefore, as *cestui que trust* for the infant defendant, F. Lowry, jr. is entitled to the property, or its value, either from Lowry the elder, or the person who has obtained the possession of it from him.

But it appears from the pleadings, that the defendant, Lowe, as administrator of the estate of Sophia Lowry, prosecuted an action of replevin against F. Lowry, sen. for the personal property mentioned in the deed of trust, and that, having failed to establish his right, judgment has been rendered against him for the sum of one thousand four hundred and thirty-six dollars and thirty-one cents, the value found by a jury under the provision of the statute. The property belonged to neither of the parties to the suit, and yet the defendant has obtained a judgment for its full value.

The law has either transferred that property to the plaintiff, which clearly does not belong to him, or there is a penalty at least to its full value for commencing a groundless action. This is a view of the statute not very favorable to its provisions, as a substitute for the writs, *de retorno habendo* and *of withernam*. It is fortunately, perhaps, not now necessary to consider whether Lowe would be also answerable to the trustee for the property, or its value, in case he elected to bring an action at law upon the tortoins possession of the administrator. The court thinks, that without violating any principle of equity, the judgment in favor of Lowry the elder, can be taken as a trust fund for his infant son. This is upon the grounds that the judgment is more beneficial to the infant, than the goods in specie. Lowe cannot be aided in this court. This has

already been determined in the case of *Lowe, Adm'r. v. F. Lowry, sen. et. al.* The proceedings in replevin, have transferred to him the possession of the property, and charged him with the judgment. He must abide by this bitter law. But as that judgment is the proceeds of the infant's property, and as neither the plaintiff nor the defendant in the action, had a shadow of legal right, equity requires that Lowry, sen. should transfer it to the *cestui que trust*, to be applied according to the declared intentention of Sophia Lowry. The court decree, that F. Lowry, sen. assign the judgment recovered in the action of replevin against P. P. Lowe, except the costs, to the complainant, who is to collect the same in the name of Lowry, who is perpetually enjoined from interfering with the collection thereof, or from discharging or releasing the same, or the proceeds thereof. And, as to the other defendants, the bill is to be dismissed.— And it is further ordered and decreed, that the costs of this suit be paid out of the proceeds of the judgment, and the residue to be retained by the complainant, for the further direction of this court.

LOWE *v.* LOWRY, ET AL.

Personal property cannot be made the subject matter of a bill of peace unless the right at law has been established.

Where a party prosecutes a groundless action of replevin equity will not relieve him from the legal consequences.

This was a bill in chancery, which was adjourned here for decision from Montgomery county, in connection with the preceding cause, between the same parties. The facts necessary to state, for a clear understanding of the decision of the court, are these:—

In the month of January, 1822, Sophia Cooper, widow and relict of Daniel C. Cooper, dec. being possessed of considerable personal property, and some real estate, both in her own right, and as dower in her late husband's estate, being also the mother of two children, sons of herself and D. C. Cooper, dec. in contemplation of a marriage with the defendant, Fielding Lowry, made a conveyance in trust, of her principal property, real and personal, to the defendant Steele, to hold the same for her own use, during her contemplated coverture, and for any issue that might spring from it, reserving a power in herself, at any time, to direct the trustee in making certain dispositions of the property.— The marriage took place, and there was issue of it, one son, the defendant, Fielding Lowry, jr. The property remained in the possession of Mr. and Mrs. Lowry, and was considered subject to the trust, until her death in 1825. She had contracted some debts during her widowhood, which remained unpaid.— Some debts arose during her marriage with Lowry, in improving her real estate, and the expenses of her last sickness and funeral were to be paid. The plaintiff Lowe, at the request of the defendant Lowry, took letters of administration to Mrs. Lowry, and under these, he claimed form Lowry, in whose possession they remained, the personalties included in the deed of trust. Lowry refused to deliver them, upon which Lowe, having had them appraised, brought a replevin against Lowry, and thus obtained the possession. On the trial of the

replevin, a verdict was rendered against Lowe, and damages given in favor of Lowry for twelve hundred and fifty dollars seventeen cents, as the value of the goods, one hundred and twelve dollars eighty-seven cents, as interest, and sixty-nine dollars twenty cents as costs.

The bill sets out these proceedings, and also sets out the debts due from Mrs. Lowry, and the means within the reach of the administrator to pay them. It prays a decree, charging the estate of Mrs. Lowry with these debts, and requests that some order be made for the legal disposition of the balance, asks an injunction against the judgment obtained by Lowry, in the replevin suit, and prays for general relief.

The defendant Steele admitted the facts stated in the bill; Lowry demurred.

Lowe, for complainant. *Bacon*, for defendant.

By the COURT.

There is no equity in the bill upon which the complainant can be relieved.—Its chief object, though somewhat dimly presented, is that of a bill of peace. But the subject matter does not relate to real estate, and as to the personal, the complainant has established no right at law. This is deemed indispensable to sustain a bill of peace, unless an issue is necessary to bring in different interested parties, and thus prevent litigation, and a multiplicity of suits. 2 *John. Ch.* 281.

There seems to be no ground for relieving the complainant against the judgment at law, in the action of replevin. There is no allegation, that the complainant was ignorant of any material fact since discovered: no suggestion of fraud, accident, surprise, or mistake. No circumstance is charged in the bill, to warrant a conclusion that the judgment at law is not according to the right of the case. On the contrary, we are satisfied, from another case which has been before us in connexion with this, that the judgment against the complainant in replevin, is unimpeachable. The facts, that he prosecuted a groundless action, and that the result has involved him in a heavy responsibility, supply no grounds for his relief here. If the peculiar provisions of the statute regulating the proceedings in replevin, operate hardly in a particular case, that circumstance invests the court with no power to relieve against them. 4 *Ves.* 639. The injunction must be dissolved, and the bill dismissed with costs.

KING v. KENNY.

The original survey and entries in the office of county commissioners are admissible in evidence instead of authenticated copies.

This was a writ of error to the Court of Common Pleas of Athens county, brought to reverse a judgment rendered in that Court, in a case where the plaintiff in error was defendant, and the defendant in error plaintiff. It was an action of trespass with force and arms, for breaking and entering plaintiff's close, breaking down and carrying away fences, and for carrying away and

converting rails. Plea, not guilty. Verdict and judgment for plaintiff, for five dollars and costs.

At the trial the defendant took a bill of exceptions to the admission of certain testimony offered by the plaintiff. The testimony offered and excepted to, consisted of the commissioners' book, containing the minutes of the proceedings of the commissioners in laying out a road, and the original report of the reviewers and plat of survey, without a record of either. Upon this bill of exceptions the writ of error was founded, and the error assigned was the admission of the testimony.

H. Stanberry, for plaintiff in error.

By the COURT.

The error complained of in this case, is, the admission of original documents in evidence, instead of authenticated copies. It is clear, that the question, as presented in the record, is not a mere abstract proposition, as applicable to any other case as to this. In such cases, a bill of exceptions does not lay the foundation for a writ of error. 1 *Cranch*, 310. Another rule, as to the bill of exceptions, is, that the party excepting, must distinctly point out wherein he may have been prejudiced by the decision excepted to. 2 *Caines*, 169. 8 *John.* 387.

But waiving this consideration, the Court are called upon to determine the points, whether the original papers, with the minutes of the commissioners, are admissible evidence to shew the establishment of a road; or whether the record makes the public highway. The statute declares, the commissioners shall cause the report, survey and plat to be recorded, and from thenceforth the road shall be considered a public highway. The petitioners, the reviewers, the surveyor and commissioners, performed the whole duties under the law. The omission was in the clerk of the commissioners. It would seem unreasonable, that such ministerial *non feasance*, should render the whole proceedings nugatory. To authorize this construction for such omission, would require precedent and authority; but in fact, they are the other way. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, it is in law considered as recorded, although the manual labor of writing it in a book kept for that purpose, has not been performed. (*Marbury v. Madison,*) 1 *Cran.* 161, 10 *Ezst.* 350. The commissioners holding a public office, and entitled to the custody of their own records, cannot be compelled to produce the originals in court; but when presented, they are as good evidence as copies can be, authenticated in the most ample forms of law. Courts, for a most obvious reason, will not compel the production of their own original records, as evidence for parties, or those of any other public officer; but have never refused to admit them on the ground that they were not of as high a nature as copies. Indeed, it is a general rule, which admits of no single exception, that originals are good evidence, where copies would be admitted. 1 *Starkie E.* 151. The authenticity of the copy, cannot be made more perfect than the record itself. A record, therefore, may be proved by mere production. It appears in this case, the original documents were before the court, as well as

the minutes, and we will not enquire how they came there. When these proceedings were found in the possession of the party offering them in evidence, the court below had no further enquiry than to reject or admit them.

Judgment of the court below affirmed.

MORRIS v. MARCY, ET AL.

The sheriff is authorized to take bail on an attachment for contempt.

This was an action of debt, adjourned here for decision, from the county of Athens. The declaration was upon the obligatory part of the bond, in the usual form. The defendant, Marcy, craved *oyer*, and set out the condition in these words:—

"The condition of this obligation is such, that if the above bound John Marcy, shall and does appear before the judges of the Supreme Court, to be *holden* at Athens, in and for the county of Athens, on the first day of the next term, and answer unto what shall then and there be objected to him, by the state of Ohio, and not depart the Court without leave, then," &c.

Upon the oyer, the defendant Marcy, pleaded:—

First. *Non est factum*

Second. That the bond was executed by Marcy, as principal, and his co-defendants as his sureties, to the plaintiff Morris, as sheriff, and that at the time when the bond was so executed and delivered, the sheriff had not served, and was not serving any writ of *capias* against said Marcy, upon any indictment found, &c.

To this plea, the plaintiff replied, that the Supreme Court, sitting in Athens county, awarded a writ of attachment against Marcy, for contempt, returnable to the next succeeding term, which writ was duly issued, and put into the hands of the sheriff, commanding him to take the body of said Marcy, &c. upon which writ he arrested Marcy, and at his special request, took the bond, &c.

The defendant demurred.

H. Stanbery, in support of the demurrer. *Olds*, contra.

By the Court.

The court are called to decide, upon the pleadings, whether, on attachment for contempt, the sheriff can take bail or not. The defendants do not rely upon performance of the condition, nor upon any excuse for non performance; but upon the fact, that the sheriff took this bond, and discharged the prisoner "without having any *capias* upon indictment, found." The fourth section of the act to which this plea refers, authorizes an arrest in any county in the state, and directs the person to be committed or held to bail, as shall be provided for by law, &c. By the act "defining the duties of sheriffs and coroners in certain cases," the sheriff must preserve the public peace, and cause all persons guilty of a breach thereof, within his knowledge or view, to enter into recognizance with sureties, for keeping the peace, and appearing at the succeeding term of the

Common Pleas, &c. The authority to take bail upon an attachment for contempt, is not expressly given to the sheriff by either of these acts. The necessity of issuing a *capias* for contempt, appears not to have been in the contemplation of the legislature, when they were under consideration. To enable the plaintiff to recover upon this bond, the power of the sheriff to take bail, must either be found in the usages of the common law, or be justly inferred from the provisions of our statutes.

At common law, bail was allowed for all offences except murder, 2 *Inst.* 190. The accused might be bailed until convicted of the offence. 2 *Inst.* 186. 2 *Salk.* 608, (*Rex v. Daws.*) Daws was taken by attachment for contempt, and the sheriff took a bail bond for his appearance. The Court agreed that a bail bond might be taken by the sheriff on attachment. A resolution of the judges appears afterwards contrary to this. 1 *Strange*, 479. Both of these decisions grew out of the *Statute*, 23, *H. VI. c.* 10, and the reasons are not given in either case. At common law, the sheriff was not compelled to take bail for the appearance of his prisoner, but might of his own accord. 1 *Vent.* 55. By the *Statute of Westminster first*, the sheriff is forbidden to take any thing for the escape of a thief or felon, unless it be first judged an escape by the justices in Eyre. 2 *Inst.* 164. North C. J. in delivering the opinion of the court, in (*Ellis v. Yarborough, Sheriff, &c.*) 2 *Mod.* 181, says, "the common law was very rigorous as to the execution of process; the *capias* was *ita quod capias* the body at the day of the return, and if the sheriff had arrested one it had had been an escape to let him go. Before this statute, 23, *H.* 6, *c.* 10, the sheriff usually took securities for the appearance of the prisoner, and by this means used great extortion, &c. to prevent which mischiefs, this statute was made and so designed." It seems, therefore, quite clear, that before this statute, the sheriff might take bail in criminal cases, although not compelled to do so. If the prisoner failed to appear, it was an escape; but the undertaking of the sureties was not void, and it would seem not void, although taken for ease and favor before the statute, 23, *H.* 6. So here, the sheriff might be liable in the first instance for the escape; but it would not follow that the bond taken for appearance would be void. We therefore conclude that the taking of the bond was warranted by the principles of the common law, and cannot be avoided by the obligors, unless the statute law restrained the powers of the sheriff. But if this exercise was not warranted by common law, it would be worthy of enquiry whether it is not fairly inferable from our statutory regulations. It will not be seriously controverted, that a power to let to bail in criminal cases, is one which cannot be safely intrusted to those officers. The legislature has granted it to them upon indictments found, and breaches of the peace. If it is proper to be exercised after the guilt of the accused has been found by a grand jury, no sound reason could be discerned why it should not be before. The presumption of guilt is certainly stronger *after*, than it is *before* the indictment found. The statutes enlarge, but do not restrain the powers of the sheriff to take bail. We are forced to the conclusion, that the legislature intended to include the exercise of the less responsible power in the grant of the greater. This view of the powers of the sheriff is fortified by an examination of the nineteenth section of the act, "pointing out the mode of trying criminals." If we give this act the strict construction insisted upon, by the defendants, for the one to which

their pleadings refer, a person imprisoned on attachment for contempt, however small the offence, or weak the presumption of guilt, would, in many instances, owing to casualties not unfrequent in this court, be compelled to suffer a most wasting imprisonment without bail or mainprise. The act last referred to, if taken literally, and without latitude of construction, would only authorize a judge to admit to bail when the prisoner is confined by *warrant*, or *capias upon indictment*. This would be placing one who had merely disobeyed the orders or rules of court, in the situation of him who was under a charge of a capital crime. The statute should be very explicit to do this. While the rules of construction will admit of a different interpretation, the court should not put this harsh one upon them. The right to exercise this power by the sheriff is less doubtful than by a judge under the act above referred to. If neither have the power, the legislature must have widely departed from the general character of our criminal jurisprudence, which is to extend to the accused every indulgence consistent with the public good. We think they have not so departed.

The defendant's principal has received the full benefit of the condition of the bond, which is neither opposed to sound public policy, the usage of the common law, or the provisions of any statute of the state; but on the contrary, the right to take it is fairly implied in the powers given to the Sheriff, in cases requiring more prudence and discretion, and seems to accord with the mild character of our criminal jurisprudence. The demurrer to the replication is therefore overruled.

Judgment for the plaintiff. Judge Swan was ill, and did not sit. Judge Hitchcock dissented.

LESSEE OF HAINES v. LINDSEY.

The deed of a deputy sheriff, for lands sold on execution by himself or the sheriff, is valid.

The warrant deputizing an under sheriff is valid if filed with the clerk though the filing be not endorsed.

This case came before the court on a motion for a new trial, made by the defendant; the decision of which was adjourned here from Clermont county.—The defendant claimed title under a sale upon judgment and execution, the sheriff's deed being executed by the deputy sheriff. At the trial this deed was rejected, with leave that the defendant move for a new trial, for error in the court in rejecting that deed.

T. Morris and *T. Moorehead*, in support of the motion. *Este*, against it.

By the COURT.

In the most ancient times of the English common law, the sheriff had his under sheriff. 6, *Com. Di.* 413. Such deputy, when appointed, was vested with authority to perform every ministerial act that the principal sheriff could perform. The power given the principal sheriff, by our statute, is but in affirm-

ance of the common law, and must be considered as clothing the deputy with the ordinary authority exercised by the deputy sheriffs at the common law; and we think that upon just principles of analogy, the power to make conveyances of lands sold under execution, may be legitimately exercised by the deputy.

A writ of *elegit* in England, directed the sheriff to hold an inquisition upon the debtor's lands, and according to the finding of that inquisition, set off to the plaintiff, in execution, a certain portion of those lands to be held, at an annual rent, until the debt is paid. The inquisition and sheriff's return upon the writ, are the evidence of the creditor's right to the possession of the lands. It has been adjudged, not only that a deputy sheriff may take an inquisition, and make an extent upon *elegit*, but that the bailiff of a liberty may do it, by warrant under him. *Croke Cha.* 319. In our state, the order of the Court confirming a sale, and the sheriff's deed in conformity with that order are essential items of proof to sustain the purchaser's title. And there is certainly nothing but what is strictly ministerial, in executing the deed, when the Court, acting judicially, have confirmed the sale. Holding an inquisition upon *elegit*, bears a much stronger semblance of exercising a judicial authority.

In New York it is settled that an inquisition of damages may be held by the deputy sheriff. 2 *John.* 63. The very question presented in this case, has been directly decided in that state, and the validity of a sheriff's deed executed by a deputy, sustained. 10 *John.* 223, 7 *Cow.* 737. The statute of New York authorizes the sheriff, "by writing under his hand and seal, to make some proper person under sheriff," &c. It directs that "such be recorded in the office of the clerk of the county;" but it does not define what shall be the powers of the deputy, in the life of the principal. In case of his death, it declares the deputy shall in all things execute the office of sheriff of the same county." Our statute is much stronger than this, for it directs that the warrant appointing the deputy, shall authorize him "to perform all, and singular the duties appertaining to the office of sheriff, within his respective county," These duties he may perform in the life of the sheriff, and as the execution of the deed, after a sale of real estate is one of them, we consider the authority as vested in the deputy by express terms.

In this case, an exception is taken that the warrant constituting the deputy, has not been filed agreeably to the provision of our statute. It appears to have passed through the proper office, before it was placed with the papers, in this cause. There is no further evidence that it was filed. In our practice, the ordinary evidence that a paper has been officially filed, is the clerk's endorsement of that fact, upon the back of it. But we are not prepared to say that it cannot be filed unless thus endorsed, or that no other evidence than the endorsement can be received to establish the fact of filing. It would be especially dangerous to suspend the validity of titles to land upon any practice of a ministerial officer, regulated by no positive law, and not so supported by usage and precedent as to constitute an unbending rule. The exact time when a paper is placed upon file, frequently is very material to rights arising under it, and, for this reason, the practice of endorsing the fact and the date, upon the paper itself meets the entire approbation of the Court. Still had the paper been placed in the office, either strung upon a thread, or laid in a drawer or pigeon hole, we conceive it would be filed within the terms of the law. The fact of filing it is

to be regarded as a matter *in pais*, seeing there is no law directing it to be made matter of record. In the absence of all testimony with regard to the paper, except that it had been in the clerk's office, before it was used in the cause before us, we feel bound to presume that it was regularly filed. If the deputy deposited his warrant of deputation with the clerk, and that officer omitted to file it, we are not satisfied that the power of the deputy should be deemed void, upon that account. 1 *Cranch*, 161. But it is not now necessary to express an opinion on this point. The verdict must be set aside, and a new trial granted: the costs to abide the event of the suit.

HOLMES v. ROBINSON.

Judgments between the same parties, and due in the same rights, may be set off, on motion.

This was a motion made by Holmes to have set off of certain judgments between the parties. Holmes had recovered two judgments against Robinson, in the Courts of Franklin county, for an aggregate amount of more than one thousand dollars. Robinson, who, on the record, sued for the use of Reed, had recovered against Holmes, in the Supreme Court of Pickaway county, for a sum exceeding three hundred dollars. Besides the judgment debts, Robinson owed Holmes some other monies, and there was a suit in Chancery *pending* between them, in which a Master had reported a considerable balance due from Robinson to Holmes. There was no assignment of the debt against Holmes, from Robinson to Reed, but it was proof that Robinson had agreed with the attorney who held his note to Reed, that the suit against Holmes should be brought for Reed's use, and the amount, when recovered, applied to the payment of Reed's claim. The motion was adjourned here for decision from the county of Pickaway.

G. W. Doan, in support of the motion. *J. Olds*, against it.

By the COURT.

The practice of setting off one judgment against another, between the same parties, and due in the same rights, is ancient und well established. Some of the adjudged cases go upon that principle of extending the statutes of set-off in their spirit of equity and justice. Others hold the exercise of the power, independent of the powers of set-off, and rest it upon the general jurisdiction of a court over the cause and the parties, when before them. Of the first class of cases, we may cite, 3 *Wil.* 296; 2 *Blac. Rep.* 826; 2 *Bos.* and *Pul.* 28; 2 *Caines*, 190. Of the latter, 4 *Term*, 123; 1 *John. Chy.* 91; 6 *Ser.* & *Rawle*, 443; 8 *Mas.* 451.

But in order to warrant the set off, it seems to be equally well settled, that the actual debts must exist in the same right. This is clearly settled in the case of *Duthy v. Tito and others*, (*Strange*, 1203.) There were verdicts in both cases for the defendants, and Tito moved to set-off the costs recovered by him.

self and co-defendants of Duthy, against the costs recovered by Duthy of Tito alone. But his motion was refused. Chancellor Kent considers this the true rule, both at law and in equity. *Duncan v. Lyon*, 3 *John. Chy.* 451; *Bur.* 1214; 1 *Atkins*, 237; 2 *Merivale*, 121.

It is perfectly clear, both from the record, and the other proof, that Reed has an interest in the judgment against Holmes. He does not appear before us, nor does it appear that he has had notice of the motion. He may be injuriously affected by a decision on the merits of the motion. This summary mode of exercising the legal or equitable power of the court, is not the most proper, when there is any uncertainty as to the rights of parties. (8 *Mas.* 451.) The motion must, therefore, be overruled.

STILES EX. DEM. MILLER, ET AL. *v.* MURPHY.

The lien of a judgment does not attach to after-acquired lands, so as to affect the rights of a bona fide purchaser.

This case was adjourned here, for decision, from the county of Pickaway. It was an ejectment, and came before the court upon a case agreed. The material facts were these: T. W. Dyott, at June term, 1822, recovered a judgment in the county of Pickaway, against Henry Nevill, for one thousand and twenty-three dollars and fifty cents. Execution was taken out and levied upon a tract of land, containing three hundred and thirty-three and two thirds acres. on the 4th March, 1825. In February, 1829, the undivided two thirds of said land was sold, on Dyott's execution, to the defendant, for seven dollars sixteen and three fourths cents per acre. The sale was confirmed, and a deed, in due form, executed by the sheriff to the defendunt, who claims under it. On the fourth day of September, 1822, Nevill acquired title to this land; on the 27th day of January, 1823, Nevill executed a mortgage of the land to the lessors of the plaintiff. On the 4th day of January, 1825, a *scire facias* issued upon the mortgage, and a judgment of execution was rendered on the 5th January, 1825. On the 1st of August, 1826, an execution issued, which was returned, *staid.* A levy was first made January 1st, 1828. On the 21st of February, 1829, the property was sold to the lessors of the plaintiff, for seven dollars and seven cents per acre. The sale was confirmed, and a deed executed, in due form, under which the lessors of the plaintiff claim.

Folsom, for the plaintiff. *Ewing* and *Doan*, for defendants.

By the COURT.

The only question submitted, was, whether a lien of a judgment attaches to after-acquired lands, so as to affect the rights of a *bona fide* purchaser. The question now presented for consideration, was decided, by this court, in the case of *Roads v. Symmes*, (1 *Ohio Rep.* 313); but the confidence of learned counsel in a contrary opinion, has called the court to a more particular examination of the principles involved in that decision.

By the common law, a man could only have satisfaction of the goods, chattels, and present profits of lands. (3 *Black. C.* 418.) The lands and person were exempt from execution, upon feudal principles, which it is not necessary to review. The king, by his prerogative, might have execution of body, goods, and lands: and in an action of debt against an heir, upon an obligation made by his ancestor, the lands descended were liable to execution. (3 *Co.* 12, *a*, 2 *Bac. Ab.* 686.) These were the excepted cases, at common law. The statute of *Westminister* 2, (13 *Ed.* 1, *c* 18) subjected a moiety; and the same year, the statute *de mercatoribus*, all the lands of the debtor to execution. The proceedings under our *fieri facias*, have some analogy to those under the first mentioned statute, although the tenant by *elegit*, and the purchaser at sheriff's sale, hold very different estates. The statute of *Westminister* 2, is in these words:—"When debt is recovered, or acknowledged, in the king's court, or damages awarded, it shall be from henceforth in the election of him that sued for such debt, or damages, to have a writ of *fieri facias* unto the sheriff, to levy the debt upon the lands and chattels of the debtor, (saving only his oxen and beasts of his plough) and one half of his lands until the debt be levied, upon a reasonable price and extent. And if he be put out of the land, he shall recover it again by writ of *novel disseisin*, and after that by writ of *redisseisin*, if need be." (*Rastal's Statute*, 149.)

Strange as it may seem, it is very difficult to ascertain the extent given to liens, under this statute. The 29 *Car.* 2, *c.* 3, extended the creditor's right to a moiety of the debtor's land, held in trust. The fifteenth section limits the lien to the day the judgment was entered. Blackstone says, "if the goods are not sufficient, then the moiety, or one half of the freehold lands, *which he had at the time of the judgment given*, whether held in his own name, or by any other in trust for him, is also to be delivered to the plaintiff, to hold, till out of the rents and profits thereof, the debt be levied, or until the defendant's interest be expired." 3 *Black. Com.* 418. 2 *Inst.* 395, is cited, which is to the same effect. Many of the English authorities warrant a different conclusion. *Roll.* 892, *Plow.* 72. The form of the *elegit* corresponds with the authorities last cited. The command of the writ to the sheriff, is, "that without delay you cause to be delivered to the said A., by reasonable price and extent, all the goods and chattels of the said B., on the —— day of (*the day the judgment was signed*) the —— year of our reign, on which day the judgment was given, was, or at any time since, hath been seized to him, the said A." to hold," &c. *Imp.* 284. No adjudged case can be found, in the English books, so far as opportunity has been allowed for examination, upon the question whether lands, acquired subsequent to the judgment, and conveyed before the execution issued, are liable to inquisition under an *elegit*. The Supreme Court of Pennsylvania, has traced the authorities to the year books, and conclude it is not settled by any of them. The learned judges examined the case, 30 *Ed.* 3, 24, and deny the inference drawn, by subsequent elementary writers, from it. 6 *Bin.* 135. The court, however, based their decision, in that case, upon the usages and practices which prevailed in Pennsylvania. The same court, in the case, *Richter v. Selin*, (8 *Serg & Rawle*, 425) appear to consider their former decision an innovation upon the law, and not an improvement: they therefore confine the rule most strictly to the point before decided, and refuse to extend it beyond the letter.

Indeed, more than a doubt is expressed of the correctness of the former decision.

In looking further into the American cases, the question still appears nowhere solemnly decided. It has been adjudged, in New York, that where the body of the defendant has been taken in execution, the lien of the land is suspended; and if, during imprisonment, a *fi. fa.* is issued on a junior judgment, and the land is sold, the purchaser shall hold. 13 *John. Rep.* 533. It is also said by Spencer, judge, in *Stow v. Tifft*, "that it cannot be doubted that a judgment will attach on lands, of which the judgment debtor becomes seized, at any time posterior to the judgment, and nothing could prevent a judgment creating a lien on the subsequently acquired lands of the judgment debtor, but the circumstance that his seisin, in the given case, was instantaneous." 15 *John. Rep.* 464.

The question before the court, was, whether a widow could be endowed of lands, when the seisin of the husband was but for an instant, and passed from him *eo instante* he acquired it. The case of *Ridgley v. Gartrill*, (3 *Harris and McHen.* 449) was this: At May term, 1787, the plaintiff obtained a judgment against G. Burgess, for the debt, &c. which was not paid. At the time the judgment was rendered, Burgess was seized in fee of a tract of land of more value than would satisfy the judgment. In 1791, Brown's executor obtained a judgment for an hundred pounds and costs. In 1792 a *fi. fa.* issued, by virtue of which the sheriff sold the land to the defendant, who paid the money and obtained a deed. This was a *scire facias* to the defendant, as terre-tenant, to make the land answer to the plaintiff's judgment. The report furnishes no argument, or reference to authorities, or even to the statute of Maryland. The report says, "the court gave judgment for the plaintiff upon a statement of facts." Upon a careful examination of all the authorities within our reach, the point under consideration, does not appear to have been solemnly adjudged, upon full investigation, either in England, or in our own country, except in Pennsylvania.

Our researches have furnished but little light upon the question, and it seems not much less distinct in the mists of antiquity than in our own day. We would appear, then, to violate no settled principle, in analogous cases, by giving to our statute the construction which our circumstances and policy require. With us, the judgment creditor's lien upon the debtor's land, the right to sue, and the manner of transferring to the purchaser, are all matters of statutory regulation. The statute declares that "the land and tenements of the debtor, shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered." The writ of *fieri facias* "shall command the officer to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the moneys specified in the writ: and, for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor." It is provided in the eleventh section of the same act, "that the sheriff, or other officer, who, by such writ, or writs of execution, shall sell the said lands and tenements, so levied upon, or any part thereof, shall make to the purchaser, or purchasers, as good and sufficient a deed of conveyance, for the lands and tenements so sold, as the person, or persons, against whom such writ or writs of execution were issued, might or could have made for the same, at any time after said lands became liable to said judgment, which deed shall be *prima facie* evidence of the legality of

such sale, and the proceedings thereon, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate, in the premises therein mentioned, as was vested in the party, at or after the time when the said lands and tenements became liable to the satisfaction of the said judgment." 22 *L. O.* 108.

The legislature, in giving judgments a lien, had particularly in view the lands, that the debtor held at the time when the judgment was rendered. They clearly intended the judgment should attach to these, so that a purchaser would hold them *cum oncre*. The execution, according to its command, was not only intended to embrace lands, upon which the judgment was a lien, but those *held* by the debtor, at the time the execution was issued, and a levy made. The command of the *fi. fa.* certainly does not embrace, in terms, or literally, the lands acquired at any time posterior to the judgment, but which had been aliened before the execution issued. Such cannot, with strict propriety, be said to be the "lands of the debtor." They were not the lands of the debtor, and therefore not "bound by the judgment." The deed of conveyance shall be as good and sufficient as the debtor could have made at any time after the said lands became liable to the said judgment. According to our construction, the lands held by the debtor, when the judgment was rendered, as well as the lands held at the time of issuing the execution, are "liable to judgment," and to "the satisfaction of the judgment." The legislature has defined, more explicitly, the deed of the sheriff, and the effect of it. In giving the lien of the judgment, in the command of the *fieri facias*, in the definition of the sheriff's deed, and in declaring its effects, the legislature has guarded the terms employed, in the most cautious manner, to save lands of the debtor, purchased after the judgment, and aliened before execution.

This inference is most strongly deduced from the command of the *fieri facias*. If we are to arrive at the law of the court, from the form of the *elegit*, we may surely, with equal propriety, infer the intention of the legislature, from the command of the *fieri facias*, as given in the statute. It is a matter of history that this law was drafted by learned counsel, appointed as a committee of revision, who were undoubtedly exactly acquainted with the form of the *elegit*. We cannot but presume many members of the legislature, who passed it, were intimately acquainted with the common and statute law, touching executions. It must have been well known that the *elegit*, in form, extended itself to a moiety of all lands of the debtor, held at the date of the judgment, or of which *he had been seized, at any time since*. If such had been the intention of the legislature, they would have framed their execution accordingly. For the satisfaction of the execution, those are the lands of the debtor which are bound by the judgment as well as those afterwards acquired, but not conveyed. The terms, in which this construction is expressed, are without ambiguity, and do not require analogies to render them satisfactory. But this point has been put to rest, in the case of *Roads v. Symmes*. When a rule of construction has been adopted, upon which titles to real estate depend, it would lead to great inconvenience, if not injustice, to alter it. That decision may have been an innovation upon the established principles of law—it may have been a depar-

ture from the true policy, under the circumstances in which we are placed—but it would be a more dangerous innovation, and a wider departure from true policy *now* to disturb it. 2 *Cran.* 22, 1 *O. R.* 1.

Judgment for the plaintiff.

STEWART, ET AL. *v.* THE TREAS. OF CHAMPAIGNE CO.

A devastavit cannot be proved, in a suit on an administration bond, against the administrator and his sureties.

This was a writ of error to a judgment of the court of common pleas, rendered against the plaintiff in error, in favor of the defendant in error. It was an action of debt brought upon an administration bond, the defendants being securities, and the writ, as against the administrators being returned not found.

The declaration set out the granting of administration, and the execution of the bond. It then averred a judgment in favor of McAdams against the administrators, and that assetts to a certain amount had come to their hands, which they had wasted; but it contained no averment that any execution had issued on the judgment of the plaintiff against the administrators, or of any adjudication that they had wasted the assetts. Judgment was rendered in the common pleas against the plaintiffs in error, by default, to reverse which the writ of error was brought.

The errors assigned were:

1st. That the record did not show that a *devastavit* had been established by action, or otherwise.

2d. That it did not appear that any execution had been sued on the plaintiff's judgment against the administrators, before the commencement of this suit.

3d. That the judgment was founded on a *devastavit*, and the record did not show that any *devastavit* was found by the Court, the inquisition of a jury, or otherwise.

Mason, for plaintiff. *Anthony*, for defendant.

By the COURT.

The principal question to be decided in this case, is whether, in an action upon an administrator's bond, brought against the administrator and his securities, the fact of a *devastavit* by the administrator, can be properly put in issue and tried and determined. The *Statute* 1, *Hen.* 8, *C.* 5, directed the taking of surety for the true administration of goods, chattels and debts. The *Statute of* 22 *and* 23, *Car.* 2, *C.* 10, commonly called the statute of distribution, declares "that all ordinaries and ecclesiastical judges upon granting administration, shall take a bond of the administrator with two or more sureties, with condition that the administrator shall make a true and perfect inventory of all the goods and chattels of the deceased, and exhibit it unto the registry of the ordinary's Court, by such a day, and to administer, according to law; and to make a true and just account thereof; and to make distribution of the surplus." Un-

der these statutes, much difficulty was experienced, by the English Courts in settling an uniform mode of establishing a *devastavit*.

Anciently, if the sheriff returned *nulla bona*, and also a *devastavit* to a *fieri facias de bonis testatoris*, sued out upon a judgment obtained against an executor, it was sometimes the practice to sue out a *capias ad satisfaciendum* against the executor. Several other methods were devised, which need not be enumerated, as they have long since fallen into disuse. The practice in the common pleas, was, upon suggestion, in the special writ of *fieri facias* of a *devastavit*, to direct the sheriff to enquire, by jury, whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued against him, and unless he made a good defence thereto, execution was awarded, *de bonis propriis*. It afterward became the practice of both Courts, to incorporate the *fieri facias* enquiry, and the *scire facias* into one writ, called a *scire fieri enquiry*. This writ recites the *fieri facias de bonis testatoris*, the return of *nulla bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debts, commands the sheriff to levy the debt, &c. of the goods, &c. of the testator, in the hand of the executor, if they could be levied thereof; but if it should appear to him, by the inquisition of a jury, that the executor had wasted the goods, then the sheriff is to warn the executor to appear, &c. This practice is still frequently adopted.

But the most usual mode of proceeding, is by action on the judgment, suggesting a *devastavit*. (1, *Saund.* 219, *n.* 8.) A *fieri facias* is first sued out, and upon the sheriff's return of *nulla bona*, an action is commenced on the judgment, stating the judgment, the writ of *fieri facias*, and the sheriff's return; and on the trial, the record, the writ, and return will be sufficient evidence to prove the case. And the action may be brought upon a bare suggestion of *devastavit*, without any writ of *fieri facias* first taken out. (1, *Saund. note* 8, cited *Wheatly* v. *Lowe*, 1 *Sid.* 397.) These modes of establishing a *devastavit* are well settled by the English practice. So far as can be discovered, no attempt has been made to fix a *devastavit* upon an administrator, by making a suggestion, in the suit against him and his securities, *upon their bond*. The administrator may traverse the inquisition, as well as the return, and is entitled to the same defence. (*Crok. Eliz. Gibson v. Brook*, 859.) It cannot be disputed that this has been treated as a matter of practice, under the control of the court, as to which they can establish their own rules. (4, *Con.* 445.) The practice adopted in this country, appears uniformly to be an action upon the judgment, suggesting a *devastavit*. (3, *Hen. and Mun.* 123.—4. *Mun.* 466. 1, *McCord*, 76. 4, *Con.* 445. 4, *Bibb*, 83.)

The practice, so far as can be ascertained in this state, is to sue upon the judgment making the suggestion. It is probable the provisions of our statute would make a difference in some instances, in the evidence on trial. During the time limited by the Court for the settlement of estates, no execution can be issued upon a judgment rendered against an administrator. We are not, however, in this case, to determine what shall be *evidence* of a *devastavit*, under the provisions of our statute. By the 5th section of the act, "defining the duties of executors and administrators," it is provided that the Court shall require the administrator to give bond, with two or more sufficient securities, conditioned for the faithful performance of the duties required of him by law. The 11th

section declares that a refusal or neglect to settle up the estate shall be deemed a breach of the bond of the administrator. It is probable this was useless legislation, for one of the duties the law requires of the administrator, is to adjust and settle up his accounts, within eighteen months from the date of his letters, unless the Court shall extend the time.

If the non-performance of any duty which the statute requires of an administrator could be assigned as the breach of the condition of his bond, it is clear that this might, upon general principles without any declaratory act. This cause was treated at bar, as if the whole remedy upon the bond against an administrator and his security, depended upon establishing, or suggesting a *devastavit*. It is not necessary now to decide whether the condition of an administrator's bond was only intended to protect heirs and creditors against a single malfeasance. The condition would indeed, appear to secure the performance of every duty which the law enjoins on an administrator. Nor can this view of the subject disturb the authority of the *Treasurer of Pickaway county v. Hall*, (3 *Ohio Rep.* 225.) That was an action on the bond of the administratrix, and the principal breach assigned, was "that she had neglected and refused, though often requested, and demanded particularly on the 30th March, 1827, to pay the said Nicholas and Rebecca," (for whose use the action was brought,) "said Rebecca being one of the heirs of Joseph Glase deceased, the proportion of moneys before that time, come into the hands of the administratrix, to which said Rebecca, as heir at law was entitled."

The Court say, "if the plaintiff claims, as heir, he must show how he makes himself so, that his right may judicially appear to the court, and the proportion due to him ascertained." Again. "It is much the safer doctrine to require proceedings, first against the administrator himself, and only allow resort to the surety, when nothing is to be contested but the question of payment." The questions considered by the Court were, 1st. Whether, in the declaration, the plaintiff had shewed herself, with sufficient certainty, to be heir to the intestate. 2d. Whether, admitting she was heir, she could sue upon the bond as distributee before settlement, and her proportion had been ascertained. The Court never could have intended to be understood as deciding that no breach of the condition of the bond could be assigned, except non payment to the distributees, nor that the bond could not be forfeited, so as to charge the securities until final settlement. The Legislature, without doubt, intended this bond, as a security, not only for the heir, but for the creditors; and indeed all interested in a just administration of the estate. But this is aside from the consideration whether *devastarit* can be assigned in a suit upon the bond of the administrator. A creditor shall not take an assignment of the bond and sue it, and assign for breach the non payment of a debt to him, or *devastavit* committed by the administrator, for that would be needless and infinite. *Archbishop of Canterbury v. Wells*. 1 *Salk*. 315. The first proposition in this decision, has been questioned; (13 *John. Rep.* 437;)—but it has received the sanction of the Supreme Court of Massachusetts, (9 *Mass.* 114,) and so far as an authority upon the question under consideration, has never, (that can be discovered,) been doubted. In the case of *The People v. Dunlap*, the Supreme Court of New York, do not expressly decide that *devastavit* may be suggested, upon a suit on the bond of the administrator; but rather seemed to permit the recovery, upon

the ground, that she suggestion, under the statute, amounted to an assignment of a breach of the condition. The cases cited by that court are, 1 *Wash.* 31 and 9 *Mas.* 114. If the object in citing these authorities, was to maintain the proposition, that in a suit on the administrator's bond, a devastavit might be suggested, they furnish no authority to support it. In neither of those cases is there any such suggestion. The wasting of the estate is in itself a tort.—It is contrary to the oath of the administrator, and the trust and confidence reposed in him. To the suggestion on the inquisition, not guilty may be pleaded. It is like a criminal prosecution. 1 *Wash.* 31. It would present a strange anomaly to join a security, whose liability arose from contract merely, with a principal charged, in an action *ex delicti!* Whether we look to precedent and authorities, or the reason of the thing, the conclusion is forced upon us that a *devastavit* cannot be established in a suit against the administrator and his securities, upon the official bond. How a *devastavit* shall be fixed, and how far the securities under our statuse, shall be liable for such malfeasance, must be left open for consideration. The question on the record is whether a *devastavit* can be first established upon the suit against the administrator and his securities; and we are clearly of opinion it cannot, and that such practice would be warranted by no authority. The conclusions of the Court will be found supported by the following authorities: 1 *Salk*: 315, *Camp.* 140. *At.* 248. 1 *Mun.* 1. 1 *Wash.* 31. 9 *Mass.* 114. 1 *Marshall*, 448. 1 *Bibb.* 292. 13 *John.* 443. 1 *Bay*, 328. 1 *McCord*, 76. In these various authorities, with the exception of 13 *John.* 443, we find no suggestion of *devastavit* in the declaration upon the administrator's bond, nor is a question made of the liability of the administrator and his securities upon a breach of the condition. Upon the first error assigned, the Judgment of the Court below must be reversed.

No argument was furnished on either side.

BUSH, ET AL. *v.* CRITCHFIELD, ET AL.

It is a general rule, that where a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite.

Where persons covenant as sureties, that their principal shall sell and account for all merchandize placed in his hands, within a stated period, it is not necessary to aver notice to the sceuties, of a failure, in an action on the covenant.

This was an action of covenant, adjourned here for decision from the county of Knox. The declaration contained two counts, upon the same covenant: The second count stated, that on the 27th June, 1825, the defendants convenanted with the plaintiffs, in consideration that the plaintiffs would supply one D. B. McConnel with merchandize to sell on commission, at such per cent. as the plaintiffs and McConnel might, or had agreed upon, that the said defendants would hold themselves responsible for the faithful and honest performance of said McConnel, for one year from that date, and as much longer as said Mc-

Connel should be justified in the sight of the plaintiffs and defendants, and that said McConnel should render a just and true account of all merchandize so delivered by the plaintiffs to him, and of sales made of such goods by him, as often as the plaintiffs should call for such account. The defendants covenanted that McConnel should, faithfully and honestly, fulfil all that he had engaged, by an article with the plaintiffs, dated 18th April, 1825, and that the defendants would be bound for the merchandize delivered under said article, as if they had been formerly bound with their co-defendants, and others, for the same, for the faithful performance of the same; which article of 18th April, 1825, is then recited in the delaration, containing various stipulations for selling and accounting for merchandize, and for articles received in barter for the same, at an allowance of fifteen per. cent. upon the proceeds of sales.

The declaration then avers, that on the 28th of June, 1825, plaintiffs delivered a large amount of merchandise to MConnel, to be sold on commission, under the contract. It then avers, that McConnel did not, for one year from the 27th June, 1825, "honestly, and fairly account with, and pay the said plaintiffs, the money for which the said McConnel sold the said goods, wares, and merchandise; but, on the contrary thereof, said McConnel, within one year from the 27th June, 1825, sold a large quantity of the said merchandise, and received for the same a large sum of money, to wit, the sum of eighteen hundred dollars, which he neglected and refused to pay," &c. assigning various other breaches, under the contract of June 27, 1825, as including the contract of April 18, 1825, concluding with an averment that McConnel had failed to comply with the terms of the contract, "although said plaintiffs afterwards, to wit, on the 17th day of April, 1826, at county aforesaid, and within one year from the 27th day of June, 1825, called on said McConnel, for that purpose." The declaration contains no averment that the defendants had notice of any failure alleged in the declaration.

The defendants pleaded, *first*, that they had performed their covenants.

Second. That on the 17th April, 1826, McConnel settled and accounted with the plaintiffs for all the goods delivered, and for the profits of sales, and generally of all matters arising on the contract, and delivered to them goods and merchandise of the value of fifteen hundred dollars, and gave separate promissory notes for sums specified, to individuals named by mutual agreement between the plaintiffs and McConnel, in full satisfaction of the whole contract, and for the merchandise delivered by plaintiffs to McConnel, and for the profits arising on the sale.

The plaintiffs joined issue on the plea of general performance. And to the special plea, they also replied, negativing the allegations of the plea, and concluded by tendering an issue to the country. To this replication the defendants demurred.

H. Stanbery, for plaintiffs. *T. Ewing*, for defendants.

By the COURT.

It is a general rule, that, where a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite: therefore,

if a man is bound by obligation or covenant, or promises to do a thing, on the performance of an act by a stanger, notice need not be alleged, for it lies in the defendant's knowledge, as much as the plaintiff's, and he ought to take notice at his peril. 2 *Saund.* 62, *n.* 4; 2 *Chit.* 81; 11 *John. R.* 61.

The defendants have covenanted, in general terms, to hold themselves accountable for the fidelity of McConnel, and that he should render a true account for one year; and if it had been the intention of parties, that the obligors should have notice, that should have been inserted in the condition. A party who covenants generally, to do a particular thing, is bound at all events. *Duffield v. Scott, et. al.* 3 *J. R.* 374. The plaintiffs had less to do with the supervision of McConnell's conduct than the defendants; nor had they any better means of ascertaining that he was converting the goods to his own use. The plaintiffs did not reserve the power of visitation, nor did they covenant to notify the defendants, of McConnel's mode of transacting the business. The defendant, in consideration of a ruff-band delivered to him, promised to pay him, on the day of the plaintiff's marriage, three pounds, and alleged he was married such a day, yet although often requested he had not paid. There was judgment of *nihil dicit* and enquiry. A motion was made in arrest of judgment, because there could be no breach of promise unless notice was given of the plaintiff's marriage; but Hutton, Harvey, and Yelverton adjudged it to be good enough, for the defendant, at his peril, ought to take notice, and the plaintiff need not show he gave notice of the marriage. *Croke, Car.* 34. In the case of *Norris, et al. v. Powell,* (14 *East.* 510) a bond had been taken by the commissioners of the land tax, for the fidelity of a collector. It was objected that no notice had been given to the surety, of the collector's default, nor demand of payment made, until after the principal had been discharged for misconduct; but both points were overruled by the court. *Fell on Guaranties,* 224. The defendants do not assume the position, that there is any express covenant to give notice, or even covenant in law to do it; but rather place their case upon principles of commercial law. But certainly there is no just analogy between principal and surety, in a bond, and the drawer or endorser of a bill of exchange, so far as legal principles fix their liabilities. The liability of an endorser is conditional, and entirely arbitrary. His undertaking is conditional, that he will be holden, upon demand and refusal of the drawer, and notice of those facts. This condition, though not expressed, is of the essence of the contract. There is no such contract implied in sealed instruments. If parties wish to have and give notice, they must so covenant, and then the non-performance might be assigned as a breach. As this instrument stands, there is no express covenant to give notice to the defendants, of McConnell's default, nor are the covenants such as to raise any in law. From the nature of the covenants, the defendants were bound, at their peril, to take notice of the breaches.

Demurrer to the replication overruled, and costs taxed to the defendants since filing, and the cause continued for enquiry of damages.

RAGUET v. WADE.

The statutes imposing a tax upon merchants are not unconstitutional.

The declaration is for taking, and carrying away goods, &c. of the plaintiff, to the value of five hundred dollars.

The defendant pleads, *first*, the general issue.

Second. That the defendant was treasurer of the county of Hamilton, and, as such, was authorized, by law to collect all taxes assessed by and under the authority of the state of Ohio, within said county. That at the time of seizing, and taking said goods, the plaintiff was a merchant, selling goods, wares, and merchandise, within said county, and was subject to pay a tax upon his capital employed, &c. and being so subject, was taxed in the sum of dollars, under, and by virtue of the laws aforesaid; and said tax, being so laid and assessed, was placed in the defendant's hands, as treasurer, to collect; and the plaintiff wholly neglecting, and refusing to pay the same, defendant entered, &c. and took, &c. and disposed of said goods, according to law, which is the same, &c.

The plaintiff replies that his capital was employed in importing into this state, from other states, and that he was vending, by wholesale and retail, divers, &c. the growth, &c. of foreign countries, and other states, &c. and he, the plaintiff, imported direct from said states, in bulk, and in packages put up by the manufacturer, none of which, by law, were the subject of taxation, by the state authority, &c.

To this replication there is a general demurrer and joinder. The question submitted, was, whether the law of the state, imposing a tax upon the capital employed by merchants, is constitutional.

Hammond, for plaintiff. *Wade*, for defendant.

Opinion of the COURT, *by Judge* SWAN.

This presents an enquiry, of acknowledged delicacy, concerning the constitutional powers of the general and state governments. The question is deeply interesting to this state, as her citizens must depend upon this general legislative authority for the preservation of their faith, and the completion of the public works they have undertaken. It is imposing, as it involves the exercise of sovereign power.

The acts of the legislature, supposed to be in conflict with the constitution and laws of the United States, were passed February 3d, 1825, and January 17th, 1826, and, so far as concerns the present inquiry, are in these words: "all persons trading in foreign or domestic goods, wares, and merchandise, or drugs and medicines, within this state, whether the capital employed in such trade shall be owned within the state or elsewhere, shall be considered merchants, and as such shall be classed according to the amount of annual capital, by them respectively employed." The act of January 17th, 1826, is exactly in the same words, except "they are to be entered on the general list for taxa-

tion, and as such shall be assessed according to the amount of capital by such merchants respectively employed," &c. This is a part of an equitable system of taxation, adopted to meet the disbursements for canals, as well as to defray the general expenses of the government. The right of taxing capital employed in merchandise, of licensing tavern keepers to vend foreign and domestic liquors, and of regulating retailers, pedlars and hawkers, has been exercised without question as to its constitutional existence, from the foundation of the state government. Whatever then may be the effect, it would be unjust to impute to the legislature any intentional invasion of the laws of Congress, or the constitution of the United States.

The plaintiff insists that these acts of the legislature are repugnant to Art. 1, Sec 10, of the constitution of the United States, which declares that no state shall, without the consent of Congress, lay any imposts or duties, on imports or exports, except what may be absolutely necessary for executing its inspection laws; and also to Art. 1, Sec. 8, which says Congress shall have power "to regulate commerce with foreign nations, and amongst the several states, and with the Indian tribes."

The powers of the general and state governments, under these clauses of the constitution, have been so often and so ably discussed, and the principles so profoundly considered by the Supreme Court of the United States, that nearly the whole grounds have been occupied, and but little remains for us other than the application of those principles as settled to the case presented by the pleadings. The powers of the different governments under the first article, *section tenth* of the Constitution, are very candidly and ably examined in the *thirty second number* of the Federalist, by Mr. Hamilton. This fair and profound commentary upon the constitution, has deserved and received the approbation of the highest judicial tribunal in the nation. The power of the states to impose taxes on all articles, other than exports or imports, is here contended to be "manifestly a concurrent and co-equal authority," &c. There is plainly no expression in the granting clause, which makes that power exclusive in the union. There is no independent clause or sentence which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the states in relation to the duties on imports and exports. This restriction implies an admission, that if it were not inserted, the states would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the states remains undiminished. In another view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the union of the power of laying those duties, implied the exclusion of the states, or even their subordination, in this particular, there could be no need of such restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended. I mean that the states in all cases to which the restriction did not apply, would have a concurrent power of taxing with the union. In the case of *Sturges v. Crowninshield*, (4 *Wheat.* 122,) one of the principles recognised, was, that the mere grant of a power to Congress, did not imply a prohibition on the states to exercise the same power; but wherever the terms in which a power is granted to Congress, or the nature of the power required that it

should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act upon it. This leaves a class of cases in which the general and state governments have co-ordinate, and concurrent powers of legislation. The states were, therefore, not forbidden to pass bankrupt laws, provided they should contain no principle which would violate the tenth section, of the first article of the constitution of the United States.

In the case of *Gibbons v. Ogden*, (9 *Wheaton*, 1,) it was decided that the power to regulate commerce, was the power to prescribe the rule by which commerce was to be governed; that it was complete in itself; might be exercised to its utmost extent; and had no limitations other than those prescribed in the constitution. But the court say, "the grant of the power to lay and collect taxes, is like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states, &c. The power of taxation is indispensable to their existence, and is a power, which in its own nature is capable of residing in, and being exercised by, different authorities at the same time," *p*, 199. The co-ordinate authority seems a necessary result of the division of sovereign power. The self-preservation of both governments requires the exercise of the taxing power; and it seems admitted by the whole tenor of the constitution. The principle appears established beyond controversy, that the states can tax all articles concurrently with the general government, except imports and exports, or where it will interfere with the power of Congress, to regulate commerce. The case of *Brown and others v. the state of Maryland*, (12 *Wheat.* 419,) is supposed by the plaintiff to be an authority exactly in his favor; and that the principles decided require this court to pronounce the law under consideration, unconstitutional and void. The law of Maryland required "importers of foreign articles or commodoties, of dry goods, wares, or merchandises, by bulk or package, &c. and other persons selling the same by wholesale, bale, or package, &c. before they were authorized to sell, to take out a license, &c. for which they should pay fifty dollars." The penalty and forfeiture were the amount of the license, and one hundred dollars to be recovered by indictment. The provisions of this law were held to be in conflict with the powers vested in the Congress by the United States, as well as that article of the constitution, which inhibits a state from laying any duties upon imports. The court held the principle to be sound, that a grant to import included a power to sell, subject to some limitation, and that the article imported, as well as the importer were constitutionally protected from local legislation. "Any penalty," says the court, "inflicted on the importer, for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into, and with the mass of property in the country, must be hostile to the powers given to Congress to regulate commerce, since an essential part of that regulation, and the principal object of it is to prescribe the regular means of accomplishing that introduction and incorporation." The powers of a state to tax its own citizens, or their property within its jurisdiction, are admitted to be *sacred;* but these cannot be exercised so as to obstruct the operations of an act of Congress, or defeat their constitutional right to regulate commerce. The correctness of these views are evident from the whole

tenor of the instrument, which establishes the fundamental principles of the government, and from the very nature of our complex system. Without a recognition of them, the portions of sovreignty which have been given and retained by the general and state governments, could not exist. The one or the other would sink for want of support, and a consolidation or separation would be the necessary result. The powers of the governments approach each other, until they are only separated by delicate shades, and almost imperceptible gradations. It is difficult to trace with certainty, but yet it is hoped not impossible, the line that separates the constitutional powers of the general and state governments. The constitution has not, in all cases, exactly marked the termination of the one, nor the commencement of the other. Perhaps no skill in the science of government could, in all cases, fix the line of limitation. We have it from the highest judicial authority, that should the general and state governments, in the exercise of their powers, come in conflict, "that which is not supreme must yield to that which is supreme." The Supreme Court of the United States felt, and acknowledged the difficulty of establishing a rule universal in its application, a rule which should fix the boundary between the constitutional powers of the general and state governments, upon the subject of taxation. They have not determined the exact point where the operations of the grant to the importer shall cease, upon the articles imported, to protect them from state imposition.

A rule, however, is suggested, and applied more than once in the decision of the court, which, with great deference, is deemed too vague and indefinite, even for practical purposes, and cannot be adopted as a guide in judicial determinations. It is this, "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state." This rule seems to have been suggested from that familiar principle, that if one mingle his money with another's, so that the proportions cannot be distinguished in the mass, the other shall have the whole.

In some states, and respecting some articles, this rule might operate with justness and propriety; but by far the greater proportion of foreign commodities, and those from other states, are never mixed with the mass of property, so as to lose their identity. This is peculiarly the case in the agricultural states. The stock of our merchants, consists, almost exclusively, of articles from other states and countries, which can as well be discovered singly, as in packages, bales, or trunks. The brandy of France, or the wine of Germany or Spain, can be as easily distinguished in bottles, as in pipes. It would seem a task, not much less difficult, to discover what should be considered an *incorporation*, and *mixing* up of property, so as to admit the laying of a tax upon the articles, by the state, as it was before to find the limits of local legislation, under the constitution. The power of taxing property within its jurisdiction by a state, although the same has been subjected to imposts, by the laws of the United States, seems never to have been directly denied by the bar or court. Its exercise, after the right acquired under the laws of the general government has ceased, is required by principles of self preservation, and is acknowledged to be consistent with a correct construction of the constitution. The difficulty is

not in the power, but in the extent of its application, so as not to come in collision with the co-ordinate authority of the general government. It is conceded that the revenue arising from foreign commerce, belongs exclusively to the United States, as well as the power to regulate intercourse with foreign nations. The law of a state which would interfere with either, would be unconstitutional and void. The right to make their own regulations concerning them is essential to the existence of the federal government, and the constitution has declared it in terms which leaves little to be supplied by inference or implication. If the acts of the legislature, under consideration, came in conflict with the powers of congress to lay duties upon imports, to regulate commerce with foreign nations and among the states, or any other secured by the constitution, the court, without hesitation, would declare them inoperative and void.

The laws in question impose a tax upon the capital of merchants, without any discrimination between wholesale and retail dealers, except the classes would make such discrimination. This tax cannot be admitted to come within the idea of a duty upon imports, nor can it be discovered that its operations can interfere with the powers of congress to regulate commerce. It is purely a police regulation, affecting the consumer alone. The amount of tax upon the capital thus employed, bears a just proportion to that assessed upon land, and almost every species of property within the state. It can no more affect importations, or interfere with commercial regulations by the United States, than a tax upon land or bullocks, could be deemed a duty upon exports. The state power to tax, must be taken with the limitation only that it be not an impost, or duty upon imports, or exports, and that it does not conflict with the powers of congress to regulate commerce.

It is with these exceptions, an unlimited, sovereign power. The legitimate exercise of this authority is one thing; the abuse of it is a different question. If a state, in a fit of political phrensy, should lose sight of its duty, as a constituent part of the general government, and levy a tax upon the capital of merchants, so as to amount to a prohibition of foreign commodities, and destroy the revenue of the general government, this would be most clearly an interference with the powers of Congress to regulate commerce, and such a law would not only be repugnant to the principles of the constitution, but void, on the grounds that it would be a manifest act of tyranny and oppression.

This is not, however, the character of the tax under consideration, nor has it the remotest tendency to bring about such a result. So, an insupportable tax upon bullocks, or the land upon which they must be grazed, may be imposed by a state, so as wholly to prevent the exportation of beef. This possible abuse of power ought not to furnish a constitutional objection to its being exercised in a just and reasonable manner, for the legitimate ends and objects of the local governments, and the maintenance of that part of the sovereign power with which they are entrusted by the constitution. When such unjust and oppressive measures shall be adopted in state legislation, as their powers are not supreme, "they must yield to that which is supreme." The highest judicial tribunal in the union must determine this, and they will fearlessly determine it, when such a law of the state shall be presented. The judicial department of the government, as cases arise, must determine the municipal powers of the states, and the commercial powers of the union.

No doubt the limited powers of the states may have occasionally, through inadvertence, or temporary popular excitement, been transcended in legislation; but the power exists with the judiciary, to prevent the effects of these dangerous collisions, and it is on the exercise, the independent and fearless exercise, of this power, that the government *has depended* for its continuance, and *must depend* for its perpetuity. To pronounce these laws unconstitutional, because by possibility they may, in some very remote degree, affect importations, or the operations of commerce, would be to yield the principle, that a state has not a right to tax property within its jurisdiction for its own support. It would be surrendering the portion of sovereignty reserved at the formation of the constitution, and acquiescing in becoming a consolidated government. These laws impose no impost or duty, upon imports. The tax is upon capital, just and equitable, upon abstract principles; indispensably necessary to be laid for the credit, faith, and interest of the state; conflicting with no provision of the constitution, or law of Congress; and interfering with no power to regulate commerce, either foreign or amongst the states. It is believed these views do not oppose any principle decided by the supreme court of the United States, but, on the contrary, are sanctioned by the general admissions and reasons, where similar points have been under discussion and consideration. To preserve the balance between the powers of the general and state governments, the end and object must be kept in view. Mist, if not darkness, is upon the line which marks the division of the sovereign power. The rights of both must depend upon the patriotism and good sense of the citizens, and the mutual forbearance of their agents, as much as upon any distinct, visible, constitutional boundary.

The demurrer is sustained.

LESSEE OF SMITH, ET AL. v. JONES.

The statute of wills in Ohio is more comprehensive than that of HEN. VIII.

Where the testator, at the time of making his will, was in possession of a lot of land, under a a verbal contract of purchase, held that a devisee of such lot was good, notwithstanding the testator acquired the legal title after the execution of the will.

Such aquisition of the legal title does not operate as a revocation of the will, and upon the death of the testator the legal title passes to the devisee, and not to the heir at law.

This was a motion for a new trial, in action of ejectment, the jury having, under the instruction of the court, returned a verdict for the defendant. The case was this. The lessors of the plaintiff claimed as heirs at law to their father, a lot, in Cincinnati, conveyed to him by Joel Williams, on the 26th of May, 1812. The defendants claimed under a will, duly executed, dated July 25, 1811. The defendant also gave evidence that the testator, Smith, was in possession of the lot, under a verbal contract of purchase, and commenced improvements upon it, anterior to July, 1811, the date of the will. It was also, in proof, that on the 9th of September, 1811, the testator entered into a written agreement with J. Williams for the purchase of the lot, in completion of which the deed was subsequently made.

The court instructed the Jury, that if they were satisfied, from the proof, that the testator was in possession, under a verbal contract of purchase, at the

time of making the will, the devise was inoperative, and the defendant entitled to a verdict. Under this instruction, the jury found for the defendant, adding that they found that the testator was in possession, upon a verbal contract of the ground that the purchase, when the will was made. The motion for a new trial was made, on Court erred in the instruction given; and the decision of this motion was adjourned here by the Supreme Court of Hamilton county.

Benham and *Finley*, for plaintiff. *Fox* contra.

By the COURT.

The statute of Ohio is much more comprehensive in its terms than those of the 32d and 34th of Henry the 8th. "Every male person aged twenty-one years, or upwards, being of sound mind, shall have power at his or her will and pleasure, by last will and testament, to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he or she hath, or at the time of his or her death, shall have, in, or to, lands, tenements, hereditaments, annuities, or rents charged upon, or issuing upon them." 9 *L. O.* 64.

The third section provides for the revocation of wills, in the details of which an alteration of the estate, after making and publishing the will, is not mentioned.

A prominent feature of the English law is to favor the heir, and prevent disinhersion. This has introduced the fixed principle that at the inception of the will a man must be seized of the estate he devises, which should remain unaltered to the time of its consummation by his death. *Pow. on Dev.* 566. The difference in circumstances has, with us, led to a difference in legislation, and cases may arise in which our courts may, with great propriety, depart in their judicial decisions, from those of England, upon questions arising out of wills. The laws of the various states show that it is the general policy of the government, that estates should not accumulate in families, or succeed in perpetuity. This is universally supposed to be the most effectual way to guard from degeneracy and destruction, our free and equal institutions. Notwithstanding this solicitude in favor of the heir, which is manifested in the course of decisions in that country, it has been held that when a devise is made in general words, it will carry the estate both in law and equity. 1 *Ves.* 437. So any contract which a court of equity would enforce on an application for a specific performance, would be sufficient to pass under sweeping words in a will. 1 *Ves.* 437; *Pow. on Dev.* 208. But such contract must exist at the time of making the will, because one having no title whatever can devise nothing. 2 *P. Will.* 629. It has also been decided that if a man devise all his lands for the payment of his debts, and afterward purchase lands, although there were no articles of agreement previous to the will, a sale will be decreed of those after purchased lands. 2 *Ch. Ca.* 144. It appears to be the settled law in England, that an equity may be devised, and if a deed is not executed during the life of the testator, the obligor will be held a trustee for the devisor, and may compel an execution of the articles for his benefit. If the testator may pass equitable interests in land, by will, in England, there can be no doubt he may do it under the more comprehensive terms of our statute. In this case no doubt can exist as to the in-

tention of the testator. The words embrace his whole estate. It is beyond controversy that whatever interest the testator had in this land, when the will was made and published, passed to Agnes Smith, his wife.

The question more difficult, is, whether getting in the legal estate before his death, and after the execution of the will, amounts to a revocation, and whether the legal estate so obtained, passed by the will, or descends to the heir.

In the case of *Rex. ex. dem. Norden, v. Griffiths and others*, it was held that an admittance would refer back to a surrender, being only a completion of it. 4 *Burr.* 1952.

In *Selwin v Selwin*, (2 *Bur.* 1131,) the principle was decided that the whole of a conveyance shall be taken together and the several parts of it shall have relation back to the principal part. S. being seized in fee by indenture of lease and release, conveyed to uses and covenanted to levy a fine. All were adjudged and assurance. 2 *Bur.* 704. Mr. Justice Wilmot—"He considered these deeds a covenant to levy a fine, and they ought with the fine to be considered as one and the same assurance." The same principle was decided *Croke Ja.* 643. All the court held that a bargain and sale, and the fine and recovery, are but one assurance, and says the court "the recovery being executed which is grounded upon the covenant, is *quasi* a conveyance to use *ab initio*. 2 *Ves.* 681. These cases are deemed analagous in principle to the one under consideration. The equity which existed at the time of making the will, clearly passed, and the conveyance to the devisor is no change of the estate to work a revocation, but rather a confirmation of it.

For the purpose of protecting the devisee, it would but conform to the authorities to hold the legal conveyance accepted by the testator, posterior to the execution of the will, as an act of confirmation on his part, and to consider them both as one assurance. It cannot be doubted if the testator had refused to accept the deed in his life time, the right would have been complete in the devisee, and she could have compelled a specific performance of the contract. The principles involved in this case were decided, *Gist's heirs v. Robinet*, (3 *Bibb* 2.) The case was this: under the royal proclamation of 1763, Thomas Gist, for military services in the war with Great Britain and France, became entitled to a grant of two thousand acres of land, upon his personal application to any of the governors of the colonies of North America. In 1772, before he applied for his claim, he made and published his will, by which he devised to his sister, Anne Gist, one moiety of his whole estate, both real and personal; the other moiety he gave to Elizabeth Johnson. He afterwards obtained a warrant, caused it to be surveyed, and, in January, 1780, obtained a grant. He died in 1785, without altering or republishing his will, leaving Nathaniel Gist his heir at law. Anne Gist, conveyed to Nathaniel Gist, in fee, a moiety of the tract of land; Nathaniel died, leaving the lessors of the plaintiff his heirs at law. The question was, whether Thomas Gist, at the time of making his will, had such an interest under the proclamation of 1763, as was transmissible by devise. The court lay down the doctrine as incontrovertible, that an equity will pass by a devise. The judgment, which had been in favor of the plaintiff for a moiety only, was affirmed. The effect of this decision is, that when an equity existed at the time of publishing the will, and before the testa-

tor's death it was carried into grant, the equitable and legal estate could not be parted, but the latter attached to the former, so as to vest a complete estate in the devisee. If otherwise, the lessor of the plaintiff, who was heir at law of the testator, must have recovered the whole tract of land instead of the moiety, and turned the devisee of the other moiety to a court of chancery for relief. This defendant is the grantee of the devisee, and if the legal estate has descended to the heir at law, of the testator, whatever exquities may exist, the plaintiff is entitled to recover in this action. The cases before cited would appear, however, fully to warrant this court in considering the estate complete in the devisee, in consequence of the will vesting the equity, and by reason that the legal estate was acquired by the testator before his death. To consider it in any other light, would be separating the legal estate to no other purpose, except to produce litigation and expense, or indulge in subtleties which have little to do with reason or justice. The court are therefore of opinion that the acceptance of a deed after the execution of the will is not an ademption of the legacy, and for the purpose of preventing circuity of action, the deed may be attached to the devise, and considered but one assurance.

Judgment on the verdict.

BANK OF CHILLICOTHE v. YOE, ET AL.

Under the statute regulating judicial proceedings where banks and bankers are parties, a bank, upon a joint and several contract, cannot ask the aid of equity, until they have made use of all their legal remedies.

This case was adjourned here for decision from the county of Ross. It was a bill in chancery, and the case made was as follows: On the 19th of May, 1819, Daniel Vanmetre made his promissory note to Jesse McKay, payable at the Bank of Chillicothe, by whom and John Creed it was endorsed, and discounted at the Bank. In consequence of non-payment it was duly protested, and suit brought under the statute, against the maker and endorsers, jointly. Process was served on Vanmetre and Creed, and returned not served as to McKay. Judgment was rendered against Vanmetre and Creed, and Vanmetre was deceased and insolvent. McKay was also deceased, no judgment having been rendered against him in his lifetime, and the defendant was his administrator. The object of the bill was to set up the claim, in behalf of the bank, against the administrator of McKay. It alleged the insolvency of the principal debtor, Vanmetre, but was silent as to the responsibility of Creed, the other endorser, against whom judgment, at law, had been obtained.

The defendant demurred.

Ewing, for complainant. *King*, for defendant.

By the COURT.

The question to be decided, is, whether, upon a joint and several contract, made by the statute joint, as to the suit and judgment, the complainants can

go into equity, before they have made use of their legal remedies. The ninth section of the act to regulate judicial proceedings, where banks and bankers are parties, authorizes a joint action against the drawers and endorsers; and declares that if the bank shall institute a separate action against drawer and endorser, no costs shall be recovered. The complainants claim they have lost their legal remedy, by the death of McKay, under the provision of the statute. But by any thing that appears in this bill, the legal remedy is still perfect as against Creed, the survivor, whose insolvency is not even suggested, and against whom process of execution has not been taken. The most favorable aspect of the bill places the complainants' equity upon the restoration of a naked legal right, lost by the act of GOD, under our statutory regulations concerning banks. A court of chancery would probably be open to the complainants, when they shall have exhausted their legal remedies, if a balance still remains due upon the judgment. But the complainants shew no present necessity for a decree against the representatives of McKay, nor have they even alleged that such decree would facilitate the collection of their judgment. They came into this court, having from their own shewing, a perfect legal remedy against the survivor, which they have neglected to enforce, without furnishing any excuse whatever for their negligence. They are here as volunteers for one of the endorsers, without showing why the estate of the other should be liable for the payment of their judgment. In this bill the court cannot settle the equitable rights of the endorsers, especially as one of them is made a party. Those who are interested should be left to their own litigation, without the interference of strangers. Bill dismissed, with costs.

WADE v. GRAHAM, ET AL.

The securities of an administrator are liable for the proceeds of real estate sold by the administrator under an order of court for the payment of debts.

This was an action of debt on an administrator's bond. The facts are thus stated: This suit is brought on the bond of the administrator of Daniel Symmes, executed at the time of the appointment of the administrator, to recover the amount of a judgment in favor of Samuel McHenry, a creditor of the estate. On the trial before the jury the plaintiff offered in evidence, the proceeds of the real estate of the intestate sold by the administrator by order of the court, to which evidence the defendants objected. The objection was overruled by the court, and the evidence admitted, and a verdict given for the plaintiff. For this supposed mistake of law, the defendants moved for a new trial, and the decision of the motion was adjourned here from the county of Hamilton.

J. W. Piatt, for plaintiff. *N. Wright*, for defendants.

By the COURT.

The condition of an administrator's bond is, that he shall faithfully perform all the duties required of him. The eighteenth section of the act, (prescribing the duties of administrators,) directs, most explicitly, the distribution of the

"assets," arising from the sale of real estate by an administrator. It requires the funeral expenses, and those of the last sickness, with the cost of the administration, to be paid; secondly, judgments rendered in the lifetime of the intestate, and lastly, distribution of the residue amongst the creditors. Nothing can be clearer than that the condition of an administrator's bond was intended, to secure to all interested in the estate, every duty which the law enjoins upon that officer. Certain duties are required of him respecting the distribution of assets arising from the sale of lands: can it be doubted that his bond secures fidelity in the performance of them? If the terms of the statute, however, left a doubt as to the extent of the liability of the administrator, and his security upon the bond, more than twenty years uniform practice and usage have made it cover money arising from the sale of real as well as personal property. It is true, when the court grant an order to sell real estate, they have the power, for the security of heirs and creditors, to require from the administrator what security they may deem proper, respect being had to the value of the estate. When letters of administration are granted, it cannot always be known that a necessity exists for the sale of real estate, to discharge the debts of the intestate. The penalty of the bond, therefore, is usually required in double the amount of the personal property.

This amount is frequently insufficient to cover the assets arising from the sale of lands: and sometimes the securities become irresponsible for the additional sums. The legislature contemplating these things, gave a discretionary power to the Courts to require what security they might deem proper, when they granted an order for the sale of real estate. This appears to be a reasonable exposition of the legislature's intention, and it is the same it has uniformly received in practice. When the penalty of the bond is sufficient, and the obligors have been considered responsible, no other security have been demanded by the Courts; when they were not, an additional bond has been taken before the order of sale granted; the administrator is held liable on his bond to the same extent, for money arising from the sale of real estate, as for the proceeds of personal property. The proceeds of the former are to all intents and purposes, assets as well as the latter. They are both appropriated in the same manner, and when land is turned into money, it is instantaneously assets, according to the legal acceptation of the term. The case of *Truman v. Anderson and Others*, (11 *Mass. R.* 190,) has been cited as an authority in point for the defendant. The question submitted in that case was whether the bond of an administratrix was forfeited for her neglect, to apply for a license to sell the real estate of her intestate, for the payment of his debts. This is not the case here. The question to be decided by the Court is, whether the administrator and his security are liable for the proceeds of real estate, *actually sold*, and which came into the hands of the administrator. It will be sufficient to decide the point determined by the Supreme Court of Massachusetts, when presented. It clearly does not arise in this case. In deciding the point under consideration, we rely upon our own practice, which has given construction to our statutes, and, it is believed a correct one, according to the principles of sound policy and just reasoning. It is the opinion of the Court, the condition of an administrator's bond covers all assets, to the extent of the penalty, at least,

whether personal, or arising from the sale of real estate. Motion overruled. Judgment on the verdict.

LESSEE OF GOFORTH v. LONGWORTH.

It is now well settled that Courts give a liberal construction to statutes authorising sale of real estate, by executors and administrators, and will make all reasonable presumptions in support of such sales; but when no record of an order of sale is produced, the sale is void.

This was an ejectment adjourned here for decision from Hamilton county. The plaintiff claimed as heir at law of Aaron Goforth, who died, legally seized of the lot in controversy, being No. 161, in Cincinnati. The seisin of the ancestor, and the heirship, were admitted. The defendant claimed under an alleged sale and conveyance, made by the administrators of A. Goforth, of the lot in question, for the payment of debts. In support of this claim he gave in evidence, a deed from the administrators, dated January 26, 1814, which recited that the sale was made by the administrators, under an order of court. To sustain this deed, the defendant further gave in evidence an order of court, dated of August term, 1813, in these words: "Petition and motion made by the administrators of A. Goforth, dec'd. for the sale of real estate. Account or statement exhibited to court, who appoint Joseph Carpenter, Ethan Stone, and Richard Fosdick, appraisers," &c.

An appraisement made by the persons named, of real estate, and returned to court, including the lot in dispute, was also given in evidence, which was dated December 11, 1813. An account of sales, as made by the administrators, dated December 15, 1813, was in proof, in which the lot 161, was set down as sold, December 14, 1813. This account was marked filed, as of the 14th April, 1814. No other order of court, in the premises, was given in evidence, except the one before quoted. The question submitted for decision was, whether upon the proofs exhibited, the sale, by the administrators, was valid.

Caswell & Starr, for the plaintiff. *N. Wright*, for the defendant.

By the COURT.

It is now well settled that courts give a liberal construction to statutes authorising sales of real estate, by executors or administrators. Public policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this necessary. But where the statute is explicit and unambiguous, in its terms, the court is not authorised to dispense with the formalities and modes of proceeding prescribed, or to supply them by presumptions and constructions.

The sale, relied upon by the defendant, was made under the statute of February 10, 1810. The 32d section provides "that when it shall be made appear to the satisfaction of the court that it is necessary to sell real property for

the discharge of debts, as specified in the preceding section, they shall appoint three disinterested men to view the lands, tenements or hereditaments, so to be sold, and return to court under oath, a statement of the value thereof, *after which the court shall direct* the executor or executors, administrator or administrators, to proceed to sell, either the whole or a part, as they may think proper, of such real estate, after giving notice," &c.

The provisions here cited required that certain acts shall be done by the court of common pleas, and these constitute the foundation upon which the sale of a deceased person's real estate, by his personal representative, must rest. That these acts were done by the court must be evidenced by the record of their proceedings. The law requires that the Court shall appoint valuers, who shall value the estate, and make a return of the valuation, "*after which the court shall direct*" the whole or a part to be sold, "*as they may think proper.*" This act, to be performed by the court, is essentially of a judicial character. A judgment is to be made up, and pronounced; and this judgment is the foundation of the administrator's or executor's power to sell. Were such a judgment, order, or direction produced, it would be correct to infer that it was rendered or made upon a proper state of facts. The appointment and return of the valuers, with other preliminary proceedings, might be inferred or presumed. But the judgment or direction stands upon a different principle. It can only exist as matter of record, and can in no other mode be proven.

No transcript of any such record is produced; nor any thing more than the order appointing the valuers; which in the nature of things, preceded the direction, or order to sell; because between that appointment, and the final direction to sell, the valuers were to perform the duties required of them by law. The counsel, aware of the necessity of adducing record evidence of this order or judgment, attempt to deduce it from the "*et cetera*" at the end of the order appointing valuers. But such an interpretation of the "*et cetera*," in the case before us, is wholly inadmissible. Lord Coke himself, whose commentary upon the "*et cetera*" of Littleton is a standing jest with the profession, never could have thought that matter subsequent, and that the final decision of the court, in the case, could be included in an "*et cetera*" attached to the incipient order in the proceedings.

The statutory provisions in respect to cases of sales of real estate, by the personal representative, are intended to protect the interests of heirs and creditors, as well as that of purchasers. The power of the personal representative over the real estate of the deceased, is derivative and limited. It is derived from the act of the court, in conformity to the law. The discretion of the court must be exercised and declared upon the subject, and, without this, the act of the administrator or executor is void, because based upon no legal foundation. It is a case of acting under a power, where no power is conferred.—The act must therefore be void. In this case there is the proper proof that valuers were appointed, and made a return. These steps prepared the subject for the court to act upon, finally. But there is no evidence that they did finally act upon it. On the contrary, there are facts stated that warrant a contrary conclusion. The appraisement is dated December 11, 1813, and the administrators report the sale as made the 14th of the same month. In this period of

time, it was impossible for the court to act, and then for the administrator to give legal notice of sale. It seems, therefore, to be an almost necessary conclusion, that the administrators did not consider an order, or direction to sell, founded upon the return of the valuers, as necessary to invest them with the power to effect a sale. We cannot otherwise account for their appointing and advertising a sale, even before the valuation was made, and, of consequence, before any power to sell could be vested in them. They mistook their duty and their powers. We might as well attempt to sustain a sheriff's deed for land sold, on execution, where the pleadings were found, but no judgment, as to sustain the sale by the administrators, in this case. To divest the heirs of their estate by the sale of the personal representative, that sale must be made in substantial compliance with the statute. This must appear in the record, or arise on a just implication from it. Here we have neither. The judgment must be for the plaintiff.

COWDIN v. HURFORD.

A foreign attachment cannot be sustained against one of several joint contractors.

This was a writ of error adjourned here for decision from the county of Jefferson. The original suit was an attachment sued out of the Court of common pleas, of Jefferson county, upon the affidavit of the defendant in error, filed in January, 1823. Upon the return of the writ of attachment, Joseph Hurford filed a declaration, charging the assumpsit upon Robert Cowdin. George Starr claiming to be creditor, filed his declaration in the same manner. Other declarations were in like manner filed. Thomas Stevenson counts "that Robert Cowdin jointly with one Robert Gilmore, they being then and there joint partners, made his certain receipt, &c. jointly with the said Robert Gilmore, by which said receipt, said Cowdin acknowledged," &c. The promise was laid, as made by the defendant in attachment, to the plaintiff. To all these declarations, the defendant in attachment, pleaded in abatement, because the undertaking, if any, was by said Cowdin and one Robert Gilmore, who is still living. Demurrers and joinders to the pleas. The Court below adjudged the several pleas in abatement insufficient, and gave several judgments, to reverse which, this writ of error is brought.

Tappan, for plaintiff in error. *J. & D. Collier*, contra.

By the COURT.

The writ of attachment appears to have been issued under the statute of 1810; but the subsequent proceedings have been had under the law, which took effect on the 1st day of June, 1824. The pleadings disclose the fact, that one of two partners lived in the county of Jefferson, and the other was not a resident of the state. The affidavit was made, and the writ issued against the absent partner. The declaration charged him alone as the promiser, and the judg-

ments are rendered against him without noticing the liability of the other partner. The correctness of the whole pleadings is fairly before the court, upon the assignment of general errors. The question principally to be considered, is, whether in proceedings in attachment upon contracts, express or implied, where there are partners, it is necessary to charge them in the declaration, as in other actions. The thirteenth section of the act is in these words: "where two or more are jointly bound, or indebted either as joint obligors, partners, or otherwise, the writ of attachment provided for by this act, may be issued against the separate or joint estates, or both of such joint debtors, or any of them, in the same manner, and under the same restrictions as is provided for by this act in other cases."

Now this is merely directing the mode of proceedings *in rem*, where the defendants are joint obligors or partners; but neither dispenses with the proper parties to the suit, or with the necessity of pleading according to the established usages of law. It is not now necessary to decide whether the writ can in any case issue against partners, or others jointly liable, when one of the defendants is at the time resident within the jurisdiction. There is no just inference, however, to be drawn from this part of the statute, that the legislature intended to change either the form or substance of special pleading, so as to authorize a declaration and an assumpsit laid, or a recovery had against one of two or more partners, without noticing the liability of the others. It is further provided by the ninth section, "that the plaintiff in attachment, and every other creditor, at or before the third term, may file their declaration, setting forth, in a proper manner, their cause of action, &c. and the defendant may plead to any or all of the declarations." In legal parlance, the plaintiff cannot be said "to set forth his cause of action in a proper manner," when there is a joint undertaking by two, and the assumpsit is laid as made by one only. The declaration in this case neither accords with the law nor the facts. It ought not to be presumed that the legislature intended the facts should not be disclosed in the declaration, according to the settled legal forms. They have indeed used strong and unequivocal terms to the contrary. The Court feels great anxiety to preserve the rules of special pleading, which has been founded in wisdom, and are the safest guide of the profession. To depart from them, is at best, a dangerous experiment; often leading to inexplicable confusion and great injustice.

Whatever effect was intended to be given to the writ of attachment, against the property of partners, or other defendants jointly liable, the Court is not able, from the most attentive examination of the statute, to discover any intention to change the law of pleading, or the final judgment to be rendered. Separate actions and independent judgments upon liabilities, in their very nature joint, would be an innovation upon the settled principles of law, which cannot be permitted without the legislature expressed an intention to that effect, in the most clear and unambiguous terms. The Court are of opinion that the omission to join a living partner in the writ and declaration, is as fatal in attachment, if pleaded in abatement, as in any other form of action. The judgment is therefore reversed.

HILL v. KLING.

On a sci. fa. to subject lands to execution on the judgment of a justice, it is not necessary that the constable should retain the execution from the justice thirty days—nor is it necessary to take a rule upon the defendant to plead to the sci. fa., and execution may be awarded by the com. pleas at the return term of the writ.

This was a writ of error to the Court of Common Pleas, of Richland county, adjourned here for decision from that county. The case was this:

On the 10th day of October, 1828, J. Kling recovered a judgment against S. H. Hill, before justice Gardner, in Richland county, for eighty dollars and fifty-four cents and costs. Upon this judgment execution issued on the 11th of October, which was returned on the 16th of the same month, that there was no goods whereon to levy; but it is suggested that the defendant was possessed of lands and tenements within this county.

Upon this suggestion, on the same 16th of October, 1828, *scire facias* was issued from the Court of Common Pleas, at the suit of Kling against Hill, to appear and show cause, on the 20th instant, why execution should not issue on the judgment against his lands. The sheriff returned the *scire facias* duly executed on the 18th of October, and at the October term of the same year, judgment by default, was rendered that execution issue to take the lands of *Hill*. To reverse this judgment, the writ of error was brought.

The errors assigned, were:

First. That on the judgment before the justice, execution issued on the 11th of October, returnable the 16th of the same month, which was a void execution, and laid no foundation for the *scire facias*.

The *Second* error assigned, involved the same proposition in different terms.

Third. It was assigned for error that no suggestion was made on the transcript of the justice that the defendant held lands.

Fourth. It was error in the common pleas, to render judgment on default, at the return term of the *scire facias*.

Fifth. The judgment was rendered, without either rule or order on the defendant to plead.

Sixth. The writ of *scire facias* was insufficient.

Parish and *Boalt*, for plaintiff in error.

J. M. May, for defendant in error.

By the COURT.

The plaintiff in error insists: 1, That the constable's return having been made a short time after the execution came into his hands, is void.

2. That the Court below erred in rendering a judgment at the term to which the *scire facias* was returnable.

3. That it was error to render judgment without rule or plea.

The third and fourth errors appear to have no foundation in fact, the record containing, with sufficient certainty, the suggestion that the judgment debtor was possessed of lands and tenements.

1. This question depends upon different principles from that which might arise between the party, supposed to be injured by the return, and the officer.

What might be the result of an action prosecuted against the constable, by the plaintiff in error, would depend on facts and circumstances which cannot be collaterally determined between the parties to the record. The statute does not fix any day upon which constables shall make return of executions directed to them. Executions are to be returned within thirty days. The proceedings of a constable, unless the statute otherwise provides, are strictly analagous to those of a sheriff, and his legal responsibilities are the same. A sheriff's return is parcel of the record, and in an action of debt upon it, *nil-debit* is no plea. 2 *Saund.* 344, *n.* 2. The sheriff cannot be permitted, either in pleading or by evidence, to falsify his return. 6 *Mass. R.* 325. 7 *Mass. R.* 388. A *scire facias* lies to a sheriff's return, it is therefore a part of the record.—*Croke James*, 514. When the sheriff returns he has recovered a certain sum of money made by the execution, this shall charge him, although none was actually recovered. 8 *John. R.* 16.

These authorities shew that as between parties and privies, and the officer, except where the latter is charged upon its falsity, the return is matter of record, and therefore conclusive. The return is at the peril of the officer. If true, it is his protection; if false, he is responsible. If a return upon execution can be impeached, or falsified by the parties to the judgment, purchasers at sheriff's sales, whether of personal or real estate, would be without protection. It would be hard indeed, if it was at the peril of the purchaser whether the return was true or false, especially where he must be absolutely ignorant of the fact. The point was decided, (4 *Day*, 1) in a case where the bail was fixed, by the sheriff's return, before the return day of the execution.

2. The statute settles this point. The clerk shall issue a *scire facias* against such person to appear at the next term of the court of common pleas, and shew cause why execution should not issue, the court shall issue execution against the lands and tenements of such person, in the same manner as though judgment had been obtained in said court. The provisions of the statute clearly do not grant an imparlance to a term subsequent to the return of the *scire facias*.

Lastly, the rules of the common pleas are not exhibited, so that it cannot be ascertained whether they extend to a case like this. It is no doubt competent for that court to establish rules of pleading upon *scire facias* issued from justices' transcripts; but such rules could not extend beyond the return term. The statute makes this a summary proceeding, in order, no doubt, to fix a lien upon the defendant's lands, and prevent frauds upon the judgment creditor, by alienation.

In courts of record, this lien is created from the rendition of judgment.—Justice and sound policy require the same course when judgments are rendered before justices of the peace. But as these proceedings are less notorious, and the business of transferring lands too complicated for inferior jurisdictions, the legislature intended to afford the most prompt and efficacious remedy in the courts of record.

This summary proceeding, expedited by the rules of court, as far as the law will warrant, can seldom operate injuriously or oppressively upon the debtor; but delay to the creditor might let in a paramount lien where there was no superior equity or justice.

Judgment affirmed.

BIGELOW v. BIGELOW.

Where the obligor is appointed administrator of the obligee, the debt is not thereby extinguished, but is merely suspended, and the debt becomes assets in the hands of the obligor as administrator.

This case was adjourned here for decision from the county of Licking. It was an action of covenant, and the material facts of the case are as follows:

On the 26th of April, 1815, Oliver Bigelow sold to Elihu Bigelow, a tract of land, and covenants in writing were entered into by which Oliver Bigelow agreed to convey the land, and Elihu Bigelow agreed to pay Oliver the purchase money, in instalments, of two hundred dollars on demand, and two hundred dollars yearly, from the date of the article until the whole be paid.

During the life time of Oliver Bigelow, several payments were made, and endorsed on the article. But before the contract was completed, Oliver Bigelow, deceased and letters of administration, on his estate, were granted to Elihu Bigelow, in virtue of which he became possessed of his own covenant to Oliver Bigelow. In his administration account Elihu Bigelow represented that there was due on this article to Oliver Bigelow, the sum of one hundred and eighty dollars. Whilst acting as administrator, Elihu petitioned the court under the statute, to complete the contract, by ordering a conveyance, in which petition he alleged that the whole purchase money was paid.

Subsequent to this Elihu died, and the defendants became his administrators. It was also ascertained that Oliver left a will appointing the plaintiff his executor, who proved the will, and took letters testamentary. And having by some means obtained possession of the article of agreement, instituted this suit.

At the trial the jury found a special verdict, finding that the article was the deed of Elihu Bigelow, and there was due upon it, to the estate of Oliver Bigelow, the sum of three hundred and nine dollars, and sixty cents. And that the present plaintiff obtained the article without the consent of Elihu Bigelow or his administrators. Upon this special verdict, and an agreement of the other facts stated, the cause was reserved to be decided here.

H. Stanberry, for the plaintiff. *Dille*, contra.

By the COURT.

The *first* question made, is, whether the appointment of a debtor administrator, extinguishes the debt, and *eo instante* turns it into assets.

Secondly. If the debt is only suspended, whether the application for a deed by the administrator to himself, as obligor, and an order granted, destroy the right of action on the bond.

In this case it appears that during the lifetime of Oliver and Elihu Bigelow, they entered into articles of agreement, by which Oliver covenanted, upon the payment of a certain sum of money by Elihu, to execute a conveyance for a tract of land, therein specified. A part of the money was paid in the lifetime of Oliver. Administration on his estate was granted to his brother Elihu.

It is now a well settled principle, that if a creditor make his debtor executor, it is not absolutely an extinguishment of the debt; but remains as assets in his hands. *Dorchester v. Webb, Croke Car.* 372. It is however, *quasi* a release at law, because he cannot be sued. 1 *Com. Dig.* 337. The same rule must apply to administrators who cannot sue themselves any more than executors. Both are trustees; the one under the law, the other by the appointment of the testator. In the principal case, a will was discovered and admitted to probate, and the administrator was superseded by the executor. Counsel suppose the debt or duty was only suspended, while the debtor was acting as administrator, and that a right of action immediately accrued to the executor when the bond came into his possession. The law appears to be otherwise. Personal actions once suspended, are always suspended. *Croke Car.* 372. If the bond was once assets, no act of the parties could turn them back to an obligation. Chief Baron Comyns, who is himself said to be an authority, has recognised the principle as a sound one, that a personal thing suspended, is extinct. 1 *Com. Dig.* 337. The principle under consideration was decided in *Winchop v. Bass, et al.* 12 *Mass. R.* 199, the Court says "the executor having voluntarily assumed the trust, which prevents any one from suing, and being unable to sue himself, he shall be considered as having paid the debt, and as holding the amount in his hands as administrator." By the same case, securities in the bond were considered accountable for such assets. The discovery of a will, and the appointment of an executor, only operate as a repeal of the grant of administration, which did not avoid all mesne acts. A repeal upon citation, although the goods were sold *pendente lite*, does not render the act void. *Croke. El.* 459, *Salk* 38. Consequently the application, on the part of the administrator, to have the contract specifically executed, and the record of the proceedings under it are not rendered void by the discovery of a will, and the appointment of an executor, who accepted the trust. Every act of the administrator has the same validity as if he had not been superseded, but had continued to perform his duties until final settlement and distribution of the estate. But the record of the proceedings upon the petition of the administrator for a deed, is conclusive against the right of recovery in this action. The Court had jurisdiction, and have found the payment of the money which cannot be controverted, unless this order or decree is void, and this is not pretended, it being a solemn judgment of a Court of competent jurisdiction, is no longer open for controversy. The decree cannot be open for enquiry, whether the obligee made payment or not. The court has already adjudged that, and the record shows it. A judgment of law is not to be controverted by collateral matters, for they are intended.—6 *Cok.* 38. 11 *Mss. R.* 227. *Jackson ex dem. Goforth v. Longworth, ante* 129. We cannot in this collateral way go into an enquiry concerning the propriety or impro-

priety of extending the equity of the statute to an obligee who is administrator. The policy of admitting a trustee of the law to make this application where his personal interest must come in conflict with his representative duties, would, as an abstract principle, be very questionable; but the decision has been made, and in this action cannot be controverted.

The legal maxim, *omnia praesumuntur rite et solemniter esse acta, donec probitur in contrarium*, applies with force to this as well as to every other record. The Court are of opinion, that the facts agreed are conclusive against the plaintiff's right of recovery upon this bond. Circumstances may exist, which enable the heir, or creditor, to be relieved against the effect of this order, or decree, by applying to a different jurisdiction.

Judgment of non-suit.

TAYLOR, ET AL. v. McDONALD.

Foreign attachment cannot be sustained where one of several contractors is a resident and the others non-residents.

This was a writ of error adjourned here for decision from Jefferson county.

The record shows that on the 23d of May, 1826, the defendant in error sued out of the Court of Common Pleas of Jefferson county, a writ of attachment against William H. Hayes, John Pheeham, David Adams, Thomas Taylor, William Fitsrammons and James Taylor, as non-resident debtors. To the writ the Sheriff returned, he had attached a section of land, the property of James Taylor and Thos. Taylor; at the return term the first default was entered, and an order of notice, agreeably to the provisions of the statute. At August term 1826, the second default was entered, and the notice proved. On the 14th of September following a declaration was filed, reciting the issuing of the writ, the Sheriff's return, and then avers "that whereas Thomas and James Taylor, together with the said Hayes, Adams, Pheeham, &c. trading under the name and firm of the Pittsburgh Iron Company, &c. At November term a third default was taken. The defendants, without putting in bail, pleaded in abatement, in substance, that Pheeham was, at the time the writ was sued out, and still is, a resident of Ohio; to wit, at Wellsville, in the county of Columbiana. The truth of the plea is verified by the oath of the defendants in an affidavit subjoined.

General demurrer to the plea and joinder.

At October term, 1827, the plaintiff says he will not further prosecute his suit against Pheeham, because he is ascertained to be a resident of the state. And thereupon the court adjudged the plea in abatement insufficient and *respondeas ouster*.

On the 31st of December, 1827, the defendants, except Pheeham, pleaded non-assumpserunt, and filed an affidavit of its truth, &c. Subsequently on motion of the plaintiff, and it appearing to the court that no property of the defendants, except Thomas and James Taylor, had been attached, leave was giv-

en to enter a *nolle prosequi* against all except the Taylors. By agreement either party had leave to amend. On the 15th day of May, 1828, the plaintiff filed an amended declaration, reciting all the previous proceedings, and further, "that whereas the said Thomas and James Taylor, together with Hayes, Pheeham, Adams, &c. late partners, &c. promised, &c. To the amended declaration, the defendants pleaded the general issue, and filed an affidavit. The defendants moved to strike the cause from the docket, because the writ issued on a joint liability, and the plaintiff as to several of the defendants, has dismissed his suit. The motion was overruled. The defendants also moved for a nonsuit, which was overruled. The jury empannelled returned a verdict for the plaintiff below, of one thousand four hundred and forty seven dollars, thirty-one cents. Judgment upon the verdict and an order for the sale of the property attached. Amongst the many errors assigned, one was, that the Court ought to have adjudged the plea in abatement sufficient, and the judgment of the Court being founded upon this error, it is deemed unnecessary to notice the others.

Marsh and *Collier*, for plaintiffs in error. *J. C. Wright*, contra.

By the COURT.

We have recently decided that the statute, regulating attachments, has left the parties to the suit and the pleadings to the law governing the action in other cases. But another question is now to be determined, namely, whether in the proceeding against parties jointly liable, all the defendants must either have absconded, or be, at the time the affidavit was made, non-residents. The remedy by attachment exists principally *in rem*. The party, in contemplation of the statute, is not in court when his property is seized, and the notification, which is substituted for personal service, is generally ineffectual to give the debtor information of the pendency of the action. This proceeding gives the creditor an extraordinary advantage, at its inception, over the debtor. Besides dispensing with personal service, the statute gives a lien upon the property of the defendant from the service of the writ. The property, if perishable, may be sold before the rights of the parties have been judicially determined, and is held in the custody of the law, to satisfy the judgment that may be recovered. The rights and credits of the debtor are also brought within the control of the creditor by this process. These very important consequences, which are unknown to our general course of jurisprudence, flow from this process. This remedy, being nearly *ex parte*, and not according to the course of the common law, ought not to be extended beyond the letter of the statute. *Colwell adm'r. v. The Bank of Steubenville*, (2 *Ohio Rep.* 229.) Where the creditor proceeds by attachment, the statute does not authorise him to dispense with the parties to the contract, either in the declaration or subsequent proceedings, and it is not in his power to omit one of two or more joint defendants, without incurring the danger of the suspension of his remedy, by a plea in abatement.

The court might be justified in extending the equity of the statute to a case like the one under consideration, if the creditor was wholly remediless at law, without such construction; but a less dangerous and more just remedy, one in strict conformity with the general policy of our law, is given by the act "pro-

viding for the service and return of process in certain cases." This act provides that, when a writ is returned served upon one or more defendants, it shall be lawful for the plaintiff to file his declaration against the one in court, suggesting therein the return, as to the other defendants, and proceed to judgment as in other cases. The defendants not served, if necessary, can be made parties to the judgment by *scire facias*. This statute furnished the plaintiff below with the ordinary means of securing and collecting the debt. It is no argument to say the process of attachment is more expeditious in creating a lien upon the defendant's property, which is at once taken into the custody of the law to be held subject to the future judgment. There can be neither justice nor equity, in furnishing one creditor with a lien upon the debtor's property, real and personal, from the service of the writ, and leaving another, with a claim perhaps more meritorious, to the tardy remedy of ordinary proceedings, and to bind the property by a judgment in his favor.

The remedy by attachment is an extraordinary proceeding, for the writ seizes and binds the property of the debtor before the claim of the creditor is judicially ascertained, upon the mere affidavit of an interested party.

It cannot be tolerated, unless the creditor brings himself strictly within the provisions of the statute. It would indeed be a singular exposition of this statute, to give the creditor an action by attachment against an absent partner, without allowing the resident one even a day in court to controvert the justness of the plaintiff's demand. The partners being equally interested, in the consequence of the suit, there is an obvious fitness in permitting litigation with the one present, rather than with him who is absent. The court will never proceed *ex parte*, or upon notice, which, in general, is not much better, unless it is the only alternative of the creditor. When there is another remedy according to the course of the common law, although it may admit of more delay, or, in some respect, be less advantageous to the creditor, it ought to be pursued, especially if a contrary course would lead, in the nature of things, to uncertainty and often to injustice.

The court are clearly of opinion that a creditor is not authorised to resort to process of attachment, when there are joint liabilities, without all the defendants are non-residents, or have absconded. So long as one joint contractor remains within the jurisdiction, who can be personally served with process, the creditor must seek his remedy in the mode pointed out by other statutes.

The court below, therefore, erred in overruling the plea in abatement of the defendant, for which the judgment is reversed.

SLOANE *v.* McCONAHY.

Where the proprietors of the town of Wooster, executed a bond "to the commissioners of Wayne county, that thereafter might be appointed or elected, and their successors," conditioned to lay down water pipes, through the lands of the proprietors, to convey water to the town, and to secure the use of such water to the inhabitants thereof; held, that such bond could not operate as a grant of the use of the land in which the pipes were laid; and that, in an action of trespass by the grantee, of the proprietors of the town, the defendant could not justify by showing an order of the common council of the town of Wooster, authorizing him to enter upon the premises and repair the pipes.

It is indispensable to the validity of a grant, that the grantee be capable of receiving it: that is, that he be a person, in esse, at the time of the grant.

This case was adjourned here for decision from the county of Wayne. It was an action of trespass, and stood upon a case agreed.

The defendant entered upon the premises, by order of the corporation of the town of Wooster, to repair certain conduits laid through the lands of the plaintiff. The facts agreed are as follows: On the 13th of May, 1811, John Beaver, William Henry, and Joseph H. Larwell, proprietors of the town of Wooster, in the county of Wayne, executed a bond to the commissioners of said county, that thereafter might be appointed or elected, and their successors, in the penal sum of seven thousand dollars, with a condition "that if the above bound obligors, or either of them, their heirs, executors, or administrators, do well and truly perform, execute and erect the following labors, conveyances, buildings, &c., as hereinafter specified, to wit: erect a court house, &c. And further, said obligors do bind themselves as aforesaid, to bring the water of the run, which at present runs through the town from the north, in pipes of sound white oak timber, well bored and laid, and raise the water therefrom on the centre of the diamond of said town, at least ten feet above the surface thereof, and that the same shall forever remain free and clear of all incumbrances, for the use, benefit and convenience of the inhabitants of said town, and they have the privilege of conducting the same from thence in pipes, and raised in pump stocks, to any other part, &c. of said town," &c. On the 6th of April, 1812, commissioners of Wayne county were elected. Joseph H. Larwell, one of the above proprietors of the town, held, on the 6th April, 1812, an equitable title to part of the land, upon which the trespass is alleged to have been committed, and on the 10th May, 1813, acquired a legal title, and conveyed to Sloane by deed dated July 3d, 1820. The other part of the premises were conveyed by William Henry and Joseph H. Larwell to John Beaver, and by Beaver to the plaintiff. Neither of these deeds contains any reservation whatever, except the one from Larwell and Henry to Beaver, which reserves from use and cultivation two rods on each side of the spring branch, from the north side of the quarter section to the place where the water had been taken out for the use of the town of Wooster. Through both tracts the conduits were sunk under ground by the obligors in 1814. Sloane has never been an inhabitant of the town of Wooster, and both the tracts lie without the town plat and corporate limits. Wooster was incorporated in 1824, and in 1827 an order was made by the common

council, directing the defendant to contract for and superintend the repairs of said conduits. By virtue of this order the defendant entered into the land, which is the trespass charged in the declaration. If the court are of opinion that, under these circumstances, the plaintiff is entitled to recover, judgment is to be entered for the plaintiff with five dollars damages; if otherwise, a general judgment for the defendant.

J. C. Wright, and *James*, for plaintiff. *Avery* and *Silliman*, contra.

By the COURT.

This bond is not a grant, but a covenant. It contains none of the formalities which the wisdom of ages has settled as necessary to convey real estate. The covenant against incumbrance is an accidental phraseology, borrowed from the usual term in a common law conveyance, and cannot, upon any principle, be construed into a grant. No acknowledgment appears upon the instrument; and this is made necessary by statute, in order to constitute a complete deed of conveyance. *Roads v. Symmes*, 1 *O. R.* 281. *Lessee of Johnston, v. Hains*, 2 *do.* 55. But giving the conditions of this bond all the requisites of a grant, then the proprietor of the town granted, either to the commissioners of the county, or the inhabitants of Wooster. If the legal right of entry is vested in the commissioners, the defendant cannot justify the trespass. He has neither shewed a license or orde rfrom them, to enter for any purpose. Besides, the commissioners of Wayne were not in being at the date of the instrument; the grant would therefore be void. It is indispensable to the validity of a grant, that the grantee be capable of receiving it: that is, that he be a person in being at the time of the grant made. A grant to him or her who is to be the first child, of T. S. or to his right heirs, he being living, is void. *Shep. Touch.* 235. The same principle will apply to the unincorporated inhabitants of the town of Wooster, as to their capacity to be grantees. The instrument is dated in 1811. The town of Wooster was incorporated in 1824. A grant to the inhabitants of Wooster, admitting they were capable in law to take, would only vest the estate in joint tenancy in those who were actually such at the date of the grant. The tenancy could not be made to extend to others who, subsequently became inhabitants.

Upon the death of the inhabitants *in esse*, at the date of the deed, the right would either be in abeyance, or revest in the grantors. But the inhabitants could not be grantees, and a deed executed to them would be void. The authorities to this point are numerous and perfectly conclusive. 8 *John. R.* 301. 9 *John. R.* 73. 9 *Mass. R.* 419. *Sugd.* 388. *Cok. Lit.* 3, *a.* 2 *Comy. D.* 168. The inhabitants not being a corporate body, and being therefore incapable of taking an interest in land, by conveyance, at common law cannot be *cestui qui use*. *Cruise, D.* 1, 418. If the county commissioners could be grantees, they could not be seized to the use of the inhabitants of Wooster. The facts and law arising upon them, do not furnish a justification for the defendant. There must be a judgment for the plaintiff, according to the agreement of parties.

LESSEE OF LOWRY v. STEELE, ET AL.

When a feme sole in contemplation of marriage, grants a term of seventy-five years of her real estate to a trustee, in trust for her own use during the contemplated coverture, and the marriage takes effect and she has issue and dies, living the husband—Held, that the husband may be tenant by the curtesy.

This was an ejectment adjourned here from the county of Hamilton. It was an agreed case, and the following are the material facts:

On the 14th day of January, 1822, Sophia Cooper was seized and possessed, in fee, as tenants in common, with Maria Grimes and others, of the premises in question, on which day, being of the age of thirty years, and sole, she made and delivered to James Steele, one of the above defendants, an instrument, a copy of which is submitted as a part of the case. The agreement so far as relates to this controversy, after reciting that Sophia Cooper was heir at law of Mrs. Zeiglar, and that she held in-lots, &c. and that she contemplated a marriage with Fielding Lowry, sen., and in order that she might enjoy and have said lands, and the profits thereof for her sole and separate use, and that the same might not be subject to the control, debts, or engagements of her said intended husband, "for the consideration of one dollar, she grants, &c. to James Steele in trust, for and during the term of seventy-five years, without impediment of waste, that the said Steele shall every year during said term pay and deliver, all the proceeds, rents, &c. unto such person, and for such intents, as the said Sophia Cooper shall appoint, and, in default of such appointment, then to be paid into her own hand, for her sole and separate use, &c.; and upon further trust, that Steele should transfer the premises, or any part, to such person as the said Sophia, by her writing and will shall appoint, and in default of such appointment then to the heirs of the said Sophia. The term to cease upon the death of said Sophia or her intended husband." On the 23d of January, in the same year, the said Sophia was lawfully married to said Lowry. After the marriage, partition was made between the tenants in common, and the premises in question set off to said Sophia, as by the record of partition appears, a copy of which is also made a part of the case. After the partition, Lowry, in right of his wife, received the rents, &c. until her death, which took place in May, 1825. The lease, entry, ouster, and possession by the defendants are admitted. Mrs. Lowry died without appointment, leaving a son, issue of the marriage, and leaving other children by a former marriage, who claimed as heirs at law.

The only question submitted, was whether Lowry was entitled to possession, as tenant by the curtesy.

Caswell & Starr, for plaintiff. *Hammond & Garrard*, for defendants.

By the COURT.

To entitle Lowry to curtesy, the only requisite of which there can be any doubt, is, whether he was seized during the coverture? Steele was vested in trust with an estate for seventy-five years. He was not seized of the freehold;

and having but an estate for years, when he entered, he was not properly possessed of the land, but of the term, the possession or seizin of the land still remaining in Sophia Cooper. *Woodfall, Land. and Ten.* 172. 2 *Black. Com.* 144. 1 *Cruise, D.* 61, 161. And this is not considered a seizin in law, but a constructive seizin in deed. 8 *Cranch* 245. It is therefore said, (*Hargrave's notes to Co. Litt.* 29 *a.*) if land is in lease for years, curtesy may be without entry, or even receipt of rents, the possession of the lease for years being deemed the possession of the husband and wife. The case of *De Grey, et al. v. Richardson, et al.* (3 *Atk.* 436,) was not unlike the present. During the coverture of Alice Sewell, lands descended to her as heir in tail general, under a settlement, and when they descended, were in the possession, and so remained during her life, of tenants under leases. It was decided by lord Hardwicke, that there was such a possession of Alice Sewell, as entitled her husband to curtesy. The law appears to be with the plaintiff, and there must be judgment for him.

LOINES, ET AL. v. PHILIPS.

The security in a bond for the assignment of property by an insolvent debtor, is liable for the whole debt of the creditor, on a breach of the bond, though the insolvent had no property to assign.

This case was adjourned here for decision from Ross county. It was an action of debt, upon a bond, executed by the defendant as security for Stephen Loins, who, being arrested upon mesne process, applied for the benefit of the insolvent act, and gave the bond in question, for the making a schedule and delivering up of all his property. The point presented for decision was agreed between the parties as follows:

"This cause is reserved for the special session at Columbus, on an inquiry of damages. If the Court should be of opinion that the insolvency of the defendants, or the amount and value of his property, cannot be given in evidence, in mitigation of damages, then the plaintiffs are to have judgment for $437 82, and for costs $12 66, with interest from 15th November, 1821; otherwise the cause is to be sent to the Supreme Court of Ross county for enquiry of damages."

Leonard, for plaintiff. *Douglas, Brush*, and *Fitzgerald*, for plaintiff.

By the COURT.

The condition of this bond is, that the petitioner shall assign all his property for the benefit of his creditors. It is the general policy of our laws to hold the body of the debtor as a security for the payment of the judgment to be recovered. The debtor was compelled to submit to imprisonment, or find security that he would faithfully assign all his property for the benefit of his creditors. When the security is obtained, the body is discharged, and the bond substituted for it. This Court has nothing to do with the justice or policy of the law, which gives the creditor this power over the body of the debtor. It assumes

the principle that such rigor is necessary to procure a surrender of property fraudently concealed by the debtor. It is with another department of the government to say, whether the punishment of individuals, upon presumption of fraud, would not be more justly inflicted, as in other offences, by the public after conviction than by an interested and perhaps exasperated creditor before. Our business however, is to expound and not make laws. The effect of this bond is, the discharge of the prisoner, and he has had the full benefit of it. The petition and schedule exhibited furnish no legal presumption of the truth of either. There is not even the affidavit of the applicant, that they are so. Between the filing and the final hearing of the petition, the inventory can be enlarged or diminished at the pleasure of the petitioner. If both are untrue, no penalty attaches, nor does any power exist to punish him. He can with perfect impunity, whether solvent or not, procure his discharge from arrest, and turn his creditor round to his remedy upon his bond. And he is directly interested in doing so, if the amount of his property can only be recovered for the breach. The very fact of the applicant declining to avail himself of a final discharge under the law, raises a strong presumption, not only that his principal object was abstractedly a release from imprisonment, but that he was at the time, not insolvent. Between the filing of the petition and the final hearing the applicant may have acquired property which would render him criminal to make affidavit of the truth of his schedule. The petitioner himself, and he only, is able to ascertain with perfect certainty, the true state of his property. He may have property in other states or countries. This may consist of lands, stock, vessels at sea, choses, money, the extent or amount of which cannot be known to others.— Shall the voluntary omission of the principal in the bond, compel the creditor to rely upon vague and uncertain evidence of the debtor's property, when it is for his interest to seal in secrecy his effects, and derive a direct advantage to himself, by the abuse of the law, in the first instance, and afterwards, by his own concealment and fraud? If the obligors in the bond are not liable beyond the amount of property of the principal, there would be a clear inducement to abuse the law and commit frauds.

The Court are undoubtedly authorised to put such construction upon this bond and the damages to be assessed for a breach of its condition, as will prevent the debtor from taking advantage of his own wrong to the injury of the creditor, who is fairly pursuing the remedy the law gives him, for the security and satisfaction of his debt. If damages are not recovered, beyond the amount of the property of the insolvent, upon the dismissal of the petition, the creditor would certainly loose the security of the person of the debtor, which the law in the first instance, gave him, and this by the voluntary, if not fraudulent act of the insolvent. A part of his legal right would be lost without his own default, and without consideration. Damages are defined to be a recompense to the plaintiff for the wrong done him by the defendant. *Coke Litt.* 572 *a.* The wrong here is procuring the body to be released, under color of law, and then neglecting or refusing to assign all his property, for the benefit of his creditors. The creditor has a right to seize the body and detain it, and, after the judgment, to take the lands and goods for its satisfaction. He has lost one part of his remedy altogether, and can receive no equivalent, unless he can recover damages beyond the amount of property of the principal in the bond. It has been the uniform prac-

tice of this court, under the statute, if the defendant is imprisoned under a *capias ad respondendum* to take debt, if under a *ca. sa.* the judgment, as the measure of damages to which the obligee is entitled. This rule was deemed essential to prevent an abuse of the statute, as well as to guard the legal rights of the creditor. Members of the Court who have succeeded to the bench, have sometimes doubted its correctness; but the decisions have nevertheless, been uniform by a concurrence of a majority of the Court. There appears no good grounds for making, at this late period, an innovation upon that settled practice. Judgment for the plaintiff, according to the agreement of the parties.

OLIVER, ET AL. v. PRAY.

Where an appeal is quashed for a defect in the appeal bond, occasioned by the mistake or oversight of the clerk, a Court of Equity will order a new trial, upon showing probable grounds that the appellant had a case at law.

Such new trial may be had in the Supreme Court.

This cause was adjourned here for decision from the county of Wood. It was a suit in chancery, in which the original and amended bill set forth, that in August, 1827, Pray sued out process in Wood county against complainants, which was served on Oliver only. The declaration set forth a *special contract* made between complainants, by their *attorney in fact*, Peter G. Oliver, and Pray, whereby it was alledged that complainants sold to Pray, on the 30th June, 1819, tract no. 35, and 80 acres of no. 29, (particularly described in the declaration:) that pray paid at the time, six hundred and thirty-one dollars, and sixty-one cents, and the balance, one thousand, eight hundred and ninety-four dollars and eighty-three cents, was to be paid in three equal annual payments, with interest. Deed was to be made on payment, &c. That Pray had paid in full; but complainants refused to convey, and had permitted the lands to be forfeited to the United States. The declaration also contains general counts for lands sold to which title had failed, also for money had and received. General issue pleaded by Oliver, and, at May term, 1828, verdict and judgment against him for three thousand two hundred and twenty-six dollars and ninety-six cents. Due notice of appeal was given. Oliver not being present at the trial, was informed of the judgment and immediately went to Wood county to effect an appeal. The clerk, at his request, prepared an appeal bond, which was drawn up by the clerk, or under his direction, and, after having been executed by Oliver and his security was accepted and approved by the clerk. That Oliver verily believed that said appeal bond was good and sufficient, and that said case was thereby duly appealed to the Supreme Court. That at the time Oliver applied to the clerk, for an appeal bond, the *costs* of the common pleas had not been taxed, and a blank as usual, was left in the judgment, for their insertion, when taxed. That the clerk, by accident or mistake, omitted to insert the amount of costs in the appeal bond. That at the next term of the Supreme Court in Wood county, the appeal was quashed, upon motion of Pray, upon the sole ground that

the costs were omitted, in the appeal bond, and thereupon execution was immediately issued upon the judgment.

The bill further alledged that the virdict and judgment are altogether unjust; that complainants, nor either of them, are indebted, legally or equitably, one cent to Pray. That no such contract as set forth in the declaration was ever made, or confirmed by complainants, nor was Peter G. Oliver ever authorised to make any such contract, nor did complainants ever receive one cent from Pray for, or on account of the lands. Also that the verdict was procured by the fraud, management, and contrivance of Pray, his agents and abettors.

That complainants have a just and equitable defence, in the suit at law, which is set out as follows:

In the summer of 1817, complainants and others formed an association to purchase lands, at the public sales in Wooster, and in July of that year, among others, purchased the lands in controversy, and made the first payment therefor. Oliver was constituted the agent of the company, purchased the lands, layed off the lots, held the certificates as trustee, transacted all the business, and was the only one of the company who was intimately acquainted with the locality, relative value and situation of the lands. In the summer of 1818, Oliver was made cashier of the Mi. Ex. Co. in Cincinnati, and settled and closed all his accounts with the company, and transferred all certificates, &c. &c., to Martin Baum, who was constituted trustee in his stead. In the summer of 1818, (more than a year before the date of Pray's contract,) Oliver sold out half his interest in the company, to William Steele, and in the month of March, 1819, (also before the date of Pray's contract,) Oliver sold out all his remaining interest to Jesse Embree & Co., since which time Oliver has had no interest directly or indirectly in the concern.

Early in 1818, Peter G. Oliver, brother of complainant Oliver, young and inexperienced, and having been somewhat unfortunate, applied to complainant Oliver to give him assistance. After some negotiation, an arrangement was made, by which Peter G. took a tavern house of the company's, in the town of Maume, and, for the rent thereof, was to collect rents for the company, protect their lands from waste, superintend improvements, &c.; but had no authority whatever, written or verbal, to sell the lands of the company, and never sold or pretended to sell any of the lands of the company except those now in controversy.

Complainant Oliver had lands of his own, in the same vicinity, of which Peter G. also took charge, and, after complainant Oliver had sold out all his interests, in the company, he, being well acquainted with the affairs of the company, and desirous to promote the welfare of his brother Peter G. was often made the channel of communication between Peter G. and Baum the trustee. That, in this way, and in his correspondence with his brother Peter G. the wishes of Baum, the trustee, were often communicated by complainant Oliver to Peter G.

Early in 1819, Pray applied to Peter G. to purchase the lands in controversy. Peter G. told him he was not authorised to sell, but would write to the company. He did so, and received for answer, that the company would not sell. Pray, having some object of speculation in view, revived his application

to Peter G. and by crafty representations induced Peter G. to enter into a contract for the sale of the lands, knowing Peter G. had no authority, but relying on the friendship of complainant Oliver for his brother to relieve him from the difficulties, in which Peter G. would become involved, by entering into the contract. Accordingly, Peter G. without any authority whatever, either written or verbal, and without the knowledge of complainants, or any of the company, executed a contract of sale to Pray under seal dated June 30, 1819, as agent for Martin Baum; the larger tract at fourteen dollars per acre, and the smaller at two dollars per acre, one fourth in hand, the residue in three annual payments, one half in cash, the other half in beef, pork, &c. at market price. Deed to be made when patent was obtained. This contract was not made known to complainants, or any of the company, but Peter G. on the 23d August, 1819, twenty-three days after the contract was made with Pray, wrote to the company the prices above mentioned, which had been offered, not stating other particulars, to which complainant Oliver, by direction of Baum, the trustee, replied, Sept. 16, 1819, that the lands could be had on the following terms: No. 35, at fourteen dollars per acre, the whole of 29 at three dollars per acre. The purchaser to pay government, and the company to be paid, in advance annually, the first in erecting a kitchen, the balance in one and two years, with a lien on the property when the certificates are transferred. After this letter, nothing more was heard in relation to the lands, by complainants, or either of them, or any of the company, and it was supposed to have been abandoned, and was forgotten.

In Sept. 1821, owing to the pressure of the times, the company were unable to clear all their lands out of the office, and, at that time, took the benefit of the act of Congress, for consolidating, in which they relinquished to the United States the two tracts in question, still ignorant of Pray's pretended claim.

Complainant Oliver had some lands of his own to consolidate, and, while making his arrangements, Peter G. communicated his earnest desire that complainant Oliver should consolidate on No. 35, without stating any particular reason, but suggesting that it would benefit him, Peter G. in relation to some mill improvements. Shortly afterwards, Peter G. informed complainant Oliver, that it was No. 36, instead of No. 35, which he wanted, and complainant Oliver accordingly consolidated on 36, still ignorant of Pray's pretended claim on 35. It afterwards appeared that 35 was the lot intended by Peter G. and that his object was, to comply with the contract made with Pray, but complainant Oliver knew nothing of his object, or of the contract.

The first information complainants, or any of the company, had of Pray's contract, or claim, was, in the spring of 1822, long after the lands had been forfeited. Complainant Oliver then advised Peter G. to prepare himself, and bid in the land, at the re-sales, and offered to assist him, if in his power, but this was done out of friendship only, and to relieve his brother from the unpleasant situation in which he was placed. Nor did said Pray pretend that he had any claim on complainant Oliver, or any of the company, but, on the contrary, stated to complainant Oliver, that he had made arrangements with Peter G. to bid in the land, at the re-sales.

About the date of Pray's contract with Peter G. for the land, Pray, by crafty representations, induced Peter G. to join him in erecting a mill, in whole, or in

part, on 35, and so managed, that a great part of the first three instalments were converted into the mill, and no part of the purchase money ever was paid, or come to the use of the complainants, or either of them, or any of the company.

Complainants charge that no part of the last instalment has been paid. That Pray, on the 25th of February, 1822, before the last instalment was due, and after the lands were relinquished, persuaded Peter G. to accept of his promissory note or notes, for that instalment, and endorse a receipt of payment, in full, on the contract, as of a date *prior* to the time it fell due, which was done by Peter. Suit was brought by Peter G. or his assignee, on some or all of these notes, and Pray set up, as a defence, that the consideration had failed, that Peter G. had no authority to sell, &c. and on these grounds succeeded in his defence. Still the judgment includes the last instalment, or a great part thereof. The endorsement on the contract was unknown to the complainants, till after the trial of the cause, at law.

In July, 1827, the lands were re-sold, at Delaware. Pray and complainants were present; Peter G. was insolvent, and had removed to Huntsville, Alabama. At the re-sales, Pray did not pretend that complainants, or either of them were under any obligation to purchase in the lands for his benefit, nor did he pretend that they, or either of them, were liable, in any way, to him, but, on the contrary, complained only of the hardship of his case, if any person should bid against him, and complainant, knowing that Peter G. had acted improperly, and being unwilling that any man should suffer, on his account, endeavored to prevent competition against Pray. This was done at the request of Pray, and in consequence of his urgent entreaty, and not because he was under any legal, equitable, or moral obligation so to do. Pray purchased in the lands, at one dollar and twenty-seven cents per acre.

The bill prayed a new trial of the action at law. It also prayed a perpetual injunction, and final settlement of the case, in chancery.

Two of the facts charged in the bill, were admitted in the answer: the existence of the association of Martin Baum and others, as a land company; and, that in April, 1819, Peter G. Oliver informed Pray he was not authorised to contract for the sale of the company's lands. All the other allegations were denied, either directly, or evasively.

The testimony taken, in the cause, presented strong probable grounds, in support of the defence against the action at law, which the complainants set up in their bill. Several points were embraced, in the argument, which the court deemed it unnecessary to decide. The report is confined to the subjects decided by the court.

Wilcox and *Hammond*, for complainants. *Ewing* and *Powell*, contra.

Opinion of the Court by Judge SWAN.

The principal question is, whether a Court of chancery has jurisdiction of the case, as made by the bill. The question, in this respect, is important, and has received the full consideration of the Court.

The statute of February 18, 1824, *V.* 24, *p.* 72, allows an appeal to the Supreme Court, of course, from any judgment, or decree rendered, in the common pleas, in which such Court had original jurisdiction; and the party, desirous of

appealing, shall, at the term of the Court of common pleas, at which the judgment or decree was rendered, enter on the records of the Court, notice of such his intention, and within thirty days after the rising of the Court shall enter into bond to the adverse party, with one or more good and sufficient securities, to be approved of by the clerk, in double the amount of the judgment or decree rendered, &c. The appeal bond, in this case, was taken, in double the amount of the judgment, exclusive of costs.

On motion of the respondent, the Supreme Court quashed the appeal, upon the grounds that the bond was not executed, in conformity with the provisions of the statute. The amount of the penalty was supposed to be matter of positive law, and one of the requisites upon which the appellate jurisdiction of the Court depends. To effect an appeal, the provisions of the statute, no doubt, must be substantially complied with. It cannot be done without the notice is entered of record, at the term, in which the judgment or decree was rendered.

So the appeal must fail, if the bond should not be executed within the time prescribed by the act, and it has been several times decided, that the penalty of the bond, must be in double the amount of the judgment or decree, including the costs.

The party has his right of appeal, upon complying with the conditions annexed by the statute. His right is lost, by omitting or neglecting to perform any of the conditions, and the appellate jurisdiction of this Court altogether ceases over the cause. With regard to notice and filing the bond, within thirty days after the rising of the Court, the decisions have been uniform, that the omission, in either case, ousts this Court of its jurisdiction. It is undoubtedly *within the* powers of the Legislature to attach all reasonable conditions to the right of appeal, and thus place a limitation, upon the appellate jurisdiction of this court. The cause is not appealed without the party performs the conditions required by statute, and when he neglects to do so, to entertain jurisdiction, would be mere usurpation of power. But the objection comes too late, to the correctness of the decision, in dismissing the appeal. The party complaining of the injury is fixed with the judgment of the Court of Common Pleas, and the common law can afford him no remedy. This is the case, whether the dismissal of the appeal was justified by a correct interpretation of the law or not. The injury, if any, to the complainants, has originated with the clerk, who prepared the bond, or with the appellant who executed it. Uniform practice has fixed the drafting of these bonds upon the clerks. Their offices are usually furnished with blanks for the purpose.

The bill and evidence show conclusively, that the bond was, in good faith, prepared by the clerk, and, in good faith, executed by the principal obligor. By mere mistake, or misapprehension in both, the costs were not doubled with the judgment, and inserted as the penalty. Doubts as to the necessity of adding the costs, in the penalty of the bond, have existed with the bar. Even some of the judges have not been without them. This is a mistake then, which a plain man, acting in perfect good faith, might naturally commit, upon the most careful examination of the law, and using every effort to comply with its provisions. No fault or negligence can be imputed to the party seeking to resist the plaintiff's claim, in the appellate Court. The record shews most satisfactorily, that Oliver honestly believed he had a meritorious defence to the action. In no part

of the proceedings does it appear that he was using the Court of Common Pleas, merely to ascertain the strength of his adversary. The cause was submitted to the jury in his absence, and there are circumstances disclosed, by the evidence and exhibits, which shew an effort, on the part of the present defendant, to prevent the appellant from obtaining security to the acceptance of the clerk, not very consistent with the idea, that the judgment was fairly recovered, and justly due. But although this may cast a shade of suspicion over the fairness of the judgment, it does not lay the foundation of Chancery jurisdiction. From the nature of society, it is difficult, if not impossible, to embrace the powers of a Court of Chancery, in a general definition. Peculiar and extraordinary cases will arise, in the complex and diversified affairs of men, which, perhaps, cannot be classed under any of the distinct heads of chancery jurisdiction, but which must be acknowledged, nevertheless, to come within the legitimate powers of the chancellor, because complete justice cannot otherwise be done between the parties. Of this character is the case of *Ray, v. the Duke of Beaufort*, (3 *Atk.* 191.) In that case lord Hardwicke makes some remarks quite applicable to the case under consideration. "It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into consideration, though they cannot, at law, pay any regard to it."

The following cases shew, that courts of equity go far to prevent injustice, when no remedy exists at law. 2 *P. Will.* 425, *Countess of Gainesborough, v. Gifford*, 8 *Wheaton*, 174, *Hunt, v. Rousmanier's adm'r.* Further authorities are collected in a note to 3 *Desaus. R.* 325. This reference wants accuracy; but some of the cases go far to justify the remark, "that courts of equity will give relief in all cases, not of a criminal nature, of fraud, surprise, or extraordinary cases, when complete justice has not been done; and in many cases upon principles of general policy."

Anciently, courts of equity exercised jurisdiction, in granting new trials in cases of manifest injustice, or when testimony had been newly discovered. The practice went out of use when courts of law became more liberal in granting new trials. 6 *John. C. R.* 476. Chancellor Kent says, "the present case seems to prove an exception to the modern rule, and to require of this Court the exercise of that ancient jurisdiction, because here is a trial in which the court of law has no power to award a new trial upon the merits." The case at bar is within the principle and reason of the one last cited. This defective statutory bond was executed, after the term, when it was neither in the power of the party to apply for, or of the Court to grant a new trial. It is a case within the exception of the modern rule, and the Court is, therefore, permitted, upon the justest principles, to resort to its "ancient jurisdiction." This Court considers this as an extraordinary case, in which the injured party has no redress, if a court of equity has no jurisdiction. Great injustice may follow, especially to the complainant Oliver, should the judgment of the Court of Common Pleas conclude the parties. From the peculiar circumstances of this case, and to prevent that injustice, which may otherwise take place, this Court believes no sound principle is violated by entertaining jurisdiction of this cause. But it is not enough that the Court has jurisdiction of the subject matter. We must be satisfied that the complainants have some merits: some grounds of defence to the action, at law, before the judgment will be set aside. It is not enough that

the party has lost the naked right of a second jury trial in the Supreme Court. A judgment never ought to be opened to gratify a spirit of litigation.

From the novelty of the circumstances of the case, and from the fishing grounds assumed in the bill, in order to catch an equity, as well as the amount in controversy, a vast many exhibits, and a great body of testimony, are found with the record. The evidence, in the cause, shows most satisfactorily that the complainants have grounds of defence to the action at law.

It is not proper for this Court to say what effect that evidence ought to have, or may have, upon an issue between the parties. Nor does it any where appear, nor was it necessary it should appear, that all the evidence is produced in this cause within the power of the parties. It is competent for the parties to produce other testimony in explanation of their rights and the merits of the cause. The complainants cannot ask more of this Court, than to be restored to what they have lost, without their default. If the defendant had a just claim upon the complainants, to the amount of his verdict and judgment, he has it still, and can prosecute it in the Supreme Court, as well now as he could if the appeal bond had, in form, met the approbation of the Court; if he had not, to enforce the judgment would be against all equity. As to accepting the bond, the mistake originated with the agent of the law, as well as the appellant. The clerk was wholly ignorant of the law, or the construction which had been put upon it, as to the penalty of the bond. We are not, however, prepared to say that a mere mistake in law of a party would give this Court jurisdiction, although there are some cases that seem to go that far. 8 *Wheat.* 174. 2 *Peer W.* 315. It seems to this Court this would be laying down the principle too broadly. There must, in the general, be other circumstances to authorise the interference of a court of equity. Perhaps it would be well to make the case, in addition to a mistake in point of law, one in which it would be against conscience for the other party to insist upon, or which, at once, would shock the moral sense, if enforced. This is that case, as the bill and evidence disclose it. The respondent has obtained an advantage by the misprison of the clerk, or the mistake of one of the complainants, which he is attempting to retain, when he must know that the appellant has acted, so far as it respects the pursuit of his legal rights, with perfect good faith, and with all reasonable diligence. He must also know that the complainants, especially one of them, has some legal grounds of resisting his claims in a court of law. The law would be dishonored if courts were furnished with no powers to place the parties thus situated in *statu quo*, and thus prevent probable injustice. There is no principle to be found in the books which forbids a court of chancery from granting relief, under such circumstances. Reason, justice, equity, require it.

This cause, upon the settled rule, that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally, will remain in this Court. This being the unanimous opinion of the Court, it is therefore ordered, adjudged and decreed, That the action at law, the judgment in which is enjoined in this cause, be docketed in the Supreme Court in the county aforesaid, that the declaration be so amended as to make said Martin Baum a party thereto,—that the said Martin cause his appearance to be entered in the said action, and plead thereto the general issue. And that the cause stand at issue for trial, on the merits, at the next Supreme Court for said county. On the tri-

al, no objection shall be taken for mis-joinder or want of parties, further than this:—If it should appear that the plaintiff has a good cause of action against Oliver, arising out of the transaction in litigation, but not against Baum, or any other of the company, in the pleadings named in these causes, then a verdict shall be taken against said Oliver, and not against said Baum; if it should appear on the trial that the plaintiff has cause of action growing out of the transaction in litigation, against the said Baum alone, or the said Baum and others, then the verdict shall be taken against the said Baum, and in favor of the said Oliver. In this trial no exceptions shall be taken to the depositions in this suit in chancery, or the action enjoined; but they may be then read unless there may be other legal objections taken and sustained.

This cause to stand continued for further proceedings, &c.

McCLUNG ET AL. *v.* MEANS.

A letter from M. to B. authorising a general credit to V. is not sufficient to charge M. for goods sold to P. by persons to whom the letter was never presented but who had heard of its contents.

This cause came before the Court upon a motion for a new trial, made in behalf of the plaintiffs, and was adjourned here for decision in Jefferson county. The case was this: The plaintiffs brought their action of assumpsit, and declared for goods sold and delivered as upon an original contract with the defendant. In support of their claim they gave in evidence the following letter, addressed, by the defendant, to Mr. James Boggs, of the house of Knox & Boggs, Philadelphia.

"*Steubenville, Dec.* 26, 1825.

"Mr. James Boggs,

Sir: All the goods C. O. Page may purchase, in Philadelphia, during the month of January, 1826, I hold myself accountable for the payment of the same.

"Respectfully, yours, JAMES MEANS."

This letter was not delivered or entrusted to C. O. Page, but was forwarded to Mr. Boggs, and in the month of Jan. 1826, was shown by him to several merchants, in Philadelphia, but was never shown by him to the plaintiffs. C. O. Page was the brother-in-law of Means, the defendant, and was known to be insolvent. The plaintiffs were informed by David King, who learned the fact from a brother of C. O. Page, that the defendant had written a letter of general credit, to Boggs. They sold to Page merchandise to the amount of thirteen hundred and forty-five dollars and fifty-four cents, in the month of January, 1826, and on the 20th of that month took his individual note for that sum, at ten months, with interest after four months. Page purchased goods of Knox & Boggs and others upon the credit of the letter, for which the defendant paid. The clerk of the plantiffs testified that the goods were sold to Page, on the credit of the defendant's letter to Boggs, of which the plaintiffs had received information as stated. There was no proof in the case, that the plaintiffs had ever given any direct notice to the defendant, of a claim against him for goods sold

to Page. But there was proof that, in August, 1827, defendant conversed about the claim, and refused to pay it, not on the ground of want of notice, but on the ground that this letter not having been shown to them, they could not charge him with the goods. The Court, at the trial, instructed the jury, that the plaintiffs could not recover, unless, within a reasonable time after the sale, they had notified the defendant of the sale made to Page upon his account. Under this instruction, a verdict was returned for the defendant. And the plaintiffs moved for a new trial on the grounds of misdirection by the Court.

D. Collier, and *J. C. Wright*, in support of the motion.

Tappan, for defendant.

By the COURT.

One of the questions made on the trial was, whether the plaintiffs could recover without reasonable notice to the defendant. The view the court has taken of the case, renders it unnecessary to decide that question.

The principal question arises, under the mercantile law, which has its foundation in good faith. The first thing to be considered is, the object of the letter, so far as it is explained by the contents, and other facts and circumstances, proved, in the case. The letter appears to furnish a credit, limited only by time. The liability to be incurred, was an indefinite amount, without any specification of the time or mode of payment. These were left to the discretion of Page, or of Boggs, or of both of them. They could not have been submitted to the dealer with Page. This would have been a folly too great to impute to the writer of a letter of credit, in his sober senses. If the discretion was confided to Page, no good reason can be given why the letter was not delivered to him. But as it was not, the fact itself furnishes a very strong argument, that the writer did not intend to place such unlimited confidence in him. The letter was addressed not to the firm, but to one partner: and this, independent of the other circumstances, shows there was a trust and confidence of some kind reposed in Boggs, the individual to whom it was written. According to the reasoning of the plaintiffs, there was no other object, in this, than to give the contents publicity in the city. The answer is, that Page could as well do this as Boggs. The motive of the writer was in some way to benefit Page, through the instrumentality of Boggs. It might be, and it seems fair to presume it was, to introduce Page to men of integrity and fair dealing, and prevent his being overreached by every sharper that might by chance meet with him. The circumstances warrant the conclusion that Boggs had something to do with the extent of the credit, as well as the persons to whom Page should be introduced.

All these matters of discretion, in Boggs, seemed justly inferable from the nature and circumstances of the case. It appears one of the partners' plaintiff, had indirectly got information of the contents of the letter. Besides, rumor had probably spread them over the city, and had brought them to both partners. There would, however, be something assuming the appearance of a departure from strict fairness and propriety, to permit a man, perhaps a young and inexperienced one too, to be sought out and made enter into extensive engagements

to charge a friend, without an introduction, or exhibition of the letter, upon which the writer was to be charged, to an unlimited amount. Such is not the ordinary course of fair dealing merchants. In the absence of authority, the Court would pause before they would give countenance to a transaction attended with such circumstances of unfairness. The case of *Ayliff v. Mr. Justice Tracy*, (2 *P. Will.* 65,) bears a strong analogy, in principle, to the one before the Court. The plaintiff courted one of the daughters of Sir T. Hazlewood, and treated with the father about the marriage, who consented to it. He wrote his daughter, intimating that he had met the plaintiff and had agreed to give him a portion, and subscribed his name to the letter. The father died before the marriage. The daughter did not shew the letter to the intended husband before the marriage. The father had made his will, before the treaty of marriage, and left his daughter a legacy of two thousand pounds, which the husband received. It was held, this was no more than a communication, and not being shown to the husband before his marriage, he could not be supposed to have married in consequence of it, &c. 4 *Wheat.* 89, *note*. The very fact that the plaintiffs did not call upon Boggs to see the letter, or obtain a copy, although one of the partners had understood such a letter had been written, shows that they either intended to give credit to Page, or that some apprehensions were entertained that Boggs would decline recommending their house to him. It would be fairer to presume the credit was given to Page himself, than to Means upon vague rumor. Indeed, the probability it was given to Page is a good deal fortified, by the facts that his note was taken for the amount, and that no notice was given, or demand made, for payment of Means, until some time afterwards. If the credit was given to Means, why take the not of Page? The answer is a difficult one to make, consistent with the plaintiff's present claims. It is not unfair to impute to the plaintiffs extreme negligence, if they originally intended to charge Means, or an intention to withdraw Page from the vigilance or experience, or both, of Boggs, who most certainly was entrusted with some agency and discretion, by Means. The whole circumstances of the case warrants the latter conclusion. This stamps the transaction with a want of fairness, and forbids the Court to aid the plaintiffs, in reaping the fruits of their own imposition.

The circumstances of this case authorised the jury to find for the defendant, and judgment must be entered on the verdict.

NICHOL *v.* PATTERSON.

Justices of the peace have no jurisdiction in cases of nuisance.

Where the defendant appeals an action for a nuisance from the judgment of a justice, he may move to quash the proceedings for want of jurisdiction after declaration and plea filed and continuances granted.

Upon such motion no judgment can be given for costs.

This cause was adjourned from the county of Belmont, where it came before the Court upon a writ of *certiorari* to the Court of Common Pleas, in the following case:

The plaintiff brought an action on the case against the defendant for a nuisance, in causing the water to flow back on plaintiff's land, by a mill-dam.—The suit was brought before a justice of the peace, and judgment rendered against the defendant, who took the case, by appeal, before the court of common pleas. A declaration was filed, pleas put in, an issue joined, and an order of survey made. After all these proceedings, the defendant, the appellant, moved to quash the appeal, on the ground that the law gave a justice of the peace no jurisdiction, in an action on the case for a nuisance. The court of common pleas made an order quashing the appeal, and gave judgment against the plaintiff for costs. To reverse this order and judgment, the writ of *certiorari* was brought.

Tappan, for plaintiff in *certiorari*. *J. C. Wright*, for defendant.

By the COURT.

Three questions are presented for the consideration of the court:

1. Had the justice jurisdiction of this action?

2. Have the parties waived jurisdiction by pleading, suffering continuances, &c.?

3. If the Court of Common Pleas had no jurisdiction, could a judgment be rendered for costs on dismissal?

1. The cases excepted from the jurisdiction of justices of the peace are "actions against justices of the peace, for misfeasance in office, actions of ejectment brought to obtain possession of lands and tenements, actions of replevin, actions of slander, actions on contracts for real estate, or when the title of land is called in question, except trespass on real estate," &c. In this action, a mere naked possession, a title of the lowest and most imperfect degree, but nevertheless a title, is necessary to enable the plaintiff to support it. It is settled that, in personal actions against a wrong doer, it is sufficient to state, in the declaration, that the plaintiff was possessed, without setting forth specially the title. *Cro. Car.* 490. *Com. D. Pleader C.* 39. 3 *Term R.* 766. It can hardly, however, be denied, that possession is one species of title, and that this must either be established, on the trial, or the plaintiff will be non-suited. The title, so far as possession constitutes it, is the first question to be determined, at the trial, and, if the plaintiff fails in this, he must fail in the cause. It may be ascertained, *prima facia*, and this may be rebutted, by testimony on the other side. 3 *Starkie's Ev.* 987. The word title, in the statute, must be taken in its technical, legal sense, and, if so, a naked possession must be admitted to be comprehended in the term.

It has been suggested, in favor of the justice's jurisdiction over this and other similar actions, that although it is necessary to set out the title of the plaintiff in the declaration, yet, until the pleadings disclose a question concerning it, the jurisdiction of those inferior courts is not ousted by the statute. If this was the true criterion, it would be within the power of the defendant, at any time, to preserve or destroy the jurisdiction of the court. This would leave no rule by which the jurisdiction could be ascertained. Certainly a matter so important as the jurisdiction of a court, ought to have, if possible, some rule of general application. Hence in the case of *Hulsicamp v. Teel*, 2 *Dall.* 358, the court held

the damages laid, in the declaration, and not the amount assessed by the jury, as evidencing jurisdiction. Indeed the mere discretion of the party, or the finding of a jury, upon a question of damages, ought not, and cannot affect the jurisdiction of the court. The same principle has been decided by the English courts. 3 *Burr.* 1592. 2 *Will.* 48.

But if doubts could be entertained, whether this case is excluded from the jurisdiction of justices of the peace, the 67th section of the judiciary act, would seem completely to remove them. The statute declares, "that in all actions for libel, slander, malicious prosecution, assault and battery, *action on the case for a nuisance*, &c. if the jury, upon the trial of the issue, or on enquiry of damages, shall find, or assess the damages under five dollars, the plaintiff shall not recover any costs." It is true, this act is prior in date to that regulating the duties of justices of the peace, but both were passed the same session. The same class of cases has long been excluded from the jurisdiction of justices of the peace, and, while they are excluded, a separate law was passed, the same in substance as the provisions in the 67th section of the judiciary act. Upon a fair comparison of these acts, and a correct construction of their provisions, no doubt can be entertained, that the Legislature considered the action on the case for nuisance, not within the jurisdiction of justices of the peace. Upon a different construction of these statutes, on an appeal by either of the parties, the plaintiff could not recover costs, unless the jury assessed the damages to five dollars or upwards. It would be difficult to discover a plausible reason for making the action on the case, for nuisance, an exception to all others in this respect. This would be the only exception to the general law, that where the matter in controversy is within the jurisdiction of a justice, the costs, whatever the amount assessed, should follow the damages. If the actions of ejectment, slander, &c. ought not to be tried by a justice of the peace, by reason of their greater importance to the community, and to the parties, or the greater difficulty of comprehending and applying the rules which govern them, it seems quite proper that actions on the case, for nuisance, which frequently present very complex questions of vast importance to estates, depending, for their decision, upon nice discrimination, and accurate knowledge of law, should also, in the first instance, be brought before the courts of record, where the judges are selected from the profession, and are supposed to have a more perfect knowledge of the legal rights of the parties. But it seems unnecessary to resort to the reason for the particular exclusion, where the legislature has put a construction upon the justices' act, which shews a manifest intention to exclude the action under consideration, from their jurisdiction.

2. The question presenting more difficulty, is, whether the defendant, by suffering continuances, pleadings in bar, &c. has not precluded himself from making objections to the jurisdiction of the court. It appears to be a general rule the objections to the jurisdiction come too late, after a plea in bar, and that the want of it, must be taken advantage of by plea. 2 *Ven.* 484. *Cok. Litt.* 127. 6 *Cow.* 161. 3 *John. R.* 105. To this general rule there are exceptions. Where the court has no jurisdiction, at common law, or it has been taken away by an act of the legislature, such want of jurisdiction may be pleaded in bar, or be given in evidence, under the general issue, and is not properly the subject of a plea in abatement. 1 *Chitty*, 428. 1 *East.* 352. 6 *East.* 583. In the case of

Parker v. Elding, (1 *East.* 352,) the plaintiff brought his action for depasturing cattle, &c. and proved himself entitled to recover a sum under forty shillings.

The defence set up was, that the debt was contracted in the Isle of Ely, and the statute of 18 *Geo.* 3, *c* 36, which declares, "that no action or suit for any debt not amounting to forty shillings, and recoverable by virtue of this act, in said court of request, shall be brought against any person residing, or inhabiting, within the jurisdiction thereof, in any of the king's courts of Westminster, &c. or elsewhere, out of the said court of requests." The Court held they were bound to take notice of this law. How then, say the Court, can we say that the plaintiff shall recover against the positive direction of the act? The decision was against the exercise of jurisdiction. The case under consideration, upon the face of the papers, was in the common pleas, and must have been tried by that court, by virtue of its appellate, and not of its original jurisdiction. It is the essential criterion of appellate jurisdiction, that it revives and corrects the proceedings, in the cause already instituted, and does not create that cause. 1 *Cran.* 175.

The courts of justices of the peace, if not all others in this state, are of limited jurisdiction. If not inferior, in the technical sense, so that transcripts of their proceedings must show jurisdiction, they are limited, and when it appears that the powers given by law have been transcended, the appellate court is authorized to treat the proceedings as a perfect nullity. The appellate jurisdiction of the common pleas is based upon the jurisdiction of the justice whose transcript is brought up. If it appears from that, the justice had no jurisdiction, the superior court is left to create the cause, or dismiss it. A safe and convenient general rule for this Court to adopt, would perhaps be, that, when upon the face of the papers it appears that the appellate, and not the original powers of the common pleas are sought by the parties, and that the subject matter was not within the jurisdiction of the justice, to dismiss the proceedings, upon motion, in any state of the cause; but when the papers do not sufficiently disclose these facts, and the defendant pleads in bar, to consider the process as waived, or the jurisdiction admitted. This will preserve the distinction between the original and appellate jurisdiction of the Court, and prevent the confusion and difficulties which might arise, either from the illegal exercise of powers by justices of the peace, or by having the independent judgment of two courts for the same cause of action. The latter would have been the case in this instance, if the Common Pleas had considered the proceedings of the justice a nullity, for want of jurisdiction, and had treated the cause as originating in the higher court. We are of opinion that an appellate court, as such, has no jurisdiction of the subject matter where the Court in which the cause originated had none. Therefore, when the parties themselves show the fact, it is the duty of the appellate Court, in any stage of the proceedings, to dismiss the cause, and leave the costs to be recovered by those interested in them.

The judgment of the Court below is affirmed, as to the dismissal of the cause, and reversed as to the judgment for costs. *See Kennedy, v. Terrell, Hard.* 490.

BUTLER v. COWLES.

Assumpsit, for use and occupation, after a recovery, in ejectment, will not lie, to recover rents and profits, accruing after the date of the demise in the declaration.

This cause was reserved in the county of Delaware, on a written statement, as follows: "In case, &c. for use and occupation. It is agreed in this case, that Moses Bixbe, in his lifetime, took possession of the premises in the declaration mentioned, claiming title to the same. That he used and occupied them a a short time himself, and afterward by his tenants, who paid him the rent in money, &c. The plaintiff also, during the occupancy by Bixbe, claimed title to the same premises, and, from time to time gave notice to Bixbe that the premises were his. It is admitted, that the legal title to the said premises was in the plaintiff, and still is in him, and that he took possession under a *habere facias*, having recovered in an action of ejectment. If the plaintiff is entitled to recover under this statement of facts, then a jury shall assess the damages; if not, there shall be a judgment of non-suit, &c."

Parish and Boalt, for plaintiff. *Cowles*, contra.

By the COURT.

It seems well settled that a plaintiff, after a recovery in ejectment, cannot, in assumpsit, for use and occupation, recover rents and profits, accruing after the date of the demise in the declaration. 1 *Ter. R.* 378. 3 *Ohio Rep.* 264. *Woodfall's Ter. L.* 432. Bixbe entered claiming title, and not as tenant. This action, by statute 11 *Geo.* 2 *c.* 19, *s.* 14, lies upon an implied agreement to pay rent. To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Presumptive evidence will do, such as that the defendant holds over after the expiration of his lease by parol. *Osgood, v. Dewey*, 13 *John. Rep.* 240. 3 *Stark. E.* 1516. 13 *John. R.* 297.

But the facts must shew, expressly, or impliedly, that the defendant occupies as tenant of the plaintiff. In the case of *Smith, v. Stewart*, (6 *John. R.* 46) the defendant took possession of lands, as a purchaser, from the plaintiff, and by his consent, but afterwards refused to pay, and abandoned the contract.— The court say, as the defendant did not enter under the relatio of tenant, but under a contract for a deed, the plaintiff could not recover in this form of action. The same principle was decided in the case of *Bancroft, v. Wardell*, 13 *John. R.* 489. 1 *Esp. N. P.* 20. *Woodfall's Term Law*, 432. 3 *Serg. & Rawl.* 500. 17 *Mass. R.* 299. 2 *Green.* 337. 1 *Mun.* 407. 3 *Dall.* 503. These authorities establish the principle, that when a person occupies the land of another, not as a tenant, but adversely, or, where the circumstances under which he enters, shew that he does not recognize the owner as his landlord, this action will not lie. The remedy is trespass for mesne profits, after a recovery in ejectment.

It has been determined, that a defendant cannot, in this action, dispute the title of the plaintiff, and that *nil habuit tenementis*, is a bad plea. *Lewis, v. Willis*, 1 *Wil.* 314. *Cook, et al. v. Loxley*. 5 *Term. R.* 4. 2 *Wils.* 208. In the

principal case, the facts admit that Bixbe entered claiming title. This surely, rebuts the implication of the relation of landlord and tenant.

There is no express contract to pay rent; consequently the plaintiffs cannot recover on the facts before the court.

Judgment of nonsuit.

ABRAMS v. KOUNTS, ET AL.

Where a bond recites, that the obligors "are held and firmly bound in the penalty of 1000 dollars for the performance of a marriage contract, which H. K. engages to perform with M. A." the 1000 dollars, is to be deemed a penalty and not liquidated damages.

Upon such a bond covenant will not lie.

This case was adjourned here for decision from the county of Columbiana. It was an action of covenant founded upon a sealed writing, in the following words:

"Know all men by these presents, that we, Hiram Kounts and John Quinn, of the county of Columbiana, and state of Ohio, are held, and firmly bound, in the penalty of one thousand dollars, for the true performance of a marriage contract, which the said Hiram Kounts engages to perform with Maria Abrams of Brooke county, Virginia, against the 8th day of February next. The conditions of the above obligation are such, that if the above bound *Hiram Kounts*, does well and truly perform the above obligation, this obligation to be void, otherwise, &c." Dated January 22, 1827.

The declaration contained six counts. In all, the capacity of the Plaintiff, as a feme sole, to make a contract of marriage is averred. In some, a promise on the part of the plaintiff to marry the defendant Kounts, is averred, in one this is omitted: in one a mutual promise is set out, and in the second count it is averred, in addition, that the defendant Kounts, by promise of marriage, had seduced the plaintiff, in consequence whereof, at the time of making the contract, she was pregnant. As no exception was taken to the form of the declaration, it seems unnecessary to describe it more minutely.

To all the counts but the second, the defendant demurred generally, and the plaintiff joined in demurrer. To the second count, the defendants pleaded, three separate pleas, alleging that Kounts was imprisoned by the plaintiff, and by duress, was induced to make and execute the bond. Upon these replications the plaintiff joined issue. This cause was adjourned here for decision upon the demurrers.

Loomis and *Metcalfe*, in support of the demurrers. *Goodenow*, contra.

By the COURT.

We are of opinion that the penalty of the bond, in this case, cannot be regarded as liquidated damages, and that the instrument is not one upon which covenant can be maintained. The demurrers are therefore sustained.

WATERS, ET AL. v. LEMMON.

Upon a writ of error, to a decree in chancery, nothing is examinable, but the bill, answer, and exhibits made part of them, the decree itself and such matter as may be made part of the case, by a bill of exceptions; the court do not rehear the cause upon its merits.

A decree, rescinding a contract of purchase, and directing the purchase money to be refunded, and leaving the vendee in unconditional possession of the premises, is erroneous.

This was a writ of error brought to reverse a decree in chancery, pronounced against the plaintiffs in error, by the Court of Common Pleas, of the county of Brown, in a suit wherein the plaintiffs in error were respondents, and the defendant in error, complainant. It was adjourned here for decision from Brown county.

The material facts of the case were as follow: On the 15th of January, 1816, the Waters' executed a penal bond to Lemmon, in the sum of three thousand dollars, conditioned that they should get a good and sufficient collector's deed, for twenty acres of land, described in the bond, and specifying that the title was derived from a sale of taxes; or, that they should make, or cause to be made, a quit-claim deed for the same. No time was fixed for procuring and making these deeds:

On the 18th day of January, 1816, Wm. Waters entered into another contract in writing, with Lemmon, specifying, that in consideration of the sum of two thousand dollars, paid one part in goods, and the residue in three annual payments from the date, W. Waters sold to Lemmon, forty acres of land, adjoining the twenty, and bound himself; when the last payment, became due, to make Lemmon a general warranty deed, and to warrant and defend the same to said Lemmon. This article also contained a reference to certain personal property sold by Waters to Lemmon. Lemmon entered into possession, which he still retained.

The bill charged that the purchase was made with reference to a mill seat, which was on the twenty acres: that the whole purchase was made from Wm. Waters, and the two thousand dollars specified in the article as the purchase money of the forty acres, was the purchase money of the whole. It further states; that Lemmon entered into possession, and erected on the twenty acres a grist mill, house, and stable, which cost him upwards of seven thousand dollars: that no deed was procured for the twenty acres, and that after the improvements were made, he was informed that the title was worth nothing, and that W. Waters made a fraudulent representation as to the character of the sale for taxes, well knowing that the title was defective. The bill further stated, that the lands sold for taxes had been redeemed by the heirs. It further stated, that of the purchase money of two thousand dollars, about fourteen hundred dollars had been paid to said Waters, and that Waters had obtained a judgment, and levied an execution on Lemmon's property for the balance. An amended bill charges, that at the time of the purchase, W. Waters produced a Collector's deed which was defective upon account of certain blanks, which

Lemmon pointed out, ahd which W. Waters promised to have corrected. But that in consequence of a defect in the sale for taxes it could not be done. It is also charged in the original bill, that the whole quantity sold for taxes, was seventy acres, of which the twenty is part, and that for the remaining fifty acres, an ejectment had been brought against W. Waters, and a recovery had, he being unable to sustain the tax sale. The bill prayed, that the contract for the sale of the twenty acres of land might be rescinded, and that Lemmon might receive compensation for his improvements, and other general relief.— This bill was filed December, 1823.

In his answer, W. Waters, admits the sale, and that part payment was made, and judgment for the balance. He denied all fraud or misrepresentation. He denied that the twenty acres was the chief consideration for the two thousand dollars, and alleges that the whole sixty acres of land, considerable stock, mill stones, and valuable implements to a grist mill, and a saw mill, were sold in gross, for the gross sum of two thousand dollars. Alleges that every thing was fairly represented, and all the papers exhibited at the time of the sale.

Much testimony was taken in the cause, and upon an interlocutory decree, it was referred to a master commissioner, upon whose report, a final decree was made in the common pleas, cancelling the contract for the twenty acres of land, enjoining the recovery of the judgment at law, and decreeing that W. Waters pay to Lemmon 1372 dollars, 52 cents, and costs. This decree was pronounced at April term, 1828, and upon petition the Waterses obtained a rehearing.

At August term, 1828, the Waterses excepted to the Master's report, and the cause was again heard, and a decree pronounced, corresponding with the previous decree, except that Wm. Waters was decreed to pay to Lemmon, 1384 dollars, 22 cents. No disposition was made, by the decree, of the possession of the sixty acres of land, which was left with Lemmon. To reverse this decree the writ of error was brought.

M. Marshall, for plaintiff in error. *H. Brush*, for defendant.

By the COURT.

Upon a writ of error, to a decree in chancery, nothing is examinable, but the bill, answer, and exhibits, made part of them, the decree itself and such matter as may be made part of the case, by a bill of exceptions. The court do not rehear the cause upon its merits. This case must, therefore, be decided upon the allegations of the parties, and upon the decree. From these it appears that Lemmon, the complainant below, purchased from the Waterses sixty acres of land, with some personal property, and was put in possession of the whole. These purchases were made at different times. The first, for twenty acres, the latter for forty acres of land, the two tracts lying contiguous and adjoining. Lemmon remained in undisturbed possession of the whole of both tracts, and of the improvements made upon them. His bill contains no offer to surrender all, or any part to the Waterses, from whom he received it; but prays that the contract may be rescinded, and the purchase money paid by him refunded. The decree conforms to this prayer. It directs the contract, so far as it relates to the twenty acres, to be rescinded; and it restores to Lemmon the purchase

money, leaving him, also, the possession of the land. This we deem inequitable, and therefore erroneous. For this cause, the decree must be reversed, and the cause remanded for further proceedings. As the cause may, possibly, come before us again, upon its whole merits, as presented by the proofs, it has not been considered necessary to make up, or express an opinion, except upon this single point.

Decree reversed.

LESSEE OF SYMMES, ET AL. *v.* BEAVER.

This cause was adjourned from the county of Licking. It was submitted to the Court upon the facts, involving a question of fraud, in the original conveyance to the lessor, Symmes. The Court were of opinion that the fraud was fully established by the proof, and gave judgment for the defendant. It was deemed unnecessary to report the mass of testimony necessary to an understanding of the case. Without this report could be worth nothing.

PARKER *v.* DUNN, ET AL.

Notoriety of Entries.

The holders of resolution warrants have repeatedly been recognised by Congress as equally entitled to bounty lands within the Virginia Military reservation, with others having certificates.

It is not competent to institute an enquiry upon what evidence a warrant issued.

This cause was adjourned here for decision from the county of Brown. It was a bill in chancery by the junior patentee of the elder entry, seeking a conveyance from the elder patentee. The case is stated in the opinion of the Court.

M. Marshall, for complainant. *Thompson* and *Scott*, for defendants.

By the COURT.

The bill states, that, in July, 1799, Josiah Parker, being an owner of a land warrant, issued by the Commonwealth of Virginia for revolutionary services, caused an entry of the same to be made between the Little Miami and Scioto rivers. The entry is as follows: "January 29, 1799. No. 3549, Josiah Parker enters four hundred and fifty acres of land on part of a military warrant, No. 1920, on White Oak creek, about four or five miles from the mouth, beginning at the southwest corner of Curry's, and northwest corner to Heath; thence N. 45, W. 370 poles, crossing White Oak to a sycamore and hackberry marked with painted letters; thence S. 45, W. 370, to an ash and hackberry; thence S. 12, W. 30 poles to a stake; thence eastward to the beginning." The bill further states, that Josiah Parker was the grandfather of the complainant, and that he died leaving a will devising to complainant all his estate, including

the tract in controversy, upon condition that his devisee should assume the name of Parker, which he has done.

John Graham has made an entry covering the same land, and has the elder patent. The prayer is, that the defendant may set out his title, and convey to the complainant his right, &c.

Walter Dunn, the trustee of the said John Graham, and the defendants, who claim under him, say, in their answers, that the warrant of the complainant was issued by a resolution of the Commonwealth of Virginia, and was therefore by law void, as respects the complainant's right to locate the lands in the Virginia military tract. One of the complainants also insists upon the statute of limitations, &c. By the agreement of parties, it is admitted that the complainant was a minor residing in the state of Virginia, where he continued to reside until some time in the year 1824, and also that Josiah Parker was a resident of the same state, and never was in Ohio. Upon well settled principles, the statute of limitations does not apply.

The case furnishes the most abundant proof of the notoriety of the entries of Heath and Curry for more than thirty years. As the facts furnish no deviation from the settled principles applicable to notoriety, it is unnecessary to detail them as exhibited in evidence.

It is urged this entry is vague in its calls for Curry's and Heath's, as those entries are not identified by quantities or numbers; but those entries are well defined, not only by fixed, but by artificial monuments, and there is an entire absence of proof that there are any other claims, in the name of Curry or Heath, on White Oak run. A subsequent locator could not, therefore, be misled or confused for the want of a more exact and precise description of these entries.

The other point made in this cause was considered and decided in the case of *Parker v. Wallace*, (3 *Ohio Rep.* 490.) Upon a review of the principles of the last mentioned case, the court is entirely satisfied with the decision. It may be added, that the h lders of resolution warrants have repeatedly been recognised by Congress as equally entitled to bounty lands within the Virginia military reservation with others having certificates, and particularly by the acts of March 3, 1807, April 11, 1818, and March 1, 1823. This, however, was a vested right in the holder when the cession was made to the General Government. In the reservation, no distinction is made between those entitled to bounty by resolution or otherwise, nor is it competent to institute an enquiry upon what evidence the warrant was issued.

The court is, therefore, clearly of opinion the complainant is entitled to the relief sought.

WALLACE *v.* THE OHIO INSURANCE COMPANY.

The rule of one third new for old, in the law of marine insurance, is applicable to the insurance of steam-boats on the Ohio river.

This was an action on a policy of insurance taken by the defendants upon the steam boat Hercules, for the sum of eight thousand dollars. Cincinnati was the home of the Hercules and of the plaintiff. She was run against by the B. Franklin and injured, but was nevertheless brought to Cincinnati, and there repaired. The whole amount of charges claimed by the plaintiff for repairs, was eleven hundred and thirty-six dollars. Of this sum, six hundred and forty-seven dollars was admitted to be for repairs properly chargeable as such. The residue of the charges were for kitchen and table furniture, and for wages to captain, mate, steward, cook and clerk. By the terms of the policy, the insurers were not to be charged, unless the loss amounted to ten per cent. upon the amount insured. The insurers refused to pay, because they contended that the loss, when reduced according to the marine law, one third, upon the doctrine of new for old, did not amount to eight hundred dollars, and because the items charged above the sum of six hundred and forty-seven dollars were not legally chargeable against the insurers. The action was an amicable one, and the facts were all agreed, reducing the case to the points here stated, and agreeing also that the boat was not improved by the repairs. It was adjourned here for decision from the county of Hamilton.

Caswell & Starr, for plaintiff. *Hammond* and *Garrard*, contra.

By the COURT.

In its practical application, the whole doctrine of insurance is new to us. We cannot, therefore, undertake to settle principles, so as to conclude us, should further litigation arise, and further investigation diffuse new lights upon the subject.

The question now necessary to decide, is, whether an established doctrine of the law of maritime insurance, shall be applied to the case of insurance, upon steam boats navigating our interior rivers. The plaintiff contends that it is wholly inapplicable, and should, for that reason, be rejected.

It is admitted, that, if a sea vessel be injured to an extent less than one half her value, she shall be repaired at the expense of the insurer. But in that case, one third of the charges of repair shall be borne by the owners. The reason upon which the rule seems to be founded, is, that the repairs place the vessel in a better condition than when she was insured. In this case it is agreed, that the vessel was not improved by the repairs, and the drift of the plaintiff's argument appears to be that, when the reason for the rule ceases, its obligation is at an end. We understand that the rule is of universal application, and that it is not one adapted to each particular case. It is so laid down by judge Story, in *Peel and others v. The Merchant's Insurance Company*, 3 *Mason*, 73.

"The rule itself is somewhat arbitrary, and not founded upon an exact calculation, with reference to the particular case. The ship may be almost entirely new, and then the reason for the deduction would altogether cease. The ship may be very old, and the reason for a much greater allowance would apply. The general principle upon which the rule is founded, is, as stated by MAGENS, that the underwriters ought to pay for the actual damage or injury, but not for the wear of the things lost or injured; and therefore proper allowance ought to be made for the difference in value between the new and the old. But if this difference were to be ascertained, in every particular case, by actual inspection and estimates, there would be no end to controversies, and therefore general usage, which the law follows, as founded on general convenience, has applied a certain rule to all cases, not upon the notion of perfect justice, but as generally reaching, in substantial equity, the mass of them.

The doctrine, as here asserted, makes it wholly immaterial whether, in the case before us, the steam boat was actually improved, or not, by the repairs. So we must declare that the principle, new for old, is applicable to steam boats, or else that fact, in the case, can have no weight in deciding our judgment.

We are not prepared to say, that, in general cases, steam boats, when not injured more than half their value, at the time of injury, may not be greatly improved by repairs. That is, improved from the actual condition, when the injury was sustained. We think this may be the case, and if so, we are not now willing to declare that this branch of the law of marine insurance should not extend to steam boat insurances.

If we understand the counsel for the plaintiff rightly, they propose that we shall take upon ourselves to revise the whole doctrine of marine insurance, and retain part as properly applicable to the case of steam boats, and reject part as wholly inapplicable. We think this work, if necessary to be performed, should be undertaken where there is more experience and knowledge upon the whole subject. Steam boats commenced running in the waters of New York, before they did in the western waters. The city of New York is the great commercial emporium of the Union. Her jurists, both bench and bar, are eminent for their deep and sound learning. Questions of insurance must have arisen, yet neither in the books of reports, nor in the excellent elementary treatise of chancellor Kent, have we any intimation that the general doctrines of the law of marine insurances are inapplicable to steam boat insurance. Steam boats have been in use in England for years. We have no information that the principle now pressed upon us, has been urged there. Under these circumstances, we hold it safest to adhere to the doctrine as we find it settled, and administer it as an entire system, to those who claim, at our hands, the administration of part of it. When the amount of one-third is deducted from the whole charge for repairs, the loss is reduced to a less sum than eight hundred dollars. This not being ten per cent. upon the actual value, the terms of the policy do not entitle the plaintiff to recover. The whole case is thus disposed of, and it is unnecessary for us to say any thing upon the other points presented in it. Judgment for defendants.

LUDLOW'S HEIRS *v.* KIDD, ET AL.

When the legal title is fraudulently obtained against a better equity and conveyed to an innocent purchaser without notice, the complainants are entitled to a decree for the value against him who thus obtained by fraud the legal title.

This cause was adjourned here for final decision, from the county of Hamilton. It is the same cause reported in *vol.* 2, *p.* 372, and *vol.* 3, *p.* 541, and now came up for final decision upon the merits of the original equity of the complainants. The facts are briefly these: In the month of January, 1789, the town of Cincinnati was laid out, by Matthias Denman, Robert Patterson, and Israel Ludlow. Afterwards Denman and Patterson sold out to Joel Williams and Samuel Freeman. John Cleves Symmes, was the original grantee of the government, for a large tract of land between the great and little Miami rivers: the patent having been issued to him, in trust for himself and his associates, in the month of September, 1794. The proprietors of the town of Cincinnati agreed that the title should remain with Symmes, who should make deeds for the lots to the purchasers, upon the certificate of any two of the proprietors. At the original laying out of the town, the proprietors each selected a lot for themselves, which was not put into market. The complainants claimed that the lot in controversy was selected by their ancestor, who took possession, cleared off the timber, and enclosed it with a fence, and cultivated it.

John Kidd, under whom the defendants claim, in the month of July, 1799, rented the lot of Ludlow, and took a written lease for the term of eight years, and entered into possession under that lease, as Ludlow's tenant. In August, 1799, J. C. Symmes conveyed the lot to his nephew, Celadon Symmes, without any certificate from the proprietors directing such conveyances. In 1804, Ludlow deceased. Celadon Symmes conveyed the lot to Joel Williams, who was then the owner of Freeman's interest, in the town property. And, before the expiration of Ludlow's lease, Williams conveyed it to Kidd, who, at the expiration of his lease, retained possession upon his deed. The bill was originally brought against Williams and Kidd, to obtain from them the legal title, and in 1817, was dismissed upon a final hearing.

After this dismissal, Kidd sold part of the property, in fee, and leased a part of it, for ninety-nine years, renewable forever, reserving an annual rent. Afterwards Kidd made his will, and directed that his executors expend the rents reserved, for the education of poor children. For a time the executors received and so applied the rents, and, at length, transferred their interest and trust to the Cincinnati College. The Bank of the United States became the owners of the lease, and, in this condition of things, the bill of review was filed. Upon the service of the process, on the bill of review, the bank ceased to pay the rents. The Court, having on the bill of review, reversed the decree of dismissal, the purchasers under Kidd, put in the plea that they were innocent purchasers, without notice, and this plea was ruled in their favor. The rents reserved, upon Kidd's lease, and the value of the lot, as against Kidd's estate, were all that was left for the complainants to obtain by a final decree, in their favor.

This cause now came before the Court, upon questions of fact and law, involving the superior equity, as between the heirs of Ludlow, claiming under him, and the representatives of Kidd claiming under Symmes. The Court decided the facts to be in favor of the complainants, but considered it of no utility to report the evidence, so as to make the grounds of decision intelligible. The following decree was rendered in the cause:

"This day came the parties by their counsel, and the bill, answer, and exhibits being read, and understood, and the arguments of counsel thereon heard, the Court are of opinion that the complainants are in equity well entitled, as against the devisees of John Kidd, to the possession and legal title to the lot numbered four hundred and one, in the bill mentioned; and it having heretofore been adjudged and decreed in this cause, that the whole of said lot, except the annual rents of one thousand dollars per annum, reserved by John Kidd, upon his lease to John Smith and David Loring, for ninety-nine years, renewable forever, dated the 18th of August, 1818, of a part of said lot, had passed into the hands of innocent purchasers for a valuable consideration without notice, and, therefore, could not be affected by the equity of the complainants, the court can only extend relief to the complainants, as against the said John Kidd, and as against his devisees of the said rent reserved.

The Court do, therefore, order, adjudge, and decree, that the Cincinnati college, by a proper deed of conveyance under their corporate seal, assign and transfer to the complainants, all the right, title, and interest, they may have acquired in and to the lease from the said John Kidd, deceased, to David Loring and John Smith, and to the rents thereon reserved; and that the said Joshua L. Wilson and Oliver M. Spencer, executors and trustees of the said John Kidd, deceased, by a proper deed, in writing, release to the complainants all the right, title, and interest that may remain in them, to the lease aforesaid, and the rents thereon and thereby reserved, both said conveyances to be made and executed on or before the first day of February, 1830, and in failure thereof, then that this decree fully invest the said complainants with all the right, title and interest of the said Cincinnati college, and of the said Joshua L. Wilson and Oliver M. Spencer, as executors and trustees of the said John Kidd, deceased, in and to the said lease and rents thereon reserved: and, in respect to the annual rents of one thousand dollars per annum, reserved upon said lease, which have accrued since the emanation of the process in this case, upon the bill of review and supplemental bill, to wit: since the first day of April, 1825, the Court are of opinion that the complainants are entitled to a decree for the same, and it appearing to the satisfaction of the Court that the said rents remain in the hands of the defendants, the President, Directors, and Company of the Bank of the United States, the Court do award, order, and decree, that the President, Directors and Company of the Bank of the United States account for, and pay over to the complainants the whole amount of the one thousand dollars per annum of annual rents, which have accrued since the first day of April, 1825, until the pronouncing of this decree.

And it further appearing to the court, that, at the time of filing the original bill in this case, to wit: on the 15th day of March, 1821, the said lot was improved and yielding rents, the court are of opinion that the complainants, as against the estate of the said John Kidd, and his executors, representing that estate, are entitled to an account for, and payment of the rents and profits justly

accruing on said lot, deducting therefrom all proper charges for taxes paid, and improvements made. It is therefore decreed, that Samuel F. Hunt be, and he is hereby, appointed commissioner to take and state an account of all such rents nnd profits, from the 15th of March, 1821 to the time of taking such account, crediting upon said account the annual sum of one thousand dollars, from the first day of April, eighteen hundred and twenty five, already charged by this decree; said account to be taken upon equitable principles, and report thereof made to the next term of the Supreme Court in Hamilton county. The Court are further of opinion, that the complainants, as against the estate of John Kidd, are entitled to the present value of the said lot of ground, number four hundred and one, in the bill mentioned, except for the portion thereof which produces the annual rent of one thousand dollars per annum. It is, therefore, ordered that the said commissioner estimate the present value of the said lot, number four hundred and one, deducting therefrom such part as produces the annual rent aforesaid, and report the same to the Supreme Court of Hamilton county, at their next term. As to the defendants, John Williams, Thomas Williams, Benjamin Williams, Joel Williams, and Eleanor Williams, the bill is dismissed. And the Court do award, order, and decree, that the complainants recover of the executors of John Kidd, deceased, to be levied upon his goods and chattels in their hands to be administered, their costs and charges in the prosecution of this suit expended; and it is ordered that the clerk of the Supreme Court for Franklin county send a certified copy of this decree to the clerk of the Supreme Court of Hamilton county, who is directed to enter the same on the Journal of the Court.

Garrard, for complainant. *Fox*, for defendant.

DECISIONS IN BANK.

JANUARY, 1831.

COOPER, ET AL. *v.* WILLIAMS.

The powers of the Canal Commissioners in controlling the waters of Mad river for canal purposes, and in selling water privileges.

This was a suit in Chancery to enjoin the defendant, one of the acting Canal Commissioners, from selling certain water privileges created by the location of the canal at Dayton, and was reserved from the county of Montgomery. The bill alledged, that the ancestor of the complainants was the owner of a large real estate in and adjoining the town of Dayton, that this real estate was so situated, as to give him the entire control of valuable water powers, by taking the water from Mad River, a mile or more above its mouth, and conducting it through his lands by races, and then discharging it into the Great Miami River either east of and above the town, or south of and below the town of Dayton. That in his life time he erected divers large and valuable mills, and in various other modes appropriated and used these water privileges; and to prevent future col-

lisions, he reserved to himself, his heirs, &c. the right of conducting water though most of the out-lots and lands sold by him, lying west of the road leading from Dayton to Waynesville, and south of the town of Dayton. That by his last will and testament he directed his executors to sell certain out-lots and lands for the payment of his debts, but reserving the same privilege of conducting water through them, and that the complainants, his children and residuary legatees, are entitled to said real estate, with all water privileges, &c. That in 1827 the Board of Canal Commissioners located the canal, a basin and feeder, at Dayton. The canal was located on the east side of Dayton to Main Cross street; the basin from Main Cross street to First street; and the feeder was taken from Mad River, above the lands of the complainants, and upon the lands of James Findlay; and after passing southwardly and mostly through the lands of the complainants, discharged itself into the Main Canal a short distance below the saw-mill erected by the ancestor of the complainants. The canal, basin and feeder, were completed in 1828, agreeably to this location, and the bill avers that the feeder conveys an ample supply of water to the Main Canal for the purpose of navigation.

The bill further alleges, that at the time the canal, basin and feeder were located, the Canal Commissioners agreed that a cut should be made from the head race of the complainants' saw-mill to the basin, at or near its head, and the water thus turned, might be used by the complainants for the purpose of propelling machinery; that this agreement has been carried into effect on the part of the complainants, and the cut made and privilege leased to one *Richards*, who is erecting a valuable cotton factory upon the cut. It is also charged, that an agreement was made with the Canal Commissioners to raise the complainants' saw-mill wheel, to save the expense of a culvert, which has also been complied with by the complainants.

It is further alleged, that the complainants, without materially injuring their water privileges, can furnish a constant and ample supply of water for the canal and that the Commissioners by their dam across Mad River can always control a sufficient quantity of water by the feeder as located and finished. The complainants also charge, that the defendant, in conjunction with others, and for private speculation, caused a new feeder and basin to be excavated; and that the defendant is about to divert the water from the old feeder to create a water power, and to sell the same for the benefit of the state, to the great detriment of the complainants. It is also alleged, that a much greater quantity of water is taken from Mad River, by the feeder, than is necessary to supply the canal, and thereby the property and water works of the complainants are essentially injured.

The bill prays for an injunction to prohibit the diversion of water from the old feeder, and the sale of a water power which would be created by such diversion; and also to prevent more water, than is necessary to supply the canal, from being taken into the feeder.

The defendant, in his answer, admits the location of the canal, basin and feeder at Dayton, as set forth in the bill, and that the dam across Mad river will amply supply the canal through the feeder. He denies that any contract was ever made by him or any other of the canal commissioners, that a cut should be made from the head race of the saw-mill to the basin; but says that

at the time the basin was located, an objection was made by the guardians of the complainants and by others, that so large a body of water might endanger the health of the neighborhood, unless a current should be let into and pass through it; to this objection it was replied, that such an evil might be avoided by making a cut and introducing a small wheel for light machinery. In this way, and to obviate said objection, and not to confer any peculiar benefit upon the complainants, the officers of the state permitted said cut to be made. Defendant admits, that the complainants raised the saw-mill wheel twelve or eighteen inches, but denies that any agreement was entered into by which the state are bound to permit the water to pass through the mills into the canal, and alleges that the deposits of saw-dust, &c. in the canal, below the mill, have induced a belief, that it may be necessary to abandon the present mode of admitting water from the mill. The defendant is unable to say whether the canal can be supplied by water from the mills or races of the complainants, but alleges that it has been determined by the proper officers under the law, that for obvious reasons, it is not prudent to rely upon private individuals for a supply of water. He is also unable to say whether the complainants have been injured by withdrawing from Mad river the water necessary for the canal, but believes, with ecomomy, the complainants would have sufficient water for their mills, &c., which were erected at the time of the commencement of this suit.

The defendant denies that he ever intended to change the location of the old feeder, or establish a new one, or that he ever authorized the excavation of a feeder to connect said basin with the canal, or established another basin or race, but alleges that said basin and race are the works of individuals, and managed at their own will and discretion.

The defendant admits, that he was about to sell, for the benefit of the state, about two thousand cubic feet per minute, of the water passing through the feeder, to be used for hydraulic purposes, and to be returned into the canal through the basin, race and side cut, made by said individuals, leaving one thousand or fifteen hundred cubic feet per minute to pass into the canal through the first feeder, and insists he has a right so to do under the law. The defendant further alleges, that the state have purchased about one and a half acres of ground, at the point, where it is proposed to take the water from the feeder, for hydraulic purposes. This purchase was made by order of the canal board, in the form prescribed by law, and for the purpose of using the water from the feeder for hydraulic purposes.

The defendant denies that he ever caused, or ordered more water to be thrown into the canal through the feeder than was necessary for the purposes of navigation, nor did he ever propose to sell water to such an amount as would increase the quantity necessary to be drawn through the feeder from Mad river, nor would the sale of two thousand cubic feet per minute, at the point owned by the state, produce that effect.

To this answer the complainants replied generally:

The complainants took the depositions of eleven witnesses. Isaac Pioneer, James Clymer, David Reid, Wm. M. Smith, Elisha Brabham, Amos A. Richards, John Sharter, John W. Vancleve, Alex. Grimes, Samuel Farrer, and T. Clegg.

The defendant took the deposition of James H. Mitchell.

An abstract of this testimony, so far as is deemed material, is here made, and arranged to the different points presented in the cause.

FIRST: The works erected by the complainants, before the location of the canal, was absolutely fixed.

Brabham testified, there was a merchant mill, with three run of stones, a waste wheel to drive from two to four grind stones, a fulling mill, with two water wheels, driving two setts of fulling hammers, a carding machine, with one water wheel, driving two carding machines, and one wool picker. A cotton factory, number of spindles not known, and a saw mill with two saws.

There was no controversy, but that the works here enumerated, were owned and kept in operation, by the complainants, before the canal was finally located.

SECOND: The works erected after the canal was located, and before the sale of water power was proposed.

Amos A. Richards testified, that he had erected a cotton factory, on a cut from the head race of complainants to the basin. That he had taken a lease for the water, from complainants. That before he took it, complainants sent him to J. Farrer, principal engineer, to obtain permission to make the cut. That he went to Farrer, explained the object, and the quantity of water required, that Farrer assented: the race or cut, was dug by a person whom Farrer recommended, and that Farrer was present while the cut was digging, and approved of it.

The testimony of this witness was unimpeached.

J. Farrer testified the wheels were raised by complainants, at their own expense, for the accommodation of the canal commissioners, and at a loss of a considerable portion of their water power.

THIRD: The injury sustained by complainants, by the abstraction of the water of Mad river, into the canal feeder.

Upon his first examination, *Brabham* testified that he had kept the complainants' merchant mills for eight or nine years. That during the last year there was a deficiency of water, for about four months, in the latter part of summer and beginning of autumn. That a part of the time, all the water of Mad river was turned into the feeder, and the mills supplied by a waste way from the feeder, but all that could be spared from the canal was insufficient. In his latter deposition, he states that after the first of August, 1830, the saw-mill stopped from a deficiency of water—the fulling-mill was also stopped, and the merchant mill stopped after the sixth of August, except on nights and Sundays.

Shartle testified that he had attended the saw-mill, for several years, and that in 1829, the mill did not run for two months. In his second deposition, he stated that the saw-mill was stopped for want of water, that they had from a hundred and fifty to a hundred and sixty logs on hand; that if the saw-mill could go on, it would be worth from ten to twelve dollars for every twenty-four hours, and that Mad River was not then lower than usual at that season of the year. He further stated, that before the opening of the canal there was no deficiency of water, for all the works.

FOURTH: With respect to the connexion of the defendant with Seely's works, and the nature and character of the title to the land contracted for, by the State, where the sale of water power is proposed.

John W. Vancleve testified to the general correctness of the map produced. He also stated that the ground purchased by the Canal Commissioners was sold by H. Phillips to Seely, and by Seely to the State, that Barr and Lodwick held Phillips' bond to Seely, and were prosecuting a suit against Phillips for the title.

Samuel Farrer testified that he had examined Seely's works, at the request of the defendant, after the proposition to sell to the State was made. He stated also, that defendant informed him his brother was once concerned, in a purchase of land connected with Seely's works: but that when he ascertained that Mr. Seely intended to sell the land to the State for water power, his brother, at his urgent request, relinquished his interest.

There was much testimony as to the waste of water, the opinion of witnesses concerning the relative injury and benefit of the canal to the complainants' property, at Dayton, and with respect to the admeasurement of the water, its waste by absorption, and the effect of the sale of the proposed quantity of water, upon the water works of the complainants, and upon their general interest. There was testimony, also, as to the capacity of the complainants' mill-race and other works to supply the canal with water, and the propriety of the State relying upon such supply.

Jas. H. Mitchel was the only witness examined by the defendant. His testimony applied to different views of the case. He stated distinctly, that should the water of Mad river be as low as in 1829, and the State take three thousand cubic feet per minute for the canal, Cooper's mills must stop. He also stated that no advantage would probably result to the State, by supplying, from the feeder, water for Seely's canal and basin, but the revenue from the sale of the water power. He stated, in addition to this, that the water power from the feeder could be as advantageously used on the complainant's lands, as at the point it was proposed to sell it.—The witness was the superintendant of the canal at Dayton.

Hammond, for complainants.

Mason, Kelly, Ewing, Corwin and *Collet*, contra.

Opinion of the Court, by Judge LANE.

The proof in this case shows, that the plaintiffs are the proprietors of a tract of land on Mad river, near the town of Dayton, upon which a valuable water power exists, and is improved, and that a greater power may be created by diverting a greater quantity of water from the river. That it is necessary to take from the river three thousand cubic feet of water per minute, to supply the Dayton canal, by which the value of the plaintiffs' milling privileges is materially impaired. That the Canal Commissioners have erected a dam on the land of Findlay, which lies above, and have constructed a feeder, which transmits the water from the river, first through Findlay's land, next through a part of plaintiffs' land, thence upon the land of another person, from which it again enters the plaintiffs' land, and joins the canal. That, in the construction of this feeder, a new water power is created, which may be used either on the plaintiffs' land, or on the intermediate land, and that the defendant, who is one of the Canal Commissioners, is about to sell the right of using two thousand cubic

feet of water per minute, to be taken from the feeder at some point between the two portions of the plaintiffs' land, and returned to the canal below. The bill prays general relief; but the pleadings direct the attention of the court to two points, which comprises the remedy he asks.

It is not an objection raised by the defendant that he is but one of five Commissioners, and that he only carries their acts into execution: nor is a decree resisted on the ground that the whole board of Canal Commissioners are not principals acting in their own rights, but agents of the State only. The case is discussed by the respective counsel on the merits, and the court will view it in no other aspect.

We are first called upon to restrain the defendant from the unnecessary consumption of water. If it be proper for us to institute this enquiry, the evidence shows that three thousand feet per minute is necessary, for the ordinary supply of the canal, at this point, and that this is all intended to be taken. And, although some irregularities exist in the quantity introduced, that they arise, partly from the accidental influx from other sources, or, perhaps, partly from the inexperience or want of attention, in the superintendent, yet they chiefly spring from the variable quantity flowing through the race of the saw-mill, a volume under the controul of the defendant. The evidence therefore does not support the plaintiffs' claim. But if it were otherwise, I am not sure it would be within the proper duty of the court to controul the Commissioners, in the manner of supplying the canal with water. The power to construct the canal is an high attribute of sovereignty; and in tracing the line,—in selecting materials for its construction,—in the introduction and management of the water,—and in the thousand subordinate operations, attending the execution of so vast a work, there is a necessity for the exercise of large discretionary powers. The board of Canal Commissioners are selected with special reference to their possessing capacities adapted to this work, and although a case strong enough to justify our interposition may arise from corruption, from malicious intention, or caprice, yet, in the absence of these, the court would pause, before it will assume to controul the discretionary powers the law intends to confide to them. The security, for the faithful exercise of this discretion, is found, not in the superintendence of courts of justice, but in the individual reputations of the Commissioners—in the tenure of their office,—in their acting openly on the rights of others, in the face of a people, vigilant to watch and acute to discern, and in their being exposed to the overwhelming force of public opinion.

The more important question in this suit is, whether the court will restrain the sale of the 2000 feet of water to be taken from the feeder, between the point where it emerges from the plaintiffs' land, and the point where it again enters upon it. The determination of this, depends upon the nature of the plaintiffs' interest, in the water flowing down the feeder.

The interest of a riparian proprietor, where his rights are not limited by usage or convention, consists in an absolute right to any use he can make of the water, while passing over his land. He is bound to transmit it by its natural channel to the next occupant, and he is permitted to exact the same "servitude" from the proprietor above him. The right thus acquired, is not a right to the water itself, but an interest in the manner of its flow; for the water in a running stream, flowing in its natural channel, is not a subject of property. (2 *Black.*

Comm. 18.) The right, therefore, to all advantage of the river, in its channel, to all benefit of the present mill race, and the right to create any other mill seat, which would permit the water to be returned to its natural channel before it left their land, were all vested and absolute in the heirs of Cooper, at the time of the creation of the canal, and they could not not be deprived of them, except in due course of law.

It is upon these rights, the State has assumed to act, by virtue of its transcendent sovereignty,* a power to appropriate private property for public uses, for the purpose of promoting the general welfare. This power is inherent in every government; but it should be exercised in cases, and for objects strictly public; and, in our country, the constitution of the United States, and of the State of Ohio, ensure that principle of natural justice, which requires compensation be made to the individual deprived of his property.

There is no doubt that a canal is such an object, that private property may be subjected to its construction. By the act of 1825, (*St.* 23, 56, 5. 8.) the legislature have authorized the commissioners to use the water of streams for this purpose, and the means of compensation is provided for those who suffer by the exercise of this power. The commissioners have abducted a portion of the waters of Mad river, by this authority, and the plaintiffs are entitled to a compensation for every injury, resulting from this act. For every infringement of their rights—for every injurious interference with the control of their own property—for all detriment to a form of their mill privilege, they have received, and may receive satisfaction. And when satisfaction is thus made, and offered, their rights, so far as encroached upon, are extinct.

It remains to consider whether any new rights ensue from the transit of the canal, or its feeder, over the plaintiff's land, which entitle them to the relief they ask. In considering this question, it becomes important to ascertain the nature of the benefits, which ensue from the construction of the canal. They may be classed under the names of general or accidental. The general advantages are the facilities of travelling, accessibility to market, reduction of the price of transportation, and the effect of these, in enhancing the value of land. The accidental advantages consist of the peculir benefit conferred upon specific tracts of land, by the opportunities of basins, warehouses, and other commercial advantages; of all benefits of the water, consistent with its use for the canal, and for the means of irrigation, &c. from waste gates. To attain the general advantages, was the precise end for which the canal was constructed.—They were designed for all,—they belong to all; and may be claimed by all. But the accidental benefits, although often of the highest moment to the individual, are of a nature so indefinite and uncertain, that no vested rights exist to exact them from the agents of the State.

The owner of land, cannot compel the commissioners to select black acre rather than white acre for the line of the canal: and, although there ought to be an indemnity for injuries, there is no justice in a claim upon the State to make compensation for profits which might have accrued under a different location. This view of the case seems decisive of the plaintiff's rights. They might exact from Findlay, the transmission of the water to them through its

* Dominum eminens.

ordinary channel; but this right, so far as it extends to the 3000 feet of water, is extinguished by the transcendent sovereignty of the State. The commissioners possessed the undoubted power to take it from the river and to conduct it through the land of the plaintiffs, to the point where it is proposed to sell the 2000 feet; up to this point there is no cause of complaint; and in consequence of thus using the water, a right to full indemnity ensues to the plaintiffs, and they have no further right. The water of the river is not theirs; certainly not this water, which never touched their land, except through a feeder. We can recognize no greater claim in the plaintiffs, than that which attaches to every proprietor of land, through which the canal might be brought;—no such vested right, in accidental benefits, or expected profits, as give them authority to interfere with the discretion reposed in the public functionaries. No case of corrupt intention, or of malicious design is shown; and we cannot regard, as an abuse of power, an attempt to diminish the pecuniary burthens of the people, by means, which, in our opinion, are no violation of any vested right.

Bill dismissed.

Judge BRUSH dissented.

A majority of the court are of opinion that the complainants have not made a case, that warrants the interference of the court, in their behalf, to restrain the action and discretion of the agent of the State, in the matter complained of. My mind has been conducted to a different conclusion. In assigning the reasons which influence my judgment, I do not purpose to answer the positions taken in support of the opposite opinion. I shall content myself with stating the case, as I understand it, and with explaining the principles of law, by which, I conceive, the rights and the remedy of the complainants ought to be governed.

The material facts are,

FIRST: The Miami canal has been constructed under the authority of law, from Dayton, on the Great Miami, to Cincinnati.

SECOND: The complainants, by descent from their father, at the time of the construction of the canal, owned a body of land adjoining the town of Dayton, through a part of which Mad river flowed, the water of which had been appropriated and employed, by the proprietor, for many years, in propelling grist and saw mills, and factories of different descriptions, which were owned and continued to be carried on, by complainants.

THIRD: In February, 1825, the Canal was located. The plan required the water to be supplied from Mad River, by a feeder, the course of which, with that of the canal and a basin, was settled upon and decided. Upon this plan the whole work was subsequently constructed and completed. The water was taken from Mad river, into the feeder, above the lands of the complainants, upon the lands of the next adjacent proprietor, and above the dam from which they took the water for their own use. It was conducted through the adjacent tract, into the lands of the complainants, and into the vicinity of their different water works, and in such position as to be conveniently and safely used, in aid of those works, and returned into the basin, at the head of the canal.

FOURTH: Before the water of Mad River was taken for the feeder, there was an abundant supply for all the establishments of the complainants, then in oper-

ation. But since the water has been used for the feeder, there has been a deficiency of water, for the same operations, to an extent considerably injurious to these establishments.

FIFTH: Subsequently to the completion of the canal, some individuals, owning land, on the side of the feeder, opposite to the town of Dayton, constructed a canal, with a view to private profit, for which a supply of water could only be obtained, from the feeder, at a proper point. At this point the board of Canal Commissioners purchased a piece of land, lying upon both sides of the feeder, for the purpose of disposing the water power of the canal, for the benefit of the state. The respondent, as acting Canal Commissioner, in conformity with the law, advertised the sale of the water. The place where the water thus to be sold, was to be used, was so arranged that the water, after having been used would flow into the new canal, and pass through it into the public canal, at a considerable distance below the town of Dayton, and would be diverted from its course in the public feeder, through the lands of the complainants, to the lands of the constructors of the new canal. It is to prevent this sale and diversion of the water, that the bill is filed, and the injunction asked. It was allowed by the Court of Common Pleas, and comes here upon an appeal.

Before the location of the canal and basin, in 1825, the complainants were invested with a complete and perfect right to the use of the water of Mad River, for any purpose that it could be used upon their own lands. This right was subject to no other restrictions, but that they should not flow it back upon the proprietor above them, and that they should return it into the bed of the river, for the use of the proprietor below them. 2 *John. Chy.* 165. The state in its sovereign capacity, had no right to any portion of it. In the exercise of its sovereignty it could take it from the actual owner for an object of public character and of public utility. But this assumption of private property cannot be made for the use of the government. It can only be made for the use and benefit of the people: for that description of use, which every citizen may enjoy, in the same manner and upon the same terms. It is this kind of use that constitutes the "public welfare," which I conceive to be distinct from government interest, profit or concern. It is only this great and common benefit to all the people alike, that creates a necessity authorizing and justifying the seizure, by the government, of the private property of individuals. It is the people's prerogative, exists in the social compact, and is founded on the maxim, "*salus populi suprema est lex.*" The terms in which our constitution recognizes the principle, private property is "*always subservient to the public welfare,*" excludes its assumption or use, in any other way, or for any other object or purpose whatever.

However enlarged and liberal, the exercise of this prerogative, by the sovereign power, may be, or ought to be held, it must have some limit. It will hardly be maintained, by the wildest adventurer for power, that the State may, at pleasure, assume to itself the franchises, or other rights or interests of individuals, to improve and dispose of them for the purposes of revenue. The sovereign may take that, without which he cannot promote the general welfare, in the sense I understand it, and no more. And even this power would be without limit, or the limit of no avail, unless the line can be drawn, with such

certainty as to become a *rule*, capable of illustration, and of being so stated that all, who are subject to it, may understand it.

In the case before us, the Legislature seem to have understood this doctrine as I do, and they have attempted the definition, in authorizing the assumption of private property for the great "*public welfare*" of constructing the canal. The public agents are authorized to "*seize and take*" what is required for the public use, "*doing no unnecessary damage.*" What does this mean, when reduced to a rule, applicable to the case before the court? It seems to be plainly this. You may take from the complainants the use of their water necessary for the safe and secure navigation of the canal. But, if consistent with this use, in the location where you have resolved to use it, a beneficial interest may still remain in them, you shall not deprive them of it. To do so, is damaging them unnecessarily. To sell the water for government profit, in aid of the revenue, is to seize the complainants' property; not for the common use of all, in the same manner and upon the same terms: but is, in fact, fastening a burthen of taxation upon ONE, which ought to be enforced equally upon ALL. This inequality of burthens is not necessary, for the purposes of navigation, the great and principal object of the canal: and it is illegal if imposed for any other purpose.

I do not perceive how the case is affected, by the position, that the canal commissioners are clothed with the exercise of a sound discretion. The law certainly does not, and, indeed, under our constitution, could not, constitute them exclusive judges of what would be a sound discretion. That appertains to the judicial tribunals of the country. They alone can establish and apply the rule of right, where individuals are concerned. Where public agents are about to transcend the legal limits of their authority, courts of equity adjudicate upon the matter, and enjoin their irregularities if necessary. In the case of *Shawd v. the Aberdeen Canal Commissioners*, 2 *Dow.* 519, Lord Eldon said: "If the Canal Commissioners exceeded their powers, they became trespassers, but chancery would restrain by injunction, and keep them strictly within the limits of their powers."

In a still later case, an injunction was granted, in England, restraining defendants, acting under a private act of Parliament, from cutting a canal through the land of complainant, in a manner not supposed to be within the equity of the statute. *Cooper's Equity, Rep.* 77.

Chancellor Kent cites these cases with approbation, (2 *John. Chy.* 168, 473,) and admits that the complainant might have lain by and rested on his legal rights, and then brought trespass: but he was also at liberty to come into chancery, in the first instance, for a preventive remedy, and if there was any dispute, as to the fact, which course the complainant ought to pursue, chancery would direct an issue." It is a question of power, however an attempt may be made to confound its exercise, with a sound discretion. In such a case, I believe it the safest rule, and the one most conformable to principle, and the letter and spirit of our constitution, to endeavor to ascertain the exact line of right, and then adopt Lord Mansfield's maxim, "*fiat justitia ruat cælum.*"

The discretion confided to the Canal Commissioners, by law, is to assume private property for constructing the canal, and making it navigable. For these purposes, a necessity arises within the meaning of the terms "*public wel-*

fare." But is there any *public necessity* for the sale of the water power in question? Such a sale does not aid the navigation. It only aids the state revenue. If made, will it lessen the value of the property of the complainants? I cannot entertain a doubt upon these matters. The proposed sale of water power is not *necessary* to the "public welfare," and it must operate very injuriously to the complainants. If doubt pressed upon my mind, still I should incline strongly to fix the strictest limit, upon the governmental prerogative of assuming private property for public use, taking care that the great object of the canal, its safe navigation, should not be defeated, or its benefits impaired. This navigation, is, in my opinion, the only legitimate object of the canal. So far, therefore, as any advantage to the state, or to its revenues, may be contemplated, by this sale of water power, to the prejudice of private right, I think the strictest rule should be applied. I think, too, that in the case before us, the contemplated sale of water power, is a sheer state speculation, at the expense of the complainants.

It is objected that the state, having assumed the water, is under no legal obligation to permit, or dispose of the use of it to any one. Consequently, it may be conducted in the feeder, through complainants' lands, and the use of it refused to them with impunity. This point is not now before the court, but, in respect to it, it may be remarked, that possibly a court of equity might deem itself authorized to compel the agents of the state, to allow the complainants to use the surplus water, on their own lands, taking care that such use should never prejudice the secure and easy navigation of the canal.

From the best view I can take of the case before us, its turning point seems to be this: May the respondent, as a public agent, for the purpose of aiding the public revenue, do as he pleases with water, however much his doings may prejudice the individual rights and interests of the complainants? My response is, "*I am unwilling.*" Such, I think, ought to be the response of the laws and judicial tribunals of the country.

The converse argument runs thus. The Canal Commissioners have the *right*, that is, the *power* to take the water out of Mad river, and conduct it, by a feeder, to the canal, for the purpose of navigation. Having it in motion, on the way to the canal, they may put it into market to raise revenue for the state, without any regard to the individual interests and rights of those who owned the use of the water, before it was introduced into the feeder. I cannot allow this. The discretion of all public agents, especially in the assumption of private property, for public use, must be brought to the test of legal judgment. It must be controlled by some limit, and subjected to some rule. The application of that rule belongs to the judicial tribunals. They settle the bounds of official discretion, which has a continual tendency to encroach upon private rights. It is their province to arrest the exercise of that discretion, when it oversteps the requisitions necessary for the "*public welfare.*" In this light, the proposed sale of water presents itself to my mind, and I would prohibit it. If any given quantity of water can be taken from the feeder, and returned to the canal, without injury to the navigation, the only legitimate object of state appropriation, I conceive it should be left with the original owners, whose right is the oldest, the best, and ought to be exclusively enjoyed.

JORDAN v. THE OVERSEERS OF DAYTON.

A patent issued by the President of the United States, securing the exclusive right to manufacture and use certain medicine, does not authorise the administration of them, by an individual in the character of a practising physician, without conforming to the laws of the state where they are administered.

The overseers of the poor, brought an action of debt before a justice of the peace, against Jordan, to recover certain penalties, for practising physic, in violation of the statute, regulating the practice of physic and surgery. The case was appealed to the court of common pleas, and judgment was there rendered in favor of the overseers of the poor; to reverse which, this writ was prosecuted.

The facts were agreed between the parties as follows:

It was admitted, that Jordan, not being a member of any medical society of the state, and not being qualified to practice medicine, as required by the statute, did administer to, and prescribe for one William Sullivan, and one William Prigg, and received fees and rewards therefor. That on the 25th of January, 1823, a patent was regularly issued, from the United States to Samuel Thompson, granting to him, his heirs and assigns, for the term of fourteen years, the exclusive right of making, constructing, using, and vending to others to be used, a certain new and useful improvement, being a mode of preparing, mixing, compounding, administering and using, the medicine described in certain specifications thereto annexed, in the manner, and in the diseases set forth in *said* specification. It was also further admitted, that Jordan was the assignee of Thompson, and vested with all the rights and privileges conferred upon Thompson by the patent, and that the medicines prescribed and used by Jordan in his treatment of Prigg and Sullivan, were the same set forth in the patent and specifications, and were administered for the diseases therein mentioned. Also, that on the day of 1813, a patent was granted to the same Samuel Thompson, with specifications substantially the same as those attached to the patent of 1823, and conferring the same rights and privileges.

Corwin, *Collet* and *Lowe*, for plaintiff in error. *Witcher*, contra.

Opinion of the Court, by Judge LANE.

The case presents two questions: 1. whether the evidence sufficiently shows that the defendant practiced medicine, and 2. whether the eleventh section of the statue, imposing a penalty for practising medicine, by persons not members of the medical society—is inoperative on him, by reason of Thompson's patent.

On the first point, the case shows that Jordon prescribed and administered medicines to two sick persons, for fees. The stipendiary character of the service forbids the belief that it was an act of neighborly kindness, or the execution of a moral duty. Administering medicine may be the office of a nurse; but prescribing medicine to the sick implies the exercise of skill, in the discrimination of diseases, and the selection of fit remedies; to acquire which skill is the object of medical education, and to exercise which, for fees, is but another

name for the practice of medicine. In the absence of explanation, we believe the statement sufficiently shows, that Jordan, in these cases, acted in the character of a physician.

In discussing the second question, I choose to divest the case of all matters, except thos arising from its simplest merits. For present purposes, therefore, I assume that the right of prescribing and administering medicines, is a proper subject for a patent, and that the patent of 1823 is to all purposes regular and effective. I proceed to consider, whether the patent conveys such a right, that the authority of the State may not controul its exercise.

A large portion of the duty of the law giver, in every civilized community, consists in regulating the conduct of individuals, in different matters, for purposes of general welfare. Some acts of this nature are the objects of penal legislation. There is no moral turpitude, in vending tickets of lotteries from other States, or in selling spirituous liquors to Indians: yet the good of society demands their prohibition. Other and the larger class are in various forms regulated by law. Thus, the act of keeping tavern is a lawful trade: yet, because it is of public concern, that the convenience of travellers be secured, and because it is conducive to public morals that intemperance be suppressed, the legislature have forbidden its indiscriminate practice, and have placed those engaging in it under the watch of a court. And for reasons, in some respect similar, pedlars and ferrymen are placed under the same supervision. The exercise of police powers by municipal corporations, the laws concerning the inspection of provisions, and the fixing rates of toll for turnpikes and bridges, are examples of similar powers. So the business of grinding grain, a work strictly private, interests so many persons, that the legislature have deemed it proper to fix a price for labor. So the profession of law is of so public a nature, that its practice is wholly forbidden, until after a reasonable demonstration of ability, and until after an opportunity has been offered, to learn the morals of the practitioner. And the profession of medicine is regarded, by the legislature, as of a similar character, so that policy requires an examination should be instituted into the professional capacity of the practitioner, before he shall be permitted to operate upon the health of citizens. In all these cases, the interpretation of the law given, is justified by the obvious principle, that although a man's rights to his own are absolute and indefeasible, yet these rights must be so used, as not to infringe the rights of others, and may be so regulated as to promote the general good.

But the plaintiff in error, without denying these matters, to be the suitable and ordinary subjects of legislation, insists the power of the legislature is limited, in this case, because the patent, securing to Thompson the exclusive right of preparing and mixing medicines, emanated from the general government, under the authority of the constitution: and that its full effect cannot be had, unless it be holden altogether exempt from State controul. This leads us to consider the nature and extent of such rights as accrue from letters patent, for useful discoveries. Although the inventor had, at all times, the right to enjoy the fruits of his own ingenuity, in every lawful form of which its use was susceptible, yet, before the enactment of the statute, he had not the power of preventing others from participating in that enjoyment, to the same extent with himself; so that however the world might derive benefit from his labors, no profits en-

sued to himself. The ingenious man was therefore led, either to abandon pursuits of this nature, or to conceal his results from the world. The end of the statute was to encourage useful inventions, and to hold forth as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute, is to enable him to prevent, others from using the products of his labors, except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property, or give direction to his labors, at his pleasure, subject only to the paramount claims of society, which requires that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws, which render it subservient to the general welfare, if held subject to State controul. If the State should pass a law, for the purpose of destroying a right created by the constitution, this court will do its duty; but an attempt, by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes directly affect the enjoyment of rights flowing from the federal government.

Judgment affirmed.

LESSEE OF HUNT, v. GUILFORD.

An agreement to submit a question of boundary to arbitration defeats the operation of the statute of limitations.

This cause was adjourned here, for decision, from the supreme court of Hamilton county. It came before the court, upon a motion for a new trial, made by the defendant, where the plaintiff had obtained a verdict, in an action of ejectment. The case is stated in the opinion of the court.

Fox, for the new trial. *Pendleton*, against it.

Opinion of the Court by Judge BRUSH.

The ground in controversy, in this action of ejectment, was about fifty-nine and a half feet wide at one end of out-lot No. 12, in the city of Cincinnati, and forty-six and a half feet wide at the other and west end of same lot, on the north part of the lot: which ground, by mistake, had been enclosed within the fence, made round out-lot No. 13, adjoining No. 12 on the north. Plaintiffs' title was made out as follows:

FIRST: A deed from John Cleves Symmes to Jesse Hunt, for out-lot No. 12, dated February 21, 1809.

SECOND: A deed from Jesse Hunt to the lessor of the plaintiff, for the same lot, (No. 12,) dated the 20th August, 1820.

THIRD: An agreement in writing, as follows:

"Whereas, doubts and uncertainty exist, respecting the distance which each out-lot of the town of Cincinnati, ought to extend north, from the northern

boundary of Seventh street, or Northern Row, agreeably to the plan and records of said town, and in order to do away all doubts and disputes, that may hereafter arise, respecting the same. Know ye, that we, the undersigned owners of out-lots, do agree to submit, and by these presents do submit, the matter of doubt and uncertainty, to the judgment and award of Martin Baum, Wm. Lytle, O. M. Spencer, John S. Gano, and John S. Wallace, commissioners to settle, and fix a true line of each of said out-lots, who are hereby authorized to call witnesses before them, or such other testimony as they may may deem necessary. And it is agreed that their award shall be final and binding on the parties hereunto subscribed, dated 10th April, 1816." Signed by twenty-eight persons, (one as the guardian of heirs.) Amongst the rest, by Jesse Hunt, the person under whom the lessor of the plaintiff claimed title, and William Woodward, under whom the defendant claimed title. A report and award, in writing, as follows:

"We, the undersigned, having been chosen, by D. E. Wade, Abdeel Coleman, Daniel Symmes, James Ferguson, and others, as appears by the annexed instrument or submission, owners of out-lots in the town of Cincinnati, to fix the true lines of said out-lots, having caused an accurate survey of said out-lots, by Joel Wright, town surveyor of said town, which said survey or plat is hereto annexed and, having fully examined said plat, and being convinced that it is the most correct and equitable plan of establishing the boundaries of said out-lots, do award and determine, that the lines and boundaries shall be established and fixed according to said plan, making the width of said out-lots, from northwardly to southwardly, about four hundred and twenty-six and a half feet, and extending eastwardly and westwardly half the distance between the present streets, and now running from towards the Ohio, northwardly. We do further award and determine, that the principle or standard on which the annexed plat is made, shall be to divide the distance from the north side, Northern Row, along the east side of Vine street, to the northern boundary line of said out lots, as lately established, into eight equal parts, and from the points made by such division, to run lines eastwardly and westwardly, parallel to Northern Row, as far as the plan of said out-lots extends, which lines shall be the northern and southern boundaries of said out out-lots.

Given under our hands at Cincinnati, this 15th day of February, 1817.

MARTIN BAUM,
O. M. SBENCER,
JOHN S. WALLACE,
WILLIAM LYTLE,
JOHN S. GANO."

Upon the plan or map referred to in the above award, as annexed thereto, the said surveyor certifies thus:

"I hereby certify that I have surveyed Cincinnati out-lots, agreeably to the construction of the commissioners, which is further exhibited by this map, and the distance that each lot extends northwardly is stated, on the east line of Vine street; and the area attached to their respective numbers. Second month, 1817. Joel Williams, T. S.," and underwritten on same, "Recorded, March

20, 1817, in Book R. page 23, Thomas Henderson, Recorder of Hamilton county, Ohio."

On the trial, the plaintiff objected to the admission of the above agreement, award, and map or plan of that part of the town, as not legal or competent evidence in this action of ejectment.

The objection was overruled, and the evidence admitted as proper to show the character and nature of plaintiff's possession, whether adverse or not; and to furnish some evidence where the original line was actually run, thereby to show that the fence, to which the defendant claimed, was on the lot No. 12, and included part of it within the enclosure round No. 13.

FOURTH: General Wm. Lytle, one of the commissioners, testified, that the principle by which the commissioners ascertained and established the lines between the out-lots, was as stated in the award,—that they, or the surveyor, stuck stakes, at the corners of the lots, and at every corner on the streets from Seventh street, or Northern Row, north to the northern boundary line of the town. That Seventh street was agreed to be the southern boundary and base of the award: That Vine street was that by which Ludlow laid off the town and made the orignal plat or plan, as recorded, (which was in evidence,) and that the ground for the out-lots was divided into eight equal parts:—And that persons generally were satisfied with the division made by the commissioners. Cross examined,—he has no recollection that Mr. Woodward made any objections or revoked the authority of the arbitrators.

Joseph Guest testified, that in running the line between the lots Nos. 12 and 13, agreeable to the new survey, he found it on Broadway, (the east side of the ground in controversy,) to be fifty-nine and a half feet north of defendant's fence, and on Sycamore, (west side of the ground in controversy,) forty-six and a half feet north of the fence. The streets now laid out and improved, are agreeably to the new survey: That the streets north of Seventh street, running east and west, have all been laid out since 1816, by the proprietors: That there is more that four acres of ground in each of the out-lots so established; that there is no street laid out east and west, east of Main street, and north of Eleventh or Canal street:—That the Sycamore tree is at the west end of the fence at the south west corner of No. 13, as enclosed and claimed by plaintiff,—and he has understood it has been called a corner.

For defendant, Wm. Woodward testified: He thinks it was in 1793, when he purchased the lot No. 13. The deed is dated 1795, Capt. Benham and James Dement owned No. 12 at that time. It was planted with a peach orchard.—Fifteen or sixteen years ago, the present fence between the lots was built. Mr. Henderson run the line, and carried it about thirty feet north of the old line. The Sycamore was then the corner of No. 13, the south west corner. Henderton's line runs east from that tree, so far north of the fence on the east side, as so leave thirty feet between it and the fence, leaving out of my lot, a triangular piece of ground. I went before they (the commissioners) had dispersed, and told them I must revoke what I had done. I could not consent to alter my fences, but must continue to hold as I had done. Some person, one of the body, said, then if I don't sign it, it will be of no use to record it. Mr. St. Clair said, yes, by God we will record it. I have occupied out-lot, No. 15, more than

twenty-five years. The south fence of No. 13 did not run the course of the lines between the lots.

R. R. Williams testified, he was in the room where the commissioners were —Mr. Woodward stepped up and put his hand upon the paper, and said he should revoke what he had done. It was soon after they had gone into the house. Mr. Hunt was in the room, I think. General Lytle, Mr. St. Clair and others were present.

Mr. Henderson presumes he did not find any old traces of old lines. One corner which he found agreed with the new lines, and one did not, but varied a little. My impression at that time was, that the out-lots were intended to contain, and did actually contain four acres, strict measure. He surveyed a good deal there for Judge Symmes and Joel Williams.

There is not a general satisfaction by the claimants, in the new survey. The north line of the town is a section line. Originally and now those out-lots extended to the section line.

Defendant then gave in evidence:—

A deed from J. C. Symmes to said William Woodward, for fraction north of No. 8, dated September 7, 1804.

A like deed for out-lot No. 8, same date.

A like deed for out-lot No. 13, dated October 1, 1795.

Another deed from Levi Woodward to William Woodward for out-lots Nos. 21 and 22, and fraction north of Nos. 21 and 22.

Plaintiff's rebutting evidence.

Oliver M. Spencer testified—He was one of the commissioners, and has no recollection that Woodward revoked the submission. Does not know that any one attempted to act upon the submission or award.

Col. John S. Wallace, one of the commissioners, testified—He does not recollect that there was any objection made by Mr. Woodward to the submission or award, or that he pretended to revoke the same. That there were stakes set down for the corners of the out-lots, and people occupied and improved, and fenced accordingly. Cross examined. David Logan enclosed the lot No. 13, and assisted my father to enclose the lot No. 14. Logan enclosed the lot No. 13 in 1791 or 1702.

Defendant's counsel then gave in evidence, a deed from J. C. Symmes to John Machin, for out-lot No. 15, dated Jan. 6, 1799. There was a verdict for plaintiff, and a motion for new trial, reserved for decision, &c.

The reasons, as stated, are, 1st. Because plaintiff did not show any sufficient title to make an entry, on the premises described in his declaration.

2d. Because said verdict is contrary to evidence.

3. Because the statute of limitations was a bar to the plaintiff's recovery.

4. Because the court mistook the law in charging the jury.

To the first objection, or reason assigned, it may be sufficient to say, that the plaintiff proved a perfect legal title in his lessor, which has usually been considered a sufficient right of entry to maintain an action of ejectment, *prima facie*. Again, the award, if found by the jury, to have been made, before revocation of the authority of the commissioners, or arbitrators, establishes a right of entry sufficient to entitle him in whose favor made, to recover in ejectment. (15. *John. Rep.* 199, *Sellick v. Adams.* 3. *East. Rep.* 15, *Doe, Morris and others, v. Rossu.* 2. *Caine's Rep.* 199, 320.)

If by the second reason assigned, (that the verdict is contrary to evidence) is intended that there was not evidence that defendant was in possession of the premises at the time the declaration was served upon him, the answer that he relied so much upon the fact, that he was so in possession, and that he, and those under whom he claimed title, had been so in possession, from the year 1793, might reasonably be considered sufficient, without any formal proof of that possession. The chief ground of his defence being, the bar which the statute of limitations interposed in such cases, would have no foundation in fact, unless such possession was proved or admitted. In this case, it was not disputed, and was considered by the court, as yielded on all sides, at least by the plaintiff; and was most strenuously maintained by defendant's counsel. The matters litigated at the trial, and which only are entitled to consideration, were, first, the true boundary between the two lots Nos. 12. and 13. If that was found to be any considerable distance north of plaintiff's fence and possession: then, secondly, was that possession adverse to plaintiff's title, or subordinate: thirdly did it continue adverse twenty years, from the taking effect of the statute of limitations, June 1, 1804, before the commencement of this action, November 8, 1824. Or did its adverse character cease, by the acts of the parties, in entering into the submission and agreement aforesaid, and the making the award above set forth? Both, or either?

The question whether the submission, and the authority by it vested in the commissioners to make the award, was revoked by Mr. Woodward before the award was completed, or not, was left to the jury, being matter of fact, proper for their determination. They were advised that it was incumbent on the defendant to satisfy them that the power had been so revoked, before the award was completed, else the award would be valid against Woodward, and all claiming under him—that the law not only allowed parties, to settle amicably their controversies, and in this way, but favored such settlements, and when they so appeared, slight proof should not destroy them. It ought to be strong and convincing.

The jury, upon the evidence stated above, have found this matter in favor of the plaintiff, and the court are satisfied with their verdict. I should be very unwilling to believe those commissioners had allowed that document to be recorded, without noting on it, the fact that Woodward had revoked the submission, if he had actually done so, before it was completed. Three of them now testify they have no recollection of it, if he did. His own testimony leaves the impression that he did not announce his intention to revoke, until too late, after the commissioners had finished, and no longer could control their doings in that respect; when nothing remained to be done but to record the instrument. The testimony of Williams makes the same impression: he says Mr. Woodward stepped up and put his *hand* on the *paper*, and said he should revoke, &c. Neither of these witnesses, or any other, state any act done by the commissioners, or either of them, as signing the award, after Mr. Woodward spoke of revoking their authority. The award being thus properly established, by the jury, its effect is decisive, in this action, and upon this motion for a new trial, which accordingly should be overruled. Were it necessary, in this case, I should fee at liberty to say, that the agreement ought, and would have the effect in law, to preclude Woodward, and all claiming under him, knowing it, from insisting

on the bar of the statute, or that his possession was adverse. In 9. *John. Rep.* 104, it is said: "This possession has continued nearly forty years, and would be conclusive, unless the *agreement*, said to have been made in 1790, should be sufficient to take the case out of the statute of limitations."

In *Doe v, Rossu*, above quoted, 3. *East. Rep.* 15, the court say: "The award cannot have the operation of conveying the land. But there is no reason why the *defendant* may not conclude himself by his own *agreement*, from disputing the title of the lessor in ejectment." *Dane's Abr. vol.* 5, *p.* 187, *Ch.* 141, *Art.* 7, *S.* 9. "The defendant is concluded by his own *agreement* from disputing the title of the lessor in ejectment." (*Id.* 2. *Caine's Rep.* 320.) If then the award did not bind the defendant, the agreement did, and then it would be a question of fact for the jury, where was the true line between the two lots. It was so left to them, and they have found, and correctly, upon the evidence, that by that line the plaintiff is entitled to a piece of the ground, as part of No. 12, which is included within defendant's fence, as part of No. 13. Upon no principle is the verdict contrary to evidence; nor do I think the defendant can rely on the statute as a bar. As to the charge, I concur with my brethren, that it was nothing erroneous or against law.

PAINE *v.* FRENCH, ET AL.

The assignment of a note secured by mortgage, and a delivery of the mortgage deed without an actual assignment, transfers all the rights secured by the mortgage.

Previous to the act of 1818, a seal was not necessary to an acknowledgment of a deed, except where the estate of a feme covert was to be conveyed.

It is not sufficient to postpone a prior mortgage, that the first mortgagee assisted in the execution of a second mortgage; but it must appear affirmatively, that the first mortgagee denied or fraudulently concealed his title.

A defendant cannot set up one defence in his answer, and upon the final hearing rely upon another; his allegations and proofs must correspond.

This was a suit in chancery, to subject to sale certain mortgaged premises, and was reserved from the county of Geauga. The bill was filed by Charles C. Paine, as administrator, with the will annexed, of Samuel W. Phelps, and set forth, that on the 8th of June, 1813, the defendant French, who then owned the premises in controversy, mortgaged the same to one Daniel S. Coit, to secure the payment of five hundred dollars, which mortgage was duly recorded, and afterwards, on the 18th of May, 1819, was duly assigned by Coit to the defendant Ford. This assignment was also duly recorded. On the 27th of September, 1814, French mortgaged the same lands to one Gaius Pease, to secure the payment of a note of the same date, for the sum of nine hundred and ninety-seven dollars and twenty-nine cents, payable in one year. This mortgage was recorded September 29th, 1814; but there was *no seal* attached to the certificate of acknowledgment, by the Justice of the Peace. On the 11th of November, 1814, Pease assigned his mortgage to Phelps, of which assignment French had notice, and on the 20th of January, 1816, paid Phelps upon the mortgage four hundred and fifty dollars. On the 16th of November, 1818, French conveyed

the lands in controversy, with general warranty, to Ford; the deed was recorded on the 18th of December, 1818, and was absolute in its terms, but intended merely as security for advances made to Ford. On the 19th of March, 1827, French gave Ford a quit-claim deed for the same premises, under which Ford took possession, French having always occupied previous to that time. Phelps died on the 1st of July, 1826. The complainant prayed that the mortgaged premises might be sold, subject to Coit's mortgage, and the proceeds applied to the payment of the mortgage assigned by Pease to Phelps.

The defendant, Ford, answered, and denied all knowledge of the note and supposed mortgage given by French to Pease, but admitted that after the deed to himself, of November 16th, 1818, he had heard of said supposed mortgage, but insisted that it could not operate as notice, in consequence of the want of a seal to the acknowledgment. He also denied all notice of the supposed mortgage at the time he took the assignment of Coit's mortgage. He further alleged, that on the 16th of November, 1818, he purchased the premises of French for the sum of four thousand five hundred dollars, and was at that time entirely ignorant of any mortgage on the same, except Coit's mortgage; that Phelps had full knowledge of this purchase, and the payment of the consideration money; that this defendant and French applied to Phelps to draw the deed, who did so; and was not only silent as to any claim he might have on the land, but told defendant that there was no mortgage or other lien on the same, except Coit's mortgage. This defendant neither admitted or denied that the deed of November 16th, 1818, was intended to secure advances made by him to French.

The defendant, French, admitted all the material allegations in the *bill*, and stated further, that at or just before the time of the execution of the deed of November 16th, 1818, he gave Ford notice of the mortgage to Pease, and also stated that that deed was intended only as security for advances, and that Ford gave him an instrument of writing to that effect.

It appeared from the exhibits and testimony, that the note given by French to Pease for nine hundred and ninety-seven dollars and twenty-nine cents, was assigned by Pease to Phelps, by an endorsement on the back of the note; but there was no actual assignment of the mortgage, which was given to secure the note. It was admitted that the deed of November 16th, 1818, was drawn by Phelps, and in his own hand writing. It was also in proof, that some time in the spring, or in the month of June, 1826, Phelps told the witness that he had advised Ford to give French further time to pay his debt, and assigned as a reason, that Ford had a clear title to the farm, or that there was no claim on the land except Ford's; and that there was an agreement between French and Ford, giving further time to pay, which was written by Phelps, but was afterwards cancelled.

Phelps, for the complainant. *Webb*, for defendants.

By the COURT.

1. It seems to be settled law, that an assignment of a note in writing, and delivery of the mortgage deed, transfers all the rights secured by the mortgage. (1 *Johns. Rep.* 580. 3 *John. Ca.* 322. 2 *Sw. Dig.* 110. 4 *Johns.* 41. 1 *Gallison*, 155. 1 *Ohio Rep.* 320.)

2. Is the mortgage to Pease defective, for want of a seal to the acknowledgment, of the Justice of the Peace? No seal, or other ceremony, in the acknowledgment of deeds, executed by a *man*, or by an *unmarried woman*, was required by any law of this state, until the statute of 1819. (*Vol.* 16, 192.) The law adopted from Pennsylvania, in 1795, required that all deeds executed by *husband and wife*, should be acknowledged in a certain manner, and such acknowledgment should be certified, upon the deed, under the hand and seal of the Judge or Justice of the Peace.

This distinction between deeds executed by husband and wife, and other deeds, was maintained in the statutes of 1802 and 1805; and it was not till 1818, that the distinction was annulled, and a seal required to the acknowledgment of all deeds.

The seal, and other ceremonies, in the acknowledgment of deeds, by husband and wife, were doubtless intended to protect the rights of married women; and were originally introduced into our law to supply the place of the common law formalities, in the conveyance of real estate by *femes covert*.

The mortgage in question, having been executed in 1814, by French alone, no seal was required to the acknowledgment; it was, therefore, well recorded, and conveyed notice to Ford.

3. The mortgage having been duly recorded, Ford's subsequent purchase was necessarily subject to the rights of the mortgagee, or his assignee, unless there was such a fraudulent suppression of the truth, or suggestion of falsehood, by Phelps, as to authorize a court of equity to postpone or annul his mortgage. If, at the time of Ford's advancement or purchase, Phelps denied, or stood by, and when questioned, concealed his own title, he practised a fraud, and has no right against Ford. (4 *John. Chy.* 65.)

Ford, in answer, alleges that Phelps drew up the deed, and was not only silent as to his own claim, but asserted that there was no mortgage or other lien on the land, except Coit's mortgage. This allegation is not responsive to any charge contained in the bill, but is new and distinct matter, set up in the answer, to avoid a pre-existing right in Phelps; and must therefore, be proved. (2 *Johns. Ch.* 62. 2 *Vesey*, 587. 1 *Johns. Rep.* 580.) It is agreed between the parties, that Phelps drew up the deed from French to Ford; but this circumstance neither proves nor disproves the charge of fraud. It is not sufficient to postpone a prior mortgage, that the mortgagee assisted in the execution of a second mortgage; but it must appear affirmatively, that the first mortgagee denied or fraudently concealed his title. The mortgage of Phelps being duly recorded, was notice to all the world, and the fact that he acted as a scrivener, in drafting a subsequent mortgage, cannot, *per se*, operate as a forfeiture of his rights. There is no evidence that Phelps, at the time, either concealed his title, or denied its existence.

The only testimony in the cause, is the deposition of the younger Ford, and that refers exclusively to a transaction in 1826, a few days before the death of Phelps, and nearly eight years after Ford's purchase or advancement. This testimony, taken in its strongest sense, amounts to no more than an admission, by Phelps, that the mortgage money had been paid. But Ford, by his pleadings, does not rest his rights upon this ground. He does not pretend, in his answer, that the mortgage was paid in 1826, or at any other time, but insists

that Phelps shall be postponed, by reason of the alleged fraud practised in 1818. His proof does not correspond with, or support his allegations. A defendant cannot set up one defence in his answer, and upon the final hearing rely upon another. His allegations and his proofs must correspond.

Decree for complainant.

Judge BRUSH dissented.

The testator in his life time, to wit: November 11, 1814, obtained from Gaius Pease the assignment to him of a note of hand for nine hundred and ninety-seven dollars and twenty-nine cents, payable one year from date, and dated September 17, 1814, made by defendant, Jacob French, to said Pease. January 20th, 1816, said French paid testator four hundred and fifty dollars; the receipt of which was endorsed on the note, as a credit or receipt of so much that day, on the note. To secure the payment of that note, defendant, French, had given to said Pease a mortgage on three hundred and two acres of land, lying in Geauga county, bearing date, and no doubt executed and delivered, on the same day of the note, September 27, 1814. It is said in the bill, and admitted in French's answer, that this mortgage was assigned and transferred by Pease to the testator, by the assignment of said note. There is nothing in the note, or assignment thereon, which refers to the mortgage in any way; nor is there any assignment or transfer in writing of said mortgage, by Pease to testator. French, before the execution and delivery of the above mortgage by him to Pease, had given a mortgage, for the same land, to Daniel L. Coit, bearing date June 8th, 1813, to secure the payment of five hundred and six dollars. This last mortgage was sold and transferred, by assignment in writing, May, 1819, by Coit's agent, Perkins, to defendant, Ford. Before that time, to wit. November 16, 1818, defendant, French, sold and conveyed to Ford, the same land, for the consideration of four thousand five hundred dollars. This deed was written for the parties by the testator, Phelps, that is, a printed blank deed was filled up by him, at the request of the parties thereto, said French and his wife, of the first part, and defendant, Ford, of the second part.

The bill states, and defendant, French, admits, that he gave to Ford a quit-claim deed for the same land, March, 1827. Defendant, Ford, says nothing about this quit-claim deed, in his answer, probably because he considered it unimportant in the controversy, as it undoubtedly is.

Phelps, the testator, died in 1826. His administrator, with the will annexed to his administration, now brings this bill, setting forth the above conveyances and incumbrances upon said farm and tract of land, and insists on the right of his testator, and his right, as personal representative, to have the premises sold, to pay him, as such administrator, the balance due on said note, after satisfying the prior incumbrance, created by the mortgage to Coit, now belonging to defendant, Ford: and that, after deducting the said sum of four hundred and fifty dollars, paid and endorsed on the said note, the balance thereof is due.

The above deeds were all duly recorded in Geauga county, and each of them is still entitled to preference, according to its date, unless the defendant, Ford, has alleged, in his answer, and proved sufficient to postpone and bar the mesne incumbrance to Pease, of 1814, which intervenes between the Coit mortgage

of 1813, and of Ford's deed of 1818; and the plaintiff will be entitled to the relief he seeks, if he has sufficiently shewn his right to the mortgage from defendant, French, to Pease, and has the proper parties before the court, to enable them to decree.

Ford's answer denies, explictly, more than once, all knowledge (that is, actual knowledge) of the existence of the mortgage and note from French to Pease, at the time he received the deed from French to him, and paid for the land, the consideration therein expressed. He states in his answer, that testator, Phelps, had full knowledge of the purchase by him from French, and the consideration; and that he, Phelps, was applied to by both, to draw the deed, and did draw it; that it is in his hand writing, and that he, Phelps then told him, Ford, that there was not any mortgage, claim, or lien on the land, except his, Ford's, and charges the fraud of concealing the mortgage to Pease, &c.

Plaintiff's counsel admit, in writing, that the deed from French to Ford, dated November 16, 1818, is in the hand writing of Phelps, except the printed part, the signatures of the grantors and witnesses. The deposition of Seabury Ford, defendant's son, proves the confession of Phelps, made in 1826, that he "had advised defendant, Ford, to give time of payment to French for his debt, assigning as a reason, that he, Ford, had a clear title to the farm, or that there was no claim on the land, except his, or similar words, conveying the same idea; and it being so clear, was a sufficient security for the debt." In answer to a question, by counsel, "If Phelps told the time he had this conversation, and gave this advice," witness answers: "I do not recollect that he did, but I suppose that it was a few months before, as an agreement was made between said French and Ford, giving further time to pay; and said agreement was written by Samuel W. Phelps, but was afterwards taken up and cancelled."

The bill states that Phelps died on the 1st of July, 1826. Defendant, Ford, could not, therefore, by interrogations in his answer, call for any confession of the matters stated by him. There is not, and consequently could not be, any denial of those allegations. Yet the plaintiff must prove them, but is not bound to the extraordinary proof of two witnesses, as in case of a denial by a party under oath, or of one witness, with circumstances corroborating his testimony.

The ground of defence, upon the merits in this case, is, that if Phelps is the real owner of the mortgage from French to Pease, he fraudulently concealed from defendant, Ford, the knowledge of the fact, or that any such claim rested upon the estate in controversy, at a time when it was important for him, Ford, to know it, when he, Phelps, was bound in conscience to disclose.

I know of no legal reason, why I may discredit the witness, Seabury Ford, although he is the son of defendant, for whom he testifies. There is no denial of the matters he has related, or evidence against his character. His evidence harmonizes, in every respect, with the uniform conduct of the testator, sustaining the honesty and fairness of that conduct, which, otherwise, it would be impossible to reconcile with integrity and honor.

Are we not bound to believe, that a witness, uncontradicted, tells the truth, when he proves the adversary party honest, rather than presume the contrary, without any proof? There is no evidence, that Phelps ever claimed the mortgage of Pease, as a security for the note assigned to him: he might, therefore, well say, there was no other lien upon the land but Ford's, and pursuade Ford

to give time of payment, and write for the parties an instrument, stipulating such extended credit; which, in this instance, had the effect in law, to convert the absolute deed into a mortgage. The witness was not informed by Phelps when he gave the advice, to give time of payment. What then is our duty, but to infer that the time was when the act done would have the effect intended, and which the witness says it had? The object and purpose of the statements of Phelps, and his advice to Ford, was to procure time of payment for French. The motive of Phelps may be altogether immaterial, but it is difficult to imagine any other than a favor to French, or to advance his own interest, or both. The latter might be effectually accomplished, by the delay, which might enable French, in the mean time, to raise the money, to pay off Phelps' debt, if he owed him any at that time, on that note, or on any other account. Whatever the motive or object, the effect of those statements and advice, was to change the nature of the title, which Ford had to the land, from an absolute to a conditional fee, extending the equity of redemption to French a considerable length of time, and thereby enlarging his rights.—This in law, happen when it would, is sufficient to postpone and bar the lien of him who procures this to be done, by denying his own title, if he has any at the time, and persuading thereby his adversary to change his. And more so, if this was done, (and I feel warranted, from the evidence and all the circumstances of the case, to find it was) at the time when the absolute deed was made. It seems to me there is better reason to believe it was done at that time, than any other.—That it was done there is no reason to doubt, unless there be good reason to discredit the witness. As I understand the case, the actions of the parties, and the circumstances of the entire transaction, corroborate the witness in every particular so far as he undertakes to speak with any certainty. The testator acquired his right to that lien, if at all, when the note was assigned to him, and by that act—that was 1814. A payment was made to him in 1816, of $450. Is it not remarkable he did not assert his right to this security, and coerce payment of this debt, during his life, if he had the right, and the debt subsisted, from 1814 or 1816 until 1826? In the mean time deny his own right, and assure his neighbor his was perfect! I cannot overcome the reluctance I feel to set it up at this late day.

A sleeping mortgage, denied during all the life of the testator, to be set up after his death by his personal representative, and that with such a doubtful title to it, as here is manifested. It may sleep on for me. I cannot lend my aid, to give it force to take from that neighbor his estate, clear of every other embarrassment, and clear of this, if any faith may be given to the assurance of his testator, in his life and in his actions neither of which, in this respect, did he ever contradict. It is due to his memory to believe, as he declared, that no such claim existed on the land. I should also be prepared to say, that as he acted, as the agent of French and Ford, in preparing the deed from French and wife to Ford, being the scrivener, it would be fraudulent in him, if alive, to set up any claim to an incumbrance which he then held on the land, and forebore to to disclose to Ford, who was giving a full consideration for it. Within the meaning of Chancellor Kent, in *Brinkerhoff and others, v. Lansing*, (4 *John. Ch. Rep.* 70, 71, 72,) I consider this employment of the testator, to prepare for the parties the conveyances, as equivalent to "asking information," and his "silence

deceptive," if indeed he could claim any title vested in himself, at that time, of the same land thus about to be exchanged by French for so great a price.

For him to insist on his title, under such circumstances, if not technically "active fraud," within the Chancellor's meaning, it seems to me, he would say it was most wickedly inactive, deception, and treacherous; against good faith, and pernicious in its consequences. In its features and circumstances, there is really no analogy between that case, and the present. It introduced the subject of this fraud, (by concealment of title, when others were dealing,) but made no case for relief. And the Chancellor, in discoursing upon it, ran it down, so eloquently, that there would be room to question the precision or accuracy of his language as to this active fraud, there considered necessary in all cases, if it could be made applicable to this case and its circumstances. On the whole, it is my opinion, that the bill ought to be dismissed; and at any rate, that no decree can be made, for plaintiff, until Gaius Pease be made a party. (*Mallow v. Hinde*, 12. *Wheaton*, 193, 196. 9. *Cranch* 25. 1. *Peters*, 243.)

BUELL *v.* CROSS.

However summary or irregular the judgment of a competent tribunal may be, it cannot be treated as a nullity.

A person having an option of law or equity, after selecting one tribunal, cannot resort to the other.

Equity cannot revise the errors of a court of law.

This was a suit in chancery, and reserved for decision by the supreme court of Washington county.

The bill stated, that sometime previous to the 14th of May, 1817, the plaintiff was treasurer of a certain company or association, existing in Washington county, and known by the name of the *Duck-creek Bridge Company*, which company, before that time, and under an act of the legislature of Ohio, had erected, at a great expense, a bridge across Duck-creek, and had been accustomed to receive tolls, authorized by said act. That on the 14th of May, 1817, one William Hart and the plaintiff, as treasurer of said company, entered into an agreement by which said Hart rented said bridge for the term of one year for the sum of three hundred and thirty-seven dollars, to be paid quarterly.—That to secure the payment of the rent, Hart executed to the plaintiff, as such treasurer, a joint bond with Obadiah Lincoln, Philip Abbott, and Timothy Stanley, as securities. That no part of said rent has ever been paid by Hart, or any of his securities. That Timothy Stanley died sometime in March, 1819, leaving a will, and Abigail Stanley his executrix, who made probate of the will. That on the 15th of April, 1819, the plaintiff commenced a joint action of debt on said bond, against Hart, Lincoln, Abbott, and Abigail Stanley, as executrix of Timothy Stanley, and in July, 1819, a judgment was rendered by default, against all the defendants, for the sum of five hundred dollars, the whole penalty of the bond—no breaches having been assigned. That after the rendition of said juudgment, and before the 24th of March, 1825, Abigail

Stanley died, and the administration of her estate, as well as that of Timothy Stanley, not fully administered upon, was committed to the defendant, Lucius Cross.

On the 24th of March, 1825, the plaintiff issued a *scire facias* to revive said judgment against Cross, as administrator, *de bonis non*, of Timothy Stanley, upon which Cross appeared, and on demurrer, a judgment was rendered against the plaintiff, in June, 1825. Since the rendition of the original judgment, Lincoln has died wholly insolvent, Hart and Abbott are both insolvent; and at no time since the rendition of the original judgment, could any thing have been collected from Hart, Abbott, or Lincoln. Executions against them were returned, no property found.

The prayer was, that Cross be decreed to pay the said sum of three hundred and thirty-seven dollars, with interest, to the plaintiff, as treasurer of the Duck-creek Bridge Company, and for general relief.

The defendant demurred generally.

Nye, in support of the demurrer. *Goddard*, contra.

By the COURT.

The plaintiff, by his own showing, has a judgment now subsisting against the executrix of Stanley, and no good reason is assigned why that judgment does not embrace his rights. The doctrine, recognized by this court, in 3 *Ohio Rep.* 305, is applicable to this case: that however summary, or however irregular, the judgment of a competent tribunal cannot be treated as a nullity. There is an explicit and formal judgment, and although the proceedings upon which it was predicated, may be unknown to our jurisprudence, still, as in all other judgments, they are not open for enquiry, except in a regular mode of re-investigation, on writ of error or certiorari. The remedy of the plaintiff is purely at law: this remedy he has attempted by the *scire facias*. If he properly failed, his rights are at an end; if improperly, his remedy was by error or appeal.

A person having an option of law or equity, after selecting one tribunal, cannot resort to the other. (1 *Ohio Rep.* 435. 2 *Ohio Rep.* 268. 3 *John. Ch.* 356.)

It is unnecessary to determine the question argued by counsel, whether, when the legal remedy against a surety is extinct, a court of equity will enforce the obligation. This court would hesitate, before they adopted the doctrines contained in the cases cited from 2 *Wash.* 136. 2 *Hen. & Mun.* 124.

Bill dismissed.

KERNS v. SCHOONMAKER.

The statute of limitations begins to run from the time of the injury committed, and not from the time of the damages sustained, or discovery of the injury.

This cause was reserved for decision by the Supreme Court of Hamilton county.

It was an action on the case to recover damages of the defendant, for negligence and omission of duty, as Justice of the Peace.

The declaration alleged, that on the 25th of April, 1825, one John Stewart voluntarily confessed a judgment, in favor of the plaintiff, Jacob Kerns, before the defendant, as a justice of the peace, for the sum of one hundred and seventy-two dollars and sixty-nine cents. On the 28th of April, 1825, Stewart offered one Simon Elliott, as security, for the stay of execution upon this judgment, who was accepted by the defendant; but the entry upon his docket was so carelessly, negligently, and informally made, that Elliot was not legally bound thereby. Stewart died, insolvent, before the supposed stay of execution expired. The plaintiff prosecuted Elliot, upon the informal recognizance, taken by the defendant, and such proceedings were thereupon had, that this court pronounced the supposed recognizance absolutely void; and Elliot was discharged. The plaintiff claimed the amount of the judgment, with interest, and also his costs and expenses in prosecuting Elliot.

The defendant plead, first, not guilty. Second, not guilty, within one year next before the commencement of this suit.

The plaintiff joined issue upon the first plea. To the second he replied specially, that on the 26th of January, 1828, he brought an action of debt, against Elliot, upon the supposed recognizance, in the court of Common Pleas of Hamilton county, in which, a judgment was rendered against the plaintiff, at November term, 1828. The plaintiff appealed to this court, and at May term, 1829, this court gave judgment against the plaintiff, upon the ground that the supposed recognizance was void; which judgments are unreversed. The plaintiff further alleged, that this suit was brought within one year after his rights were made known by the decision of this court, at the May term, 1829. This suit was commenced on the 12th of December, 1829.

To this replication there was a general demurrer and joinder. The court below sustained the demurrer, and gave judgment for the defendant, from which the plaintiff appealed to this court.

There was no argument in support of the demurrer.

Caswell and *Starr*, contra.

By the COURT.

The plaintiff insists that his right of action did not accrue until the termination of the suit in this court, in 1829: and unless he can sustain this position, he is too late in his action. For if the action accrued when the mistake was made, or when the supposed stay of execution expired, or when the suit was instituted against Elliot, more than one year had elapsed before the commencement of this suit.

It is unnecessary to determine the precise moment when the statute did attach, for we entertain the opinion, that no later period can be selected than the institution of the suit against Elliot. Admitting that the plaintiff might reasonably expect Elliot to fulfil his supposed recognizance, and pay the debt, yet, when he evinced his intention not to be bound, the plaintiff's remedy against the Justice was complete.

It is, however, objected, that only nominal damages could have been recovered, previous to the determination of the suit against Elliot. This objection seems to be removed, and, indeed, the whole case disposed of, by the decision of the Supreme Court of the United States, in the case of *Wilcox, et al. v. Plummer*, 4 *Peters*, 172. It was a suit brought against an attorney for negligence. The plaintiffs placed a note in the hands of Plummer for collection. On the 7th of May, 1820, he commenced a suit against the drawer, but neglected to do so against the endorser. The drawer proved insolvent. On the 8th of February, 1821, Plummer sued the endorser; but in consequence of a misnomer, the plaintiffs were non-suited in June, 1824. Before the non-suit, the action against the endorser was barred by the statute of limitations. The suit against the attorney was instituted on the 27th of January, 1825, to which was pleaded the statute of limitations of North Carolina, which interposes a bar after three years. Mr. Justice JOHNSON, in delivering the opinion of the court, uses this language: "When the attorney was chargeable with negligence, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action. This is fully illustrated by the case from 1 *Salk.* 11, in which a plaintiff having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault, which could not have been anticipated, and, of consequence, could not have been compensated, in making up the verdict."

The cases are numerous and conclusive on this doctrine. As long ago as 20*th Eliz.* 1 *Cro.* 53, this was one of the points ruled in the *Sheriffs v. Bradshaw*. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Baltley v. Faulkner*, 3 *B. & A.* 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In *Howell v. Young*, 5 *B. & C.* 254, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discover of the injury. (*a.*)

Demurrer sustained.

(*a.*) The recognizance taken by the Justice, was as follows:

Jacob Kerns, v. John Stewart. } Recognizance bail, 25. Simon Elliot appears, and acknowledges himself bail in the above case.

MAY v. BABCOCK, ET AL.

A receipt may be explained by parol.

Where a bill of lading was signed by the master of a vessel, acknowledging the receipt of certain goods, and stating that they were to be transported from Buffalo to Cleveland, the dangers of the lakes and rivers only excepted; held, that the legal effect of this agreement was to convey the goods from Buffalo to Cleveland, by the most direct route, conveniently adapted to that purpose; and that a parol agreement between the master and shipper, before and at the time of executing the bill of lading, permitting the master to deviate from the usual course, was inadmissible evidence in an action by the shipper against the owners of the vessel, to recover for the loss of the goods.

Parol evidence of the custom of navigating Lake Erie, is admissible, not for the purpose of varying a written contract, but for the purpose of carrying it into execution, as understood by the parties.

This was an action of *Assumpsit*, brought against the defendants, as owners of the schooner America, to recover the value of two hundred and five barrels of salt, shipped on board the America, at Buffalo, in the state of New York, to be delivered at Cleveland, in the state of Ohio, and which was lost upon Lake Erie.

Upon the trial, before the Supreme Court, in the county of Cuyahoga, the plaintiff offered in evidence the following bill of lading.

No. 197.

SHIPPED in good order, and well conditioned, by S. Thompson & Co., on board the schooner called the America, whereof is master, for this present voyage, Z. Brown, now lying in the port of Buffalo, and bound for Cleveland, Ohio.

TO SAY:

For Merwin Giddings & Co. 113 barrels, containing 120 50-280 barrels salt by weight.

S. P. Babcock—192 barrels, containing 205 barrels salt by weight.

Shipping charges $8,20.

Charged M. G. & Co.

S. S. & Co.

per Taylor:

being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of Cleveland, the danger of the Lakes and Rivers only excepted, unto Merwin Giddings & Co., they paying freight for the said salt at 2-8 per barrel, when delivered at their ware-houses. In witness whereof, the master of the said vessel hath affirmed to one bill of lading, all of this tenor and date, the one of which bills being accomplished, the other to stand void. Dated in Buffalo, the 21st of October, 1827.

ZADOC BROWN.

It also appeared, that the America, being heavily laded, deviated from the usual and direct course from Buffalo to Cleveland, for the purpose of going to the port of Otter creek, in Upper Canada, and during the voyage, the salt was unavoidably lost, on the Canadian coast, in a storm.

The defendants then offered in evidence the *manifest*, duly proved, by the collector of the port at Buffalo, by which it appeared, that the America was authorized to proceed to Cleveland, *via* Otter creek; and also the depositions of certain persons, by which it appeared, that John L. Kimberly, of the firm of S. Thompson & Co., who acted as shipping and forwarding merchant for the plaintiff, in the shipment of the salt, verbally agreed that the master of the schooner might go to Cleveland by the way of Otter creek, and that the master refused to take the salt on board the schooner upon any other terms. To this testimony the plaintiff objected, and the court sustained the objection. A verdict was found for the plaintiff, and a motion for a new trial was made by the defendants, which motion was reserved for the decision of this court.

Case, in favor of the motion. *Willcy* and *Stirling*, contra.

By the COURT.

That a *receipt* may be explained by parol evidence, is a principle too familiar, to require authorities for its support. The bill of lading is a *contract* including a *receipt*. It is a contract, admitting the reception of certain goods, with an agreement to carry them to the port of discharge; and the only doubt in the case, is, whether the terms of this agreement, as reduced to writing, in the bill of lading, can be varied by parol. If the actual reception of the salt by the master, was the point in controversy, a different question would be presented. Such a case might come within the general rule of law, applicable to all receipts. But, in this case, it is agreed by all parties, that the salt was actually received by the defendants, or their agent; and the only question is, whether the agreement, for the transportation of the salt thus admitted to be received, can be changed by parol testimony.

The legal effect of this agreement, as reduced to writing, is, to carry the goods from Buffalo to Cleveland, by the most direct route, conveniently adapted to that purpose, dangers of the seas, &c. excepted. The defendants seek to avoid this legal effect, and the consequences resulting from its violation, by showing that it was a part of the agreement, that the schooner might touch at Otter creek, a place out of the regular course, and where she could not go, except by such agreement, and that the master refused to receive the salt upon any other terms. This evidence comes within the direct operation of the rule, that you shall not engraft a parol condition upon a written contract. (*Sergt. and Rawl.* 469, *B. Moore* 535. 1, *Starkie*, *N. V.* 361.)

We considerthis point of the case settled in 2 *Conn. Rep.* 9. "Where the master of a vessel, receiving goods for transportation, gave the shipper a writing, acknowledging the receipt of goods, and stating that they were to be transported to the place of destination, at customary freight, dangers of the seas excepted:—It was held that a parol agreement, between the shipper and master, before and at the time of giving the writing, as to the mode of stowing the goods, was inadmissible to shew the terms of shipment, as all such communications between the parties, are to be considered as merged in the writing."

But is said, that the court, in this case, admitted parol evidence of the custom of navigating Lake Erie. Evidence of this character is admissible, not to vary the contract, but for the purpose of carrying it into execution, as understood by

the parties. This principle is laid down with great precision and force in 9 *Wheaton* 587. There is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict, or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties, by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principles as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. (*a.*)

The evidence of the collector of the port, to show that the vessel was at liberty to visit the Canada shore, without incurring a forfeiture, can have no effect as between these parties; and is also liable to the same objections as the other testimony rejected.

Motion overruled.

(a.) See Doug. 511. 4 Mass. 155. 3 Day. 346. 1 Caines. 43. 18. John. 220 5. Crouch. 492.

HOOKER *v.* THE STATE OF OHIO.

The right of peremptory challenge may be reserved, by the party accused, until after he has made all his challenges for cause.

Where the prisoner is indicted for stealing a grey *horse*, proof that the animal stolen was a grey *gelding*, is a fatal variance.

Error to the court of common pleas of Ross county.—Hooker was indicted for horse stealing. On the trial, two bills of exceptions were taken.

The first stated, that after the prisoner had pleaded to the indictment, and the jurors called and empannelled, the prisoner moved the court to discharge one of the jurors *for cause;* but the court refused the motion until the prisoner should have made all his *peremptory challenges.*

The second bill of exceptions stated, that upon the trial, it was proved to the jury, that the animal stolen by the prisoner, was a *grey gelding*, and not a *grey horse*, as charged in the indictment; and thereupon the counsel for the prisoner moved the court to instruct the jury, that the prisoner could not be found guilty, if the jury were satisfied that the animal stolen was a *grey gelding*, which instructions the court refused.

By the COURT.

FIRST: In the administration of criminal justice, it is of the first importance to secure an impartial tribunal. For this reason, the law gives to the party accused, the right of challenge. This right may be exercised, indefinitely, upon cause shown, and to a limited extent, without cause, or peremptorily. The question is, whether this right of peremptory challenge, may not be reserved

by the party accused, until after he has made all his challenges for cause. Prejudices often exist, for which no cause can be assigned. The personal appearance of an individual often creates the most unaccountable prejudices. The mere challenge, for cause, may provoke resentment, if the reason assigned prove insufficient to set aside the juror. The trial of a juror, challenged for cause, may excite a prejudice, which does not amount to a legal disqualification, but to the influence of which, the party accused ought not to be compelled to submit. For these reasons, the law has wisely provided, that the right of the peremptory challenge, out to be held open, for the latest possible period, to wit. up to the actual swearing of the jury. (4 *Black. Comm.* 366, 4 *Har. St. Tr.* 758, 739, 740, 750. *Bac. Ab. jury, E. U. Done, Sig.* 329.

Second: The objection raised, by the second bill of exceptions, seems too insignificant to demand a serious consideration. The term *horse*, being a generic name, ought to include every variety of the animal, as diversified, by age, sex, occupation, or modification.

The English authorities however, and which have been recognized in several states of the union, as sound law, are too strong to be resisted, and too pointed to be evaded. It is the duty of the court, not to make, but to declare the law. *Ita lex scripta est*, precludes all inquiry into the reasonableness or propriety of the objection.

Judgment reversed.

THE STATE OF OHIO v. TODD, ET AL.

A mandamus may issue to the court of common pleas to sign a true bill of exceptions; but not to sign a particular bill of exceptions whether true or not.

The power of determining whether a bill of exceptions is true or not, is vested in the judges, to whom it is presented for signature.

At the August term of the Supreme Court in Ashtabula county, in the year 1826, Atkins obtained a rule upon the defendants, to show cause, at the next term, why a *mandamus* should not issue, commending them to sign a certain bill of exceptions, tendered on a trial, in the court of common pleas. At the August term, 1827, the rule was extended to the next term. At the August term, 1828, the defendant's having failed to show cause, the rule was made absolute, and a *peremptory mandamus* awarded. At the August term, 1829, the defendants, Todd and Kellogg, appeared, and having satisfied the court, that they had omitted to show cause against the rule, under a misapprehension of the course of proceedings, in cases of the sort, and that no intentional contempt was committed; the rule for a *peremptory mandamus* was vacated, and cause permitted to be shewn. Hays, one of the associate judges, had complied with the *peremptory mandamus*, and signed the bill of exceptions. Keller, another of the associates, was dead. The defendants, Todd and Kellogg, showed for cause, that to the best of their recollection and belief, the bill of exceptions did not contain a true statement of the facts, and that they believed such statement untrue, and coloured, and therefore they refused to sign it, &c. The case was

thus continued to August term, 1830, when it was reserved for decision in this court.

Giddings, for the plaintiff.

By the COURT

The authority to issue a *mandamus*, in a case like the present, cannot be doubted. The power is incident to supervising courts, and there are instances of its exercise, both in England, and in our own country.

But this power is to be exercised in such a manner, as best to promote the advancement of justice, and the only legitimate object of its exercise, in cases of this sort, is to compel the Court below, to place upon the record, a true statement of the facts as they existed.

The bill of exceptions, is in practice, and by law, to be signed and sealed only, not to be prepared by the judges: the only obligation upon the judges, is, to sign and seal a true bill of exceptions.

But the object of the relator is, not to compel the judges to sign a correct bill of exceptins, but to sign the bill offered. The motion in 1827, is for a *mandamus* to sign the bill presented, or show cause, &c. The cause shown, is that the bill presented did not contain a true statement of the facts. It does not appear that the judges refused to sign any and every bill of exceptions: but they refused to sign the bill presented, because it was not true. The power of determining whether a bill of exceptions is true, or not, is vested in the judges, to whom it is presented for signature. In this case, that power has been exercised, and the return of the judges shows, that the bill as tendered, was not true. In this matter, thus presented, we may adopt the language of the Chief Justice of the United States, in a case that bears a very close resemblance to the present. (4, *Pet.* 106. "If the Court had granted a rule to sign the bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is to oblige the judge to sign a particular bill of exceptions which had been offered to him, The court granted the rule to show cause, and the judge has shown cause, by saying that he has done all that can be required of him: and the bill is not such an one as he can sign. Nothing is more manifest, than that the court cannot order him to sign such a bill of exceptions."

If the return be false, or if there be a refusal to sign any bill of exceptions, we need not indicate a remedy.

The rule for a *mandamus* is discharged, and the case remitted, that the relator may apply for a *mandamus* to sign a bill of exceptions, or show cause, &c.

GRAY *v.* THE STATE OF OHIO.

A negro is not an admissible witness against a quateroon.

Error to the court of common pleas, of Hamilton county. Polly Gray was indicted for robbery. On the trial, at November term, 1829, the prosecuting

attorney called to the stand, a *negro*, as a witness in behalf of the State. The counsel for the prisoner objected to his admission, on the ground of incompetency, under the statute regulating black and mulatto persons. The prisoner appeared, upon inspection and of such opinion was the court, to be of a shade of color between the mulatto and white. The court overruled the objection, and the witness was admitted. To this opinion of the court, the counsel for the prisoner excepted; and the verdict and judgment being against her, she brought her writ of error.

VanMatre, for plaintiff in error. *Wade*, contra.

By the COURT.

The witness was improperly admitted. The statue compels courts of justice to reject black and mulatto witnesses, where a white person is a party. The statute is one which a court is called upon to execute, with reluctance, yet where a case is presented, the court has no alternative but to yield to the expression of the legislative will. Three descriptions of persons are designated, by name, in the statute; white, black, and mulatto—and these three are well known, by the same terms, in common life: but we doubt whether we can refine upon these obvious distinctions, or whether good policy, or good sense, requires us to raise the necessity for further discrimination. We are unable to set out any other plain and obvious line or mark, betweenn the different races. Colour alone is insufficient. We believe a man, of a race nearer white than a mulatto, is admissible as a witness, and should partake in the privileges of whites.

We are of opinion, that a party of such a blood, entitled to the privileges of whites, partly because we are unwilling to extend the disabilities of the statute further than its letter requires, and partly from the difficulty of defining and of ascertaining the degree of duskiness which renders a person liable to such disabilities.

Judgment reversed.

COLVIN v. CARTER.

Where A. obtains credit from B. upon an agreement to pay and take up certain notes made by B. and endorsed by C. as they become due and fail to do so; B. may recover the amount due, and A. cannot set up his liability as an off set.

Carter brought an action of *assumpsit* in the court below, against Colvin, and declared upon the common counts, for goods sold and delivered, and upon a special contract. Colvin pleaded the general issue, with notice of offset.

On the trial, Carter produced and proved, a written agreement, dated June 16th, 1828, signed by Colvin, in which Colvin, in consideration of a bill of merchandize that day purchased of Carter, amounting to one thousand seven hundred and thirty-two dollars and ninety-eight cents, agreed to pay for Carter

certain notes of hand, to the amount of one thousand seven hundred and five dollars and fifteen cents, signed by Carter and payable to and endorsed by Colvin, as they might severally fall due, and also to release Carter from all liability on said notes; which notes were then held by several individuals, and had all become due before the commencement of the present suit.

The plaintiff also proved an account for other goods, to the amount of ninety dollars and eighty-five cents, and there rested his case, without proving that he had paid any part of the notes mentioned in said agreement.

The defendant then proved that he had paid a part of the notes, amounting to four hundred and fifty-five dollars and fifteen cents; and that another part had been sued, and judgments rendered both against Carter and Colvin, and upon which both were liable; and that the residue of the notes were unpaid, and upon which both Carter and Colvin were liable.

The defendant also proved, that previous to the execution of said agreement, he had paid to several persons the sum of two hundred and fifty dollars, in satisfaction of debts due by Carter, and for the payment of which Colvin was liable, as security.

Upon this statement of facts, the defendant moved the court to instruct the jury, that Carter was entitled only to nominal damages, under the agreement, unless he proved that he had paid the notes, or that Colvin was released from all liability thereon; but the court refused this instruction, and charged the jury that Carter was entitled to recover the full amount of the consideration of said agreement, deducting the amount of the notes paid by Colvin, notwithstanding Colvin might be liable upon the notes unpaid.

The court also instructed the jury, at the request of Carter, that the agreement in relation to the notes was presumptive evidence of a settlement of all previous accounts between the parties, but was not conclusive, and the jury must judge from all the circumstances attending the transaction, whether the two hundred and fifty dollars paid by Colvin, previous to the agreement, had been refunded by Carter.

To these opinions of the court, the defendant, Colvin excepted. The jury returned a verdict of one thousand four hundred and nine dollars and eighty-nine cents in favor of Carter, and judgment having been rendered thereon, Colvin prosecuted his writ of error.

Storer and *Fox*, for plaintiff in error. *Caswell* and *Star*, contra.

Opinion of the Court, by Judge COLLET.

It is contended for Colvin, that the opinions of the court of common pleas, contained in the bill of exceptions are erroneous. It is the opinion of this court, that the court of common pleas did not err, when it refused to instruct the jury that Carter was entitled to nominal damages only. The goods were sold by Carter to Colvin, on a limited credit, limited to the time that the notes of Carter became due, which Colvin had agreed to pay. The clause in the agreement, that Colvin should release Carter from all liability on the notes, does not extend the time of payment beyond the times when the notes became due, or authorise Colvin to retain the money, the price of the goods, after the notes became due.

When an endorser pays to the holder the amount due from the maker of a promissary note, the maker is still liable on the notes to the endorser. This was the reason of this agreement of Colvin to release Carter. It was an agreement, that as he paid an took back the notes of Carter, that he would cancel them. It did not extend the times of the payment before fixed, but was limited by those times.

Colvin, by the contract, was authorised to retain the price of the goods, until the notes of Carter, which he had endorsed, become due, and then to pay for the goods by discharging the notes, and thereby to prevent himself from being made liable, as endorser, but he was not authorized, to retain the price of the goods for so long a period.

The endorser of a note due, and unpaid, cannot off-set the amount due on the note, against a claim of the maker, or successfully urge it as a defence against a suit brought by the maker.

The violation of this contract, left in the hands of various persons, several notes of Carter, due and unpaid, by which his credit would be injured, and he would be liable to several suits. As Carter had reason, more than in ordinary cases, to be desirous that Colvin should punctually perform his contract, so he had greater reason, than, in ordinary cases, to rely on Colvin's punctuality, in the performance of it, as when he paid his debt to Carter, according to his contract, he would, at the same time, have discharged his own liability to the holders of Carter's notes. It would seem that Carter was entitled to increased, rather than nominal damages. As to the opinion of the court of common pleas, as expressed in their charge to the jury, in relation to the off-set of *Colvin*, the charge must all be taken together, and in the sense in which the jury would understand it. It would then apply only to the two hundred and fifty dollars, this being the only claim offered in evidence, as having existed prior in date to the written contract. When so taken, it is that the agreement was presumptive evidence, but not conclusive, of the settlement of the two hundred and fifty dollars; and that the jury, in determining whether Carter had paid the hundred and fifty dollars to Colvin, would take the making of the agreement, and all the circumstances attending the transaction, into consideration.

When Carter was selling to Colvin, on credit, more than one thousand seven hundred dollars worth of goods, and authorizing him to pay, nearly the whole of the price of the goods, in discharge of the notes of Carter, which were not then due, and on which Colvin was indorser, it does seem reasonable to conclude, that Colvin would have remembered and mentioned to Carter, that Carter then owed him two hundred and fifty dollars, for payments he had before made, on the notes of Carter, which he had indorsed, and that it would then have been paid by Carter. Why should it not have been done? It would have been better for Colvin, at once, to have had the credit, and as well for Carter. Carter's obligation to pay, as soon as he knew of it, was great. His friend had had to advance his money for him. The presumption of payment is not as great, as that the first quarter's rent is paid, from the landlord's receipt for the second quarter's rent; but it is such as would have weight with any sensible man, who had to determine whether the two hundred and fifty dollars had, or had not been paid, and ought therefore go to the jury as presumptive evidence.

The court do not presume there is error in this charge. The judgment must, therefore, be affirmed with costs.

BIGALOW, ET UX. v. BARR, ET AL.

The acquiescence of a female devisee in the construction of the will, does not conclude her.

This was a bill in chancery to establish an equitable life estate in the complainant, Maria Bigalow; and was reserved from the county of Hamilton.

William Barr, sen. died in May, 1816, having made his last will, devising one hundred and sixty acres of land near Cincinnati, to the defendants, William Barr, James Keys, and John B. Enness, his executors, upon the following trusts:

"First: For the use of my son, John M. Barr, during his natural life, but nevertheless to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the same, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die, leaving a legitimate child, or children, then also in trust, for Maria Barr, wife of the said John M. Barr, in case she survive him during her natural life, for the purpose of maintaining herself, and her child, or children, and educating the said children: but nevertheless to permit and suffer the said Maria Barr to hold, use, occupy, and enjoy the said farm, and to receive the profits during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case she survive, if not, then upon the decease of John M. Barr, I do further give and devise the remainder of my estate, in said farm, to him or her, or his or her heirs forever. But if he have two or more children, then I give and devise, the said farm unto such children, and their heirs, to be equally divided between them. But should my son, John M. Barr, die without having any issue of his body, then, and in that case, I give and devise the remainder of my estate in said farm, unto my said sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs forever. And if the present wife of my son John M. Barr, should survive him, dying without bearing any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to pay or cause to be paid, unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if, during her widowhood she should again be lawfully married, then I further direct my said sons-in-law to pay her the sum of one thousand dollars, &c."

John M. Barr died in August, 1820, leaving his wife Maria, and one child. In November, 1821, the child died, leaving the said Maria, wife of John M. Barr, who intermarried with the complainant, John Bigelow, in October, 1824. In the lifetime of John M. Barr, the defendant, William Barr, at his request leased the premises for several years. The tenant, in possession, in the year 1827, attorned to the complainants. The defendants prosecuted a suit of forcible detainer, and recovered judgment, which is still pending on error. The bill charged that the defendant, William Barr, claims the premises, by virtue of some pretended agreement, to accept the two hundred dollars annuity, instead of the life estate of the complainant, Maria Bigelow, that she never made such agreement, and prays for an injunction, account, &c.

The defendant, William Barr, admitted in his answer, the material facts charged in the bill; but set up a verbal agreement made, on the death of the child of John M. Barr, between the complainant Maria, then unmarried, and the defendant, by which she agreed to receive the annuity of two hundred dollars per annum, during her widowhood, and one thousand dollars upon her re-marriage, in satisfaction of her claims under the will. That under this agreement, he, in his own behalf, and in behalf of the other executors, took possession of the premises, as their own property, in the latter part of the year 1821, with the consent and approbation of the complainant, Maria. That the defendant, Keys, being in failing circumstances, on the 28th of December, 1821, gave the said Maria a mortgage upon the premises, to secure the payment of his third of the annuity, and of the one thousand dollars, upon her re-marriage: that she accepted this mortgage, and in 1826, the complainants prosecuted this mortgage, and recovered a judgment thereon. That the annuity of two hundred dollars was paid during the widowhood of the complainant, Maria, and also since her intermarriage, principally in rents which were received by the complainants, under the said agreement, until 1826. The defendants, Keys and Enness, are embarrassed; but he, William Barr, is willing, and offers to pay up the thousand dollars, upon a proper release being made by the complainants.

That he has kept no accurate account of the rents, or moneys paid to the complainants, as the tenants often paid the rents directly to the complainants; but alleges that the complainants were fully paid to the amount of the annuity, until the year 1826, or 1827. That in 1827, the complainants, by collusion, procured the tenants in possession, to attorn to them, &c.

The testimony taken in the case, showed that the child of John M. Barr, and of the complainant, Maria, died, in November, 1824, and did not establish an independent parol agreement, as alleged in the answer. It only made out an acquiescence of the complainant, Maria, in the construction put upon the will by her three brothers-in-law.

Hammond, for complainant. *N. Wright*, contra.

Opinion of the Court by Judge BRUSH.

The objection of the bill is to establish the right of the wife, Maria Bigelow, to the use and possession of a farm of one hundred and sixty acres of land, lying in Hamilton county, by virtue of the will of William Barr, Sen. deceased for and during her natural life; and to enjoin further proceeding at law upon a judgment in forcible detainer obtained against the tenants of complainants. The clause in the will relied upon reads thus: "And in case my said son, John M. Barr, should die, leaving a legitimate child or children, then also in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the child or children, and educating the said children; but nevertheless to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life." The said John M. Barr, former husband of complainant, Maria, died August, 1820, leaving said Maria and a daughter the legitimate issue of

both: and thereupon, the estate, thus limited and declared in her favor, became and was absolutely vested in her, for and during her natural life. But it is said this estate, thus expressly devised to complainant Maria for life, was nevertheless subject to be defeated by the death of the child; as thereby the object and purposes of the devise fails or is accomplished. And as the child died in November, 1821, about one year and three months after her father, the estate thereupon was defeated, and, by another clause in the will, passed to the defendants, J. Keys, J. B. Enness and W. Barr as executors, and residuary legatees. And this is argued by defendant's counsel not on the ground that the testator has expressed any such intention or wish in the will, but for the reason above suggested, that the purpose of the devise in favor of complainant Maria was accomplished when the child died: in other words, that the purpose and object of the devise was the maintainance and education of said child. Although this is expressed to be one purpose, yet it is believed that the primary object and chief purpose was the maintenance and support of the mother, during her life, thereby to enable her to do her duty to her child or children. This was expected of her, and that of course she would raise and educate such and so many as her late husband left with her. It is true, according to the authorities cited by defendant's counsel, and upon principle, that property given by will for certain purposes, results when those purposes are accomplished; or that nothing more is subject than those purposes require." But the application of the rule in this case is not so readily perceived. The testator has been explicit, and has directed, in the very next clause, that the remainder in fee, upon the decease of said Maria, shall go to said child or children and their heirs. Indeed, taking the two clauses together, he has so said expressly, and thus has left his intention unembarrassed, and not perplexed with any doubts whatever in relation to this matter. But there is another defence. Defendant sets up an agreement made, as he says, on the death of said child, between him, Enness and Keys, the other executors, named in the will, of the one part, and complainant (of the other part meaning) in substance, that the annuity mentioned in the will of $200, should be paid her while unmarried, and the $1,000 in lieu on her marriage, as a satisfaction of all claim on her part under the will. It is not said that the above agreement was in writing, nor is it stated to be a purchase by them or a sale by her of her life estate in said farm. But we understand defendant that it was an agreement to give her precisely what she was entitled to under the will, according to the construction he and they and she gave to the will at the time. They made a verbal agreement to give her what was her own, by the construction they put upon the will. Defendant says he did not advise her, as to the construction of the will, but left her to act for herself, and by the advice of her other friends. Her brother advised her. Defendant states unsubstantial and unsatisfactory apologies and excuses for not performing this agreement on their part. They were men dealing with a weeping widow, who, a little more than a year before, had lost her husband, and just then her only child! But the agreement is denied by her, and is not proved. And unsuitable as the time was, yet, in this respect, if it were otherwise, and the agreement stated was proved, it would be no defence against the right now claimed; because the right was not considered as existing and was not therefore the subject matter of the agreement.

The afflicted widow did not know, or imagine she was parting with an estate for her life, producing an income, if properly managed, of two or three hundred dollars a year, and likely to increase in value. It was not the understanding of the parties, as we learn from defendant's answer; but their understanding was, that she was entitled only to the annuity and the composition thereof, on her marriage. It was that they were making some efforts to secure and pay to her, but have failed almost, if not altogether to do that, even according to his own showing. If the life estate had been distinctly the subject matter of the agreement, it could not be set up in this instance, without overstepping the statute of frauds. Such part performance is the foot and ground of the agreement, (supposing it to have been for the life estate) as would take it out of the operation of the statute, is not stated and evidenced by proof. And besides now, after so long delay, and the rise of property, it would be unreasonable to enforce any such agreement. The evidence is not favorable to this defence: so far from showing that Mrs. Bigelow considered, or understood she was parting with the estate in controversy, it strongly countenances the contrary belief. Her conversations given in evidence, were about her rights under the will, not about any agreement she had made to part with any of them. So far as the depositions relate conversations of the husband, John Bigelow, they are idle, as having no bearing upon the defence set up in the answer. They, however, prove nothing of importance in this case; and if they did, would be obnoxious to the objection, that they prove, if any thing, a verbal conversation concerning the sale of real estate.

Decree for complainants.

TOM, A COLORED BOY, v. DESHA, ET AL.

Where a slave is purchased under a promise to emancipate him, such promise may be enforced in equity, against the purchaser, and those claiming under him.

This was an injunction to restrain the defendants from interfering with the personal liberty of the complainant; and was reserved for decision by the supreme court in Hamilton county.

The bill, which was filed in the court of common pleas, January 17th, 1829, in the name of Tom, by his next friend, Orange Witt, charged, that Kate Daily, the mother of Tom, and sister of the defendant, Thomas Daily, was formerly a slave of Miss Baker, of Mason county, Kentucky, who intermarried with one Alexander Edwards. That Edwards died in 1823, and at a public sale, made by his administrator, on the 8th of December of that year, Kate, being then *pricement enseint* with the complainant Tom, was sold to the defendant, Daily, brother of Kate, for the sum of one hundred and sixty-one dollars. At this sale, Daily made public proclamation, that his sole object in purchasing Kate was, to liberate her from slavery, and requested the bystanders to aid him in his benevolent purpose, by permitting him to purchase her without competition. In consequence of this public declaration, Daily purchased Kate without oppo-

sition, and immediately thereafter, pronounced her a free woman, and on the 12th of January, 1824, duly emancipated her by deed. Soon after the sale, Kate removed to the plantation of James Dummitt, of Mason county, Kentucky, where she has ever since resided and where the complainant, Tom, was born soon after the purchase and verbal emancipation of his mother, Kate, by the defendant, Daily. Tom always lived with his mother, until she placed him, a short time since, under the protection of his next friend, Orange Witt, in Cincinnati.

Some time in April, 1828, the defendant, Daily, purchased a slave of the defendant, Joseph Desha, and to secure a part of the purchase money, gave Desha a bill of sale of the complainant. This bill of sale was to be void, if the purchase money should be paid by the 7th of October, 1829. At the time this bill of sale was made, complainant was living with his mother, and he was not delivered to Desha. A short time before this bill was filed, Desha threatened to seize the complainant and reduce him to slavery, but his mother, hearing of these threats, sent him to Cincinnati, under the protection of Witt. Desha then made application to the mayor of Cincinnati, who issued his warrant, by virtue of which, the complainant has been taken into custody. The bill charges, that Desha, when he took the bill of sale, knew that Daily never had possession of the complainant, and also knew that his mother Kate, on, and before the birth of complainant, was equitably emancipated, although no deed of emancipation had been actually executed.

Prayer, that the defendants be enjoined from further interfering with the person of the complainant, and to restore him to freedom, &c.

Desha answered and admitted the pedigree of the complainant, as set forth in the bill, and also the sale made by the administrator of Edwards, but denied all knowledge of the declarations made by Daily of his intention to emancipate Kate. He denied that Kate was emancipated until six months, or more, after complainant was born. He admits that Kate, shortly after she was purchased, moved to the farm of James Dummitt, and alleges that when he purchased complainant from Daily, he left complainant with Dummitt, where he was to remain until he called for him. He denies that he knew, when he purchased complainant, that Daily never had possession of complainant; but Daily at that time informed him, that he never intended to emancipate complainant. After defendant had bought the complainant, he agreed to let the complainant remain with Dummitt for a certain length of time, and that, if within that time, Daily paid him one hundred and twenty-dollars, the purchase was to be cancelled, and defendant was to restore the possession of complainant to Daily.

Daily also answered, admitting all the material allegations in the bill. He further stated that the complainant was not delivered to Governor Desha, at the time the bill of sale was executed, and that it was agreed between himself and Desha, that Kate should not be informed of the bill of sale upon Tom, and that Governor Desha requested Dummitt to keep the matter a secret from Kate.

He neither denies, or admits the freedom of Tom, but alleges that he will pay Desha the hundred and twenty dollars when it becomes due.

It was proved on the part of the complainant, that the sale of Kate was made, as set forth in the bill, and that she was declared free by Daily, the purchaser.

It was agreed between the parties, in writing, that Tom was born five months previous to the emancipation by deed, that neither Daily or Desha had ever had the possession of Tom, and that Daily verbally told Desha he delivered the boy into his possession.

Robert Blanchard and John Rankin on the part of the defendant, testified, that, in May, 1829, they heard the defendant, Daily, say that the sale of Tom to Desha was fair and bona fide, and the delivery was intended to be a delivery in fact of the possession.

Simon Baker testified that he had heard Daily claim Tom as a slave, and once said he would give him to the daughter of witness.

James Dummitt was present at the sale of Tom to Desha. The bill of sale was absolute, and was dated March or April, 1828. Daily delivered to Desha the possession of the boy, and at Daily's request he was permitted to remain with his mother. Desha requested witness to take charge of Tom until he should call for him. Witness kept the boy till he was carried to Cincinnati by his mother. After the sale was made Desha agreed that if Daily would pay him 120 dollars in eighteen months, he would re-convey the boy Tom to Daily. This agreement was reduced to writing, but it formed no part of the original bill of sale.

Hannah Paine was present at the sale of Edward's property. It was generally understood, by persons present, that the intention of Daily in purchasing Kate was to free her from slavery, and in consequence of this understanding Kate was sold for less than half value. After the sale, Daily declared that Kate was a free woman and must provide for herself. James Dummitt was at the sale and purchased four of Kate's children, and requested Kate to go and live with him and bring up the children, and he would build her a cabin and find her provisions. Kate complied, and Dummitt sent his wagon and took Kate and the children home.

The Court below dissolved the injunction and dismissed the bill, and the complainant appealed to this court.

By the COURT.

This is a contest between the complainant, a coloured boy, who asserts his freedom, and the defendant, Joseph Desha, of the state of Kentucky, who claims the complainant, as a fugitive slave, under the act of Congress of 1793. The only serious question between the parties seems to be, whether the acts and declarations of the defendant, Daily, before the birth of the complainant, constitute such an emancipation of the complainant's mother as a Court of Equity will enforce.

It is a well settled rule that no man shall take advantage of his own wrong. The conduct of Daily at the administrator's sale was a fraud. By his declarations and promises he was enabled to purchase his sister at less than half value; and that, too, by imposing on the humanity of the by-standers. Will a Court of Equity now permit him to turn round and claim his sister and her offspring as slaves? Where a widow stands by and hears her deceased husband's estate proclaimed for sale, free from dower, at public vendue, and is silent, she shall be forever estopped to assert her right of dower. (2 *Ohio Rep.* 506.) Where

a grazier, driving a flock of sheep to London, was encouraged by an innkeeper to put his sheep into a pasture belonging to the inn; the landlord seeing the sheep, consents that they shall stay there one night, and then distrains them for rent. The plaintiff was compelled to replevy, and at law the landlord had judgment; the plaintiff there filed his bill, and was relieved; upon the ground that the landlord should not take advantage of his own wrong. (2 *Ves.* 129.)

This question, however, seems to be settled, and the controversy between these parties put at rest, by the Court of Appeals in Kentucky. (1 *Bibb.* 422.) In that case it appears that one Thompson purchased a slave, named Will, from Ruth Wilmot, and expressly stipulated that he would manumit and emancipate Will in seven years. Will served the term of seven years, and then instituted a suit at law to recover his freedom, but failed, because the agreement was held not to amount to an actual and formal emancipation under the laws of Kentucky.

Will then continued in the service of Thompson for several years, until Ruth Wilmot, in behalf of Will, filed a bill in chancery setting forth the above facts, and which were admitted by the answer. The circuit court decreed that Will should be emancipated, and that Thompson should pay to Wilmot, in trust for Will, 691 dollars 25 cents, the value of his services after the expiration of the seven years. From this decree Thompson appealed, and Bibb, Chief Justice, in delivering the opinion of the court, affirming the decree, uses this language: "That the answer of Thompson does not afford a colourable pretext for withholding a performance of his engagement, solemnly made, under circumstances interesting to humanity, and most obligatory upon a man of good conscience and unpolluted faith. The contract in itself was not forbidden by any political institution, but is in unison with the dictates of natural right, and was a most becoming subject for a court of chancery to act upon specifically."

We surely may be permitted to apply these doctrines to a case, where a *brother* is seeking to reduce *his sister and her offspring* to slavery, in direct violation of his repeated and most solemn engagements.

The mother, then, in equity, which considers that as done which was agreed to be done, was virtually, if not actually and formally, free, at the time of the birth of the complainant. It necessarily follows that the complainant was free. *Partus sequitur ventri.* (*Littell*, 319.)

The complainant, therefore, being free born, is not the subject of property, and neither Daily or Desha, who claim under him, have any rights, as against the person of the complainant.

WATKINSON v. ROOT.

An agreement, after interest is due, to turn it into principal, is valid.

An action will lie to recover interest due, and in such action interest may be recovered upon the interest after it becomes due.

This was an action of *assumpsit* to recover a sum of money, as interest, upon a special contract; and was reserved from Medina county.

There was a contract between the parties, dated in April, 1826, by which the defendant agreed to pay the plaintiff 4,586 dollars, in four equal annual payments, in the years 1830-31-32 and 33, with lawful interest, to be computed from the 1st of July, 1825, and to be paid annually. This suit was brought in 1829, to recover the arrearages of interest, which had accrued; and the only question was, whether interest was allowable upon the successive annual charges of interest, after they fell due.

Cowles and *Andrews*, for the plaintiff.

There was no argument on the other side.

By the COURT.

An agreement, after interest is due, to turn it into principal, is valid. (4, *T. R.* 612, 2, *H. Bl.* 144.)

It is however understood, that in England, at least until recently, an agreement, at the time of an original contract, that if interest be not paid at the end of the year, it shall be deemed principal, and carry interest, will not be enforced. (1 *Johns. Chy.*) and cases cited. This is claimed to be a rule of policy, and it is supposed that a contrary rule would tend to oppression, hard dealing and other evils. We deem it unnecessary to inquire into the correctness of this policy, although the current opinions of modern political economists render it at least doubtful.

Such a contract as the present is prohibited by no statutory provisions, and we see no reason why it should not be enforced. The decision of a respectable court is found; (*Adams. N. H. Rep.* 179.) where interest upon interest was allowed, in a case similar to the present; and we are willing to follow the precedent. (*a.*)

(*a.*) An action will lie to recover interest, (2 Mass. 613, 3, Mass 221.) Where money is payable on demand, interest is not recoverable until demand made. [4 Bibb, 246, 2 Bibb, 471.]

COWDEN v. HURFORD.

Where a judgment is reversed on error, and a general judgment of restitution awarded, execution cannot be issued without a sci. fa. otherwise, if the judgment of reversal specify the precise thing to be restored.

Hurford and others recovered a judgment against Cowden in the court of common pleas of Jefferson county. Upon this judgment Cowden sued out a writ of error, and this court reversed the judgment, and thereupon rendered a judgment for costs, upon the writ of error, and for a restitution in the usual form, with a mandate to the court of common pleas to carry the same into execution. When this mandate came down, Cowden moved the court of common pleas to award a writ of restitution, which motion was overruled. He then applied to this court for a *peremptory mandamus* to the court below, or to award a writ of restitution returnable in this court. This application was reserved for decision

here by the supreme court. The record of the judgment of reversal was not produced, nor did it appear that this court, in the judgment of reversal, had awarded the restitution of any certain sum of money, but upon the application to the court of common pleas for a writ of restitution, Cowden exhibited evidence of certain payments made upon the judgment reversed.

Tappen, in support of the application.

By the COURT.

A judgment of restitution is strictly a judgment which the court have inherent power to execute. (12 *Sergt. & Rawle*, 292.) And the court, in the case cited, hold that where this judgment of restitution is rendered, *assumpsit* will no. lie for the money.

But the court are now called upon to point out the manner of executing this judgment. If the judgment of reversal contain evidence of the precise thing to be restored, the writ of restitution may be awarded. (*Cro. Car.* 699.) But where the matter to be restored is not specified, in the judgment, but depends upon evidence *dehors* the record, it is inconsistent with the policy of the law to permit execution without an opportunity given to the other party to make his defence.

The proper remedy in such case is the writ of *scire facias*. (2 *Saund.* 101.) (*y*) 2 *Salk.* 583. (*a*)

(a) For the form of a scire facias quare restitutionem non, see Lill. Ent. 641, 650; and for the form of a restitution, see Tidd's Prac. Forms, 541, 542.

STORY v. HAMMOND, ET AL.

If an individual erects a mill dam which causes disease and sickness, he is responsible to individual sufferers in an action on the case for a nuisance.

In such case, it is no defence, that the injury affects the whole neighborhood; nor is the civil remedy merged by an indictment and conviction.

This was a motion for a new trial, reserved from the county of Cuyahoga.

The plaintiff brought an *action on the case*, to recover special damages, sustained by himself and family, in consequence of a mill-dam, erected by the defendant, across a branch of Yellow Creek, in Cuyahoga county.

The plaintiff in his declaration, alleged, that the dam, by overflowing the adjacent lands, rendered the atmosphere exceedingly impure and unhealthy; and thereby occasioned the sickness of himself and family; and that he was put to great costs and charges, in and about curing himself and his wife and children, &c. and that he and his family had sustained a great loss of time, &c.

The jury rendered a verdict, in favor of the plaintiff, for one hundred and eighty-eight dollars and seventy-five cents; and the defendant moved for a new trial upon two grounds.

FIRST: That the court permitted the plaintiff to give evidence, not only of his own sickness, but of the sickness of his family, and the different members

thereof, and the loss of their service, as a foundation for the recovery of damages.

SECOND: Because the court charged the jury, that this action was, by law, sustainable, although the neighborhood generally, was afflicted with the same injury sustained by the plaintiff and his family, and for which this action was brought. That if the jury were satisfied, that the sickness of the plaintiff and his family, was caused by the erection of the dam, or nuisance, then the plaintiff had proved a damage, done to himself and family, sufficiently special, to entitle himself to recover, notwithstanding the neighborhood generally, were proved to have sustained the same injury. That the defendant, having been indicted, and plead guilty, under the 43d section of the "Act for the punishment of certain offences therein named," previous to the commencement of this suit, formed no bar to this action, and that the private remedy of the plaintiff, was not thereby taken away.

It was proved on the trial, that Yellow Creek was not a navigable stream, and that the dam was erected, upon the lands of the defendant, in the vicinity of the plaintiff's residence.

Humphrey & Kirkum, in favor of the motion. *Willey & Olcott*, contra.

By the COURT.

The declaration is somewhat loose and inartificial, but is substantially good. No other evidence was admitted on the trial, than to show the sickness of the plaintiff, and that of his wife and children, whom he was bound to support.

It appeared, upon the trial, that, not only the plaintiff and his family, but the neighborhood generally, suffered much sickness and disease, occasioned by the defendant's mill-dam, and it is insisted, that this general injury is a legal bar to the recovery of individual damages.

We consider it unnecessary to determine whether the injury complained of belongs to the class of public or private nuisances, as defined by the common law. Every member of society is bound by the principles of natural justice, so to use his own property, as not to injure the rights of others. If an individual erects a mill-dam, which creates disease and sickness, he must be responsible for the consequences.

The defence set up is entirely without foundation. If a man were to sally forth into the public streets of a town, and commit an assault and battery, upon every person he met, it would hardly be competent for him, in a suit by an individual for special damages, to set up as a defence, that he had not only beat the plaintiff, but had also beat the whole town. Or, if a man were to poison a reservoir of water, for the supply of a city, and thereby create a general sickness among the inhabitants, it would not be seriously contended, that the magnitude of the offence was a bar to a private action; or, in other words, that the defendant might exculpate himself by proving, that he had not only poisoned the plaintiff, but had poisoned all the inhabitants of the city.

There is no foundation in the objection, that the civil action was merged in the indictment. In England, actions of trespass or *tort*, in certain cases, were

held to be merged in the felony. But this rule, it seems, did not operate after the offender was brought to justice. (1 *Bac. Abg.* 99. 4 *T. R.* 333.) *

Motion overruled.

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* The doctrine of merger by felony, of a civil action, has no foundation in this country. 15 *Mass.* 338. In assumpsit for money received, proof that a lamb was driven to London and sold, is sufficient, unless it appear to be stolen, when trover would be the only proper remedy. (Bull. N P. 134.)

FORD, v. SKINNER, ET AL.

The lien of a judgment upon real estate, is not discharged as against a subsequent purchaser, by a release of chattels once levied upon, by the mutual assent of the parties to the execution.

This was a bill of injunction, to restrain the defendants from selling certain real estate, taken in execution upon a judgment at law; and was reserved from the county of Geauga.

The case was as follows. On the 8th of June, 1813, one Jacob French mortgaged the lands in controversy to Daniel L. Coit, for the sum of five hundred dollars. On the 16th of November, 1818, French conveyed, in fee, the same premises to John Ford, the complainant, who afterwards, on the 17th of May, 1819, purchased and took an assignment of the mortgage from Coit. At the October term of the court of common pleas, in the year 1816, the then commissioners of the county of Geauga, and whose successors were made defendants, in this bill, recovered a judgment against French and others, for the use of Abraham Skinner, the intestate of the defendant, Augustus Skinner, for the sum of four thousand dollars, to be discharged on the payment of one thousand eight hundred and eighty-four dollars and costs. Upon this judgment, executions issued from time to time, and small sums of money collected, until the 28th of October, 1818, when the sheriff levied upon personal property of French, sufficient to discharge the judgment, but the same was returned by the sheriff, unsold for want of time to advertise.

On the 26th of December, 1818, a *vendi.* was issued, and on the 3d of March following, by consent of parties to the execution, the personal property thus levied upon was released and re-delivered to French. Executions were again issued, from time to time, and a considerable portion of the money made. On the 19th of February, 1828, a pl. fi. fa. was issued, and the sheriff having endorsed *nulla bona*, levied upon a part of the real estate purchased by the complainant Ford, as before stated, and thereupon this bill was filed to enjoin all further proceedings upon the execution. There was no charge, that the levy, upon the personal property, was discharged fraudulently, or with intent to injure the complainant; but the bill contained the common charge, that the defendants combining, &c. to injure and oppress the complainant, refuse to release their lien on the land, &c.

***Webb*, for complainant. *Mattoon and Cord*, contra.**

By the COURT.

The judgment in favor of Skinner, was a lien upon the real estate of French, subject, however, to the prior encumbrance of Foit's mortgage. Ford having purchased, subsequent to the rendition of the judgment, took the estate, subject to the lien of the judgment, unless it was satisfied, in contemplation of law, by the prior levy upon the personal estate of French.

It has been determined, by this court, that a levy upon goods and chattels, is a satisfaction of the judgment, while the levy is in force and undisposed of. (*Case v. Lyttleton, et al.* 3 *O. R.* 223.) This principle must be understood to operate, not as an actual discharge, but as a suspension of the right to enforce the judgment until the levy shall be disposed of.

In the present case, the levy upon the personal estate was set aside by mutual consent, and the property re-delivered to the judgment creditor. This mutual arrangement cannot affect the lien upon the real estate, at all events, as between the parties to the judgment. The parties stood in the same situation as if the levy never had been made; and the judgment creditor was at liberty again to execute the personal property, if it could be found, and if not to prosecute his lien upon the real estate.

It necessarily follows from these principles, that the lands are liable to execution in the hands of Ford. Had the levy been discharged for fraudulent purposes, or with a design to injure Ford, the case would present an entirely different aspect. But no circumstance is disclosed from which a presumption of fraud can be raised; and the complainant, in his bill, rests his claims, not upon any fraud practised in the transaction, but upon the supposed satisfaction of the judgment. We discover nothing in the case, to exempt him from the general rule, applicable to all subsequent purchasers, with notice of a prior incumbrance.

Bill dismissed.

Judge BRUSH dissented.

CARTER v. LONGWORTH, ET AL.

A demurrer to a Bill in Chancery charging "a fraudulent concealment of title, while the complainant was making improvements" is bad.

This was a suit in chancery, reserved for decision by the supreme court in Hamilton county.

The bill was filed in the court of common pleas, and set forth, that the plaintiff, some time in 1816, purchased of one William Stewart a certain lot of ground in Cincinnati, for the sum of one thousand five hundred dollars, and received from Stewart a deed of general waranty. At the time of the purchase, Stewart exhibited to the plaintiff a deed for the lot, from Longworth to himself, and assured the plaintiff that the purchase money was fully paid to Longworth. At this time the plaintiff, Longworth, and Stewart were residents of Cincinnati.

The plaintiff, fully believing that the purchase money had been paid to Longworth, erected a dwelling house, and made other improvements upon the lot, to the value of six hundred dollars. Longworth knew that these improvements were making, yet fraudulently concealed from the plaintiff the fact, that at that time, he held a mortgage on the lot for one thousand five hundred and seventy-five dollars, the whole amount of the purchase money due from Stewart, for the lot. Sometime in 1818, after these improvements were made, and before any steps were taken to foreclose the mortgage, Longworth took possession of the lot, and on the 15th of November, 1822, sold a part of it to the defendant, Jacob Flagg, for one thousand three hundred dollars, and the residue to one Matthew Vandusen, for one thousand dollars. Vandusen afterwards relinquished his part to Longworth, who is still the owner.

The defendants, Longworth and Flagg, continued in possession, and received the rents and profits, to the amount of nine hundred dollars, until the year 1826, when Longworth sued out a *scire facias* upon the mortgage, and upon the return of two *nihils*, recovered a judgment by default, for the whole amount of the purchase money, with interest, giving no credit for the rents and profits. The plaintiff was not made party to the *scire facias*.

The bill charges, that Longworth extended credit to Stewart—gave him a deed for the lot, and thereby enabled him to defraud the plaintiff, by inducing him to believe that the lot was paid for, when, in fact it was not. That the plaintiff is the only person injured in the premises, and that injury was sustained by the fraud and combination of Longworth and Stewart. The bill did not state the date of the deed from Longworth to Stewart, or of the mortgage; nor did it appear that either of them were ever recorded. It did not appear that the lot had been sold under the judgment upon the *scire facias*. The deed of the plaintiff was duly recorded. Stewart is insolvent and a non-resident.

The bill contained a prayer for redemption, account, and for general relief.

The defendants, Longworth and Flagg, demurred generally to the whole bill.

The defendant, Stewart, made no defence.

The court below sustained the demurrer, and the plaintiff appealed to this court.

The decision of the court rested upon other grounds than those argued by counsel.

Longworth and *Worthington*, in support of the demurrer. *Gaines*, contra.

By the COURT.

If the defendants are bound to answer any part of the bill, the demurrers being entire, to the whole bill, must be overruled. A demurrer, bad in part is bad *in toto*. (1 *Ves.* 248. 1 *Atk.* 450. 2 *Atk.* 44. *Md. Ch.* 226. 1 *Johns. Ch.* 51. 5 *Johns. Ch.* 186) (*a*)

The main question intended to be presented by the demurrer, whether a *scire facias* binds subsequent incumbrances, need not be determined. The bill charges "a fraudulent concealment of title, while the complainant was making improvement." A demurrer to such charge of fraud is bad. In the case of *Higinbotham v. Burnet*, (5 *Johns. Chy.* 184) the bill charged, that the party in in

terest stood by and saw great and costly improvements made upon the land, by persons claiming and believing themselves to be owners in fee, and never interposed any pretension of right or title. There was a demurrer to the whole bill, which was overruled, because the charge amounted to an imposition and fraud. Here the charge of fraud is direct and positive, and must be met otherwise than by a demurrer.

Demurrer overruled.

(*a*) Contra, 2 *Bibb*, 484.

GATEWOOD v. THE STATE OF OHIO.

When the scienter is part of the statutory description of an offence, it must be so laid in the indictment.

Error to the court of common pleas of Hamilton county.

Gatewood was indicted for stealing bank bills. The indictment was founded upon the sixteenth section of the act for the punishment of crimes, 22 vol. 161, which provides, That if any person shall steal, &c. any bank bills, &c. of fifty dollars, or upwards, *knowing them to be such*; every person, &c.

The indictment contained no averment that the prisoner *knew* the bills stolen to be bank bills. The prisoner was convicted and sentenced; *and this writ* was sued out to reverse the judgment.

Strait and *Hawes*, for the plaintiff in error.

By the COURT.

The objection taken is fatal. Where the *scienter* is part of the statutory description of the offence, it must be so laid in the indictment.

Judgment reversed.

McDOUGAL v. FLEMING.

The party, who takes a bill of exceptions, must distinctly point out wherein he may have been prejudiced by the opinion excepted to.

Error to the court of common pleas of Hamilton county.

The plaintiff in error brought an action of *assumpsit*, in the court below, for the use and occupation of a house and lot in Cincinnati, and also on a special contract to pay rent.

The declaration contained three counts. First; That on the 1*st of May*, 1827, the plaintiff demised the premises to the defendant, in consideration of which, and of the possession and enjoyment thereof, the defendant promised to

pay three dollars per month, and that the defendant entered and has ever since enjoyed, &c. Second; That on the *5th of November*, 1827, the defendant promised to pay the plaintiff three dollars per month, as rent for said premises, in consideration that the plaintiff had demised the same by parol to the plaintiff, with an averment that the defendant had occupied. Third; General *indebitatus assumpsit* for the use and occupation of the same premises. Plea—general issue with notice.

Upon the trial before the jury, the defendant, under his notice, offered in evidence the record of a judgment in an action of ejectment rendered in the supreme court of Hamilton county, at May term, 1829, in which McDougal was lessor of the plaintiff, and Fleming defendant, and which was brought to recover possession of the same house and lot.—The demise in the declaration in ejectment was laid upon the *1st of October*, 1828, for the term of twenty-one years, and the judgment was in favor of the defendant.

To this record the plaintiff objected, but it was admitted by the court, and a bill of exceptions taken. The verdict and judgment passed against the plaintiff, and thereupon he sued out his writ of error.

Caswell and *Starr*, for the plaintiff in error. *Storer* and *Fox*, contra.

By the COURT

The party excepting, must distinctly point out wherein he may have been prejudiced by the decision excepted to. *King vs, Kenny* (4, *Ohio Rep.* 81.) In the present case, the whole evidence is not disclosed, nor any precise question raised, by the bill of exceptions. The issue, in an action of *assumpsit*, is so broad, that we can suppose many situations, in which the record would be proper testimony. Inasmuch, then, as the record does not show, that the court below erred, we affirm the judgment.

Judgment affirmed.

LEWIS *v.* THE STATE OF OHIO.

The Court cannot be called upon to charge the jury upon abstract propositions, but only those arising upon the evidence.

To refuse such instructions as properly arise in the case, is error.

Error to the court of common pleas of Fairfield county.

Lewis was indicted and convicted of larceny. The indictment charged the goods stolen to be the property of Christian and William King. Upon the trial a bill of exceptions was taken, which stated, "that evidence was given on the part of the prosecution, tending to prove that the chattels charged in the indictment to have been stolen, by the prisoner, were the property of William and Christian King, and that it was feloniously taken from their ware-house." There was also evidence tending to prove that the chattels were purchased in March last, in the name of William and Christian King; that William King,

at the time of the purchase, and for four or five years previous thereto, was, by reason of mental imbecility, incapable of making or assenting to a contract, or transacting business of any kind. There was also evidence tending to prove a partnership between William and Christian King, namely, that a sign had been for several years kept up and continued over their ware-house, or store door, on which were the names of William and Christian King, and that the books of the store were kept in their names.

The arguments and evidence being closed, the counsel for the prisoner prayed the court to instruct the jury, 1, If there was not sufficient evidence to satisfy them that there was a partnership between William and Christian King, and if the property alledged to have been stolen, was purchased in the names of William and Christian King, at a time when William King was incapable of contracting, that the property vested in Christian King alone, and is improperly laid in the indictment as the property of William and Christian King. If the jury should find that the property described, in the indictment, was stolen out of a ware-house of William and Christian King, yet that circumstance is not sufficient to sustain the allegation of property in the indictment, unless William and Christian King were proved to have been carrying on business in that ware-house jointly, or that the goods were received or retained there by the joint assent of William and Christian King, at a time when William King was capable of giving his assent. These instructions the court refused to give, but charged the jury that the evidence given, was, in the opinion of the court, sufficient to prove a partnership between William and Christian King.

The jury found the prisoner guilty, and judgment having passed against him, he prosecuted this writ of error.

Ewing and *Swan* for the plaintiff in error. *Hunter* and *Leonard* contra.

By the COURT.

The court cannot be called upon to charge the jury upon abstract propositions, but only those arising upon the evidence. But to refuse such instructions as properly arise in the case, is error. (1 *Cranch*, 309, 318. 6 *Wheaton*, 75.)

By the first exception, we understand the defendant designed to contest the fact of partnership; and for this purpose, he relied upon the legal proposition, that property purchased for a lunatic does not vest in him. The fact of partnership was material to be established by the state; and that it was material, is matter of law. The legal proposition, that the property thus purchased, could not vest, would go far to protect the defendant, if settled in the affirmative. Upon these legal propositions, the bill of exceptions states, the court below refused to charge; but gave an expression of their opinion upon the question of fact, as to the sufficiency of the proof. We are of opinion that the court erred in refusing to charge the jury upon the legal propositions.

It is unnecessary to notice the second exception.

WOLF v. POUNSFORD.

A sci. fa. to revive a judgment, is only a continuation of the former suit, and is not an original proceeding.

When the original judgment was for 2500 dolls. and the sci. fa. to revive recited a judgment for 918 dolls. and a judgment of revivor was taken, by default, for the sum named in the sci. fa. the judgment of revivor is erroneous.

A sci. fa. must contain every thing that is required to constitute a good declaration.

Error to the court of common pleas of Hamilton county.

On the 13th of October, 1820, one John J. Richey, being in custody, at the suit of Pounsford, made his application for the benefit of the insolvent law, and executed his bond to Pounsford, with Wolf and one Gabriel Hubble as securities, conditioned to make a schedule and deliver over his property. Suit was brought upon this bond, and at December term, 1821, a judgment was rendered in favor of Pounsford against Wolf and Hubble, process being returned, *not found*, as to Richey, judgment was rendered for the sum of two thousand five hundred dollars, the penalty of the bond, to be released on the payment of *nine hundred* dollars and *five* cents, with *eleven* dollars and *twenty-nine* cents costs.

On the 22d of January, 1829, a writ of *scire facias* was sued out, in the name of William Pounsford, *for the use of one Hezekiah Sanders*, suggesting the death of Hubble; and after reciting that the judgment recovered by Pounsford against Wolf and Hubble, was for the sum of *nine hundred eighteen dollars* and *five* cents, with *eleven* dollars *twenty-nine* cents costs, called upon Wolf to show cause why *said judgment* should not be revived, and why Pounsford should not have execution thereon, for the use of Hezekiah Sanders. The *scire facias* contained no allegation that the judgment was unpaid or unreversed, or that Richey was indicted to Sanders when the bond was given, or at any other time, nor did it appear what interest Sanders had in the judgment, nor by what authority he sought to revive it.

At February term, 1829, a judgment by default was taken against Wolf, by which it was ordered, that the judgment, *as set forth in said scire facias*, be revived, and that execution issue thereon. *Leave granted to take out execution for the claim of Hezekiah Sanders, being two hundred and eighty dollars, with interest from 14th October, 1820, amounting to four hundred and twenty-one dollars and forty cents, with costs of this suit.*

Hammond and *Garrard*, for the plaintiff in error. *Storer* and *Fox*, contra.

By the COURT.

FIRST: A *scire facias*, to revive a judgment, is only a continuation of the former suit, and is not an original proceeding. (2 *Tidd*. 933. 1 *T. R.* 257.) When a *scire facias* is issued to revive a judgment, the whole record is before the court; and if the defendant makes default, and no payments appear upon the record, it is the duty of the court to award execution for the amount of the origi-

nal judgment. (*Stat. vol.* 22, 68.) In the present case, the original judgment was for the sum of *two thousand five hundred* dollars, and the judgment of revivor for the sum of *nine hundred* and *eighteen* dollars and *five* cents. The writ misrecites the original judgment, and the judgment of revivor follows the writ. This variance appears on the face of the record, and vitiates the judgment of revivor. The original judgment was not revived by the proceedings, upon the *scire facias*, and the record shows no other judgment which could authorize the issuing of the writ of *scire facias*, or the judgment of revivor.

Second: The original judgment was founded upon a bond, executed by Hubble and the plaintiff in error, as securities for Richey, and conditioned that Richey should make an assignment of his property for the benefit of his creditors, under the act of 1805, for the relief of insolvent debtors. It seems, from the record, and particularly from the award of execution in favor of Sanders, that Sanders was one of the creditors of Richey at the time the bond was executed; and that the *scire facias* was issued to enable Sanders to enforce the collection of his claims. It is unnecessary to determine in what manner Sanders might avail himself of the judgment in favor of Pounsford, to secure his debt against Richey. Admitting a *scire facias* to be the proper remedy, the nature and extent of his claims ought to be set forth, in the writ, with some degree of certainty. The writ contains no averment that Richey was at any time indebted to Sanders in any amount, nor does it set forth any facts from which even an inference of such indebtedness can be drawn. Writs of this description must contain every thing that is required to constitute a good declaration; or, in other words, they must set out all the facts that are necessary to show a right in the plaintiff to the relief prayed for. (2 *Ohio Rep.* 248.) The award of execution in favor of Sanders, is not warranted by any matters contained in the record, and is, consequently, erroneous.

Judgment reversed.

ROLL v. RAGUET.

A court of justice will not lend its aid to enforce a promise for the payment of money, the sole consideration of which is another promise, made by the plaintiff, to conceal or stifle the prosecution of a felony.

Whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the court will not rescind it; if executory, the court will not enforce its execution.

Error to the court of common pleas of Hamilton county.

Hy. Raguet brought a suit in the court below against Peter Roll and Charles Roll upon a promissory note for the sum of five hundred dollars. Charles Roll was returned by the sheriff, not found, and the declaration was filed against Peter Roll, in the common form of the payee against the maker.

The defendant, besides the general issue, pleaded in bar, that before, and at the time said note was given, Charles Roll, who was the son of the plaintiff in error, was suspected and accused by Raguet, of having feloniously taken his

money, goods and chattels, in Cincinnati; that Raguet was about to institute a criminal prosecution against Charles Roll, and cause a judicial investigation to be made touching said supposed felony, and threatened Charles and Peter Roll that, unless they would pay him five hundred dollars, he would subject Charles Roll to undergo an examination before some judicial tribunal for said supposed offence, and would endeavor to cause Charles Roll to be indicted and sent to the Penitentiary for the same; but at the same time promised and agreed with Charles Roll and Peter Roll, that if they would pay him five hundred dollars, he would altogether desist from instituting any criminal prosecution against Charles Roll, nor would he appear before any judicial tribunal to give evidence against him for said supposed offence; but would endeavor to suppress any investigation concerning the same. That, in order to prevent a criminal prosecution against Charles Roll, and to save him from any indictment and punishment, and in consideration of said agreement, on the part of Raguet, he, Peter Roll, made, and delivered to Raguet, the note in the declaration mentioned.

To this plea there was a general demurrer and joinder. The court below sustained the demurrer and gave judgment in favor of the defendant in error; to reverse which this writ of error was prosecuted, and the common error assigned.

Caswell & Star, for the plaintiff in error. *Storer* and *Ames*, contra.

By the COURT.

A father and son join in giving a promissory note, for the consideration that the payee will abstain from prosecuting the son for a larceny, and will not appear in a court of justice as a witness against him.

The court are not called upon to decide whether an action may be supported upon a promise to pay for stolen goods, nor whether an action will lie to recover private damages sustained by the commission of a public offence. The only question, presented by the record, is, whether a court of justice will lend its aid to enforce a promise for the payment of money, the sole consideration of which is another promise, made by the plaintiff, to conceal or stifle the prosecution of a crime, perpetrated against the peace and common good of mankind.

The well being, the existence of every government, obviously depends, in a great measure, upon the due execution of its criminal laws. Any contract, therefore, the consideration of which is to conceal a crime, or stifle a prosecution, is necessarily repugnant to public policy; and it is a settled rule of law, that all contracts, whose consideration is contrary to public policy, are void. (2, *Kent. Com.* 366, 2 *Stark. Ev.* 87.)

It is unnecessary to enquire whether such contracts are positively prohibited by law, or whether it is, in all cases, the legal or moral duty of an individual, cognizant of the commission of a crime, to make a disclosure to the proper authorities. Admitting the existence of cases where silence would be excusable, it by no means follows that an express contract to conceal the offence, or smother its prosecution, must be sanctioned by law, or enforced by the judicial tribunals of the country.

The objection, that when the contract was made, no suit had been commenced, or indictment found, is without foundation. The same, if not stronger reasons of public policy exist, before as after the existence of a prosecution.

By a public prosecution the offender becomes notorious, and the community are put upon their guard. By a compromise of the felony, in secret, without any prosecution, the true character of the offender is unknown, and the community are subjected to depredations, which otherwise might be anticipated and prevented.

As between the parties to this action the defence may not be very honest; and we may adopt the language of Lord Mansfield, (*Comp.* 341,) "that the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, that *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an *immoral* or *illegal* act."

Whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed the court will not rescind it; if executory, the court will not aid in its execution.

Judgment reversed. (a)

(a) Same principle, 4 Johns. 419, 12 Johns. 306, 19 Johns. 341, 3 Cowen 213, 11 Johns. 388, 2 Wils. 341.

AVERY v. RUFFIN.

Where the court of common pleas make an order under the statute, to distribute the fees between the present and former sheriff, a strong case of abuse must be presented to induce the supreme court to interfere.

On the 4th of September, 1823, a *fi. fa. et lev. fa.* was issued to William Ruffin, *then* sheriff of Hamilton county, in favor of E. Graham v. T. Graham, for five thousand four hundred and fifty-four dollars, with costs, returnable at December term, 1823. This execution was levied upon the real estate of Thomas Graham, by Ruffin.

On the 21st of April, 1829, Ruffin's time of office, as sheriff, having expired, a *vendi. expo.* was issued to August term, 1829, directed to Avery, the then sheriff, to sell the real estate, thus levied on by Ruffin, the former sheriff. Upon this writ, Avery sold the land and made the money, and at August term, 1829, the court, upon the application of Ruffin, ordered the poundage to be divided between the present and late sheriffs, in the proportion of two-thirds to the former, and one-third to the latter. To this order, Avery excepted, and to quash it, sued out this *certiorari*.

Storer and Fox, for the plaintiff in *certiorari*. *N. Wright*, contra.

By the COURT.

At common law, an execution, partly executed by a sheriff, shall be completed by him after the expiration of his term of office; but by statute, v. 22, 201, *sec.* 8, he is directed to transfer all executions to his successor: and it is further

provided, by the same statute, that no *vendi. expo.* shall be directed to, or executed by a sheriff whose term of office has expired.

By the statute of 1825, r. 23, 18, power is given to the supreme court, or court of common pleas, to order poundage and fees taxed to be distributed between the sheriff and his successor, in such manner and proportion, as they may deem just and equitable. The power to make the order in question, was vested in the court of common pleas; and wherever that court has used its discretion in the exercise of that power, a strong case of its abuse must be presented, to induce this court to interfere on *certiorari*. Let the order be affirmed.

RANDALL *v.* PRYOR.

The statutory provision, that a decree for a deed shall operate as a conveyance, does not divest the court of the power to enforce the actual execution of a deed by attachment for contempt.

Motion to discharge a rule taken upon the defendant, to show cause why process of contempt should not be issued against him; and was adjourned here for decision from the county of Belmont.

It appeared, that at the October term of this court, 1829, a final decree, in chancery, was rendered against Pryor, and in favor of Randall, by which, among other things, it was decreed, that Pryor, within thirty days thereafter, should execute and deposit with the clerk, for the benefit of Randall, a deed of release in fee simple, for certain lands, with covenants of special warranty.—Pryor having neglected and refused to comply with this decree, a rule was taken upon him, at the May term of this court, 1830, to show cause why an attachment should not issue against him for contempt. Upon this rule Pryor appeared and submitted the present motion.

There was no argument in favor of the motion.

Hubbard and Johnston, contra.

By the COURT.

There is no doubt of the general power of the court, to enforce its decrees by attachment. The statute, *v.* 22, 80, *Sec.* 40, gives this power in so many words. The only question is, whether the legislative provision, making a decree for the conveyance operate *per se*, as a conveyance, does not take away the power of the court, to enforce the specific execution of such a decree, by attachment.

It was the intention of the legislature to discharge the party, against whom such a decree might be rendered, from the actual execution of the deed. The provision was not intended for the benefit of the party, who had agreed to execute a conveyance, and who, by neglect or refusal, compelled the other party, to resort to a court of equity for a specific performance. The object of the legislature was, to furnish an adequate remedy, in that class of cases, where the proceedings were *in rem*, and where the court could not enforce personal obedi-

ence to its decrees, for want of jurisdiction over the person. It is true that the provision in question, embraces all cases where a decree for a conveyance is rendered; but the party has an option, either to rely upon the decree, as a conveyance, by act and operation of law, or to enforce the actual execution of a deed, where the person of the defendant, is within the jurisdiction of the court.

Whether in the event of a failure of title, the remedy of a grantee would not be more plain and simple upon a deed with covenants, than upon a decree, the court do not intend to intimate an opinion. The general power of the court to enforce its decrees, is not limited by any statutory provision; and we see no reason, in this case, why it should not be exercised.

Motion to discharge is overruled.

FULTON v. MONAHAN.

Whenever an individual undertakes to justify a trespass, under the authority of government, that authority must be traced to some officer of the government, known and recognized by law as such.

When the defendant justifies the breaking of the close of the plaintiff and carrying away stone for the construction of the National Road, the plea must set forth the facts that constitute a necessity for such invasion of private rights.

This was an action of trespass, *quare clausum fregit*, and was reserved from the county of Muskingum.

The defendant *justified*, under the act of Congress, passed May 15th, 1820, and March 3d, 1825, establishing a national road through the state of Ohio, and, in his plea of justification, alleged, that the national road had been laid out, near the close in which, &c.: and that the defendant, as the servant, and under the direction and authority of the government of the United States, broke and entered said close, and took, and carried away said lime stone, and used the same, in the construction of said road, and for no other purpose.

To this plea, the plaintiff demurred generally.

Adams and Stilwell, in support of the demurrer. *Culbertson*, contra.

By the COURT.

The plea does not set forth with sufficient certainty, the authority, under which the defendant professes to have acted. The government necessarily acts by its officers: and whenever an individual undertakes to justify a trespass, under the anthority of government, that authority must be traced, to some officer of the government, known and recognized by law as such.

The defendant, however, in this case seems to have rested his defence principally upon the grounds that the national road had been located near the plaintiff's close, and that stone were necessary in the construction of that road. Admitting these grounds, it by no means follows that it was necessary to use the plaintiff's stone. If he chose to rest his defence upon the necessity of using the plaintiff's stone, he out to have set forth the facts, that the court might judge

of the necessity. A man may justify going over another's ground, by reason that the common highway is foundrous, or out of repair; but, in this plea of justification, it is not enough to say, that it was necessary for him to go upon the adjacent land, but he must alledge specially, that the highway was out of repair, or fownderous. (*Doug.* 747. 1 *Saund R.* 298, *v.* 1. *Story's Pld.* 607.)

Demurrer sustained.

THE TOWN OF MARIETTA *v.* FEARING.

Incorporated towns, in this State, cannot subject stray animals, owned by persons not residents of such town to their corporation ordinances.

Error to the court of common pleas of Washington county.

An action of debt was commenced before the mayor of the town of Marietta, to recover a penalty for the violation of an ordinance of said town, to restrain horses from running at large. From the decision of the mayor, the defendant in error appealed to the court of common pleas. The plaintiffs in error set forth, in their declaration, their charter of incorporation, by which, among other things, it appeared that they were authorized and empowered to establish such ordinances and laws, with such penalties annexed, as to them might seem proper and necessary, for the health, safety, cleanliness, convenience, morals, and good government of said town, and the inhabitants thereof: and to cause the streets and commons of said town to be kept open and in repair, and free from every kind of nuisance, and to require and compel the abatement of all nuisances within the corporation: Provided, all such ordinances and laws should be consistent with the constitution and laws of this state, and of the United States. Under these powers, the plaintiffs, on the 7th of April, 1825, established an ordinance, by which it was declared to be unlawful for any horse to be suffered to run at large on the streets, commons, or vacant or uninclosed lots, within said town, between the 10th of April and the 1st of December, of each and every year; and that if the owner or keeper of any horse, mare, &c. should suffer the same to run at large, contrary to the provisions of this ordinance, the person or persons so offending, should forfeit and pay, for the use of said town, a sum not exceeding two dollars for each offence, to be recovered before the mayor. This ordinance was duly published. The defendant, disregarding said ordinance, permitted his two mares and one colt to run at large, on the streets and commons of said town, during the time prohibited in said ordinance.

To this declaration, the defendant pleaded, that before and at the time when, &c. the defendant did not reside within the limits of the town of Marietta, but resided upon a tract of land adjoining said town, and through which tract of land, there run a public highway, leading from said town of Marietta to the town of Belpre; and between which and the commons of said town of Marietta, there was no fence or barrier; and that at the time when, &c. the defendant turned said two mares and colt from his fields, part of said tract of land, into the said highway, whence the said mares and colt, without any other permission of the defendant, strayed upon the commons, in the declaration mentioned, and

remained there without the defendant's knowledge, which is the same running at large, complained of, &c.

To this plea, the plaintiffs demurred generally. The court below overruled the demurrer, and gave judgment for the defendant, to reserve which, this writ was prosecuted, and the common error assigned.

Nye and *H. Stanbery*, for plaintiff in error. *Goddard*, contra.

By the COURT.

It is a general rule of law, that strangers, as well as citizens, are bound by the ordinances and by-laws of a corporation. Strangers visiting a country, are bound by the laws of its sovereign. (1 *Vattal, ch.* 4, *sec.* 49.) Strangers coming into a corporation, must, at their peril, take notice of the by-laws of such corporation. (1 *Bac. Ab.* 550. 1 *Comp.* 269.) A by-law of a city is binding upon strangers coming within the territorial limits of the city. (6 *Pickering*, 187.) These principles prevail in all well organized governments, and the experience of ages has proved their practical utility.

But do these principles apply to the present case? The statute concerning stray animals, (*Vol.* 22, 343,) after pointing out the mode in which animals running at large may be taken up and disposed of, provides, "that nothing in the act for the incorporation of towns, and nothing in any special act for the incorporation of any town or village in this state, shall be so construed as to authorize the making of any by-laws or ordinances, or to enforce the same, of any such town or village, which shall subject any animals, the property of any person not residing within the limits of such town or village, to be taken up and dealt with in any other manner than is provided for in this act." We consider this a decisive expression of the legislative will upon this subject; and it was intended to subject non-resident owners of animals to no further liabilities for strays, than those imposed by the act. It removes no difficulty to say, that the ordinance of the town of Marietta operates, not on the animals but on the owner, in the shape of a penalty. It infringes the spirit of the law, and is repugnant to its policy. That cannot be done indirectly, which the law prohibits to be done directly. An ordinance of an inferior corporation, in violation of a public statute, is necessarily void.

But this statute was passed after the town of Marietta was incorporated, and it is to be enquired, whether it is competent for the legislature to modify or restrict its charter without its consent. In this respect there seems to be a well settled distinction, between private and public corporations. In the case of *Dartmouth College v. Woodward*, (4 *Wheat.* 518,) the supreme court of the United States held, that a private corporation is a contract between the government and the corporation, and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared. But a public corporation, created for the purpose of government, cannot be considered as a contract. We adopt the rule laid down by the late Chancellor Kent upon this subject. (2 *Kent's Com.* 245.) "In respect to public corporations, which exists only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, or restrain

them, securing, however, the property, for the uses of those for whom it was purchased."

Upon the whole, we are of opinion, that the legislature reserved the power to prohibit corporations from interfering with animals running at large, where the owners are non-residents of the corporation; and that this power was virtually exercised by the passage of the statute.

Demurrer overruled.

MILLER *v.* FULTON ET AL.

Trespass, *quare clausum fregit*, cannot be supported by the landlord for a wrong done by a stranger, while the tenant has the actual possession.

This was an action of trespass *quare clausum fregit*, for tearing down the plaintiff's mill dam, situated on the Scioto river, in the county of Ross. A verdict was found for the plaintiff, under the plea of the general issue, in the supreme court, and a motion for a new trial was submitted, and reserved for the decision of this court. Numerous questions were presented by the record, but the opinion of this court was limited to the question of the plaintiff's possession of the *locus in quo;* the statement of facts is therefore confined to the same point.

John Cutright, a witness for the plaintiff, stated, that at the time the trespass was committed, and for several years before, the complainant was the owner of, and in possession of a small tract of land, situated on, and bounded by the western bank of the Scioto river, in Ross county, on which tract of land there was a water mill, a small dwelling house, and a corn house; that no part of the tract had ever been tilled or cultivated; that some ten or twelve years previous, a dam had been erected from the mill across the river, and which abutted against the eastern bank of the river, on a tract of land formerly owned by one Hough, who also had a mill supplied from the same dam. The breach in the dam, for which this suit was brought, was between the east bank and the centre of the river. That for two or three years prior, the plaintiff had repaired the whole dam every spring. That he, the witness, at the time the breach was made in the dam, was running the plaintiff's mill, as his miller, and he and his family occupied the dwelling house and the corn house, situate on the mill tract, near the plaintiff's mill. That he, Cutright, hired hands to assist him in running the mill, and paid them out of the proceeds of the mill. That he provided lights for the mill, and was not bound to grind for the plaintiff more than for other persons: That he had the entire management of the mill, as a miller, to work her:—that he had a right to do as he wished with her: he used the tract of land on which the mill stood, or a part thereof, for pasturage: That he was to retain one third of the proceeds of the mill for his services, as miller, &c. and give the plaintiff two thirds; and that no time had been fixed for the termination of the contract between himself and the plaintiff.

Joseph Hawkes also testified that Cutright and one Veal were in possession of the mill, at, or about the time of the trespass.

It was admitted that at the time of the trespass, the plaintiff resided in the town of Chillicothe, one or two miles from the mill.

King, *Allen*, and *Leonard*, for the motion. *Murphy* and *G. Swan*, against it.

By the COURT.

The evidence in this case, proves beyond a doubt, that Cutright was a tenant of the plaintiff, and had the possession *in fact* of the premises, at the time the trespass complained of, was committed. A special contract had been entered into, by which Cutright was bound to pay the plaintiff, two thirds of the proceeds of the mill. Under this contract, Cutright took actual possession of the mill and its appurtenances, and employed and paid his own laborers, in conducting the business of the mill. The same relation of landlord and tenant existed between Cutright and the plaintiff, as between any other landlord and his tenant, who is bound to yield one third of the crop, and the owner of the soil.

It is no longer an open question, whether trespass *quare clausum fregit*, can be supported by the lessor, for a wrong done by a stranger, while the tenant has the actual possession: (1 *Chitty's Pld.* 161, 1 *Johns. Rep.* 511, 3 *Sergt. and Rawl.* 514.)

New trial granted.

JOHN DOE v. RICHARD ROE.

SAME, v. SAME.

By the 59th Sec. of the Judiciary act, a discretionary power is vested in the Court, to admit the tenant, landlord, or other person claiming title, as defendant in the place of the casual ejector, upon application being made to the Court for that purpose; but the Court have no power to compel the tenant or any other person, to make defence.

These actions were brought in the supreme court of Hamilton county, to recover the possession of certain lots in the city of Cincinnati.

Declarations were duly served upon the tenants in possession. At the appearance term, William Harmer and others, heirs at law of Josiah Harmer, moved the court to be made defendants, in the place of the casual ejectors; and, at the same time, presented a petition to remove the causes to the next circuit court of the United States, for the district of Ohio.

It appeared that the value of the premises in question, was greater than five hundred dollars, exclusive of costs; that the lessors of the plaintiff were residents of the state of Ohio; that the persons upon whom the declarations were served, were tenants for years, under the said William Harmer and others, who were owners of the fee, and bound by their covenants to sustain their said tenants in the quiet possession of the premises; and that the said William Harmer and others, are citizens and residents of the commonwealth of Pennsylvania. Bonds with security were entered, in pursuance of the act of congress. (*Vol.* 2, 60.)

The decision of these motions was reserved for the special session.

Caswell and *Starr*, for the motion. *Hammond*, contra.

By the COURT.

Upon service of a declaration in ejectment, if no application be made to the court by the tenant, or other person claiming title for leave to defend, a judgment by default passes as of course; and the court have no power to compel the tenant in possession, or any one else, to make a defence. By the 59th section of the judiciary act, a discretionary power is vested in the court, to admit the tenant, landlord, or other person claiming title, upon application being made to the court for that purpose. In these cases the tenants are not before us. They make no application to be admitted defendants, either severally, or in conjunction with their landlords; and it is out of the power of the court to compel them, *nolens volens*, to undertake the defence. The application is made by the landlords alone, and having exhibited a *prima facie* right, they must be admitted as defendants. The landlords being admitted as defendants, and showing themselves citizens and residents of the commonwealth of Pennsylvania, are entitled to the privileges of the act of Congress; and the cases are accordingly certified to the circuit court of the United States.

THE CINCINNATI WATER CO. *v.* THE CITY OF CINCINNATI.

When a plaintiff undertakes to set out his title he must set out a good one.

Where he claims title in his declaration under an ordinance, and from his own showing it appears, that his rights depend "upon certain terms in said ordinance expressed," such terms must be set forth.

This was an action on the case, reserved from the county of Hamilton.

The declaration alleged, that on the 31st of March, 1817, the town council of the city of Cincinnati, by their certain ordinance, granted to the Cincinnati Manufacturing Company, their heirs, successors, and assigns, the exclusive privilege of conveying water, by tubes or otherwise, from the Ohio river, through the streets, alleys, &c. of the city of Cincinnati, for the purpose of supplying the inhabitants, &c. for the term of ninety-nine years, upon certain terms, in said ordinance expressed. That on the 18th of March, 1820, the Cincinnati Manufacturing Company duly assigned all their interest and privileges, acquired under said ordinance, to one Samuel W. Davies, who, with his associates, on the 7th of January, 1826, were duly incorporated, under the name of the Cincinnati Water Company. That the Cincinnati Water Company thus acquired the exclusive privileges, so granted by the city, and became possessed of all the buildings, machinery, pipes, reservoirs, &c. of the Cincinnati water works, and became and were the owners, and were possessed of divers pipes, &c. located in divers streets, alleys, &c. which were particularly specified and described in the declaration. That the Cincinnati Water company, being so possessed, &c. and enjoying great profits, &c. the city of Cincinnati, not ignorant of the premises, but contriving and intending to injure and oppress the Cincinnati Water company, and to deprive them of the profits, &c. and to put them to a great expense in removing and replacing said pipes, &c. by a certain ordinance of

the city council, did order and direct and cause the said streets and alleys to be dug down, torn up, and the water pipes, &c. therein located, to be dug up and destroyed, &c. and compelled the Cincinnati Water company to replace their pipes, &c.

The defendants demurred generally. The court of common pleas sustained the demurrer, and the plaintiffs appealed to this court.

Storer and Fox, in support of the demurrer. *Hammond*, contra.

By the COURT.

The plaintiff might perhaps have rested his title upon his possession, but he has chosen to set out his title, and he must therefore set out a good title. (1 *Ch. Pld.* 215.) He claims title under an ordinance of the city of Cincinnati, and from his own showing it appears, that his rights depend "upon certain terms in said ordinance expressed." It does not appear what those terms are, or whether they are such as give him any rights. *

Demurrer sustained.

* A plaintiff, who is to recover upon the strength of his own case, is to show that sufficiently, to entitle himself. (13 East. 112.- 1 Bos. and Pul. 97.)

REEDER, ET AL. v. BARR ET AL.

A patent was issued to N. "as assignee of the administrator of R. H. deceased," such recital is sufficient to put a subsequent purchaser from the patentee, upon enquiry for the rights of the heirs, and he must at his peril, as certain whether those rights have been extinguished.

This was a suit in chancery, reserved for decision by the supreme court in Hamilton county.

The bill sets forth, that the complainants are the heirs at law of one Henson Reeder, who died in the year 1811: That some time in the year 1810, Henson Reeder purchased a certain lot of land in the city of Cincinnati, of the United States, and paid up a part or the whole of the purchase money, and obtained a certificate therefor, in the usual form, and took possession thereof. Sometime after the death of Henson Reeder, Samuel Newell set up some claim to said lot, as assignee of the administrator of Henson Reeder; and by falsely representing himself as such assignee, obtained a patent for the lot in his own name: That the administrator of Henson Reeder never sold, directly or indirectly, said certificate, or any interest whatever in the lot, to Newell, or any other person, and had no power so to do: That Newell took forcible possession of the lot, and retained the same until 1823, when it was sold upon execution, as the property of Newell, to the defendants, John T. Barr and Thomas Welch.

The bill also charges, that the defendants, Barr and Welch, when they purchased, had notice that Newell claimed title only as assignee of the administrator of Henson Reeder; that his title is so recited in the patent, and knew also that

said administrator did never, in fact, assign any interest in the lot to Newell.

It is also charged, that the patent was fraudulently obtained, and the President of the United States imposed upon.

The patent was issued on the 15th of August, 1816, to Newell, *as assignee of the administrator of Henson Reeder, deceased.* The bill prayed for an account of the rents and profits, and for a reconveyance of the title.

The defendant, Barr, filed his plea in bar, alleging, that on the 8th of December, 1819, Newell, being in the quiet possession of the lot, mortgaged it to Barr and Welch, for a valuable consideration: that the mortgage became forfeited; a *scire facias* issued; a judgment was rendered, and the lot was taken in execution, and sold by the sheriff to Barr and Welch, and conveyed to them by the sheriff, on the 26th of February, 1823: That Barr and Welch took possession; and on the 5th of October, 1826, Welch, for a valuable consideration, conveyed all his interest in the lot to Barr, who has continued the possession ever since: That he had no notice whatever of the claim of the plaintiffs, or that Newell claimed title only as assignee of the administrator of Henson Reeder; or that his title was so recited in his patent; or that the administrator had not assigned the title of said lot to Newell, at or before the time when he, the said Barr, acquired his title, as herein set forth; and that he was an innocent purchaser, for valuable consideration, and without notice.

To this plea the plaintiffs filed a general replication.

The defendant, Newell, answered, denying all fraud, and disclaiming title, the lot having been sold upon execution, as set forth in the plea in bar.

No testimony was taken.

Storer and *Fox*, for complainants.

By the COURT.

The patent was issued to Newell, *as assignee of the administrator of Henson Reeder, deceased;* and the only question is, whether this disclosure of the rights of the patentee, and of the manner in which they were acquired, is sufficient to charge a subsequent purchaser, with notice of the equitable rights of the complainants, as heirs at law of Henson Reeder. The true rule upon this subject appears to be, "that the law imputes that notice, which, from the nature of the transaction, every person of ordinary prudence must necessarily have." (13 *Ves.* 120. *Mad. ch.* 327. *Newland*, 511.)

If, in the investigation of a title, a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed. Here, Barr, in tracing his title, must have seen from the patent, that Newell's right was derived from an administrator, who possessed no title to the land himself, and whose deed could be available only by a previous compliance with certain legal formalities. If the assignment of an administrator, *per se*, conveyed the equitable rights of the intestate, the purchaser might stand in a different situation. As it is, we are of opinion, that the recital in the patent, is sufficient to put a man of ordinary prudence to an enquiry for the rights of the heirs; and that a subsequent purchaser must, at his peril, ascertain whether those rights have been regularly extinguished.

Authorities are cited to show, that presumptions of regularity are to be made in favor of public officers. (3 *East.* 200. 19 *John.* 347.) And that the existence of a grant is sufficient ground to presume that every pre-requisite has been performed. (9 *Cranch*, 98. 5 *Wheaton*, 304.) If this grant were a simple conveyance to Newell, his assignees might, perhaps, claim the benefit of these rules; but the grant, upon its face, shows that the heirs of Reeder were the owners of the estate, after the death of their ancestor; and it is going too far to say, that there is a legal presumption, not only that the officers of government have performed their duties, but that the rights of the heirs of Reeder have been divested, by a judgment of a court of competent jurisdiction. (a)

Plea overruled.

(a) Purchasers under letters patent, reciting a trust, are bound to take notice of the trust at their peril. [1 Ves. 261, 319. 1 Ch. Ca. 258.] So a purchaser under persons authorised by statute to sell, is presumed to know the nature and extent of the authority, and purchases at his peril. [3 J. C. R. 344.]

LYTLE, ET AL. v. THE CINCINNATI MANUFACTURING CO.

Money made upon a junior judgment, in life, cannot be distributed among elder judgments, upon which executions have not been issued or levied within five years, and which have not been revived.

Certiorari to the court of common pleas of Hamilton county, to reverse an order for the distribution of certain monies made upon execution.

At November term. 1829, the sheriff returned, that he had made twenty-six thousand eight hundred and sixty dollars upon an execution, issued on a judgment in favor of Lytle and Avery, against the Cincinnati Manufacturing Company. Upon this return, several other judgment creditors appeared, and claimed this money or a part thereof, and founded their claims upon the following state of facts:

October 12th, 1820, the Miami Exporting Company recovered a judgment against the Cincinnati Manufacturing Company for seventeen thousand eight hundred dollars. *On the same day*, Samuel Davis, James Findlay, and Jacob Wheeler recovered a judgment against the same defendants, for ten thousand two hundred and thirty-six dollars and fifty cents. *On the 27th of December*, 1820, Lytle and Avery recovered a judgment against the same defendants, for forty-nine thousand six hundred and forty-five dollars and fifty-nine cents.

There was also another small judgment, against the same defendants, in favour of Henry Hafer, which, by the agreement of all parties, was entitled to a preference, and about which there was no dispute. Upon the other three judgments, executions were issued, and returned as follows:

Mi. Ex. Co.—Judg't Oct. 12, 1820.

Execution.	*Date.*	*Return, &c.*
Fi. fa. et. lev. fa.	Jan'y. 30, 1821.	Levy on land, January 30, 1821.
Vendi.	Dec. 8, 1821.	Unsold.

Al. vendi.	June 19, 1823.	Sold on an execution, in favour of Davis, Findlay, and Wheeler. This return, on motion of plaintiff, was set aside at August term, 1823, to which the writ was returnable. This judgment was revived by *scire facias*, on the 24th of December, 1829.

DAVIS AND OTHERS—Judg't. Oct. 12, 1820.

Execution.	*Date.*	*Return, &c.*
Fi. fa. et. lev. fa.	Jan. 31, 1821.	Jan. 31, 1821.—Levied on same land, as execution in favour of Mi. Ex. Co.
Vendi.	April 2, 1822.	To May 7, 1822. Stayed by injunction.
Al. vendi.	June 25, 1823.	Aug. 1, 1823.—Sold to J. C. Morris. At August term, 1823, this sale was set aside by the court.

Execution.	*Date.*	*Return, &c.*
Pl. vendi.	Nov. 11, 1823.	Dec. 15, 1823.—Sold to the plaintiffs in execution. This sale and the valuation, was set aside, by consent, Sep. 3, 1829

LYTLE AND AVERY.—Judg't. Dec. 27, 1820.

Execution.	*Date.*	*Return, &c.*
Fi. fa. et. lev. fa.	Feb. 8, 1821.	Feb. 9, 821.—Levied on same land, as execution in favour of Mi. Ex. Co.
Vendi.	March 27, 1824.	Not given to the sheriff.
Al. vendi.	March 23, 1827.	Endorsed, "Judgment assigned to U. S. Bank, 31st March, 1827:" Stayed by Jones and Fox, June 27, 1827.
Pl. vendi.	June 16, 1829.	Sold, July 20, 1829, to the Mi. Ex. Co.

		This sale, and the valuation, were set aside, by consent, Sept. 3, 1829.
Al. pl. vendi.	Sept. 10, 1829.	Sold, Nov. 16, 1829, to G. W. Jones, Agent U. S. Bank, for twenty-six thousand eight hundred and sixty dollars, the money now in controversy.

The assignees of the judgment of Lytle and Avery, against the Cincinnati Manufacturing Company, also offered in evidence a mortgage of the premises levied upon, dated December 11, 1820, executed by William Lytle, William H. Lytle, and Timothy Kirby, in their capacity as trustees of the Cincinnati Manufacturing Company, to William H. Lytle and Henry Avery, to secure the payment of forty-eight thousand eight hundred and six dollars and eighty-two cents, This mortgage was recorded January 9th, 1821, and on the 13th of April, 1826, was assigned by Avery and Lytle to the bank of the United States.

Also, a notice, dated December 21, 1820, signed by David E. Wade, president, *pro tem.* and William Oliver, cashier, served upon the Cincinnati Manufacturing Company, notifying them that the Miami Exporting Company, on the 25th of December, then next, would take judgment against the Cincinnati Manufacturing Company, upon the same debts for which the judgment had been rendered in favour of the Miami Exporting Company, against the Cincinnati Manufacturing Company; and that at the date of this notice, Wade and Oliver acted as the officers of the Miami Exporting Company.

Also, a declaration in assumpsit, signed by Este and Storer, as attorneys for the Miami Exporting Company, against the Cincinnati Manufacturing Company, founded upon the same debt, and served upon the latter company at the same time, with the above note.

Also, a bill in chancery, filed in the supreme court of Hamilton county, at June term, 1821, by the Miami Exporting Company, against Davis, Findlay, Wheeler, and others, in which the Miami Exporting Company charged, that Davis and Wheeler, pretending to be two of the trustees of the Cincinnati Manufacturing Company, on the 2nd of September, 1820, made a warrant of attorney to Joseph S. Benham, Esq., by virtue of which, he confessed the judgment in favour of the Miami Exporting Company, against the Cincinnati Manufacturing Company: That the Miami Exporting Company were never consulted by Davis and Wheeler, as to the confession of said judgment, or the warrant of attorney to Benham; nor had they any knowledge thereof until after the judgment was confessed; and they deny any and all right in Davis and Wheeler to make said power of attorney in behalf of the Cincinnati Manufacturing Company; and pray, that the said judgment be decreed null and void, and completely vacated, for the want of authority in Davis and Wheeler to make

said warrant of attorney, and for the manifest collusion, fraud and illegal conduct, on the part of the defendants in the bill, in obtaining the judgment. This bill was dismissed by the complainants the same term at which it was filed, and the injunction, allowed therein, dissolved.

Also, the following statement of David E. Wade, which was admitted in evidence, by consent, as if sworn to, not admitting its truth or competency. David E. Wade states, that in 1820 he was a director of the Miami Exporting Company; and acting as their president, *pro tem.* That the above bill in chancery was filed at the instance of B. Storer, one of the counsel of the bank, Mr. Este being absent: That he was first induced to take some steps in this matter by Henry Avery, who informed him how the judgments were taken, and urged him to file the bill, which he did, by the advice of Storer, and two or three of the directors, contrary to his own opinion. He thinks the board of directors were not convened upon the occasion.

The Miami Exporting Company gave in evidence, a bill in chancery, and an injunction allowed thereon, filed in the supreme court of Hamilton county, on the 18th of May, 1821, by the Cincinnati Manufacturing Company, against the Miami Exporting Company, Oliver M. Spencer and William Oliver, charging that the warrant of attorney to Benham was unauthorized by the Cincinnati Manufacturing Company, and reciting the allegations contained in the bill filed by the Miami Exporting Company, against the Cincinnati Manufacturing Company, as above set forth; and charging that the Miami Exporting Company had levied an execution on the lands of the Cincinnati Manufacturing Company, and were proceeding to sell the same, and prayed a perpetual injunction. The bill was answered; and on the final hearing, May 19th, 1823, was dismissed, at the costs of the complainants.

Also, the record of the original judgment in favor of the Miami Exporting Company, against the Cincinnati Manufacturing Company, and of the proceedings in a writ of error allowed thereon; from which it appeared, that a summons issued in favor of the Miami Exporting Company, against the Cincinnati Manufacturing Company, on the 7th, and was served on the 13th of October, 1820, and that the judgment was confessed by Benham on the 12th of the same month, by virtue of a warrant of attorney for that purpose, executed by Davis and Wheeler, as trustees of the Cincinnati Manufacturing Company, with a release of error, and stay of execution for three months. Upon this judgment, a writ of error was allowed on the 27th of September, 1825, and continued in the supreme court until May term, 1829, when the same was quashed, on the motion of the defendants in error.

Also, the record of the original judgment in favor of Davis, Findlay, and Wheeler, against the Cincinnati Manufacturing Company, and of the proceedings in a writ of error allowed thereon; from which it appeared, that this judgment was confessed by Benham on the same day, and under the same circumstances, as the judgment in favor of the Miami Exporting Company, with the exception of a stay of execution. Upon this judgment a writ of error was allowed on the 21st of April, 1825, which was discontinued by the plaintiff in error, at May term, 1829.

Also, a bill in chancery, now pending in the common pleas of Hamilton

county, filed by the bank of the United States and William Lytle, against the Cincinnati Manufacturing Company, the Miami Exporting Company, Davis, Findlay, Wheeler, and Avery, setting forth the assignment of said mortgage, and of the judgment of Lytle and Avery, against the Cincinnati Manufacturing Company, to the bank; and also, all the proceedings of the Miami Exporting Company, and of Davis, Findlay, and Wheeler, in relation to their respective judgments against the Cincinnati Manufacturing Company, and praying a sale of the mortgaged premises, for the benefit of the judgment of Lytle and Avery, and an injunction against the Miami Exporting Company, to restrain them from enforcing their judgment against the mortgaged premises.

Also, the answer of the Miami Exporting Company, asserting their rights to a preference, by virtue of their prior judgment against the Cincinnati Manufacturing Company.

The order for the distribution of the moneys in controversy, was made on the 16th of November, 1829, the same day on which the land was sold.

No bonds were given upon the allowance of the writs of error, upon the judgments against the Cincinnati Manufacturing Company.

The judgment of the Miami Exporting Company was revived on the 24th of December, 1829.

Upon this state of facts, the court below ordered, that after discharging the judgment of Hafer, the balance of said moneys should be applied to the discharge of the judgments of Davis, Findlay, and Wheeler, against the Cincinnati Manufacturing Company, and the Miami Exporting Company, against the Cincinnati Manufacturing Company, in preference to the judgment of Lytle and Avery, against the Cincinnati Manufacturing Company; to which order, the bank of the United States, assignees of Lytle and Avery, excepted, and sued out this writ of *certiorari*,

Caswell and *Starr*, for the plaintiffs in *certiorari*.

Storer and *Fox*, on the same side. *Worthington*, contra.

By the Court.

The assignees of Lytle and Avery, having purchased the real estate in controversy, upon an execution in their favor, regularly issued and levied, are entitled to retain the purchase money, and apply the same as a credit upon their judgment, unless some other subsisting, paramount claim is interposed.

The pretensions of the several applicants are to be considered.

First: It seems agreed by all parties, that the judgment of Hafer is entitled to priority; and may, therefore, be laid out of the question.

Second: The judgment of the Miami Exporting Company being older than the judgment of Lytle and Avery, is entitled to a preference over the latter, unless that preference has been lost by the lapse of time, or laches of the party. It appears that the last execution issued by the Miami Exporting Company, was on the 19th of June, 1823; the sale upon which was set aside at the August term following. The judgment was revived on the 24th of December, 1829, more than five years from the date of the last execution, and from the time the sale thereon was set aside. The sale, which produced the moneys in

controversy, was made on the 16th of November, 1829; and the motion to distribute the moneys was made and granted on the same day, and more than one month before the judgment of the Miami Exporting Company was revived. So far, therefore, as the Miami Exporting Company are concerned, the only question is, whether a senior judgment creditor, who has issued no execution for more than five years, is entitled to moneys made by a sale upon a junior judgment.

By the common law, a plaintiff could not have execution upon a judgment after a year and a day passed; but he was put to his action of debt upon the judgment. (2 *Inst.* 469. *Co. Litt.* 290, 6.) But by *St. W.* 2, 13 *Ed.* 1, 45, he might have a *scire facias quare executionem non, &c.* If this statute was in force in this state, it is now abrogated by the statute, in which our legislature have undertaken to act upon the same subject matter; and they have, in effect, prevented the issuing of executions, either *fi. fa. lev. fa.* or *vendi.*, by declaring, that after the expiration of five years, it shall be lawful to maintain an action of debt, or sue out a *scire facias* upon judgments, &c.

At common law, if a *fi. fa.* were issued within the year and day, and *nulla bona* returned; or an *elegit*, and no execution thereon, there might be another *fi. fa. elegit*, or *ca. sa*, several years after, without *scire facias*, if continuance were entered from the first *fi. fa.* or *elegit*. (1 *Inst.* 230. 4 *Inst.* 271. *Str.* 100. 4 *Com. Dig.* 143.) This principle of the common law was also abolished by our statute, which provides, that if five years intervene, after the date of one execution, before another is sued out, then debt or *scire facias* may be prosecuted, &c.

It is a well settled rule, that an execution is sued upon a dormant judgment, will be set aside on motion, and the goods or money levied, restored to the judgment debtor; and sometimes with costs. (2 *Wills.* 82. *Tidd's Prac.* 935. 3 *Caine's Rep.* 270. 2 *Saund.* 71, 4.) The reason of this rule is, that after the year and day, the law presumes the judgment satisfied; and it will not permit the judgment creditor to be disturbed by an execution, without a *scire facias*, or other legal process.

This rule of the common law, and its reason, apply with equal, if not greater force, to cases under our statute, where five years have elapsed and no execution issued; or where five years elapse after the date of an execution, before another is sued out. But, it is urged that the injunction obtained by the Cincinnati manufacturing company, takes the case out of the operation of this rule.

It was formerly held, that if the plaintiff had been tied up by injunction, for a year and day, he could not take out execution without a *scire facias*. (6 *Mod.* 283. 1 *Str.* 301. *Bac. Ab. Execution.* But this principle has been overruled, and it is now held, that he may afterwards sue an execution without *scire facias*. (2 *Burr.* 660. 2 *Saund.* 72.)

In the present case, however, the injunction was dissolved, and the bill dismissed in May, 1823; and more than five years having elapsed from that time, as well as from the date of the last execution, the party is in the same situation as if the injunction had never been allowed, or any execution issued.

It is also claimed, that the writ of error prosecuted in 1825, removes the necessity of suing out execution within five years from the date of the last execution.

If the defendant brings a writ of error, and the judgment is affirmed, the defendant in error may take out execution after the year, and without *scire facias;* because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait until it be determined. (5 *Rep.* 88. *Bac. Abg. Execution*, 332. 2 *Saund*, 72.)

But by the express provisions of our statute, *vol.* 22, 70, no writ of error shal operate as a *supersedeas*, until bond and security are given. Notwithstanding the allowance of the writ of error, therefore, the Mi. Ex. Co. were at full liberty to sue out execution upon their judgment. No bond was executed, and of course there was no *supersedeas* to the execution.

Admitting then that the judgment of the Mi. Ex. Co. was originally valid, a point upon which we intimate no opinion, it was dormant, and no execution could have regularly issued upon it, at the time the order of appropriation was made in the court below. It necessarily follows, that the moneys in controversy cannot be applied to discharge such a judgment. The law presumes it to have been paid; and that presumption must be rebutted by an action, or a *scire facias.* Had an execution issued on the judgment of the Mi. Ex. Co. and the money made, the court, on motion, would set aside the execution, as irregular, and restore the money, to the judgment debtor. It would be an anomaly in the administration of justice, to apply money, raised upon a junior judgment, to the discharge of a senior judgment, when, if the same money had been raised upon the senior judgment, itself, the court would set aside the execution and award a restitution of the money.

THIRD. The claims of Davis and others, rest upon the same grounds as those of the Mi. Ex. Co. with one exception.

On the 11th of November, 1823, an execution was issued on the judgment of Davis and others, upon which a sale of the real estate was made by the sheriff, on the 15th of December, 1823; which sale, with the valuation, was set aside, by consent, on the 3d of September, 1829.

Whatever may have been the rights of Davis and others, on the 3d of September, 1829, as to the sale upon their execution, they were then lost, by their voluntary appearance in court, and consenting that their own purchase should be set aside. More than five years had then elapsed, since the date of their last execution, and they were bound to know, that they could issue no other execution without *scire facias.*

The law presumes that the sale was set aside, because the debt had been paid, or released; and if such be not the fact, the plaintiffs must attribute their loss, if any there be, to their own acts. It has been settled in this court, that if a levy be set aside, the parties stand in the same situation as if no levy had been made. (2 *Ohio Rep.* 400.) We see no reason why this principle should not be applied to a sale upon execution, voluntarily set aside by the parties: the execution upon which the sale had been made was *functus officio;* no subsequent steps could be taken to enforce the collection of the judgment, without a new execution; and no new execution could be sued out, because more than five years had elapsed since the date of the last execution.

The judgment of Davis and others, therefore, was entitled to no share of the money in controversy.

It is unnecessary to settle the question, whether the judgments of the Mi. Ex. Co. and of Davis and others, have lost their priority of lien upon the real estate, or whether the purchaser, under the judgment of Lytle and Avery, holds the lands, discharged of the prior incumbrance of those judgments. We are satisfied that the Mi. Ex. Co. and Davis and others, are not entitled to the monies in controversy; and if they have any other rights, we leave them to be asserted, in such manner and form, as the parties may be advised.

Order reversed.

LEIBY *v.* PARKS, ET AL.

Whether a court of law erred in opinion, is not a proper subject of enquiry in a court of equity; nor whether a fair and impartial trial was had at law, unless the complainant shows clearly to the court, that he had a good defence at law, and was prevented from availing himself of it, by fraud, or pure accident, without any default in himself or his agents.

The power of administrators to sell the real estate of an intestate, is strictly a legal power; and if a sale be made, its validity is triable at law; and if, upon such trial, it is decided that the administrator had no power to make the sale, such power cannot be set up in equity.

If a person advance money to pay the debts of the intestate, he thereby acquires no lien upon the lands of the intestate in the hands of the heir.

An agreement to indemnify a warrantor against his covenant of warranty, can work no prejudice to the warrantee.

This was a bill in chancery, to which the defendants demurred generally. It was certified here, for decision, from the county of Hamilton.

The bill charged, that the complainant purchased from Culbertson Parks three different, but contiguous pieces of ground, now situate within the limits of the city of Cincinnati. The first in 1812, the second in 1813, and the third in 1818, for which he paid a full and fair consideration, and received regular conveyances, with covenants of warranty: That he entered into possession of the same, at the time of purchase; had made valuable improvements, and had ever since continued in possession; and that, at the time of the several purchases, he had no notice of any claim, or pretended claim, of any person whatever.

The bill further stated, that on the 10th day of December, 1810, the said Parks had purchased the tract of land, of which complainant's purchases were part, at a public sale, for a full and fair value, from the administrators of Israel Ludlow, deceased, under orders of the court of probate, a court of competent jurisdiction, which orders, at the time of purchase, were in full force, and unimpeachable.

It further charged, that in the month of May, 1804, when the first order was made for the sale of the real estate of Israel Ludlow, on the application of his administrators, the tract of land purchased by Parks, was without the limits of the city of Cincinnati, and wholly unimproved: That Ludlow, at the time of his death, in January, 1804, was largely insolvent: That the outstanding debts greatly exceeded the amount of personal assetts, and of the then value of the real estate: That the administrators, in consequence of the order for selling the real estate, made terms for delay with the creditors, by reason of which, the

estate was extensively benefitted, and a considerable property divided among the children and heirs of Israel Ludlow, the defendants in the case.

The bill further charged, that the heirs of Ludlow had prosecuted an ejectment against Parks for a tract of twenty-seven acres, of which the complainant's grounds were part, upon which they had recovered a judgment, in the supreme court of the state, and threatened to take out a writ of possession, and dispossess the complainant.

The bill further charged, that subsequent to the recovery in ejectment, J. D. Garrard, one of the defendants, had entered into a covenant with C. Parks, to indemnify him, upon all his covenants of warranty, for sales of parts of said twenty-seven acres, by way of compromise of the dispute, which compromise operated as a fraud upon Parks' covenant to complainant.

The bill also alleged, that the plat of the city, used at the trial of the ejectment, to prove that the twenty-seven acre tract in dispute, was, in May, 1804, within the limits of the city, was entirely erroneous; and that a true copy, made part of the bill, shows that said ground, at the time stated, was not within the limits of Cincinnati, as it then existed.

All the documents referred to, were made exhibits; and the prayer was for a perpetual injunction, for a release of the title, and for any benefit complainant might claim of the covenant with Parks.

The order of the probate court, of May, 1804, referred to in the bill, is in these wrods:

"Administrators of Israel Ludlow, deceased, exhibit an account current of said estate. John Ludlow and James Findley sworn, and pray order to sell the real estate, to satisfy the debts, &c. Court grant the prayer of the administrators, excepting and reserving the farm and improved lands at Cincinnati, with the houses and lots in Cincinnati."

The order of December, 1810, also referred to, is in these words. "17th of December, 1810.—Petition of the administrators of Israel Ludlow, deceased, &c, for to sell real estate, to satisfy the demands, &c., which this court grant."

The covenant between Garrard and Parks, referred to, is in these words:

"Memorandum of an agreement, made and entered into this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and thirty, between Culbertson Parks, of the city of Cincinnati, and state of Ohio, of the first part, and Jepthah D. Garrard, of the same place, witnesseth: That the said Culbertson Parks, for and in consideration of the covenant of the said Jepthah D. Garrard, hereinafter mentioned, covenants and agrees to and with the said Jepthah D. Garrard, his heirs, executors, or administrators, that he will make and execute to the said Jepthah D. Garrard, his heirs and assigns, on demand, a deed of release or quit-claim, to the following described property, in the city of Cincinnati, to wit: a certain part of lot, number one hundred and four, in Cincinnati, as the same is now occupied by Robert Kennedy and Wm. Conclin, measuring about thirty-eight feet on Main street, and running back to the alley, about one hundred and ninety feet. Also, a certain other lot, bounded as follows: North by Third street, as extended; east by a lot occupied by Geo. Leiby; south by Second or Columbia street, extended; and west by the section line of the seventeenth fractional section, on which the city is in part laid out. Also, a certain other lot, bounded as follows, to wit: north by Fifth street; eas

by the division line between the said Parks and a lot of twenty-seven acres, late the property of Ormsby and Stanley; south by Third street, extended; and west by the east line of a lot heretofore sold to Messrs. Phillips, Tatem, and Speer; excepting therefrom so much of said lot as was heretofore deeded to Caleb Fagely. And the said Culbertson Parks covenants and agrees to and with the said Jepthah D. Garrard, to deliver up to the said Garrard the quiet and undisturbed possession of the said premises, above mentioned, whenever the same shall be demanded. And the said Jepthah D. Garrard, on his part, covenants and agrees to and with the said Culbertson Parks, his heirs, executors, or administrators, that he will indemnify and save harmless the said Culbertson Parks, his heirs, executors, or administrators, on all of his, the said Parks', covenants contained in certain deeds, heretofore made to George Lieby and others, for parts of a twenty-seven acre lot, which lie between Third street and the Ohio river; which said parts of the said lots have been recovered from the said Lieby and others, in an action of ejectment, by the heirs of Israel Ludlow, deceased, in the supreme court of the state of Ohio. And the said Garrard further covenants and agrees to and with the said Culbertson Parks, his heirs, executors or administrators, that he will pay all the costs that may have accrued on the suits for the said twenty-seven acre lot, and the said lot on Main street, in the circuit court of the United States, and in the court of common pleas, and supreme court of Hamilton county, and state of Ohio, as the same shall be taxed by the clerks of the said courts And the said Garrard further covenants and agrees to and with the said Culbertson Parks, that he will pay the fees that may now be due and owing by the said Culbertson Parks, to his counsel, Messrs. Benham, Este, Wright, Caswell and Starr, provided they do not exceed five hundred dollars in all; and if they exceed, in the aggregate, the sum of five hundred dollars, the said Parks is to pay the excess. And the said Garrard further covenants and agrees to pay to the said Parks, the sum of one thousand five hundred dollars, upon the delivery of the deeds of release, and the quiet and undisturbed possession of the premises, by the said Parks to the said Garrard. And the said Garrard further covenants and agrees to and with the said Culbertson Parks, his heirs, executors, or administrators, that he will indemnify and save harmless the said Culbertson Parks, his heirs or assigns, against any and every claim which the heirs at law of Israel Ludlow, deceased, may have against the following tract or parcel of land, now in the possession of the said Parks, to wit: beginning at the intersection of Fifth and Mill streets, thence eastwardly with Fifth street to the west line of a lot, deeded by the said Parks to Phillips, Tatem, and Speer; thence south with their line, to Third street, extended; thence with Third street to the east line of Milll street; thence with Mill street to the beginning.

In testimoney whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

C. PARKS, [Seal.]
JEPTHAH D. GARRARD. [Seal.]

Witness: DANIEL GANO.

It is the agreement, that this article is in no manner to affect the recourse of the said Parks upon his deed from the administrators, for the said lots.

J. D. GARRARD."

Recorded 22nd February, 1830.

Cincinnati, June 17th, 1831: A true copy from record No. 31, page 407.

Hammond and *Garrard*, in support of the demurrer. *Gaines*, contra.

OPINION OF THE COURT, by Judge COLLET.

Does the complainant, in his bill, state such facts as will authorize this court to enjoin the proceedings in the action at law? The complainant, by his bill, relies for relief on three grounds:

FIRST: That there is a plat, in the clerk's office of Hamilton county, which shows that the land in dispute wassituate beyond the bounds of the town of Cincinnati, when the order to sell lands, of May term, 1804, was made by the court of common pleas; and, consequently, as it was unimproved, was embraced by that order: whereas, on the trial at law, the plat exhibited in evidence, was erroneous, and showed that the premises in controversy were situate within the town of Cincinnati, at the time the said order to sell was made, and consequently, not embraced by that order.

SECOND: That the sale of the land was necessary for the payment of the debts, due from the estate of Ludlow; that it was fairly made by the administrators, for its full value, and the purchase money all appropriated to the payment of the debts due from the estate of Ludlow.

THIRD: That the agreement of Garrard and Parks, referred to by the bill, is a fraud on the covenants of Parks, contained in his deeds to the complainants, for the premises, and an equitable bar to the recovery of the premises, by the heirs of Ludlow.

As to the first ground for relief. The title of the complainant depends on the orders of the court of common pleas, directing the administrators of Ludlow to sell the property, and on the compliance, on the part of the administrators, with the orders and the law, in effecting the sale to Parks. Of the authority to vest this power to sell, and of the compliance with the law and orders, in perfecting this sale, the court of law had jurisdiction to enquire; and further, the court of law did make this investigation. Whether the court of law erred in opinion, is not a proper subject of inquiry, for a court of equity; nor whether a fair and impartial trial was had at law, unless the complainant shows clearly to the court, that he had a good defence at law, and was prevented from availing himself of it, by fraud, or pure accident, without any fault or negligence of himself or his agents. (2 *Peter's Cond. Rep.* 518.)

That an erroneous plat was used on the trial, showing that the premises were situate within the town of Cincinnati, at the time the order to sell land, of May term, 1804, was made; that the premises were then unimproved; that there is a correct plat in the clerk's office of Hamilton county, showing that the premises were not within the town of Cincinnati, at that time, if its production would probably have altered the verdict, is not a sufficient showing to authorize this court to grant relief.

If the erroneous plat was fraudulently made, and imposed on the court at the trial, by the heirs of Ludlow; or the complainant was prevented, by fraud, from using the correct plat the bill should state how the fraud was practiced, what fraudulent acts were done, or words spoken. If he was prevented by acci-

dent, the bill should state how: As that the complainant, or his agents, did not know of the plat in the clerk's office of Hamilton county, in Cincinnati; or if they did know that there was such a plat, that they did not know where it was, until after the time within which they could have moved the court of law to grant a new trial.

Should this court enjoin this judgment, and order a new trial at law, because a fair trial had not been had, it must order a new trial in every case, where the defendant may, in general terms, allege fraud in the plaintiff, in obtaining the verdict against him, and that there existed evidence which would probably change the verdict. From their feelings, defendants would do this with a pure conscience, in most of the cases, where verdicts are against them. Hence courts of chancery, before they order a cause re-heard at law, require that the complainant should show that he used due diligence in preparing and conducting his defence at law, but that he was prevented from then making it, by circumstances beyond his control. (3 *John. Chr.* 350.)

The second ground for relief is, that the sale of this land was necessary for the payment of the debts due from the estate: that it was fairly made, for full value, and that the proceeds of the sale were appropriated to the payment of the debts due from the estate.

As to this, the title to, or lien on the land, in behalf of the complainant, if it exists, is strictly legal, and must arise from the authority of the court of common pleas, to issue the orders referred to by the bills of the complainant, and from the compliance of the administrators with those orders, and the law, in making the sale of the premises to Parks. (2 *O. R.* 393.) Those inquiries have been made, by the court of law; it has been there decided that the sale was without authority; and that the complainant's title was therefore defective. The complainant, if he had purchased directly from the administrator, could not have a lien on the land in controversy, superior to that of any other person, who had furnished the administrators with money, to be appropriated to the payment of the debts due from the estate; and which they had so appropriated. This would not create a lien on the lands inherited by the heirs from the intestate. (1 *O. R.* 522. 3 *O. R.* 332.) If the complainant has a right to recover any part of the purchase money, paid by Parks to the administrators of Ludlow, the administrators must, undoubtedly be parties to the suit. (1 *O. R.* 522.)

That the complainant has made valuable and expensive improvements on the premises, does not authorize this court to enjoin the proceedings in the ejectment, for the recovery of the premises. The right of a defendant in ejectment, to recover payment for the improvements, he has made on the premises recovered of him, is given by the occupying claimant laws: the rules and mode, by which the amount shall be ascertained, are prescribed by these laws, and the proceedings are all required to be in the court of law, in which the ejectment is tried. The law does not give to this court jurisdiction in such cases. The remedy at law is as plain and as adequate, as the legislature chose to make it.

THIRD: That the agreement of Garrard and Parks, is a fraud on the covenants in the complainant's deeds from Parks, and entitles the complainant to relief against the judgment at law. The agreement of Garrard and Parks cannot injuriously affect the rights of the complainant. It does not place him in a

worse situation in respect to his rights of recovery of the purchase money and interest of Parks, since the complainant did not assent to it. If the covenants contained in the agreement of Garrard and Parks, to indemnify Parks against his covenants of warranty with the complainant, can operate as an estoppel, to prevent Garrard, or the other heirs of Ludlow, from setting up their legal title to the premises, it would be by giving to these covenants of Garrard, an effect not probably intended by Garrard and Parks, at the time they made them.—This court will not sustain a bill, to extend the operation of an agreement, beyond the intention of the parties, when they entered into it. It will, in many cases, sustain a bill, to prevent its being so extended. Estopples are not favored by courts of law, and less by court of chancery. Whether this article can have this operation in a court of law or not, this court will not determine, nor will it sustain a bill to give it this effect.

Upon this whole case, this court is clearly of opinion that the complainant's bill does not state such facts as would authorize the court on the hearing, if they were all proved, to decree for the complainant. The bill must, therefore, be dismissed at the complainant's costs.

DENNISON v. ALLEN.

A subsequent purchaser from a mortgagor cannot redeem against a purchaser under a judgment on sci. fa. upon the mortgage, though no party to the proceedings on the sci. fa.

This case was adjourned here for decision, from the county of Hamilton. It was a bill in chancery, by the purchase of an equity of redemption, to redeem the mortgaged premises, in the lands of a purchaser under the mortgagee. Various matters were introduced into the bill and answers, which it is deemed unnecessary to state, because the decision turned upon a single point, which arose on the following state of case.

On the 15th of May, 1815, Cyrus Coffin mortgaged the premises in question, to P. Allen, as a collateral security for Coffin redeeming certain other grounds, previously sold to Allen, subject to a mortgage. On the 2d of February, 1816, Coffin sold and conveyed to Dennison, the lot thus mortgaged to Allen, and Dennison took possession. Subsequently Allen sued a *sci. fa.* against Coffin, on the mortgage, without making Dennison, or the *terre* tenants parties. At May term, 1821, judgment was rendered on the *sci. fa.* in the usual form, for five hundred and fifty-five dollars and fifty-nine cents; and on the 6th of April, 1822, the lot was sold upon execution, and purchased by Allen for three hundred and forty-seven dollars. The other defendants were purchasers under Allen.

Fox, for complainant. *Storer*, contra.

By the COURT.

We conceive that the provisions of our own statute are decisive of this case. By the second section (*vol.* 22, 232,) it is provided, that on a judgment in *scire*

facias, "a writ of *levari facias* may issue, whereon the mortgaged premises shall be taken in execution and disposed of in the same manner and under the same regulations, that lands and tenements are, or may be, disposed of for the satisfaction of judgments." Conformable to these regulations, the land must be valued by sworn appraisers, must sell for a proportionate part of that valuation, the money must be paid to the sheriff, and the sale must be confirmed by the court, and a deed ordered to the purchaser. The fourth section provides that the proceedings shall not "affect the right of any person or persons who may set up any claim to such mortgaged premises, by purchase from or under the mortgagor, or otherwise, and which claim, in law, shall be paramount to the claim of such mortgagee. There seems no ground of doubt, but that the legislature, when they made this provision, intended that interests not paramount to that of the mortgagee, such as interests subsequently derived from the mortgagor, should be concluded by the proceedings on the *scire facias*. We think these two sections, taken together, must be so interpreted as to place the purchaser, at sheriff's sale, under the judgment on the mortgage, in the position occupied by the mortgagor, when the mortgage was executed. Any other construction would convert the judicial proceedings, authorized by the law, into a means of practising fraud on the purchaser. It would discourage bidders at sheriff sale, lessen public confidence in titles held under sheriff's deeds, and prevent the improvement of lands so held. This seems to have been the construction of the Pennsylvania courts, upon a law of similar import. And the same construction appears to have prevailed in Ohio. This is the first bill we recollect filed by a subsequent purchaser from the mortgagor, to be let in to redeem, against a purchaser at sheriff's sale, under a previous mortgage. Had such bills been thought maintainable, we should have heard of them before. The bill must be dismissed.

GOODLOE *v.* THE CITY OF CINCINNATI.

Where a corporation, in grading the streets of a town, acts illegally and maliciously, an action on the case may be sustained against such corporation, for damages.

This cause was adjourned here for decision, by the supreme court of Hamilton county. It was an action on the case, for an injury done to the real estate of the plaintiff.

The declaration states, that the plaintiff, prior to the injuries received, was seized and possessed of a lot of land, (describing it by number,) and a brick house thereon, situated on the north side of Water street, in the said city: That he, the plaintiff, had expended large sums of money in erecting the walls of his said house, in placing a cellar under the same, in fitting and accommodating the doors, windows, cellar, and every part of his said house, for the convenience and accommodation of himself and family, as a place of residence; and for the same purpose, and at like expense, had paved the said street and side-ways thereof, next to and adjoining his said dwelling, as well for the accommodation of his said family, as for the convenience and accommodation of those with whom they held intercourse. To make the said conveniences complete, and

render the house valuable for the purposes intended, its doors, walls, windows, ways, walks, &c. were all finished with an express view to the level and grade of said Water street, as previously made by the defendants: That the defendants, while the plaintiff was so enjoying his house and lot, maliciously and without cause, &c. dug up and destroyed said street, pavements, ways, &c. to the depth of five feet; and took and removed the stone, earth and gravel, &c. by reason of which the walls of his house were injured, his cellar destroyed, and himself and family deprived of the use of his house, &c.

The defendants demurred generally, and the cause was adjourned for decision on the demurrer.

Storer and *Fox*, in support of the demurrer. *Gazlay*, contra.

By the COURT.

Whatever may have been the ancient doctrines, with regard to the liability of corporations, for wrongs done by their agents, courts have gradually departed from them, and adopted principles more congenial to the state and condition of the world. Corporations are established, in our country, for almost every concern of life,—political, pecuniary, and eleemosynary. They govern towns, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations, they act by agents. Where benefits are derived, the corporation enjoys them. Where injury is inflicted, through their means, they ought to be responsible for it.

When the corporation of a town grade the streets, the object is the benefit of the whole town. If an individual is injured, it is right he should have redress, against all upon whose account the injury was perpetrated. There is no justice in sending him to seek redress from an irresponsible agent. There is no propriety in compelling the injured party to look for compensation to the mere agent, who acted in good faith, according to the directions of his employers. And, when the agent is made responsible, leave him, for indemnity, to the discretion of the corporation.

All corporations act by agencies, and those agencies are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case, the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it.

The demurrer is overruled.

SMITH *v.* THE CITY OF CINCINNATI.

This cause was adjourned from Hamilton county, and stood upon the same principle with that of *Goodloe v. the City*, except, that in this case, the act complained of was not charged in the declaration, as *malicious*.

Demurrer overruled.

NOTE. Both of the foregoing cases were remanded back to Hamilton county, with leave to withdraw the demurrer and plead. This was accordingly done; and the causes were tried, at the last term of the supreme court, before Judges HITCHCOCK and WRIGHT, on the plea of general issue. In Smith's case, there was a verdict of two hundred and fifty dollars damages for the plaintiff. In Goodloe's case, there was a verdict for one hundred dollars damages. In both cases, final judgment was rendered for the plaintiffs.

PRICE, ET AL. *v.* METHODIST CHURCH, ET AL.

The payment of burying fees in the burial ground of the Methodist Episcopal Church, or burying in virtue of membership, confers no right to control the Church in the appropriate use of its grounds.

Lands obtained by religious societies, cannot be considered as set apart for a burial ground, unless actually surveyed, described and platted.—Whether the plat must be recorded, QUERE.

Where lands are conveyed to the trustees of the Methodist Episcopal Church, for the use of that church, according to its rules and discipline; the trustees can create no public or individual right inconsistent with the use prescribed by the discipline.

The bill states, that a number of individuals in Cincinnati associated themselves together, as Methodists; and in 1807, purchased lots of ground in Cincinnati, for the accommodation and convenience of themselves and others, for a place of worship and burial; and shortly after the purchase, at their joint expense, erected a place of worship, and opened a burial place, in which the members of the society had liberty to bury their dead, free of expense; and others had leave, also, to bury their dead there, on paying certain burying fees, to the trustees of said society; and that from thence, hitherto, the said ground has been used as a burying ground: That the complainants and others, some of whom are, or were members of the Methodist church, *used the ground designed for that purpose*, as a place of burial for their friends and relatives; and that those who were not members of the society, have paid the trustees of said society, a valuable consideration for the privilege of burying in said ground; and that they have incurred great expense, in erecting memorials and monuments over the graves of their friends: That, to secure the objects of said purchase, the title to said lots was made to certain trustees and their successors, to be held perpetually for the use of said society, and for objects connected with worship, and the burial of the dead: That the defendants have come to a

resolution, to open and dig in the ground of said grave yard, and have given notice that they will remove the ground, and the remains of the dead, therein lying, unless the friends and relatives of the said dead shall remove their remains and monuments from the yard. The complainants pray, that the defendants may be perpetually enjoined from digging up the graves in the yard, and removing the remains of the dead.

The answers admit the purchase of the lots, and the building of the place of worship or church. They also admit, that interments have been made in the ground adjoining the church, from time to time, by members and strangers; and that from some, burial fees have been received; that, in the permitting interments and receipt of the fees, all has been done with the understanding, that the ground was to be held, and used, when necessary, for the purposes of the original trust. They deny the payment of money, by any of the complainants, or that that they were ever given any privilege inconsistent with the trust, or promised any: That the only disturbance threatened, was in a vote of the society, in the regular course of its business, to erect a new church on the ground; and a determination of the trustees, to remove, decently, to some suitable place of interment, such bodies, in said burying yard, as should be necessary, for the convenient building a church, suited to the present exigencies of the society.

The title papers, exhibited by the respondents, are

First: A deed from J. Kirby and wife, dated the 25th of September, 1805, to Lynes and others, trustees, &c. of the Methodist Episcopal Church, of ground in dispute, to the grantees and their successors, in trust:—"That they should erect and build, or cause to be erected and built, a house or place of worship, for the use of the members of the Methodist Episcopal Church of the United States of America, according to the rules and discipline, which from time to time may be agreed upon and adopted by the ministers and preachers of the said Church, at their general conferences in the United States of America; and in future trust and confidence, that they shall at all times forever hereafter, permit such ministers and preachers belonging to the said Church, as shall from time to time be duly authorized, by the general conference of the ministers and preachers of the said Methodist Episcopal Church, or by the yearly conference authorized by said general conference, and none others, to preach and expound God's holy word therein." The deed then prescribes the mode of filling vacancies and keeping up the number of trustees; and then provides, that in case any of the trustees, for the time being, have advanced, or shall advance, or become responsible for, any money on account of the premises, they, or a majority of them, after notice to the society, &c. may raise the money by a mortgage, or sale of the premises.

Second: A like deed from the same persons, dated the 19th of October, 1807, for the same property, on the same trust.

Third: The society, having been incorporated by the general assembly of Ohio, a deed from Kirby and wife, dated 13th June, 1821, of confirmation to the trustees, under the act of incorporation, and their successors in office. This deed covers the same property, except about one hundred feet, before sold by the society, and contains the same declaration of trust.

It is proven, amongst other things, in the case, that soon after the purchase of this ground, in 1805, interments began to be made in it, and have continued

from thence until lately, permission having been occasionally given by the trustees to bury there, and fees taken for the privilege in many cases: That some of the complainants had friends and relatives interred there, and monuments erected to perpetuate their memories: That the ground was never thrown open, or set apart for a public burying ground, though in 1803, about one hundred feet in the north west corner of it, had been laid out in fifteen ranges, a plan for which had been exhibited to a meeting of the society and adopted, as appeared by their minutes, and that since then interments had been regulated by that plan.

An injunction in this case had been allowed by a single judge, in vacation; and the court was asked, on the case made, to exercise its extraordinary power of injunction, to stay the trustees from breaking up the graves and monuments, and disinterring the remains of the dead, in the ground held by them as aforesaid.

Gazlay, Storer and *Fox*, for complainants. *Brooks*, contra.

Opinion of the Court by Judge WRIGHT.

The complainants rest their claim in argument, upon the following grounds:

FIRST: That as purchasers of the privilege of burying in the yard, they thereby acquired a right to the exclusive use, each of a portion of the soil.

SECOND: That this ground has been dedicated to public and pious uses, as a burying yard, and that the disturbing the repose of the dead is a public nuisance, shocking to the best moral and religious feelings of community, which cannot be remedied by ordinary legal process.

As to the first point. We are unable to perceive how the complainants could acquire any right to the soil, by the payment of the burying fees. That exaction, it does not appear, was ever made or yielded to, under any agreement, understanding or expectation, on either side, that it was the purchase of any portion of the land. No conversation looking to that end, ever passed between the parties, nor was any memorandum, conveyance, deed, or other instrument of writing, of any sale, purchase, or appropriation of any portion of this ground, ever demanded or given by the parties. The probability is, these exactions were only made to defray the expense of keeping the ground enclosed and in repair; possibly for compensation to a sexton. But it is unnecessary to inquire into this matter further. At no period of time, since the first organization of government in the territory, now forming the state of Ohio, could title to real estate be acquired in the way claimed. The trustees of the church held this land as trustees only. The limit and extent of the trust was fully and clearly expressed in the deeds, which were formed according to the printed discipline of the society, in the possession of all the churches of the Methodist persuasion.

The deeds were recorded in the county. The discipline and record were notice alike to the members of the church, to those dealing with it, and to all the world, of the manner in which the trustees held these lots, and of the extent of their power over them. They had no right to use them for other purposes than those expressed in the deed; and if they undertook, expressly, in terms, to sell and convey any part of the lots, in any other manner, or for any other purpose than is expressed in the conveyance, their acts would be void.

Can it be successfully maintained, that persons trading with trustees or others, standing only in fiduciary relation to the subject of the trade, can acquire any more or greater rights than the trustees have powers to grant? We think not. The payment of money for interment, is no uncommon thing; but has never been understood as the purchase of a right. It is a charge upon the estate of the deceased, and stands in place of an original contribution for the purchase of the ground, for repairs and for protecting the ground. (*Comyn's Dig. Cemetery, A. 3. B. p.* 324, 326.)

If the claim of the complainants be placed on the ground of membership, and contribution to the purchase of the lots, it will not be found much more favorable. Property of this kind, acquired by the common contribution of the members of an association, is subject to their common control. No separate interest is acquired; and such property is managed by the majority. Even a vote to divide, gives to individuals no right to enforce any separate interest. (*Denton v. Jackson*, 2 *John. Ch.* 320 *to* 329.)

The interests of the members of the Methodist Episcopal Church, assimilates very near to that of pew holders in a church. The right to pews is limited and usufructuary, and does not interfere with the right of the parish to pull down and re-build the church. (*Freligh v. Pratt*, 5 *Cowen's Rep.* 496.) Even an individual, not a member of the society, who purchased and paid for a pew, and occupied it thirty years, acquires but a qualified property in it, subject to the common control; and if it be determined to pull down the church, the minority of pew holders have no remedy, unless it is done wantonly. (*Gray v. Baker*, 17 *Mass. Rep.* 435. *Daniel v. Wood*, 1 *Pick. Rep.* 102. *Wentworth v. Parish in Canton*, 3 *Pick. Rep.* 344. *Commonwealth v. St. Mary's Church*, 9 *Serg. & Raw. Rep.* 508. *Mason v. Muncaster*, 9 *Wheat. Rep.* 445. *Terret v. Taylor*, 9 *Cranch*, 52. *Green v. Willer*, 6 *John. Rep.* 41. *See also* 4 *John. Ch. Rep.* 596, *and* 6 *D. & E.* 396.)

Upon the best reflection we have been able to bestow upon this branch of the question, we are brought to the conclusion, that the complainants have failed to establish their right to the interference of this court, by injunction.

As to the second point. It is urged that the property has been dedicated to the public as a burying ground, under the acts of the general assembly of Ohio, of the 5th of February, 1819, (17 *Ohio Laws*, 120,) for incorporating religious societies. The 4th section of that act, provides: "That any lot or part of lot, obtained by any religious society, by purchase or donation, and set apart for the SOLE purpose of a burial ground, may be by them surveyed and platted, carefully noting its extent and situation, and be recorded by the recorder of the county in which the same is situated: which lot or burying ground, *if it* be occupied as such, at the time of recording, shall never afterwards be sold, transferred or used for any other purposes." The complainants contend, that the platting the fifteen ranges of burying blocks, and the resolution adopting the plan, brings this case within the statute of Ohio. We will examine this claim, as it regards the one hundred feet platted into burying blocks; and if it shall be found that the statute does not embrace that portion of the lots, it will hardly be contended it does the residue. Was the one hundred feet set apart for the sole purpose of a burying ground? Was it platted and recorded? At the time it was

recorded, was it used as a burying ground? The lot was purchased for a meeting house or church: certain persons, members and others, were permitted to bury their deceased friends there. The conveyances not only give no authority for such burials, but contain express limitations of the trust to other uses, that may be inconsistent with the use claimed. There is no evidence that the lot was ever, in fact, set apart for the sole use of a burying ground, or intended to be set apart. It has never been recorded as a burying ground. By the minute of the society referred to, it appears, that a plan of the blocks was exhibited, containing fifteen ranges, which plan was approved: that the ranges and blocks were ordered to be designated at each end, by stakes, &c.: that the plat should be deposited with one C. Smith, who should designate future interments.

The evidence does not show that the ground was ever finally surveyed and platted, or that the ranges and blocks were marked and designated by stakes, or otherwise, or their extent and situation carefully noted. There was no order for the record, nor any record ever made. There is no order, setting apart this ground for the sole purpose of a burying ground. The plan of the fifteen ranges may have been a rough sketch only, upon which the meeting may have intended to take further steps under the law: but we have no evidence that they did do any thing more. The provisions of this act innovate upon the settled general law of acquiring title to real estate, and its provisions must be substantially followed, or no rights can be gained under it.

The transfer of real estate to the public, or to individuals, under the operation of law, without grantee or deed, can only be sustained where a clear case is presented, leaving no doubt of such legal operation. The requisitions of the statute are not satisfied, by the acts of the trustees or society, in the case before the court. The substantial provisions of the act have not been followed. But it is said, that the trustees here shall not avail themselves of their own neglect, to cause their plat to be recorded, to avoid the dedication claimed by the complainants. It is a sufficient answer to this assumption, to say, that the law referred to, has not been complied with, in its other requirements. It will be time enough to decide that question, when a case shall be presented, where the substantial provisions of the act have been all complied with, and there appears only a neglect to place the plat on record. There is strong reason for supposing, however, that the placing the plat on record, and thus giving it publicity, is essential to the passing title to real estate, under its provisions.

The counsel for the complainants urge, with great earnestness, that the acts of the defendants amount to a dedication of this lot, to public and pious uses, which is to be sustained upon general principles; and several adjudged cases are referred to, as settling this claim, beyond dispute. The case of *Woodyard v. Hoddon* (5 *Taunton*, 125,) is cited. In that case, the plaintiff had erected and opened a street, leading from a public highway, across his own lands, and terminating at the defendant's close. This had been used for twenty-one years, and had been paved and lighted at the public and private expense. It was claimed, that this was a dedication to public use; but chief justice Mansfield was of a different opinion; and that the jury found, that the land had not been dedicated to the public. On a motion for a new trial, the case was fully argued, and judges Mansfield, Gibbs, and Heath decided that the land was not

dedicated to the public, while judge Chambre was of a contrary opinion. The opinion of Chambre is cited to us, as the law of the case!

The *Town of Pawlet v. Clark, et al.* (9 *Cranch* 392,) is relied on. In that case, there was a grant, by the crown, to sixty-three persons, of twenty-three thousand and forty acres of land, in the town of Pawlet, six miles square. The tract was divided into sixty-eight squares, four of which were reserved,—one for a glebe of the Church of England. The court determined that the Church of England was not a body capable of receiving the grant *eo nomine:* that a grant at common law may be made to pious uses, before a grantee is in existence, capable of taking; and if made by the crown, it could not be resumed at the pleasure of the crown. That the state of Vermont, which, after the revolution, succeeded to the rights of the crown in the glebe, might alien the land, with the assent of the town; or might erect there, an Episcopal church, and collate its parson, who would hereby become seized of the glebe, *jure eclesie,* and become a corporation capable of transmitting the inheritance. We do not perceive the bearing this decision has on the case before the court. The legal dedication of land, to the public use, without an individual grantee, we shall have no occasion to dispute.

In the case of *McConnel, v. Town of Lexington,* (12 *Wheat. Rep.* 585—6,) the court sustained the dedication of a spring for public use, without an individual grantee or written evidence, upon the reasonableness of the dedication. The lots in that town had been disposed of by lottery draft, and the court predicated their decission upon the concurrent testimony of all the settlers, that the spring was so reserved, and the universal opinion that no person had drawn the spring lot.

The case of *Beatty and Ritchie, v. Kurtz, et al.* (2 *Peter's Rep.* 566,) is most earnestly pressed upon our consideration, as conclusive authority in the case at bar. In that case, Beatty and Hawkins in 1769 laid out an addition to the town of Georgetown, the lots of which addition were laid down on a map, on which was set apart a lot for the sole use of the German Lutheran Church, as their absolute right and property, to be held by them for religious purposes and the use of the congregation. This plat was duly recorded, according to the laws of Maryland. Shortly afterwards the Lutheran society took possession of the lot, enclosed it, built a church on it, and opened a burying ground. They had from thence continued to hold it upwards of fifty years, and used it as a burying ground, without their title being called in question.

They were put in possession by Beatty, who declared the lot to be the property of the Lutherans, and that he was ready to convey the title; and both he and Hawkins died without claiming or disposing of said property. Ritchie, the heir, entered upon the lot and tore down the fences and tomb stones, and was about breaking open the graves and removing the remains of the dead. The Lutherans filed their bill to compel a conveyance of the lot in fee, to be quieted in their possession and use, and for an injunction upon the defendants from interrupting or disturbing it. The court sustained the bill, on the ground that there was a dedication of the lot to public and pious uses. In this decision they make express reference to the laws and bill of rights in the constitution of Maryland, which gave validity "to any sale, gift, lease, or devise, of any quantity of land not exceeding two acres, for a church, meeting or other house of

worship, and for burying ground, which shall be improved, enjoyed, and used only for such purpose;" and also to the laws of Maryland for laying out and recording town plats, which contains similar provisions to the law of Ohio, on the same subject. The court determined, that in such cases of dedication, it was not requisite there should be a legal grantee, at the time of the dedication. —That was a case of dedication by the ancestor of the defendants, at an early period; without grant, by designation on the original plat of the town, and the record thereof under the laws of Maryland.

The Lutheran society were put in possession by the proprietors, and had quietly occupied for more than half a century, without interruption from them, and accompanied by their repeated declarations, of the rights of the Lutheran society. After all which, the heirs of the proprietors were attempting to reclaim the possession of the lot, and to appropriate it to their own private use, on the ground that the title had never passed out of their ancestors. The court very properly determined, that in such case an individual grantee was not necessary to an effectual dedication of the lot at law. Were a similar dedication made by the proprietors of a town in Ohio, under our statute, by designation on the plat of the town, and a record made according to the provisions of the act for incorporating religious societies, referred to by counsel, we should without difficulty find an analogy of principle, sustain the dedication, and exercise the same power to restrain undue interference with the public or church rights, acquired under the dedication. And in the present case, if Kirby, the grantor, or his heirs, were seeking to reclaim these lots, as forfeited by the burials which have been made in this yard, we should not hesitate to restrain them.

The learned and eloquent Judge Story, in closing the opinion of the court, in the case last referred to, remarks: "This is not a case of a mere *private* trespass; but a *public* nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use, by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased, are to be wounded; and the memorials, erected by piety and love to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry, to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." With these sentiments and feelings we fully accord, and where a case is presented analogous in principle, shall be ready to apply the proper remedy. But the case in hearing bears no analogy to the Lutheran case. It is governed by certain fixed principles of law, over which this court can exert no control.

By a recurrence to the title papers, a part of this case, all must clearly perceive the nature and extent of the grant made by Kirby and wife to the trustees of the Methodist Episcopal Church. The object and limit of the estate granted in trust, is in the deed defined and distinctly marked out. The trustees "shall erect and build, or cause to be erected and built, a house or place of worship,

for the use of the Methodist Episcopal Church of the United States," according to the rules and discipline of said church, at its general conference, and to maintain the same forever, permitting the preachers and ministers, authorized by the general or yearly conference of said church, to expound God's holy word therein, and none others. Nothing is said in either of these deeds or dedications of trust, on the subject of any other use whatever. In the Lutheran case, the dedication was to the use and benefit of the Lutheran Church, to be their absolute right and property, and held for religious purposes and the use of the congregation. In Kirby's declaration of trust, the erecting and maintaining a place of worship for the members of the Methodist Episcopal Church, according to the rules and discipline of their conference or government, is the main, if not the only object of the grant. There is no ambiguity in the terms of the grant, or room for any latitude of construction. No other use or purpose is expressed. Can a court of chancery change a trust expressly declared by the grantor in trust? It may enforce the trust, and compel the execution of its provisions, according to the design and purpose of the grantor, but can it divert the trust, and so construe it as to defeat and thwart the object and purpose of its creator? We think not. The trustees of the Methodist Episcopal Church take these lots under Kirby's deeds in fee, as trustees of an expressed trust, limited and declared on their face. There is nothing left to implication or inference. It is an admitted principle, not only that the rules of property should be the same in equity as at law, but that the rules of construction should be so likewise.

Courts of equity, therefore, when trusts are actually and finally *limited, generally* follow the rules of the courts of law. (*Jeremy's Equity Jurisdiction*, 30. 2 *Bur. Rep.* 1108. 14 *Viner's Ab. title intent.* 2 *Ves. jr.* 655, *and* 1 *Jacob and Wolher*, 571.) If this be correct, and we believe it is, let us enquire whether *at law* we could extend this trust, so as to cover individual or public rights, resulting from *use* and *occupation*, not only beyond the trust expressed in the deed, but inevitably tending to the destruction of the trust itself. It will not be seriously contended, that a court of law could do this. If then the rule of property and construction is the same in this court as in a court of law, there would seem to be an end of the enquiry.

The trust expressed in the conveyances must govern; and unless we can find some general expression in the trust, embracing the claims set up by the complainants, we can afford them no aid or relief. We have looked in vain for any such claim or expression. Injunctions are not allowed where the complainant's right is doubtful, nor unless he show a vested title, legal or equitable, or such a public interest which any one may ask to have protected. (*Corporation of New York, v. Mapes*, 6 *John. Ch.* 50. *Storm v. Mann*, 4 *John. Ch.* 21.) The complainants in this cause have shown no such interest or right.

The express trust declared by Kirby, being to secure, forever, a church or place of worship for the members of the Methodist Episcopal society, we conceive it to be within the legal and equitable construction of the trust, to allow the trustees, as the society increases in numbers, and its exigencies require, to enter upon the lots granted, in order to erect a new and larger edifice, than the one originally erected. The kind of building adapted to the convenience of the society, and the part of the lot on which it shall be built, are matters neces-

sarily and legally left to the sound discretion of the trustees, aided by the advice of the congregation. They must be taken to act in good faith, until the the contrary be alleged and proven. We can never presume their acts wanton, in the absence of all evidence. No such inference can be drawn from the vote of the society, and the resolution of the trustees, to build a new church. We should incline to restrain them from any wanton breaking up of the graves in this yard, though we see no necessity for deciding this question now.

From the view taken of this case, it results, that the trustees have a legal and equitable right, under Kirby's deed of trust, to determine, in good faith, the necessity of erecting a new church or place of worship, its dimensions and site, having regard to the convenient enjoyment, by the society, of the lots, for the purpose of the grant: That, in order to execute the trust fairly, they may so far interfere with the interments made on the lots, as may be necessary to lay the foundation of the new church; and in executing their work, they may disinter, and decently remove, the remains of any dead within such limits,—forbearing any act calculated to shock the feelings of surviving friends or the public.

We do not intend to express any opinion, encouraging the idea that the trustees of the Methodist church can appropriate this ground to any other purpose than the erection and maintenance of a suitable and convenient church, for the society, upon the plan agreed upon by the society, or the trustees; nor further interfere with, or disturb the remains of the dead, buried there, than is necessary to effect that object.

The bill is dismissed, and the injunction dissolved. Each party to pay their own costs.

N. B. Judge Collett, who allowed the provisional injunction in the above cause, was present when the decision was made, and concurred with the court in the principles decided.

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