REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

FEBRUARY TERM 1826.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. XI.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.

THE following proceedings of the court and bar took place on the occasion of the decease of the Honorable THOMAS TODD, an Associate Justice of this court, who died at his seat near Frankfort, in Kentucky, about the commencement of the present term.

Feb. 21st.—This court being informed that our much respected brother and associate Mr. Justice TODD, has departed this life,

Resolved, That we will, in testimony of our sense of his worth, and of our deep feeling at the afflicting loss we have sustained, wear crape for the residue of the term.

The Court, on motion of the Attorney-General, directed the following proceedings of the bar, and officers of the court, to be entered on the minutes:

"At a meeting of the bar and officers of the supreme court of the United States, in the court-room, on Monday, the 20th day of February 1826, Mr. Attorney-General WIRT being called to the chair, the following resolves were proposed by Mr. WEBSTER, and unanimously adopted:

"Resolved, That the members of this bar, and officers of the court, feel sensibly the loss which this court, and the country, have sustained in the death of the Honorable THOMAS TODD, late a judge of this court.

"Resolved, That to testify their respect for the virtues and talents of the deceased, and their sense of the loss which the community has sustained by his death, the members of this bar, and the officers of the court, will wear the usual badge of mourning for the residue of the term.

"Resolved, That the Attorney-General, in behalf of the bar, and officers of the court, do respectfully move the court, that the foregoing resolutions may be entered on the minutes of its proceedings.

"WM. WIRT, Chairman."

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OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

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OF THE

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The references are to the STAR *pages.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1826.

The MARIANNA FLORA: The Vice-Consul of Portugal, Claimant.

Admiralty practice.—Amendments.—Piratical aggression.—Right of search.

In admiralty proceedings, amendments are made in the appellate court, not only as to form, but as to matter of substance, as, by the filing a new count to the libel; the parties being permitted, whenever public justice and the substantial merits require it, to introduce new allegations and new proofs; *non allegata allegare, et non probata probare.*

If the amendment be made in the circuit court, the cause is heard and adjudicated by that court and (upon appeal) by this court, on the new allegation; but if the amendment be allowed by this court, the cause is remanded to the circuit court, with directions to permit the amendment to be made.

An attack made upon a vessel of the United States, by an armed vessel, with the avowed intention of repelling the approach of the former, or of crippling or destroying her, upon a mistaken supposition that she was a piratical cruiser, and without a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property, is not a piratical aggression, under the act of the 3d of March 1819, c. 75.

Nor is an armed vessel, captured under such circumstances, liable to confiscation, as for a hostile aggression, under the general law of nations.

*The act extends to foreign vessels committing a piratical aggression; and whatever responsibility the nation may incur towards foreign states, by executing its provisions, the tribunals of the United States are bound to carry them into effect. [*2

Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war; for they are *hostes humani generis.*

American ships, offending against our own laws, may be seized upon the ocean, and foreign ships, thus offending within our territorial jurisdiction may be pursued and seized upon the ocean, and brought imto our ports for adjudication.

But in such cases, the party seizes at his peril, and is liable to costs and damages, if he fail to establish the forfeiture.

Ships of war sailing, under the authority of their government, in time of peace, have a right to approach other vessels at sea, for the purpose of ascertaining their real characters, so far as the same can be done, without the exercise of the right of visitation and search, which does not exist in time of peace.

The Marianna Flora.

No vessel is bound to await the approach of armed ships, under such circumstances; but such vessel cannot lawfully prevent their approach, by the use of force, upon the mere suspicion of danger.

Where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued, upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages, for subduing, seizing and bringing into a port of this country for adjudication, the offending vessel.[1]

The Marianna Flora, 3 Mason 116, affirmed.

APPEAL from the Circuit Court of Massachusetts. The original libel filed in the district court against the Portuguese ship Marianna Flora, and cargo, was for an alleged piratical aggression attempted or committed by the ship on the United States armed schooner Alligator, Lieutenant Stockton, commander, against the act of congress of the 3d of March 1819, c. 75, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy."(a)

*3] *Upon the hearing of the cause in the district court, the judge pronounced an interlocutory sentence of restitution, and subsequently pronounced a further decree for damages, amounting to $19,675, for the act of sending in the ship for adjudication, and the consequent detention. An appeal was taken by the libellants from both decrees to the circuit court; and afterwards, before the hearing of the appeal, by request of the government of the United States, and with the consent of the libellants,

*4] the ship and cargo were restored to the claimants, and further *proceedings respecting the same were abandoned. The only question, therefore, litigated in the circuit court, was upon the point of damages, and ultimately, a decree was there pronounced reversing the decree for damages; and this constituted the matter of the present appeal.

Pending the proceedings in the circuit court, leave was granted to the libellants to file a new count or allegation, in which the aggression was

(a) Which provides (§ 1.), that the president of the United States be authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews, from piratical aggressions and depredations. (§ 2.) The president of the United States is authorized to instruct the commanders of the public armed vessels of the United States, to subdue, seize, take and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. (§ 3.) Authorizes the merchant vessels of the United States to defend themselves against any piratical aggressions, &c., and to capture the assailant. (§ 4.) Whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

[1] The Palmyra, 12 Wheat. 18.

stated to be hostile, and with intent to sink and destroy the Alligator, and in violation of the law of nations.

The facts which were given in evidence, and relied on to support the allegations in the libel, were substantially as follows: On the morning of the 5th of November 1821, the Alligator and the Marianna Flora, were mutually descried by each other, on the ocean, at the distance of about nine miles, the Alligator being on a cruise against pirates and slave-traders, under the instructions of the president, and the Portuguese vessel being bound on a voyage from Bahia to Lisbon, with a valuable cargo on board. The two vessels were then steering on courses nearly at right angles with each other, the Marianna Flora being under the lee bow of the Alligator. A squall soon afterwards came on, which occasioned an obscuration for some time. Upon the clearing up of the weather, it appeared, that the Marianna Flora had crossed the point of intersection of the courses of the two vessels, and was about four miles distant, on the weather bow of the Alligator. Soon afterwards, she shortened sail and *hove to, having at this time a vane or flag on her mast, somewhat below the head, which, together [*5 with her other manœuvres, induced Lieutenant Stockton to suppose she was in distress, or wished for information. Accordingly, he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the Alligator was within long shot of the Portuguese ship, the latter fired a cannon shot ahead of the Alligator, and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pendant. The Marianna Flora then fired two more guns, one loaded with grape, which fell short, the other loaded with round shot, which passed over and beyond the Alligator. This conduct induced Lieutenant Stockton to believe the ship to be a piratical or a slave-vessel, and he directed his own guns to be fired in return; but as they were only carronades, they did not reach her. The Alligator continued to approach, and the Marianna Flora continued firing at times, until she came within musket shot, and then a broadside from the Alligator produced such intimidation, that the Portuguese ship almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender, and send her boat on board, which was accordingly done. He demanded an explanation; and the statement made to him by the Portuguese master and other officers, was, that they did not *know him to be an American ship of war, but took him to be a piratical cruiser. [*6 Under these circumstances, without much examination of the papers, or the voyage of the ship, Lieutenant Stockton determined to send her into the United States, on account of this, which he deemed a piratical aggression. She was, accordingly, manned, and sent, with her officers and crew, under the orders of Lieutenant Abbot, into Boston.

February 20th. *J. Knapp*, for the appellents, argued: 1. Upon the facts, to show that the visitation of the Marianna Flora, and her detention for examination and search, were unlawful and unjustifiable. He insisted, that the Portuguese master was deceived by the omission of the Alligator to affirm her flag with a gun, according to the law and usage of the nations on the European continent. 2 Azuni 203; 2 Wheat. app'x, 10; 1 Code des

Prises, par Le Beau, 223. He had a lawful right to resist the approach of the other vessel, until assured, beyond all reasonable doubt, of her true notional character. Puffend. lib. 2, c. 3, § 8; 2 Ruth. 493; 2 Azuni 207. A remark of Lord ELLENBORCUGH, in an analogous case, recognises such manœuvres as were used by the Marianna Flora, as coming within the legitimate acts of defensive resistance. He says, "defence might happen in various ways, as by making a show of confidence in the face of an enemy, with a view to deter him from an attack. 6 East 202." Upon the topics of
*7] the nature or *character of unblamable defence, and the time when forcible resistance may lawfully begin, and the extent to which it may be carried, particularly between persons belonging to different civil societies or between vessels of different nations, on the ocean, authorities were cited from various text-writers, as applicable to the situation of the Protuguese master, and justifying his conduct. 1 Ruth. 372–7, 398, 180; Puffend. lib. 2, c. 5, § 6, 8. It was asked, if it be lawful for private ships to arm, in time of peace, for the purposes of self-protection, whether that liberty did not comprehend the right to do with force whatever, under existing circumstances of apparent peril, human instinct and natural prudence would dictate? Could the maxim that we must so use what belongs to us as not to infringe the rights of others, be inconsistent with this principle? Could it be the duty of the master of a merchant vessel, armed for such a purpose, when his nation was at peace with all the world, and when the seas were infested with pirates, to suffer another armed vessel to approach him, without first being satisfied of her pacific intentions? Still less was it his duty to submit to the exercise of the right of visitation and search (a right which has no existence in time of peace), in the unlawful manner in which it was attempted to be exercised. 2 Azuni 205; *The George*, 1 Mason 24.

2. It was insisted, that if the search and examination had been made in a
*8] lawful and deliberate manner, it must have resulted in a conviction *of the innocence of the Portuguese ship, and her consequent immediate liberation. As, in this case, simple reparation only was sought, and not vindictive damages, it was considered sufficient to refer to the case of *The Appollon*, where it was laid down by this court, that, except in cases of captures *jure belli*, or on exemption expressly created by statute, even probable cause will not excuse from simple reparation. 9 Wheat. 374. But there must, in every case, be probable cause to justify the seizure. 2 Cranch 64, 170; 3 Ibid. 458.

3. But it was further contended, that the subsequent detention and sending in of the ship for adjudication, was wholly unjustifiable, and subjected the seizer to damages. Even the harsh and unbending rules of prize law render the captors liable to costs and damages, whenever the evidence of the neutrality of the ship and cargo exists on board, unless it is afterwards shown to be enemy's property, or to have been guilty of some unneutral conduct, rendering it liable to confiscation. Wheat. on Capt. 312, app'x, Croke's Reply to Schlegal, 62; 2 Azuni 212; 1 Dall. 183; *The Anna Maria*, 2 Wheat. 333. But yet there was a distinction between a right to seize and examine, and a right to capture. The right to detain and send in for adjudication, did not necessarily follow from a seizure and examination, which might have
*9] been warranted by the circumstances, but which had not resulted in showing that there was any reason *to doubt the true character of the

Portuguese vessel, and the innocence of her conduct. But at all events, the misconduct of the master, supposing it to be ever so aggravated, could not affect the owners of the ship and cargo, whose agent he was, for ordinary civil purposes, but not so as to subject their property to loss or injury by his unlawful acts. And for the losses accruing by the detention of the ship and cargo in port, after it was satisfactorily ascertained that they could not be proceeding against by the seizers, there was still less reason to doubt the right of the claimants to recover damages. 2 Bro. Civ. & Adm. Law 210; *The St. Juan Baptista*, 5 Rob. 40; *The Zee Star*, 4 Ibid. 58; 3 Dall. 333; 2 Wheat. app'x, 12.

4. The charge that the Portuguese ship had attempted, or committed, a piratical aggression or restraint, within the act of congress, was considered as negatived by the restitution, with the consent of the captors, in the court below. Whatever might be the nature or degree of the offence meant to be defined by the act, it must be piratical; and all the authorities define piracy to be a robbery, or forcible depredation on the high seas; and they all concur, that a bare assault, without taking or pillaging something, does not constitute this crime. 2 Wooddes. 140; 2 Azuni 351; Bynk. Q. J. Pub., Du Ponceau's Transl. 127, note; 2 Bro. Civ. & Adm. Law, 462; 1 Sir L. Jenkins' Life 91; 5 Wheat. 161; 3 Ibid. 641. If the act of congress goes beyond this definition, it is not warranted *by the law of nations, and cannot give jurisdiction to the tribunals of this country over the persons and property of foreigners. [*10

Blake, for the respondents, made three points: 1. The captors were justifiable, under all the circumstances of the case, in subduing and taking possession of the Portuguese ship. 2. They were justifiable in sending her in for adjudication. 3. There was probable cause of seizure and sending in for adjudication.

1. Even the sentence of the district court admits that Captain Stockton was not liable to damages for the mere act of subduing and seizing the ship. She had committed a hostile and piratical aggression on a public vessel of the United States, in time of peace. The learned counsel here entered into an able and elaborate argument upon the evidence, to show that the first aggression was committed by the Portuguese ship, and that it was not justified or excused by the conduct of the Alligator. It was a predetermined, deliberate and wanton attack; not an accidental rencontre, nor the result of any mistake. It was an act of private war, and the *onus probandi* is on the claimant to show that it was authorized by the law of nations. Admitting even that the Alligator pursued the Portuguese vessel, she had an unquestionable right to approach her in time of peace; and an attempt to exercise the right, could not be construed into *an act of hostility, or warrant the use of force to prevent it. As the ocean is the common property of all nations, every nation has a right to its free use, and no one can claim the exclusive control of a larger portion than is sufficient for the purposes of its own movements. The regulations as to keeping out of cannon-shot, and sending a boat on board, are applicable only to a state of war, and to the exercise of the belligerent right of search, which, it is admitted, does not exist in time of peace. Indeed, these regulations are the creatures of conventional law, and bind those nations only between whom they are [*11

established by special treaty. But the Alligator was a public armed ship, belonging to the navy of the United States, and sent out to cruise against pirates and slave-traders, under the different acts of congress passed for the suppression of these offenders. Captain Stockton was authorized by these laws, and his instructions under them, to seize and subdue all vessels and persons offending against them, wherever they might be found. If every vessel on the ocean has a right to draw around her a magic circle, and to prevent by force the approach of all others, it is obvious, that the acts of congress must remain a dead letter, since they could not be executed, without approaching sufficiently near to ascertain the probable character of the vessel. The act of heaving to, on the part of the Marianna Flora, indicated either a desire to speak the Alligator, or to get the weather-gage for the
*12] purposes of annoyance; and in either case, it was the duty *of Captain Stockton to change his course, and overhaul the Portuguese ship. But the circumstance of the hostile guns which were soon afterwards fired from the Marianna Flora, without hoisting any national flag, made it still more imperatively his duty to approach her; and had he avoided the rencontre, he could not have justified his conduct to his government and his country. He had a right, then, to pursue and capture, founded upon the act of congress, and his instructions. He was justified in considering the ship as having not only attempted, but as having actually committed, a piratical restraint and aggression, within the meaning of the act.

But independent of the authority derived from this statute, he was justified in pursuing and subduing the aggressor, upon the more general grounds of natural and public law. The right of freely navigating the ocean, and of self-defence, or repelling force by force, was common to both vessels. The Alligator was not bound to decline the combat by flight. In the expressive words of Baron Puffendorf, lib. 2, c. 13, § 14, "in a state of nature, the aggressor hath no right, by which the other party is bound to decline his violence, rather than oppose it; and the reason why a man, under his natural condition, sometimes chooses rather to fly than fight, is not out of any favor to him who sets upon him, but because he thinks it more convenient for his own affairs to fly, like hares, whose armor is in their feet."
*13] *This doctrine has reference to the condition of man in a state of nature; and such was the condition of the parties now before the court, when upon the ocean, and waging war with each other. The *vindices injuriarum* were not there, and each party became, of necessity, his own avenger and judge. As to the Alligator not firing a gun in affirmance of her flag, it cannot surely be pretended, that such an idle ceremony could give any additional assurance that she was what she pretended to be, or that the general law of maritime states requires any such ceremony. It may be the particular usage of Spain and Portugal, and it may have been adopted between some other nations, as a part of the conventional law; but it has reference exclusively to a state of war, and is a mere regulation of the exercise of the belligerent right of visitation and search.

Still less can it be maintained, that the Portuguese had reasonable grounds to suspect that the Alligator was a pirate, and had hostile designs upon his ship, and therefore, he had a right to attack and destroy her. The analogies of the municipal law may assist to illustrate this branch of the inquiry. What degree, or what grounds of fear or bodily harm, will justify

an act that may result in the destruction of human life, is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending and almost unavoidable. But the writers on natural law may, perhaps, on this *occasion, be more properly cited; and the following passage from Puffendorf affords the fullest illustration of the principles applicable to this subject. "Sometimes," says he, "a doubt has arisen, whether, if one assault me, by mistake without any evil design, but with intent to employ his force against another, I may kill him, in my own defence. Grotius makes this clear in the affirmative. (De Jure Belli ac Pacis, lib. 11, c. 1, § 2.) Inasmuch as nature obliges us to maintain peace with others, it may, and ought to be presumed, that every one will fulfil this obligation, unless he give manifest evidence of contrary designs." "But now (speaking of timely preparations for self-defence), though my providing thus far for my security can be injurious to none, yet, before I can actually assault another, under color of my own defence, I must have tokens and arguments amounting to a moral certainty that he entertains a grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power. 'Tis a very gross way of philosophizing which some men have got, when they tell us, by way of advice, 'He that is able to hurt you, undoubtedly is willing, and therefore, without further warning, down with him.' This kind of doctrine is manifestly destructive of all social commerce among men, and the authors commonly cited in *defence of it, either are such whose character prevents their authority, or else, in the passages alleged from them, they speak only of precaution in our dealing with those who have given us sufficient tokens of the resolution to hurt us." Puffend. lib. 2, c. 5, § 6. The applications of these principles to the case now in judgment, is too plain to require illustration, and seems to leave no doubt, that the respondents are fully justified as to the act of subduing and capturing the appellant's ship. [*14 [*15

The counsel also commented upon a passage from Albericus Gentilis, which had been relied on by the learned judge of the district court as supporting his decree, but which, it was contended, had been misunderstood; and, at all events, was but the opinion of a private individual against the solemn judgment of a court of justice in a case analogous to that now in discussion. Albericus Gentilis, Hispanicæ Advocationis, c. 27.(*a*)

(*a*) Albericus Gentilis is justly regarded as one of the founders of the modern law of nations. He was born in the March of Ancona, in the year 1550, and left Italy, with his father, an eminent physician, who was obliged to fly from that country on account of his religious opinions. The son afterwards established himself in England, where he obtained a chair of professor of the civil law at Oxford, in 1582, and died at London, in 1608. His works are, *De Jure Belli*, in three books; *De Crimina Lesæ Majestatis; De Nuptiis; Comment. ad L.* 3; *Cod. de Professoribus et Medicis;* and the work above referred to, *Hispanicæ Advocationis*, which is a collection of opinions given by him as the counsel of Spanish claimants in the English courts of prize, and may be considered as the earliest reports of adjudged cases of maritime law. (Moreri, Dict.) "Albericus Gentilis," says Sir James Mackintosh, "was certainly the

*2. The captors were equally justifiable in sending her in for adjudi-
*17] cation. It was the exercise *both of a right and a duty. Taking it for granted, that there was a right to subdue, and to capture,

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forerunner of Grotius. The opinion entertained, at the time, of the difference between them, will be seen in the following words of Zouch, the pupil and successor of Gentilis, at Oxford. 'He chiefly followed Albericus Gentilis, and Hugo Grotius, of whom the former justifies all his positions by authorities of law, the latter tried his doctrines by the test of reason.'" Edinb. Rev. vol. 27, No. 53, art. 9. Singular mutability of human opinions! Nearly all the writers cited by Gentilis are now forgotten; he himself is hardly known except by name; even Grotius is little read, and however extensive the effects of his great work, on his own age, it is now considered as resting more on the authority of the innumerable writers of every age and nation cited by him, than on original principles, or the deductions of reason. The editor has supposed, that the following translation of the passage from Gentilis, above referred to, would not be unacceptable to the reader.

"Concerning an English vessel which fought with a Tuscan, and was taken. An English ship was captured by a Tuscan, after an engagement, and confiscated. The Florentine judges state, as the ground of this decree, that the English ship was the aggressor, and that the Florentine acted only in necessary defence. With submission, your honors, I will reply, that your premises are void of probability, your conclusion of truth. For instance, he is presumed the aggressor, who supposed himself injured; in such a case, where it is a question of intention, opinion is sufficient. The Tuscan may have supposed himself injured by the commerce of the English with the Turks. (Therefore, the Tuscan, not the Englishman, was the aggressor.) Again, he is presumed the aggressor, who lies in wait, in arms. Such was the case of the Tuscan, who (as appears from what he had done to other vessels of ours) was cruising for our merchantmen in that trade. Again, he is presumed the aggressor, who is superior in strength. And who does not see the Tuscan vessel of war was stronger than our merchantman? Again, he is presumed the aggressor, who, being armed, is accustomed to conflicts. Does this character also suit the merchantman, or rather, the cruiser? Finally, he is presumed the aggressor, who, under the circumstances already stated, conquers. And which is he? Why do we ask? the decree of condemnation declares that the Tuscan first fired twice on the Englishman. Again, did not the Tuscan begin the battle? He is considered as beginning, who has provoked to the battle to hostility; and he is considered principal in the crime, with whom the malice began, and to him, as the aggressor, are justly imputed the consequences. And will those judges tell me, that it is a practice and sign of amity to fire once and again? It is the custom of a ship of war hailing another vessel, and assuming this authority. The Tuscan vessels practised this at that time, and in other cases. Then, the defence of the English was against a claim of authority, against threats. The object of the Tuscans was to search our ship, as appears from their transactions with others; they came, therefore, to interrupt our navigation, to intercept our commerce, as appears from what they did with others. Deeds declare the intention. The deed of the Tuscans was unlawful, if a huntsman cannot lawfully enter another man's farm, without the owner's permission; if it is unlawful to injure an enemy, in a neutral territory, and if territory in this respect differ not from jurisdiction, neither shall the custom above alluded to (if ever anywhere so received) be now obtruded upon me as a law of the sea, relative to the power of ships of war; for, although the custom may be admitted on the shores of the prince to whom the vessel belongs, it cannot in other seas. Nor let us regard the opinion of those customary jurists, but adhere to those who proceed on general principles. (*They* teach that) the defence of the English was just, fearing an attack. And the bare preparation of another against one, giving me a right to assault and slay him. In fact, I am not obliged to wait till I am assailed. I have a right to commence. This is the opinion more favorable to humanity, and

*the right to send in for adjudication follows as a corollary. The right to seize depended upon *the fact of the offence committed by the captured vessel. The captors had no authority to apply the law to the [*19 fact, to sit in judgment upon the case, and to inflict summary justice on the offender. Still less could the commander of a public ship be expected to assume the responsibility of suffering the offender to escape. It was apparently a piratical, or, at least, a hostile aggression against the law of nations, which had been committed upon a public vessel of the United States. It is not essential to constitute the piratical restraint and depredation, which is meant to be punished by the act of congress, that there should be an intent to rob or plunder. Any wanton attack on a vessel, on the high seas, and especially, an attack with an intent to sink the vessel, and destroy the lives of the officers and crew, is clearly within the letter and the spirit of the act. If a homicide had been occasioned by this aggression, it could not be considered as justifiable or excusable, upon the principles of the criminal code of this, or any other civilized country; and not being justifiable or excusa-

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proved from facts on trial, and is also confirmed by all the writers. 'We must go to meet the assault (say they), not only that which actually exists, but that which may take place.'

"The defence of the English was justifiable, even on the behalf of the Turks, who were to suffer injury from the Tuscans, in our ship. For an injury is done to us, which is done to another in our house; and a ship is compared to a house. So, an injury done to a fellow-traveller, is done to us. It was, therefore, commendable for us to defend those whom we had undertaken to carry. Nay, we ourselves were entitled to be spared, although carriers (of enemy's property, simple as such) should not be so entitled. It was still necessary for us to defend ourselves, through fear lest we should suffer, by being confounded with the Turks, and by a wish to save our own property. Thus, in a case still harder to defend, Cravetta held, when a city shut its gates on its lord, through fear of being ravaged, and for the sake of preserving its property, and in order that, with a few guilty, the remaining innocent might not be confounded. If, then, it was a defence of ourselves, and a just defence, the attack of the Tuscans must have been unjust. But grant that their attack was just. Certainly, in the doubtful conflict of just attack, and just defence, every one will think the defence entitled to favor. There are all degrees of just, equitable and favored, and that which is more just, is to be preferred to that which is less so. But grant that the assault was on our side, and that it was unjust. Shall a stipulated surrender avail us nothing? They are not regarded as captured, who have surrendered, even from extreme necessity. But grant that they were captured, are persons and property captured, the perquisites of the captor? On this supposition, there is a kind of war between us and the Tuscans, and this a battle between enemies, which, therefore, must be adjudged by the public rules of war, and not those of pirates and murderers. The most learned Alciati is to the contrary, and the plainest law teaches that neither captured persons nor goods accrue to the captor. But grant that captured goods do accrue to the captor; the goods, in this case, did not belong to the combatants; and the deed of these mariners must not prejudice the owners. The mariners are not to be understood to have done wrong by the order of the owners; nor the latter to have given orders otherwise than according to mercantile usage. 'The owners must not suffer, although the mariners should say they had acted according to orders.'

"See how, even in the liberal concessions I have made in the defence, the mariners would hardly be responsible, the owners not at all. But since the defence of the mariners was on every principle just, what follows, but that the Tuscans should restore to us, as to persons plundered, everything taken away, with damages, costs, interest, profits, &c., to the last farthing."

ble, it would be a *case of murder, and if a case of murder, of piratical murder. Now, if the act attempted to be done would have been piratical, the attempt also was piratical. It may, indeed, be said, that the act of congress is broader than the rule of international law on this subject; that, by the law of nations, an attempt to commit a piracy is not a piracy; and therefore, the detention and sending in for adjudication was unlawful. Supposing this to be so, *argumenti gratiâ*, still, the judicial tribunals of this country are bound to protect the officer who acts under it, and in obedience to it. This very question of an apparent collision between the law of nations and a municipal ordinance, was presented to the mind of that great man who presides in the British high court of admiralty, in the memorable case of the orders in council, and disposed of, without hesitation or difficulty, upon the plain and intelligible ground, that he could not presume the prize ordinances of his own country to be repugnant to the law of nations. *The Fox*, Edw. 311.

But supposing it not to be a piratical aggression, or an attempt to commit one, still, it was an act of deliberate, wanton, flagrant hostility, committed against the law of nations, and the rights of this country as one of the community of nations. For such an offence there must be some punishment, and the appropriate penalty inflicted in analogous cases, is that of confiscation. Thus, in the case of *The Anne*, 3 Wheat. 435, this court condemned, *as prize of war, enemy's property taken within neutral jurisdiction, upon the ground, that the captured vessel had made the first attack upon the captor, and by this act of aggression on the other belligerent, had disturbed the state of peace which is always supposed to exist in a neutral port.

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3. There was probable cause, such as will exempt the captors from damages. Probable cause is, where a seizure is made under circumstances which warrant suspicion, and upon evidence less than that which would justify condemnation. *Locke* v. *United States*, 7 Cranch 348. No case can be shown, where a court of the law of nations has decreed damages, merely for bringing in for adjudication, if the original seizure was justifiable, unless under peculiar circumstances not affecting the principle, or its application to the present case. The learned counsel here cited and classified all the cases to be found in the English books, where damages had been given or refused; and deduced from them the general inference, that wherever there is probable cause for the original seizure, the captors are only liable, to make simple restitution, even if, upon adjudication, it turns out that their suspicions were groundless.(*a*)

(*a*) The three classes of cases affecting this question, are, 1. Where damages have been given or refused, on restitution. 2. Where compensation has been given, or refused, the prize being lost in the hands of the captors. 3. Where, although restitution was decreed, the captors have been allowed their costs and expenses.

1. In The Corier Maritimo, 1 Rob. 287, demurrage was given for unnecessary detention, and unjustifiable delay in proceeding to adjudication. In The Zee Star, 4 Ibid. 71, demurrage was given to the claimants, and costs and expenses refused to the captors (which are usually allowed, even on restitution), for improper delay in proceeding to adjudication. In The Triton, Ibid. 78, costs and damages were given to the claimant of the goods, and demurrage for the ship, for seizure on an insufficient ground. In The Madonna del Burso, Ibid. 169, all the circumstances concurred of a

*As to the decision of this court in *Murray* v. *The Charming Betsey*, 2 Cranch 116, 122, it is affirmed by Mr. *Dallas, *arguendo*, as a general principle of maritime law, that probable cause will justify a [*23 marine seizure, is not denied by the opposite counsel, and is impliedly conceded by the court in its judgment, the whole scope of which goes upon *an inference of fact from the evidence, that there was not probable cause of seizure, showing, that if there had been, damages would not [*24 have been given. In *Little* v. *Barreme*, 2 Cranch 170, the court did not deem it necessary to determine whether the probable cause afforded by the

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seizure originally unjustifiable, protracted detention, and improper delay in proceeding to adjudication: costs and damages were given. The Peacock, Ibid. 185, was the case of an unjustifiable detention of the prize-vessel, carried into Lisbon, and delay in bringing her home to England for adjudication. In The Wilhelmsburg, 5 Ibid. 143, demurrage allowed, and the expenses of the application given against the captors, for loss arising from his not bringing the captured vessel to the most convenient port for adjudication, within the meaning of the prize act. In The Zacheman, Ibid. 152, which was a mistake as to the law of contraband, under the Swedish treaty, and the seizure was pronounced perfectly justifiable, demurrage was allowed for unreasonable delay. The Anna, Ibid. 332, was a case of restitution, with costs and damages, for a violation of the neutral territory of the United States. The seizure itself was pronounced to be unjustifiable, and costs and damages were given, because the prize ship was improperly brought from the mouth of the Mississippi to England, for adjudication, instead of being carried into one of the West India islands. In The Washington, 6 Ibid. 275, damages were given for bringing the vessel to an inconvenient port. The Acteon, 2 Dods. 48, was an American ship sailing under a license, unlawfully seized and burnt. The St. Antonio, 1 Acton 113, was sailing under a license to enter the port of Holland, but was seized under suspicion of an intention to go to a French port. On bringing in, the captors offered to liberate, on payment of their expenses, but afterwards retracted, and went on to adjudication. There was a decree of restitution, and the claimants appealed to the Lords for costs and damages; the appeal was rejected and the claimants condemned to pay the costs of the appeal. In The Catharina Elizabeth, 1 Acton 309, costs and damages were given by the Lords, for carrying the captured vessel to an inconvenient port. In The Louis, 2 Dods. 210, damages were refused by Sir W. Scott, although he held the seizure clearly illegal, it being a case of the first impression.

2. The rule on the subject of compelling the captors to proceed to adjudication, where the property is lost in their hands, is, that where the seizure is unjustifiable, the captor is answerable for every loss or damage. In cases of justifiable seizure, he is responsible for due diligence only, and is held to simple restitution in value. The Carolina, 4 Rob. 255, was a neutral ship which had been employed in carrying French troops to Egypt, and was taken coming away. Had she been taken in actual *delicto*, she would have been liable to condemnation. The captors were held exempt, not only from costs and damages, but from restitution in value, the ship having been lost while in their possession, by stress of weather. In The William, 6 Ibid. 316, the original seizure was held justifiable, but restitution in value was decreed for a loss occasioned by not taking a pilot on board, but no damages were given. In The Der Mohr, 3 Ibid. 129, the original seizure was considered as justifiable, but the captors were held responsible to make restitution in value (not for costs and damages), on account of the loss, of the vessel by the ignorance and wilfulness of the prize-master.

3. In general, the captors are allowed their expenses and costs on restitution, whenever there is probable cause of capture. The Imina, 3 Rob. 167; The Principe, Edw. 70. The only exceptions to this rule are, where there has been some negligence or misconduct on the part of the captors. There are a great number of cases on this head, which it was deemed unnecessary to cite.

conduct of the captured vessel to suspect her of being an American, would exempt the captors from damages, because it was of opinion, that had she been so, the seizure would still not have been warranted by the law. And the case of *Maley* v. *Shattuck*, 3 Cranch 458, was the application of the ordinary principle of the prize court, that if the seizure is without probable cause, the captors are liable to make restitution, with costs and damages, even if the property be lost without their fault; evidently implying, that if there had been probable cause for the original seizure, they would not have been so liable.

Webster, on the same side, entered into a minute examination of the evidence, in order to show that the party, who was in fact the wrongdoer, and the aggressor, now appeared before the court in the character of a plaintiff, seeking redress for a supposed injury done to himself. It had been said, that the owners of the ship, and of the cargo, were not to be held responsible for the misconduct of the master. There were two answers to this objection: 1. That it was not the captors who were seeking to *punish
*25] the owners, but the owners who were seeking compensation against the captors, for the consequences of the misconduct of their own agent. 2. That the universal principle, applied by courts administering the law of nations, was to consider the thing taken *in delicto*, as responsible, whether it was the property of the master or of others. In cases of blockade, of contraband, of carrying enemy's property with false papers, of resistance to visitation and search, he is considered as the agent of the owner both of ship and cargo. So also, the revenue laws, from the necessity of the case, regard him in that character, and subject the vessel and goods under his control to confiscation for his unlawful acts. In every case, until the innocent are separated from the guilty, until examination and regular adjudication can be had, the law is compelled to regard the ship, and everything on board, as belonging to the master.

It had also been contended, that though the original seizure might be justifiable, the captors were liable in costs and damages for not releasing the vessel, after she was subdued and seized. But it was not pretended, that Captain Stockton had authority to punish her himself; and therefore, unless the Portuguese ship had, notwithstanding all that had happened, a clear right to go off with impunity, he had an unquestionable right to send her in for adjudication. If she had a right to pursue her voyage, she would have had the same right, if the consequences of her aggression had been ever so calamitous; if she had *crippled the Alligator, and destroyed half
*26] her crew. The actual consequences being less serious, do not affect the right, though they may the exercise of discretion. But we have nothing to do here with the question of military discretion. The captured vessel had made war. She had committed what was, *primâ facie*, a piratical restraint and depredation. If unexplained, it was piracy. Whether it could be satisfactorily explained, or excused, was a question to be decided by the civil tribunals. It was not too much to say, that the captors had here something of a belligerent right. The act of congress was not a mere municipal law; it was a prize ordinance. The seizure was not a mere municipal seisure. War against pirates existed, and the act was intended to define who

should be treated as pirates. And, even if the court should now be of opinion, that the captured vessel ought not, under all the circumstances, to be sent in, still the question recurs, whether Captain Stockton might not, at that time, have thought otherwise. He was called on, suddenly, to decide and act on a question full of difficulties, and which has occasioned no little embarrassment to the civil tribunals, with all the advantages of a deliberate examination. Even with these advantages, the learned judges of the courts below have differed in their judgments upon it; and yet, it is now contended, that this naval commander was bound to be better instructed in the laws than those whose peculiar duty it is to study and expound them. Upon these grounds it was, that Sir W. SCOTT *determined, in the case of *The Louis*, 2 Dods. 210, 264, that it being a case *primæ impressionis*, [*27 the captors were exempt from costs and damages, although the court was clearly of opinion, that the seizure itself was unjustifiable, a right of search not existing in time of peace. A doubt respecting the true construction of the law, is as reasonable a ground for seizure, as a doubt respecting the fact. 5 Cranch 311. But here was doubt respecting both fact and law, and that doubt is not yet cleared up. The capture was made in repelling what appeared, at the time, to be an act of piratical aggression. It has turned out not to be so, after a judicial examination. But the question is, what it appeared to be *recenti facto*. It cannot be maintained, that an habitual course of piratical depredation is necessary to constitute the offence of piracy. A single act of piratical aggression, stimulated by revenge, or national prejudice, or wanton cruelty, would be sufficient. The act of congress evidently supposes it, and is in conformity with the public law.

It had also been argued, that this was a municipal seizure, and that the vessel having bean restored, without a certificate of probable cause, costs and damages followed as a matter of course. But it was insisted, that municipal seizures are for offences within our own territorial jurisdiction, or by our own citizens elsewhere. Here, the proceedings are under the law of nations; and, if found guilty, the property would be condemned, *not for a municipal offence, but as prize, and distributed as prize. And [*28 even if it had been a municipal seizure, it could not be admitted, that such consequences would necessarily follow, in every case, without regard to its circumstances. The true principle applicable to seizures of every kind was, that the party having a right to cruise, and bring in some vessels, if others so conduct as to give themselves the character of those who are liable to capture, they would be entitled to nothing but simple restitution. This is laid down in clear and satisfactory terms by Sir W. SCOTT. "The natural rule is, that if the party has been unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule; but, like all other general rules, it must be subject to modifications. If, for instance, any circumstances appear, which show that the suffering party has himself furnished occasion for the capture; if he has, by his own conduct, in some degree contributed to the loss; then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution." *The Acteon*, 2 Dods. 48.

Emmet, for the appellants, in reply, argued, that the second count in the libel filed in the circuit court, charging a hostile aggression, was inadmissible, as the original subject-matter *of the suit was originally cognisable in the district court (where the ship and cargo had been acquitted from the original charge of a piratical aggression), and to allow such an amendment would be to institute an original, and not an appellate proceeding, in the circuit court.

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The appellants were entitled to damages as claimed. The capturing vessel derived her right under the municipal law. The piracy alluded to in the act of congress is sea-robbery. It is an act to protect commerce; and the history of the times shows, that the great evil to be remedied was the system of depredations on the ocean. They were, indeed, frequently accompanied with murder, and various other enormities. But these were only subservient to the system of plunder, and intended only to facilitate or conceal the crimes of the offenders. The piracy referred to is, that by the law of nations, and not by any peculiar law of the United. *United States* v. *Smith*, 5 Wheat. 153; *United States* v. *The Pirates*, Ibid. 184. And, even if our statutory piracy had been contemplated in this act, it would not apply to the present case. The crimes act of 1790, defines the piracy created by that statute to be "murder, or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death." Now, as the firing by the Portuguese did no mischief, no offence was committed, which, if committed on land, would be punishable with *death. Besides, it has been determined, that this section of the crimes act does not extend to foreign vessels. *United States* v. *Palmer*, 3 Wheat. 610; *United States* v. *Klintock*, 5 Ibid. 144. For the purposes of this case, then, if not for the purposes of every case, it may be assumed, that the piratical aggression mentioned in the act of the 3d of March 1819, c. 76, must be with intent to rob or plunder. Nor can the act affect the antecedent rights of other nations. It did not, and could not, create a state of war. Pirates are, indeed, called *hostes humani generis;* but the use of such metaphorical language is often calculated to mislead, and to confound our ideas of legal rights. They are, indeed, public offenders, like the highway robber, but they are not public enemies, so as to give those who cruise against them any of the rights of war, in respect to the subjects of friendly states who are not involved in their guilt. The act could not give to our own ships the right of visitation and search, or any other belligerent rights, so far as respects foreign nations. It could not affect the pre-existing rights of Portuguese subjects to maintain for themselves the privileges of a state of peace. Its utmost effect would be, to impose on vessels of this country the obligation to submit to examination, and the seizures it authorize must be regarded as strictly municipal. The commissioned vessel must, therefore, act on credible information, or on evidence it has of acts of piracy. A claim to examine *or detain vessels of another nation, on suspicion, without information or evidence, would be as large as the belligerent right of search, though under another name. If the commissioned vessel acts against a foreign vessel, it acts at its own peril, and (more especially, when it acts without information or evidence) must abide the consequences as to damages, if it has acted erroneously. In captures *jure belli*, if there be probable cause, the captors are entitled, as of right,

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to an exemption from damages; but in case of a municipal seizure, there must be some provision of positive law creating and defining the exemption. The party who seizes, does it at his peril; if condemnation follows, he is justified; if an acquittal, then he must make compensation, unless he can protect himself under some statute. *The Apollon*, 9 Wheat. 372.

It has been said, that under this construction, the act would become a dead letter. The same was said in the case of *The Louis*, and the answer of Sir W. SCOTT to the objection is conclusive and pertinent to the present case. But the objection is unfounded. The dangerous pirates are, for the most part, not difficult to distinguish. Their haunts, their habits, their appearance, point them out; and though the commissioned officer acts at his own risk, yet if he acts on those *indicia*, and on information and evidence, and stays his hand, where he can find no trace or evidence of guilt, he incurs no real danger *of being liable to damages; and in any event, may rely on the justice and liberality of his own government for protection. This is also the doctrine of the municipal law, in analogous cases on land, both criminal and revenue proceedings. [*32

One of the privileges of a state of peace, which the Portuguese have still a right to maintain for themselves, is the benefit of the principle, that on the high seas the merchantman is equal to the man-of-war. Each may protect itself according to its sense of expediency and necessity, and resist the doing of anything by the other, as a right, which is not a right. If the man-of-war has no right to examine, the merchantman has a right to resist that examination. Even in war, a vessel navigating the ocean may, to a certain extent, draw a line of jurisdiction around itself. This is proved by the restrictions put on the right of search. It is said, indeed, that these are the result of treaty stipulations. But they are the result of a true interpretation of the law of nations, and have been recognised in treaties, because England had practically violated the right: *à fortiori*, in time of peace may every vessel drawn a circle of jurisdiction around itself, and resist the exercise of that search and visitation which is not lawful in time of peace. It is upon this ground that Sir W. SCOTT held the doctrine, that if a neutral resist search, not knowing of the existence of a war, it is no ground of condemnation (*The St. Juan Baptista*, 5 Rob. 36); and that still more recently he has *determined, that the right of visitation and search does not exist, and cannot be exercised, in time of peace. *The Louis*, 2 Dods. 210. Every ship navigating the ocean in time of peace may appropriate to her temporary use so much of it as is necessary to her protection, consulting the equal rights of others. It is a right that will lie dormant, and never be exercised, except upon real apprehension. When there is no apprehension of danger, the consent to approach will never be withheld. But the right to approach *in invitum* can never exist; and, both parties being independent and equal, each party is to judge for himself as to the extent and reality of that danger. Unless this exclusive right of judgment is maintained, the approach of pirates could never be prevented, who frequently assume the flag of public ships, and fall upon their victims under this disguise. [*33

The learned counsel here argued upon the evidence, to show, that upon a just application of these principles, the conduct of the Marianna Flora was perfectly justifiable. The first fault was committed by the Alligator, in chasing, and not affirming her flag with a gun. This is the law of nations,

and recognised as such by every maritime nation on the continent of Europe. The language of Azuni on this subject is peculiarly appropriate to the present case. He says, "the fear of meeting with a pirate, and being the dupe
*34] of deceitful appearances, is the reason why *no credit is given to the flag of a vessel, though a ship of war." 2 Azuni 204, 602, c. 3, § 3. Had the flag been affirmed, in this instance, in the manner to which the Portuguese are accustomed, they would not have resisted the attempt to approach their vessel, and all the present consequences would have been avoided.

They might also have been avoided, by that deliberate and impartial examination, which it was Captain Stockton's duty to make, before he decided on sending in the ship for adjudication. It would have been his duty, even in war, to examine faithfully the ship's papers, and pay due respect to the evidence produced. *The Anna Maria*, 2 Wheat. 327; 2 Azuni 212, § 8. But it is said, that the usual documentary evidence would prove nothing, since it was not a question of proprietary interest or neutral character. The answer is, that the ship's papers would have shown, that the vessel, whom he treated as a pirate, was an innocent merchantman; and that the cargo was not liable, by the act, to confiscation, even if the vessel had been guilty of a piratical aggression. The 4th section of the act only subjects the vessel or boat to confiscation, and even that must be understood with the implication, that they are the property of the wrongdoers; for the master can never be considered as the owner, even of the ship, so as to subject it to forfeiture for his criminal acts, much less can he be considered as the owner
*35] of the cargo for such a purpose. *In the words of this court, it may be said, that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whem the legislature has authority and jurisdiction." *The Apollon*, 9 Wheat. 370.

Nor can it be maintained, that here was an act of private unauthorized war, committed by the Portuguese, which, being a violation of the law of nations, would subject the vessel, if taken *in delicto*, to confication. Private war never gives the right of capture and confiscation. Stewart's Vice Adm. 301. That belongs to public war alone. In time of war, every violation of belligerent rights is followed by condemnation, because it is considered as evidence of enemy's property, which, by the laws of war, is transferred to the capturing power. But in time of peace, to make every violation of the law of nations, however slight, produce the condemnation of property, however valuable, and belonging to innocent persons, would reduce the law of nations to the sweeping severity of Draco's code.

In this case, the sending in for adjudication has been sought to be justified by hypothetical reasoning, grounded upon the supposition that lives might have been lost; and a learned discussion of the municipal law of homicide was entered into, to show, that if any of the Alligator's crew
*36] *had been killed, it would have been murder; and then, it is asked, whether it would not have been Captain Stockton's duty to send in for trial, for what would have been clearly piracy. But we are to deal with the case as we find it. No lives were, in fact, lost; no injury done to the vessel. It was nothing but the offence of firing, and in self-defence, against a vessel that turned out to be a public ship of war, but which did not at first

manifest her character in the mode to which the Portuguese had been accustomed. Was it possible to suppose, that such an act could produce the confiscation of the cargo, belonging to innocent owners, or of the ship, the owner of which was equally innocent? It was, at most, a marine trespass, cognisable in the courts of the offender, because it was not a case of war, nor to be determined by the law of war; or if there were a doubt whether there was anything of national insult in it, it might be a fit subject to be represented to this government for diplomatic discussion. But after the ship and cargo were brought in, and it was ascertained, that she could not be subjected to confiscation, why were they detained and proceeded against as if captured *jure belli?* Here are a series of wrongs, for which they who suffer damage must look for compensation to him whom the law considers as the wrongdoer, although many of them were the acts of his agents, and done in his absence. They do not seek vindictive damages, but simple compensation only. The long list of cases which *has been arrayed against us cannot furnish a rule for a seizure, which was not made [*37 *jure belli*, but which (if to be justified at all) must be considered as having been made in execution of a municipal statute. Will probable cause, even if it existed, furnish a defence in such a case? That is not the law of *Hoyt* v. *Gelston* (13 Johns. 141, 561; 3 Wheat. 246), which was a seizure under an act of congress, and where there was probable cause, thought it was not certified by the court according to the statute. Is it the law of any case, where the wrongdoer acts under municipal laws, on his own responsibility? Is it the law to be collected from the cases of *The Acteon*, 2 Dods. 48, 52; of *Murray* v. *The Charming Betsey*, 2 Cranch 125; of *Little* v. *Barreme*, Ibid. 170; of *The Jeune Eugenie*, 2 Mason 409, 439; or even of *The Louis*, 2 Dods. 210? In the last case, indeed, damages were refused, because it was *primæ impressionis*—a case of some doubt and difficulty as to the new construction of the law of nations, and the application of the French decree respecting the slave-trade, and the parties seeking damages were stained with crime. But here, the law is old, and well settled; and nothing but the offence is of novel impression. The parties are innocent; and the very novelty of the offence ought more certainly to secure its punishment.

March 20th, 1825. STORY, Justice, delivered the opinion of the *court, and after stating the pleadings, proceeded as follows:—An [*38 objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel, filed in the circuit court, upon the ground, that the original subject-matter was exclusively cognisable in the district court; and to allow this amendment would be to institute an original, and not an appellate inquiry in the circuit court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage, and admitted doctrine of such courts, to permit the parties, upon the appeal, to introduce new allegations, and new proofs, *non allegata allegare, et non probata probare.* The courts of the United States, in the exercise of appellate jurisdiction in admiralty causes, are, by law, authorized to proceed according to the course of proceedings in admiralty courts. It has been the constant habit of the circuit courts, to allow amendments of this nature, in cases where public

justice, and the substantial merits, required them; and this practice has not only been incidentally sanctioned in this court, but on various occasions, in the exercise of its own final appellate jurisdiction, it has remanded causes to the circuit court, with directions to allow new counts to be filed. We may, then, dismiss any further discussion of this objection, and proceed to the main questions in controversy. [Here the learned judge recapitulated *the facts of the case as they have been before stated.]

*39] In considering the circumstances, the court has no difficulty in deciding, that this is not a case of piratical aggression, in the sense of the act of congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards, with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the Alligator, with the avowed intention of repelling her approach, or of crippling or destroying her. But there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defence, against what the master very imprudently deemed a piratical cruiser. The combat was, therefore, a combat on mutual misapprehension; and it ended, without any of those calamitous consequences to life, which might have brought very painful considerations before the court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our courts,

*40] for *such aggressions; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt, that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle, that, for gross violations of the law of nations, on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so, in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent and unprovoked attack is made by one vessel upon another, upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this, does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean, by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as much, are liable to the extreme rights of

*41] war. And a piratical *aggression by an armed vessel, sailing under the regular flag of any nation, may be justly subjected to the penalty

of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed further, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer. These latter ingredients are entirely wanting in the case before us; and therefore, if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of congress, or the general law, that it ought not to be enforced.

But, in the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend, that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

*In considering these points, it is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, [*42 in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations, in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril; if he establishes the forfeiture, he is justified; if he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business, without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ui non alienum lædas.*

It has been argued, that no ship has a right to *approach another at sea; and that every ship has a right to draw round her a line of [*43 jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations, within cannon-shot of their shores, in virture of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted

beyond it. Every vessel, undoubtedly, has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognised, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war, sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems
*44] *indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage, in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress of course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations, navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say, that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora; and her firing was persisted in, after the Alligator had hoisted her national flag,
*45] and, of *course, held out her signal of her real pacific character. What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the Alligator? It is said, that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a sup-

posed enemy by day-light, and in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the Alligator? How was it to be known, that she was a Portuguese ship, or that she took the Alligator for a pirate, or that her object in laying to, was a defensive operation? When the vessels *were within reach of each other, the first salutation from the ship was a shot fired ahead, and, [*46 at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and from her manœuvres, almost necessarily led to the supposition, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag, until the surrender. What, then, was Lieutenant Stockton's duty? In our view, it was plain; it was to oppose force to force, to attack and subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion, would have been to betray (what no honorable *officer would be supposed to indulge) an indifference to its [*47 dignity and sovereignty.

But it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground, can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary, with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference, that his ship *might properly be deemed, [*48 under such circumstances, a piratical cruiser.

But we are not disposed to admit, that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It

may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counter-proof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts betweeen neutrals and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution, in time of war, arises from circumstances, which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows, that it is justly to be insisted on, at the peril of costs and damages, in peace. In any view, therefore, we do not think this omission can avail the claimants.

*49] *Again it is argued, that there is a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon-shot, and to demean themselves in such a manner as not to endanger nentrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation. Doubtless, the obligation of treaties is to be observed with entire good faith, and scrupulous care. But stipulations in treaties, having sole reference to the exercise of the rights of belligerents in the time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties to other nations,

*50] we have no such treaty subsisting with *Portugal. It will scarcely be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation. Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and ultimately, in subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defence and vindication of the rights and honor of his country.

The next inquiry is, whether the act of sending in the Marianna Flora for adjudication, was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages. It is argued, that, upon examination of the ship's papers, the crew and the cargo, it must clearly have appeared,

that the ship was a merchant ship, bound on a lawful voyage, and not a piratical cruiser. This state of the case must be admitted to have been apparent. But the real difficulty is of another sort. Her papers, and cargo and destination, could give no information of the nature of the attack made upon the Alligator. However hostile, malignant or even piratical the aggression might be, the papers could shed no light upon the subject. The owners of the cargo, and the owners of the ship (so far at least as their duties and responsibilities were not bound up by the acts of the master, as their agent), might be innocent; the voyage might be of a purely mercantile character, and yet, acts of aggression might be committed, *which might bring the case completely within the act of congress, or of the general law [*51 of nations, as a gross and violent injury, calling for ample redress. The real duty imposed upon Lieutenant Stockton was, not to examine the papers, unless so far as they might explain doubtful circumstances, but to ascertain the nature, object and intent of the attack upon his vessel. He was bound to exercise an honest and fair discretion on the subject, and to obtain such explanation as might guide his judgment. What was the excuse offered for attack upon him? It was not that the guns were fired by mistake or accident. They were admitted to have been by authority and design. They were fired, after his own flag was displayed, and with the express intention of disabling the vessel and destroying the crew. The only excuse offered for this unjustifiable act was, that the commander entertained a fear that the Alligator was a pirate. But such a fear, unauthorized by any acts on the other side, was no excuse for a wrong which might have led to the most fatal consequences. If the Alligator had been seriously injured, or any of her crew had been killed, no doubt could exist, that, under such circumstances, the ship ought to have been sent in for adjudication, to enforce redress, and also to administer, if necessary, punishment. The attack was not the less inexcusable, because the consequences were not as injurious as the master intended.

It is a different thing to sit in judgment upon this case, after full legal investigations, aided by *the regular evidence of all parties, and to [*52 draw conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment, to declare, that an officer, charged with high and responsible duties on the part of his government, should exercise the discretion intrusted to him, at the peril of damages, because a court of law might ultimately decide, that he might well have exercised that discretion another way. If Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages. But it is conceded on all sides, and in this opinion the court concurs, that he acted with honorable motives, and from a sense of duty to his government. He thought the aggression was piratical, and that it was an indignity to the national flag, utterly inexcusable. The view now taken by this court, in respect to the whole case, upon a full examination of all the facts, is certainly somewhat different. It leads us to say, that Lieutenant Stockton might, without justly incurring the displeasure of his government, have released the ship, not because she had done no wrong, but because the wrong was not of such a nature as called for vindictive redress.

But the question upon which damages must depend, is not whether he *might* not have released the ship, but, whether he was, at all events, *bound* so to do; and whether that obligation *was so imperative, that the omission ought to be visited with damages. We are, then, to consider the real difficulties of Lieutenant Stockton's situation. An attack had been made upon a national ship, under his command, without cause. It was a hostile act, an indignity to the nation, and a trespass upon its rights and sovereignty. It was not an accidental, but a meditated act; not necessarily carrying its own excuse along with it, but susceptible of different interpretations. It was not an affair in which he was at liberty to consult his own wishes or honor merely, although a brave and distinguished officer might naturally feel some solicitude to preserve his high reputation untarnished in the eyes of his government. He was bound to look to the rights of his country. He might well hesitate in assuming the arbitration of national wrongs; he might well feel a scrupulous delicacy in undertaking to waive any claim which the government had authority to enforce, or to defeat any redress which it might choose to seek, or to prevent any inquiries which, though its established tribunals, it might think fit to institute, in respect to his conduct, or that of the offending vessel. Considerations of this nature could not but weigh heavily upon the mind of a gallant officer; and they are not unfit to be entertained by this court in forming its own judgment.

*53]

It is also further to be observed, that the case was confessedly new in its character and circumstances. The researches of counsel throughout the progress of this protracted controversy, have not discovered any case, which in point of law, can govern this. If it is new here, it may well be deemed to have been new and embarrassing to Lieutenant Stockton. In such a case, it is not matter of suprise, that he should come to the conclusion, that it was not proper to take upon himself the responsibility of a final decision; but to confide the honor of the nation, as well as the rights of the other party, to judicial decision. No inference is attempted to be drawn, that his acts were intentionally oppressive and harsh; and it would be going a great way, to declare, that an exercise of honest discretion, in a case of wrong on the other side, ought to draw after it the penalty of damages.

*54]

There is another more general consideration, which is entitled to great weight in this case. In cases of capture, strictly so called, no decision has been cited, in which, if the capture itself was justifiable, the subsequent detention for the adjudication has ever been punished by damages. So far as counsel have examined, or our own researches extent, no such principle has ever been established. The present case stands upon a strong analogy, and to inflict damages would be to desert that analogy. Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion upon the subject. A party who is *in delicto*, ought to make a strong case, to entitle himself to general relief.

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The case of *The Louis*, 2 Dods. 210, is a striking example in illustration of these remarks. There, a French slave-ship was, in a time of peace, taken possession of by an English armed cutter, after a sharp engagement, in

which several men were killed on both sides. The ship was carried into Sierra Leone for adjudication, and subsequently, the cause came before the high court of admiralty, upon appeal. The decision pronounced by Lord STOWELL appears to have been made after very full consideration, and is expounded in his most elaborate manner. He decided, that the original seizure was totally unjustifiable; and that, even if the slave-trade was prohibited by the French laws (which, he thought, it was not), still, it was not for English cruisers to claim a right of search, or to seize such vessels to enforce those laws. He, therefore, pronounced a decree of restitution. But he denied damages and costs to the claimant. His language on that occasion was, "Upon the matter of costs and damages, that have been prayed, I must observe, that it is the first case of the kind, and that the question itself is *primæ impressionis*; and that, upon both grounds, it is not the inclination of the court to inflict such a censure." Here, then, we have a case of an acknowledged maritime trespass, accompanied with circumstances of immediate and fatal injury, in which the original wrong travelled along with, *and infected, the whole subsequent proceedings; and yet the court, on account of its being the first instance, and of the novelty of the [*56 question, deemed it a conscientious exercise of its discretion, not to award damages. The case before this court is also of the first occurrence, and the question is entirely new in its presentation. It has this striking fact, in which it is most favorably distinguished from *The Louis*, that the original seizure was justifiable, and if the intent of piratical aggression had been established, condemnation must have ensued.

If, then, this court should, under these circumstances, award damages, it would take a new step, never known to have been taken before by a court of admiralty. It would desert the analogy of cases of justifiable capture in matters of prize, and introduce a rule, harsh and severe, in a case of first impression, whose bearing and character have engaged the bar and bench in several most laborious discussions, and inflict upon an honest exercise of discretion, a punishment which has been denied, in *The Louis*, to an inexcusable wrong.

There are one or two other suggestions which were urged in the argument, that ought not to be passed over in silence. It is said, that the tort, if it ought to be redressed at all by a proceeding *in rem*, was exclusively cognisable in the courts of Portugal. We are not aware of any principle upon which this position can be legally maintained. There is no more reason why the courts of Portugal should hold exclusive *jurisdiction upon this case, than the courts of this country. We see no difficulty [*57 in supporting the jurisdiction, as concurrent in both nations. But if there be any choice, it seems more properly to belong to the country of the injured, than of the offending, party.

It is also said, that, at all events, the cargo was not liable to condemnation, even if the offending vessel was liable under the act of congress. Probably, this is true, in respect to that act. But the second count embraces a wider range; and if it had been proved in its aggravated extent, it does not necessarily follow, that the cargo ought to be exempted. That is a question which would require grave deliberation. It is, in general, true, that the act of the master of the vessel does not bind the innocent owner of the cargo; but the rule is not of universal application. And where the master is also

agent of the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise, in the principle of decision. But however this may be, in the present case, if the vessel was sent in for adjudication, the cargo must, of necessity, accompany her; nor could its particular ownership be fully ascertained, until the examinations of the crew were regularly taken. There is no evidence in this case to show, that at any subsequent period, it was desirable, or could have been advantageous to the
*58] claimants, to have separated the ship and *cargo, and to have instituted a new voyage for the latter, under other auspices.

In the district court, an allowance was made of $500, distributable among the crew, on account of their confinement on the passage to Boston, on the ground, that the sending in of the vessel was wrongful. That award was reversed in the circuit court; and no appeal was taken by the crew, as, indeed, none could be, on account of this insufficiency of the sum to entitle the parties in interest to appeal. It is only necessary, therefore, to state, that that matter is not now before this court; and it is to be presumed, that the confinement was such only as was indispensable for the safety of the seizers.

Upon the whole, it is the opinion of the court, that the decree of the circuit court ought to be affirmed, and it is, accordingly, affirmed, without costs to either party.

Decree accordingly

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*59] *Solomon Etting, Plaintiff in error, *v.* President, Directors and Company of the Bank of the United States, Defendants in error.

Charge.—Court and jury.—Divided court.

Although a judge may refuse to declare the law to the jury on a hypothetical question, not warranted by the testimony in the cause, yet, if he proceed to state the law, and state it erroneously, his opinion may be revised in the court above; and if it can have had any influence on the jury, their verdict will be set aside.[1]

Although it is the province of the court to construe written instruments, yet, where the effect of such instruments depends, not merely on the construction and meaning of the instruments, but upon collateral facts *in pais*, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury.[2]

Where the court is equally divided in opinion, upon a writ of error, the judgment of the court below is to be affirmed.

Quære? What concealment or suppression of material facts, in a contract where both parties have not equal access to the means of information, will avoid the contract?

Error to the Circuit Court of Maryland. This was an action of *assumpsit*, brought in the court below, by the defendants in error, against the plaintiff in error, Etting, as the indorser of the promissory note of James W. McCullough, under the following circumstances.

In the year 1819, the president of the branch bank, established at Baltimore, his partner in trade, McCullough, the cashier of the branch, and
*60] Williams, one of the directors of the parent *bank, had contracted a debt to the bank to the amount of $3,497,700. The directors at Philadelphia, in consequence of some information which they had received

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[1] Beaver *v.* Taylor, 1 Wall. 637.

[2] Richardson *v.* Boston, 19 How. 263.

respecting it, passed a resolution, on the 19th of February 1819, calculated to draw forth a complete statement of the case, with all its circumstances. This resolution brought the papers it required, and also brought the president and cashier to Philadelphia, who attended for the purpose of making verbal explanations. These were received, and the case was referred, on the 16th of March, to a committee, whose report was made on the 30th of the said month. It appeared by this report, that the securities offered for the debt consisted of 20,848 shares of the stock of the bank, of 26,550 shares, previously pledged, for very large sums, in London, Liverpool, New York and Boston, the amount of which was not stated, and the personal liability of the debtors themselves. The report stated, "as the result of many conferences, and a good deal of deliberation," an offer on the part of the debtors to give additional security for $900,000, payable in five years, by annual instalments. A part of the proposed arrangement was, that the shares previously pledged in London and elsewhere, should be liberated from the claim of the bank, and that the separate liability of each for $300,000, should be received, instead of the joint liability of all for $900,000. This offer, with some modifications, was accepted by the bank. A part of the security offered by McCullough, was *sixteen merchants of Baltimore, who were to become bound for $12,500 each. The committee recommended the [*61 acceptance of these terms, and also recommended, that the sufficiency of the security offered by Williams and McCullough, including the sixteen sureties proposed by McCullough, should be referred to the members of the board, residing in Baltimore. This course was adopted by the bank, and the committee of members residing in Baltimore reported on the whole subject. Of the sixteen names proposed for their consideration, three were withdrawn, and three were objected to. Among those who were accepted was Etting, the plaintiff in error. The negotiations, investigations and arrangements for the completion of the business, were some time in progress. Propositions were made for changes of the securities, and on the 10th of May, the president of the bank addressed a letter to the committee in Baltimore, urging them to bring it to an immediate close. On the 14th of May, the committee in Baltimore reported the documents which had been executed in pursuance of previous arrangements made with the debtors, a report of which was made by the committee at Philadelphia, on the 17th of the same month, and on the 18th, McCullough was removed from the office of cashier, which he had held from the first establishment of the bank. It was admitted, that he was a young man, worth nothing, who had a family, and whose salary as cashier was $4000.

*When the note indorsed by Etting, the plaintiff in error, fell due, [*62 he refused to pay it; on which it was protested for non-payment, and this suit was brought by the bank. At the trial in the court below, the whole matter was given in evidence, and the court was moved to instruct the jury on the law which would arise on the facts of the case, and the inferences which the jury might draw from those facts. The counsel for the plaintiffs moved the court to instruct the jury, that if they should be of opinion, from the evidence, that the defendant, Etting, without any communication with the plaintiffs, but on the application of McCullough only, agreed to become his indorser, under the arrangement made between him and the plaintiffs, although they should be satisfied, from the evidence

offered by the defendant, that the said McCullough deceived the said Etting; that it was known to the bank before, or pending the negotiation, that the debt from McCullough, or the greater part thereof, had grown out of his unauthorized and fraudulent appropriation of their funds to his own use, which knowledge the bank did not promulgate, though they contemplated his removal as soon as the securities should be given, in conformity with the arrangement which had been made; that the defendant indorsed the note, in ignorance of any fraud on the bank, or of any abuse of his office of cashier, or of any probability of his removal from the said office; that, had the defendant known these circumstances, he would not have indorsed the said
*63] note; and that the bank forbore *to promulgate either the information they possessed, or their intention to remove the said McCullough, under the impression, that the disclosure would increase the difficulty of the said McCullough in procuring security, if not render it impossible for him to procure it; yet, if they should also be of opinion, that the defendant, without making any inquiries of the plaintiffs on the subject of such information and intention, or holding any communication with them on the subject of his intended indorsement, did, of his own accord, on the application of the said McCullough, and for the purpose of giving effect to the said arrangement, indorse the said note on which this action is brought, that there was nothing in the evidence so given by the defendant, to affect the plaintiff's right of recovery in this action. That, in order to vitiate the said note and indorsement in law, and to bar the plaintiff's right of recovery thereon, on the ground of a fraudulent misrepresentation, or fraudulent concealment of circumstances known to them, and unknown to the defendant, it was incumbent on the defendant, to show that he applied to the plaintiffs for information, or held some communication with them for the purpose of receiving such information, and that on such application or communication, the plaintiffs either misrepresented or concealed such circumstances; and that, in the absence of such proof, there was nothing in the facts so given in evidence by the defendant, to affect the right of recovery in the action.
*64] *The court gave the instruction as asked, to which an exception was taken.

The counsel for the defendant then moved the court for instructions, that if the jury should draw from the evidence certain inferences which were stated, the plaintiffs were not entitled to recover. These inferences were, that the bank was fully informed, in March 1819, of the fraudulent conduct of McCullough, the extent of his misapplication of their funds, and of his insolvency; that on receiving this information, they became satisfied of his unfitness to continue in office, and determined to remove him. That, however, they continued him in office until the 18th of May, carefully concealing the circumstances, and their determination, for the purpose of obtaining security of the debt due to them from the said McCullough, one of which so contemplated securities was the note in question. That the defendant was, to the knowledge of the plaintiffs, ignorant of McCullough's breach of duty, and of the determination to remove him, and indorsed the note by reason of that ignorance. The court refused to give this instruction, unless the jury should be further of opinion, that the defendant was led into this state of ignorance, in consequence of inquiries made by him of the plaintiffs, or of some previous communication between them and him.

On the farther application of the counsel for the defendant, praying the court to instruct the jury, that on the statement and evidence contained *in the bills of exception, if the jury believed the same, the plaintiffs were not entitled to recover; the court refused to give the instruction asked, and directed the jury, that on the evidence aforesaid, the plaintiffs were entitled to recover. [*65

Judgment was rendered for the plaintiffs in the court below, and the cause was brought by a writ of error to this court.

March 9th and 10th. The cause was argued by *Webster* and *Taney*, for the plaintiff in error; and by the *Attorney-General* and *Emmet*, for the defendants in error. The discussion took a wide range upon the doctrine of misrepresentation and concealment in contracts; but as that point was not determined by the court, it has not been thought necessary to report anything more than a concise summary of the arguments of counsel.

The following points were made for the *plaintiff* in error, upon the instructions given and refused by the court below. 1. That the concealment of the facts and circumstances above mentioned, or the concealment of any one of them, whereby the plaintiff in error was induced to enter into the contract in question, was a fraud upon him, and vitiated the contract. 2. That if the mere omission to communicate the said facts and circumstances would not be a fraud, yet, the act of the defendants in error, of continuing McCullough in office, in order to give *him credit, and thereby to procure the security in question, by which means the plaintiff in error was deceived, and induced to indorse the said note, was a fraud upon him, and vitiated the contract. [*66 3. That the continuance of McCullough in the office of cashier, from the 16th of March 1819 (when his misconduct in office came to the knowledge of the president and directors of the bank), until the 18th of May following, when he was dismissed, was a violation of the duty of the president and directors to the government of the United States, and to the public, and therefore, vitiated any contract obtained by means of such continuance in office.

Upon the first point, it was argued, that the concealment of material circumstances, known to one party, and unknown to the other, vitiates the contract. 1 Com. Cont. 38; 1 W. Bl. 465; 1 Fonbl. Eq. 379, note h; 1 Doug. 18; *Hill* v. *Gray*, 1 Starkie 434; Verplanck on Contracts, *passim*; 8 Mass. 408. In the opinion given by the court below, the principle was admitted, but with this qualification, that it must be on inquiry or communication, for the purpose of information. In this view of the subject, the only question would be, whether the rule is subject to this limitation, *i. e.*, of inquiry or communication for the purpose of information. But an exception to the rule was supposed to exist, and it might be said, that a party is not bound to communicate circumstances extrinsic *to this contract, and that the circumstances concealed were extrinsic. If the proposition were true, although there had been inquiry and communication, yet the facts themselves being of such a character that they need not have been disclosed, that alone created the exception to the rule. But it was insisted, the exception ought to be confined to those facts which are equally open to both parties. *Laidlaw* v. *Organ*, 2 Wheat. 183. The ground upon which Etting undertook for McCullough's performance, was his confidence in his supposed integrity, and in his resources and credit derived from his connec- [*67

tion with the bank. No case could be found, which states, that inquiry is necessary to create the obligation to disclose material facts, which are not equally within the knowledge of both parties. The fraud consists in dealing with the party in ignorance, and leaving him so. It is not necessary that the other party should have created the false impression, or intended to have created it. It is sufficient that he knows it, and takes advantage of it. *Stuart* v. *Wilkins*, 1 Doug. 18; *Pidcock* v. *Bishop*, 3 Barn. & Cresw. 605; *Smith* v. *Bank of Scotland*, 1 Dow P. C. 272; 1 Brod. & Bing. 289; *Jackson* v. *Duchaire*, 3 T. R. 551. Undue concealment consists in the suppression of a material fact, not in the knowledge of both parties, and not of a nature to be equally known to both parties, in a case where confidence is
*68] reposed that the fact does not exist. In *Laidlaw* v. *Organ*, *the intelligence was of a nature to be equally known to both parties, and it was not a fact respecting which confidence is generally reposed that it will be disclosed.

On the second point, it was argued, that here was an act done in order to give a false credit, and it did give false credit. It was a positive deceit by acts, though not by words. It was asked, whether a party might lawfully deceive in one way, and not in the other? The law is more consistent with common justice, and says you must do nothing to deceive. 2 Wheat. 295; 1 Dow P. C. 294–5; 2 T. R. 587. It was a case of industrious concealment. Sugd. on Vend. 226–7, and cases there collected. By continuing the cashier in office, the defendants in error gave him a fictitious credit, which they knew did not belong to him. It was analogous to the ordinary case of the fraudulent misrepresentation of the credit of another. *Paisley* v. *Freeman*, 3 T. R. 51. It had been said, there was no inquiry. Why was there none? Because, the very continuance of the officer in office, was evidence that they thought him honest. It might, perhaps, be contended, that nothing was positively said or done by the bank, calculated to mislead the surety. But silence, or an omission to act, may, in many cases, as effectually deceive the party, as the most explicit declaration, or the most positive acts. Continuing the cashier in office was equivalent to a *suggestio falsi*. (*a*)
*69] On the third point, the peculiar character of the bank was insisted on, as an instrument of the government, not created for its own profit merely, but as a means to aid the financial operations of the government.

(*a*) In the case of Smith *v.* Bank of Scotland, 1 Dow P. C. 294; Lord ELDON spoke of another case which had come before him (Maltby's Case): "A clerk to the Fishmonger's Company had incurred a considerable debt. The deficit had been increasing from year to year, and was at length carried beyond what the company were likely to recover. They demanded additional security, which he procured. The case had come before him only upon motion, but he had thought a good deal upon it, and the light in which it appeared to him was this: If he knew himself to be cheated by an agent, and, concealing that fact, applied for security, in such a manner, and under such circumstances, as held him out to others as one whom he considered as a trustworthy person, and any one acting under the impression that the agent was so considered by his employer, had become bound for him; it appeared to him, that he could not conscientiously hold that security. He was, then, of opinion, that the Fishmonger's Company could not hold their security. He did not know what had become of the case afterwards, but he believed, that his opinion was submitted to, and that no further proceedings were had. He had since reconsidered the matter, and still retained his former opinion, and would act upon it judicially, if occasion offered."

Mc Culloch v. *Maryland*, 4 Wheat. 411, 422. Both the public and the government were deceived and injured by the misplaced confidence of the bank in their cashier. It was their duty to have removed him, the instant his default was discovered. It is contrary to the policy of the law, to enforce a contract obtained by a breach of duty to the public. The bank may be considered as a public officer, and is bound by the same obligations, and owes the same duties, as any other public officer. But would it be pretended, that a public officer could keep an unworthy agent or deputy in office, for *the mere purpose of securing a debt due to himself? [*70

On the part of the *defendants* in error, it was stated, that the rule is accurately laid down by Mr. Fonblanque, as to what circumstances a contracting party is bound to disclose: "If a man, by the suppression of a truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of a good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation." 1 Fonbl. Eq. 164. Under certain modifications, and with certain exceptions, the party is bound to communicate all circumstancee intrinsic in the contract itself; all those circumstances which enter into the contract as ingredients, and from constituent parts of it. But with regard to circumstances extrinsic to the contract, though forming inducements to enter into it, however powerfully he may believe and know they are operating with the opposite party, he is at liberty to keep silence. Intrinsic circumstances are such, for example, as regard the quality and price of the article, which must, of necessity, enter snto the inducement. Extrinsic circumstances are those considerations which from no component part of the contract itself, but which may form inducement with the party to enter into it. The distinction is founded *in reason, and is necessary to the business of life. (2 Wheat. 185 n. and the passages from Pothier there cited.) With regard to the whole class of extrinsic circumstances, though, if the party undertake to disclose them, he must take care to state the truth, yet, he may maintain the most obstinate silence respecting them, and the contract will still be valid. [*71

As to the objection, that the rule must be received with the qualification, that the facts are equally accessible to both parties, it was said, that if by this was meant, that they must be equally accessible to both, by the use of ordinary diligence, it could not be considered as well founded. *Fox* v. *Mackreth*, 2 Bro. C. C. 420. And if it meant nothing more than that it was physically accessible, where the party pushes his inquiries in all possible directions, and takes sufficient time to make the discovery, then it was inapplicable to any practical purpose in the business of life. The qualification had been borrowed from the law with regard to intrinsic circumstances, to which it was properly applied, and transferred to extrinsic circumstances, to which it was wholly inapplicable. Assuming, that, with regard to extrinsic circumstances, a party may conceal them, without impairing the contract, there was not a feature in any one of the instructions in this case which was not justified by the operation of that principle. The keeping the cashier in office was doing nothing. *It was a mere forbearance to act. All the cases referred to, of industrious concealment, [*72

admitted of two answers: 1. That the concealment was of circumstances intrinsic to the contract. 2. That, in all the cases, no acts were done to alter the antecedent state of things, for the purpose of concealment. As to the case of *Smith* v. *Bank of Scotland*, 1 Dow P. C. 272. which had been relied upon as analogous to the present, it would be found, that there was a positive misrepresentation on the part of the bank, they alleging that further security was wanted on account of an increase of business, when, in fact, there was a decrease. Another case from the same book might have been cited, where an attempt was made to set aside a security bond, alleged to have been obtained by unfounded representations of circumstances, generally, without any direct reference to the bond, and the court having, according to the forms of the Scottish law, appointed the sureties to say whether they would refer to the respondent's oath, "that he did elicit that bond?" and the sureties having admitted, that "they never meant to say that there was any degree of personal influence with either of them to elicit the bond of relief," the court of session pronounced in favor of the bond, which was affirmed by the house of lords on appeal. *Webster* v. *Chrystie*, 1 Dow P. C. 247. So, here, it might be asked, whether the plaintiffs below
*73] had done anything to *elicit the note. All that was alleged was, that they had not communicated their intention of removing the cashier, when they were not asked respecting their intentions, and when it was equally lawful for them to retain or to remove him. The effort on the other side is to induce the court to establish a new rule of law, which, however analogous to other principles merely applicable to the contract of insurance, was admitted, even by the ingenious and learned author of the treatise which had been referred to, not to form a part of the jurisprudence of this country. Verplanck on Contracts.

March 16th, 1826. MARSHALL, Ch. J., delivered the opinion of the court. —If this case depended on the deservedly high character of the individuals who were engaged on the part of the bank in the transactions in which the suit originated; if elevation above the possibility of suspicion that they could have meditated anything believed by themselves to be legally or morally wrong, could decide it, this cause would not have required the great efforts which have been bestowed upon it. The names which appear on this record can never be connected with actual fraud; nor would any difficulty be found in protecting them from the imputation, were it possible that it could be made. But judicial inquiries are into the rights of the parties;
*74] *and, although high and honorable character has, and ought to have, great influence in weighing testimony in which that character is in any manner involved; yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide.

At the trial, several points of law were raised by both parties, on which opinions were given, to which exceptions were taken, and the correctness of those opinions constitutes the single inquiry in this court. [Here the learned chief justice stated the case, as it is stated above.]

As preliminary to the inquiry, whether the law arising on the facts, and on the inference assumed in the bills of exception contained in the record

was correctly stated by the court, a point has been made at the bar, which must be disposed of. It has been contended, that a court is not bound to answer abstract or hypothetical questions of law, not growing out of the testimony in the cause, which may be propounded at the bar; and to apply this principle, it has been also contended, that the testimony contained in the record, and referred to in the bills of exception, contains nothing from which the jury could possibly draw those inferences of fact upon which the court was asked to declare the law. That the points made in the bill of exceptions constitute a distinct and totally different case from that made by the evidence. *That a judge cannot be required to declare the law on hypothetical questions, which do not belong to the cause on trial, [*75 has been frequently asserted in this court, and is, we believe, incontrovertible. *Hamilton* v. *Russell*, 1 Cranch 309, 318. The court may, at any time, refuse to give an opinion on such a point; and if the party propounding the question is dissatisfied with it, he may except to the refusal, which exception will avail him, if he shows that the question was warranted by the testimony, and that the opinion he asked ought to have been given. But if the judge proceeds to state the law, and states it erroneously, his opinions ought to be revised; and if it can have had any influence on the jury, their verdict ought to be set aside.

It cannot, however, we think, be correctly affirmed, with respect to the case now under consideration, that the points stated in the bills of exception have no relation to the testimony to which those bills refer. That testimony consists of various communications and reports, made to the bank, of their own transactions, and of the admissions of parties. It has been said, that this testimony is all in writing, and is to be construed by the court; and from this proposition is deduced the corollary, that the jury was not at liberty to draw inferences from it.

Were the fact as alleged, and were it true, that the testimony is all in writing, the consequence drawn from it cannot be admitted. Conceding it to be the province of the court, to construe any particular paper which was offered in *evidence, the report of the 30th of March for example, and to declare the meaning of every sentence, and of the whole instrument, yet this report contains a great variety of extrinsic circumstances, suggests measures of deep interest, was followed by numerous successive acts which took place in the country, and which do not derive all their influence on the cause, from the construction of the particular papers in which they are communicated, but, in a considerable degree, from their connection with each other, from the motives in which they originate, and from the effects they were calculated to produce, and did produce, on others. These subjects are peculiarly proper for the consideration of a jury. If the testimony be examined, it will, we think, appear, that the counsel for the plaintiffs has not asked the court to give its opinion on any inferences of fact which it was not, at least, possible for the jury to draw from the evidence. The knowledge of the bank is not questioned. The ignorance of Etting might be inferred from the absence of all testimony proving his knowledge that any fraud had been practised by McCullough. The original resolution of the bank to remove McCullough might be inferred from their knowledge of his unfitness for the office, and from the fact that they did remove him, the instant the securities were obtained which they expected from him. The [*76

same facts might justify the inference respecting the motives which induced the bank to retain him in office, until those securities were procured.

*77] We are far from saying, that these inferences were *all of them such as the jury ought to have drawn. It is not difficult to perceive, that the bank might have acted on motives equally unexceptionable in morals and in law. The jury might very well have believed that the bank thought the 26,550 shares of stock were not worth more than the sums for which they were pledged, or, at any rate, were not a safe security, and might, therefore, think it advisable to relinquish that pledge, if other security could be substituted in its place. Others might estimate that stock more highly than they did, and might estimate it rightly. Friends, therefore, acting on their own judgment of the value of this stock, might be found willing to indorse the paper of Mr. McCullough on receiving it as a pledge. The motive, too, for retaining Mr. McCullough in office might be to induce him to do the bank all the justice in his power, not to induce others to indorse his notes. The whole subject was before the jury, and they might have drawn from the testimony either these inferences, or those which are stated in the bills of exception. The counsel for the plaintiffs, believing the law to be in their favor even upon that view of the testimony which is taken in the exceptions, and fearing that the jury, should they take that view, might find for the defendant, chose to refer the law to the court. Whether his fears respecting the jury were well or ill founded, this cause must now be decided on the correctness of the opinion given by the circuit court.

*78] In the very elaborate arguments which have *been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in. opinion upon it.

Judgment affirmed.

BROOKS *v.* MARBURY.

Assignment.—Copy of deed.

A debtor has a right to prefer one creditor to another in payment; and it is no objection to the validity of an assignment for that purpose, that it was made by the grantor, and received by the grantee, as trustee, in the hope and expectation, and with a view of preventing prosecution for a felony connected with his transactions with his creditors; if the preferred creditors have done nothing to excite that hope, and the assignment was made without their knowledge or concurrence, at the time of its execution, and without a knowledge of the motives which influenced the assignor, or was not afterwards assented to by them, under some engagement, express or implied, to suppress or forbear the prosecution.

An assignment for the benefit of preferred creditors is valid, although their assent be not given at the time of its execution, if they subsequently assent in terms, or by actually receiving the benefit of it.

It is no objection to such an assignment, that it defeats all other creditors of their legal remedies, even if amounting to a majority in number and value, unless there be some express provision of a bankrupt law to invalidate the deed.

**Quære?* How far, and under what circumstances, the possession of the property assigned to trustees for the benefit of creditors, continuing in the grantor, will invalidate the assignment. [*79

A certified copy of a registered deed cannot be given in evidence, if within the power of the party claiming under it to produce the original, unless there be some express provision by statute making an authenticated copy evidence.

ERROR to the Circuit Court for the District of Columbia. This is the same case which is reported 7 Wheat. 556. The judgment of the court below was then reversed, and a *venire de novo* awarded. At the new trial, exceptions were taken to the instructions given by the court to the jury; and the cause having again been brought before this court for revision, was argued by *Jones* and *Coxe*, for the plaintiff, citing 6 Har. & Johns. 234; *Hamilton* v. *Russell*, 1 Cranch 310; *Hildreth* v. *Sands*, 2 Johns. Ch. 35; *Edwards* v. *Harben*, 2 T. R. 587; and by the *Attorney-General* and *Key*, for the defendant, citing *Marbury* v. *Brooks*, 7 Wheat. 556; *Wheaton* v. *Sexton*, 4 Ibid. 503; *Astor* v. *Wells*, 4 Ibid. 466; *Sands* v. *Hildreth*, 14 Johns. 493.

February 10th, 1826. MARSHALL, Ch. J., delivered the opinion of the court.—This case depends on the validity of a deed executed by Richard H. Fitzhugh, on the 31st of December 1819, purporting to convey to the defendant, for the use of certain enumerated creditors, his slaves, goods and debts, which deed *was recorded in the record-book for the county in which the parties resided, on the 3d of January 1820. Immediately [*80 after executing this deed, the said Fitzhugh absconded; and on the 10th of February thereafter, the plaintiff sued out an attachment, to attach his effects in the hands of the said Marbury. The garnishee denies that he has any effects of the said Fitzhugh in his hands, which can be affected by the attachment, the same not being sufficient to satisfy the creditors enumerated in the deed which has been mentioned. The plaintiff contests the validity of that deed. The jury found a verdict in favor of its validity, upon which the circuit court rendered a judgment against the plaintiff, which he has brought before this court by a writ of error. In the course of the trial, exceptions were taken by the counsel for the plaintiff to some opinions given by the court, and to its refusal to give others for which they applied. The

correctness of the opinions given, and of the refusal of those not given will now be considered.

On the trial, the garnishee offered to read from the record-books of the county, the memorial of the deed which has been mentioned, to which the plaintiff objected, and insisted that the original ought to be produced. The court overruled this objection, and the copy was read. To this opinion of the court, the plaintiff's counsel excepted; and he now insists, that there is no law of the state of Maryland which directs a deed of the description of that of which a copy was read in this case, to be recorded; and that, if there
*81] *were such a law, still, the original ought to be produced, if within the power of the party claiming under it. The act of 1729, ch. 8, enacts, "that from and after the end of this session of assembly, no goods or chattels, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, unless the same be by writing, and acknowledged before one provincial justice of the county where such seller, mortgagor or donor shall reside, and be within twenty days recorded in the records of the same county."

The counsel for the plaintiff insists, that this law directs the recording of those deeds only which convey property of which the donor remains in possession, and that the possession in this case must be supposed to have passed with the deed, unless the contrary be shown. This objection is not without its weight. It, however, does not appear to have been suggested at the trial, and probably did not occur to the court, or the parties, at the time, or it might have been shown that, in point of fact, the possession was not immediately changed. Since, however, the admission of the evidence was not made to depend on the circumstance of possession, this objection cannot be overlooked.

It has been also contended by the plaintiff, that if possession did not accompany and follow the deed, it is void as to creditors, under the author-
*82] ity *of the case of *Hamilton* v. *Russell*, 1 Cranch 310. On this point, it may be proper to observe, that in *Hamilton* v. *Russell*, the deed purported to convey the property to the vendee, for his own immediate use, and the subsequent continued possession of the vendor was incompatible with the instrument. This is a deed of trust, not for the benefit of the person to whom it is made, but for the benefit of certain enumerated creditors. The continuance of the possession with the donor, until the trust can be executed, may not be so incompatible with the deed, as to render it absolutely void, under all circumstances. The court does not mean to express any opinion on this point, further than to say, that it is not supposed to be decided in *Hamilton* v. *Russell*.

Should the act of 1729 be considered as applying to this case, the question would then arise, whether the copy of a deed be admissible, where the original is in the power of the party offering the copy. This would be contrary to the great principle, that the best evidence which the nature of the case admits of, ought to be required. But it has been said, in answer to this objection, that the courts of Maryland have so decided. This court will certainly respect the decisions made in the state; but we are not satisfied, that the principle is settled. In the case cited from 6 Har. & Johns. 234, the question arose on the conclusiveness, not on the admissibility, of the evi-

dence. The suit was on an administrator's bond, and Mr. McGruder said, in argument, that *the law requires such a suit to be brought on a copy [*83
of the bond. Of course, such copy must be admissible. It is true, that in deciding against its conclusiveness, the court said, generally, that a copy is *primâ facie* evidence in all cases where the law directs an instrument of writing to be recorded. This is the assertion of a general principle, not the construction of a particular act, and we understand that the courts of Maryland have not adhered uniformly to the principle thus laid down. There is some contrariety of opinion on this point; but the majority of the court conceives that the copy should not have been read, without showing that the original was not in the power of the party. Although the judgment of the circuit court must be reversed, for error in admitting improper testimony, yet, as the record presents other points which must again arise, and which have been fully argued, this court will proceed to indicate its opinion on those points.

The deed having been admitted, its validity came on to be discussed. Richard H. Fitzhugh had made notes to a very considerable amount, and had forged the names of indorsers thereon; after which, he had discounted them in the banks of Georgetown, and of this city. The proceeds of the deed were to be applied, in the first instance, to the payment of these forged notes; after which, the residue was for the benefit of the creditors generally. It is understood, that there is no residue; and that if the deed be valid, the debts due to the favored *creditors will be paid, to the exclusion of [*84
all others; if it be invalid, the whole proceeds must be paid to the attaching-creditors, in the order in which they stand, to the exclusion of those for whose benefit the deed was made, and of those attaching-creditors also for whom nothing shall remain after satisfying prior attachments. It is, then, a mere question of legal preference, unmixed with any equitable considerations whatever.

It is contended by the plaintiff, that the deed is void, because the consideration is illegal, it being given for the purpose of suppressing a prosecution for a felony. The testimony in the cause was abundantly sufficient to justify the jury in drawing the inferences, that the deed was executed by Fitzhugh, in the hope that payment of the forged notes would enable him to escape a prosecution; and that the same hope was entertained by Marbury. It is not doubted, that had there been any previous communication with the banks, which led to this hope, or any evidence that the prosecution was not instituted, in consequence of the notes being paid, or that their payment was to depend on a forbearance to prosecute, the deed would have been against the policy of the law, and utterly void. But the evidence stated in the case, and the opinions which were given, as well as those which were refused by the court, present the question whether, assuming the entire innocence of the favored creditors, the deed to Marbury is annulled, by any hope which might have lurked in the bosoms of both the grantor and *grantee, that the payment of the notes it was intended to secure, [*85
might save Fitzhugh from a prosecution.

This case has once already been before this court, on a writ of error to a judgment of the same circuit court, made in favor of the attaching-creditor, which judgment was reversed. (7 Wheat. 556.) But although the facts were the same, the opinions on which the case depended were

essentially different from those which are now to be considered. The case wears a new aspect in many respects, and stands on principles which are not absolutely the same. Although any point, already determined, will not be changed, lightly or inconsiderately, yet, we think, that the decision in the former case does not positively determine this.

The first exception is to an opinion given on the prayer of the defendant. The court instructed the jury, "that if they believed, from the evidence, that Richard H. Fitzhugh executed the deed in question, and William Marbury accepted the same, without the concurrence, or knowledge of the banks mentioned in the deed; and that the said banks assented to the same, without any engagement, express or implied, to suppress or forbear the prosecution of the said Fitzhugh, then the plaintiff is not entitled to recover." To this instructiou given by the court to the jury, the counsel for
*86] the plaintiff excepted. *The case assumed is, that the deed was executed, "without the concurrence or knowledge of the banks." At the time of its execution, then, they cannot be considered as having in any manner participated in it; the terms exclude any agency whatever on their part in obtaining it. The case proceeds, "and that the said banks assented to the same, without any engagement, express or implied, to suppress or forbear the prosecution of the said Fitzhugh." This branch of the statement supposes equal innocence on the part of the banks, when the deed was accepted. The case put is, that they had entered into no express or implied engagement to suppress or forbear the prosecution. This certainly left the jury at full liberty to infer an understanding between Marbury and the banks, which is an implied engagement, from the fact that they forbore to prosecute, when it was in their power to do so, if such was the fact. It left the jury at full liberty to draw this inference, from any language or conduct of the favored creditors, either before or after the deed was accepted, which, in their opinion, would justify it. If, then, the court erred in giving the instruction, that, in such a state of things, the plaintiff was not entitled to recover, it is because the belief on the part of Fitzhugh and Marbury, that the payment of the forged notes might save Fitzhugh from a prosecution, although such a belief was unauthorized by those for whose benefit the deed was made, and was not communicated to them, vitiates the conveyance, so that nothing passed by it.

*87] *The general principle, that notice to a trustee, or an agent, is notice to the *cestui que trust*, or to his employer, is too well settled, to be drawn into question. But the case put to the court, does not suppose Marbury to be the trustee or agent of the creditors. He is the trustee and agent of Fitzhugh, to perform an act for him which his situation disabled him from performing in person. This act was entirely consistent with law; it was to sell his property, and apply the proceeds to the payment of creditors of a particular description, in the first instance, and afterwards, to creditors generally. His right to give the preference is not questioned, nor is the validity of the consideration, so far as it moved from the creditors, infected with any vicious principle, or in any manner brought into doubt. A contract, the consideration of which is the compounding of felony, is admitted to be void; and if this conveyance had been induced by such composition, or the promise of it, or had depended on it, the fact that it was made for the payment of debts justly due, would not have secured it from

the effect of this contaminating ingredient. But no such ingredient enters into the case; everything on the part of the creditors, or of any person acting for them, or by their authority, is unexceptionably fair and legal. The plaintiffs rest their claim to set aside this deed, on the expectations which Fitzhugh and his agent had formed, of its operation on the conduct of the creditors, although the proceedings under the deeds were not to be influenced by the success or failure *of their hopes. The case put in this prayer for the instruction of the court, does not, indeed, suppose such [*88 expectations; but as it does not exclude them, and as this instruction to the jury is, that the plaintiff cannot recover, whatever inferences they may draw from the testimony, not inconsistent with those which the court supposes to decide the cause, it becomes necessary to inquire, whether these expectations vitiate the deed.

It cannot be questioned, that Fitzhugh might have sold his property, and paid the proceeds to the banks, and that such sale and payment would not have been vitiated, by any expectation he had formed that it might save him from a prosecution. Had he communicated this expectation to the purchaser, told him the use he intended to make of the money, and that his motive for preferring the holders of these forged notes to other creditors, was the hope, that on receiving payment, they might be less active in the prosecution, would this have rendered the sale a nullity? We cannot conceive that such a communication would have affected the transaction. Had Fitzhugh conveyed his property directly to the banks, in trust, to sell it for the payment of these notes, in the first instance, so that their right became absolute, without any engagement, express or implied, to suppress or forbear a prosecution, and without any previous or simultaneous communication with them, would the hope, cherished in his own mind, that this payment might operate in his favor with them, avoid the *transaction? [*89 We can perceive no reason for giving such an effect to a latent hope, which could have no influence on those to whom it was not communicated. If, then, this very transaction, passing directly between Fitzhugh and the banks, would have been legal, why should it be rendered illegal, by the agency of Marbury, who was employed by Fitzhugh, and who was impelled by the same motives which influenced his principal? If Fitzhugh might have conveyed directly to the banks, with power to sell for their own benefit, why might he not convey to Marbury, with power to sell, and pay the money to the banks? If a real distinction exists between the cases, we are incapable of perceiving it. The preference of creditors of a particular description, over others, being one which a debtor has a right to make, the sale of his property, and the payment of the proceeds to such favored creditors, being an act which the debtor may perform by himself or his agent, we cannot conceive, that the motives which may have induced the preference, although communicated to the agent, can, in reason, affect the transaction, provided nothing has occurred on the part of the creditors, which is in any degree exceptionable, either in law or justice.

It has been said, that this deed, as between Fitzhugh and Marbury, is fraudulent, and that no person, however innocent, can take anything under a fraudulent deed. This proposition is certainly laid down too *broadly. [*90 That deeds which are absolutely void cannot be the foundation of title, or that a *cestui que trust* can claim nothing under a deed which is

fraudulently obtained by his trustee or agent, acting by his authority, need not be controverted; but that a principal and his agent, meditating, as the probable consequence of their act, an object forbidden by the policy of the law, cannot, because the one has conveyed to the other in furtherance of this design, sell to a fair creditor, or for the benefit of a fair creditor, not participating in their views, or cognisant thereof, is more than this court is prepared to say. The counsel for the plaintiff suppose, that this proposition is sustained by the opinion of Chancellor KENT, in *Hildreth* v. *Sands and others*, 2 Johns. Ch. 35. Any opinion expressed by that judge is, undoubtedly, entitled to great attention, and will be highly respected by this court. In that case, the chancellor said, "If the deed is admitted to be fraudulent on the part of Comfort Sands, the grantor, there would be difficulty in allowing the deed to stand, even if the grantee was, as he alleges, innocent of the fraud."

This expression of Chancellor KENT must, undoubtedly, be understood in reference to the case in which it was used. He had not said, nor could he mean to say, that in every possible case, a fraudulent intent on the part of the grantor would avoid a deed to a *bonâ fide* purchaser, for a full and valuable consideration, having no knowledge of the fraud. He has only
*91] said, that if the *particular deed in that case be admitted to be fraudulent on the part of the grantor, there would be difficulty in allowing it to stand, even if the grantee was ignorant of the fraud. An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different. In the case in 2 Johns. Ch., a deed from Comfort Sands, to his brother Robert, was declared to be fraudulent and void, because, 1. The consideration was inadequate. 2. There was no proof that the consideration was paid or secured. 3. The grantor continued in possession, exercising acts of ownership. 4. That there were many circumstances attending the execution of the deed, showing that it was not a *bonâ fide* sale. The bill had been taken for confessed against the grantor, but the grantee had denied fraud. In this case, the chancellor said, that if this deed is admitted to be fraudulent on the part of the grantor, there would be difficulty in allowing it to stand, even if the grantee was innocent. But in this case, the grantor and grantee were the sole parties. The vice of the deed was in its consideration, in its not being intended or used as a *bonâ fide* transfer of other property, and in other circumstances, in all which the grantee necessarily participated. The chancellor did not decree, nor did he think himself justifiable in decreeing, against the grantee, on a bill taken for confessed against the grantor. Yet, this circumstance established the fraud of the grantor, as completely as it could be established by testimony.
*92] Why did he not proceed upon this fact? The reason is, that it would not sustain a decree against the grantee. We think, that this declaration has been pressed much further in argument than the eminent judge who made it would be willing to carry it.

The opinion that Chancellor KENT intended to confine this observation to the particular case, is strengthened by a reference to the authority on which he relies. He cites *Huguenin* v. *Baseley*, 14 Ves. 273, in which case the Lord Chancellor said, "With regard to the interests of the wife and children of the defendant, there was no personal interference on their part in the transactions that have produced this suit. If, therefore, their estates

are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained whether it is not competent to a court of equity to take away from third persons the benefit which they have derived from the fraud, imposition or undue influence of others." These expressions were used in a case in which Baseley had obtained from Mrs. Huguenin, by means which the court pronounced fraudulent, a settlement of her estate, after her death, upon himself, his wife and children. No consideration moved from the wife and children. They were volunteers, claiming under a fraudulent deed, obtained by a husband and a father, acting for their interests as well as his own. In this case, the chancellor said, "he should regret *that any doubt should be entertained whether it is not competent to a court of equity to take [*93 away from third persons the benefit which they have derived from the fraud, imposition or undue influence of others." We should join in that regret. But the distinction between a declaration that a third person, a mere volunteer, claiming under a deed fraudulently obtained by a person acting for his interests, can be reached by a court of equity, though such volunteer had "no personal interference in the transaction," and a declaration that every person claiming under such a deed, for a valuable consideration, though entirely untainted by the fraud, and unconnected with those concerned in it, must, necessarily, lose his property, is too obvious not to be perceived.

The cases cited by the Lord Chancellor, in support of his opinion, which are also referred to in *Hildreth* v. *Sands*, are all cases in which the third person affected by the fraud claimed as a volunteer, and was, in some measure, connected with the party practising the imposition. The mischief which these decisions were indended to reach, was the attempt (to use the language of Lord Chief Justice WILMOT) "to purify the gift, by partitioning and cantoning it out amongst his relations and friends." That a question could exist in such a case, furnishes a very strong argument in favor of the parties claiming under this deed. The very respectable opinion, then, of Chancellor KENT, does not bear upon this case, nor have we found in the books any decision which *does bear upon it, so as to affect the creditors who claim under the deed of the 31st of December 1819. We [*94 think, then, there is no error in this first instruction given by the court to the jury.

The counsel for the plaintiff moved the court to instruct the jury, "that if they should be of opinion, from the evidence, that the deed was devised and executed by Fitzhugh, and procured and accepted by Marbury, with the motive and intent, and for the purpose and object, of suppressing a prosecution against said Fitzhugh, by prevailing with the holders of the said forged notes to forbear and forego a prosecution for the said forgeries; that then the said deed is fraudulent, and void in law, as against the plaintiff." In discussing the propriety of refusing to give this instruction, it may be proper to observe, that there is no error in rejecting a motion of this description, unless it ought to have prevailed in the very terms in which it was made. Nor is a court to be required to give opinions on abstract propositions, not supported by any evidence in the cause. The language in which counsel addressed this application to the court, presents different ideas to the mind, and is susceptible of different constructions. The court is required to say, that the deed is void, if executed by Fitzhugh, and procured and

accepted by Marbury, with the intent of suppressing the prosecution, by prevailing with the holders of the said forged notes to forbear and forego a
*95] prosecution for the said forgeries. If this was to be the effect of *the deed itself, unaccompanied by any stipulations which were to be the condition of its application to the purposes for which it professes to be made, then the instruction would have contradicted that previously given, and was properly withheld. But if the counsel is to be understood as praying the court to say, that if the deed was to be used by Marbury, as an instrument by which to procure the suppression of the prosecution, that being the condition on which the holders of the forged notes were to entitle themselves to its advantages, it was fraudulent and void as to the plaintiff, there can be no doubt that the instruction ought to have been given, unless the court was satisfied that there was no evidence in the cause to which it could apply.

The second motion is, in substance, that if the jury find, from the whole evidence, that the deed was executed, for the intent and purpose afore mentioned, and that the preferred creditors accepted the agency of the said Marbury, and adopted his act in procuring and accepting said deed, it is competent to the jury to infer a notice, either actual or constructive, to the said preferred creditors, though their said agent, of the illegal consideration, intent and object of the said deed. This instruction was refused, because there was, in the opinion of the court, no evidence to authorize the conclusions of fact, in the making of which the law was to arise. There was no error in refusing it on this ground. There would have been error, had there
*96] been testimony *in the cause to authorize the conclusions of fact assumed.

The counsel also moved the court to instruct the jury, that if the preferred creditors named in the said deed, or any other creditors of the said Fitzhugh, have not accepted or claimed any benefit under it, and that the same remains the mere act of Marbury and Fitzhugh, without any participation, before or after, on the part of the preferred, or other, creditors of the said Fitzhugh, then the said deed is fraudulent and void as against the plaintiff. The court refused to give this instruction. In discussing the propriety of this opinion, it becomes necessary to inquire, whether the deed remained imperfect, passing nothing in law to Marbury, until it received the assent of the creditors. Upon its face, it purports to transfer the property immediately, without any act on the part of the creditors or others; it is incumbent on the plaintiff, to show that this is not its legal operation. It will be very readily conceded, that, had the creditors disclaimed the advantages proffered to them in this deed, or looked on as unconcerned spectators, while the property was applied by Marbury to the use of Fitzhugh, these, or other circumstances tending to show that the deed was not made in good faith, for the purposes expressed in it, would have induced a court of chancery to set it aside, or have justified a court of law in instructing a jury to consider it as fraudulent. But nothing of this sort is alleged. The
*97] single inquiry is, whether the assent of the *creditors be necessary to the completion of the deed. If it be, then the title to the property it purported to convey remained in Fitzhugh, until such assent should be given, and might be subjected to this attachment. If the instrument was complete, without such assent, then the property passed immediately to

Marbury, for the purposes of the deed, and did not remain liable to attachment.

Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed, on the idea that the deed was complete, when executed by the parties to it. The counsel for the plaintiff could mean no more than to insist, that the omission of the creditors to assent to the deed, or claim under it, was such evidence of fraud, that the jury ought to find it fraudulent. Let this circumstance be examined. Real creditors are rarely unwilling to receive their debts from any hand which will pay them. No such unwillingness can be gratuitously ascribed to the holders of forged notes. Unless there be proof to the contrary, the banks must be considered as willing to receive payment from Mr. Marbury, or any other person, from the proceeds of the sales of this property, or from any *other fund. This deed was executed on the 31st day of January 1819, and the attachment was sued out [*98 on the 10th of February 1820. Time was required to sell the property, and to collect the proceeds of the sales. It is not alleged, in the statement, on which the opinion of the court was prayed, that any notes fell due before the attachments were issued, and remained unpaid. These circumstances do not, we think, afford any ground for the presumption that the deed was fraudulent, so that the property it purported to convey was, on the 10th of February, the property of Fitzhugh, and, consequently, liable to be taken by this attachment.

The counsel for the plaintiff then moved the court to instruct the jury, that if the great majority, in number and value, of the creditors of the said Fitzhugh, were, by means of said deed, unjustly and purposely hindered, delayed and defeated, in their proper suits and remedies, for the recovery of their said debts, on the absconding of Fitzhugh, and that the deed was executed with the purpose of defeating all legal recourse in behalf of such majority of creditors, against the property and effects which said Fitzhugh intended to leave behind, and did leave behind him, then the said deed is fraudulent and void. This instruction also was refused. The right of a debtor to prefer particular creditors, where no bankrupt or other law prohibiting such preference exists, is not questioned. Yet, such preference defeats all other creditors, whether they amount to a majority in number *and value or not. The court ought not to have left it to the jury to [*99 defeat this right, because they might think it unjust. The instruction prayed by the counsel, if given, would have defeated it.

The last prayer of the plaintiff supposes, that the deed was obtained for the purpose of being used as the means of suppressing the prosecution; and further, that Marbury acted as the agent of the preferred creditors. The refusal of the court to give this instruction, must have been founded on the opinion, that the question was entirely abstract in its nature. If there was any evidence tending to this conclusion, which ought to have been submitted to the jury, the instruction ought to have been given. But if there was no such evidence, the court could not be required to say, hypothetically, what would be the law had the evidence existed.

This court is of opinion, that the circuit court erred, in admitting the record of the deed offered in evidence, to be read to the jury, without any evidence that the original was not in the power of the party offering the copy. The judgment, therefore, is to be reversed, and the cause remanded to the said court, with directions that the verdict be set aside, and a *venire facias* de novo be awarded.

Judgment reversed.(*a*)

(*a*) The general principle that, in the absence of any express provisions of a bankrupt law applicable to the case, a debtor has a right to prefer one creditor to another, by actual payment, or a transfer to the creditor himself, or by an assignment in trust, if the creditor be a party to the assignment, or subsequently assents thereto, has
*100] been settled in a variety of cases in the different *courts of this country, both state and of the Union. Hatch *v.* Smith, 5 Mass. 42; Putman *v.* Dutch, 8 Ibid. 287; Widgery *v.* Haskell, 5 Ibid. 144; Stevens *v.* Bell, 6 Ibid. 339; Thomas *v.* Goodwin, 12 Ibid. 140; Cushing *v.* Gore, 15 Ibid. 74; Meeker *v.* Wilson, 1 Gallis. 419; Brown *v.* Minturn, 2 Ibid. 557; McMenomy *v.* Ferrers, 3 Johns. 72; Wilkes *v.* Ferris, 5 Ibid. 335; Phœnix *v.* Ingraham, Ibid. 412; Hendricks *v.* Robinson, 2 Johns. Ch. 283; Murray *v.* Riggs, 15 Johns. 571; Austin *v.* Bell, 20 Ibid. 442; Wilt *v.* Franklin, 1 Binn. 502, 514; Burd *v.* Smith, 4 Dall. 85, in note; Lippincott *v.* Barker, 2 Binn. 186; Marbury *v.* Brooks, 7 Wheat. 556.

The resulting trust, or residuary interest, remaining to the assignor, after the purposes of an assignment for the payment of debts are satisfied, does not avoid the deed, unless it be made *malâ fide*, and for the sake of the resulting trust; nor is such interest liable to execution against the grantor's property. Wilkes *v.* Ferris, 5 Johns. 336. But where an assignment was made in trust, 1. To pay certain preferred creditors: 2. To pay the other creditors of the assignor, on condition of their releasing their demands: 3. In case any of them should refuse to release, then in further trust to pay such of the creditors of the assignor as he should appoint. Certain of these creditors refused, obtained judgment, and levied on the property in the hands of the trustees. It was *held*, that the trust failing as to them, resulted for the benefit of the assignor, and the deed was, therefore, void, by the statute of frauds, as to the other creditors; and being void in part, was void in the whole. Hyslop *v.* Clark, 14 Johns. 458. But an assignment by a debtor, in trust, with a power of revocation, is fraudulent only as regards judgment-creditors, or such as are taking measures to recover their debts by suit. Murray *v.* Riggs, 15 Johns. 571 588. It would, therefore, seem, that an assignment like that in Hyslop *v.* Clark would be good, if the new appointment were made before any creditor refusing to discharge had obtained a judgment, or brought a suit. It could not, then, be said to be made to "delay, hinder or defraud creditors," according to the language of the statute of frauds of Elizabeth. Thus, where A., on the 23 of March 1798, assigned property to B., in trust, to pay him, and
*101] certain other creditors, *with a power of revocation, and to appoint new trusts, and, on the 31st of May 1800, executed an irrevocable deed to B., in trust, having before made several intermediate deeds, all in relation to the same subject, and reserving the same power of revocation; it was determined, that the last deed was valid, and might be taken in connection with the first, and no rights of creditors having intervened, the first deed was confirmed by the last. Murray *v.* Riggs, 15 Johns. 571, 588. And it has been held, in the state of New York, that the deed of assignment may exclude from its benefits such creditors as neglect or refuse to assent to the assignment within a limited time, throwing the distributive shares, to which they would have been entitled, into the general mass, for the benefit of the other creditors provided for by the deed. Ibid. But, if the deed, instead of merely excluding the dissenting creditors, and throwing their shares into the general mass, reserves the shares of the dissenting creditors, and directs them to be paid to the grantor himself, the deed of assignment is fraudulent and void. Austin *v.* Bell, 20 Johns. 442. In Massachusetts, it seems

that an assignment in trust for such creditors as should, within a certain time, become parties to the deed, and release their demands, is void as against the dissenting creditors. Ingraham *v.* Geyer, 13 Mass. 146. But see Hastings *v.* Baldwin, 17 Ibid. 552. In Pennsylvania, the rule to be extracted from the decisions seem to be, that where no definite time is limited, or a period very remote, within which the essent of creditors is to be given, the assignment is considered as fraudulent. But where a reasonable time is limited, within which the trust property is to vest in those for whom the beneficial interest was intended, it is valid. (Whart. Dig. tit. Deed, I., pl. 70, 76.)

In the case of Murray *v.* Riggs, 15 Johns. 571, 588, it was held by the court of chancery, and the court of errors of New York, that a reservation in the assignment, of a sum sufficient for the maintenance of the assignor, until discharged from his debts, does not invalidate the assignment; though, in case of a deficiency, the creditors are entitled to have the part reserved applied in satisfaction of their debts. But in the recent case of Mackie *v.* Cairns, 5 Cow. 547, it was determined, that such a reservation rendered the conveyance totally void.

As to the question how far the fact of the possession of the property assigned, still continuing in the grantor, would affect the validity *of the deed, it seems to be generally considered, that if the possession of the grantor be consistent with the deed, as, when the possession is continued at the request, and for the benefit of the assignees, for their convenience in making the sale, or where the property is at sea, or out of the country, if possession be taken by the trustees within a convenient and reasonable time, the conveyance will be valid. Vredenbergh *v.* White, 1 Johns. Cas. 156; Meeker *v.* Wilson, 1 Gallis. 419; Dawes *v.* Cope, 4 Binn. 258; Wilt *v.* Franklin, 1 Ibid. 517; Putnam *v.* Dutch, 8 Mass. 287; Lippincott *v.* Barker, 2 Binn. 174. So, a delivery of the key of the warehouse in which the goods are stored, is a sufficient delivery to transfer the property. Wilkes *v.* Ferris, 5 Johns. 335. So is a delivery of the receipt of the storekeeper for the goods, it being the regular documentary evidence of the title. Ibid. [*102

As to the effect of an assignment for the benefit of creditors (whether under a bankrupt law, or a voluntary private assignment, valid by the *lex loci*) on property, or the rights of creditors, in another state or country than that where the assignment is made, see Hatch *v.* Smith, 5 Mass. 42; Widgery v. Haskell, Ibid. 144; Harrison *v.* Sterry, 5 Cranch 289; Ingraham *v.* Geyer, 13 Mass. 146; Le Chevalier *v.* Lynch, 1 Doug. 170; Hunter *v.* Potts, 4 T. R. 182; Milne *v.* Moreton, 6 Binn. 353; Burke *v.* McClain, 1 Har. & McHen. 236; Taylor *v.* Geary, Kirby 313; Wallace *v.* Patterson, 2 Har. & McHen. 463; Ward *v.* Morris, 4 Ibid. 330. This point was much discussed in the case of Holmes *v.* Remsen, 4 Johns. Ch. 460; s. c. 20 Johns. 229, where all the authorities on the subject will be found collected. Even after these very learned and able discussions, it must still be considered as an unsettled question of international law.

*STEPHEN HARDING and others, appellants, *v.* ASA HANDY and CALEB WHEATON, respondents.

ASA HANDY and CALEB WHEATON, appellants, *v.* STEPHEN HARDING and others, respondents.

Relief in equity.—Cancellation of deed.—Mental unsoundness.—Practice in the master's office.—Parties.

There must be sufficient equity apparent on the face of the bill, to warrant the court in granting the relief prayed; and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue.

A court of equity has jurisdiction of a suit brought by heirs-at-law to set aside a conveyance of lands obtained from their ancestor by undue influence, he being so infirm, in body and mind, from old age, and other circumstances, as to be liable to imposition, although his weakness did not amount to insanity.

The same jurisdiction may be exercised, where one of the heirs-at-law has, with the consent of the others, taken such a deed, upon an agreement to consider it as a trust for the maintenance of the grantor, and, after his death, for the benefit of his heirs, and the grantee refuses to perform the trust.

Under what circumstances, such a conveyance may be allowed to stand as security for actual advances and charges, and set aside for all other purposes.

In such a case, not depending on the absolute insanity of the grantor, at the time of executing the conveyance, the court may determine the quesion of capacity, without directing an issue.

The verdict of a jury as to the sanity of the grantor at the time of executing such a conveyance, would not be conclusive, the court being competent to determine for itself the degree of weakness, or of imposition, which will induce it to set aside the instrument.

Exceptions to the report of a master are to be regarded by the court only so far as they are sup-
*104] ported by the special statements of the *master, or by a distinct reference to the particular portions of testimony on which the party excepting relies; the court does not investigate the items of an account, nor review the whole mass of testimony taken before the master.

Rules of practice, in accounting before a master.

In a suit of equity brought by heirs-at-law to set aside a conveyance obtained from their ancestor by fraud and imposition, a final decree for the sale of the property cannot be pronounced, until all the heirs are brought before the court as parties, if they are within the jurisdiction.

If all the heirs cannot be brought before the court, the undivided interest of those who are made parties may be sold.

Harding *v.* Wheaton, 2 Mason 378, affirmed in principle, but reversed on a question of parties.

THESE were cross-appeals from the decrees of the Circuit Court of Rhode Island.

The bill filed in the court below, by the appellants, Harding and Nancy his wife, and Sterling Wheaton, alleged, that they, with four others not made parties to the suit, together with Caleb Wheaton, one of the defendants, were entitled, as heirs-at-law of Comfort Wheaton, deceased, to the real property mentioned in the bill, and situate in the state of Rhode Island. That Comfort Wheaton, about the year 1802, began to exhibit symptoms, indicating a loss of intellect, and soon became, from various causes mentioned in the bill, incompetent to the management of his estate, and died in 1810. That under these circumstances, the defendant, Caleb Wheaton (his son), and who acted as well for himself, as in behalf of the plaintiffs, and the defendant Handy (the son-in-law of Comfort Wheaton), entered into an agreement to endeavor to take his estate out of his hands, and to preserve it for the benefit of his heirs-at-law. That it was agreed, that Comfort Wheaton should be prevailed on to convey his real property

to *Handy, for a nominal consideration, who should forthwith execute an instrument of writing, declaring that he took and held the same in trust; first to provide for the decent support of the grantor, during his life; and after a full remuneration for his expenses and trouble in that respect, to hold the residue of the estate for the benefit of the heirs-at-law. That on the 9th of May 1805, Handy did procure such conveyance, for the nominal consideration of $2178, from Comfort Wheaton, and entered upon, possessed and enjoyed the property in question; but that he refused to execute any declaration of trust as he had agreed, but held the property, claiming it as his own. The bill then alleged, that the defendant, Caleb Wheaton, after the death of his father, Comfort Wheaton, acting on behalf, and for the benefit of, the heirs, procured letters of administration of the personal estate of Comfort Wheaton, to be issued by the proper court, and caused such further proceedings to be had, as that the administrator exposed to sale the real property before mentioned, which had been conveyed to Handy, and that Caleb Wheaton became the purchaser thereof, for the general benefit of the heirs. That various suits at law had resulted from these transactions (and among others, an ejectment brought by the defendant, Handy, against the defendant, Caleb Wheaton), by which the value of the property had been much deteriorated. The bill then prayed for an account respecting the property; that a decree might be rendered, exonerating it *from the deeds to the defendant, Handy, after satisfying his just claims, and ordering one-fifth part of the real estate to be set off to [*106
the plaintiff, Nancy Harding, and one-fifth to the plaintiff, Sterling Wheaton; and for general relief.

The answer of the defendant, Handy, denied that Comfort Wheaton was incapable of conveying his property, when the deeds of the 9th of May 1805, were executed; and insisted, that his intellect was perfectly sound at that time. It also denied, that he, the defendant, purchased as a trustee, and averred, that he was a purchaser for a valuable and full consideration. The answer of the other defendant, Caleb Wheaton, admitted the allegations of the bill, and submitted to any decree the court might think equitable.

A great mass of testimony, taken in the court below, appeared in the record, which was very contradictory, as to the capacity of Comfort Wheaton to make the conveyance in question.

The circuit court, by its interlocutory decree, directed that the deeds of the 9th of May 1805, should be set aside, as having been obtained by false impressions made on a mind enfeebled by old age, and various other causes; and that an account of the receipts and disbursements of the defendant, Handy, should be taken, and that he should be credited for all advances made, and charges incurred, for the maintenance of Comfort Wheaton during his lifetime, and for repairs and improvements made on the real estate. Exceptions were filed by both parties to the report, which was confirmed by the court below. The final decree declared, that the real [*107
estate conveyed to the defendant, Handy, should stand charged with the amount of the balance of the account due to him; that the same should be sold, and the proceeds brought into court; that the said balance should be paid to him, deducting his proportion of the charges, &c., and the residue, deducting their proportions, &c., should be paid over, and distributed among the heirs-at-law of Comfort Wheaton. If there were any such heirs,

not made parties, they to be at liberty to come in under the decree, and receive their shares, paying their proportions of costs and expenses; otherwise to be excluded. That each party before the court should pay his own costs, excepting the fees of the officers of the court, which should be a charge on the property, and borne by the parties according to their respective proportions of interest in the proceeds of the sale. From this decree both parties appealed.

February 22d. *Wheaton*, for the original plaintiffs, made the following points: 1. That the decree ought to be reversed, so far as it declared, that the real property should stand charged with the advances made by the defendant Handy. 2. That it ought, in all other respects, to be affirmed.

On the first point, he contended, that the deeds having been obtained by the imposition of the grantee on the grantor, the property ought not *108] *to stand charged with the expenses incurred by the former. That, even supposing him to have held as a trustee, during the lifetime of the plaintiff's ancestor; after that period, he ceased to hold in that capacity, and became a *malâ fide* possessor, who was not entitled to be allowed for improvements made on the land. *Green* v. *Biddle*, 8 Wheat. 77–83; 2 Ves. sen. 516; 2 Ves. jr. 281; Belt's Supplement, 345, 396; 1 Bro. C. C. 420.

On the second point, he argued: 1. As to the objection made in the court below, of the defect of jurisdiction in that court; that the words of the judiciary act of 1789, c. 20, § 16, providing that suits in equity should not be sustained in the courts of the Union, "in any case where plain, adequate and complete remedy can be had at law," were not intended to abridge the equity jurisdiction of those courts; that it had been frequently determined, that the proceedings in those courts were to be according to the English system of equity, both as to principles, practice and jurisdiction (*Robinson* v. *Campbell*, 3 Wheat. 221; *United States* v. *Howland*, 4 Ibid. 108); that fraud and trust were familiar subjects of cognisance in the court of chancery; and that equity often interfered to redress fraud, even after a verdict and judgment at law. 2 P. Wms. 425; 2 Vern. 146; 2 Ves. sen. 628. That this was not a case analogous to that which had been cited in the proceedings below, where the only ground of equitable interference was a discovery *109] sought to establish the *fraud, and the plaintiff having failed in the discovery, and having a complete remedy at law, should not be allowed to proceed in equity. *Russell* v. *Clarke*, 7 Cranch 89.

2. Another objection was, that this was an attempt to establish a trust by parol evidence, contrary to the statute of frauds. The court below did not consider it necessary to determine this point, because, at all events, there was a resulting trust for the heirs (after allowing for advances, &c.), which, even in England, might, unquestionably, be established by parol. But a comparison of the English statute of frauds, 29 Car. II., c. 3, with the provisions of the local statute of Rhode Island on the same subject, would show, that the latter did not extend to trusts, and therefore, there could be no question of the admissibility of parol evidence in this case.

3. It was a case of imposition practised by a son-in-law upon his father-in-law, an old man, infirm in body and mind, morally and physically incapable of managing his own affairs, and of resisting the influence and importunities of the other party, standing in that intimate relation. It was analogous

to other cases of fraudulent and hard bargains made with expectant heirs, and other persons standing in peculiar relations, rendering them liable to imposition. The great leading case on the general analogy, was that of *Chesterfield* v. *Jansen*, 2 Ves. sen. 157, which was not cited *as a direct authority, but as illustrating the general principle. Lord HARDWICKE [*110 there lays down the rule on which the court of chancery proceeds, and classifies the cases in which it will interfere. These are—1. Actual fraud: 2. Such as is apparent, from the nature of the bargain itself, as being flagrantly unequal: 3. A kind of fraud which may be presumed from the circumstances and condition of the parties contracting: 4. Which may be inferred from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement: 5. Fraud infecting catching bargains with heirs, reversioners, expectants, &c.

There are to be found in the books a great variety of applications of these principles. Thus, in *Clarkson* v. *Hanway*, 2 P. Wms. 203, the suit was brought by an heir-at-law to set aside a conveyance by his ancestor, who is described as a "weak man," 72 years old, who had conveyed his estate for a small annuity. The conveyance was set aside on those circumstances alone, by the master of the rolls, and decree confirmed, on appeal, by Lord MACCLESFIELD. In *Bates* v. *Graves*, 2 Ves. jr. 287, the bill was filed by a son, to set aside a conveyance (which was confirmed by a will), by his father, to a son-in-law, under circumstances of fraud, and undue practices upon the weakness of the grantor. Lord THURLOW and Lord ROSSLYN concurred in holding these circumstances to be sufficient to annul the conveyance, *though the party was not a lunatic. In a still more [*111 recent case, 16 Ves. 512,(*a*) Lord ELDON relieved against a bargain with an expectant heir, where there was no fraud or imposition, upon the ground of inadequacy of consideration, where there was an inequality of condition in the parties. Mere inadequacy of consideration was held insufficient, but, coupled with the other circumstance, was deemed a sufficient ground to annul the contract. In *Huguenin* v. *Baseley*, 14 Ves. 273,(*b*) a settlement by a widow, upon a clergyman and his family, was set aside, as having been obtained by undue influence, and abused confidence in the party, as the agent of the grantor's affairs, upon the principle of public policy and utility, applicable to the analogous cases of guardian and ward, attorney and client, &c. It was there earnestly contended, that the law of England does "not prevent a prodigal disposition by a person of sound mind." But the argument was overruled by Lord ELDON; and the words of Sir S. ROMILLY, *arguendo*, in that case, are remarkably pertinent to the present: "Though no direct authority is produced, your lordship, dispensing justice by the same rules as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide accordingly." *The same principles and authorities had been applied, by a court of [*112 justice of our own country, to a case almost the same with the present in all its material circumstances. *Whelan* v. *Whelan*, 3 Cow. 537. They

(*a*) See also Oliver *v.* Court, 8 Price 127.

(*b*) Griffith *v.* Robins, 3 Madd. 191.

are applied in every system of jurisprudence having a due regard to the protection of the weak from the artifices of those who have the means of unduly influencing or controlling their conduct. Thus, in the countries governed by the Roman law, the provisions of positive law prohibiting donations *inter vivos.* between persons standing in certain peculiar relations of mutual confidence and dependence, are extended by equity to other relations of a similar character, and falling within the reason of the prohibition. Pothier, *Traité de Donations*, § 1. The court below seems to have considered, that it might have been justified, on these principles, in declaring the deeds in question utterly void, though, in framing its decree, it thought proper to take a more mitigated view of the defendant's conduct.

Coxe (with whom was *Webster*), for the defendant, Handy, argued: 1. That there was a defect of jurisdiction in the court below, proceeding as a court of equity. A complete and adequate remedy at law existed. If the deeds were invalid on the ground of fraud and imposition, that question might be tried in an *action at law. It had been so tried and deter- *113] mined. *Smith* v. *McIver*, 9 Wheat. 532.

2. It appeared, on the face of the bill itself, that there were other children of Comfort Wheaton, who are his heirs-at-law, but who had not been joined in the present suit. They were equally interested with the other plaintiffs, and should, therefore, have been joined. Their interests are also affected by the decree. It is not too late to take advantage of this objection. Coop. Eq. Pl. 33; Pr. Reg. 299; Bart. Eq. 31, n. 1; Hinde's Ch. 2; 1 Vern. 100; 5 Wheat. 313; 9 Ibid. 842.

3. The bill contained multifarious matters which ought not to be joined. Each of the defendants claimed to have the legal estate in him, in opposition to each other. There was no privity between them as to their respective interests; and before the plaintiffs could have any interest in vacating the deeds of the defendant, Handy, the deed of the defendant, Caleb Wheaton, must be removed. The establishment of their right against one defendant was a pre-requisite to their calling upon the other to answer.

4. The main object of the bill, and that attained by the decree, was, to enforce specifically a parol agreement, alleged to have been made between the two defendants, denied by the defendant, Handy, and not proved by any competent testimony. The contract proved is wholly different from that alleged. Such a contract as is *alleged, and now attempted to *114] be enforced, is deficient in mutuality. Newl. Cont. 152. It also virtually admits the sanity and competency of the grantor, Comfort Wheaton, which is now made the ground for setting aside the deeds.

5. If, however, he was in the state of mind in which the bill represents him, the plaintiffs, by their agent, participated in the fraud, and therefore, have no right to call upon a court of equity to interfere, to relieve them from the web in which they have entangled themselves. 14 Ves. 288.

6. The plaintiffs are barred by lapse of time.

7. The decree sanctions an attempt to establish a contract concerning lands, and a trust in real estate, by parol evidence. The proof of a trust lies on the party who alleges it. *Prevost* v. *Gratz*, Pet. C. C. 364; s. c. 6 Wheat. 494. In this case, the conveyances are absolute on their face, and the evidence of a trust is wholly *aliunde.* To warrant the court in decree-

ing the execution of a parol declaration of trust, the evidence should be plain and unambiguous. Whart. Dig. 580. The taking the conveyance was not in part performance. The act of part performance must be such as the party would not have done with any other view than in execution of the alleged agreement. 4 Ves. 108. This secret trust, and the allegation of part performance, are both denied by the answer, *and this set- [*115 tles the question. 6 Ves. 39. The secret trust cannot be proved by parol testimony, especially, where it is made with a stranger to the estate, without consideration. 2 Johns. Ch. 405; 7 Cranch 176; 11 Mass. 342; 13 Ibid. 443; 4 East 577 n.; 1 Eden 515; 1 Cox 15.

8. The bill does not distinctly allege the incompetency of Comfort Wheaton, and the imposition said to have been practised on him, so as to put these facts in issue. The decree must conform to the *allegata*. Some substantial ground must be stated. Old age alone is not sufficient. 1 Ves. jr. 19, 20; 1 Dessaus. 518.

9. If these facts had been ever so distinctly put in issue, they have not been proved. Where fraud is alleged, it must be fully proved, and will not be presumed. Cas. temp. Talb. 116; 1 Madd. Ch. 208. The presumption of law is in favor of a party executing an instrument. 5 Johns. 158; 3 Bac. Abr. 527, 540. The question is confined to the state of mind at the time of executing the instrument. 13 Ves. 88; 8 Mass. 371. Two witnesses deposing *sanæ menti*, are to be credited before a hundred proving insanity. Co. Litt. 246 *b*, note 1. The law will not measure a man's understanding, and a partial diminution of intellect is not sufficient to invalidate the deeds; nor is there any such thing as an equitable incapacity, where there is a *legal capacity. 1 Madd. Ch. 223–4. Fraud of this description is [*116 equally cognisable at law, and in equity; and the court of chancery will not set aside a will of lands on that ground, without directing an issue. 3 Bac. Abr. 321; 2 Atk. 424; 3 Ibid. 17; 2 Ves. jr. 287; 1 Madd. Ch. 206.

10. The decree is inconsistent both with the allegations in the bill, and with itself. It is a bill with a double aspect. It charges incompetency in the grantor, and prays that the estate may be exonerated; it also charges a trust, and prays an account, and general relief. The decree declares that the grantor was incompetent, and his conveyance invalid, and yet does not exonerate the estate from them. A deed cannot be set aside partially on the ground of fraud. If set aside at all, it must be *in toto*. 2 Ves. jr. 408; 3 Atk. 281. The decree proceeds on the ground of imposition, and grants a relief which could only apply to the pretended trust, which necessarily implies capacity in the grantor. It does not pass on the conveyance from the administrator of Comfort Wheaton, to the defendant, Caleb Wheaton. So long as the legal estate remains in him, under that deed, the right of the plaintiffs is a nonentity.

11. The master's report is erroneous on several grounds, and ought to have been set aside. 1. Because, in taking the account, he refused to receive the testimony of the defendant, Handy, when it was competent and credible. 2. The *master required evidence of the consideration of a prom- [*117 issory note, when the signiture was sufficienty proved. *Mandeville* v. *Welch*, 5 Wheat. 282. 3. He held also, that where a party charges himself with a certain sum, and at the same time discharges himself, it shall be evi-

dence against him, but not for him. Ambl. 589 ; 1 Ves. jr. 546. The other exceptions to the master's report were also minutely discussed ; but it is not thought necessary to state them, as they are enumerated, and fully examined, in the judgment of this court.

12. The final decree is erroneous in several particulars. 1. In directing a sale of the property under the circumstances. 2. Because it purports to bind, and does affect the interest of those who are not parties. 3. Because it wholly omits to provide for the defendant, Handy, as tenant by the curtesy. 4. Because it does not, unless by implication, determine all the matters in issue, and which ought to have been decided.

Wheaton, for the plaintiff below, in reply, as to the want of proper parties, argued, that, as by the local law, one coparcener could maintain an action at law, for his share of the real estate, the same rule of proceeding would be adopted in equity. Under the peculiar circumstances of the case, the court below had considered the defendant, Caleb Wheaton, as legal
*118] owner under the administration sale, sufficiently representing all *the parties who could claim any beneficial interest ; and he (as in effect a plaintiff) submitted to any decree the court could make in favor of the plaintiffs. Besides, the nature of the jurisdiction of the courts of the Union, which was derived from the character of the parties as citizens of different states, would prevent their insisting upon parties who were not absolutely necessary to the determination of the merits of the cause as between the parties before the court. *Russell* v. *Clarke*, 7 Cranch 98. But, in this case, the court might apply the analogous rule, as to next of kin suing for distributive shares of personal property, one of whom may sue, and the rest may come in under the decree. Coop. Eq. Pl. 39, 40.

Upon the merits, he insisted, that the question as to the capacity of the grantor was not a question of absolute insanity. All the cases show, that the court will interfere, wherever a peculiar relation has been abused to influence or imposed upon a person of weak mind. A commission of lunacy is not, by the modern practice of the court of chancery, confined to cases of strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause, as disease, age or habitual intoxication. *Ridgeway* v. *Darwin*, 6 Ves. 65. This principle is fully developed by Lord ERSKINE in *Ex parte Cranmer*, 12 Ves. 445. It was not, therefore, neces-
*119] sary *to show that the grantor was absolutely *non compos mentis*, in a strict legal sense, still less was it necessary to prove that he was incapable, at the precise moment the deeds were executed.

As to the defects in the pleadings, and the other informalities in the proceedings, it was said, that the court would look with an indulgent eye upon the pleadings and practice in equity causes in those states, where, no state court of chancery existing, the forms of proceeding were less familiar to practitioners. But it was insisted, that the bill contained a sufficient allegation of the incapacity of Comfort Wheaton to execute the deeds in question, to put that fact distinctly in issue, and it had been met responsively by the answer of the defendant, Handy, explicitly denying it.

March 1st, 1826. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows :—The counsel for Asa Handy contend, that the bill seeks to set up a parol trust, which is denied

in the answer, and that the decree is founded on a supposed incompetency of Comfort Wheaton to convey his property. The decree, therefore, is not supported by the allegations of the bill. They also contend, that the decree is not sustained by the proofs in the cause.

That the bill alleges the conveyances of the 9th of May to have been received for the benefit of the family, is unquestionable; but this is not *incompatible with the incompetency of Comfort Wheaton to execute them. Deeds may be obtained from a weak man, for the purpose of [*120 preserving his estate for himself and family, and of protecting him from the impositions to which he might be exposed; and there is nothing to restrain one of the heirs, who may think himself aggrieved, from bringing the whole case before a court of equity. If, indeed, it were true in fact, that the bill does not allege this incompetency so as to put it in issue, the objection would be conclusive; for, it is well settled, that the decree must conform to the allegations of the parties. But we think, this bill is not justly exposed to this objection. It states the general correct conduct of Comfort Wheaton during the life of his wife; that, soon after her decease, he was visited by a paralytic stroke, which was followed by a total change in his conduct. He was addicted to intoxication, and to many vicious habits, in the course of which, fears were excited in his family, that he would waste all his property, or convey it to his profligate companions. They consulted together, and with their friends; and the first proposition was, to apply to the court for a guardian to manage his affairs, according to the law of Rhode Island in such cases. It was, however, finally agreed, that Asa Handy should obtain deeds for his property, and hold it for the use of Comfort Wheaton during his life, and of his heirs, after his death. The bill then proceeds to state, that the said Asa Handy, knowing the premises, did induce the said Comfort, "he being in the state and condition *of body and mind aforesaid," for the nominal consideration of $2178, to [*121 make the conveyances in the bill mentioned. Although a more direct and positive allegation that Comfort Wheaton was incapable of transacting business, would have been more satisfactory than the detail of circumstances from which the conclusion is drawn, yet we think, that the averment of his incompetency is sufficiently explicit, to make it a question in the cause. The defendant has met this charge, and we cannot doubt that his answer is sufficiently responsive to the bill, to give him all the benefit which the rules of equity allow to an answer in such circumstances.

We proceed, then, to look into the proofs in the cause, and to inquire whether the testimony establishes the incompetency of Comfort Wheaton when these deeds were executed. We have examined with attention the immense mass of contradictory evidence which the record contains. A number of persons, and among others, the witnesses to the deeds, express the opinion, that he was capable of managing his affairs, and disposing of his property. This evidence, however, is met by such a mass of opposing testimony as can scarcely be resisted. Among the numerous witnesses who testify to the imbecility of his mind, are many who had been long and intimate acquaintances. All his physicians concur in stating, in strong and decided terms, the weakness of his mind, as well as *his body, which [*122 they ascribe chiefly to the character of his disease. One of them, Dr. Barrows, attended him about the time these deeds were executed. He says,

"with regard to the state of his mind, at all times when I saw him within the said period (from the 1st of March to the 25th of November 1802), I can say, that he appeared to me wholly incapacitated to transact any money business, or to have the care of any concerns whatever. It is my opinion, the decay of his mental faculties was such as to induce that state of fatuity which would unfit him for all the purposes relative to the affairs of life, except obeying the various calls of nature." Some of the witnesses add to their opinion of his imbecility, some circumstances on which the opinion is founded, which cannot fail to make a deep impression on the mind. Ziba Olney says, that he was acquainted with Comfort Wheaton for the last five years of his life, who, for the last fifteen months of them, resided in his family. "That during the whole of these times, he appeared to be childish, and incapable of transacting any business. The reasons of this opinion are, that he would frequently repeat the same questions, and would, several times in the same day, ask what day of the week it was. At short intervals, he would talk rationally, and then would break off from conversation to singing, and from that to crying. That he would frequently go out, in the night and day, naked except his shirt. That he would frequently break out in profane language, and at other times, preach." Several other *witnesses describe the situation and conduct of this afflicted old gentleman, in a manner to add great weight to their opinion, that his faculties were prostrated. Many even of those witnesses who depose to his competency, declare, that the public opinion and language of his neighborhood was, that his mind was deplorably impaired; and the conduct and declarations of his family, including the defendant, Asa Handy himself, show a settled conviction that Comfort Wheaton was incapable of managing his affairs.

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There is evidence of the consultations in which Handy participated, previous to the deeds of the 9th of May, for putting the old gentleman and his estate under guardianship; and there is also evidence of similar consultation respecting the propriety of procuring a conveyance of his property, in order to save it for himself and his family. This may not be admissible as proof of a trust; but it is strong evidence of a conviction, that the person from whom the deed was to be obtained was unfit for the management of his own affairs. Among other testimony to this point, Abner Daggett deposes, that Asa Handy asked him, if he had a notion of buying his father Wheaton's lot? The witness answered, that he had had some conversation with Wheaton about it; upon which Handy said, Wheaton was no more capable of selling his estate than a child. The witness was deterred from purchasing, though he wished to acquire the lot, by the fear of subsequent controversy.

The great and sudden revolution in the whole *conduct of Comfort Wheaton, immediately after the first paralytic stroke, viewed in connection with his advanced age, is a strong circumstance in corroboration of the opinion that his mind was diseased. A sober, prudent, reflecting and moral man, between seventy and eighty years of age, mingles with profligate people, to whom he devotes himself, and becomes suddenly intemperate, immoral, and childishly whimsical and indiscreet, so that his nearest friends think it necessary to put it out of his power to ruin himself.

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The terms on which this old gentleman stood with his family, are not

entirely unworthy of consideration. But two of his children, Caleb, and Mary, the wife of the defendant Asa, lived near him. From causes, some of which may be discerned in the record, he was on ill terms with Caleb. One of the witnesses deposes, that he said, on one occasion, "You know, Asa, I made you the deeds to spite Caleb." There is other testimony to the same effect. The necessary consequence of this quarrel with Caleb, was, to subject him, in an increased degree, to the influence of Mary Handy and her husband, and exposes the deeds conveying all his property to them, to an increased degree of suspicion.

The inadequacy of the consideration, as stated in the bonds referred to in the answer, furnishes an additional argument against these deeds. It was chiefly the support of Comfort Wheaton for the residue of his life. This proved to be five years, which was a longer time than his age, and state of health, at the time of the transaction, rendered *probable; but which [*125
was certainly not a full consideration for the property.

These various circumstances add so much weight to the opinions of those who depose to the incompetence of Comfort Wheaton, that the mind cannot withhold its assent from that conclusion. An issue, indeed, might have been directed; but we do not think it a case in which this course ought to have been pursued. The degree of weakness, or of imposition, which ought to induce a court of chancery to set aside a conveyance, is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. A verdict affirming the capacity of Comfort Wheaton to execute these deeds on the 9th of May 1805, could not, we think, have been satisfactory to the court: and it was consequently, not necessary to refer the question of competency to a jury.[1]

If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience, for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience, to set them aside. That a court of equity will interpose in such a case, is among its best settled principles. The cases cited in the argument, which we will not repeat, place this beyond the possibility of question. It was, therefore, proper to set aside the deeds, and to direct the defendant, *Handy, to account [*126
for the money he had received under them.

But although that defendant ought not to be permitted to benefit himself by his own improper act, it is not reasonable, that he should be burdened with the debts of Comfort Wheaton, and the expenses of his maintenance. These are proper charges on the estate itself. So are improvements and repairs which enhanced the rents, and the value of the estate. As a defendant in equity, Asa Handy has certainly a right to retain them, and to receive credit for them in the account which was directed by the circuit court.

There is, we think, no error in the manner in which the account was directed to be taken. The parties were heard before the master, who, after a very laborious and conprehensive examination of their accounts, has made

[1] See Wainwright's Appeal, 89 Penn. St. 220.

a voluminous report, to which both parties have excepted. It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is received as true, when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptant relies. Were it otherwise, were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would be of little *avail. Such testimony, *127] indeed, need not be reported further than it is relied on to support, explain, or oppose, a particular exception.

1. The first exception made by Handy is, that only the sum of $5448.26, was allowed him by the commissioner, instead of $101,167.30, the amount of his claim. This is a general exception, which comprehends, it is supposed, the particular alleged errors enumerated in the subsequent exceptions.

2. The second exception is, that the master did not admit his whole account on his own oath. The conduct observed by the master on his point, is thus specially stated by himself. "I admitted said Asa to make oath to all charges, whether for money, specific articles, or services, which, from the circumstances of the parties, or the nature of the charge itself, could not, in my opinion, be proved by vouchers, or other legal evidence." This rule, adopted by the master, is, in our opinion, one to which Handy could make no just objection. There can be no propriety in admitting the party as a witness to support items in an account, which, from their character, admit of full proof.

3. Of this description are the items which constitute his third exception. It is the demand of testimony to support his charges for repairs and im- *128] provements. These repairs and improvements are susceptible of complete proof; and as there could be no difficulty in procuring *it, the commissioner did right in requiring it.

4. The fourth exception is to the rejection of his oath to discharge himself from rents, which, as he alleged, he had not received. The commissioner has made considerable deductions from the total amount of rent, if calculated for the whole time, but has rejected the oath of Handy, because he admitted that he had kept ledgers, in which his receipts of rents were regularly entered, which were still in his possession, but which he refused to produce. The decision of the master on this point was so obviously right, that it need only be stated to be approved.

5. The fifth exception is, that the master has not allowed for repairs and improvements according to the measurement of Nathan Parks, which was on oath, but according to the estimate of John Newman, which was not founded on actual measurement, but made principally by the eye. The master reports, that, "in addition to the evidence produced by the parties, I appointed John Newman, an experienced and skilful measurer of carpenter's work, to go on the premises, together with the said Handy and myself, and to measure and estimate all such repairs, and alterations and buildings, as said Handy, being under oath, should point out as being made and executed by him." The estimate of the said Newman, with his deposition, are referred to, and annexed to the report. Newman deposes, that his es-

timate is founded *on actual measurement, except parts of the roof of one building, which he took from the measurement of Nathan Parks, and of another, in which he was guided by the statement made by Handy himself of the length of the rafters, which accorded with his own estimate. That a measurement thus made and proved, was entitled to more respect than the *ex parte* measurement of Parks, cannot be doubted.

6. An exception is also taken to the report, because it disallows the charge made by Handy of a note, which he says was proved. This exception, it is presumed, was not taken before the master, as he does not notice it, and it is too vague to be regarded. Neither the note, nor the gronnd on which payment is claimed, nor its amount, nor the reasons of its rejection, are stated; nor is there any reference to the evidence in support of it. Nothing is stated to induce a suspicion, that the disallowance of it was improper. Yet the court, from its solicitude to discover whatever the record might contain on this subject, has looked through the report. Nothing is said, so far as we can perceive, respecting a note, except in the affidavit of Ziba Olney, who states, that Asa Handy became the indorser of some note for Appleby, which was settled in some way in the board of Comfort Wheaton, on which note, he believes, Handy was sued. If this is the note to which the exception alludes, the claim is absorbed in the allowance made him for the board of Comfort Wheaton. But whether it be the note or not, *the exception is totally unsupported, and cannot be sustained. [*130

7. A seventh exception is, a charge of money alleged to have been received of Doctor Bowen, although he discharged himself therefrom on oath, in payments of different sums under twenty dollars each. This is the application to a particular item of the principle contained in the second exception, and is disposed of with that exception.

8, 9. The eighth exception is a reception of the objection to the manner in which Handy is charged with repairs, the master's report respecting which has been already stated to be satisfactory; and the ninth is a repetition of the claim to sustain his accounts on his own oath.

10. The tenth exception is to the requisition made on him to produce his ledger, in which entries had been made of the rents he had received; a requisition to which he objects, because it contained transactions anterior to the entries of rent. The validity of this objection cannot be admitted. The ledger might be inspected in the presence of the defendant, Handy, and there could be no propriety in commencing the examination with prior transactions.

11. The eleventh exception respects the calculation of interest. The commissioner had made what are denominated rests in the account, instead of calculating interest on each minute item. This mode of calculating receipts and expenditures, in accounts consisting of numerous *small items, is recommended by convenience, and has been generally adopted. It seems to have been properly adopted in this case. [*131

12. The twelfth and last exception, is a repetition of the often repeated, and as often rejected claim, to be admitted to swear to his whole account.

The original plaintiffs except (1) to the allowance made to the said Asa Handy, for buildings which were erected on the lot after the death of Com-

fort Wheaton, which are said to be no advantage to it. But there is no proof, and no reason to believe, that these buildings were not a real advantage to the property, and did not increase the rent and the value. This exception, therefore, was properly overruled.

2. The second exception is to the admission of the said Handy's oath, in cases in which he refused to produce his books, and the books of Comfort Wheaton. No example of this admission is given, nor is there any proof in support of the exception. The rule by which the master was governed has been already stated and approved.

3. The third exception is a repetition of the objection to the admission of items in the account of Handy, on his own oath; and is answered by a reference to that part of the report which relates to this subject, and which has been already stated. The fourth, fifth, sixth and seventh exceptions, are totally unsupported by evidence, and, consequently, cannot be sustained.

*132] *We think the circuit court did right in confirming the report of the commissioner.

Upon the return of the report, the circuit court directed the estates to be sold, and the money due to the said Asa Handy to be paid, in the first instance, and that one-fifth of the residue should be paid to each of the plaintiffs, that being the distributive share of each, under the law of Rhode Island. The decree proceeds to authorize the heirs who were not made parties to come in and receive their distributive shares, on paying their proportion of the costs and charges of suit. The objection to this decree is, that the children of Mary Handy, and the children of Daniel Wheaton, are not parties to the suit.

It has been supposed, that it is not necessary, in Rhode Island, to make all the heirs parties, because, by the laws of that state, parceners can sue separately for their respective portions of the estate of their ancestor. This law would, undoubtedly, be regarded, in a suit brought on the common-law side of the circuit court. Its influence on a suit in equity is not so certain. But however this may be, we are satisfied, that a sale ought not to have been ordered, unless all the heirs had been before the court, as plaintiffs or defendants. Although the legal estate may be in Caleb Wheaton, under the deed made by the administrator, yet he acknowledges himself to be a trustee for the heirs, having purchased for their benefit. They have, therefore, a vested

*133] equitable interest in the property, of which they *ought not to be deprived, without being heard. They may choose to come to a partition, and to redeem their shares, by paying their proportion of the money with which the estate is charged. The bill does not state, that the heirs who are not made parties are unwilling to become so, or cannot be made defendants by the service of process. We think, then, that there is error in proceeding to decree a sale, without bringing all those heirs before the court who can be brought before it; and for this error, the decree must be reversed, and the cause sent back, with liberty to the plaintiffs to amend their bill, by making proper parties. If all the heirs cannot be brought before the court, the undivided interest of those who do appear, is to be sold, and the lien of Asa Handy is to remain on the part or parts unsold, to secure the payment of so much of the money due to him as those parts may be justly chargeable with.

DECREE.—These causes came on to be heard, &c.: On consideration whereof, this court is of opinion, that there is no error in the interlocutory decree, nor in so much of the final decree as approves and confirms the report made by the master; but there is error in so much thereof as directs a sale of the premises therein mentioned, all the heirs who are shown to be interested in the said premises not being made parties, and it not being shown or alleged that they could not be made parties. So much of the decree, therefore, as directed a sale of the premises in the *bill mentioned, is reversed and annulled, and the residue thereof is affirmed; [*134 and the cause is remanded to the said circuit court, with liberty to the plaintiffs to make all proper parties, that the whole may be sold, if all the heirs can be made parties, otherwise the shares of such as are made parties. Each party to pay his own costs in this court.

HENRY CASSELL, Administrator of LOUISA BROWNING, *v.* CHARLES CARROLL, of Carrollton.

Quit-rents on lands in Maryland.

The title and claim of Charles, Lord Baltimore, his heirs and representatives, to the quit-rents reserved by the proprietary of the late province (now state) of Maryland, was extinguished by the agreement between the heirs, devisees and personal representatives of the said Lord Baltimore, and of his son and heir, Frederick, Lord Baltimore, made in 1780, and confirmed by an act of the British parliament, in 1781.

It seems, that a *bonâ fide* assignment, for a valuable consideration, made by a husband, of a debt, actually and presently due to his wife, divests, in equity, the title of the wife.

But however this may be, in general, the agreement made in 1780, including the quit-rents then actually due (if at all), to Louisa Browning, the daughter of Charles, Lord Baltimore, and assigning them to Henry Harford, the devisee of Frederick, Lord Baltimore, having been entered into in England, by the husband of Louisa Browning and her committee (she being a lunatic), and the consideration having actually gone beneficially for their use, and the *whole transaction having been between British subjects, under the direction of the high court of [*135 chancery, and confirmed by an act of parliament, transferred a complete legal and equitable title to the assignee.

ERROR to the Circuit Court of Maryland. This was an action of debt, brought by the plaintiff in error, in the court below, for the recovery of certain quit-rents alleged to be due from the defendant to the plaintiff's intestate. The special verdict found by the jury stated the following facts:

The jury find, by their verdict, that Charles I., in the eighth year of his reign, granted to Cæcelius Calvert, Baron of Baltimore, his heirs and assigns, for ever, in fee-simple, the province (now state) of Maryland, by a charter dated the 8th of June 1633. Cæcelius Calvert died in 1675, and left Charles, afterwards Baron of Baltimore, his son and heir, who entered into the said province, and was seised thereof. The said Charles, in 1711, granted, according to the laws of the province, to Charles Carroll, Esq., father of the defendant, a patent for a tract of land containing 10,000 acres, "to have and to hold the same unto him, the said Charles Carroll, his heirs and assigns, for ever; to be holden of us, and our heirs, as of our manor of Baltimore, in free and common socage, by fealty only, for all manner of services; yielding and paying therefor, yearly, unto us and our heirs, at our receipt at the city of St. Mary's, at the two most usual feasts in the year, viz., at

the feast of the Annunciation of the Blessed Virgin *Mary, and St. Michael the archangel, from and after the second day of April, which shall be in the year of our Lord 1723, the rent of one hundred pounds sterling, in silver and gold."

The defendant inherited the said tract of land from his father, and is now seised and possessed of the same. On the 31st day of December 1698, the said Charles, Lord Baltimore, executed a deed, by which he settled the province of Maryland on himself, remainder on his son Benedict, for life; remainder on the heirs male of the body of the said Benedict; remainder to the said Charles, in fee. There were trusts created in the said deed, all of which are determined. The said Benedict died in 1714, and Charles, his father, in 1715. The said Benedict left issue male, Charles, his heir, afterwards Lord Baltimore, and proprietor of Maryland. Benedict left other sons, all of whom died without issue. The last-mentioned Charles entered into the province of Maryland, and was seised thereof, as the law requires; and on the 11th day of July 1730, executed a deed to trustees, to the use of the said Charles and his assigns, for life, remainder to the use of the first and other sons of the said Charles in tail male successively; remainder to the use of the said Charles, in fee. There were other trusts created in the deed, but they were all determined at the death of Mary, the wife of the said Charles, which took place in 1769.

In 1692, an act was passed by the legislature of Maryland, which
*137] declares, that no manor, land, *tenements or hereditaments whatsoever, within the province, shall pass from one to another, except the deed or conveyance be acknowledged before certain magistrates, and enrolled or recorded. This act was in force when the indenture of the 31st of December 1698, was executed, but the said indenture was not acknowledged or recorded. The legislature of Maryland, in 1715, ch. 47, passed an act, which requires deeds, and leases for more than seven years, to be acknowledged and recorded within six months from their date. It also declares all deeds, not acknowledged and recorded, according to the provisions of the act of 1692, to be void. The deed of the 11th of July 1730, was neither acknowledged nor recorded.

The last-mentioned Charles, Lord Baltimore, had issue only one son, named Frederick, and two daughters, one named Louisa (who is the plaintiff's intestate), and the other named Caroline. The said Charles, Lord Baltimore, being seised of the province of Maryland as aforesaid, made his will, in 1750, and devised the province of Maryland to trustees, for the use of his son Frederick, and his assigns, for life; remainder to the use of the sons lawfully begotten of the body of the said Frederick, successively, in tail male; remainder to the daughters of the said Frederick; "and, in default of such issue, then to the use and behoof of Louisa, my eldest daughter, her heirs and assigns, for ever." Charles, Lord Baltimore, died seised, the 23d
*138] day of April 1751. The *said Frederick, Lord Baltimore, died without lawful issue, on the 4th day of September 1771.

Louisa, the plaintiff's intestate, was married to John Browning, on the 15th day of May 1762, and remained *covert baron* of the said John, until 1792, when he died. The said Louisa was a lunatic from the year 1780, till the day of her death, which took place in November 1821. She has never been in the state of Maryland since the death of her father. Letters of

administration were regularly granted to the plaintiff, on the 17th day of April 1823.

Frederick, the son of Charles, Lord Baltimore, entered into the province of Maryland, and was seised thereof as the law requires. On the 1st day of July 1761, the said Frederick, and Cæcelius Calvert, his uncle, executed a deed of bargain and sale to Thomas Bennett and William Sharp, of the province of Maryland and its appurtenances, for the purpose of docking the entail of the province. On the 8th of April 1767, the said Frederick executed a deed of lease and release of Ann Arundel manor, and all other manors held by the lord proprietary in the province, to Bennett Allen, and recoveries were afterwards suffered of the said manors, in pursuance of the said deed of lease and release. On the 4th day of March 1771, Frederick, Lord Baltimore, made his will, and devised the province of Maryland, and all its appurtenances, to Henry Harford.

That upon the death of the said last-mentioned Frederick, Baron of Baltimore, Henry Harford, *the devisee named in his will, was a minor, and a ward, under the guardianship of the court of chancery in England, [*139 and so continued until 1779. That the said Henry Harford, as devisee as aforesaid, was recognised and acknowledged by the provincial government of Maryland, as the lawful proprietor, under the charter, and by his guardians, with the knowledge and consent of the British government, entered into the possession of the government of the province of Maryland, and received the rents and revenues thereof, as proprietor, until the beginning of the disturbances which separated the United States of America from the British government. That those disturbances began in 1774, at which time the people of the province of Maryland took the government of the said province into their own hands, and ousted the officers of the proprietor; and the government of the said province so continued in the hands of the people, until the declaration of independence, the 4th of July 1776. That no quit-rents, nor any revenues which fell due in the said province, after the year 1773, were paid to the proprietor, or his officers; that, after the revolutionary war, the British government paid to the said Henry Harford 60,000*l.*, as a compensation for his losses in Maryland by the revolution; and paid to the above-mentioned John Browning, and to Robert Eden, who married the above-mentioned Caroline, 10,000*l.* each, as a compensation for their losses in the said province, by the said revolution. That suits in the chancery court of *England were instituted in 1772, by the said Browning and wife, and the said Eden and wife, against the said Harford, to recover the [*140 province and revenues of the said province of Maryland, which suits continued until 1782, when the said bills were dismissed by the complainants.

In 1780, the legislature of Maryland passed an act, which declares, that "the citizens of Maryland, from the declaration of independence, and for ever, be, and they are hereby declared to be, exonerated and discharged from the payment of the aforesaid quit-rents, and that the same shall be for ever abolished and discontinued."

In 1780, an agreement was entered into, in England, by deed, between Henry Harford, of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline his wife (the said Louisa and Caroline being the heirs-at-law of Frederick, Lord Baltimore), of the second part, Sir Cecil Wray, the committee of the real and personal estate of the

said Louisa (she being a lunatic), of the third part, and Hugh Hammersley and Peter Prevost, two of the executors named in the will of Frederick, Lord Baltimore, of the fourth part, all the said parties being British subjects. The agreement makes an absolute cession of the province, and revenues, &c., from the time of the decease of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of 10,000*l.* to John Browning and Louisa his wife, and 10,000*l.* to Sir Robert Eden and
*141] Caroline his wife, in the manner stipulated in the *agreement. It also provided, in the event of the restoration of Henry Harford to the possession of the province and its revenues, growing, or in arrear, for an additional sum of 10,000*l.* for the benefit of each of said ladies, payable out of the same. The agreement further stipulated for an application to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, with a provision that the agreement should be void, unless the royal assent should be given to the act within three years. The act, accordingly, passed, and was assented to by the king, within the period prescribed. It vests the title to the province, and its revenues, and quit-rents, &c., absolutely in Henry Harford and his heirs, subject only to the payment of the sums before mentioned, and some others not material to be stated.

Upon this special verdict, a judgment was entered in the court below *pro formâ*, by consent, for the defendant, and the cause was brought, by writ of error, to this court.

March 13th and 14th. The cause was argued by *Webster* and *Raymond*, for the plaintiff; and by the *Attorney-General* and *Taney*, for the defendant.

It has not been thought proper to report the arguments of counsel, at large, involving a great variety of feudal and constitutional learning, which the court did not think it necessary to examine, as the cause was determined
*142] upon the single point of the effect of the agreement made *in 1780, and confirmed by act of parliament in 1781.

On the part of the *plaintiff*, it was contended: 1. That the deeds of 1698 and 1730, were void under the acts of assembly of 1692 and 1715, referred to in the special verdict; and that, consequently, Charles, Lord Baltimore, the testator of the plaintiff's intestate, was tenant in fee-simple of the province of Maryland, at the time of his death in 1751.

2. If those deeds were not void, then the said testator was tenant in tail, under the deeds, with reversion in fee, which reversion was a devisable interest, and was well devised to the plaintiff's intestate. *Calvert* v. *Eden*, 2 Har. & McHen. 279, 337; Opinion of Sir F. Hargrave, in s. c. p. 341.

3. Payment of rent to Henry Harford, or his agents, did not discharge the defendant from his liability to pay the plaintiff.

4. The act of the legislature of Maryland of 1780, which professes to abolish the quit-rents from and after the declaration of independence, is void, on the general principle of the law of nations, that a division of an empire does not affect vested rights of property, and by a special provisions of the treaty of peace of 1783, and the treaty of 1794, between the United States and Great Britain. The original charter to the first Lord Baltimore, distinguished between his public and his private character, and

meant to confer upon him beneficial rights of property *independent of his political character as the ruler of the province. At all events, the act of 1780 could not affect, retrospectively, the quit-rents which were then actually due, and had accrued from the death of Frederick, Lord Baltimore, in 1771, until May 1780, when the act was passed. Vattel, *Droit des Gens*, liv. 4, c. 2, § 22; *Ware* v. *Hylton*, 3 Dall. 199, 239; *Georgia* v. *Brailsford*, Ibid. 1; *Terrett* v. *Taylor*, 9 Cranch 43, 46; *Orr* v. *Hodgson*, 4 Wheat. 453; *Society, &c.*, v. *New Haven*, 8 Ibid. 464.

5. That the agreement of 1780, alleged to have been confirmed by act of parliament in 1781, is no bar to the plaintiff's right of action. Upon this last point (which was the only one determined by the court), it was argued for the plaintiff, that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums of money, consequent on that event, and that this being an essential part of the contract, which became incapable of execution by the result of the war, the agreement could not legally be enforced. It was also contended, that it was not competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to Louisa Browning, his wife, so as to bar her, in case of survivorship, from the right of recovery (Roper on Husb. & Wife, 204, 223, 227), and that, she being a lunatic, no act done by her committee could in any manner affect her rights. A mere intention to reduce into possession the wife's *choses in action*, has been *held insufficient to bar the widow of her right to them. *Blount* v. *Bestland*, 5 Ves. 515; *Lamb* v. *Milnes*, Ibid. 517. So, a general assignment in bankruptcy has not the effect of reducing into possession, a legacy of stock, in trust for the bankrupt's wife, whose right by survivorship will be established against the assignees. *Mitford* v. *Mitford*, 9 Ves. 87. And a transfer of stock into the wife's name, to which she became entitled as a distributive share of personal estate during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship. *Wildman* v. *Wildman*, 9 Ves. 174. See also, *Nash* v. *Nash*, 2 Madd. 133; *Hornsby* v. *Lee*, Ibid. 16. Supposing, therefore, the husband had agreed to transfer this specific claim, it would only operate as an equitable assignment; the assignee must sue in the name of the husband; and if he did not recover during the lifetime of the husband, the right would survive to the wife. But in no point of view, could it be considered as a legal defence, or be pleaded in bar of this action. [*144

On the part of the *defendants*, it was insisted: 1. That as soon as Maryland became a sovereign and independent state, the quit-rents which fell due after the declaration of independence, were due to the state, and not to the representative of Lord Baltimore. They belonged to him in his public political character as lord *proprietary, and not in his individual private capacity. 2 Bl. Com. 53, 288; Co. Litt. 244, note *b*; Pownall, Colonies, 48–9; *Kirk* v. *Smith*, 9 Wheat. 241, 266, 282. [*145

2. That Henry Harford, being acknowledged by the province of Maryland, and by the king of Great Britain, as the proprietor of Maryland, was, by such acknowledgment, the lawful proprietor, and entitled to the quit-rents, until Maryland became an independent state. 1 Bl. Com. 106–7; *Derby* v. *Athol*, 2 Ves. sen. 337; *Penn* v. *Baltimore*, Ibid. 455.

3. If the province was private property, and entailable and devisable, then the entail was barred by Frederick, Lord Baltimore, and the devise to Henry Harford was good.

4. If Henry Harford was not lawful proprietor, he was proprietor *de facto*, and as such, payment to him would discharge the tenants.

5. That the treaties with Great Britain have no application to rents falling due subsequent to the declaration of independence. At all events, the act of assembly of 1780, effectually confiscated the quit-rents due before that time, and so divested the title of whoever might be entitled to them, as to extinguish all claim to those quit-rents. *Smith* v. *Maryland*, 6 Cranch 306.

6. That the agreement of 1780, confirmed by act of parliament in 1781, bars the plaintiff's right of action. Upon this last point, it was argued for the defendant, *that John Browning, the husband, had a right to *146] bind all the rights of Louisa Browning, the wife, with respect to such debts as were then actually due and payable, and therefore, had a right to transfer, for a valuable consideration, the quit-rents actually and presently due. The cases cited on the other side did not shake this principle. The case of *Blount* v. *Bestland*, 5 Ves. 515, was not the case of a sale for a valuable consideration, but of a bequest by a husband to his own children, of a legacy due to the wife, which he had not reduced to possession. *Mitford* v. *Mitford*, 9 Ves. 87, was the case of a general assignment of all *his* effects, by a bankrupt husband, and the court determined that it did not pass a legacy which he had not reduced into possession. But the argument manifestly admitted, that a particular assignment of the specific legacy, for a valuable consideration, would have produced the effect. The case of *Hornsby* v. *Lee*, 2 Madd. 16, was the sale of a wife's reversionary, not a present, interest. So that the power of the husband over the wife's present debts, immediately recoverable, remained untouched by these decisions. But in the present case, the wife was a ward of chancery, and was represented by her committee in the transaction, which was advantageous for her, the benefit of which she had received, and now actually enjoys. The compromise was confirmed by an act of parliament obtained on an application of *the parties, and ought, therefore, to be considered as annihilating *147] all her claims to the subject in controversy.

March 17th, 1826. STORY, Justice, delivered the opinion of the court.—This is the case of an action of debt, brought by the plaintiff, as administrator of Louisa Browning, against the defendant, for the recovery of certain quit-rents, asserted to be due to the intestate, as proprietary of the province of Maryland, and accruing between the years 1771 and 1780. In the circuit court for Maryland district, upon the trial of the cause, upon the general issue, a special verdict was found, upon which that court gave judgment *pro formâ* for the defendant, and the cause has been brought before us for a final decision, by a writ of error.

The cause has been here argued with great ability and care. Many important and difficult points have been discussed at the bar, upon which, if we were called to pronounce a decision, we should wish for more time and consideration to mature our judgment. But as we have all come to a conclusion upon one point, which finally disposes of the whole cause, it is

deemed proper at once to put the parties in possession of our opinion, without attempting to analyze the learning which is involved in others of more complexity, and would require more extensive researches.

For the purposes of the present decision, it is assumed (without, however, meaning to intimate *any real opinion on the subject), that every other difficulty in respect to the title and claim of Louisa Browning [*148 to the quit-rents in controversy, is overcome, and the question of the effect of the agreement concluded between the parties, in June 1780, and subsequently confirmed by parliament, in the year 1781, is that to which the court has addressed its attention. If that agreement, so confirmed and executed, as the case finds, extinguished, in point of law, the title of Louisa Browning to these quit-rents, and passed it to Henry Harford, there is an end to the present suit. And such, upon the best consideration of the case, in our judgment, was the legal effect of that agreement so confirmed and executed.

The agreement is *quadripartite*, between Henry Harford, of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline his wife (the said Louisa and Caroline being the heirs-at-law of Frederick, Lord Baltimore), of the second part, Sir Cecil Wray, the committee of the real and personal estate of the said Louisa, she being a lunatic, of the third part, and Hugh Hammersley and Peter Prevost, two of the executors named in the will of Lord Frederick, of the fourth part. The object of the agreement was to make a final settlement between the parties of all differences, and particularly to settle the title to the province of Maryland, and all the hereditaments and revenues connected therewith. It makes an absolute cession of the province and revenues, &c., *from the decease [*149 of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of 10,000*l.* to John Browning and Louisa his wife, and 10,000*l.* to Sir Robert Eden and Caroline his wife, in the manner stipulated in the agreement. It further stipulates, in the event of the restoration of Henry Harford to the possession of the province and its revenues, growing or in arrear, for an additional sum of 10,000*l.*, for the benefit of each of these ladies, payable out of the same; but as that event never occurred, it is unnecessary to dwell further upon it; the other sums were duly and regularly paid. The agreement further stipulated for an application to be made to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, &c.; with a provision, that the agreement should be void, unless the royal assent should be given to the act within three years. The act passed, and was assented to by the king, within the period prescribed. It vests the title to the province, and its revenues and quit-rents, &c., absolutely, in Henry Harford, in fee, subject only to the payment of the sums before mentioned, and some others not material to this cause.

What is there, then, to prevent the agreement and act from having full effect? The parties were all British subjects, resident within the realm; the act of parliament was passed upon their own application and agreement; all persons in interest were fully represented, so far as by law *they [*150 were capable of being represented; the conditions stipulated have been complied with; the confirmation was absolute; and the intention was,

to extinguish, at law, as well as in equity, every claim of Louisa Browning to the quit-rents now in controversy.

It has been argued, that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums consequent thereon; and that, this being a material ingredient in the contract, which became incapable of execution, the agreement ought not to be enforced, or held obligatory. It would be a sufficient answer to this objection, that the parties, at the time of the execution of the agreement, knew perfectly well that the province had assumed independence, and that the chance of restoration depended upon the issue of the war then waged between the United States and Great Britain. They acted upon that state of things, and provided for the payment of these additional sums, only in the event of an unsuccessful struggle on the part of the province. The stipulation, therefore, has not failed, in point of consideration, from the misconduct of either party; but the event, in which alone it was to have any effect, never has occurred. The payment was conditional, and the condition has never arisen, upon which alone the contract could act.

But there is another answer presented by the very terms of the agreement itself. It is, that the parties expressly agreed, that the title to the *province, &c., should vest absolutely, upon the payment of the first 10,000*l.*; and, of course, the other provisions were to rest in covenant only between the parties, and were not to be construed to defeat or divest that title. The act of parliament treats it in that way, and vests the title in Henry Harford in fee, conclusively. *151]

It has been further argued, that it was not competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and that, she being a lunatic, no act done by her committee could in any manner touch her rights. It is to be recollected, that the quit-rents, as claimed, were debts then actually due (if at all) to Louisa Browning; they were not future contingent or reversionary interests vested in her. How far, in respect to such interests, the husband, or the committee of a lunatic, is by law authorized, by a conveyance or assignment, to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here, is of *choses in action* actually due to the wife. There can be no question, that he was entitled to receive them to his own use, or to extinguish them by a release. What, then, is there to prevent him from disposing of them by assignment, at least, in equity?

It does not appear to us, that it has ever yet been decided, that a *bonâ fide* assignment, for a valuable consideration, made by a husband to a third person, of a debt actually and presently *due to his wife, does not divest, in equity, the title of his wife. So far as authorities have gone, they seem to proceed upon a different and opposite doctrine. The cases of *Lamb* v. *Milnes*, 5 Ves. 517, and *Mitford* v. *Mitford*, 9 Ibid. 87, are distinguishable. They were cases of a general assignment under the bankrupt laws, which are not supposed to do more than place the assignees in the same situation as the bankrupt himself. The case of *Hornsby* v. *Lee*, 2 Madd. 16, turned upon another distinction, that the interest was not a present, but a reversionary, interest. But without deciding any general principle, we *152]

think, that under the particular circumstances of this case, where the consideration has actually gone beneficially for the wife, and the whole transaction has been under the direction of a court of chancery, and been confirmed by parliament, the assignment was, to all intents and purposes, valid to assign the rents. If, in ordinary circumstances, such an assignment would pass an equitable title only, we think, the act of parliament makes it, to all intents and purposes, a legal title and assignment. Without dwelling upon the known principles of the paramount and omnipotent authority over private rights and authorities, which is often attributed to parliament, it may be justly said, that it is competent for the legislature, upon the application, and with the consent of all the parties in interest, to give a legal and conclusive effect to their own agreements, and to pass that at law, which the parties, in the most *unreserved manner, intended to pass. A title so passed, and so confirmed, by authorities perfectly competent to make it, ought, under such circumstances, to be recognised as valid in the tribunals of every other country. [*153

This is a summary exposition of the views of the court upon this subject; and it at once disposes of the whole matter in controversy. The judgment of the circuit court is, therefore, affirmed, with costs.

Judgment affirmed.(a)

Mr. Justice DUVALL, being a land-holder in Maryland, did not sit in this cause.

(a) The editor has supposed that it would gratify the curiosity of the learned reader, to be presented with the following note (with which the editor has been favored by his friend Mr. Taney) of an argument in the court of king's bench, in 1775, upon a case sent from the court of chancery, in the suit brought by Sir Robert Eden and others against Henry Harford, to recover possession of the province of Maryland and its revenues, in which the learning respecting the nature of the dominion and proprietary interest of Lord Baltimore in the province, was very elaborately discussed.

Trinity Term, 15 Geo. III., B. R., Tuesday, 27th June 1775.

HARFORD *v.* BROWNING.[1]

Serjeant *Hill*, for Mrs. Browning and Mrs. Eden.—He first stated the case, and when he had finished this, Lord MANSFIELD asked, in what shape the cause came before the court, and for whom Mr. Serjeant Hill was to argue. The serjeant answered, that the case came from chancery, to know whether the last lord had a right to devise; and that, if he could not, it was the same to Master Harford whether the property went to Mrs. Browning and Mrs. Eden, the last lord's sisters, as co-heirs of the first grantee of Maryland, or to Mrs. Browning alone, as devisee of her father. Lord MANSFIELD then observed, that there would have been no question, if the estate had been situate in England, and *that the ground of the doubt was its being a seignory and proprietary government in America. [*154

Serjeant *Hill* proceeded in his argument, to the following effect: The general question is, whether the province, and proprietorship, and port-duties of Maryland, are well devised by the will of the last Lord Baltimore; and to show that they could not pass, I shall submit two general points: 1. That the property is so high in its nature, and in other respects, so peculiar, as not to be devisable: 2. That the subsisting entails were not well barred by the last Lord Baltimore, either because he did not do the proper and necessary acts for barring, or because such entails were not capable of being barred in any way.

[1] See the case of Harford *v.* Browning, in Chancery, 1 Cox 307.

1. I apprehend, that the proprietorship of Maryland is not alienable, without the license of the crown, and much less devisable. The design of the Maryland charter was, to erect a province in the district called Maryland, to establish a form of government similar to our own, and to place Cæcil, Lord Baltimore, and his heirs, at the head of it. The highest powers are conferred, and, perhaps, the crown's right to grant some of them may be doubtful; but it is not necessary to this case to determine which could, and which could not, be granted. The charter gives royal jurisdiction, and a royal seignory. Of the first kind, are the powers of enacting laws with the consent of the assembly, of erecting courts, of appointing magistrates, of punishing criminals, and of levying men, and all the powers of war and peace. Of the second kind, is the power of making sub-infeudations. The charter reserves a tenure of the king, as of the castle of Windsor; for the law would otherwise have created a tenure *in capite*. The king cannot grant without reserving a tenure, for he cannot change the principles of the constitution, one of which is, that there must be a tenure. The king constituted Lord Baltimore the lord and proprietor of the whole province. There is no instance before, of the grant of a proprietorship. But though there was not before any such sovereignty in name, yet, in specie, there was such a property, and the counties palatine of Chester and Durham resembled it. From the high nature of these powers and jurisdictions, I argue, that the province could not be aliened, without license of
*155] the *crown, nor could it be a subject of the statute of wills. At the time of that statute, no such high property existed in the empire. The 32 Henry III, in giving the power of devising, mentions manors, lands, tenements and hereditaments. It begins with manors, and though hereditaments, which is the last word, would, singly, have been sufficient to have extended to this property, yet, coupled with the former words, it is not so. The 13 Eliz., cap. 10, § 3, begins with enumerating deans, &c., and then adds, all others having spiritual or ecclesiastical promotions; but bishops and archbishops being higher than deans, are not included. So, the statute of wills, beginning with manors, shall not extend to a higher dominion, such as proprietary government. Dependent kingdoms are not devisable, without the consent of the superior prince. Dominion is not the subject of testamentary disposition; and Craig says, that all feudists agree in this. Nor are things given for the support of dominion, such as the port-duties here, in their nature devisable. With us, the king cannot devise the lands and revenues allotted for the support of his royal dignity. This, indeed, has not been the subject of judicial decision; and in the Bankers' Case, Lord Somers, though he reversed the judgment of the court of exchequer, avoided this point; but our kings never attempted to exercise such a power. See 5 Mod. 46, and Lord Somers's argument in the Bankers' Case. The 9 & 10 Wm. III., cap. 23, which gave a revenue to King William for his life, recites it to be for his household and family expenses; and now, by the civil list act of Queen Anne, the alienation of the crown revenue is expressly provided against. But, even before the civil list act, there is no instance of a devise of the royal revenues. In the present case, it could not be intended, that the port-duties should be alienable. The port-duties were created for the benefit of the subject, and they, and the proprietorship, were intended to go together. But I insist further, that the lands themselves are not alienable. Anciently, when the king made a duke, and gave possessions to him, they were so annexed to the dignity as not to be transferrible, without a preceding act of parliament. See Godb. 397. In Dyer, fol. 2 *a*, there is a case very analogous to the present; for there it is said, that if the king creates a duke, and gives him 20 pound a year for the maintenance of his dignity, he cannot give it to another, because it is not incident to his dignity. Many things, of
*156] a special nature, are inalienable. Dignities *are so, because they are personal, and in the blood. Offices of trust are not assignable, unless by the original terms of the grant, or by prescription, which supposes such a grant. Ministerial offices, are, indeed, assignable, and the power of appointing a deputy is incident, where the office is assignable, but not *vice versâ*. See Bro. Abr. tit. Office, pl. 108. The office of forester is of such a trust, that it cannot be granted over without license. 4 Inst. 315. The Register and Fitzherbert, there cited, warrant Lord Coke in his

doctrine. Earldoms are not alienable. The case about the office of Great Chamberlain in Sir W. Jones 96, and Collins's Baronies, contain much learning on this subject, which applies strongly here. DODDRIDGE, who was with the majority of the judges, states everything which made against his own opinion.

Lord MANSFIELD.—The case is very well reported both in Sir W. Jones, and in Collins; but there is a great difference between offices and territories.

Serjeant *Hill*.—The judges who held the office alienable, only hold it partly so, that is, that it might be settled, so as to keep it in the male line; because males were more fit for the office than women. But they agreed, that though the office was granted in fee, it could not be disposed of from the blood of the first grantee. In the present case, it is observable, that the charter makes a difference in the use of the word assigns. That word is used in granting the land, but it is omitted, where the charter gives the power of calling assemblies, and enacting laws, of appointing judges, and of pardoning crimes. Therefore, these powers, at least, were not intended to be alienable.

2. If the whole of the property, or any part, is disposable by will, it must be so, on this ground, that all the statutes and laws of England, in force at the time of the settlement of Maryland, attached on the province, though subsequent statutes will not extend to it, without express words. Then, I have a right to assume, that the property is entailable; for the statute *de donis* was an existing law, at the time of the grant and settlement of the province, as well as the statute of wills, and so was the statute of uses. Now, the property was entailed, and, upon the supposition and the entail was within the statute *de donis*, I argue, that the entail *was not well barred by the last Lord Baltimore, and that this gives a title to his sister, Mrs. Browning, all the entails being now spent for want of issue male, and she being the devisee of the reversioner in fee, by the will of her father. [*157

Lord Baltimore's mode of barring was by lease and and release, a conveyance the weakest of all in its operation. Before Machell *v.* Clarke, it was understood, that such a conveyance, by tenant in tail, would only pass an estate during his life; and, even according to that case, the estate it passes is voidable on his death, by entry of the issue in tail. See Machell *v.* Clarke, 3 Ld. Raym. 678; 2 Salk. 619; 7 Mod. 18, and Comyn 119. As against those in remainder, it still passes only an estate during the life of the tenant in fail. But a feoffment, without warranty, would have been a discontinuance, and, with warranty, when it becomes collateral, it would have become a bar at this day; for the statute of Anne doth not take away the effect of collateral warranty, when it is by a tenant in tail in possession. See 4 & 5 Ann. c. 16. Therefore, I say, that this was one mode by which Lord Baltimore might have barred the entail; because, if he had made a feoffment with warranty, the warranty would have been collateral to Mrs. Browning.

But there was another mode of barring which might have been used. The Province of Maryland is a fief holden of the king, as of the castle of Windsor, for so the tenure is reserved. As, in the grant, is not similitudinary, but is the same as *ut* in pleading that one was seised *ut de feodo*, which, says Lord Coke, is to be understood positively that the party was seised in fee. Co. Litt. 17 *b*. The tenure, then, being as of the castle of Windsor, the province is to considered in the same way as other lands originally holden of the castle, and, like other fiefs, is to be impleadable within the manor. To every manor a court baron is necessarily incident, and therefore, it is so to every castle. The jurisdiction of a court baron is well known. Without the king's writ, it holds pleas of personal actions, where the demand doth not amount to 40 shillings. With the king's writ of right, it may hold plea of land. Writs of right are of two kinds, patent and close. If the writ is brought in the lord's court, it is directed to him, and is patent. If he holds no court, or waives, or the tenure is immediately of the king, it is brought in the king's court, is directed to the sheriff, and is close. *Magna Charta*, c. 24, provides against the abuse of the writ of right in the latter case, by declaring, that *præcipe in capite* shall not issue, where the land is not holden *in capite*. But the practice is otherwise, and the writ of right has been [*158

usually brought in the common pleas, in all these cases. Another writ of right close lies for lands in ancient demesne. This writ is well known, and recoveries are suffered upon it, in the courts of ancient demesne. See F. N. B. and Booth on Real Actions. The general writ of right patent lies in the court of the manor, in all cases where the tenure is of the subject, or of the king, as of an honor; and where the estate lies, makes no difference. 4 Inst. 219, and Fitzh. Abr. Jurisdiction, pl. 61, there cited. If a man holds lands as of an honor, the bailiff may execute the process as of the court of the honor, wherever the lands lie. In the case in Fitzh. Abr., it was objected, that the officers of the county palatine of Chester, could not execute writs in a foreign county; but it was adjudged otherwise, because the lands were within a manor holden of the principality of Chester.

There are many precedents of recoveries on writs of right patent. One is in N. Bendlow, p. 4, pl. 4, on a writ of right patent directed to the bailiff of the castle of Rising. According to this ancient principle, that wherever a fief lies, it is impleadable in the manor of which it is holden, the province of Maryland might have been impleaded in the court of the castle of Windsor, for it is clearly holden of the castle, and there is a court baron necessarily incident. True it is, that if the tenant pleads a foreign plea, or the mise is joined on the mere right, to be tried by the grand assize, the cause must be removed into the common plea. But I insist, that a writ of right patent might have been brought in the court of the castle of Windsor, and that a common recovery might have been suffered; because, then, neither foreign plea, nor joining of the mise on the mere right, by the grand assize, is necessary. The precedent cited from N. Bendl. is in point, and conformable to the principles I am arguing upon. The writ of right patent was for a manor holden of Rising Castle, and was directed to the bailiffs of the castle. It appears clearly, that there was a recovery in the court of Castle Rising. There was a plaint by the demandant, the tenant vouched to warranty, and the vouchee making default, judgment was given for demandant. Afterwards, a writ of false judgment was brought in the common pleas by the *vouchee, and the error was, that the writ of right patent should have been directed to the suitors; but the court held, that the bailiffs were the proper persons, and judgment was affirmed. See Mod. 1. Another instance of a like proceding in the court baron of the manor of Wolverhampton, is in Robbins' Ent. 323. There, false judgment was brought on this error, that the lands were not mentioned to be within the manor; but the judgment was affirmed. In Restell, there are several instances of writs of false judgment, on judgments in writs of right close, in courts of ancient demense. Rest. Ent. 221 *b*. Also, Booth states the manner of proceeding in the court baron, on a writ of right patent, where the cause is not removed. Booth on Real Actions 89. If then a recovery might be had on a writ of right, in the court baron, when the proceeding is adverse, much more might a common recovery be suffered. Errors in common recoveries are aided by the statutes of jeofails, and no objection is fatal to them, but such as might be pleaded to the jurisdiction of the court where they are suffered. But how could such an objection hold in this case? Every plea to the jurisdiction must state, that there is another court in which the cause may be tried and which that court is. Therefore, if want of jurisdiction is objection to the court baron of Windsor Castle, it should be stated, where else the province of Maryland can be impleaded; for fines have been levied in the court of common pleas here, of shares of a proprietorship in America. The only proprietorships at present are Pennsylvania and Maryland; but Carolina was once a proprietorship, and whilst it was so, fines were levied here of shares in it. The first grant of Carolina was to eight persons, and the word assigns was used throughout: *scire facias* was bought to repeal the letters patent; but no judgment was ever given, for the proprietors were well advised, and agreed to surrender, and an act was made to comfirm the agreement. See 2 Geo. II., c. 34. Though the proprietors were seised in fee, yet this act recites, that from the nature of the estates proposed to be surrendered, great difficulties might arise as to the manner of conveying. In the present case, like difficulties induced the advisers of

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the last Lord Baltimore to recommend the applying to parliament: but no act was obtained.

Lord MANSFIELD.—He was stopped by the difficulty of proceeding.

*Serjeant *Hill.*—The last thing I have to submit is, that if no recovery could be suffered, and feoffment with warranty would not have been sufficient, then [*160 the entail was not barrable in any way, and the Province of Maryland was in the same condition as land here, before the introduction of common recoveries, and of barring by fine under the statute Hen. VII. Like an executory devise, the entail is not barrable, because a recovery cannot be suffered. See the case of Scatterwood *v.* Edges, 12 Mod. 278. The words of Lord HARDWICKE, in 2 Ves. 353, are very applicable. In speaking of the limitations in the act of parliament, which made the Isle of Man inalienable, he says, that if they were considered on the foot of the statute *de donis*, and they were estates-tail, they was no want of a restrictive clause; for, before Taltarum's Case, which established the doctrine of recoveries, and the 4 Hen. VII., of fines, these, by the statute *de donis*, were inalienable, and of Man there could be neither fine nor recovery. Here, I say, that the property is not entailable; but if it is, it must be because within the statute *de donis*, and if that statute operates upon Maryland, and no recovery could be suffered, there was a perpetuity. It is absurd to say, that there must be the means of making property alienable, because it is within that statute; for the statute was made to restrain alienation. A recovery might have been sufficient to bar; but the conveyance by lease and release is too mild in the operation, and on such a conveyance by tenant in tail, the old use reverts to the releasor.

The capability of losing in an action is a very different thing from the power of alienation. What is the objection to a perpetuity, in such a case as this? Can any useful end be attained by making a sovereignity alienable? The cases of copyholds are not authority in point, for they depend on custom. Here, Serjeant *Hill* cited many authorities to comfirm and illustrate some of the doctrine he had advanced in the previous part of his argument. He cited Co. Litt. 108 *a;* Dyer 44 *a*, and Bro. Abr., Tenure, 94, to show the difference between tenure *ut de corona*, and *ut de honore*, and that it was in the king's option to reserve either; Co. Litt. 17 *a*, and 1 Lev. 222, to prove the word *ut* affirmative, and not similitudinary; Co. Litt. 5 *a*, 2 Inst. 31, and the Register, to prove a castle contains a manor; and 4 Inst. 26, Hob. 170, and 2 Bro. Abr. 45, to prove that a court baron is incident to a manor, and that they are inseparable. For the distinction *between writs of right patent, and writs of right close, and the [*161 causes of removal, and that where the former lie, they may be preferred to the latter, he cited F. N. B. 1–9, 11–14, Old Nat. Brev., Fitz. Abr. tit. Droit, pl. 45, Magna Charta, cap. 24, and Bro. Abr. To show that it was immaterial where the land happened to lie, he cited Fitzh. Abr. tit. Jurisdiction, pl. 61, and 4 Inst. 219. He then observed, that the king might make a new island, arising out of the sea, part of a county, and for this he cited Collis on Sew. 45, and asked why he could not make a province part of an honor. He also cited from 1 Str. 177, the case of the King *v.* City of Norwich (which was the case of an information against the latter for not repairing some bridges), to show that the king may enlarge, contract or vary the bounds of a county, for the purpose of jurisdiction. He next mentioned, a second time, that fines had been levied of shares of the Carolina proprietorship, and added, that error on a fine of land in America had been brought in B. R. and that it might be proper to search in order to know what was done.

Lord MANSFIELD.—Fines and recoveries of plantations in America, with a viz., to bring them within a parish here, were frequent in the court of common pleas, till provincial laws were made to provide other modes of barring. But I do not know of any instance of such fines or recoveries in the case of a seignory.

Serjeant *Hill.*—In 1 Ventr. 258, Lord HALE says, that the writ of right close (for lands in ancient demesne) is not to be resembled to another *præcipe*, and that being directed *ballivis manerii*, mention of the manor, without naming the vill in which the

lands lie, is sufficient. So, here, mention of the castle of Windsor, in the writ of right patent, without a viz., to bring Maryland within England, would have been sufficient. Lord C. J. NORTH, in 2 Mod. 49, observes, that it had been long a dispute whether a fine of lands in a *lieu conus* was good; that in King James's time it was settled to be so, and that, by the same reason, a recovery shall be good; for they are both amicable suits and common assurances, and as they grow more in practice, the judges have extended them further. He adds, that a common recovery may be of an advowson,
*162] and that no reasons are to be drawn from *the visne, or execution of the writ of seisin, because it is not an adverse proceeding, but by agreement. This is material, for common recoveries of advowsons were anciently on writs of right; and though writs of entry are now used, they are improper for an advowson, and they are only allowed, because common recoveries are by agreement. The observation about the writ of seisin answers the reason in 1 Ventr. 59, why an ejectment of lands in Jamaica will not lie here, and shows that it is not applicable to the present case. That where one jurisdiction is pleaded to, another must be shown, I cite Barker *v.* Dormer, 1 Show. 191; and that a seignory out of England may be impleaded in the courts here, I cite 4 Inst. 213; Bro. Abr., Jurisdiction, 101, Lien, 75, Trial, 58; Fitzh. Abr., Assize, 282; Vaugh. 405. As to suing for ancient demense lands, I cite 1 Salk. 56, and 1 Ld. Raym. 43. Upon the whole, the property in question is neither alienable nor devisable, or, at least, the seignory is not so. If the property is both alienable and devisable, then, I insist, that it is entailable, and that the entail is not barred.

The supposed necessity of barring by lease and release, doth not exist; for, 1. There might have been a feoffment with warranty; and 2. The province being holden of Windsor Castle, is impleaded in the court baron there, and a common recovery might have been suffered there. Besides the authorities already cited, to show that the bailiffs of that court were officers competent to hold plea of the province in a writ of right patent, there is one in Aston's Ent. 375. If a recovery could not be suffered in the court of the castle of Windsor, it might have been suffered on a *præcipe quod reddat* in the court of common pleas; and the property not being in England was no objection to a recovery, either in the common pleas, or the court of Windsor Castle. If it is denied, that a recovery could be suffered in either of these courts, it must be shown what court has the proper jurisdiction, or the object cannot be taken. If a recovery could not be suffered anywhere, then I insist, that the entail of the property made it
*163] inalienable, *and that it descended as a perpetuity; and that it might so descend, I cite the authority of Lord HARDWICKE in 2 Ves. 353. and of Jenkins, in his Centuries, 250 and 257. Serjeant *Hill* concluded with citing a case about the writ of right patent, in 6 Co. 11.

Kenyon, for Master Harford.—The principal questions in this case, arise on the grant by the crown of the Province of Maryland, in 8 Charles I., and the settlements made of it in 1730 and 1761. The grant by the crown being by letters-patent under the great seal of England, the law of England is, therefore, the rule by which the property must be adjudged upon. It has been truly observed by the court, that no points could arise, if the property was in England. If the property was situate here, it would be alienable, devisable and entailable, and the entail might be barred by common recovery. But the property lies in America, and thence arise the difficulties.

The questions referred to this court concern both the province and the port-duties, and their value is great. But the great value and extent of the property will not make any difference in deciding upon it, though its situation will. The Province of Maryland was settled by Englishmen, and these carried the law of England with them. In 2 P. Wms. 75, it is said to have been adjudged by the privy council, that if a new country is found out and settled by English subjects, they carry their laws with them, though subsequent acts of parliament, without naming, will not bind the plantation. The like doctrine is laid down in Penn *v.* Baltimore, 2 Ves. 349, with more precision; for, there it is said, that an English colony carries with them all the laws of England in being at the time of planting it, which are adopted to the situation; but that no statute, made

afterwards, binds, without naming them. Now, both the statute *de donis*, and that of wills, were before the settlement of Maryland, and both have words sufficient to comprehend the proprietorship, the word *tenement* being used in the former, the *hereditament* in the latter. Therefore, both statutes must extend to the property in question, unless it can be shown that there is something incongruous in applying them to Maryland. But they are necessary and convenient laws for Maryland, nor is the law of descents more so. It is objected, that these statutes may extend to lands granted to the Lord Proprietor * in the way of sub-infeudation, but that they ought not to be applied to the seignory and proprietorship. But no reason is given for the [*164 distinction, except saying, than the proprietorship is a transcendent property, and hath regalities and high powers annexed to it. Is an assignee or devisee less likely to be fit and able to govern it, that the descendants of the first grantee, who may be infants? Higher property than this hath been the subject of wills; for kingdoms have been devised. Constantine devised an empire, and so did Charlemagne; and the same was done in our own country by Hen. VIII., under an act of parliament. It is said, that the property is not alienable, because it is annexed to an office of trust. But lands to which offices are annexed, may pass together with the office. When the Champion of England passes his manor, his office passes with it. The Province of Maryland may be resembled to a large manor. The jurisdictions of some manors were anciently as extensive, both in criminal and civil matters, as the jurisdiction of the lord of Maryland. The power of making by-laws to regulate commons, and other subjects, relative to the tenants, is incident to many manors.

But the question doth not depend merely on arguments of analogy. The proprietorship is granted in free and common soccage, and it was intended to be alienable. The word assigns is used in the letters-patent, and, in some places, is applied to the seignory itself. The first grantee would not have accepted the grant on other terms. We should consider, not the present value of the property, but its value when the grant was made; and then, Maryland was a desert, and it is not to be supposed, that the first grantee would have been at the expense of settling it, if it had not been made alienable. Besides, the usage, since the grant, is an argument in favor of its being alienable. Both Maryland and Pennsylvania have been constantly subjects of entails and settlements, and this practice ought to weigh something. Another strong argument arises from the preamble of the statute 2 Geo. II., c. 34, about the shares of the Carolina proprietorship. In deriving titles to the several shares, wills are mentioned; this shows that it was deemed to be within the statute of wills. The preamble also recites a cause in chancery about an agreement to sell the share of one Dawson, and a decree by the Lords for a specific performance, on an appeal. The preamble further recites various grants to show title in those with whom the crown was contracting *for the surrender of their shares. All this shows, that parliament thought a proprietorship in America alienable like other property. [*165

Lord MANSFIELD.—In Dawson's Case, the question between the parties was not about the power of alienating.

Kenyon.—The statute of 7 & 8 Wm. III., c. 22, § 16, is also of consequence, for it restrains all persons, and their assigns, claiming any right or propriety, in any islands or tracts of land on the continent of America, by charter, or letters-patent, from selling to any, but natural-born subjects. This act supposes a proprietorship to be alienable.

Lord MANSFIELD.—The clause in the act of William is odd. Without such a restriction, aliens were incapable of purchasing.

Kenyon.—In Penn *v.* Lord Baltimore, the question of alienation actually occurred; and though it was not necessary to decide upon it, yet Lord HARDWICKE seems indirectly to have given an opinion, that the proprietorship of Maryland was alienable. See 1 Ves. 448.

Lord MANSFIELD.—The question before Lord HARDWICKE was on the effect of an agreement between the Penn and Baltimore families, about the limits of Maryland and

Pennsylvania, it being contended that Lord BALTIMORE had not power to dismember his province, though he might make sub-infeudations; but the question was determined without deciding anything on the power of alienating the whole province.

Kenyon.—I cite the case for the sake of Lord HARDWICKE's *dictum*, and not as an adjudication. Thus, I am in possession of the opinion of the legislature, and of the house of lords, and of Lord HARDWICKE, as authorities, to show, that the property is as alienable as other property. It remains to show, that the entail was well barred by Lord BALTIMORE, so as to enable him to dispose by will; and this Mr. Serjeant Hill makes the great point. The question is as to the whole province and seignory, and
*166] not as to any particular parts or sub-infeudations. If it had arisen on the *latter, the forms required by the provincial laws might have been complied with. But no court within the province can hold plea of the seignory itself. See Vaugh. 404. If no court can be found in Maryland for a common recovery, some other court must be found, or there must be some mode of barring the entail, without a recovery. When this cause was before the chancellor, Mr. Serjeant Hill said, that a recovery might have been suffered before the king in council; but that ground is now deserted.

Lord MANSFIELD.—If anything had been done for barring there, it could only have been a proceeding having analogy to common recovery, the council being the proper place for adverse proceedings about the title to Maryland. The jurisdiction over all the seignories of the provinces in America, has resided in the privy council, from the time of Elizabeth.

Kenyon.—Two places for suffering a recovery have been mentioned; the court of common pleas, and the court of the castle of Windsor. As to the former, it is said, that fines have been levied of lands in America, with a viz., to bring them within England. But the plea for land is local, and it is impossible, by a viz., to transfer the place to England; and two or three precedents are not sufficient for this purpose. As to the court of the castle of Windsor, I admit, that one manor holden of another may be pleaded for in the principal manor; but I do not know of any instances in which there can be such a plea, except the cases of copyhold, and of lands in ancient demesne. Besides, how is seisin to be given of Maryland, by a court baron in England? It is said, that a recovery may be on a writ of right, in a court baron of Windsor Castle; but if such a court exists (which I do not admit), it is allowed, that joining the mise carries the cause to the common pleas, and the moment the suit comes there, it fails, for that court cannot give seisin; and this deficiency, according to the case of the Isle of Man, in 2 Ves. 353 would make the recovery ineffectual. It is said, that Maryland might have been annexed to a county in England; but the answer is, that it is not so annexed. Further, it doth not appear that a court baron is incident to the castle of Windsor. Such a court may belong to the honor of Windsor; but Maryland is bolden
*167] of the castle, and *the castle and honor are distinct. A castle may be part of an honor or manor. F. N. B. 6, d. I am told, that the only court belonging to the castle is for personal actions.

If the entail was not barrable by common recovery, it is to be considered, whether an alienation by some other common assurance is not sufficient. The mode by lease and release, is found fault with; but this conveyance is founded on the statute of uses, and since that statute, it passes the fee as well as any other. As to feoffment with warranty, in general, it would have failed; and I am not sure, that it would have had the proper effect, in the case which hath happened, because, here, the warranty would have descended both on Mrs. Browning and Mrs. Eden, as heirs of their brother; and, on the supposition that the property is entailable, to prevent perpetuities, the entail must be barrable in some way. In general, the power of barring by common recoveries, is incident to entails; and if that mode had not been adopted, the other modes would have been found out. Where common recoveries cannot be suffered, alienation is sufficient; and whether it may be by feoffment, or lease and release, the effect ought to be the same. In the case of copyholds, where there is a custom for entailing, and

no custom for a common recovery, a surrender is equivalent to a recovery. This point was adjudged by three judges against one, in Carr *v.* Singer, 2 Ves. 603; and the doctrine was approved of by Lord HARDWICKE in a subsequent case. See Moore *v.* Moore, 2 Ibid. 601, which case, though given by the reporters before Carr *v.* Singer, is subsequent in point of time. These authorities alone are sufficient; but the same principles in favor of alienation are to be met with in ancient books. In Willion *v.* Berkley, Plowd. 244, Judge WESTON argues on the principle, that every estate-tail is barrable; and, in Mary Portington's case, 10 Co. 40 *a*, Lord COKE mentions, that Lord DYER, in a case before the Lords of Parliament, reproved one of the counsel for finding fault with common recoveries. But, besides the case of copyholds, I have another authority, to show, that complying with the law of England as nearly as circumstances will allow of, is sufficient. I have in my hand the report of a committee of the privy council in the case of Governor Wentworth, who was complained of on various charges. One of these was, that he had set aside grants of land, in the American province of which he was governor, without office, according to the forms of the law of *England; and the lords of the committee of the privy council, one of whom was Sir EARDLY WILMOT, say in their report, that in some of the American provinces they have not courts so correspondent to those in England as to admit of the same forms, and that in such cases, if a mode of doing the same thing *cy pres* is adopted, it ought to be good *ex necessitate*. See p. 10 of the report. This doctrine is applicable to the present case. The property is entailable, but a common recovery cannot be suffered for want of a proper court, and therefore, *ex necessitate*, alienation being the only mode of barring the case will admit of, ought to be adjudged sufficient. [*168

But if the property is not within the statute *de donis*, and yet should be within the statute of wills, it may be material to consider, what consequences will follow. Then, under the settlement of 1733, the last Lord Baltimore had a fee-simple conditional, and if a possibility of reverter is not grantable, as Lord HARDWICKE holds, in Stafford *v.* Buckley, 2 Ves. 180, then the possibility of reverter in this case, did not pass to Mrs. Browning by the will of the father of the last Lord Baltimore, but descended on him, and for want of an intervening estate, the former merged in the latter. During the life of the father of Lord Frederick, they were distinct; but after the father's death, they met in the son, and this union gave him the whole fee.

Lord MANSFIELD.—A possibility of reverter is certainly not grantable.

Kenyon.—As to the Isle of Man, there is an annotation by Lord HALE, in the new edition of Coke upon Littleton, now publishing, which explains the reason why the statues *de donis*, of uses, and of wills, do not extend to Man, in a way not applicable to Maryland. Man was a dominion belonging to the King of England, before those statutes; and Lord HALE says, it was ruled, that those statutes do not extend there, because Man was not parcel of the realm of England, and is not specially named. But the grant and settlement of Maryland are subsequent to those statutes. See 20 *b*, of the new edition of Co. Litt.[1]

*Lord MANSFIELD.—It will be very proper to consider the case of the Isle of Man, in 4 Inst. and 2 Anderson. Both Maryland and Man are dominions held of the crown of England; and the grant of Man to the Derby family, was prior to the statute *de donis*, and yet the judges held, that it did not extend to it, any more than the statutes of uses and wills, which were subsequent. The case of the Duke of Athol and the Bishop of Man, should also be considered. Lord HARDWICKE took great pains in giving his opinion in that case. He gave me a corrected note of his opinion, and another to the Duke of Athol. [*169

Sergeant *Hill*, in reply.—It is agreed, that if the property was in England, the case would be clear against the devisee of Lord Baltimore, for want of a recovery; and it has not been shown that a recovery was impossible. The distinction between the land

[1] Hargr. & Butler's ed.

and port-duties has not been answered. They were separated by King William. He seized the former, but did not touch the latter. The distinction between sovereignty and mere land is solid. The case from 2 P. Wms. 75, was cited, to prove, that subjects of the King of England carry over our laws with them into a new settlement; which I do not controvert. A manor is not to be compared with the seignory of Maryland. The principal powers given to the proprietor of Maryland do not belong to the lord of the manor. The word assigns is necessary to make offices of trust transferrible; and the reason for omitting it in some parts of the Maryland charter, was, to make some parts of the property inalienable. It is omitted in the grant of the seignory. It is said, that kindoms are devisable; but there is no instance of the devise of a dependent kingdom. I say this on the authority of Craig. Henry VIII. and Elizabeth had acts of parliament.

Lord MANSFIELD.—By the feudal law, land was not devisable; much less a kingdom, though William the Conqueror claimed England under a will.

Serjeant *Hill.*—It is said, that recoveries on writs of right in manor courts, have only been in the case of copyholds, and of lands in ancient demesne. But in the cases I cited from Benloe and Robinson, of recoveries in the courts baron of Rising and Wolverhampton, the recoveries were of freehold land, and the words *secundum consuetudinem manerii*, which are used where the recovery is of copyhold, or ancient demesne, are not mentioned. The argument from the entails of copyholds, which are barrable by surrenders, supposes, that there is no custom to warrant another mode; but the argument of necessity fails here, for there is another mode. I give the same answer to the *cy pres* doctrine in the report to the privy council in Governor Wentworth's case.

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Lord MANSFIELD.—The questions in this case are new, and of great difficulty. I have often considered them. I do not know of any litigated case, before the present, in which the question has been, whether a seignory like that of Maryland can be aliened or devised. Both the Baltimore and Penn families have made their proprietorships the subjects of settlements and entails. As to the statute of William & Mary, it is strange, that it should restrain from selling lands or proprieties to aliens; because, before that statute, they were incapable of purchasing. But still, the words of the statute, which mention any right or property in any island or tract of land in America, by charter, or letters-patent, furnish some argument. In the case of Penn *v.* Baltimore, the question of alienation could not arise. There, the suit was about an agreement as to the bounds of two provinces; and it is certain, that a province cannot be dismembered, be aliening one part so as to be holden of another province. Something might be incidentally said as to the point of alienation, but there could be no solemn adjudication, for the case did not require it. The jurisdictions and powers granted by the Maryland charter, are larger than those in any other. Doubts may arise as to the principality, from the nature of the property. Taking in execution, and other consequences of its being subject to alienation, may furnish strong reasons of policy against the power of alienating. The law being settled as to the principality, a secondary question will be, whether the lands or port-duties can be severed from it. The rule of applying to America all the laws of England, in force at the time of settling a colony, is subject to many qualifications. The statute of charitable uses doth not extend to Antigua. There may be a difference, too, between the seignory and proprietorship of Maryland, and other estates here. The seignory and proprietorship passed under the great seal, and that carries the law of England. Another *thing quite new, is the question as to barring the entail. The history of barring entails in the provinces is material. If there had not been provincial laws, to regulate the barring of entails, it might have been proper to have supported the mode of barring fines and recoveries in England. The necessity of the case might, perhaps, have justified it. But the provincial laws do not apply to the seignory and proprietorship of Maryland. The question as to them is entirely new, and of great difficulty. The pains taken to show, that a recovery might have been suffered in the court of the castle of Windsor, proves

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the force of the argument of necessity as to barring by alienation. The case of descendible freeholds, the entails of which are barred in that way, may have influence on the present case.

The case was ordered to stand for argument a second time, next Michaelmas term; and Lord MANSFIELD said, that, probably, several arguments would be necessary.

The PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES *v.* SMITH.

Demurrer to evidence.—Action on promissory note.

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of a jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.[1]

It seems, that as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary.[2]

But as against the indorser of a bill or note, such an averment and proof is in general, necessary.

Where the bill or note is made payable at a particular bank, and the *bank itself is the holder, such averment and proof may be dispensed with, and all that is necessary is, for [*172 for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.[3]

On a demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted.[4]

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences, where the party takes the question of fact from the appropriate tribunal.[5]

Proof necessary to support an action against the indorser of a bill or note.

United States Bank *v.* Smith, 2 Cr. C. C. 319, reversed.

ERROR to the Circuit Court for the District of Columbia.

February 7th, 1826. This cause was argued by *Lear*, for the plaintiffs, citing 2 H. Bl. 509; 3 Mass. 403; Ibid. 524; 12 Ibid. 403; 8 Ibid. 430; 1 Wheat. 373; 1 Doug. 132, 218; 1 Johns. 241; 5 Ibid. 1; 2 Wash. 253: and by *Taylor*, for the defendants, citing 2 Brod. & Bing. 165; 17 Johns. 248; Chitty on Bills 321.

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[1] A court of error is bound to notice a fatal defect, apparent in the face of the declaration. Maher *v.* Ashmead, 30 Penn. St. 344.

[2] If the maker or acceptor was at the place of payment, at the time designated, and was ready and offered to pay, it is matter of defence to be pleaded, and proved on his part. Wallace *v.* McConnell, 13 Pet. 136; Cox *v.* National Bank, 100 U. S. 714; Caldwell *v.* Cassidy, 8 Cow. 271; Huxtun *v.* Bishop, 3 Wend. 13.

[3] Rahm *v.* Philadelphia Bank, 1 Rawle 335; Jenks *v.* Doylestown Bank, 4 W. & S. 505; Sherer *v.* Easton Bank, 33 Penn. St. 134; Hallowell *v.* Curry, 41 Id. 322.

[4] Smith *v.* Steinbach, 2 Caines Cas. 158; Forbes *v.* Church, 3 Johns. Cas. 159; Thornton *v.* Bank of Washington, 3 Pet. 36; Snowden *v.* Phœnix Ins. Co., 3 Binn. 457. The testimony is to be taken most strongly against the party demurring, and such conclusions only as a jury might justifiably draw, the court ought to draw; but he is not bound to admit forced and violent inferences. Pawling *v.* United States, 4 Cranch 219; United States *v.* Williams, 1 Ware 175.

[5] A demurrer to evidence not being a matter of right, it has fallen into disuse; and in lieu of it, the practice has prevailed, of requesting the court to give a binding instruction to the jury, that admitting the evidence to be true, the plaintiff is not entitled to recover; this answers the same purpose, and is to be tested by the same rules. Parks *v.* Ross, 11 How. 362. If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. Pleasants *v.* Fant, 22 Wall. 121; Schuchardt *v.* Allen, 1 Id. 370.

February 13th. THOMPSON, Justice, delivered the judgment of the court.—This case comes before the court on a writ of error to the circuit court for the district of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

*173] The action is by the plaintiffs, as indorsees, *against the defendant, as indorser of a promissory note made by William Young. The note is made payable at the office of discount and deposit of the bank of the United States, in the city of Washington. And the questions which have been raised and argued, relate, in the first place, to the sufficiency of the averment in the declaration of a demand of payment of the maker of the note: and secondly, to the sufficiency of the evidence to sustain the plaintiffs' right of recovery.

It is alleged, however, on the part of the plaintiffs, that this court cannot look beyond the demurrer to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the king's bench, in England, in the case of *Cort* v. *Birkbeck*, 1 Doug. 208, that, upon a demurrer to evidence, the party cannot take advantage of any objections to the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence be sufficient to maintain the issue. And the judgment of the court upon such evidence, will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his

*174] favor, may avail himself of all defects in the declaration, *that are not deemed to be cured by the verdict.

The objection to the declaration is, that it does not contain an averment, that a demand of payment of the maker of the note, was made at the place where it was made payable. It is a general rule in pleading, that where any fact is necessary to be proved on the trial, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective, for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States, in the city of Washington, it is proper to inquire, whether proof of that fact was indispensably necessary to entitle the plaintiffs to recover?

Whether, where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial, to prove such demand, is a question upon which conflicting opinions have been entertained in the courts of Westminster Hall. But that question, may, perhaps, be considered at rest in England, by the decision in the late case of *Rowe* v.

*175] *Young*, 2 Brod. & Bing. 165, in the House of Lords. It was *there held, that if a bill of exchange be accepted, payable at a particular

place, the declaration, in an action on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by courts in this country, that a demand on the maker of a note, or the acceptor of a bill, payable at a specific place, need not be averred in the declaration, nor proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But, if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defence, to be set up by plea and proof. 4 Johns. 183; 17 Ibid. 248. This question, however, does not necessarily arise in the case now before the court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that, as against the maker or acceptor of such a note or bill, no averment, or proof, of demand of payment at the place designated, would be necessary.

But when recourse is had to the indorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due diligence having *been used against the maker, payment is not received, then the indorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title, and right of recovery, against the indorser. And when, in the body of the note, a place of payment is designated, the indorser has a right to presume, that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note, are indispensable. In the present case, the bank at which the note is made payable, is the holder, and the question arises, whether, in such case, an averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial, and the want of it could not be taken advantage of upon a writ of error. [*176

In the case of *Saunderson and others* v. *Judge*, 2 H. Bl. 509, the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand, for them to turn to their books, and see the maker's account with them, and it was deemed a sufficient refusal, to find that the maker had no effects in their hands. So, in the case of the *Berkshire Bank* v. *Jones*, 6 Mass. 524, decided in the supreme judicial court of Massachusetts, Chief Justice PARSONS, *in delivering the opinion of the court, said, that, "the plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up to the maker, or to demand payment of him, at any other place. The defendant, by his indorsement, guarantied, that on the day of payment, the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it, without notice of the default of the maker." The rule here laid down has received the sanction of that court in subsequent cases (12 Mass. 404; 14 Ibid. 556), and is founded in good sense and [*177

practical convenience, without in any manner prejudicing the rights of the maker, or the indorser of the note. The indorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note; and he will be more likely to be exonerated from his liability, by having the demand made there, than upon the maker personally. But if the bank, where the note is made payable, is the holder, and the maker neglects to appear there, when the note falls due, a formal demand is impracticable, by the default of the maker. All that can, in fitness, be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and if not, there was a default, which
*178] gave to the holder a right to look *to the indorser for payment. And even this examination of the books was not required in the cases cited from the Massachusetts reports. The maker was deemed in default, by not appearing at the bank to take up his note when it fell due. We should incline, however, to think, that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the indorser.

The declaration in this case does contain an averment, that the note was presented to the maker, that he refused to pay it, and that notice of the non-payment was given to ths indorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the indorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What, then, in such case, is a presentment of the note? It would be an idle ceremony, to require the bank to take the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is, that the note be there, ready to be delivered
*179] up, if payment should be offered. When the note *is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such inquiry, in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a presentment, and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptation of these terms, under such circumstances.

The evidence upon the trial was introduced under this averment, without objection, and if that is sufficient to entitle the plaintiff to recover, the court ought not readily to yield to technical objections, where the defendant has had the full benefit of whatever defence he had to make. Under this state of the case, we think, the exception taken to the declaration cannot prevail. And the next inquiry is, whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the

jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong, to show that the court will be extremely liberal in their inferences, where the *party, by demurring, will take the question from the proper tribunal. It is [*180 a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witnesses examined could probably answer.

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary. The plaintiffs, to entitle them to recover, were bound to show that they were the indorsees and holders of the note; that the note was at the bank where it was made payable, at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The indorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States, at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume that the note was then at the bank, where it was discounted; and the bank being the holder and owner of the note, the presumption, at least, *primâ facie*, is, that it remained in the bank, to be delivered up, when paid. This establishes the two first points; and to show that the maker had no funds in the bank, *the book keeper [*181 was examined as a witness, who swore, that on the 19th day of July 1817, when the note fell due, there was no balance to the credit of the maker, or either of the indorsers, on the books of the bank. And the remaining question is, whether due notice of the default of the maker was given to the defendant?

The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post-office in the city of Washington, addressed to the defendant, at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the day the note fell due, he presented it at the store of the defendant, and demanded payment of his clerk, who replied, that Mr. Young was not within, and he would not pay it. And that, on the same day, he put in the post-office notice of non-payment, addressed to the defendant, at Alexandria. If the defendant's place of residence was Alexandria, it is not denied, but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable, to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view, in demanding payment of the maker. And it is fair, also, to presume, that he made inquiry for the residence of the defendant, before he addressed a letter to him; for it is absurd, to suppose, he would direct to him at that *place, without [*182 some knowledge or information that he lived there, this being the

usual and ordinary course of such transactions, and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer, from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was, manifestly, taken for granted by all parties, that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent, and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability; and the court, upon a demurrer to the evidence, will draw the same conclusion that the jury might have drawn.

We are, accordingly, of opinion, that the evidence was sufficient to entitle the plaintiffs to recover. That the judgment of the court below most be reversed, and the cause sent back, with directions, to enter judgment for the plaintiffs, upon the demurrer to evidence, for the amount of the note, and interest.

JUDGMENT.—This cause came on, &c.: On consideration whereof, it is *183] ordered and adjudged, that the judgment of the said circuit *court, on the demurrer to evidence in the said cause, be reversed. And it is further ordered and adjudged, that the said cause be remanded to the said circuit court, with instructions that judgment be entered there on said demurrer, for the plaintiffs in the cause; and further, that the court there do render judgment on the contingent verdict found for the plaintiffs, according to the tenor thereof, with costs, &c. (a)

(a) The demurrer to evidence is an unusual and antiquated practice, which this court, and other courts, have recently endeavored to discourage, as inconvenient, and calculated to suppress the truth and justice of the cause. It is allowed or denied by the court, where the cause is tried, in the exercise of sound discretion, under all the circumstances of the case; and, it seems, that the exercise of this discretion cannot be made the foundation of a writ of error. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows, that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. Young *v.* Black, 7 Cranch 565. See also, Pawling and others *v.* United States, 4 Ibid. 219; Phil. Ev. 216, 217; Bull. N. P. c. 4, p. 313.

*United States v. Vanzandt.

Discharge of sureties.

The case of the United States *v.* Kirkpatrick, 9 Wheat. 720, reviewed, its authority confirmed, and applied to the present case.

An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 24th of April 1816, c. 69, does not discharge his surety.

The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety.

The statute not removing from office the delinquent paymaster, *ipso facto*, but only making it the duty of the proper officer to remove him, the circumstance of new funds being placed in his hands, after his delinquency, does not discharge the surety.

United States *v.* Vanzandt, 2 Cr. C. C. 338, reversed.

Error to the Circuit Court for the District of Columbia.

February 8th, 1826. This cause was argued by the *Attorney-General* and *Swann*, for the plaintiffs, citing *United States* v. *Kirkpatrick*, 9 Wheat. 720; and by *Jones* and *Key*, for the defendant.

February 16th. Washington, Justice, delivered the opinion of the court.—This was an action of debt, brought in the circuit court for the district of Columbia, upon a paymaster's official bond, against the defendant in error, one of the sureties in that bond. The condition of the bond, as set out upon *oyer*, is in the following words, viz:

"That whereas, the above-bounden John Hall is appointed pay-
*master of the rifle regiment, in the army of the United States; now, if the said John Hall shall well and truly execute, and faithfully [*185 discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, &c., shall regularly account, when thereunto required, for all moneys received by him, from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and moreover, pay into their treasury such balance as, on final settlement of the said J. Hall's accounts, shall be found justly due from him to the United States, then," &c.

To the declaration filed in this action, the defendant pleads, that the said John Hall did well and truly observe and discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster in the rifle regiment of the army of the United States, and did pay into the treasury such balance as, on settlement, was found due, and hath observed, kept and fulfilled, every matter and thing in the condition of the said bond, which, according to the said condition, ought to have been observed and kept. The breach set out in the replication is, that the said John Hall did not pay to the United States the sum of ———, which was due, and in arrear, on a certain day, and which he ought then to have paid, according to the condition of his bond.

*Upon the trial of the issue formed on the matter stated in the [*186 replication, a bill of exceptions was taken to the opinion of the court, by the United States, which states, that to support the issue on the part of the United States, they gave in evidence a certified copy of the bond aforesaid, together with the account of the United States against the said John

Hall, settled at the treasury department, and duly certified according to law, whereby it appeared, that a balance of $29,266.06 was due to the United States by the said John Hall, as paymaster of the rifle regiment of the army of the United States. Whereupon, the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, they should believe, that John Hall, named in the condition of the bond, had neglected and failed to make any report to the paymaster-general, once in two months, showing the disposition of the funds previously transmitted; with estimates for the next payment of the said regiment, and had also neglected and failed, either to transmit such estimates, or to render his vouchers to the paymaster-general, for settlement of his accounts, more than six months after receiving funds, and was not recalled for such default and neglect, but additional funds were placed in his hands, notwithstanding his known defaults and neglects, in the instances aforesaid, then the defendant is not chargeable for any failure of the said John Hall to account for such additional funds, so placed in his hands after his said defaults and neglects, in respect of the
*187] funds *previously received, were known as aforesaid. The court gave the instruction as prayed; and a verdict being found for the defendant, a writ of error was sued out to the judgment rendered thereon.

The counsel for the plaintiffs in error have rested their cause entirely upon the decision of this court in the case of the *United States* v. *Kirkpatrick*, 9 Wheat. 720, and as we do not feel disposed to dissent from the opinion given in that case, it becomes material, in the first place, to inquire, whether the two cases are the same in principle, or not. If they are, it will avoid the necessity of any general reasoning upon the point decided in this cause by the court below. The case referred to, arose upon the act of congress for the collection of the direct taxes and internal duties. The action was founded upon the collector's bond, against the sureties; and one of the questions which came up for decision was, whether the failure of the comptroller to call the collector to account, at the periods prescribed by law, and the consequent injury to the sureties, did not discharge them from their responsibility, upon the ground of *laches?* By the 28th section of the above act, the comptroller of the treasury is required, in case any collector should fail to collect, or to render his account, or to pay over quarterly, or sooner, if required, the moneys by him collected, immediately after such delinquency, to issue a warrant of distress against the delinquent collector, to be
*188] *levied on his personal estate, and in case that should prove insufficent to satisfy the warrant, then upon his real estate. The decision of this court was, 1. That *laches* is not imputable to the government; and 2. That the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to the officers, and form no part of the contract with the surety.

The correctness of these principles is admitted by the counsel for the defendant; but they insist, that they are inapplicable to the case of a surety in a paymaster's bond, because, by the 4th section of the act "for organizing the general staff, and making further provision for the army of the United States," if the paymaster fail to render his vouchers to the paymaster-general, for settlement of his accounts, for more than six months after his

having received funds, the injunction of the act is imperative, "that he shall be recalled, and another appointed in his place." It is contended by the defendant's counsel, that this section leaves no discretion in the proper officer of the government, to continue the paymaster in office after his delinquency, but that he ceases thereafter to be paymaster, and the responsibility of his sureties is terminated.

It must be conceded, that the injunction on the proper officer of the government to recall the delinquent paymaster, is expressed in very strong *language. But, whether the omission to perform the act, amounts, under every possible circumstance, to a breach of official duty, may [*189 admit of some doubt. May it not be excused, in a case where the paymaster has been prevented from rendering his vouchers, at the periods mentioned in the act, by causes acknowledged by the government to have been beyond his control? And if it may, it would seem, that the ground of excuse could not properly be made a subject of judicial inquiry, in an action against the surety. It may further be remarked, that if it had been the policy and intention of the legislature, that the act of delinquency should be inexorably followed by a removal from office, it might not be unreasonable to presume, that such a consequence would have been distinctly announced. It is not, however, the intention of the court, to express any opinion upon this point, because, whatever may be the duty of the proper officer of the government in this respect, it must, we think, be admitted, that until the paymaster is recalled, he continues in office. The act authorizes, perhaps, requires, his recall, but it does not displace him. The officer whose duty it may be to recall him, acts upon his own responsibility to the government, by declining to do so; but until he acts otherwise, the paymaster is authorized, notwithstanding his delinquency, to receive, and to disburse the funds which may be placed in his hands.

The attempt to distinguish this from *Kirkpatrick's Case*, is made upon the ground, that that *was purely a case of *laches*, whereas, in this, an unauthorized act was done by the government in confiding funds [*190 to the disposal of a public defaulter, whom the government was bound by law to have dismissed from office. But will it be contended, that the obligation to dismiss this officer was more imperative than that imposed upon the comptroller to call the collector of direct taxes to account, at the periods prescribed by law, and in cases of delinquency, to pursue the summary remedy which the same law provided for the public, and, consequentially, for that of the surety? The neglect in the one case, and in the other, imputes *laches* to the officer whose duty it was to perform the acts which the law required; but in a legal point of view, the rights of the government cannot be affected by these *laches*. The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety. If, then, the paymaster continues in office, notwithstanding the omission of the proper officer to recall him on the ground of his defaults, the act of placing funds in his hands, to be disbursed according to law, is not one of which the surety can complain, since the public interest requires that the troops should be paid, which can be done only by the officer appointed for that purpose. If the neglect of the officers of government, from which the surety suffers, does not discharge him from

his responsibility *in either case, it is not perceived how the placing funds in the hands of the paymaster, who continues in office, can have that effect, seeing that the latter circumstance is the necessary consequence of the former. If the law displaced the officer, upon the ground of delinquency, the placing funds in his hands, after his removal from office, could not possibly be upon the responsibility of the surety, inasmuch as his undertaking was for the faithful discharge of the duties of his principal as paymaster, and, consequently, he is not bound for his acts, after he has ceased to hold that office. The whole argument of the counsel for the defendant proceeded upon the assumption, that the office terminated, *ipso facto*, as soon as the delinquency occurred, which, we have endeavored to show, presents an incorrect view of the subject.

Whether, admitting that the surety could claim to be discharged from his responsibility, upon the ground assumed by his counsel, such a defence could be set up on the proceedings in this cause, is a question upon which the court avoids expressing an opinion, because it is rendered unnecessary, by that which has been pronounced, and because it was not argued at the bar.

The opinion of the court is, that there is error in the judgment of the court below, and that the same ought to be reversed.

Judgment reversed.

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*192] *Otis, Plaintiff in error, *v.* Walter, Defendant in error.

Embargo bond.

Under the embargo act of the 25th of April 1808, c. 170, § 11, the collector is protected, in the honest exercise of his discretion, in detaining the vessel, and securing both vessel and cargo, until an actual termination of the voyage.

Whether the voyage has terminated, is a question of fact, and if the voyage be colorably, but not really, terminated, the collector may detain the vessel, if he has honest suspicions.

Error to the Supreme Judicial Court of the State of Massachusetts. This is the same cause which was formerly before this court. (2 Wheat. 18; 6 Ibid. 583.)

February 9th, 1826. It was argued at this term, by the *Attorney-General* and *Blake*, for the plaintiff in error; and by *Webster* and *Read*, for the defendant in error.

February 13th. Johnson, Justice, delivered the opinion of the court.—This cause is brought up by writ of error, from the supreme judicial court of Massachusetts, for the purpose of reviewing a judgment of that court, given in favor of the defendant here, upon an action of trover, instituted in that state, *to recover damages for the alleged conversion of sun- *193] dry articles composing the cargo of the sloop Ten Sisters. Otis, in the capacity of collector of the district of Barnstable, had, in the year 1808, seized and detained the vessel and cargo, under the provisions of the embargo act of the 25th of April in that year.

This is the third time that this cause has been brought to the notice of this court. In the two former instances, it came up upon bills of exception,

and in both, the decisions of that court were reversed, and a *venire facias de novo* awarded. In the present instance, a special verdict has been taken, and as the law was settled in the two former decisions, that until the termination of the voyage, the collector was protected in the honest exercise of an unlimited discretion in detaining the vessel, and, by necessary consequence, in resorting to the ordinary and necessary means of securing and preserving both vessel and cargo, this verdict seems to be drawn up with a view to bring up the single question, whether, in the sense of the laws of congress, and of the decisions of this court, this voyage was not, in effect, terminated, before the seizure.

The special verdict finds, that the vessel cleared out "for the port of Yarmouth." It is true, the master, in the oath attached to his manifest, makes use of the mere indefinite expression "bound for Yarmouth." But when we come to examine the sense in which he made this oath, by referring to his instructions, which are also *found by the verdict, we find it restricted to a voyage to Bass river, where it was to terminate, by [*194 landing his cargo, and storing it in a particular warehouse. This, then, was the point of his destination, call it port, harbor, place, or what we will. And as the collector uses the definite, instead of the indefinite article, before port, in the clearance, the fair inference is, that the clearance was for Bass river, under the designation of "the port of Yarmouth."

We are far, however, from intending to intimate, that if the master's oath as to his destination could not be modified and explained by reference to his instructions, it might be permitted to enlarge the meaning of the word port, as used in the clearance, so as to embrace the township of Yarmouth. In those times, when it behooved every public officer to be on the alert against the multiplied evasions of the system of that day, it is not to be supposed, that the definite language of the clearance was adopted, without an object. The master appears to have acted as if he had received a clearance, on a general voyage to Yarmouth, whereas, it is obvious, that the collector of Ipswich acted under a sense of the impropriety of giving a clearance that would leave the *terminus* of the voyage so void of precision. We consider the definite article as having been used for a definite purpose, and to preclude the general privilege of sailing to any point in the town or township of Yarmouth, at which a landing might have been effected.

It is obvious, indeed, from the whole tenor of *the verdict, that the mouth of Bass river is understood more emphatically to be the [*195 of port Yarmouth, than any other place in the township of Yarmouth. In one place, it finds, "that the harbor or port of Barnstable is about three miles from the harbor of Yarmouth;" in another, that a long point of land intervenes between "Yarmouth harbor or Bass river harbor, and Hyanis or Barnstable harbor;" in both instances, drawing an express discrimination between Yarmouth harbor, to which the vessel was bound (taking the term to be the synonyme of port), and Hyanis or Barnstable harbor, in which she was seized. Everything proves that Bass river harbor was the original destination of the vessel. In this sense, it cannot be denied, that Bass river harbor was the port to which, in the language of the law, she was "ostensibly bound." No one contends, that when at her anchorage in Hyanis bay, where she was seized, she could be considered as arrived at Bass river harbor. It was ten miles from this harbor—a peninsula interve-

ning—and as the verdict finds, the vessel had gone to Hyanis bay, after being compelled, by head winds, to pass Bass river.

But it is contended, that as her clearance was not specified to Bass river harbor, but to the port of Yarmouth, an arrival at Gage's wharf would as well have satisfied the exigencies of her case; that, in fact, she had arrived there, when anchored where she was seized, and that, having then a right
*196] to demand her permit to land, and *having demanded it, the circumstances make out, a termination of the voyage, as effectually as if she had put in to Bass river.

We have already stated, we think, sufficient reasons for not admitting that the clearance could be satisfied by a destination to Gage's wharf. Yet, it cannot be denied, that there is one part of the special verdict that does throw some obscurity over this part of the case. It is that in which the jury find in these words: "that, in the practice of the custom-house for Barnstable, and of the owners and masters of vessels belonging to Barnstable district, Yarmouth and Barnstable are considered one and the same port; and that Gage's wharf, at the head of Lewis' bay, is a place in Yarmouth, at which vessels bound to that port frequently unload, and that no difference is made in the custom-house between Yarmouth and Barnstable or Hyanis, as to the entry of vessels that have arrived at either place."

If, in this passage of the verdict, the jury meant to find, that a vessel arriving in Hyanis roads, an open road-stead, not locked in by any headlands that could make a port of it, had, in fact, arrived at Gage's wharf, or Bass river, they should have been explicit; and absurd and repugnant to the geography of the country, and the common sense of mankind, as the fact would have been, we must have submitted to it, or refused to act upon it. As it is, we can only draw such inferences as the finding will sanction. And we are free to confess, that we cannot understand what is meant by a prac-
*197] tice of the custom-house *and ship-masters of Barnstable, which confounds the open road-stead of Hyanis, with the harbor of Bass river, or even the landing-place at Gage's wharf, the one ten, the other three miles off. We can very readily conceive why the landing-place at Gage's wharf should be indifferently called Falmouth or Barnstable, since it is in the town, by the one name, and the landing-place for the port or bay, by the other name, the line crossing the bay but a few feet from the wharf. To arrive, therefore, at Barnstable habor, or Lewis' bay or Hyanis roads, which seem to be somehow confounded in this verdict, and to arrive at the township of Yarmouth, at Gage's wharf, may be considered as one and the same thing. And yet the inference from that fact may be directly the reverse of that insisted on for the defendant in error. For, the finding is clear and positive, which distinguishes between Barnstable harbor and Yarmouth harbor; and if, then, Barnstable harbor be identified with the landing-place at Gage's wharf, the conclusion is unavoidable, that the port of Yarmouth cannot mean the landing-place at Gage's wharf. Indeed, it is impossible to arrive at the conclusion that the destination of this vessel was indifferently to Gage's wharf or Bass river, without permitting a mere inference, and that too from equivocal terms, to conflict with a positive finding of the jury, couched in the most explicit terms. And even when advanced that far, it would
*198] still remain for the defendant here, to maintain that a vessel at anchor in Hyanis roads had completed her *voyage to Gage's wharf: a

proposition as wide of the fact, with reference to the topography of the country, as it is of the intendment of law, or the finding of the jury. For the words of the special verdict are, "that the vessel, when seized, lay at anchor in the harbor, or port of Barnstable, above half a mile from the shore or beach, and about three miles from the harbor of Yarmouth." That the jury did not intend to confound Gage's wharf with the harbor of Yarmouth is distinctly shown, by the words that follow the above, declaring Gage's wharf to be six miles and a half from where the vessel was seized. Whether the jury were right, or wrong in fixing these distances, the inference we deduce from it is still the same, to wit, that the harbor of Yarmouth and Gage's wharf could not be one, no more than the port of Barnstable and the harbor of Yarmouth. The vessel lay in the former, three miles distant from the latter, and six and a half from Gage's wharf.

Upon the whole, we can discover nothing in this case, to induce us to alter the opinion entertained in the two former, that the vessel had not reached the *terminus* of her voyage, that she was *in itinere*, and therefore, liable to seizure. On the subject of the argument deduced from the demand of the permit to land, we think this also was fully answered and disposed of in the former decisions of this court, in the same suit. We are, therefore, of opinion, that the act on which the collector relies, justified the seizure; that there is error in the judgment of the court of Massachusetts; that *it must be reversed, and a judgment entered for the plaintiff here, [*199 the defendant in the original suit.

Judgment accordingly.

Hinde's Lessee *v.* Longworth.

Exception.—Fraudulent conveyance.

Question as to the sufficiency of a certificate of acknowledgment of a deed of lands in Ohio.

In examining the admissibility of testimony in the court above, the party excepting is to be confined to the specific objection taken at the trial.[1]

Where a voluntary deed is impeached as fraudulent, evidence of judgments against the grantor is admissible, as proof (among other facts) that he was indebted at the time of making the deed, although the grantee was not a party to the suits on which the judgments were obtained.

A voluntary deed is void as to antecedent, but not as to subsequent, creditors.[2]

Error to the Circuit Court of Ohio. This was an action of ejectment, brought by the plaintiff in error, to recover the possession of the premises in the cause, described as in lot No. 107, in the town of Cincinnati.

It appeared in evidence, at the trial, that on the 28th of March 1799, Thomas Doyle, sen., under whom both parties derived title, was seised and possessed of the lot in question. The lessor of the plaintiff claimed under a deed of that date from Thomas *Doyle, sen., to his son Thomas; [*200 and the defendant set up a title under a judgment against Doyle, the elder, at the suit of John Graff, entered at the August term 1799, of the court of common pleas for the county of Hamilton. At the trial, three bills of exception were taken by the lessor of the plaintiff.

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[1] Stoddard *v.* Chambers, 2 How. 284; Burton *v.* Driggs, 20 Wall. 125.

[2] Burbank *v.* Hammond, 3 Sumn. 429; Gilmore *v.* N. A. Land Co. Pet. C. C. 460; Hopkirk *v.* Randolph, 2 Brock. 132; Mattingly *v.* Nye, 8 Wall. 370; Barker *v.* Barker, 2 Woods 87; Graham *v.* Railroad Co., 102 U. S. 153

The first bill of exceptions stated, that the plaintiff, in support of his action, offered in evidence the deed from Doyle, sen., to his son, to the reading of which in evidence, the defendant objected, and the court rejected it, as not being properly acknowledged. The certificate of acknowledgment was as follows:

"Hamilton, ss: Personally, before me, Thomas Gibson, one of the justices of the court of common pleas for said county, the above-named Thomas Doyle and —— Doyle, his wife, who being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned."

Thomas Doyle only had signed the deed; his wife was not named as a party to the conveyance, except in the conclusion of the deed, as follows: "In witness whereof, the said Thomas Doyle and ——, his wife, who hereby relinquishes her right of dower in the premises, have hereto set their hands and affixed their seals, the day and year first above written." A seal was affixed to the deed, but no signature of the wife.

In the second bill of exceptions, the counsel for the plaintiff stated, that he claimed title under the same deed mentioned in the first exception, *201] *by virtue of which Doyle, the younger, became seised of the premises in question, which had descended to the wife of the lessor of the plaintiff, to which facts he adduced proof to the jury. The bill of exceptions then proceeded to state, that the defendant, in order to prove that the deed was made with intent to defraud creditors, having read certain depositions to establish that fact, offered in evidence the records of two judgments recovered against Doyle, the elder, one at the suit of John Graff, at the August term 1799, of the court of common pleas for the county of Hamilton, for upwards of $900; and the other, in favor of Edward Shoemaker, at the October term 1800, of the same court, for $590. To which testimony, the plaintiff objected, as incompetent evidence, upon the ground, that the proceedings in said suits had taken place between other persons than himself and Doyle, jun., and to which he was not a party. The objection was overruled by the court, and the testimony admitted.

The third bill of exceptions stated, that after the admission of the evidence aforesaid (the judgment records), and in order to repel the presumption of fraud in Doyle, the elder, and to show that he had no intention to defraud creditors, by making the said deed, but to prove that Doyle, the younger, then an infant, was the creditor of his father, the plaintiff offered in evidence the depositions of certain witnesses. The bill of exceptions then proceeded to state, that the depositions were offered to rebut the evidence *202] *of fraud in fact, and the evidence of a fraudulent intent in the grantor; but the court declared their opinion to be, that the last-mentioned evidence, offered for rebutting the charge of fraud, was inadmissible, and rejected the whole of the evidence so offered.

Upon these exceptions, a verdict and judgment having been entered for the defendant, in the court below, the cause was brought by writ of error to this court.

February 15th. The cause was argued by *Scott*, for the plaintiff; and by *Webster* and *Hammond*, for the defendant.

On the part of the *plaintiff*, it was contended: 1. That the court below

erred in rejecting the evidence stated in the first bill of exceptions, of the acknowledgment of the deed from Doyle, sen. Co. Litt. 9 *b;* 3 Atk. 409; 2 Ibid. 465; Hughes 184; 1 Doug. 384; Ambl. 194; 2 Burr. 193; 6 East 486; 9 Mass. 218; 15 Johns. 109, 111.

2. That there was error in admitting the evidence offered by the defendant, as stated in the second bill of exceptions, to impeach the deed for fraud. It was not fraudulent at common law, prior to the statute 13 Eliz., c. 5; Roberts on Frauds 12–15, and note *c;* Ibid. 37, 116, 574; 1 Co. 93 *b;* Dyer 192 *b*, and 167 *b;* 10 Co. 56; 2 P. Wms. 154, 157, 220; Roberts on Frauds 37, and note *p;* and that statute had never been adopted in Ohio. Ord. of 1787, § 1; 1 Laws U. S. 476; 2 Rev. Code 302.

*3. The evidence stated in the third bill of exceptions was erroneously rejected, even supposing the statute 13 Eliz., c. 5, to be in force in [*203 the states which formed the territory north-west of the river Ohio. The statute 27 Eliz., c. 4, is construed more strongly in favor of purchasers, than that of 13 Eliz., c. 5, in favor of creditors. A mere voluntary conveyance, under the last-mentioned statute, is only presumptive evidence of an intention to defraud creditors, and may be rebutted by countervailing testimony. 1 Lev. 150, 237; 1 Vent. 293; 1 Ch. Cas. 99; 2 Burr. 1072; Roberts on Frauds 30, 191. The authorities make a distinction between a conveyance to a stranger, and a conveyance to a child, for maintenance and advancement; the latter is not considered as voluntary. Fonbl. Eq. 127, note 1; Sugd. on Vend. 420; 1 P. Wms. 112. It is necessary to prove that the grantor was indebted at the time of making the conveyance. 1 Atk. 94; 1 Ves. sen. 10; 2 Bro. C. C. 90. A voluntary settlement by a trader, who afterwards becomes bankrupt, is good against all subsequent creditors, under the statute of Eliz., although it is void under the bankrupt laws. 8 Ves. 199; 1 Swanst. 106; Brownl. 189; 5 Ves. 384; Newl. on Cont. 385; 11 Mass. 421; 9 Ibid. 390; Ambl. 596; 3 Dessaus. 1. Besides, there was, in this case, evidence that the grantee was the creditor of the grantor, his father; so that, though he was then an infant, the conveyance was not *voluntary, but for a valuable consideration. Co. Litt. 2 *b;* 2 Lev. 217. If [*204 it should be objected, that the evidence offered was contrary to the consideration expressed in the deed, the answer is, that the party may aver and prove a consideration different from that expressed in the conveyance, if it be consistent with that expressed. Phil. Ev. 425–6, and authorities there cited. And courts will uphold settlements made upon fair and *bonâ fide* inducements, by every reasonable presumption in their favor. Roberts on Frauds 80, 149; 2 P. Wms. 245; Cas. temp. Talb. 64; 1 Atk. 188.

On the part of the *defendant*, it was insisted, that the statutes of frauds had been practically adopted in Ohio, by the governor and judges, under the provision of the ordinance of congress of 1787. Ohio Land Laws 322. To adopt them, by reference, without reciting them at large, has been the usual mode of adopting and publishing the English statutes which formed parts of the "laws of the United States." The common law itself is in force only by virtue of the same adoption. The statutes of frauds having been heretofore generally acted upon, and considered as in force, the validity of their adoption and promulgation having never been doubted, ought not now to be drawn in question. The construction of the statute as

to voluntary conveyances has been settled by this court. It applies as well to cases where the conveyance was made in contemplation *of creating a debt, immediately afterwards contracted, as of debts actually existing at the time. *Sexton* v. *Wheaton*, 8 Wheat. 242. But here, copies of the accounts, upon which the judgments were recovered, are spread upon the record, by which it appears, that the causes of action on the part of the creditors of the grantor, arose before the date of the deed. The deed itself distinctly stating the consideration upon which it was made, proof of a different consideration was inadmissible. 2 P. Wms. 203; 7 Johns. 341; 1 Ves. sen. 128; 1 Johns. Ch. 341. If the deed was not properly acknowledged and recorded, it was not notice to the party claiming against it. 2 Binn. 44, 51; 4 Wheat. 486. The records of the judgments were admissible in evidence, to impeach the validity of the deed, as showing, among other facts, that the grantor was indebted at the time it was executed. The maxim of *res inter alios acta* could not be applicable to this testimony, any more than to other evidence of the grantor being indebted at the time.

*205]

February 23d, 1826. THOMPSON, Justice, delivered the opinion of the court.—The premises in question in this cause, are described as in lot No. 107, in the town of Cincinnati; and it is admitted on the record, that on the 28th day of March 1799, Thomas Doyle, sen., was seised and in possession of this lot. Both *parties derive title under him. The lessor of the plaintiff claims under a deed of the date above mentioned, from Thomas Doyle, sen., to his son Thomas. And the defendant sets up a title under a judgment against Doyle, the elder, in favor of John Graff, entered in August 1799. Upon the trial, the validity of the deed from Doyle, the elder, to his son was the main subject of inquiry. Three bills of exception were taken on the part of the lessor of the plaintiff, and a verdict entered by consent, for the defendant, and the case is brought here by writ of error to the circuit court for the district of Ohio.

*206]

1. The first bill of exceptions relates to the acknowledgment of the deed from Doyle, the elder, to his son. This was deemed by the court insufficient, and the deed rejected. In the second bill of exceptions, however, the counsel for the plaintiff stated again, that he claimed title under the same deed mentioned in the first exception, by virtue of which Doyle, the younger, became seised in fee of the premises in question, and which had descended to the wife of the lessor of the plaintiff, to which facts he adduced proof, which was submitted to the jury, and to which proof no objection appears to have been made on the part of the defendant. What that proof was, is not stated, but we must presume it to have been enough to prove the due execution of the deed, both because it does not appear to have been objected to, and because the defendant went into evidence to show the deed was fraudulent and void, which would have been altogether *irrelevant, if the deed had not been sufficiently proved to be submitted to the jury. This might supersede the necessity of this court expressing any opinion upon the sufficiency of the acknowledgment of the deed; because, admitting the court below erred in rejecting it, in the first instance, still, as it was afterwards, in the progress of the cause, duly proved, the judgment would not be reversed, on account of that error, if this was the only question in the cause.

*207]

We notice this point only to correct what we consider a misapprehension of the plaintiff's counsel as to the practice in cases of this kind. But as this cause must be sent back to another trial, it is deemed advisable to express an opinion upon the sufficiency of this acknowledgment, the certificate of which is as follows: "Hamilton ss: Personally, before me, Thomas Gibson, one of the justices of the court of common pleas for said county, the above-named Thomas Doyle, and ——— Doyle, his wife, who being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned." The question is, whether this can be taken for the acknowledgment of Thomas Doyle. He only signed the deed. His wife is not named as a party in any manner, except in the conclusion, which is as follows: "In witness whereof, the said Thomas Doyle and ———, his wife, who hereby relinquishes her right of dower in the premises, have hereto severally set their hands, and affixed their seals, the day and year first *above written." A seal is affixed to the deed, but no signature. [*208

The certificate is insufficient, unless it contains enough to show, with all reasonable certainty, that, in point of fact, Thomas Doyle did appear before the officer and acknowledge the deed. And this, we think, it does not show. It does not even state expressly, that Thomas Doyle appeared before the officer; but if that is to be inferred, the purpose for which he appeared is not stated, so that nothing can be inferred from the mere fact of appearance. It does not set forth that he, in point of fact, did acknowledge the deed, or did any one act that might by possibility be construed into an acknowledgment. The certificate does state that the wife did acknowledge the deed, which, if true, necessarily implies, that she appeared before the magistrate, although that fact is not stated. The form of the certificate is adapted to the acknowledgment of the wife. It states, that being examined separate and apart, she acknowledged the deed to be her hand and seal, free act and deed. The relinquishment of dower, and the affixing of the seal, show that she was intended to be made a party; and if the court was at liberty to conjecture, or indulge any intendment about the real fact, it would be as reasonable, if not more so, to infer, that the wife did appear, and make the acknowledgment certified, and by mistake omitted to sign the deed, than that the husband acknowledged it. But the certificate of acknowledgment ought not to be left in such uncertainty. It is *ex parte* proof *of the deed; and it ought to appear with all reasonable certainty, that the requisites of the law had been complied with. The deed was, therefore, properly rejected in the first instance. [*209

2. The second bill of exceptions necessarily presupposes that the deed was in evidence before the jury. For it states, that the defendant, in order to prove that the deed was made with intent to defraud creditors, and therefore, void, having read some depositions to prove that fact, offered in evidence the records of two judgments recovered against Doyle, the elder; one in favor of John Graff, on the first Tuesday in August 1799, for upwards of $900, and the other in favor of Edward Shoemaker, in October term 1800, for about $500. To the admission of which the plaintiff's counsel objected as incompetent evidence, on the ground that these were proceedings *inter alios*, to which Doyle, the younger, was in nowise a party. The objection was overruled, and the evidence admitted. It will be perceived,

that the objection to the evidence was specifically placed on the ground, that Doyle, the younger, was not a party to the judgments. And it may well be questioned, whether, when the purpose for which the evidence is offered is specifically avowed, the court will look at it in any other point of view, or inquire whether it might not be proper for some other purpose. As a general rule, we think, the party ought to be confined, in examining the admis-
*210] sibility *of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only; and to admit an inquiry afterwards, whether the evidence might not have been admissible for some other purpose, would be sanctioning a course of practice calculated to mislead.

It is unnecessary, however, in this case, to put the question on that ground, for the evidence was admissible in whatever light the objection is taken. The consideration expressed in the deed from Doyle, the elder, to his son, is natural love and affection, and the judgments were introduced to show that the grantor was in debt, at the time of giving the deed, which, as was contended, would render it void as against creditors. This was, therefore, necessarily an inquiry into matters to which the grantee in the deed was not a party. It was certainly competent for the defendant to show that the grantor was indebted, at the time he made the conveyance; this was a necessary step towards establishing the fraud; and if these judgments conduced to prove that fact, they could not be shut out as incompetent evidence. The extent and effect of the evidence was matter for the jury. If the evidence ought to have been excluded, because Doyle, the younger, was not a party to the judgments, the same objection would have lain against the proof of his being in debt to others in any manner whatever; that would have been equally an inquiry into matters to which the grantee in the deed was not a
*211] party. *There was, therefore, no objection to the evidence on this ground.

The judgments appear to have been entered some short time after the date of the deed, and it is said, that a voluntary deed is void only as to antecedent, and not subsequent creditors, unless made with a fraudulent intent; and this appears to be the doctrine of this court, as laid down in *Sexton* v. *Wheaton*, 8 Wheat. 242, after a review of the leading authorities on this question. But copies of the accounts upon which the judgments were founded, are spread upon the record, by which it appears, that the cause of action arose before the date of the deed. If these accounts did not properly form a part of the record, according to the course and practice of the court where the judgments were entered, a specific objection should have been made to their being received in evidence, which would have led to the inquiry, whether they properly formed a part of the record; but as the question is now presented to this court, we cannot say, that these accounts are to be stricken out of the record. They may be looked to, for the purpose of showing that Doyle, the elder, was in debt at the date of the deed; but whether to an extent which would avoid the deed, must depend on circumstances which are not to be inquired into by this court. There was no error, therefore, in the admission of this evidence.

3. The third exception arises on the rejection of certain depositions
*212] offered in evidence on the part of the plaintiff. The introductory part of *the bill of exceptions sets out, "that after the admission

of the evidence aforesaid (the judgment records), and in order to repel the presumption of fraud in Doyle, the elder, and that he had an intention to defraud creditors by making the said deed, but to prove that Doyle, the younger, was the creditor of his father, the evidence was offered." The concluding part of the bill of exceptions alleges, that the depositions were offered to rebut the evidence of fraud in fact, and the evidence of fraudulent intent in the grantor, Doyle, the elder. But the court declared their opinion to be, that the last-mentioned evidence, offered for rebutting the charge of fraud, was inadmissible, and rejected the whole of the said evidence so offered. Looking, then, as we must, to the whole bill of exceptions, to collect its true meaning and import, we must understand the evidence to have been offered for the double purpose of showing that Doyle, the younger, was a creditor of his father, and that by reason thereof, although the consideration in the deed purported to be natural love and affection, it could not be considered as given with intention to defraud creditors; and also to rebut the evidence of fraud in fact, and to show the character and situation of Doyle, the elder, in point of property, at the time he executed the deed in question. If the testimony offered was admissible for either of the purposes above stated, the court erred in rejecting it.

*That the evidence was proper for the latter purpose, cannot be [*213
questioned. The charge against the grantor was, that he was guilty of fraud in fact, in making the deed to his son; that it was done for the express purposes of defrauding his creditors; and it was proper evidence, therefore, to rebut this allegation, to show that the grantor had the means of paying his debts, independent of the property conveyed to his son. Whether the evidence would have made out that fact to the satisfaction of the jury, is not for this court to inquire. If it conduced to make out that fact, it should have been submitted to the consideration of the jury. A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so, under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed fraudulent, if it could be shown, that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive, evidence of it, and may be met and rebutted by evidence on the other side. The evidence offered to show that Doyle, the elder, was indebted to his son to an amount equal to the value of the property conveyed to him, was declared also to be for the purpose of repelling the presumption *of fraud in fact, and to show that there [*214
could have been no such intention to defraud his creditors, by putting his property out of their reach, without receiving any real and adequate consideration for it. Doyle, the elder, might have sold the land to his son, or to a stranger, for a valuable consideration, and given a good title for the same, although his debts might have been double in amount to the value of his property, unless his creditors had acquired a lien upon it. It would have been no fraud, in judgment of law, against his creditors, for him to have paid one, and left the others unpaid. Had the evidence been offered for the purpose of showing that the deed was given for a valuable consideration, and

in satisfaction of the debt due from the father to the son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable*, for a *good*, consideration, and a violation of the well-settled rule of law, that parol evidence is inadmissible to annul, or substantially vary, a written agreement.

But that was not the object for which the evidence was offered, nor the effect it was intended it should have. It could not, in any respect, vary or alter the deed, or give to it a different construction or operation between the parties to it. The defendant had attempted to invalidate the deed, by going into proof of circumstances out of the instrument itself, and unconnected with it, and which circumstances, it was contended, *showed
*215] a fraudulent intention in the grantor, in conveying the lot in question to his son. And the evidence of the father's being indebted to the son, was to meet and repel the presumption of fraud which was attempted to be raised against the deed, by reason of such extrinsic circumstances. The evidence which has been admitted to show the fraud, and that which was offered to rebut it, related to collateral and independent facts unconnected with the deed, and could not, therefore, in any manner, vary or alter its terms.

The third exception was, accordingly, well taken. The judgment of the court below must, therefore, be reversed, and the cause remanded, with directions to issue a *venire de novo*.

Judgment reversed.

Littlepage *v.* Fowler and others.

Land-law of Kentucky.

The following entry is invalid, for want of that certainty and precision which the local laws and decisions require: "January 27th, 1783, J. C. L. enters 20,000 acres of land on twenty treasury warrants, No. 8859, &c., beginning at the mouth of a creek falling into the main fork of Licking, on the north side, below some cedar cliffs, and about 35 miles above the Upper Blue Licks, and running from said beginning up the north side of Licking, and bounding with the same as far as will amount to ten miles when reduced to a straight line, thence extending from each end of said reduced line, a northerly course, at right angles, to the same, for quantity."

*216] *Appeal from the Circuit Court of Kentucky.

February 14th, 1826. This cause was argued by *Bibb*, for the appellant;(*a*) and by *Talbot*, for the respondent.(*b*)

(*a*) Citing, Johnson *v.* Pannel, 2 Wheat. 211; Hite *v.* Graham, 2 Bibb 143; White *v.* Wilson, 3 Id. 542; Whitaker *v.* Hall, 1 Ibid. 79; Bodley *v.* Taylor, 5 Cranch 224. McGee *v.* Thompson, 1 Bibb 132; Marshall *v.* Currie, 4 Cranch 176, 177; Bush *v.* Todd, 1 Bibb 64; Whitaker *v.* Hall, Id. 73; Roberts *v.* Huff, Hardin 382; Taylor *v.* Kincaid, Id. 82; Bowman *v.* Melton, 2 Bibb 153.

(*b*) He cited Hite *v.* Graham, 2 Bibb 144; McKee *v.* Bodley, Id. 482; Whitaker *v.* Hall, 1 Id. 79; Craig *v.* Hawkins, Id. 53; Smith *v.* Walton, 3 Id. 153; Carland *v.* Rowland, Id. 127; Webb *v.* Bedford, 2 Id. 259; Greenup *v.* Lyne, Id. 370; Mercer *v.* Irvins, Id. 471; Landrum *v.* Hite, 1 A. K. Marsh. 419; Bartas *v.* Calhoun, 2 Id. 169.

February 23d. JOHNSON, Justice, delivered the opinion of the court.—This cause comes up by appeal from the circuit court of Kentucky, in which the appellant filed his bill to compel the defendants to convey to him 20,000 acres of land, in right of a prior entry. The defendants, having obtained the prior patent, relied upon their prior legal rights; and on the hearing below, the bill was dismissed. The entry on which the complainants relied was in these words:

"January 27th, 1783: John Carter Littlepage enters 20,000 acres of land on twenty treasury warrants, No. 8859, &c., beginning at the mouth of a creek falling into the main fork of Licking, on the north side, below some cedar cliffs, and *about thirty-five miles above the Upper Blue Lick, and running from said beginning, up the north side of Licking, and [*217 bounding with the same, as far as will amount to ten miles, when reduced to a straight line, thence extending from each end of said reduced line, in a northwardly course, at right angles to the same, for quantity."

The only question in the cause is, whether this entry contains that legal precision which the land laws of Kentucky require, to make an entry a valid appropriation of the land. For the defendants, it is contended, that it is vague, and calculated either to mislead a subsequent locator, or impose upon him an unreasonable labor in the effort to identify it. On this subject, the rule of the law of that state, and the rule of reason, is, that the objects called for to designate the land appropriated, should be specific; and, if not notorious in themselves, that they should be so indicated, with reference to those which are notorious, as to enable a subsequent locator to discover and identify them, by using ordinary diligence.

The locative calls in this cause are, a creek emptying into the main fork of Licking, on the north side, below some cedar cliffs. It is not pretended, that these objects have the attribute of notoriety, and in order to lead to their discovery, the subsequent locator is referred to the main branch of Licking river, and the Upper Blue Lick, which are notorious, and to the position and distance of the beginning point of the entry, with reference to the lick and the river. *A subsequent locator, then, having this entry [*218 in his hand, and proposing to appropriate the adjacent residuum, proceeds to the lick, as his starting point; when there, he knows that the land lies above him, with reference to the river, upon the river bank, and, in the language of the entry, "about thirty-five miles above the Upper Blue Lick." The first question which then occurs to him, is that which has constituted the principal subject of argument in this cause. Upon what principle is the distance here called for to be computed? For the appellant it is contended, that he should pursue the meanders of the river, or the most practicable route by land; for the appellee, that he must apply the mathematical principle to the entry, and take the shortest line that can be drawn between the two points; and both contend, that they are sustained by adjudicated cases.

We have examined those cases, and are satisfied, that neither party is supported in his doctrine, as a universal principle; but that the courts of Kentucky, with that good sense which uniformly distinguishes their efforts to extricate themselves from that chaos of rights, in which political relations, and inveterate practice, had involved them, have left each case to be governed by its own merits, wherever distance has been resorted to as the means of identifying a locative call. And certainly, the sense in which

the enterer uses the reference to distance, is the only general rule that can
*219] govern a court in construing *an entry. That sense may be gathered from his language, or inferred from the habits of men, and the state of the country; but, as he is responsible for the sufficiency of his entry, it would be unfair to impose an arbitrary and unusual meaning upon the language of unlettered men, exploring a country, covered with thickets, and replete with dangers.

For these reasons, the straight line, as the means of ascertaining a locative call, has certainly been rejected as a general rule. Such was the case in *Hite* v. *Graham et al.*, 2 Bibb 144, 145; *McKee* v. *Bodley*, 2 Ibid. 482; *Whitaker* v. *Hall et al.*, 1 Ibid. 79. As the method of surveying an entry, however, the meanders of a river are always reduced to a straight line, and to this class of cases are all those quoted for the appellee to be referred. *Craig* v. *Hawkins's Heirs*, 1 Bibb 53, and many others. Yet, in the case of *McKee* v. *Bodley*, before cited, both the direction and admeasurement of a straight line are resorted to, for the purpose of verifying a call lying on the side of a road. And the reason is obvious; in that case, the shortness of the line, as well as the phraseology of the entry, rendered it admissible that the enterer referred to distance as ascertained by direct measurement.

One general rule is never departed from, to wit, that when distance is indicated by a road, it shall be held to mean, by the meanders of a road. (*Whitaker* v. *Hall*, *supra* and *passim*.) So also, where there is no road or
*220] trace, the most *usual route, if there be proved such a route to exist, seems to be the rule. So, it is laid down in *Hite* v. *Graham et al.*, in which also the general rule as to the sense in which the language of entries is to be received, is explicitly declared to be "according to the popular acceptation, at the time when the entry was made." And although, in the case of *White* v. *Wilson*, 3 Bibb 542, a learned judge is reported to have said, "that there seems to be a diversity of opinion as to the most natural construction of a locative call in an entry, where a given distance, up or down a water-course, is specified," we cannot but think, that the same rules which govern the cases on the subject of distances by land, have been distinctly and rationally applied to distances called for with reference to water-courses.

Distances on the Ohio are invariably measured according to its meanders. *Hite* v. *Graham*, 2 Bibb 143; *Johnson* v. *Pannel's Heirs*, 2 Wheat. 207. Nor is there anything arbitrary in the rule, nor leading to a result so indefinite as the supposed distinction between great and small water-courses. Their navigable character furnishes the rule by identifying them with highways, and thus the popular acceptation of terms still furnishes the distinction. This is very obvious, from the case of *Hite* v. *Graham*, in which the court say, "as the Ohio is the usual way of passing from one point on it to another, and was, at an early day, the great highway of coming to that part of this country," &c. And in the same case, speaking of the Little
*221] *Sandy, the court observes, "This call, like that for distance on the Ohio, is not explicit as to computing it. But this stream, though, like the Ohio, navigable, is not, like it, impassable, except occasionally; and a person, in passing from one point of it to another, is not necessarily confined to the winding of the stream. A direct line, however, would be impracticable to travel and use, put it out of the question as being a way in

which a call of this kind would ever be understood by any one." And thus, in the case of *Bowman* v. *Melton*, 2 Bibb 153, where the call was for thirteen or fourteen miles up a small stream, the court observed, "It, indeed, is not probable, that the distance along the meanders of the water-course was intended, because, it is believed, that it never was usual to travel with the meanders of a small stream, to ascertain the distance of one object from another; nor is it probable, that the distance by a direct line was intended, because it would extend beyond the head of the water-course. But it is rather to be presumed, that reputed distance was meant."

Since, then, all the testimony goes to establish, that Licking, above the Upper Blue Lick, is not a navigable stream, at least not so as to be resorted to as a highway, especially for ascending navigation, it follows, that the inquiries of a subsequent locator, who wished to appropriate the residuum adjacent to this entry, or of the surveyor who had a warrant to survey it, would be for a creek entering into Licking, on the *north side, at a distance from the lick of about thirty-five miles, by some practicable [*222 route. The answer to this inquiry, as appears from the evidence, would direct him immediate to the fork of Licking. For Morrow, one of the witnesses, swears, that he could reach that point by travelling in a practicable route, about thirty-five or forty miles (p. 486 of the record), and in a direct line it is ascertained to be about thirty miles. Nor would the call for the cedar cliffs be wanting here, for it is worthy of remark, that the call is not for a cliff adjoining, or near to, or in sight of, the mouth of the creek, but merely for a cliff, at an indefinite distance above the mouth of the creek. Whereas, all the witnesses who are examined to identify the mouth of Foxe's creek, where this entry is claimed to lie, answer, under the impression, that the cliff is to be immediately above or adjoining the mouth of the creek. In this particular, there is much reason to believe, that Foxe's creek stands alone on the north side of Licking; but the call is vague and indefinite on this point, since it is answered, if the creek is below the cliffs, at any reasonable distance.

We will now suppose the locator dissatisfied, or in doubt, with regard to the object thus found, and, returning to the lick, resolved to renew his researches. The idea of finding the mouth of Foxe's creek, by following a direct line, is out of the case, since no course is furnished him by the entry, on which to pursue his researches for this object. He must, then, either renew his inquiries *for some other creek of the description called [*223 for; or, adopting the meanders of the river as his guide, pursue his way up its margin. In answer to his inquiries, it is obvious, that any creek lying between the north fork of Licking and Foxe's creek, would be recommended to his examination, in preference to Foxe's; because the latter must be farther removed from the distance of thirty-five miles than any one lying above it. If, then, the enterer intended to appropriate his land at the mouth of Foxe's creek, it is obvious, that his call for distance is calculated to mislead, not to direct, a subsequent locator.

But, as there is no evidence in the cause, of any road, trace or explored route, leading from the lick to the mouth of any of these creeks, let us suppose the explorer at liberty to take the course contended for in behalf of the appellant, and to thread his way up the meanders of the river. When he reaches the mouth of Foxe's creek, he finds himself short of the distance

called for, by more than one-third of the whole, that is to say, by eleven miles. Does the cause afford any ground, or the cases any principle, which will authorize his stopping there? The call is for a creek "about thirty-five miles" above the lick. We are not disposed to restrict the appellant to the rigid rule formerly laid down by the courts, by which the word "about" was rejected, and the entry limited to the number called for. In surveying entries, there is little doubt that this is the rule; but, in *measuring *224] distances, a more liberal rule is laid down in the more modern case of *Jones* v. *Plummer*, of which we are disposed to allow the party the full benefit. (2 Litt. 162.) It is in these words, "according to repeated decisions of this court, under the word 'about,' the subsequent adventurer might be required to stop a little short of, or extend the search a little beyond, the distance called for." But according to the principle of this rule, if he might stop eleven miles short, he may advance eleven miles beyond the distance called for; and two and twenty miles search, or even the half of it, on the margin of such a stream, or any stream, would be too much to require of a subsequent locator.

Had the object called for had any claim the the attribute of notoriety, it might have had some greater claim to indulgence, on the principle of *Taylor* v. *Kincaid*, Hardin 82, or, had there been proved a known and received computation of distance attributed to the object, it might have been considered with reference to the principle in *Bowman* v. *Melton*, 3 Bibb 153. But there is no evidence of any received estimation of distance from the lick to the mouth of this creek; nor is there the least evidence that it took the name of Foxe's, prior to the entry. On the contrary, and this furnishes another legal objection to this entry, there is evidence, that at that time, and a year before,(*a*) it bore the name *of Indian creek, *225] and there is on the record a copy of an entry,(*b*) made upon it by that name, in the same year, and only seven months junior to the entry of the appellants. Indeed, the time and incident that gave it the name it now bears, are positively proven to be contemporaneous with the survey.

And finally, if resort be had to the means of testing the identity of the call admitted in *McKee* v. *Bodley*, to wit, course and distance in a right line, we find the test entirely fatal to the call in this distance. The course is not given, and the distance is not one-third of that called for. And we further find, that there are at least two streams on the same river which answer the call, when subjected to this test, infinitely better; to wit, that now called the north fork, but which was formerly known as an undistinguished creek, and Warwick's creek or run, the former near thirty-five miles, and the latter twenty-seven and a half on a direct line from the lick.

On no principle, therefore, can this entry be supported, and the decree below must be affirmed, with costs.

Decree accordingly.

(*a*) John McIntire's deposition. (*b*) Shephard's entry.

*Taylor's Devisee *v.* Owing and others.

Land-law of Kentucky.

An entry calling for the land to lie on the east side of Slate creek, a south-west branch of the main fork of Licking, "beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, at the north-east side, it being the place of beginning for S. M.'s entry of 20,000 acres," is defective in certainty and precision; and its defects are not aided by the reference to S. M.'s entry for "20,000 acres, lying on the west side of Slate creek, south-west branch of the main fork of Licking creek, beginning where the buffalo road crosses Slate creek, at the mouth of a branch, emptying in on the east side there thereof; there are several cabins," &c., "to include a large quantity of falling timber," &c.

Appeal from the Circuit Court of Kentucky.

February 11th, 1826. This cause was argued by *Talbot*, for the appellant; and by *Trimble*, for the respondents.

February 22d. Marshall, Ch. J., delivered the opinion of the court.—The appellant filed a bill in the circuit court of the United States for the district of Kentucky, praying a conveyance of a tract of land, for which the defendants had obtained elder patents, and which the plaintiff claimed in virtue of a prior entry, which was made on the 6th of January 1783, and is in these words:

"James Taylor enters 12,000 acres of land, on ten treasury warrants, No., &c., to be laid off in one or more surveys, lying on the east side of Slate *creek, a south-west branch of the main fork of Licking; [*227 beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres; running from thence, with said Meredith's line, down Slate creek, bounding with the same, the distance of three miles, when reduced to a straight line, from the beginning to his lower corner; thence continuing down the east side of Slate creek, bounding with the same, as far as will amount to three miles, when reduced to a straight line, from Meredith's lower corner; thence extending from each end of this reduced line of six miles, a north-east course, and continuing said course, until a line at right angles to the same shall include the quantity of vacant land, exclusive of all legal prior claims."

The entry of Meredith was made on the 30th of November 1822, and is in these words:

"Samuel Meredith enters 20,000 acres, lying on the west side of Slate creek, south-west branch of the main fork of Licking creek; beginning where the buffalo road crosses Slate creek, at the mouth of a branch emptying in on the east side thereof; there is several cabins on said ———; running, from the beginning, down Slate creek, and bounding thereon, as far as will amount to three miles, when reduced to a straight line; then, from the beginning, running up Slate creek, and bounding thereon, as far as will amount to three miles, when reduced to a straight line, from the beginning, to include to a large quantity of fallen *timber; and then to extend [*228 from the upper and lower end of these lines, on the bank of Slate creek, a west course, until a line running due south and north shall include the quantity of vacant land required to be lain off, in one or more surveys."

The defendant contends, that this entry is invalid, because it does not

describe the land it seeks to appropriate with such certainty as to enable a subsequent purchaser to avoid it, and to locate the adjacent residuum.

The land is to lie on the east side of Slate creek, a south-west branch of the main fork of Licking. Slate creek was well known by this name, but it is a stream of considerable extent, and the law requires, that the particular part of it on which Taylor's land is placed, should be designated so specially and precisely, that a subsequent locator, using due diligence, and possessing ordinary intelligence, might appropriate the adjoining vacant lands. The plaintiff contends, that this certainty is to be found in the discription of Taylor's place of beginning. It is in these words: beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres."

It is the plain dictate of good sense, which is supported by the whole current of decisions in Kentucky, that an entry, to satisfy the law, must describe the place with sufficient accuracy to be found and known by others, and in terms which *will not fit other places equally well with that intended to be appropriated. The particular descriptive words, or, in the technical language of the country, the locative calls of the entry, are a buffalo road, crossing Slate creek, at the mouth of a branch emptying into the creek, on the north-east side, and Meredith's beginning. The plaintiff contends, that these words describe the mouth of Little Slate creek. Little Slate is a creek which empties into Slate, on its north-east side, some say 30 or 40, others 50 or 60 miles, by the meanders of that stream, above its mouth. The whole length of Slate is not mentioned by the witnesses, but it is sufficiently apparent, that its source is a considerable distance above its mouth. Two creeks, Little Slate, and Mile creek, Roe's run, and several branches, empty into it, on the north-east side, and it is crossed by numerous buffalo traces, some of which are not far from the mouths of four streams, though no one is so near as that just below the mouth of Little Slate. The crossing place near that creek is stated to be ten or twelve yards below its mouth, by some of the witnesses, and by others to be rather more.

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The objections made to this entry, are not only that it is vague, but that it is calculated to mislead. It calls for a buffalo road, crossing the creek, at the mouth of a branch emptying into it on the east side. This trace is said to be so small as not to be generally denominated a road; the traces made by buffaloes are stated to be *of various dimensions, from three to ten or twelve feet wide, and sometimes wider. This near the mouth of Little Slate is about a foot wide, and is nearly lost in the bottom. It is represented by some of the witnesses rather as a deer path than a buffalo road. These traces have been called, by the inhabitants, roads, traces and paths. Some of the witnesses say, that these names are used indiscriminately; others, that they designate larger or smaller routes; the words "road" being applied to a large trace, and "path" to a small one; that the trace at the mouth of Little Slate would never have been spoken of as a road.

*230]

Although the distinction between a road and a path is common throughout our country, yet, the court must have supposed, that it was not taken in Kentucky in reference to the traces of buffaloes, had the witnesses concurred in making this declaration. But they have not concurred in it; many of them aver, that the distinction is as applicable to tracts of this description

as to others, and is in as common use. The court, therefore, cannot avoid supposing, that a subsequent locator, finding this small path near the mouth of Little Slate, and understanding that there were considerable roads, near the mouths of other streams, would think that this could not be the road required by Taylor's entry.

There is a still more important variance in the character of the stream itself. The entry calls for a branch, and Little Slate is a considerable creek. It could scarcely be mistaken for what *is denominated a branch; and a subsequent locator, intending to lay his warrant at this place, [*231 could not reasonably suppose, that it was already appropriated by an entry professing to begin at the mouth of a branch. In argument, the counsel for the plaintiff has sought to get over this difficulty, by varying the language of his entry. He treats the question as if the entry had called for a branch of Slate creek, and shows that Little Slate fits this call. The argument would have been strong, had the language of the entry sustained it; but the words are, "the mouth of a branch, emptying into Slate." The difference between "a branch of Slate," and "a branch emptying into Slate," is obvious.

There is still a further difficulty which the plaintiff must encounter in this part of his case. It is alleged, that Little Slate was the notorious name of the stream, when Taylor's entry was made. It is well settled, in Kentucky, that if objects called for in an entry are distinguished by a known name, it is a serious defect to call for them by a name which they possess in common with other similar objects, instead of their appropriate name. If, then, the fact be, that when Taylor's entry was made, Little Slate had its appropriate name, the locator ought to have used that name, and his substituting in its place the general call for "a branch entering into Slate, on the north-east side," constitutes a serious objection to the entry, which would require the aid of other words, describing the place with greater certainty.

*The testimony on this point is not perfectly clear. Elias Folin [*232 says, that, so early as 1775, he was one of a company that made improvements on that stream, and they called it Slate. George Balla was also one of a company of improvers who encamped on Little Slate, in 1776, and knew it then by that name. He knew it by the same name, in 1783. Isaac Clinkerhead knew Little Slate by that name, in 1784, and thinks he heard it so called in 1782. Ralph Morgan says, that Little Slate was well known by that name, in 1782. William Williams has frequently heard hunters speak of Little Slate, as a place of notoriety, previous to November 1782, when Meredith's entry was made. John Lix was with a company of hunters on Little Slate, in 1776, when John Clarke gave the stream the name of Little Slate, and he has never known it by any other. George Balla knew Slate, and Little Slate, by those names, in 1776. Joseph McIntire knew those streams by their present names, in 1782. These witnesses certainly prove, that Little State was known by that name, very extensively, in 1782 and 1783, when the entries of Meredith and Taylor were made. It had, undoubtedly, acquired that name completely, in 1786. A shade of doubt is cast on the general notoriety of this name, by the circumstance, that several witnesses who speak of the stream as known to them at *this early period, and who distinguish it by its proper name, do not [*233 say that they then knew it, by that name.

James McMillan became acquainted with Little Slate, in 1781, Joseph Young, in the fall of 1783 or 1784, and Roger Clements, in 1783. Neither of these witnesses say they knew it then by that name. They do not, indeed, say the contrary; but the probability is, that had they then known the stream by its present name, they would have been interrogated to the point. There is, then, much reason to believe, that Little Slate had then acquired its appropriate name, and ought to have been so designated by the locator, though the proof is not conclusive.

Upon the whole, we think it very clear, that Taylor's land is not described with sufficient certainty by the call, "to begin where a buffalo road crosses Slate, at the mouth of a branch emptying into said creek, on the north-east side." Is this defect remedied by the call for Meredith's beginning? This reference to Meredith's entry makes it a part of Taylor's, and will give the latter the advantage of any certainty of description which may be found in the former. Samuel Meredith calls to begin "where *the* buffalo road crosses Slate creek, at the mouth of a branch emptying in, on the east side thereof; there is several cabins on said ———." The entry is to include a large quantity of fallen timber. It will be perceived, that the descriptive, or locative *calls of this entry, vary from those in Tay-
*234] lor's, in these respects only: In describing the buffalo road, Meredith uses the article "*the*;" and he likewise adds to his description, that there are several cabins, either on the creek or on the branch (for the word is not in the record); we suppose on the branch—and that his location will include a large quantity of fallen timber.

The objection made to Taylor's entry in consequence of the smallness of the trace crossing State, near the mouth of Little Slate, applies with increased force to this part of Meredith's. The words, "*the* buffalo road," if they do not indicate a single road, would, unquestionably, lead a person in search of this entry, to expect a remarkable and conspicuous road; such a road as crossed Slate, near the mouth of Long branch, or Roe's run, not such a narrow path as crossed near the mouth of Little Slate. The cabins alluded to in Meredith's entry, were not found on Long branch. They were found on Roe's run, and Mile creek. The weight of testimony is, that no unusual quantity of fallen timber would be included in Meredith's survey, if the beginning is at Little Slate, but would be included in it, if the mouth of Roe's run be taken as the beginning. The two additional circumstances, then, the cabins and the fallen timber, are found, one of them on Little Slate, and not on Long branch, which, but for that defect, would fit the description in the entry better than any other, and the other opposite Roe's run,
*235] and *not opposite Little Slate. The objection to Roe's run, and Mile creek, is, that the buffalo road cannot be considered as crossing *at* the mouths of either of them.

Since, then, no place is shown which fits precisely the description of the entry, we must inquire whether that description is so nearly satisfied by appearances at the mouth of Little Slate, as to induce the court to establish the title of the plaintiff. The objections which have been stated to Taylor's entry are certainly not removed by calling in the aid of Meredith's. Passing by the increased strength they derive from the emphatic words "*the* buffalo road," and from the absence of "a large quantity of fallen timber," we will inquire, whether the appearance of cabins on Little Slate will cure the other

defects of description in the entry. This circumstance was too common in that country, to be itself an object of notoriety. Cabins were seen on Roe's run and Mile creek, streams which enter into Slate on the north-east side, as well as on Little Slate. Their absence may exclude Long branch from the competition, but cannot decide in favor of Little Slate, unless other circumstances concur in its favor.

To the objections already mentioned, others may be added, which appear to us to be insurmountable. The entry is to begin on Slate creek, where it is crossed by a buffalo road, at the mouth of a branch emptying into the creek, on the north-east *side. Twelve or fifteen buffalo roads cross [*236 the creek, and five or six, or more, streams, empty into it on its north-east side. The creek is seventy or eighty miles in length. In what part of it is the subsequent locator to look for this road and this branch? It is not alleged, that either of them possessed any notoriety which could conduct the person in search of them to any particular part of the creek. Can he be required to search from its mouth to its source? At which is he to commence? If at neither, but at the mesne point between them, is he to look up or down the creek? If he should accidentally strike the creek, at the mouth of Little Slate, he finds a creek instead of a branch, and a path instead of a road. The place does not suit the description in the entry. Some of the witnesses say, that no other place suits it as well. Were this admitted to be true, how is he to know it, until he examines the whole extent of the creek? This would be, undoubtedly, if we regard the decisions in Kentucky, to impose an unreasonable burden on subsequent locators, one which the law could not intend to impose on them.

We think, that the entry under which the plaintiff claims cannot be sustained, and that there was no error in dismissing his bill.

Decree affirmed, with costs.

*Perkins *v.* Hart, Executor of Hart.

Indebitatus assumpsit.—Account stated.—Division of opinion.

Where there is a special agreement, open and subsisting at the time the cause of action arises, a general *indebitatus assumpsit* cannot be maintained.[1]

But if the agreement has been wholly performed, or if its further execution has been prevented by the act of the defendant, or by the consent of both parties; or if the contract has been fully performed in respect to any one distinct subject included in it; the plaintiff may recover upon a general *indebitatus assumpsit.*

A settled account is only *primâ facie* evidence of its correctness, at law or in equity; it may be impeached by proof of fraud, or omission or mistake; and if it be confined to particular items of account, concludes nothing as to other items not stated in it.[2]

Where a case is certified to this court, upon a division of opinion of the judges below, and the points reserved upon which they were divided, are too imperfectly stated to enable this court to pronounce any opinion upon them, the court will neither award a *venire de novo*, nor certify any opinion to the court below, upon the points reserved, but will merely certify that they are too imperfectly stated.[3]

Certificate of Division from the Circuit Court of Ohio. This was an action of general *indebitatus assumpsit*, brought in the circuit court of Ohio, for work and labor, care and diligence, by the plaintiff, done and bestowed, as an agent and attorney, in exploring, showing, surveying and selling the lands of the defendant's testator; also, in the searching of records, investigating titles, and in the payment of the taxes of the testator. The declaration contained the other general money counts. The plaintiff also filed what is

*238] styled an additional "bill of particulars," *for exploring, giving information of the situation and value, superintending law-suit with Granger, attending to division with Mather's heirs, and for general superintendence of Hart's landed interest in Ohio (except for paying taxes), $3500.

By consent of the parties, the jury found a verdict for the plaintiff of $4308.70 damages, if, upon the points reserved, the court should be of opinion, that the law was for the plaintiff; but if, upon the points reserved, the court should be of opinion, that the law was for the defendant, then they found for the defendant. The opinions of the judges below being opposed, the cause was removed to this court upon a certificate of the disagreement, upon the three following points:

1. That the whole evidence, and Hart's (the testator's) letter of January 14th, 1812; Perkins's (the plaintiff's) letter in reply, of February 10th, 1812, and Hart's letter of March 9th, 1812, in reply to Perkins, constitute a special agreement, investing Perkins with the agency of Hart's land in the state of Ohio, open and subsisting at the time the cause of action is claimed to have arisen, which precludes Perkins from recovering in this action.

2. That the whole evidence, and the letters above cited, constitute a special agreement, defining the nature and extent of Perkins's agency, and settling the subjects upon which he was to receive compensation, and the

*239] amount of that compensation; the legal operation of which *agreement is, to preclude Perkins from claiming compensation for anything

[1] See note to January *v.* Goodman, 1 Dall. 209. S. P. Chesapeake and Ohio Canal Co. *v.* Knapp, 9 Pet. 541; Dermott *v.* Jones, 23 How. 220; S. C 2 Wall. 1.

[2] Conrad *v.* Nicoll, 4 Pet. 295; Harden *v.* Gordon, 2 Mason 541; Wiggins *v.* Burkham, 10 Wall. 132.

[3] Sadler *v.* Hoover, 7 How. 646; United States *v.* City Bank, 19 Id. 395.

done in the execution of his agency, except according to the terms of that agreement.

3. That the plaintiff cannot recover for the two items in the bill of particulars, claimed and charged to have arisen as matters of account between the parties, in 1814 and 1815; because, the plaintiff, on the 1st of February 1815, and 19th March 1819, exhibited and stated his general account against William Hart, upon each of which a balance was due from, and paid by, the said William, as a settlement upon an account stated, which precludes the plaintiff from recovering in this action for said two items, claimed to have been due before the said accounts were rendered.

In the letter of Hart (the defendant's testator), of the 14th of January 1812, he requested the plaintiff to give him his most favorable terms of agency, to appoint sub-agents to transact the business where he (the plaintiff) might deem necessary, with such compensation as he might agree upon with them. The letter then proceeded as follows: "State the amount of commissions you shall expect me to pay on account of sales that shall be collected and remitted, but no commissions to be paid by me, till the collections are made. Provided sales are made by me, in exchange for lands, and if I should draw on you for the amount to be paid in lands, at a price agreed on, or otherwise, if necessary, to be left with you to be ascertained; in such *case, what should you expect to charge on sales of that nature? Please be particular in stating your terms of agency, and [*240 make them as favorable as possible." In the plaintiff's letter, in reply of February 10th, 1812, he says: "My commission on sales made by me, the money collected and remitted, is eight per cent. When contracts are made (as is sometimes the case), purchasers make a payment, and then give up the land so as to be left, without incumbrance, to be sold again, 50 per cent. on such receipt. On these two items, the commission cash, as it has been cash received. In case the agency should be closed, and a settlement made, and contracts remain on hand, unsettled, then, in all those contracts that should be carried into effect, five per cent. commission, received in contracts, with a conveyance of the lands covered by the contract or contracts received. On sales made in exchange for lands, &c., three per cent. commissions, to be received either in contracts here, or lands here at retail price. Always, as far as is practicable, receive commissions in that which shall be similar to that in which it is charged." The letter from the defendant's testator, dated the 9th of March 1812, in reply to the plaintiff, acknowledged the receipt of the above letter, and then added, "Your observations in regard to the mode of selling new lands, are, doubtless, sanctioned by experience, and I am happy to commit the agency of my property to your experience and good judgment, from whence I expect to derive peculiar advantage."

*February 16th. The cause was argued in this court, by *Wright* and *Whittlesey*, for the plaintiff; and by *Webster* and *Hammond*, for [*241 the defendant.

On the part of the *plaintiff*, it was argued: 1. That where a special parol contract, or a written contract, not under seal, has been entered into, the party may still recover on the common counts, in a general *indebitatus assumpsit*. 1 Chit. Pl. 333, and authorities there cited. In the case of the

Bank of Columbia v. *Patterson*, 7 Cranch 303, it was held to be incontrovertibly settled, that *indebitatus assumpsit* will lie, to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that, in such case, it is not necessary to declare upon a special agreement. So, where a beneficial service has been rendered to the defendant, under the special agreement, but not in pursuance of its terms, the plaintiff may recover upon a *quantum meruit*. Bull. N. P. 139; 7 Johns. 132. Or, where the defendant is the occasion of its non-performance; or, where the contract has been rescinded by the parties, or, put an end to by the defendant. 10 Johns. 37; 7 T. R. 181; 4 Bos. & Pul. 357. Or, where the defendant, by his own act, defeats the performance. 12 Johns. 274; 5 Ibid. 87; 7 Ibid. 132; 2 Mass. 415; Pow. Cont. 417. And where
*242] the plaintiff *seeks to recover on a special contract, and the evidence offered will support a common count, supposing no special agreement, he may recover under the latter. 4 Bos. & Pul. 351; Bull. N. P. 139; 2 Doug. 651; 5 Mass. 39, 391; 1 Ibid. 355; 7 Johns. 134; 10 Ibid. 37.

2. The correspondence between the parties, and the other evidence in the cause, did not constitute an outstanding special agreement, such as to preclude the plaintiff from recovering in this form of action. 3 Johns. 199.

3. The account stated did not specifically include the items stated in the bill of particulars. But a settled account, or a receipt, in only *primâ facie* evidence, which the plaintiff may rebut by showing the true state of the accounts. 1 Johns. Cas. 145; 5 Johns. 72; 5 Ves. 87; 14 Johns. 212; 12 Ibid. 531; 2 T. R. 366; 5 East 230; 4 Johns. 377.

On the part of the *defendant*, the counsel entered into a critical examination of the authorities cited on the other side to support the position, that a general *indebitatus assumpsit* would lie in the present case; and although it was admitted, that the precedents were to that effect, yet it was denied, that they rested on any solid or consistent ground of principle; it was asserted, that they had been settled without proper examination, and a due consideration of the general analogies of the law, and were calculated to
*243] *introduce uncertainty and confusion into legal proceedings, and to encourage negligence in making contracts, and infidelity in performing them. But it was further insisted, that those authorities, even supposing them to have irrevocably settled the practice, could not be applied to the present case. Here, the contract specially defined the terms upon which it was to be performed by both parties, and also the terms upon which it was to be closed. In all the cases cited, the right of action was held to accrue, upon the termination of the contract. While it subsisted, it could not be pretended, that a general *indebitatus assumpsit* could be maintained. It had, indeed, been said, that the contract was terminated by the death of the testator, and the act of his executor. But no case had gone so far as to decide, that an agent, whose authority terminates upon the death of his principal, may proceed against his personal representatives, upon the contract of agency, as if it had been terminated by some wrongful act of the principal. The authority of the agent terminates with the death of the principal, but for services performed under the agency, the contract remains open.

2. The agreement precluded the plaintiff from claiming compensation for

anything done in execution of his agency, except according to the terms of that agreement. The case cited to show the contrary does not apply. *Jacobson* v. *Le Grange*, 2 Johns. 199. Here, whatever services the plaintiff performed, before 1812, *in expectation of being compensated by the agency, must be considered as satisfied by the contract of agency then made. That contract must be regarded as embracing all services performed, or to be performed, by the plaintiff, for the defendant's testator, in respect to the sale of lands. If the disputed items of account arose under the contract, they could only be recovered in a special *assumpsit*, grounded upon the contract. If they were claimed, independent of the contract, as not being within its terms, it was insisted, that the plaintiff could set up no claim to compensation for services in the agency, not embraced by the contract, which settled and defined the rights of the parties. [*244

3. The question presented by the last point reserved, was, whether the plaintiff, having presented two annual accounts of his agency, embracing items of debit and credit arising under his general agency, and arising also under his special agency in the sale of lands, having stated the balance due to him upon these accounts, and received payment, could recover in a general *indebitatus assumpsit*, for other items of account due at the time the former were exhibited, without offering any evidence of error or omission. The plea of account stated, and payment of the balance found due, is a bar to the action of *assumpsit*. If it be a bar, it must be an absolute bar at law, and not a mere presumption, which may be rebutted by contrary evidence. The account can only be opened, surcharged *or falsified, in equity. All the authorities referred to in the principal case cited from the New York reports (*Manhattan Co.* v. *Lydig*, 4 Johns. 377) are from the decisions in equity; but it does not follow, that a court of law, not having the same means of doing justice between the parties, will pursue the same practice. At all events, in order to permit an account to be opened, there must be evidence of mistake or fraud. (2 Atk. 119 · 3 Johns. 387.) There was neither in this case. [*245

March 2d, 1826. WASHINGTON, Justice, delivered the opinion of the court, and, after stating the case, proceeded as follows:—The first point reserved in the court below, and on which the judges of that court were divided in opinion, consists of two propositions: 1. That, upon the whole evidence, the three letters particularly referred to constitute a special agreement investing the plaintiff with the agency of Hart's lands in Ohio; 2. That this special agreement was open and subsisting, at the time the cause of action is claimed to have arisen, which precludes the plaintiff from recovering in this action.

It is not easy to understand what the defendant's counsel mean by the whole evidence. Upon examining the voluminous record sent up to this court, we find, that an active correspondence was carried on between Perkins and Hart, from the year 1803 to 1816, upon the subject of Hart's *lands in Ohio, the payment of the accruing taxes on them, examining, surveying and preparing them for sale, and of other services to be performed by Perkins, in some way or other connected with those lands. If this be the evidence alluded to, there was no objection to submitting it to the court, to say whether the whole of this written evidence, or any part of [*246

it, created a special contract, investing Perkins with the agency of Hart's land. But we find in this record evidence of a different character, such as accounts, receipts and depositions, in relation to Perkins's agency respecting Hart's lands in Ohio. If this was intended to constitute a part of the whole evidence, upon which the question of law was to arise, we should be of opinion, that it was fit only for the decision of the jury, and ought not to have been submitted to the court.

The disinclination which this court has always evinced, to send parties back to the court below, if, by any reasonable construction, obscure parts of the record can be explained, disposes us, in the present instance, to consider the verdict as referring to the written evidence, not only because it would have been improper to call upon the court to decide upon the effect of parol evidence, but because that which is spread upon this record has no apparent relevance to the question of law which is submitted.

In the examination of the question, whether there was a special agreement or not, we shall confine ourselves entirely to the three specified
*247] *letters, because, we are of opinion, after an attentive perusal of all the others, that they furnish not the slightest ground for saying that any agreement was entered into which invested Perkins with the agency of Hart's lands. The letters addressed by Hart to Perkins, treat him as an agent empowered to perform a variety of acts in relation to the lands of the former. But it was a limited agency, created for particular purposes, and as occasion required, but founded upon no special agreement which bound Perkins to perform any specified duties, or Hart to remunerate the services he might perform, otherwise than the law bound him upon the principle of a *quantum meruit*. The particular agency which the former was requested, from time to time, to assume, was to pay taxes, attend to law-suits, examine the lands so as to enable Hart to judge of their value, and to have certain lots and townships surveyed, as preparatory to a sale of them at a future period. The taxes were annually paid, and other advances made by Perkins, upon which he charged both a commission and interest, and these, it would seem, were punctually reimbursed, when drawn for, although the charge of interest was sometimes complained of.

The preparatory steps for bringing these lands, or certain portions of them, into the market, having been taken, the correspondence commenced, which is particularly referred to in the first and second reserved points. In Hart's letter of the 14th of January 1812, he requests Perkins to give him
*248] his most favorable *terms of agency, to appoint sub-agents to do business where he, Perkins, might judge necessary, with such compensation as he might agree upon with them. The letter then proceeds as follows: "State the amount of commissions you shall expect me to pay on amount of sales that shall be collected and remitted, but no commissions to be paid by me, till the collections are made. Provided sales are made by me, in exchange for lands, and if I should draw on you for the amount, to be paid in lands, at a price agreed on, or otherwise, if necessary, to be left with you to be ascertained, in such case, what should you expect to charge on sales of that nature? Please be particular in stating your terms of agency, and make them as favorable as possible." In answer to this letter, Perkins writes, on the 10th of February 1812, as follows: "My commission on sales made by me, the money collected and remitted, is eight per cent. When

contracts are made (as is sometimes the case), purchasers make a payment, and then give up the land, so as to be left without incumbrance, to be sold again, 50 per cent. on such receipt. On these two items, the commission cash, as it has been cash received. In case the agency should be closed, and a settlement made, and contracts remain on hand unsettled, then, in all those contracts that should be carried into effect, five per cent. commission, received in contracts, with a conveyance of the lands covered by the contract or contracts received. On sales made in exchange *for lands, [*249
&c., three per cent. commission, to be received either in contracts here, or lands here, at retail price. Always, as far as practicable, receive commissions in that which shall be similar to that in which it is charged." The letter from Hart to Perkins, dated the 9th of March, in the same year, acknowledges the receipt of the above letter, and then adds, "Your observations in regard to the mode of selling new lands, are, doubtless, sanctioned by experience, and I am happy to commit the agency of my property to your experience and good judgment, from whence I expect to derive peculiar advantage."

These letters, we think, constitute a special agreement upon the subject of commissions to be paid by Hart to Perkins, by way of compensation for his agency in the sale of lands. It is confined to that subject only. The first of these letters invites Perkins to state his most favorable terms of agency in the sale of Hart's lands. The answer contains those terms, by stating the commissions which he should expect to receive upon sales made, and the amount collected and remitted; upon sales made, and then abandoned by the purchaser, after a partial payment of the purchase-money; upon sales made, but the amount not collected, before the agency should be closed; and finally, upon sales made by way of exchange for other property. The acceptance of these terms is sufficiently expressed in Hart's reply to this letter, by which he commits *to Perkins the agency of his property, [*250
the nature of which agency is too clearly explained by reference to the two preceding letters, to leave the slightest doubt as to the meaning and extent of the contract which was thus entered into.

The second proposition is, "that this special agreement was open and subsisting at the time the cause of action is supposed to have arisen." Now, this proposition involves a mixed question of law and fact. If the contract was open, and the action was founded on that contract, then the legal consequence insisted upon, "that Perkins cannot recover in this action," undeniably follows. But whether, in point of fact, it was open, when the cause of action is claimed to have arisen, that is, in the lifetime of W. Hart, must depend upon the evidence in the cause, of which the jury were alone competent to judge. If the agreement was wholly performed by the plaintiff, during the lifetime of Hart; if its further execution was put an end to, before its completion, by the act of Hart, or by the agreement of both parties, then the plaintiff was not precluded from recovering in this action. Nay, further, if the contract was fully performed in relation to any one subject covered by it; as, for example, by the sale, collection and remittance of the purchase-money for any one township or parcel of land, the plaintiff might well maintain an action of *indebitatus assumpsit* for his stipulated compensation, in cash, on that transaction, and was not bound to wait until all the lands to which his agency extended were disposed of. Where the

*agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement, after it is so closed. If, for instance, the agreement between a merchant and his factor be, that the latter shall sell and remit the proceeds of all cargoes which the former shall consign to him, upon a stipulated commission, it can hardly be contended, that the factor cannot recover his commissions in this form of action, upon the proceeds of a single cargo, which have been remitted, while there remain other cargoes yet undisposed of.

But whether this agreement was wholly closed, or whether any one or more of its parts were closed, in either of the ways above mentioned, or in any other way, was a fact resting altogether upon the evidence, whether written or parol, which was, or might be, laid before the jury. It belonged exclusively to that body to say, whether the fact existed or not; and upon the fact so found, the question of law would fairly arise. In this respect, therefore, we are of opinion, that the verdict is clearly defective, and ought to have been set aside by the court below.

It may not be amiss to add, that if the question reserved was, whether the agreement was open and subsisting, at the time this action was brought, we should be of opinion, that the agency of Perkins having terminated by the death of Mr. Hart, the further execution of the agreement was put an
*252] end to by that event, and that, consequently, *it was not open, when the action was brought. But the proposition is so stated as to refer to a period antecedent to the death of Hart.

The second point reserved in thus expressed: "That, upon the whole evidence, Hart's letter of January 14th, 1812," and so referring to the other two letters, as in the first point, "constitute a special agreement, defining the nature and extent of Perkins's agency, and settling the subjects upon which he was to receive compensation, and the amount of that compensation, the legal operation of which agreement is, to preclude Perkins from claiming compensation, for anything done in the execution of his agency, except according to the terms of that agreement." It has been already stated, that the three letters partricularly referred to in this point, did constitute a special agreement upon the subject of commissions to be paid to Perkins, by way of compensation for his agency in the sale of Hart's lands. And it may be added, that this agreement settles the subjects upon which Perkins, was to receive compensation, and the amount of that compensation. If so, there can be no question but that the legal operation of this agreement, as to every claim founded upon it, is to preclude Perkins from recovering any compensation which is not consistent with the terms of that agreement. For, although in the cases, before stated, in which the special agreement has been executed, or otherwise closed, a general *indebitatus assumpsit* may be maintained, it is, nervertheless, true, that the special agree-
*253] ment may *be given in evidence by the defendant, for the purpose of lessening the *quantum* of damages to which the plaintiff is entitled.

But after all this is admitted, the inference of law insisted upon by the defendant, that Perkins is precluded by the special agreement from claiming compensation for anything done in the execution of his angency, except according to the terms of that agreement, does not follow. The agreement is clearly prospective, and is confined to the single subject of commissions on

the sale of lands. This is apparent from Hart's letter of the 14th of January 1812, which he prefaces by stating, that he had concluded to offer certain portions of his lands for sale, at that time, and his other lands, when they should be partitioned. He desires Perkins, as his agent, to make the necessary previous arrangements, and to proceed in the sale of the portions before mentioned, and of No. 2, in the 13th range, as soon as the partition should be completed, and then be proceeds to inquire his terms of agency, as before mentioned. But when we look into the whole evidence, to which we are referred by the point reserved, it is found, that the agency of Perkins commenced at early as the year 1803, and extended to a variety of duties, unconnected with that of selling of land; such as exploring the lands of his principal, having them surveyed, their quality and value ascertained, investigating titles, attending to a law-suits, paying taxes, and making other advances.

Now, it is impossible to contend, with any *probability of success, [*254
that Perkins was precluded by the special agreement from recovering, under the general counts, a compensation for those services, or, indeed, for any other services rendered by him in his character of agent, which are not strictly within the scope of the special agreement. But the point raised here is, that he is precluded from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement, although the services so rendered are not embraced by it.

What was the nature of the particular claim submitted to the jury, upon which the parties consented that a verdict should be given for the plaintiff, the record does not enable this court distinctly to decide. So far as any information is to be derived from the declaration, and the additional bill of particulars, it would rather seem as if it was for general services rendered by the plaintiff, without the scope of the special agreement, that being confined, as before observed, to commissions on land-sales. If the paper found in this record, headed thus, "Perkins' account, on which the action is brought," which contains three items for commissions on as many sales of land, and three others for interest on those commissions, is to be considered as the original bill of particulars filed in the cause, it would seem to follow, that the action was brought to recover, as well those commissions, as a compensation for general services not embraced by the special agreement. [*525
*Upon this state of the case, the conclusion of law insisted upon in this point would, nevertheless, be incorrect, for the reasons already stated.

It was contended by the counsel for the defendant, that this action would not lie, in a case where, by the agreement, the plaintiff was to be compensated in land. This is not controverted. But it will be sufficient to observe, that it is not stated in the points reserved, nor in the account just referred to (if it be admitted to be the original bill of particulars), that the commissions there charged arose upon an exchange of lands, or were to be discharged by land. The case is too imperfectly stated to enable this court to say that it gives rise to the question to which the argument is directed.

The third and last point reserved is thus expressed: "That the plaintiff cannot recover for the two items in the bill of particulars claimed and charged to have arisen as matters of account between the parties, in 1814 and 1815, because the plaintiff, on the 1st of February 1815, and on the 19th of March 1816, exhibited and stated his general account against William

Hart, upon each of which a balance was due from, and paid by, the said William, as a settlement upon an account stated, which precludes the plaintiff from recovering in this action, for said two items claimed to have been due before the said accounts were rendered."

The difficulty of this point consists in the imperfect manner in which it is stated. The court may conjecture, that the bill of particulars alluded *256] *to is the paper just referred to; but whether it be so or not, is by no means certain. If it be the bill intended, the difficulty still remains, as the general account is not stated, or referred to, so as to enable the court to decide whether it does, or does not, include the two items which it is supposed cannot be recovered in this action. If we look through this record, in order to obtain information respecting this matter, we meet with two accounts containing charges for advances made by Perkins, in the years 1814 and 1815, for taxes due by Hart, and in discharge of other expenses connected with his agency, both which accounts were discharged. But it surely cannot be contended, that the settlement and discharge of an account for money lent and advanced for the use of the testator, is a bar to a claim for commissions, or of any other demand not included in the settled account. If, to a bill for an account, the defendant plead, or, in his answer rely upon, a settled account, the plaintiff may surcharge, by alleging and proving omissions in the account, or may falsify, by showing errors in some of the items stated in it.

The rule is the same, in principle, at law; a settled account is only *primâ facie* evidence of its correctness. It may be impeached, by proof of unfairness, or mistake, in law or in fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated *257] in it. *The legal conclusion, therefore, insisted upon by the defendant, that the plaintiff is precluded from recovering in this action for the two items claimed to have been due before the two accounts spoken of were rendered, is not correctly drawn, unless it appeared, from the point reserved, that those two items were included in what is styled the account stated.

It may further be remarked, that even if it appeared that the plaintiff was precluded by the settlement and discharge from recovering the amount of the two items referred to, it would not follow, that the law is for the defendant upon the whole verdict, although it might be sufficient to induce the court below to grant a new trial, if it had been applied for, upon the ground that the verdict was for too much.

Were this cause before the court upon a writ of error, the imperfections in the points reserved which have been noticed, would render it proper to reverse the judgment, and to direct a *venire de novo* to be awarded. Being an adjourned case, it would be improper for this court to give any such direction to the court below.

CERTIFICATE.—This cause came on to be argued, on the certificate of division in opinion of the judges of the circuit court for the district of Ohio: On consideration whereof, this court is of opinion, that the points reserved, upon which the opinions of the judges of that court were opposed, are too imperfectly stated to enable this court to pronounce any opinion upon them.

*Armstrong, Plaintiff in error, *v.* Toler, Defendant in error.

Illegal contract.

Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it.[1]

So, if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it.

But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act.[2]

Thus, where A., during a war, contrived a plan for importing goods on his own account, from the enemy's country, and goods were sent to B. by the same vessel; A., at the request of B., became surety for the payment of the duties on B.'s goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them: *Held*, that A. might maintain an action on the promise of B., to refund the money.

But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him, with his privity, in order that he may protect them for the owner, a promise to repay any advances made under such understanding or agreement is utterly void.

Toler *v.* Armstrong, 4 W. C. C. 297, affirmed.

Error to the Circuit Court of Pennsylvania. This was an action of *assumpsit*, brought by the defendant in error, Toler against the plaintiff in error, Armstrong, to recover a sum of *money paid by Toler, on account of goods, the property of Armstrong and others, consigned [*259 to Toler, which had been seized and libelled in the district court of Maine, in the year 1814, as having been imported contrary to law.

The goods were shipped, during the late war with Great Britain, at St. Johns, in the province of New Brunswick, for Armstrong and other citizens and residents of the United States, and consigned to Toler, also a domiciled citizen of the United States. The goods were delivered to the agent of the claimants, on stipulation to abide the event of the suit, Toler becoming liable for the appraised value; and Armstrong's part of the goods were afterwards delivered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable, should the goods be condemned. The goods having been condemned, Toler paid their appraised value, and brought this action to recover back from Armstrong his proportion of the amount. At the trial of the cause, the defendant below resisted the demand, on the principle that the contract was void, as having been made on an illegal consideration. When the testimony on the part of the plaintiff below was concluded, the counsel for the defendant insisted, on his behalf, to the court, that the several matters propounded and given in evidence on the part of the plaintiff were not sufficient, and ought not to be allowed, as decisive evidence to entitle the plaintiff to maintain the issue, and to recover against the defendant. The judge *thereupon delivered the following [*260 charge to the jury, which is spread at large upon the record.

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[1] Eberman *v.* Reitzel, 1 W. & S. 181; Rhodes *v.* Sparks, 6 Penn. St. 473; Ormerod *v.* Dearman, 13 W. N. C. 85.

[2] A contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote. Ocean Ins. Co. *v.* Polleys, 13 Pet. 157. S. P. Hopner *v.* Appleby, 5 Mason 71; Wilson *v.* Le Roy, 1 Brock. 447. The test, whether a demand connected with an illegal transaction can be enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. Swan *v.* Scott, 11 S. & R. 155; Hipple *v.* Rice, 28 Penn. St. 406. And see Ogden *v.* Barker, 18 Johns. 87.

"The rule of law under which the defendant seeks to shelter himself against a compliance with his contract, to indemnify the plaintiff for all sums which he might have to pay on account of the goods shipped from New Brunswick, for the defendant, and consigned to the plaintiff, is a salutary one, founded in morality and good policy, and which recommends itself to the good sense of every man, as soon as it is stated. The principle of the rule is, that no man ought to be heard in a court of justice, who seeks to enforce a contract founded in or arising out of moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness in the rule itself, but in its fitness to the particular cases to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences; carried out to such an extent, it would deserve to be entitled a rule to encourage and protect fraud. So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason, but it cannot safely be pushed further. If, for example, the man who imports goods for another, by means of a violation of the laws
*261] of his country, is disqualified from *founding any action upon such illegal transaction, for the value or freight of the goods, or other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it; it ought not to vitiate the contract of the retail merchant, who buys these goods from the importer, that of the tailor, who purchases from the merchant, or of the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of the above persons, at the time he contracted.

"I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it. The case before supposed, of an action for the value of goods illegally imported for another, or freight and expenses attending, founded upon a promise, express or implied, exemplifies a part of the above rule; the latter part of it may be explained by the following case: As, if the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and
*262] defend them for the owner, in case they should be brought *into jeopardy, I should consider a bond or promise afterwards given by the owner to his friend, to indemnify him for his advances on account of any proceedings against the property or otherwise, to constitute a part of the *res gestæ*, or of the original transaction, though it purports to be a new contract. For, it would clearly be a promise growing immediately out of, and connected with, the illegal transaction. It would be, in fact, all one transaction; and the party to whom the promise was made would, by such a contrivance, contribute, in effect, to the success of the illegal measure.

"But if the promise be unconnected with the illegal act, and is founded

on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, if A. should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling, or of a collusive capture, and in the same vessel should be sent goods for B.; and A. should, upon the request of B., become surety for payment of the duties, or should undertake to become answerable for expenses, on account of a prosecution for the illegal importation, or should advance money to B., to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract, upon a valid and legal consideration, unconnected with the original act, although remotely caused by it; and such contract *would not [*263
be so contaminated by the turpitude of the offensive act, as to turn A. out of court, when seeking to enforce it, although the illegal introduction of the goods into the country was the consequence of the scheme projected by A. in relation to his own goods.

"Whether the plaintiff has any interest in the goods imported by the defendant from New Brunswick, or was the contriver of, or concerned in, a scheme to introduce these goods, or even his own, if he had any, into the United States, by means of a collusive capture or otherwise, or consented to become the consignee of the defendant's goods, with a view of their introduction, are questions which must depend upon the evidence, of which you must judge. It ought, however, to be remembered, that it would seem, from the letters of introduction of the defendant to the plaintiff, some time after this importation had taken place, that these gentlemen were, at that time, strangers to each other.

And the jurors having submitted to the court an inquiry, in the words following, viz: "The jury beg leave to ask the judge, whether Toler must have an interest in Armstrong's goods, to constitute him a participator in the voyage? If simply having goods on board, will constitute him such?" The court gave their opinion upon the same as follows: "The plaintiff simply having goods on board, would not constitute him a participator, or affect the contract with the defendant. Being interested in the goods, would."

This charge was excepted to by the defendant, *and a verdict [*264
having been found for the plaintiff, on which a judgment was rendered in his favor, the cause was brought, by writ of error, to this court.

Webster and *Wheaton*, for the plaintiff in error, stated, that this case arose out of an illegal importation of goods from the enemy's country, during the late war, upon the false and fraudulent pretext of a capture *jure belli*, which was finally pronounced by this court to be collusive and the property condemned to the government. *The George*, 1 Wheat. 408; s. c. 2 Ibid. 278. They argued, that although the abstract principles laid down in the charge of the court below, might be considered as correct in point of law, no one of the hypothetical cases put by the learned judge, fully stated the facts as proved in the cause. The whole case being submitted, and the court being asked to give a general instruction, the charge ought to have been applicable to the case in evidence, which, it was contended, it was not. Admitting, therefore, the opinions in the charge to be cor-

rect, it was still liable to exception, because there was a material part of the case which it did not embrace. The charge did not state what the law would be, if Toler knew, previous to the consignment, that Armstrong was engaged in this unlawful trade. The general principle, that no action could be maintained upon a contract growing out of an immoral or illegal trans-
*265] action, was insisted on *as applicable to this case, where the transaction was not subsequent or collateral, but directly connected with the unlawful act. *Collins* v. *Blantern*, 2 Wils. 347; *Holman* v. *Johnson*, Cowp. 341; *Biggs* v. *Lawrence*, 3 T. R. 454; *Clugas* v. *Penaluna*, 4 Ibid. 466; *Steers* v. *Lashley*, 6 Ibid. 61; *Booth* v. *Hodgson*, Ibid. 405; *Waymell* v. *Reed*, 5 Ibid. 599; *Ex parte Mather*, 3 Ves. 373; *Ribbans* v. *Crickett*, 1 Bos. & Pul. 264; *Lightfoot* v. *Tenant*, Ibid. 551; *Aubert* v. *Maze*, 2 Ibid. 371; *Shirley* v. *Sankey*, Ibid. 130; *Thompson* v. *Thomson*, 7 Ves. 470; *Ex parte Daniels*, 14 Ibid. 191; *Ex parte Bell*, 1 M. & Selw. 751; *Cooth* v. *Jackson*, 6 Ves. 11; *Branton* v. *Tuddy*, 1 Taunt. 6; *Edgar* v. *Fowler*, 3 East 222; *Morck* v. *Abel*, 3 Bos. & Pul. 35; *Blachford* v. *Preston*, 8 T. R. 89; *Gallini* v. *Laborie*, 5 Ibid. 242; *Sullivan* v. *Greaves*, Park. Ins. 8; *Mitchell* v. *Cockburn*, 2 H. Bl. 379; *Cannan* v. *Bryce*, 3 B. & Ald. 179; *Duncanson* v. *McLure*, 4 Dall. 308; *Hunt* v. *Knickerbocker*, 5 Johns. 327; *Whitaker* v. *Cone*, 2 Johns. Cas. 58; *Belding* v. *Pitkin*, 2 Caines 147; *Graves* v. *Delaplaine*, 14 Johns. 146; *Griswold* v. *Washington*, 16 Ibid. 438; *Richardson* v. *Marine Ins. Co.*, 6 Mass. 111; *Russell* v. *De Grand*, 15 Ibid. 35; *Wheeler* v. *Russel*, 17 Ibid. 281; *Musson* v. *Fales*, 16 Ibid. 334; *Fales* v. *Mayberry*, 2 Gallis. 560; *Hannay* v. *Eve*, 3 Cranch 242; *Patton* v. *Nicholson*, 3 Wheat. 204; *Mitchel* v. *Smith*, 4 Dall. 269; s. c. 1 Binn. 110; *Maybin* v. *Coulon*, 4 Dall. 298; *Biddis* v. *James*, 6 Binn. 321; *Coulon* v. *Anthony*, 4 Yeates 24. The authorities cited would show, that this principle has been constantly recognised in the courts of justice both in England and this country, and it might, indeed, be said to form a rule of universal law which had been incorporated into the civil code of every nation. Pothier, *Des Obligations*, No. 43–45; *Des Assurances*, No. 58; Emérigon, *Des. Ass.* tom. 1, p. 211.

*266] *C. J. *Ingersoll*, contrà, insisted, that the law on this subject was accurately laid down in the judge's charge, and although there was some apparent discrepancy in the cases, they would all be found to be reconciled by the clear and intelligible principles of the charge. The distinction was, that where the contract was disconnected with the original unlawful act, and was founded on a new and distinct consideration, an action might maintained upon it, although it could not be maintained upon a contract directly arising out of the illegal act. *Faikney* v. *Reynous*, 4 Burr. 2069; *Petrie* v. *Hannay*, 3 T. R. 418; *Farmer* v. *Russell*, 1 Bos. & Pul. 295; *Tenant* v. *Elliott*, Ibid. 3; *Lloyd* v. *Johnson*, Ibid. 340; *Watts* v. *Brooks*, 3 Ves. 612; *Bird* v. *Appleton*, 8 T. R. 562; *Ex parte Bulmer*, 13 Ves. 313; *Sewell* v. *Royal Exch. Co.*, 4 Taunt. 850; *Hodgson* v. *Temple*, 5 Ibid. 181; *Haines* v. *Busk*, Ibid. 521; *Simpson* v. *Bloss*, 7 Ibid. 246; *Antoine* v. *Morshead*, 6 Ibid. 237; s. c. 1 Marsh. 561; *Daubuz* v. *Morshead*, 6 Taunt. 332; *Willison* v. *Pattison*, 7 Ibid. 439; *Evans* v. *Richardson*, 3 Meriv. 469; *Edwards* v. *Dick*, 4 B. & Ald. 211; *Woodhouse* v. *Meredith*, 1 Jac. & Walk. 204; *Whittingham* v. *Burgoyne*, 3 Anstr. 900; *Booth* v. *Jackson*,

6 Ves. 12; *Edgar* v. *Fowler*, 3 East 222; *Bensley* v. *Ringold*, 5 B. & A. 335; *Johnson* v. *Hudson*, 11 East 180; *Gross* v. *Lapage*, 1 Holt 105, 107, and cases collected in note; *Hedley* v. *Lapage*, Ibid. 392; *Duhammel* v. *Pickering*, 2 Stark. 90; *Stokes* v. *Twitchen*, 8 Taunt. 492; Gow on Partnership, 105; 2 Evans' Pothier, app'x, No. I., p. 8; 1 Fonbl. b. 1, c. 4, § 4, note *y*; Puffend. lib. 3, c. 7, § 9, note 2. The questions of fact, [*267 *whether Toler had any interest in Armstrong's goods, or was the contriver of, or concerned in, a scheme to introduce them into this country, by any unlawful means, or consented to become the consignee of the goods, with a view to their introduction, were fairly left to the jury, and are found by them in favor of the plaintiff. So that the whole question arose upon the abstract correctness of the charge, and the propositions of law laid down to the jury. Unless these could be shown to be erroneous, the judgment must be affirmed. It was also urged, that if the taint of the original illegality of transactions was suffered to infect new contracts with third parties, upon different considerations, it would put a most inconvenient restraint upon trade, and the whole business of life.

March 26th, 1826. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—The only point moved by the defendant's counsel to the court, was, that the evidence was not decisive in favor of the plaintiff. The court gave this opinion. The charge does not intimate that the testimony was conclusive, but leaves the case to the jury, to be decided by them, under the control of certain legal principles which are stated in the charge. To entitle the plaintiff in error to a judgment of reversal, he must show that some one of these principles is erroneous, to this prejudice.

The main object of the charge is, to state to *the jury the law of [*268 contracts on an illegal consideration, so far as it was supposed to bear on the case before them. To enable them to apply the law to the facts, the court supposed many cases in which the contract would be void, the consideration being illegal. It is unnecessary to review this part of the charge, because it is entirely favorable to the plaintiff in error.

After having stated the law to be, that where the contract grows immediately out of an illegal act, a court of justice will not enforce it, the court proceeds to say, "But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus if A. should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling, or of a collusive capture, and goods should be sent in the same vessel for B.; and A. should, upon the request of B., become surety for the payment of the duties, or should undertake to become answerable for the expenses on account of a prosecution for illegal importation, or should advance money to B., to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract, upon a valid and legal consideration, unconnected with the original act, although remotely caused by it, and such contract would not be so contaminated by the turpitude of the offensive act, as *to turn A. out of court, when seeking to enforce it; although [*269

the illegal introduction of the goods into the country was the consquence of the scheme projected by A. in relation to his own goods."

If this opinion be contrary to law, the judgment ought to be reversed. The opinion is, that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. This general proposition is illustrated by particular examples, and will be best understood by considering the examples themselves. The case supposed is, that A., during a war, contrives a plan for importing goods, on his own account, from the country of the enemy, and that goods are sent to B. by the same vessel. A., at the request of B., becomes surety for the payment of the duties which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money? The opinion is, that such an action may be sustained. The case does not suppose A. to be concerned, or in any manner instrumental in promoting the illegal importation of B., but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B. afterwards adopted. This illustration explains what was meant by the general words previously used, which, unexplained, would have been exceptionable.

*270] The contract made with the government for *the payment of duties, is a substantive independent contract, entirely distinct from the unlawful importation. The consideration is not infected with the vice of the importation. If the amount of duties be paid by A. for B., it is the payment of a debt due in good faith from B. to the government; and if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons who are separately engaged in an unlawful trade, can make no contract with each other; at any rate, no contract, which, in any manner, respects the goods unlawfully imported by either of them. This would be, to connect distinct and independent transactions with each other, and to infuse into one, which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage.

The same principle, diversified in form, is illustrated by another example. If A. should become answerable for expenses, on account of a prosecution for the illegal importation, or should advance money to B., to enable him to pay those expenses, these acts, the court thought, would constitute a new contract, the consideration of which would be sufficient to maintain an action. It cannot be questioned, that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the

*271] act of defending a prosecution instituted in consequence *of such illegal importation, is perfectly lawful. Money advanced, then, by a friend in such a case, is advanced for a lawful purpose, and a promise to repay it, is made on a lawful consideration. The criminal importation constitutes no part of this consideration.

It is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him, with his privity, that he might protect and defend them, for the owner, a bond or promise given to repay any advances made in pursuance of such understand-

ing or agreement, would be utterly void. The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation.

Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled, than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or *prohibited by law. How far this principle is to [*272 affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made. In *Faikney* v. *Reynous*, 4 Burr. 2069, the plaintiff and one Richardson were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs; and a bond was given for securing the repayment of Richardson's proportion of the loss. To a suit on this bond, the defendants pleaded the statute prohibiting the original transaction, but the court held, on demurrer, that plaintiff was entitled to recover. Although this was the case of a bond, the judgment does not appear to have turned on that circumstance. Lord MANSFIELD gave his opinion, on the general ground, that if one person apply to another to pay his debt (whether contracted on the score of usury, or for any other purpose), he is entitled to recover it back again. This is a strong case, to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice. In a subsequent case, 6 T. R. 410, ASHHURST, J., said, the defendants were held liable, because they had voluntarily given another security.

In the case of *Petrie and another, Executors of Keeble*, v. *Hannay*, 3 T. R. 418, the *testator of the plaintiffs was engaged with the defend- [*273 ant and others, in stock transactions, which were forbidden by law, on which considerable losses had been sustained, which were paid by Portis, their broker. Keeble repaid the broker the whole sum advanced by him, except 84*l.*, which was, in part, the defendant's share of the loss, for which Keeble drew a bill on the defendant, which was accepted. The bill not being paid, a suit was brought upon it, by Portis, against the executors of Keeble, and judgment obtained, they not setting up the illegal consideration. The executors brought this action to recover the money they had paid, and it was held, by three judges against one, on the authority of *Faikney* v. *Reynous*, that the plaintiffs could maintain their action. A distinction was taken in cases where money was paid by one person for another, on an illegal transaction, by which the parties were not bound; between a voluntary payment, and one made on the request of the party; between an *assumpsit* raised by operation of law, and an express *assumpsit*. Although the former would not support the action, it was held, that the latter would. This, also, is a strong case to show that a new contract, by which money is

advanced at the request of another, or, which is the same thing, where there is an express promise to pay, may sustain an action, although the money was advanced to satisfy an illegal claim.

*274] In *Farmer* v. *Russell et al.*, 1 Bos. & Pul. 295, *it was held, that if A. is indebted to B. on a contract forbidden by law, and pays the money to C., for the use of B., a court will give judgment in favor of B., against C., for this money. In this case, B. could not have recovered against A., but when the money came into the hands of C., a new promise was raised, on a new consideration, which was not infected by the vice of the original contract. In this case, Chief Justice EYRE said, that the plaintiff's demand arose simply from the circumstance, that money was put into the hands of C., for his use; and Justice BULLER said, that the action did not arise upon the ground of the illegal contract. Yet, in this case, A.'s original title to the money was founded on an unlawful contract, and he could not have maintained an action against B.

The general proposition stated by Lord MANSFIELD, in *Faikney* v. *Reynous*, that if one person pay the debt of another, at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case. A subsequent express promise is, undoubtedly, equivalent to a previous request.

In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it, as to be inseparable from it. As, where a vendor, in *275] a foreign *country, packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery-ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction. One of the strongest cases in the books is *Steers* v. *Laishley*, 6 T. R. 61, where the broker, who had been concerned in stock-jobbing transactions, and had paid the losses, drew a bill of exchange for the amount on the defendant, and, after its acceptance, indorsed it to a person who knew of the illegal transaction on which it was drawn, the court held, that such indorsee could not recover on the bill. In this case, the broker himself could not recover, being a party in the original offence against the law, and his bill being drawn for the very money which was due on the orginal transaction, and indorsed to a person having notice, left the indorsee in the same situation with the drawer. Yet, Lord KENYON said, in this case, that if the plaintiff had lent the money to the defendant to pay the differences, and had afterwards received the bill for the money so lent, he might have recovered on it. The difference between the case decided, and that put by the judge, is not very discernible, as the one or the other *276] may affect *morals, or the policy of the law. The distinction would seem to be founded on this legal ground, that the money lent would constitute a new consideration, and be the foundation of a new contract, which could not be vitiated, by a knowledge of the purpose for which the

money was lent, and the bill drawn. So Toler's knowledge of the illegal transactions of Armstrong, and that his money was advanced to procure the delivery of goods which had been illegally imported, could not vitiate a contract to repay that money.

In the case of *Booth* v. *Hodgson*, 6 T. R. 405, the suit was between the original parties to the illegal transaction, and was bottomed on it.

Supposing the opinions actually contained in the charge to be correct, it is still contended to be liable to exception, because there is a material part of the very case which it does not embrace. The charge, it is said, does not state what the law would be, if Toler knew, previous to the consignment, that Armstrong was engaged in this illicit commerce. Without entering into the inquiry, whether this criticism on the charge be well or ill founded, the court think it proper to declare, in explicit terms, that the plaintiff in error cannot avail himself of it in this stage of the cause. To bring all the testimony offered at the trial of a cause at common law, instead of facts, into this court, by a bill of exceptions, or otherwise, is a practice which, to say the least, is extremely *inconvenient. Its tendency is to convert this court from a tribunal for the decision of points of law, into one for [*277 the investigation of facts, and for weighing evidence. To look into that testimony, for the purpose of inquiring whether the judge has omitted anything material in his charge, would be to yield to this practice, and to sanction it, in its most exceptionable form. If the defendant's counsel wished the instruction of the judge to the jury, on any point which was omitted in the charge, his course was, to suggest the point, and request an opinion on it. If counsel may, without pursuing this course, spread the whole testimony on the record, and then, by a general exception to the charge, enable himself to take advantage, not only of a misdirection, but of any omission to notice any question which may be supposed, by this court, to have arisen in the case, such a course would obviously transfer to the supreme court the appropriate duties of a circuit court, and cannot be countenanced.

It is also contended by the counsel for the plaintiff in error, that the judge has erred in not answering fully the inquiry made by the jury. That was in these words: "The jury beg leave to ask the judges whether Toler must have an interest in Armstrong's goods, to constitute him a participator in the voyage? If simply having goods on board, will constitute him such?" The court answered as follows: "The plaintiff, simply having goods on board, would not constitute him a participator, or affect the contract *with the defendant. Being interested in the goods, would." [*278 There is much reason to believe, that the first of these questions was not understood by the jury, or by the judge, according to the literal import of the words. The inquiry would seem to be, whether, under any possible view of the transaction, Toler could be tainted with the guilt of Armstrong, so as to affect the contract in suit, unless he had an interest in the goods. This was, probably, not the intention of the jury, because an answer to this question is to be found in the charge. The judge had stated, that if Toler was the contriver of, or concerned in, a scheme to introduce these goods into the United States, or had consented to become the consignee, with a view to their introduction, these circumstances would vitiate the contract. He had already said, therefore, that an interest in Armstrong's goods was not indispensably necessary to make Toler a participator in the voyage, as

to all the purposes of the defence. He had stated two cases specially, either of which the jury might consider as proved by the evidence, in which the consideration would be unlawful; and he had said generally, "that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is *279] equally tainted by it." There is much reason to believe, *that the jury could not have intended to put a question which had been already answered, and that they might design to ask, whether, having goods on board, belonging to himself, would place him in the same situation as if interested with Armstrong. The answer of the court would show, that the questions were understood in this sense, and that answer appears to have been satisfactory to the jury. However this may be, we think the law was correctly stated by the court; and we cannot admit, that a judgment is to be reversed, because an answer does not go to the full extent of the question. Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed, that they had nothing further to ask.

We think, that there is no error in the judgment of the circuit court, and that it ought to be affirmed, with costs and damages, at the rate of six per centum per annum.

Judgment affirmed

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*280] *CHIRAC and others *v.* REINICKER.

Attorney as a witness.—Mense profits.—Error.—Variance.

A counsel or attorney is not a competent witness to testify as to facts communicated to him by his client, in the course of the relation subsisting between them, but may be examined as to the mere fact of the existence of that relation.[1]

The action for mesne profits may be maintained against him who was the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit, although he was not a party to that suit, and did not take upon himself the defence thereof upon the record, but another did, as landlord.[2]

A recovery in ejectment is conclusive evidence, in an action for mesne profits, against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, the record, in the ejectment suit, is admissible to show the possession of the plaintiff, connected with this title, although it is not conclusive upon the defendant, in the same manner as if he had been a party on the record.[3]

Amendments to the pleadings are matters in the discretion of the court below; error will not lie to this court, on the allowance or refusal of such amendments.

Variances between the writ and declaration cannot be taken adantage of in the court below, after plea pleaded.

Quære? Whether, by the modern practice, such variances can be taken advantage of at all?

ERROR to the Circuit Court of Maryland. This was an action of trespass for mesne profits, brought by the plaintiffs in error, Chirac and others, against the defendant in error, Reinicker, in the court below.

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[1] Aspinwall's Case, 7 Ben. 433.

[2] See Storch *v.* Carr, 28 Penn. St. 135.

[3] S. C. 2 Pet. 613.

The plaintiffs had recovered judgment, and possession of the premises, in an ejectment, in which one C. J. F. Chirac prayed *leave of the [*281 court, as landlord of the premises, to be made defendant in the place of the casual ejector, and was admitted accordingly, under the common consent rule. At the trial of the present suit, the record of the proceedings in the ejectment were offered by the plaintiffs as evidence, to maintain this action; and they then offered to prove, by the testimony of R. G. Harper, and N. Dorsey, Esquires, that the defendant had retained, and paid them, to conduct the defence of the ejectment, for his benefit, and also propounded to these witnesses the following question: Were you retained, at any time, as attorney or counsel, to conduct the ejectment suit above mentioned, on the part of the defendant, for his benefit, as landlord of those premises? This question was objected to by the defendant's counsel, as seeking an improper disclosure of professional confidence; and was rejected by the court. Whereupon, the plaintiffs excepted.

The plaintiffs then gave in evidence certain deeds and patents, by which, and the admissions of counsel on both sides, the title to the premises in question was vested in John B. Chirac, deceased; and also read in evidence certain depositions, to prove who were the heirs of J. B. Chirac; and also offered the record in the ejectment, to prove Maria Bonfils to be one of the heirs, and then offered to prove, by parol evidence, that the defendant was, in fact, landlord of the premises, at the commencement, and during the progress of the ejectment, and had notice of the *same, and retained [*282 counsel to defend the same, and received the rents and profits thereof, during its progress; which last-mentioned evidence the court refused to admit; and the plaintiffs excepted to the refusal.

The plaintiffs then offered to prove the same facts (not saying by parol evidence), with the additional fact, that counsel did defend the same action, for the benefit of the defendant. This evidence was also rejected by the court, and constituted the third exception of the plaintiffs.

The fourth exception taken by the plaintiffs, related to the proper parties to the action. The original plaintiffs in the suit were Anthony Taurin Chirac, Mathew Chapus and Anna Maria his wife, Mathew Thevenon and Maria his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. Pending the suit, the plaintiffs obtained leave to amend their declaration, and amended it, by introducing the name of John B. E. Bitarde Desportes, as husband of the said Maria, called at the commencement of this suit, Maria Bonfils. No objection was taken to this amendment, and the defendant pleaded the general issue to the declaration so amended. The evidence of title of John B. Chirac, deceased, having been introduced, and also evidence to prove that Anthony T. Chirac, and the female plaintiffs, were heirs-at-law of John B. Chirac, the defendant prayed the court to instruct the jury, that they ought to find a verdict for the defendant, unless they were satisfied that all the plaintiffs were the proper heirs-at-law *of John B. Chirac; which direction the court accord- [*283 ingly gave.

The fifth exception related to the supposed variance between the writ and declaration, by the amendment introducing the husband of Maria Bonfils as a party upon the record. The court held the variance fatal, under the general issue.

February 11th. *D. Hoffman* and *Mayer*, for the plaintiffs in error, argued: 1. That the rule as to professional secresy forbids disclosures by the counsel of matters communicated by the client, after the engagement of counsel, and relating to the merits, or grounds of prosecution or defence of the suit. But that the mere fact of the engagement of counsel was out of the rule, because, the privilege and duty of being silent, does not arise, until that fact be ascertained. The concealment of the real client, who may be the party essentially interested, may be part of the client's policy, and be within the client's instructions to his counsel. But the client's injunction of secresy, *per se*, would not make secresy lawful in this respect; and it is, therefore, a *petitio principii*, to say, that the counsel shall not tell who really employed him, merely because it happened to be the direction of this client, and his client's view to conceal the fact. The law would authorize a fraud on its own rules, if it would determine otherwise; and the pretension of the defendant is counter to the whole policy of the rule, as to professional secresy. 7 East 357, in note; 4 Ibid. 759; 4 Esp. 23; Bull. N. P. 284; 4 T. R. 432, 752; 17 Johns. 335; 18 Ibid. 330; Norris's Peake 250, 251, 252; 3 Johns. Cas. 198; 13 Johns. 492. *The very refusal to answer, *284] implies the affirmation of the witnesses being employed by the defendant as counsel.

2. The defendant was liable, in this action, if he had notice of the ejectment, and was, as landlord, interested in the result of it. He might, even at common law, have been made defendant; but the statute of 11 Geo. II., in force in Maryland, explicitly allows it to him. He shall not screen himself from responsibility, because he had artifice enough to waive appearing, and to let an uninterested person figure as defendant in his stead. The lessor of the plaintiff may sue for mesne profits, and the actual tenant shall be liable, although the judgment in ejectment be obtained against the casual ejector only; and in reference as well to the defendant as to the plaintiff in such a suit, the court disregards the fiction of the ejectment cause. He is answerable for the mesne profits, who has received them, and has had an opportunity of defending his pretensions in the preliminary ejectment. The ejectment suit is founded on a fiction. Fictions are under the control of the courts who use them. They will be moulded and applied to the views of justice, and according to reason—for they take their rise from the equity of the law: *In fictione juris subsistit equitas.* The authorities *sustain *285] all these positions.(*a*) Before the statute of 11 Geo. II., regulating the appearance of landlords as defendants, in lieu of the casual ejector, a judgment in ejectment was habitually set aside, where, upon the complaint of the landlord, it appeared, that he had had no notice of the suit. Where a party sells a chattel, with warranty of title, notice to the vendor, of a suit against the vendee for it, is sufficient to bind the vendor, by the verdict or judgment in that suit. One obtaining possession of land, while an action of ejectment is pending, is answerable for the mesne profits, during his occupation, whether proved to have had notice of the action or not; construc-

(*a*) 1 Burr. 667; Runnington Eject. 192–3, 198, 200–1; Adams on Eject. 328, 337; 2 Johns. Cas. 438. 3 Camp. 455, in point, and inaccurately stated in Adams on Eject.; the notice of the suit to the landlord not being required, as Adams states, to be by service of the declaration in ejectment. 2 Burr. 1290; 7 T. R. 108.

tive notice, then, sometimes, implicates a third party in this suit. 13 Johns. 447; 1 Har. & Johns. All these rules are calculated to prevent an evasion of the statute, allowing landlords, not in actual possession, to be actors in the ejectment suit, and to keep the fictions of law to their original purposes of justice. Our claim is clear of the point of *Lifford's Case*, in 11 Co. 51; though, according to the decisions in Massachusetts, we might rest this suit even upon that point. Stearns on Real Actions 416. Before the statute of Marlbridge, 52 Hen. III., damages were not recoverable in any *real [*286
action, except against the disseisor himself, and then only in the assize of novel disseisin. Hence, the practice for the disseisor (similar in principle to the attempt of this defendant) to enfeoff persons to act as defendants, who were not responsible. To prevent this abuse, the statute was passed, making all pernors of the profits responsible, in real actions, for damages. Stearns on Real Actions 390. But the action of ejectment, being a personal action in its origin, there was no need of a statutable provision to authorize an award of damages in it. It has taken the place of the real actions of common law. Reinicker, claimant of the fee, must be regarded as in possession; and his tenant's possession was his.

It is true, that Chirac appeared as landlord in the ejectment cause. But our purpose is, to show that Reinicker appeared by another; and though that other also assumed his (Reinicker's) title, that circumstance serves only to aggravate the fraud attempted upon the law, and to show the more conclusively, that Reinicker waived his privilege of defending in his own name, and by candidly announcing his interest on the record. We are not estopped, then, by C. J. F. Chirac's usurpation of the title of landlord, as well as the part of a defendant. If this action were even against him, we should be compelled to prove him landlord, notwithstanding his pretension to the character by appearing as landlord. His appearing might be relied on, to prove his being landlord, but only *as a circumstance, and as evi- [*287
dence, and not as an estoppel. We admit, that a party, to be liable for mesne profits, must be a trespasser; and we meant to prove Reinicker, by privity, to be a trespasser. The case in 7 T. R. 108 shows, that if the husband there had had notice of the ejectment, he would have been answerable for the mesne profits.

3. The action for mesne profits being the mere sequel of the recovery in the ejectment cause, the record of that recovery is the proper evidence to show the lessors of the plaintiff entitled to the mesne profits, so as they are claimed within the terms of the demise in the ejectment. If profits antecedent to the term are asked, then the plaintiffs cannot rely on the ejectment recovery, as conclusive evidence, but must prove their title to the land anew, and again open the merits of the ejectment cause. The claim for mesne profits here keeps within the limits of the ejectment demise, and we had no occasion, therefore, to prove our title, otherwise than by the record of recovery in the ejectment. Runnington Eject. 492–7; Skin. 247; 1 Salk. 260; Bull. N. P. 87; 1 Burr. 665; 2 Str. 960; Cowp. 243; 2 Doug. 584; Adams' Eject. 329, 333–4. Although the husband, who did not appear as a lessor of the plaintiff, is joined in this action with his wife, who was a lessor, still the record of the ejectment is evidence for us, since the husband no new party in interest. If necessary, this might be enforced by [*288
analogy from the writ of re-disseisin in the *case of a similar change

of parties. The addition of the husband, at the utmost, only imposed on us the duty of proving the marriage.

4. A variance between the writ and declaration could only have been taken advantage of upon *oyer* of the writ, and plea in abatement. Stephen on Pl. 69; Chit. Pl. 439; 2 Wils. 85; 2 Salk. 658. *Oyer* will not now be granted, and such a plea cannot, therefore, obtain. Nor will the proceedings be set aside for irregularity, on account of such a variance. 1 Bos. & Pul. 645; 6 T. R. 364; Com. Dig. Abatement, G. 8; Bac. Abr. Abatement, H. 1. Even supposing, that for this defect, the party might have refused to plead, or otherwise have made the objection available, it is too late now since he has pleaded the general issue. 1 Bos. & Pul. 383.(*a*) A variance of this kind could once have been taken advantage of, in England, upon writ of error; but that cannot now, since the statute of jeofails, be done there; nor in Maryland, since her act of 1809, ch. 153. Where the writ is, according to the ancient practice, fully recited in the declaration, advantage might be had of the variance on demurrer. But that is not the case here. 1 Saund. 318, in note. The recital of the writ in the declaration is unnecessary; and, when made, as in this instance, is to be rejected as surplusage. 1 Saund. 318; 2 Keb. 544; 2 Ld. Raym. 908; 1 Str. 225; Rep. temp. Hardw. 184, 189; 1 H. Bl. 250. *The body of the amended declaration here, speaks "of the plaintiffs," not of the persons mentioned or named in the recital. Besides, even the recital does not say that Maria Desportes was sued by the name of Maria Bonfils, but only mentions the circumstance of her "being called" so, at the bringing of the suit, as it would insert an *alias* for her name.

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The variance occurs in an amended declaration, filed after leave had to amend. The statute of Maryland of 1809, ch. 153, authorizes any amendment to be made "to bring the merits of a suit to issue." This amendment was justified by that act of the legislature; and the court might have made the writ to conform to the alteration, as, in England, an original writ is made to suit the declaration. The writ, in Maryland, is sometimes altered from debt to case, to suit the *narr.* The husband, here, was joined to the wife, only for conformity, and not by reason of a new interest, or as interested; since the suit, if no objection had been made, before general issue, might have proceeded in the single name of the wife. One suing by guardian, in the first instance, and afterwards becoming of age, during the suit, may, and must, appear then by attorney. If the variance could have been, and had been, pleaded in abatement, the court would, under the statute of Maryland, have allowed the declaration to be amended and cleared of the variance. This declaration may be assimilated to a declaration by the bye, by the husband and wife, though *the writ is sued out in the single name of the husband. Chit. Pl. 252. Though a misnomer may be pleaded in abatement, even in England, the *narr.* and writ may be rectified in that particular, upon terms. A party naming himself generally in a writ, may, nevertheless, declare in a special character. 1 Wils. 141; 3 Ibid. 61; 2 W. Bl. 722. The variance between the amended declaration and the first declaration, does not show that the former varies from the writ. The

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(*a*) A decision founded on the statute, allowing a plaintiff, in certain cases, to enter an appearance for a defendant, and proceed to judgment.

amended declaration is as good evidence of the contents of the writ, as the original declaration is.

D. B. Ogden and *Webster*, for the defendant in error: 1. Stated, that it was necessary to advert to the specific question which was put, as to the defendant's retaining counsel, and to the circumstances under which it was asked. The question involved the disclosure of the party's views, and of his instructions to his counsel, and of communications which were received by him in his capacity of counsel, and that would not have been made to him, if he had not been so. It is not necessary that a suit should be pending, to bind the counsel to secrecy for his client; any communication, after retainer of counsel, is within the rule against disclosure, if it relates to the suit, and is within the scope of the confidence given to the counsel.

2. No person can be made liable for the mesne profits, after recovery in ejectment, who has not *been a trespasser. The ejectment suit com- [*291
plains of a trespass, and the person to be charged for the mesne profits must, therefore, have been actually a party to that suit, by having appeared as defendant, or by having been required to appear, by service of process in the suit, and then failing to appear. It is only by this judicial notice, and a waiver of the privilege of appearing, testified by the record of the suit in ejectment, that the defendant in the action for mesne profits can be treated as if he had been a defendant in the ejectment, and adjudged a trespasser, to bear the liability for mesne profits. By mere waiver *in pais*, or notice extraneous to the record, a party cannot be rendered liable for mesne profits, although, in fact, he may have been interested in the result of the ejectment suit. That interest, however, *quoad* the ejectment, and in reference to the suit for mesne profits, does not prove him to be a trespasser, which he must be, before he can be liable to the claim. 1 Selw. N. P. 121. The court must look to the record of the ejectment for light as to the responsible parties on the score of mesne profits; they cannot derive it from other quarters, or collateral proof. Hence, too, the record of the ejectment is not evidence of the right of the lessors of the plaintiff to the mesne profits, as against one who was not actually a party in the ejectment suit, nor effectively so, by being called on, through notice, in the process of ejectment, to appear as defendant. Here, however, *another person than [*292
the defendant, Reinicker, was admitted in the ejectment suit to defend as the landlord of the property in question. He declared himself the landlord, in claiming to defend as such; and the plaintiffs in ejectment, not denying his pretension in that respect, have acceded to his representation of himself, and must now be bound by it, and are estopped from saying that any other person was landlord. Reinicker, therefore, can in no wise be connected with the ejectment suit; and, at all events, the recovery there is not conclusive against him, that the lessors of the plaintiff are the proper claimants of the mesne profits. They must prove themselves the heirs entitled to the land, and to the mesne profits, as the result of that proof. The case from 3 Camp. 455, does not establish the plaintiffs' positions on these heads. The decision there was on another point; and the reasoning of it shows, that the party liable for the mesne profits must be a trespasser. The action for mesne profits will lie, only where trespass *quare clausum*

fregit would lie. According to that principle, Reinicker could not, by mere force of notice *in pais* of the suit, be held liable for the mesne profits.

3. The case as to the amended declaration is clear of all the learning respecting the mode of taking advantage of a variance between the declaration and the writ. The variance there meant, is not such a departure from the writ as in this case, as it effects an entire change of suit, and substitutes, in reality, a new suit, for *that which the writ and first declaration defined. There is no declaration here, in the suit which was originally brought; or, at least, that which was a declaration has not been acted on; but the issue is taken, and the jury sworn, between new parties, and out of the suit which the record professes to carry on. The court may, therefore, take notice of the change of parties, and of claim, and of suit, in this case; since they cannot fail to see between what parties they are adjudicating; and it is not necessary that the inconsistency be brought to their knowledge by a plea in abatement exclusively. It does not appear that Maria Bonfils was unmarried at the time of bringing the suit.

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February 20th, 1826. STORY, Justice, delivered the opinion of the court.—This is an action of trespass for mesne profits, brought by the plaintiffs in error against the defendant in error, in the circuit court for the district of Maryland. The cause comes before this court upon exceptions taken by the plaintiffs, on the trial of the cause in the court below.

The plaintiffs had recovered judgment, and possession of the premises, in an ejectment, in which J. C. F. Chirac prayed to be admitted as landlord, to defend the premises, and was admitted accordingly, under the common consent rule. The record of the proceedings in that action was offered by the plaintiffs, as evidence in the present suit; and they then offered to prove, by the testimony of R. G. Harper and W. Dorsey, *Esquires, that the defendant had retained, and paid them, to conduct the defence of the ejectment for his benefit, and also propounded to these witnesses the following question: Were you retained, at any time, as attorney or counsellor, to conduct the ejectment suit above mentioned, on the part of the defendant, for the benefit of the said George Reinicker, as landlord of those premises? This question was objected to, as seeking an improper disclosure of professional confidence. The court sustained the objection; and this constitutes the first ground of exception.

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The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed, at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is, whether the question did involve the disclosure of professional confidence. If the question had stopped at the inquiry, whether the witnesses were employed by Reinicker, as counsel, to conduct the ejectment suit, it would deserve consideration, whether it could be universally affirmed, that it involved any breach of professional confidence. The fact is preliminary, in its own nature, and establishes only the existence of the relation of *client and counsel, and therefore, might not necessarily involve the disclosure of any

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communication arising from that relation, after it was created. But the question goes further. It asks, not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him, as landlord of the premises. We are all of opinion, that the question, in this form, does involve a disclosure of confidential communications. It seeks a disclosure of the title and claim set up by Reinicker to his counsel, for the purpose of conducting the defence of the suit. It cannot be pretended, that counsel could be asked, what were the communications made by Reinicker as to the nature, extent or grounds of his title; and yet, in effect, the question, in the form it which it is put, necessarily involves such a disclosure. The circuit court was, therefore, right in their decision on this point.

The plaintiffs then gave in evidence certain deeds and patents, by which, and the admissions of counsel on both sides, the title to the premises in question was vested in John B. Chirac, deceased; and also gave in evidence, certain depositions, to prove who were the heirs of J. B. Chirac, and also offered the record in the ejectment, to prove Maria Bonfils to be one of the heirs; and then offered to prove, by parol evidence, that the defendant was, in fact, landlord of the premises, at the commencement and during the progress of the ejectment, and had notice of the same, and employed counsel to defend *the same; and received the rents and profits thereof, during the progress of the ejectment; which evidence the [*296 court refused to admit: and this constitutes the second exception of the plaintiffs. The plaintiffs then offered to prove the same facts (not saying by parol evidence), with the additional fact, that counsel did defend the same action for the benefit of the defendant. This evidence was also rejected by the court, and constitutes the third exception of the plaintiffs.

The question of law, involved in each of these exceptions, is substantially the same. It is, whether a person, who was not a party to the ejectment, and did not take upon himself, upon the record, the defence thereof, but another did as landlord, may yet be liable in an action for the mesne profits, upon its being proved that he was, in fact, the landlord, received the rents and profits, and resisted the recovery. It is undoubtedly true, that in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence in an action for mesne profits against the tenant in possession, when he has been duly served with a notice in ejectment, whether he appears, and takes upon himself the defence, or suffers judgment to go by default against the casual ejector. The reason is, that in the first case, he is the real party on the record; in the last, he is considered as substantially the defendant, and the judgment by default, as a confession of the title set up in the ejectment. Such was the decision *of the court in *Aislin* v. *Parkin*, in 2 Burr. 667. But in relation to [*297 third persons, the judgment in ejectment is not conclusive; and if they are sued in an action for mesne profits, which is substantially an action against them as trespassers, they may controvert the plaintiff's title at large. In such a suit, the record of the ejectment is not evidence to establish the plaintiff's title; but it seems admissible, for another purpose, that is to say, to show the possession of the plaintiff. The plaintiff may certainly prove his possession, connected with his title, by any sufficient

evidence *in pais;* and if his possession has been under a judgment of law, he is entitled to establish it, by introducing the record of the recovery, and an executed writ of possession under it.

The question then is, generally, whether it is competent for the plaintiff to maintain an action for mesne profits, against any person who is in possession of the land by means of his tenants, and who, by his acts, commands or co-operation, aids in the expulsion of the plaintiff, and in withholding possession from him. All persons who aid in, or command, or procure a trespass, are themselves deemed in law to be trespassers, whether they are actually present, or do the act though the instrumentality of their agents and servants. A recovery of the possession, in an ejectment against one of such agents, does not constitute a bar to an action for
*298] mesne profits against another agent, for the same reason, that *the former suit is no bar to the latter against the defendant in ejectment, viz., that the mesne profits were not a matter in controversy in the ejectment. If, then, it is competent to maintain the action for mesne profits, against any trespasser, although not a defendant in ejectment, it is competent to prove that the defendant is in that predicament. The evidence offered, in this case, was strong, to prove the fact, that the defendant was a party to the trespass, supposing the plaintiffs to have established their title and possession. If he was landlord of the premises, and the other parties were in possession under him; if he was in the perception of the rents and profits, if he resisted the plaintiff's title and possession, and co-operated in the acts of the tenants for this purpose, the evidence was proper for the jury as proof of his being a co-trespasser.

This doctrine is supported by the case of *Hunter* v. *Britts*, 3 Camp. 455, which was cited at the bar. There, the judgment was against the casual ejector in the ejectment suit, and the action for the mesne profits was brought against Britts, as landlord; and he was proved to be in the receipt of the rents and profits, from the time of the demise, till the writ of possession was executed. The ejectment was served upon the tenant; there was no evidence that Britts had any notice of this, till after judgment; but, subsequently, he promised to pay the rent, and the costs, to the plaintiff. It was objected, that the judgment in ejectment was not, under these circum-
*299] stances, evidence of *title against Britts; and Lord ELLENBOROUGH held, that it was not, without notice of the ejectment. But he thought that his subsequent promise amounted to an admission, that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. The language of the learned judge seems, indeed, to import, that if the landlord had had notice of the ejectment, he would have been concluded by the recovery in the ejectment. It might be so, if the common notice had been formally given to him, as tenant in possession, and he had neglected to take upon himself the defence of the suit. If, however, the notice was *in pais*, and conduced merely to prove his actual knowledge of the suit, without calling upon him to defend it, we are not prepared to admit, that on general principles, it ought to have such an effect. Adams' Eject. 336 (2d Ed.). But the point actually decided was, that a party might be charged, in an action for mesne profits, who was not, in any sense, a party to the ejectment, by establishing the title against him, and showing

his connection as landlord, with the tenant in possession, and his adoption of the acts of the latter.

But it is said, that assuming the law to be so, in general, yet, in the present case, the plaintiffs are estopped from setting up the fact, that the defendant was the real landlord, because, in the ejectment, one J. C. F. Chirac prayed leave of the court, "as landlord of the premises, to be made defendant" in the place of the casual ejector, which was, with the consent of the lessee of *the plaintiffs, allowed by the court. It does not [*300 appear to us, that any such estoppel arises from this allegation in the record. The record itself certainly does not constitute a technical estoppel, for it is *res inter alios acta.* The most that can be said is, that it is proper evidence, to prove who the plaintiffs, at that time, deemed to be landlord, and therefore, admissible to rebut the presumption that the present defendant was the landlord. But, certainly, the evidence was not conclusive upon either party. It was open to the plaintiffs to show, that, in point of fact, the present defendant was the real landlord, that the admission in the record was founded in mistake of the facts, or that J. C. F. Chirac was a sub-landlord under Reinicker, or his superior landlord. What would have been the effect of such proof, is not for this court to determine. We think, then, that the evidence offered by the plaintiffs was admissible, upon general principles; and we see no estoppel which excludes it in this particular case. The directions of the circuit court were, on this point, erroneous.

If it had appeared upon the record, that the evidence offered by the plaintiffs was solely to connect the defendant with the ejectment, so that the recovery would be conclusive upon him, in the same manner as if he had been a party on the record, and, as such, admitted to defend, and actually defending the suit, the case might have required a very different consideration. We have already intimated an opinion, that notice of an ejectment suit, or defence of the suit, by a *person not tenant in possession, or [*301 defendant on record, does not make him a party to the suit, in contemplation of law, so as to conclude his rights.

In considering the fourth and fifth exceptions, it is necessary to advert to the fact, that the plaintiffs in this action originally were Anthony Taurin Chirac, Mathew Chapus and Anna Maria his wife, Mathew Thevenon and Maria his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. During the pendency of the suit, the plaintiffs obtained leave to amend their declaration, and did amend it, by introducing the name of John B. E. Bitarde Desportes, as husband of the said Maria, called, at the commencement of this suit, Maria Bonfils. To this amendment no objection was taken, and the defendant pleaded to the declaration, so amended, the general issue. The evidence of title of John B. Chirac, deceased, being introduced, and also evidence to prove that Anthony T. Chirac and the female plaintiffs were heirs-at-law of John B. Chirac, the defendant then prayed the court to direct the jury, "that they ought to find a verdict for the defendant, unless they are satisfied that all the plaintiffs are the *proper* heirs-at-law of the aforesaid John B. Chirac," which direction the court accordingly gave. The probable intention of the defendant was to pray an instruction to the jury, that unless all those of the plaintiffs who claimed to be heirs of John B. Chirac, should establish their title, the suit could not [*302 be maintained. In this view, the opinion of *the court would be cor-

rect, for it is a general rule that no recovery can be had, unless all the plaintiffs are competent to maintain the suit. If, therefore, the title fails as to one, it is not maintainable in favor of the others. The proof does not, under such circumstances, meet the case set up in the declaration. But, framed as this exception actually is, the direction given by the court is, in its terms, erroneous. It was not necessary to prove that all the plaintiffs are the *proper* heirs-at-law of J. B. Chirac. The action was maintainable, if the husbands were not the proper heirs of J. B. Chirac; for, in right of their wives, they were proper parties to the suit. The fourth exception is, therefore, well taken.

The fifth exception is founded on the supposed variance between the writ and declaration, by the amendment, introducing the husband of Maria Bonfils upon the record. The court held this variance fatal, under the general issue. It is observable, that this amendment was made under an order of the court, and was not objected to, on the record, by the defendant; and that the general issue was subsequently pleaded. It has been decided, in this court, that the allowance or disallowance of amendments, is not matter for which a writ of error lies here. Variances between the writ and declaration, are, in general, matters proper for pleas in abatement; and if, in any case, a variance between the writ and declaration can be taken advantage of by the defendant, in the court below, it seems to be an established rule, that
*303] it cannot be done, except *upon *oyer* of the original writ, granted in some proper stage of the cause. The existence of such variance forms no matter of controversy, upon the general issue, by which the jury are to be governed in forming their verdict. In the present case, as no objection was taken to the amendment, upon the record, it must be deemed to have been waived by the defendant, and therefore, not propor to be insisted upon at the trial. See Com. Dig. Abatement, G. 8; Com. Dig. Pleader, C. 13; 2 Wils. 85, 394, 395; 1 Chit. Pl. 438, 439; Stephen on Pl. 68, 423; 1 Saund. 318, note 2, by Williams. It does not appear, on the record, whether Maria Bonfils was married, before or pending the suit; and the fact might have a material bearing upon the propriety of granting the amendment, since, at all events, if pending the suit, it would not of itself abate the suit; and the objection could only be made available by a plea in abatement. Com. Dig. Abatement, H. 42.

Upon the whole, it is the opinion of the court, that there is error in the directions of the circuit court, in the last four exceptions, as contained in the record, and for this cause, the judgment must be reversed, and a *venire facias de novo* awarded.

Judgment reversed.

*Finley, Appellant, *v.* The President, Directors and Company of the Bank of the United States, Respondents.

Parties to foreclosure.

Although, in general, all incumbrancers must be made parties to a bill of foerclosure, yet where a decree of foreclosure and sale was made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there were any prior incumbrancers, the proceedings will not be set aside, upon the application of the mortgagor, in order to let in a prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief.

Quære? Whether such a practice be admissible in any case?

But in such a case, the prior incumbrancers are not bound by the decree in a suit to which they are not made parties; and the purchasers under the sale take subject to the prior liens.[1]

Appeal from the Circuit Court of Kentucky.

February 24th, 1826. This cause was argued by *Bibb*, for the appellant;(*a*) and by *Webster*, for the respondents.

February 25th. Marshall, Ch. J., delivered the opinion of the court.—*This is a bill in chancery brought by the Bank of the United States against James Finley, to obtain a decree for the sale of property [*305 mortgaged for the security of a debt due to the bank.

The mortgage deed was executed on the 28th of September 1822, and contains a recital of debts due to the bank, to the amount of $6240, on account of which a note was executed on that day to the bank, for that sum, payable sixty days after date. At the November term of the circuit court of the United States for the district of Kentucky, the bill was filed, stating the consent of the mortgagor to an immediate sale of the morgaged property, although the day of payment was not arrived; and on the same day, an answer was filed, consenting to a decree for the sale. A decree was immediately entered, by consent of parties, directing the marshal to sell the property. The court then proceeds to direct the marshal, after deducting the expenses of sale, his commission and the costs, to pay to the bank the sum of $6240, with interest from the date of the note. The sale was made in pursuance of the decree, and the report thereof was returned to the court by the marshal. At the succeeding term, William Coleman filed his petition, stating, among other things, that he held a prior mortgage on the same lands, and praying that he might be made a party defendant to the suit. His petition was rejected, and he prayed an appeal to this court, which *has been dismissed as irregularly granted. After dismissing this [*306 petition, the circuit court pronounced a decree affirming the sale made by the marshal, and directing the credit to which Finley should be entitled for the money paid out of its proceeds to the bank. This decree also con-

(*a*) He cited the following authorities, to show that all incumbrancers, or persons having an interest existing at the commencement of the suit, must be made parties to a bill of foreclosure, or they will not be bound by the decree. Haines *v.* Beach, 3 Johns. Ch. 459, 466. Ensworth *v.* Lambert, 4 Id. 605; M'Gown *v.* Yerks, 6 Id. 450; and the authorities collected in those cases.

[1] Rankin *v.* Scott, 12 Wheat. 179; Vanderkemp *v.* Shelton, 11 Paige 28; Peabody *v.* Roberts, 47 Barb. 91.

siders the debt due to the bank as amounting to $6240, with interest from the date of the note.

The mortgage to Coleman is filed, and appears to be dated three days anterior to that made to the bank. A suit to obtain a sale of the premises was instituted in the state court, in March 1823, and was depending when the final decree was pronounced at the suit of the bank. After the final decree had been pronounced, Finley filed a petition, praying that the sale and decree might be set aside, alleging, among other reasons therefor, that Coleman, the prior mortgagee, had not been made a party, although the existence of his mortgage was known to the bank. The prayer of the petition was rejected, and Finley has appealed to this court. The counsel for the plaintiff in error insists, that this decree ought to be reversed, because it was pronounced in a case in which proper parties were not before the court.

It cannot be doubted, that Coleman ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause, until he was introduced into it. But this fact was kept out of view, until *the decree
*307] was pronounced, the sale made, the money paid to the creditor, and the report of his proceedings returned by the marshal. If the manner in which the sale was made, and the money directed to be paid, be unusual and exceptionable, it was done by consent, and the error is not imputable to the court. The only question presented to the judges by this petition, was, whether a decree, completely executed by a sale of the property, and payment of the purchase-money, should be set aside, and the suit reinstated, for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown, by any proceedings in the cause, to be concerned in interest, until the decree was made and executed. There would certainly be great inconvenience in such a practice; and if it be admissible in any case, on which the court gives no opinion, it must be where the mischief resulting from a rejection of the petition would be irremediable. This is not shown to be a case of that description. Coleman's mortgage cannot be affected by this decree; his rights cannot be extinguished by it. His suit in the state court will proceed as if this decree had never been pronounced. The purchasers under the decree of the circuit court take the land subject to prior incumbrances, and have, probably, taken this incumbrance into consideration in the price given for the land. But be this as it may, they do not complain, or object to their purchase, in consequence of the cloud hanging over the title. Coleman's rights cannot
*be affected; and if Finley has suffered, by selling his land subject to
*308] a lien, it is an injury which he has knowingly brought upon himself. This is not, then, a case for such an extraordinary measure as opening a decree made by consent, after it has been carried into execution, on the petition of the party who has given that consent. We do not think the decree is erroneous, because the prior mortgagee was not made a defendant, that fact not having appeared to the court, until the decree was completely executed.

But in the disposition of the money produced by the sale, a small mistake appears to have been made. There were some previous debts due from Finley to the bank, amounting to $6240, which appear to have been absorbed in the note given for that sum on the 28th of September 1822, payable sixty

days after date, to secure the payment of which the mortgage deed was executed. If this note carried interest from its date, that fact does not appear, and cannot be presumed. The mortgage deed does not purport to secure the payment of such interest. Yet the decree of the circuit court subjects the mortgaged property to its payment. This error ought to be corrected, and may yet be corrected in the circuit court. It does not affect the sale. In all other respects, the decree is to be affirmed.

DECREE.—This cause came on to be argued, &c.: On consideration whereof, this court is of opinion, that there is no error in the decree for the sale of the mortgaged premises in the bill *mentioned, the same being made by consent; nor in the final decree confirming the report of the [*309 marshal, except so far as it directs that the note in the deed of mortgage mentioned should carry interest from its date, whereas, interest should be computed from the day on which the said note was made payable, which was sixty days after its date. The said decree, therefore, is erroneous so far as respects the computation of interest before the said note became payable, and is so far reversed, and is, in all other respects, affirmed. And the cause is remanded to the said circuit court, that the said decree may be reformed so far as it is herein declared to be erroneous: And the parties are to pay their own costs.

WETZELL *v.* BUSSARD.

Statute of limitations.

An acknowledgment of a debt which will take a case out of the statute of limitations, must be unqualified and unconditional.[1]

If it be connected with circumstances, which, in any manner, affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.

Thus, where an action was brought, on a promise in writing to deliver a quantity of powder, and the original *assumpsit* being satisfactorily proved, the defendant relied upon the statute of limitations; *and one witness deposed, that the defendant told him, that the plaintiff need [*310 not have sued him; for if he had come forward and settled certain claims which defendant had against him, the defendant would have given him his powder: to another witness, defendant said, that he should be ready to deliver the powder, whenever the plaintiff settled a suit, which Dr. E. had brought against him, &c.: *Held*, that those declarations did not amount to an unqualified and unconditional acknowledgment of the debt, but that the plaintiff ought to have proved a performance, or a readiness to perform the condition on which the new promise was made.[2]

Error to the Circuit Court for the District of Columbia.[3]

February 7th, 1826. This cause was argued by *Swann*, for the plaintiff, citing *Swan* v. *Sowell*, 2 B. & Ald. 759; *Leaper* v. *Tatton*, 16 East 420; 1 Salk. 29; *Sluby* v. *Champlin*, 4 Johns. 461: and by *Jones* and *Key*, for the defendant, citing *Clementson* v. *Williams*, 8 Cranch 72; *Bush* v. *Barnard*, 8 Johns. 407.

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[1] Thompson *v.* Peter, 12 Wheat. 565; Bell *v.* Morison, 1 Pet. 351; Kampshall *v.* Goodman, 6 McLean 189; Georgia Ins. Co. *v.* Ellicott, Taney's Dec. 130.

[2] Read *v.* Wilkinson, 2 W. C. C. 514; Lonsdale *v.* Brown, 3 Id. 404; Kampshall *v.* Goodman, 6 McLean 189; Ex parte Cornwall, 9 Bl. C. C. 114.

[3] See 2 Cr. C. C. 252.

February 11th. MARSHALL, Ch. J., delivered the opinion of the court.—This was an action of *assumpsit*, brought by the plaintiff in the circuit court of the United States for the district of Columbia, and county of Washington, on a promise in writing to deliver a quantity of powder. The defendant pleaded the general issue, and the statute of limitations.

The original *assumpsit* having been satisfactorily proved, the plaintiff, to support the second issue, introduced a witness, who swore that the defendant, in a conversation with him, soon after the commencement of the suit, said, that the plaintiff need not have sued him, for if he had come forward and settled certain claims which the defendant had against him, the defend-
*311] ant would have given him *his powder. To another witness, who spoke to him, before the commencement of the suit, at the instance of the plaintiff, he said, that he should be ready to deliver the powder, whenever the plaintiff settled a suit which Doctor Ewell had brought against him in the district court of Alexandria. Other witnesses proved declarations of the same import. The defendant demurred to this testimony, and the plaintiff joined in demurrer. The court gave judgment in favor of the defendant; and the plaintiff has brought his cause, by a writ of error, into this court.

It is contended, on the part of the plaintiff, that he has proved an acknowledgment of the debt, and that such acknowledgment, according to a long series of decisions, revives the original promise, or lays a foundation on which the law raises a new promise. The English, as well as American, books, are filled with decisions, which support this general proposition. An unqualified admission that the debt is due at the time, has always been held to remove the bar created by the statute. But where the terms of the acknowledgment are in any degree equivocal, or where some qualification has been annexed to the admission, the question whether the declarations of the party amount to an acknowledgment of an existing debt, on which the law will raise an *assumpsit*, has been differently determined.

Leaper v. *Tatton*, 16 East 420, was a suit against the acceptor of a bill
*312] of exchange, *who pleaded the statute of limitations. At the trial, the plaintiff offered a witness, who swore that the defendant, when applied to for payment, said, that he had been liable, but was not liable then, because the bill was out of date. He acknowledged his acceptance, but said, he would not pay it, that it was not in his power to pay it. A verdict was taken for the plaintiff; and on a motion for a new trial, Lord ELLENBOROUGH said, "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant, that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid be shown, it does away the statute." BAYLEY, J., said, the acknowledgment was evidence of a debt; acknowledging his acceptance, and that he had not paid it, creates a debt. The rule was discharged. Although, in this case, the defendant did not especially admit the existence of the debt, the implication is irresistible. The reason he assigns for not being liable is, that the bill is out of date, and his reason for not paying it is, his inability. The court so understood the testimony; and Lord ELLENBOROUGH speaks of his acknowledgment as amounting to an admission that he had not paid the bill, and could not pay it.

In the case of *Swan* v. *Sowell*, 3 B. & Ald. 759, BAYLEY, J., says, that if a party admits the debt, and does not say, that it is satisfied, or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will, in *these cases, raise an implied promise to pay the debt then [*313 acknowledged to be due. The language of Mr. Justice BAYLEY is not entirely free from doubt. If, by "insufficient excuse," he means an excuse which, in itself, implies an admission that the debt remains due, except for the bar created by the act of limitations, the proposition is undoubtedly supported by the general course of the cases. But if his declaration extends to an excuse, which, if true, furnishes a real objection to the payment of the claim, in whole or in part, we think it is laid down too broadly.

Both the English and American cases are very well summed up in a note in 4 Johns. 469, note *b*. The current of the English decisions seems to be in favor of the principle, that any expressions which amount to an admission that the debt was originally due, and has not been paid, will remove the bar created by the act, and revive the original *assumpsit*. The decisions, however, as to this point, have not been entirely uniform. In *Coltman* v. *Marsh*, 3 Taunt. 380, on a motion to set aside a nonsuit, in a case in which the statute of limitations had been pleaded, it appeared, that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since." It was contended, that these words ought to have been left to the jury; but the court refused the motion. So, in the case of *Leaper* v. *Tatton*, 16 East 420, the defendant said, "that he had been liable, *but was [*314 not liable then, because the bill was out of date." Lord ELLENBOROUGH held, at *Nisi Prius*, that this might be considered as no more "than pleading the statute of limitations in his own person;" and the verdict was taken on other words spoken at the same time. Yet these words imply very strongly, that the debt was originally due, and remains unpaid.

Some of the American cases proceed on the idea of a new promise, for which the ancient debt is a sufficient consideration; and this is a distinction of great importance, where the acknowledgment is connected with anything required by the defendant. In the case of *Clementson* v. *Williams*, 8 Cranch 72, this court expressed the opinion, that the doctrine of reviving debts barred by the act of limitations, had been carried full as far as it ought to be carried, and that the statutes on that subject ought to be construed, like other statutes, so as to effect the intention of the legislature. In that case, a declaration by one partner, that the account was originally due, and that he had never paid it, and did not know that it had ever been paid, but supposed his partner had discharged it, was declared to be insufficient to take the case out of the statute. It is true, that the partnership was dissolved, when this declaration was made, but the court did not put the case on that point. It was determined on the insufficiency of the acknowledgment. We think, upon the principles expressed by the court in the case in 8 Cranch, that an *acknowledgment which will revive the original [*315 cause of action, must be unqualified and unconditional. It must show positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be contrued to revive the original debt, that revival is

conditional, and the performance of the condition, or a readiness to perform it, must be shown.

In the case at bar, the defendant said to one witness, that if the plaintiff had come forward, and settled certain claims the defendant had against him, he would have given him his powder; and to another he said, "he should be ready to deliver the powder, whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant, in the court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff." These declarations do not amount to an unqualified and unconditional acknowledgment that the original debt was justly demandable. They assert a counter-claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. *316] It may be condidered as a new promise, for which *the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform the condition on which the promise was made.

A distinction seems to have been taken in England, between a promise to pay a sum of money, and a contract for the performance of a particular act. In *Boydell* v. *Drummond*, 2 Camp. 157, Lord ELLENBOROUGH said, "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract."

But without placing the cause on this distinction, the court is of opinion, that the original cause of action is not revived, and that there is no error in the judgment.

Judgment affirmed, with costs.(a)

(a) The courts, both in this country and in England, have frequently expressed their regret, that, in construing the statute of limitations, the original text had not been more strictly adhered to, so as to effectuate the intention of the legislature, proceeding upon the reasonable presumption furnished by the lapse of time, and upon the salutary policy of discouraging vexatious litigation. (See Bryan *v.* Horsman, 4 East 599; Ward *v.* Hunter, 6 Taunt. 210; Brandram *v.* Wharton, 1 B. & Ald. 463; Bartley *v.* Faulkner, 3 Ibid. 288.) Mr. Evans, in the notes to his Translation of Pothier on Obligations, speaking of Bryan *v.* Horsman, has the following observations, which *317] *are marked by the independent spirit of that abie writer. "The decision was certainly in conformity with the series of precedents upon the subject; but as to the general precedent of adhering to the mere authority of former cases, in opposition to the positive terms of an act of parliament, or an established maxim of law, of placing a secondary above a primary authority, much doubt may fairly, and without disrespect, be entertained. Where the return to the ancient principle would be attended with material detriment, as by disturbing titles to real estates, held under the sanction of rules, which, however erroneous in themselves, have been established by a series of precedents, the reason for an adherence to the precedents evidently preponderates; but where there will be no immediate inconvenience, beyond the immediate case, where the general consequences will be wholly prospective, I cannot but adhere to the opinion (which I have, perhaps, expressed with obtrusive repetition), that the courts of justice

have as much authority now to restore the law, as they have had before to subvert it; and that a correct principle of law is an authority entitled to a higher respect that an erroneous set of precedents. Considering the law, however, upon this particular subject, as now beyond the reach of argument, and aware how much my own opinion, upon the effect of precedent, is different from that which usually prevails in practice, I think it not irrelevant, to suggest to persons whose claims are barred by the statute, and who wish to obtain an acknowledgment of the subsistence of the debt, the utility of filing a bill of discovery, obliging the defendent to state whether the debt was contracted, and whether it has been paid. If the subsistence of the debt is admitted, and without perjury, it cannot be denied, it will not, if there is any consistency of decision, be of any avail to add a claim to the protection of the statute." (2 Evans' Transl. Pothier Oblig. app'x, No. 15, p. 125, note *b*.) Mr. Serjeant Williams also remarks, that, "After all, it might, perhaps, have been as well, if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is, therefore, to be favored. (Green *v.* Revitt, 2 Salk. 421–2.) And although it will now and then prevent a man from recovering an honest debt, yet it is his own fault, that he postponed his action so long; besides which, the permitting of evidence of promises and acknowledgments, within the six years, seems to *be a dangerous inlet to perjury." (2 Williams' Saund. 64 *b*, note.) [*318

In the countries governed by the Roman civil law, a much more literal rule of interpretation has been always applied to their ordinances of prescription or limitation. Thus, in France, though a positive acknowledgment of the debt is sufficient to interrupt the running of the prescription, yet a verbal acknowledgment, when the debt exceeds 100 livres, can be of no use to the creditor, as the French law requires all contracts exceeding that amount (now 150 francs, Code Civ. Nap. No. 1341) to be in writing; and this statute of frauds has also been very strictly adhered to by the courts of justice in that country. (Pothier, Des Oblig. No. 660, 688; Erskine's Inst. Law of Scotland, b. 3, tit. 7, § 10.) But what is called the decisory oath may be tendered to the debtor in a manner somewhat similar to a bill of discovery, as suggested by Mr. Evans. (Pothier, Des Oblig. No. 660, 684; Code Civ. Nap. art. 2275.) That admirable system of jurisprudence which forms the basis of the municipal law of all Europe (except England), is strongly imbued with the principles on which the rules for the prescription or limitation of actions are founded. Many of the eminent judges who have successively adorned the equity tribunals of England, have expressed their strong sense of the provident wisdom of these principles, derived from a deep knowledge of human nature, and adopted from a due regard to the peace and order of society. (See Cas. temp. King 156; 4 Bro. C. C. 269; 1 Ball & B. 156; 2 Jac. & Walk. 140. And for the doctrines of this court as to the application of the analogy of the statute of limitations of possessory actions, &c., in equity, see Elmendorf *v.* Taylor, 10 Wheat. 152, 168, and note *a*, Id. p. 177; Prevost *v.* Gratz, 6 Ibid. 504; Thomas *v.* Harvie's Heirs, 10 Ibid. 146; Hughes *v.* Edwards, 9 Ibid. 489, 497. And, as to the presumption of grants from the lapse of time, see Richard *v.* Williams, 7 Ibid. 59, 109.)

The judges in this country have recently shown a strong disposition to break through the chain of authorities by which a mere acknowledgment of the existence of a debt has been permitted to take the case out of the statute of limitations of personal actions. See the very able judgment of Mr. Justice SPENCER, in Sands *v.* Gelston (15 Johns. 511), in which a powerful effort is made to rescue the statute from a series of misrepresentations which has *nearly destroyed its efficacy. See also, Roosevelt *v.* Mark (6 Johns. Ch. 266, 290), where the authority of Sands *v.* Gelston is recognised by [*319 Mr. Chancellor KENT, and the principle is asserted, that an acknowledgment, to take a case out of the statute of limitations, must be of a present subsisting debt; and if the acknowledgment be qualified, so as to repel the presumption of a promise to pay, it is not evidence of a promise to pay.

In the case referred to in the text, of Clementson *v.* Williams (8 Cranch 72), this court stated, that it had "been frequently decided, that an acknowledgment of a debt

barred by the statute of limitations, takes the case out of the statute, and revives the original cause of action. So far as decisions have gone on this point, principles may be considered as settled, and the courts will not lightly unsettle them. But they have gone full as far as they ought to be carried, and this court is not inclined to extend them. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away." The court proceed to observe, that in the case then in judgment, there was "no promise, conditional or unconditional; but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not, then, sufficient to take the case out of the act, that the claim should be proved, or be acknowledged, to have been originally just; the acknowledgment must go to the fact that it is still due. In the case at bar, the acknowledgment of J. Clarke is, that he had not discharged the account presented to him, but he does not say, that it was not discharged. His partner may have paid it, without the knowledge of Clarke; and consequently, the declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it, or not, is no proof that the debt remains due, and therefore, is not such an acknowledgment as will take the case out of the statute of limitations."

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*320] *FOWLE *v.* COMMON COUNCIL OF ALEXANDRIA.

Demurrer to evidence.

No judgment can be rendered upon a demurrer to evidence, until there is a joinder in demurrer; and issue cannot be joined upon the demurrer, so long as there is any matter of fact in controversy between the parties.

The demurrer to evidence must state facts, and not merely the evidence conducing to prove them.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove.

Where the demurrer to evidence is defective is these respects, and judgment has, notwithstanding, been rendered upon it for the party demurring, by the court below, the judgment will be reversed in this court, and a new trial awarded.

ERROR to the Circuit Court for the District of Columbia.

February 27th, 1826. This cause was argued by *Webster* and *Swann*, for the plaintiff;(*a*) and by *Jones* and *Taylor*, for the defendant. But, as it was determined by the court upon the defects in the demurrer to evidence, it has not been thought necessary to report the arguments of counsel.

March 1st. STORY, Justice, delivered the opinion of the court.—
*321] *This is a writ of error from the circuit court sitting at Alexandria for the district of Columbia. The original action was brought against the defendants, to recover damages asserted to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Philip G. Marsteller, licensed by them

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(*a*) They cited, as to the liability of corporations in a private action for neglect of their duties, and consequent damages sustained by individuals, Yarborough *v.* Bank of England, 16 East 6; and Riddle *v.* Proprietors, &c., 7 Mass. 169.

as an auctioneer, for the years 1815, 1816, 1817 and 1818, according to the express provisions of the statute in this behalf enacted.

At the trial below, upon the general issue, one of the principal points in controversy was, whether the said Marsteller was, in fact, licensed by the defendants as an auctioneer, during the years above stated; and both parties introduced a good deal of evidence, for the purpose of supporting or repelling the presumption of the fact. The defendants demurred to the evidence, as insufficient to maintain the plaintiff's action, and the record itself contains the whole evidence introduced at the trial, as well that arising from the testimony of witnesses as that arising from written documents.

There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer, in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered; and such joinder ought not to have been required or permitted, while there was any matter of fact in controversy between the parties.

*Indeed, the nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. [*322
It is no part of the object of such proceedings, to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony, or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is, to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. This doctrine is clearly established by the authorities, and is expounded in a very able manner by Lord Chief Justice EYRE, in delivering the opinion of all the judges in the case of *Gibson* v. *Hunter*, before the House of Lords, 2 H. Bl. 187. It was there held, that no party could insist upon the other party's joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion which the evidence given for his adversary conduced to prove. If, therefore, there is parol evidence in the case, which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate and circumstantial, before the court can compel the other side to join *therein. And if there should be such a joinder, without such [*323
admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer; and the judgment, if any is rendered, is liable to be reversed for error. Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is, that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found.

Upon examination of the case at bar, it will be at once perceived, that

the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavored to prove, by circumstantial evidence, that the defendants granted a license to Marsteller, as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the
*324] demurrer could be considered as being exclusively taken to the *plaintiff's evidence, it ought not to have been allowed, without a distinct admission of the facts which that evidence conduced on prove. But when the demurrer was so framed as to let in the defendants' evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the circuit court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court, was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, what is the proper duty of this court, sitting in error. It is, undoubtedly, to reverse the judgment, and award a *venire facias de novo*. We may say, as was said by the judges in *Gibson* v. *Hunter*, that this demurrer has been so incautiously framed, that there is no manner of certainty, in the state of facts, upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried.

Judgment reversed, and a *venire facias de novo* awarded.(*a*)

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*325] *Piles and others, Plaintiffs in error, *v.* Bouldin and others, Defendants in error.

Statute of limitations.

Under the statute of limitations of Tennessee, of 1797, c. 48, § 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession.

Error to the Circuit Court of West Tennessee.

February 15th, 1826. This cause was argued by *Isaacs*, for the plaintiffs in error; no counsel appearing for the defendants in error.

March 10th. Duvall, Justice, delivered the opinion of the court.—This cause is brought up by writ of error from the judgment of the circuit court for the district of West Tennessee. The lessee of Bouldin and others, who were plaintiffs in the court below, brought an ejectment against Conrad Piles and others, for a tract of land, containing 2500 acres, lying in Overton county, on Wolf river, granted by the state of North Carolina, by patent dated July 10th, 1788, to Thomas and Robert King, who, by deed bearing

(*a*) See United States Bank *v.* Smith, *ante*, p. 171.

date 25th of March 1793, for a valuable consideration, conveyed the same to David Ross, of Virginia. Ross, by his last will and testament, *duly [*326
proved and recorded, devised the same to his four children, namely, Eliza Myers, wife of Jacob Myers, Amanda A. Duffield, wife of John Duffield, Frederick A. Ross and David Ross, jun., the lessors of the plaintiff, as tenants in common in fee.

The defendant, Piles, rested his defence on the location of several grants which were offered in evidence on the trial: 1. A grant, dated 24th of December 1798, founded on a warrant dated 10th of March 1780, by the state of North Carolina, to Henry Rowan, for a tract containing 320 acres, called Walnut Grove, lying in Hawkins county, on Spring creek. 2. A grant, bearing the same date, and founded on the same warrant, by the state of North Carolina to Henry Rowan, for another tract, containing 320 acres, adjoining Walnut Grove, and having the same beginning. This tract was conveyed by deed dated 22d of September 1800, for a valuable consideration, to Conrad Piles, and is described to include a cabin known by the name of Livingston's cabin. 3. A grant bearing date on the 15th of August 1808, to Conrad Piles, by the state of Tennessee, for a tract lying in Overton county, on Rotton's fork of Wolf river, containing 200 acres. 4. Another tract adjoining the former, containing the like quantity, granted by patent, of the same date, to Conrad Piles. Piles possessed both the tracts granted to Rowan; one by purchase, the other by a parol lease for years. All these tracts are located on the plat exhibited on the trial, and none of the locations were contested. The title *of the plaintiffs is admitted to be regularly [*327
deduced from the first patentee.

The defendants read in evidence the two grants before mentioned, from the state of North Carolina to Henry Rowan, for 320 acres each; the first is described as lying in Hawkins county, "beginning on two hickories, an ash, and a Spanish oak, on the north side of Spring creek; running north, 50 poles, to a stake; west, 335 poles, to a stake; south, 167 poles, to a stake, crossing Spring creek; east, 335 poles, to a stake; and thence to the beginning." The second tract has the same beginning, calls "to adjoin the first, running east, 335 poles, to a stake; north, 167 poles, to a stake; west, 335 poles, to a stake; then to the beginning." Also, two grants from the state of Tennessee to himself, for 200 acres each, dated 15th of August 1808. These grants interfere with the plaintiff's grant of 2500 acres, and cover all the land of which the defendant was in possession, within the bounds of the plaintiff's grant, at the commencement of the suit, viz., the 17th of October 1817. Nearly one-half of Rowan's tract, called Walnut Grove, is included within the tract for which the ejectment is brought; the settlement called Livingston's cabin lies principally in that part of Walnut Grove, thus running foul of the tract owned by the lessors of the plaintiff. Helm's improvement is contained partly in Walnut Grove, and within one of the tracts of 200 acres granted to Piles, which is included almost wholly in the tract of the lessors of the plaintiff, and includes both Livingston's cabin and Helm's *settlement. Piles has made another settlement, [*328
included in the tract called Walnut Grove, a part of which is contained within the lines of the tract for which the ejectment is brought.

The defendant, Piles, proved, that the grants before mentioned, to Rowan and to himself, covered all the lands of which he was possessed, within the

grant of the plaintiffs; he also proved, that the grant of Walnut Grove to Rowan, included Livingston's cabin, as represented on the plat, and that he had been in the peaceable possession thereof, for more than eight years before the commencement of this suit; and that he had also been in possession of a piece of ground within one of the grants to himself, and which is also within the plaintiff's grant, and which he had held and cultivated more than eight years before the commencement of this suit; and relied on the statute of limitations. It was also proved, that Rowan, in 1806, had made a parol lease of the tract called Walnut Grove, to one Helm, for six years, in consideration of certain improvements; that Helm took possession, built a cabin, and cleared a few acres of land; that in the fall of 1807, Piles bought his lease, and agreed to make the further improvements stipulated, and return the possession to Rowan; that he took possession immediately, and continued in possession, claiming for himself, and not as tenant for Rowan, though he did not mention his claim, until after he had bought Helm's lease.

Under these circumstances, the defendant, Piles, by his counsel, moved
*329] the court to instruct *the jury, that if the deed from Rowan to Piles contained, in its first part, a sufficiently certain description, according to the evidence, of the land included in Rowan's first grant, that then they should disregard any subsequent description therein which should be repugnant to said first description. And also, to charge the jury, that if the deed from Rowan to the defendant did not cover said land, yet, that if they believed the defendant went into possession of the land contained in the said first grant to Rowan, under the lease from Rowan to Helm, as stated in the evidence, the defendant could defend himself in this action of ejectment, as tenant of Rowan, without making his landlord a defendant; that, as between Rowan and the defendant, he, the defendant, could not change the nature of his possession, but that the same would operate for Rowan's benefit, to perfect his title under the statute of limitations, as against the plaintiff and persons claiming under adversary grants; and that, if the defendant's possession had perfected Rowan's title, and made it a better title than the plaintiff's, then, the defendant having shown a better outstanding title, the plaintiff would not be entitled to recover. Which instructions the court refused to give, but instructed the jury, that Piles could not avail himself of the statute, and that his deed from Rowan, by legal construction, did not cover the land included in Rowan's first grant. From this opinion of the court, an exception was taken, and the cause is now before this court for
*330] revision. *The counsel for the plaintiffs in error insists, that the circuit court erred on both points.

The two grants to Rowan begin at the same place, have the same form and dimensions, and contain the same quantity of land. The deed from Rowan to Piles adopts the courses and distances of the second grant precisely, and proceeds to describe it, as including the cabin commonly called Livingston's cabin; but Livingston's cabin is included in the first grant called Walnut Grove. The counsel for the plaintiffs in error contends, that if the first grant is not conveyed by the deed, it is, at least, doubtful which of the two tracts was intended to be conveyed; and that, therefore, it was a question of location, to be settled by the jury, not a question of law to be decided by the court. But this court is of a different opinion. Admitting

the universality of the maxim, *de jure respondent judices, de facto juratores*, it will not be denied, that it is the province of the court to decide upon the force and legal effect of a sealed instrument. The deed conveys, by metes and bounds, the land contained in the second grant to Rowan, corresponding precisely, in courses and distances, from the beginning to the given line inclusive; and will not admit of the construction, that the first tract, called Walnut Grove, was conveyed, merely because it includes Livingston's cabin. The description in the deed was full and complete, without reference to Livingston's cabin; the mention of which appears evidently to be a mistake, from inattention in the writer of the deed, and *conveyed no right or interest whatever in the first grant. And it is conclusive in the construction of this deed, that it could not have been the intention of either party, that the tract called Walnut Grove was intended to be conveyed, that it calls to begin "on the corner of the Walnut Grove tract." There is no error in the judgment of the circuit court in refusing to instruct the jury according to the first prayer of the counsel for the defendant. [*331

The second question arises upon the plea of the statute of limitations. By the 4th section of the act of the state of Tennessee, passed in the year 1797, ch. 43, peaceable possession, for seven years, by any person, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession; and all persons who neglect, for that period, to prosecute their claims, are declared to be for ever barred. There is the usual saving to infants, &c. In this case, the record affords abundant proof, which is uncontradicted, that Piles had peaceable and uninterrupted possession of all the settlements made by him, comprehended within the lines of the plaintiff's grant, and claimed to hold the same as his own, adverse to the claims of all persons whatever. The settlement called Livingston's cabin, and that made by Helm, and transferred by Helm to Piles, are included in his own grant for two hundred acres, dated August 15th, 1808, and also within the plaintiff's grant, and principally within that part of Rowan's first *grant, which interferes with that of the plaintiffs. His third possession is contained within Rowan's first grant, which interferes with the plaintiff's grant, as has already been stated. All these possessions, being founded on grants, are protected by the act of limitations, the provisions of which are too plain to be misunderstood. [*332

On this point, the opinion of the circuit court is reversed, and a *venire facias de novo* awarded.(a)

Judgment reversed.

(a) See Somerville v. Hamilton, 4 Wheat. 230; Patton v. Easton, 1 Ibid. 476; McIver v. Ragan, 2 Id. 25; McClung v. Ross, 5 Id. 116; Walker v. Turner, 9 Id. 541.

Doe *ex dem.* Governeur's Heirs *v.* Robertson and others.

Power of aliens to hold lands.

An alien may take real property, by grant, whether from the state or a private citizen, and may hold the same, until his title is divested by an inquest of office, or some equivalent proceeding.

The act of assembly of Virginia, of 1779, c. 18, § 3, secured from escheat all the interest acquired by aliens in real property, previous to the issuing of the patent, and left the rights acquired by them under the patent, to be determined by the general principles of the common law.

The title of an alien, thus acquired by patent, in 1784, under the laws of Virginia, and subsequently confirmed to him by a legislative act of Kentucky, in 1796, and to his heirs and their grantees, by an act of the same state, in 1799, will overreach a grant made by Virginia, to a citizen, in 1785, and defeat the claim of all persons holding under such grant.

These legislative acts were valid, under the compact of 1789, between the states of Virginia and Kentucky.

*333] *Certificate of Division from the Circuit Court of Kentucky. This was an action of ejectment, brought in the circuit court of Kentucky, in which the lessors of the plaintiff gave in evidence a patent from the Commonwealth of Virginia, for the lands in controversy, lying in Kentucky, to Robertus S. Brantz, then an alien, bearing date the 11th of October 1784, founded on a land-office treasury-warrant. They also gave in evidence a certificate of naturalization of the said Brantz, in the state of Maryland, on the 8th of November 1784, and an act of the legislature of Kentucky, passed in 1796, entitled, "an act for the relief of Robertus Samuel Brantz," which recited, that he was an alien when the patent issued; confirmed his estate as fully as if he had been a citizen at the time of the grant, with a proviso, that nothing in the act should affect the right or title of any other person or persons, but only "the right which this commonwealth may have in the said lands."

The said Robertus S. Brantz died in 1797, leaving a son, Johannes Brantz, an alien, incapable of inheriting the lands. An act of the legislature of Kentucky, passed December 9th, 1799, reciting that Robertus S. Brantz had departed this life, indebted to Isaac and Nicholas Governeur; that Johannes Brantz, his son and executor, and an alien, made a power of attorney to the said Nicholas Governeur, to sell the lands of the said R. S. Brantz, for the payment of the debt, which sale had been made; therefore, "all the right which the said R. S. Brantz had, before, and at his death," and

*334] the right of the said Johannes Brantz, was declared to be vested in *the said Isaac and Nicholas Governeur, "as fully as if the said Robertus S. Brantz had done in his lifetime, or as if the said Johannes Brantz had been a naturalized citizen, when he executed the power of attorney for the sale and conveyance of the said lands."

The defendants claimed title under a grant of the commonwealth of Virginia, dated the 2d of December 1785, to one Duncan Rose, and proved a regular derivation of title from him.

The plaintiffs thereupon moved the court to instruct the jury, that if they found that the grants to R. S. Brantz covered the lands in controversy, that the lessors of the plaintiff duly derive title under Isaac and Nicholas Governeur, and that R. S. Brantz neither conveyed nor devised those lands, and left no heirs capable of inheriting them, and that the defendants were in

possession at the commencement of this suit, that the verdict should be for the plaintiff.

The defendants moved the following instructions:

1. That if the jury find, from the evidence, that Robertus S. Brantz was an alien, at the time when the patent given in evidence was procured by him, that nothing passed to him by said grant, but that it was void.

2. That if Robertus S. Brantz died, leaving his son an alien, and having no relations who were citizens of the United States, or of any of the states, then, upon his death, without heirs, the title, if it had passed out of the commonwealth by the patent, was immediately vested in the commonwealth; and if the grant to Duncan *Rose, from the commonwealth of Virginia, includes the land in controversy, then the act of Kentucky, [*335 granting the land to Isaac and Nicholas Governeur, cannot, under the articles of the compact between Virginia and Kentucky, overreach the grant to Duncan Rose from the commonwealth of Virginia; and they ought to find for the defendants.

3. That the plaintiff, showing no title or connection with Robertus S. Brantz, but through and by virtue of the act of Kentucky, given in evidence by plaintiff, such grant from Kentucky is, by virtue of the 3d and 5th articles of the compact with Virginia, of inferior dignity, and inoperative to overreach the grant by the state of Virginia by Duncan Rose.

4. That the acts of Kentucky, of 1796 and 1799, given in evidence by the plaintiff, being *in pari materia*, are to be taken together; that the latter act is explained by the former, and by operation of said two acts, and of the said compact between Virginia and Kentucky, the title of the plaintiff, as offered in evidence by him, is younger in date, and inferior in dignity, and cannot overreach the Grant to Duncan Rose, so far as those grants conflict.

5. That if they find that the grant to Duncan Rose, given in evidence, includes the land held thereunder by the defendants, then the grant of the commonwealth of Kentucky, in the act given in evidence by the plaintiff, is the junior and inferior claim of title, and the jury ought to find for the defendants.

*The judges of the circuit court being divided in opinion upon [*336 the instructions moved, the division was certified to this court.

February 22d. The counsel for the plaintiff made the following points: 1. That Robertus S. Brantz, both at common law, and by the special provisions of the act of Virginia 1779, c. 13, § 3, upon his naturalization, took and held an indefeasible title to the lands in question, under his grant. 2. That, consequently, the junior grant to Duncan Rose was void, and conferred no title; and, of course, could not have estopped Virginia, if no separation had taken place; and therefore, could not estop Kentucky, by the articles of compact between the two states, from vesting the title to those lands, by the legislative act of 1799, in Isaac and Nicholas Gouverneur.

The defendant's counsel insisted: 1. That R. S. Brantz being an alien, when the grant of Virginia issued to him, the title did not pass out of the commonwealth; therefore, the grant to Duncan Rose must be considered as the prior legal title. 2. That under the compact of 1789, between Virginia

and Kentucky, the legislative acts of Kentucky of 1796 and 1799, under which the plaintiff claims, cannot overreach the prior grant from Virginia to Rose.

*337] *Sampson*, for the plaintiff, argued: 1. That *it had been conclusively settled by a uniform series of decisions in this court, that an alien can take and hold real property, either by grant or devise, until office found. *Fairfax* v. *Hunter*, 7 Cranch 603; *Craig* v. *Bradford*, 3 Wheat. 594; *Craig* v. *Leslie*, Ibid. 563; *Orr* v. *Hodgson*, 4 Ibid. 453. The grantee of the state takes by purchase as much as a private grantee. Co. Litt. 18 *b*. In *Craig* v. *Bradford*, 3 Wheat. 594, the alienage of a grantee from the state was presented distinctly as a positive bar to his taking, but the court determined the grant to be good, and the decision of that point was inevitably involved in the determination of the cause. And there was no reason, either of policy or law, for making a distinction between a public and a private grant. The title of the government being divested by the grant, which is matter of record, it could not be revested again, but by an inquest of office, by which alone the fact of alienage can be determined. Every person resident in the country is presumed to be a citizen, until the contrary is shown by a judicial proceeding. 1 Bac. Abr. Alien, C. 133. The government, having once invested its grantee with a title, cannot deprive him of it, but in due course of law; and the inquest of office is the appropriate process, where the title to lands is in controversy.

*338] But it might be contended, that the grant of the state to an alien is absolutely void, and not voidable *merely; and a passage in Vin. Abr. might, perhaps, be relied on for that purpose.. But this would be found to be a mere insulated *dictum*, unsupported by any other authority, or by any adjudged case. In *Page's Case*, 5 Co. 52, it was "resolved, that in the case of an alien," &c., "the inheritance, or freehold of the land, is not vested in the king, till office found under the great seal; for that is an office of entitling." The grants of the king are not void, unless the defect for which they are sought to be avoided appear on the face of the grant. So, here, the fact of alienage not appearing in the grant to Brantz, is sufficient to show that it was not void. If it were contended, that an alien could not take, because he could not hold, the answer would be, that he shall take and hold, until it shall appear, in the manner the law requires, that he cannot hold. The subsequent naturalization of R. S. Brantz had a retrospective effect, and confirmed and rendered valid his title, which was before subject to be defeated by an inquest of office. 2 Bl. Com. 250; 1 Johns. Cas. 399. So also, the act of 1796 would have had the effect of confirming his title, even if he had never been naturalized. But his naturalization in Maryland was sufficient to give him all the privileges of a citizen in Kentucky, and among others, that of holding lands, under the articles of confederation, before the establishment of the present constitution. And

*339] even supposing his *title as an alien to be defective at common law, that defect was completely cured by the statute of Virginia of 1779, c. 13, § 3, which provides, that "All persons, as well foreigners as others, shall have a right to assign or transfer warrants, or certificates of survey for lands; and any foreigner purchasing lands, may locate and have the same surveyed, and after returning the certificate of survey to the land-

office, shall be allowed the term of eight months, either to become a citizen, or to transfer his right in such certificate of survey to some citizen of this, or any other of the United States of America."

2. As to the defendant's claim under a junior grant, it must be regarded as entirely void, since the state of Virginia had already parted with all its title to Brantz, who (it had already been shown) was capable of taking and holding until office found. The grant to Rose was, therefore, absolutely void; the state having no title to the thing granted. *Polk's Lessee* v. *Wendell*, 5 Wheat. 303; *Alton Wood's Case*, 1 Co. 50; Dyer 77; *Green* v. *Watkins*, 7 Wheat. 27. If, then, the junior grant was void, it could not be contended, that if any title was again cast upon the commonwealth, by the death of R. S. Brantz, without heirs capable of inheriting, it inured to the benefit of the defendant, and operated as a retroactive confirmation of his title. His patent only authorized him to survey waste and unappropriated lands; he undertook to find lands of that description; *and it is not for him to say, that he misinformed the government, and having surveyed not vacant, but lands already appropriated, had thereby entitled himself to be considered a purchaser without notice. 5 Cranch 253. There is a difference in this respect, between grants by the government, and mere private conveyances. *Leyat's Case*, 10 Co. 113; *Alton Wood's Case*, 1 Ibid. 51. The grantee having failed to comply with the condition of the grant, the state could not be bound by it, or estopped by it from again asserting dominion over the lands, and re-granting them to anothor. The grantee takes an immediate title, or none at all. Noy's Max. 10; 4 Co. 61; Plowd. 432; 10 Co. 62. Even a grant made expressly to commence *in futuro* would be void. *Berwick's Case*, 5 Co. 94. [*340

Bibb, for the defendant, argued: 1. That R. S. Brantz, being an alien when the original grant from the state issued to him, took nothing thereby, but the title remained in the government. He admitted the general rule, that an alien may take by purchase, and hold until office found; but he insisted, that the principle applied only to a private grant or devise by a citizen. At common law, a grant from the sovereign to an alien passes no title. Vin. Abr. tit. Prerogative, G, b, 2. The grant of lands to an alien by the king, operates nothing; it shall not *make him a denizen, so that he may take. 2 Bl. Com. 351 (Tucker's ed. 344). A grant from a private citizen to an alien takes effect by act of the parties; a grant from the government takes effect by act of law. An alien may take by purchase from an individual, because it is for the benefit of the government that he should be allowed to take, in order that the title may pass to the government by escheat. But if the same effect were allowed to a grant from the government to an alien, it would be for the mere vain purpose of divesting the title of the government, and vesting it in a party incapable of holding it, in order to revest the very same title, by means of an inquest of office. Such a proceeding would be contrary to all the analogies of the law. An alien cannot take by act of law. An alien cannot, therefore, take as heir, or tenant in dower, or by the curtesy. *Calvin's Case*, 7 Co. 25; Co. Litt. 2 *b*, 3, *a*, 31 *a*; Plowd. 229; 2 Bl. Com. 252, Tucker's ed. 249; *Fairfax* v. *Hunter*, 7 Cranch 619; *Orr* v. *Hodgson*, 4 Wheat. 460. The reason why an alien cannot take in this manner is, because the law does nothing in [*341

vain; and it will not, therefore, confer by grant an estate on the alien, which he cannot hold, for the nugatory purpose of taking it back again by an inquest of office. This is the reason assigned by Lord Chief Baron HALE, and by Mr. Chancellor KENT. *Collingwood* v. *Pace*, 1 Vent. 417; *Mooers* v. *White*, 6 Johns. Ch. 365. The incapacity of aliens to take, is founded on
*342] *reasons of national or civil polity, rather than on principles strictly feudal. 1 Bl. Com. 392; 2 Ibid. 258; Ibid. 278.

The principles and policy of the common law in this respect, have not been changed by the local laws of Virginia. The act of 1779, c. 13, under which the grant to Brantz purports to have been issued, manifests clearly the legislative intention, not to permit aliens to take by grant, since it provides that they may purchase warrants, assign them, have them located and surveyed, return the plats and certificates to the register's office, and then shall be allowed the term of eighteen months either to become citizens, "or to transfer such plat and certificate of survey, to some citizen of this, or any other of the United States of America." *Expressio unius est exclusio alterius:* and this enumeration of privileges to aliens, all of which are in derogation of the common law, excludes that of obtaining a grant to himself, whilst he continues an alien. Brantz, then, having procured this grant to himself, whilst an alien, contrary both to the common and statute law, as well as the rules of the land-office, the act of the register, and of the governor, in so issuing the letters-patent, was unauthorized, and, as such, was absolutely void. *King* v. *Clarke*, Freem. 172; 2 Bl. Com. 352; *Earl of Devonshire's Case*, 11 Co. 90; *Colt* v. *Glover*, 1 Roll. 451. All the requisites to a valid grant were wanting in this case. Sheph. Touch. 229. The
*343] public officers were *restrained and disabled from granting to an alien; he was incapable of receiving it; the grant was not made in the order and manner required by law. The title of the public demesne lands, in England, is vested in the crown; the king has, by the constitution, the sole power of granting them. But the king cannot, by his grant to an alien, render him capable of taking. In Virginia, the title was in the people, or commonwealth; not in the governor, register or other public officer. They could only grant the land, in pursuance of the express provisions of law.

2. That under the compact of 1789, the legislative acts of Kentucky, of 1796 and 1799, under which the plaintiff claims, cannot overreach the prior grant from Virginia to Rose. Supposing that Rose's was not the prior legal title, in consequence of the alienage of Brantz, when he obtained his grant, yet Rose, under his warrant, survey and grant, had a vested interest in the land, by the laws of Virginia, originating before the grant to Brantz. The compact provides (art. 3, § 7), "that all private rights and interests of land, within the said district, derived from the laws of Virginia, prior to such operation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." Art. 5, § 9, provides, "that no grant of land, or land-warrant, to be issued by the proposed state, shall interfere with any warrant heretofore issued from the
*344] land-office of Virginia, *which shall be located on land within the said district, on or before the first day of September 1791." So that the stipulations of the compact of 1789, secure all vested as well as contingent claims and titles to land, and provide for their determination

by the then existing laws of Virginia. By the laws of that state, then in force, the title of Brantz (supposing him to have had any) was cast upon the commonwealth, by his death, without heirs capable of taking by descent. *Fairfax* v. *Hunter*, 7 Cranch 603; *Orr* v. *Hodgson*, 4 Wheat. 460; *Mooers* v. *White*, 6 Johns. Ch. 365. The interest of Rose, under his patent, became valid and secure, by the third article of the compact; and under the fifth article, it could not be interfered with by any grant from the state of Kentucky. *Green* v. *Biddle*, 8 Wheat. 1; 1 A. K. Marsh. 199; 3 Ibid 219; 1 Monr. (Ky.) 60; 1 Litt. 364. Every political society or government is bound by the ties of justice and morality, and to the observance of good faith, in its contracts with individuals. The grant of 1785 to Rose, was a contract between the state of Virginia and the grantee. *Fletcher* v. *Peck*, 6 Cranch 87. If a private individual sells land, without title, and subsequently acquires a title, is inures to the benefit of his grantee. *Barr* v. *Gratz*, 4 Wheat. 222. A vendor, purchasing in an outstanding title, cannot use it against his vendee. The same rules which are just and equitable as between individuals, are binding on governments. *The legal maxim, that the king, or the commonwealth, can do no wrong, [*345 implies the highest degree of moral excellence in the collective body of society, and those who represent it. Every prerogative being created for the benefit of the citizen, none of the powers of the government can be exerted to his prejudice. *Magdalen College Case*, 11 Co. 72. Hence, the maxims, that the prerogative of the king is no warrant to do wrong; the king is estopped, and by his prerogative can do no wrong. Plowd. 246–9. Virginia, therefore, could not violate the obligation of her contract with Rose, by using the interest of Brantz, when it lapsed in 1797, by his death, without heirs capable of inheriting. A legislative act of Virginia (had she retained her sovereignty over the territory of Kentucky), passed in 1799, to grant the land to Governeur, without regard to the vested interest of Rose, and those claiming under his grant, would have been a law impairing the obligation of contracts, within the prohibition in the constitution of the United States. Such a law, made by Kentucky, is equally prohibited by her treaty with Virginia. But the acts of 1796 and 1799 (which, being *in pari materia*, are to be construed together) do not constitute such a law. The former act confirms the title of Brantz, with the proviso, "that nothing in the said act should affect the right or title of any other person or persons." The subsequent *act transfers the estate to Governeur, as [*346 Brantz held it, subject to the proviso. It was not necessary, in the act of 1799, to repeat the proviso in that of 1796. It was sufficient to do what the act does—transfer the estate, after the death of Brantz, to Governeur, "as if the said Brantz had done (it) in his lifetime." This construction makes the acts consistent with good faith, with the compact with Virginia, and with the eternal principles of justice.

But it had been argued, that the king's grants are not void, unless the fact of alienage appears on the face of the grant itself. It had, at the same time, been asserted, that Rose's grant was absolutely void, although the fact of the patent previously issued for the same land, does not appear on the face of his grant, but is to be proved by other evidence. But when the authorities speak of a grant as void, all that is meant is, that it shall be held inoperative, and of no legal effect, whenever the facts which invalidate it

shall appear. Whenever, by the pleadings between other parties, the facts show the king's title, judgment shall be given for him, although he is not a party. Plowd. 242. A great variety of cases might be mentioned, where a resort to evidence *in pais* would be necessary to determine the validity of the grant. That the grant to Rose was not void, in the sense supposed, but that it was evidence of a contract between Virginia and the grantee; *347] *that it passed a vested interest, capable of being transmitted from one to another by deed or will; that such interests of the junior patentee are treated as legal, and not mere equitable interests, and still less as non-entities, a number of cases from the local decisions were cited. 1 A. K. Marsh. 525; 3 Bibb 535; 4 Ibid. 225; 1 Monr. 48, 189, 138.

As to the case of *Elmendorf* v. *Carmichael*, 3 Litt. 473, which had been cited as determining the questions in this cause, it could have no weight as authority in this court, because it did not decide the point as to the construction of the compact of 1789; a subject peculiarly of federal jurisdiction, which was involved in several other cases, all of which would be brought before this court for revision. The opinions, therefore, of the state judges, in that case, could be entitled to no more respect than the judgments of any tribunal, state or national, which this court might be called on to revise on error.

The case of *Craig* v. *Bradford*, 3 Wheat. 574, had been cited as determining the question, that an alien can take by direct grant from the government. But it would be found, upon examination, that Sutherland, under whom the respondent claimed in that case, was entitled to a bounty in land, under the proclamation of 1763, for military services during the preceding war, and that he obtained his warrant and survey in 1774, at which time he *348] was not an alien. He did not obtain a *patent until 1788, and it is not, therefore, of this that the court speak, when they say that he took the estate "during the war," and was not divested by any act of Virginia, before the treaty of 1794, by which his title was confirmed. But the court meant to refer to the act of Virginia of 1779 (passed during the war), by which the legislature declared, that the surveys under the proclamation of 1763 were valid. All the other cases cited to show that an alien can take by grant, and hold, until office found, are cases of grants or devises from private individuals to an alien. The distinction between such conveyances and grants form the crown, is to be found in all the authorities, from the year books down to the latest elementary writers.

March 13th, 1826. JOHNSON, Justice, delivered the opinion of the court. —This cause comes up from the circuit court of Kentucky, upon a difference of opinion certified from that court.

The case was this: Robertus S. Brantz, through whom the plaintiffs make title, obtained, on the 11th of October 1784, two grants from the Commonwealth of Virginia, comprising, together, 10,000 acres of land lying in Kentucky. One Duncan Rose, through whom the defendants make title, obtained a similar grant, of the date of December 2d, 1785, covering a part of the same land.

*349] Robertus Brantz, at the date of his patent, *was an alien, but became naturalized in Maryland, on the 8th of November 1784, less than one month after the date of his patent, and near a year before that of

the defendant was obtained. Some doubts appear to have been raised on the validity of Brantz's patent, at an early period, and in the year 1796, the legislature of Kentucky passed an act, reciting that Brantz was an alien when the patent issued, and affirming his estate as against the rights of the commonwealth, leaving it to operate as to all other persons as if that act had not passed. Brantz died in 1797, leaving a son, Johannes Brantz, an alien, incapable of inheriting, and owing debts to a considerable amount to the Governeurs. The son, unaware of his disability, executed a letter of attorney, under which the land was sold, and the purchasers, the Governeurs, subsequently discovering this defect, obtained another act from the state affirming their estate. And this makes out the plaintiffs' title.

The defendant's title is regularly deduced through the patent to Duncan Rose.

The record presents, first, a general instruction prayed for in behalf of the plaintiffs on their right to recover. And of this there can be no question, independently of the points made in the instruction moved for by the defendant, having regard to the effects, 1st, of his alien character; 2d, that of his son; and 3d, of the compact between Virginia and Kentucky on the rights of the parties. *These will be considered in their own language, and in their order. [*350

The first is, "that if the jury find that R. S. Brantz was on alien, at the time when the patents given in evidence were procured by him, nothing passed to him by the said patent, but that it was void." Although this, as well as the subsequent prayers of the defendant, purport to present distinct propositions, it will be unavoidable, that they should be considered in connection with each other, and with reference to the general prayer of the plaintiff for a charge in his favor. The defendant's object in propounding them, is to repel the prayer of the plaintiff, and to obtain a charge that the jury should find in his favor. They are introduced, in fact, as grounds upon which the prayer of the plaintiff should be rejected. And in this view of the subject, the proposition stated draws after it the consideration of another, to wit: Whether, although the patent to Brantz should be pronounced void, in consideration of his incapacity to take, at the time of its emanation, his subsequent naturalization did not relate back so as to obviate every consequence of this alien disability. On this subject of relation, the authorities are so ancient, so uniform and universal, that nothing can raise a doubt that it has a material bearing on this cause, but the question whether naturalization in Maryland was equivalent to naturalization in Kentucky? To this the articles of confederation furnish an affirmative answer, and the *defendant has not made it a question. Nor, indeed, has he made a question on the subject of relation back; [*351 yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the rights derived to Brantz through his patent.

The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien, be not an absolute nullity. The argument is, that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on this subject. We think, the doctrine of the defendant is not to be sustained on either ground.

It is true, Sir William Blackstone has expressed himself on this subject with less than his usual precision and circumspection; but, whether the context be considered, or his authorities examined, we shall find that this doctrine cannot be maintained. The passage relied on is found in his second volume (p. 347, 348, of Christian), in these words, "If the king grants lands to an alien, it operates nothing." But it would be doing injustice to the writer not to weigh his meaning by the words preceding and following this sentence. His language is this, "But the king's grant shall not inure, to any other intent than that which is precisely expressed in the grant. As, if he grants lands to an alien, it operates nothing; for such grant shall not *352] also *inure to make him a denizen, that so he may be capable of taking by grant." And the authority referred to is Brooke's Abr. Patent 62, and Finch's Law 110. (It ought to be 111.)

If we could admit that this learned writer could have committed so egregious a blunder as to suppose that an alien must be made denizen, before he could take by grant, as a general proposition, he might stand charged with having greatly transcended his authorities. But when it is considered, that the effect of an alien's being made denizen, is not to enable him to take lands, but to enable him to hold them against the king, we at once see, that his language is to be limited to the proposition laid down in the previous sentence, to wit, that the king's grants shall not inure to the double intent, when made to an alien, of vesting in him the thing granted, and then, by implication, constituting him a denizen, so as to enable him to hold an indefeasible estate.

In the case referred to, as abridged by Brooke, the latter proposition alone is laid down; and the case in the Year Books, which the author cites, affirms nothing more. This was *Bagot's Case* (7 Edw. IV. p. 29), which appears to have occasioned a vast deal of discussion for several terms of the British courts, and in which Bagot, and another grantee of an office by the crown, brought assize, and the defendant pleaded, as to Bagot, *alien nee.* In that cause, there was no office found, and the question on this part of the case distinctly was, whether the grant did not both vest the right to the *353] office, and create a capacity *to maintain assize to recover it. So, in a case in 4 Leon. 82, the same question was raised, where there had been an inquest of office; and in both, the decision distinctly was, that the king's grant did not inure to an intent not expressed distinctly as its object; or, in other words, to a double intent, one direct, the other incidental. In the latter case, the alien's right had been affirmed by a patent from the queen, and the point argued was, that the right of the party was protected by the act of the queen, against the effect of the office found. But in both these cases, the decision was no more than this, that the act of the crown did not incidentally make the party a denizen; and while an alien, he could not be enabled, by any act of the crown, to exercise rights which appertained only to denizens, or to persons naturalized, or natural-born subjects. The other authority to which Blackstone refers, to wit, Finch, imports no more than that an alien shall not maintain an action, real or mixed, but has no direct bearing upon the doctrine for which it seems to have been cited by the author.

The words, in the passage in Blackstone, more immediately relied on by the defendant, to wit, "if he grants to an alien, it operates nothing," are

obviously taken from another passage in Brooke's Abr. Patent, 44, which article gives those words as a *dictum* of KEBLE, one of the judges, And by referring to the authority in *the Year Book, on which the author relies, to wit, 2 Hen. VII. 13, the *dictum* is there found attributed to [*354 KEBLE. But in that case, as in *Bagot's Case*, there is nothing more argued than that the king's grant shall not inure to the double purpose. And the observation of KEBLE is only made by way of illustration, accompanied by several others of a similar character, such as that a grant of land to a felon shall not operate as a pardon; or a grant to a company not corporate, carry with it a grant of incorporation. It is clear, therefore, that this doctrine has no sufficient sanction in authority; and it will be found equally unsupported by principle or analogy. The general rule is positively against it, for the books, old and new, uniformly represent the king as a competent grantor, in all cases in which an individual may grant, and any person, *in esse*, and not *civiliter mortuus*, as a competent grantee. *Femes covert*, infants, aliens, persons attainted to treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. (Perkins, Grant, 47, 48, 51, &c.; Comyn's Dig., Grant, B, 1.) It behooves those, therefore, who would except aliens, when the immediate object of the king's grant, to maintain the exception.

It is argued, that there is an analogy between this case and that of the heir, or the widow, or the husband, alien; no one of whom can take, but the king shall enter upon them, without office found.[1] Whereas, an alien may take by purchase, *and hold until divested by office found. It [*355 is argued, that the reason usually assigned for this distinction, to wit, "*nil frustra agit lex*," may, with the same correctness, be applied to the case of a grant by the king to an alien, as to one taking by descent, dower or curtesy: that the alien only takes from the king, to return the subject of the grant back again to the king by escheat. But this reasoning obviously assumes as law, the very principle it is introduced to support; since, unless the grant be void, it cannot be predicated of it, that it what executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language; since the very reason of the distinction between aliens taking by purchase, and by descent, is, that one takes by deed, the other by act of law; whereas, a grantee, *ex vi termini*, takes by deed, and not by act of law. If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues, and takes effect, under a law of the state. But this is by no means the sense of the rule, since attaching to it this idea would be to declare the legislative power of the state incompetent to vest in an alien even a defeasible estate.

That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established, that the *reason of the rule is little more than a subject for the antiquary. It [*356 no doubt owes its present authority, if not its origin, to a regard to the peace of society, and a desire to protect the individual from arbitrary aggression. Hence, it is usually said, that it has regard to the solemnity

[1] See Co. Litt. 31 *b*, Harg. note 9.

of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: "Every person," says he, "is supposed a natural-born subject, that is resident in the kingdom, and that owes a local allegiance to the king, till the contrary be found by office." This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.

It remains to examine the effect of the Virginia laws upon grants made to aliens. Those laws provide, that aliens may purchase warrants for land, and pass them through all the stages necessary to obtain a patent, and may exercise every power over the inchoate interest thus acquired, in the same manner with citizens, and after returning the plat and survey to the register's office, shall be allowed eighteen months to become a citizen, or transfer their
*357] interests to those who are citizens. *These provisions, it is contended, import a prohibition to issue a grant to an alien.

But we think the inference by no means unavoidable; and in addition to the general and strong objections to raising an enactment by inference, consider it as unsupported either by the policy or the provision of the act. It is well known, that the purchaser of a warrant, under the laws of Virginia, acquired a beneficial interest in the soil, that the survey located that interest upon a particular portion of soil, by metes and bounds, and the interest thus acquired was devisable, assignable, descendible, and wanted, in fact, nothing but a mere formality to give it all the attributes of a freehold. Hence, a doubt arose, not whether an alien could acquire an interest under a warrant and survey, but whether that interest might not be subject to escheat. The object of the law was, to encourage aliens to purchase, and to settle the country; and all its provisions on this subject were intended to enlarge his rights, not to restrict them. Aliens arriving in the country, could not immediately be naturalized, but they might immediately enter upon those arrangements for establishing themselves, when naturalized, which were necessary to precede a grant. Hence, the only true construction of the Virginia law is, that as to all the interest acquired in land previous to grant, it was intended to enlarge their rights, and secure them from escheat; while, as to the rights which they might acquire by patent, they were to be left
*358] under the ordinary *alien disabilities, whatever those were, which the law imposed. The Virginia act, therefore, has no influence upon the rights of the parties in this cause.

The object of the next four prayers for instruction in behalf of the defendant, is, to maintain the proposition, that the act of Kentucky, of 1799, which confirmed the interest of the purchasers under the letter of attorney of the son of Brantz, was in derogation of the rights of Duncan Rose, the subsequent grantee. The argument is, that on the decease of the father, without an heir that could take, the land in controversy reverted to the state, and the junior patent then fastened upon it, in the ordinary manner in which it attaches to the soil, when a prior grant is removed from before it. That the act of 1799 was nothing more than a junior grant for the same land, and a grant which the state was estopped from making to the prejudice

of the prior patentee, as well upon general principles, as under the provis ions of the compact between the two states.

It is obvious, that it considering this argument, the court cannot place the defendant on more favorable ground than by substituting Virginia for Kentucky, and allowing him all the rights that he might have set up against the former state. And it is equally obvious, that to admit of the right set up in favor of the junior patent's attaching, as a patent upon the escheat, it must be affirmed that escheated land was liable to be taken up by patent; whereas, the act authorizes patents *to issue upon waste and unappro- [*359 priated lands exclusively, and not upon escheated property. And so it has been settled by adjudications both in Kentucky and Virginia. (*Elmendorf* v. *Carmichael*, 3 Litt. 484.)

It is further obvious, that as to the claim set up by the defendant, on the ground of moral right and estoppel, the court will concede much more than he has a right to assume, if it allows him the benefit of his argument, to the whole extent in which it may be applied to the rights and obligations of individuals. Assuming, *argumenti gratia*, that the state could not supersede the right of the defendant derived under his patent, in any case in which an individual would be estopped, or might be decreed to convey: but it is only on the ground of fraud or contract, that the law acts upon individuals in either of the supposed cases. Fraud is not imputable to a government; but if it were, where is there scope found for the imputation of it in the relation between a state and the patentee of its vacant lands? In selling the warrant, the state enters into contract no further than that the purchaser shall have that quantity of vacant land, if he can find it. And when the patent issues, it is to the patentee, if to any one, that the fraud is imputable, if the land be not vacant. The state never intends grant the lands to another; and where the grantee is ignorant of the previous patent, the maxim, *caveat emptor*, is emphatically applicable to this species of contract.

But to what result would this doctrine lead *us? A junior grant is [*360 to be vested with the attribute of hanging over a valid and indefeasible appropriation of soil, waiting to vest upon the occurrence of the casualty of an escheat, or an indefinite failure of heirs? This may not happen in a hundred years; it may not occur upon one life, as in this case, but may occur after the lapse of one hundred lives. It is impossible, that such a claim can be countenanced—neither principle nor policy sustains it. And, in fact, the decision upon the first ground is fatal to the cause of the defendant upon the last; for, upon no principle but the assumed nullity of the patent to Brantz, could any contract be imputed to the state to make good the junior patent, under which the defendant deduces his title. In that case, the land would still have remained vacant land, and, as such, the junior patent would, of course, have taken effect upon it as a patent, and by the immediate operation of the land law, without reference to the supposed incidental rights here set up.

So far this court has considered the cause as one of a new impression; but, on examining the adjudications quoted, they are satisfied, that in every point material to the plaintiffs, the case has been solemnly adjudicated in the courts of Kentucky. They will, therefore, direct an opinion to be certified in favor of the plaintiff.

*Shelby and others, Executors of Shelby, Plaintiffs in error, *v.* Guy, Defendant in error.

Statute of limitations.

The terms "beyond seas," in the saving clause of a statute of limitations, are to be construed as equivalent to, without the limits of the state where the statute is enacted.[1]

Quere? How far this construction has been adopted by the courts of Tennessee?

Five years' *bona fide* possession of a slave constitutes a title, by the laws of Virginia, upon which the possessor may recover in detinue; and this title may be set up by the vendee of such possessor, in the courts of Tennessee, as a defence to a suit brought by a third party in those courts.

Error to the Circuit Court of Tennessee.

February 28th, 1826. This cause was argued by *Jones*, for the plaintiffs in error; and by the *Attorney-General* and *White*, for the defendant in error.

March 10th. Johnson, Justice, delivered the opinion of the court.—The plaintiffs here were defendants in the court below, in an action of detinue brought by Thomas Guy, to recover sundry slaves. The defendants below plead *non detinet*, and the act of limitations of the state of Tennessee, which bars the action of detinue in three years. The plaintiff joins issue upon the plea of *non detinet*, and files a special replication to the plea *362] *of the statute, the object of which is to bring himself within the saving in favor of absentees. The defendants demurred to this replication, but the demurrer being overruled, the parties went to trial on the general issue, and a verdict was rendered for the plaintiff in the form now usual in the action of detinue. To revise the judgment of the court in overruling the demurrer, and its decisions upon various points of law raised in the progress of the trial, this writ of error is brought.

The case was this: One Dickerson, a citizen of Virginia, the father of the plaintiff's mother, was owner of a female slave named Amy, from whom the slave claimed had descended. Upon the marriage of Thomas Terry Guy with the plaintiff's mother, or soon after, and prior to the year 1778, the slave Amy passed into the possession of T. T. Guy, but whether by loan, or parol gift, is a point litigated, and upon which some of the principal questions in the cause arise. From the year 1778 to 1794, the slaves remained in Virginia, in the possession of the plaintiff's father, T. T. Guy, when he sold her and her increase to David Shelby, who thereupon removed with the slaves to Tennessee, where he and they have ever since resided. In the year 1788, Dickerson made his will and died; and the will was proved and recorded in July 1788. In this will he says, "I lend to my son-in law T. T. Guy, the negroes which he now has in his possession, that I lent him in the lifetime *363] of his wife, during his natural life, viz., *Cuffee, Gilbert and Amy; and at his death, I give the aforesaid slaves, with their increase, to my grandsons, John and Thomas Guy, and their heirs, for ever." Thomas Guy, here named, is the plaintiff in this action; the executory devise to him and John, took effect by the death of their father in 1795. John died unmarried, under age, and intestate, after his father, but before the action

[1] See Murray *v.* Baker, 3 Wheat. 541.

brought, and neither of the brothers had been in the state of Tennessee, until within three years prior to the institution of the suit, but had resided in the state of Virginia.

These are the material facts in the cause. The points argued have been very numerous; but if the plaintiff has tripped in pleading, by a vicious replication, the questions on the merits are put out of the case. The points arising on the demurrer, therefore, must first be considered. The replication demurred to, states, in substance, the right of Dickerson to the negro Amy, and the continuance of that right up to his death; the bequest to the father of the plaintiff for life, and to the plaintiff and John, after his death; the death of the father and of John; the qualifying of the executors on the will, and their assent to the legacy; the sale by the father to Shelby in 1794; Shelby's removal with the slaves to Tennessee, and subsequent residence there, and the residence of John, up to his death, and of the plaintiff, to within three years of the bringing of this suit, in the state of Virginia.

*The demurrer filed to this replication is special, and assigns for cause. 1. That it states the evidence of title, and does not allege a [*364
fact. 2. That is is double, in relying on the facts both of title and of non-residence. But claiming the right of looking back to the first fault, and other benefits appertaining to a general demurrer, to which, no doubt, he is entitled, the counsel for the defendant have raised a variety of other questions in the cause, of more interest than those specified. As, first, that the counts in the declaration are repugnant, the one being essentially a count in trover, the other in detinue; and secondly, that the replication involves a departure, inasmuch as the writ claims the whole property, and the replication shows him to be entitled to no more than a moiety.

That the replication is more characterized by prolixity, than by science, the court will readily admit; but that it is essentially vicious, cannot be maintained. The general object of the plaintiff is to fortify his title or demand, and this is a legitimate object. Nor can we perceive, that in doing this, he has either stated evidence, where he ought to allege facts, or tendered to the defendant a double answer to his plea, or rather, "distinct matters to one and the same thing, whereunto several answers are required." That it is redundant, and abounds in surplusage, with reference to the issue tendered, is obvious; but it prefers only one *answer that will fit the [*365
plea, which is absence from the state of Tennessee during the term when the statute would bar him.

Yet, as he has thought proper to amplify upon the nature of his demand, if he had prostrated his own action, the law would visit him with the consequences. The argument on this point is, that having set out a joint devise to himself and his brother, he is incapable of maintaining alone a suit for the entirety of the thing devised. But, in this, we are of opinion, that the law is with him. It is true, that tenants in common must ordinarily join in an action, and that the laws of Virginia produce a severance upon the death of a joint-tenant, so that the right of survivorship is abolished. But it is also true, that in suits for an indivisible thing, a right of action survives to a tenant in common; and this, from the necessity of the case, as we conceive the authorities sufficiently maintain. (Co. Litt. 198 *a*; Bro. Abr. tit. Tenant in Common, pl. 18.)

The exceptions to the counts clearly cannot be sustained. They are consubstantial, and the same plea and judgment proper to both. Averring that the defendant came to the possession of the chattel by finding, does not constitute a count in trover; an alleged conversion characterizes that form of action. Nor is it any objection to the counts, that one of them states a right to recovery, founded in a possession merely, without the direct allegation of property, since a tortious detention may well be of that which another has *no interest in, but to the temporary use or custody. *366] (Co. Litt. 286; Roll. Abr. 575.) Thus, a bailee, or common carrier, or sheriff, may maintain this action, and expressly against one who has them by delivery or finding. (2 Saund. 47; Cro. Jac. 73, *et passim.*)

We come, then, to the question raised by the demurrer upon the statute of limitations of Tennessee; and here we are met by one of those embarrassments which necessarily grow out of our peculiar system. North Carolina, in common with most of the old states, adopted the language of the statute of James, in its act of limitations. This was the law of Tennessee, before its separation from that state, and continues so to this day. The persons excepted from its operation, are infants, *femes covert*, &c., and "persons beyond seas." During a century nearly that this law has been the local law of that country, we cannot ascertain that the courts of either of those states have been called on to decide whether it shall be construed according to its literal meaning. In the meantime, solemn adjudications have taken place in several of the states, to the purport, that persons without the jurisdiction of the country, though not actually beyond seas, are within the equity, if not within the actual meaning, of the statutes containing the same words, and borrowed from the same source. And in a case which came up to this court from Georgia, in the year 1818, it was solemnly decided, that it was impossible to give a sensible and reasonable *construction to those words, according to their literal signification. *367] But we are now informed, and as it is admitted by the opposite counsel, we cannot question it, that a contrary adjudication has taken place in the courts of Tennessee, within the last year, for the first time. It is obvious, that without a more particular report of that adjudication, this court could not now act finally upon its authority. But if the majority of the court were of opinion, that an insulated decision on a point thus circumstanced, ought to control the previous decision of this court, the course would undoubtedly be, to hold up this cause for advisement.

That the statute law of the states must furnish the rule of decision to this court, so far as they comport with the constitution of the United States, in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious, that this admission may, at times, involve us in seeming inconsistencies; as, where states have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are. This court has uniformly manifested *368] its respect for *the adjudications of the state tribunals, and will be

very moderate in those claims which may be preferred on the ground of comity. Yet, in a case like the one now occurring, it cannot acknowledge the objection to go further, at present, than to examine the decision formerly rendered, on the construction of these words.

We have reflected, and heard arguments on our former decision, and not a doubt has been entertained, except on the question how far we were bound to surrender an opinion, under the actual state of difference existing between our construction, and that of the state from which this cause comes. It is true, that the words, "beyond seas," considered abstractedly, must, in every state in this Union, mean something more than "without the limits of the commonwealth;" which words the state of Virginia has very properly added to the statute of James. But it is also true, that if the words "beyond seas" be considered with reference to the insular situation of the country from which we adopted the law, they mean exactly the same as the words superadded in the Virginia law. And it was this consideration, as well as the obvious absurdity of applying the terms "beyond seas," in their literal signification, that induced this court, and has induced so many state courts, to give it the meaning of "beyond the commonwealth."

If equity, as applied to the construction of statutes by an eminent writer, means, "the correction of that wherein the law, by reason of *its [*369
universality, is deficient;" or, as another defines it, "interpreting statutes by the reason of them," may be applied to any case, we think it may to one, which, while it operates in restraint of common right, would, by a literal construction, make no saving in favor of persons residing in the most distant and unfrequented parts of this extensive continent. Nevertheless, as this cause must go back upon other grounds, we will, for the present, waive a positive decision on this point, as applied to the state of Tennessee, trusting that the courts of the state from which this cause comes, will, in due time, furnish such lights upon the fixed law to that state on this subject, as will enable the courts of the United States to come to a satisfactory conclusion upon the question.

The next class of questions in the cause arise under bills of exception. The object of the defendants, in the several prayers for instructions propounded to the court, was to be let into proof of a title, without will or deed, in the father of T. T. Guy, from whom they purchased, and to maintain, that although that title was only derived to him by implication, under the limitation acts of Virginia, it was sufficient, not only to make out a defence by pleading, but by giving such facts in evidence as would be a good defence on a plea of the statute of limitations, if the suit were instituted in the state of Virginia, or to maintain detinue in a suit to recover in right of a possession under the statute in that state. *With this view, [*370
he proposed to rely on the following propositions:

1. That the proof that Dickerson, on the marriage of Guy with his daughter, had sent the slave in question with them, or to them, upon their going to house-keeping, and permitted her to remain there ever after, as their property, without any specific declaration of the interest vested in them, other than the will of 1788, with a variety of corroborating facts, was sufficient to sustain an inference of a gift or transfer by parol, and of such an adverse possession as might constitute a bar under the act of limitations of Virginia of 1705. This the court refused, on the ground, that a parol gift

of slaves in Virginia was, at the date of that transaction, absolutely void. In this, it is contended, the court erred, both as to the law, and as to its application to the case.

As to the law, we are of opinion, that the question is not now to be stirred. We do not mean to intimate an opinion on the construction of the acts of 1757 and 1758, on this subject; but only to treat it as a decided point upon the construction of those statutes, that a parol gift of slaves, made in Virginia, even where the possession passed, between the years 1757 and 1787, was void or voidable; for, as to all the purposes of this case, it is immaterial which. The declaratory act of December 31st, 1787, we regard as a new enactment, taking effect from its date, as a repeal of the prior acts *371] in those *cases in which the possession passed with the gift. The possession here relied on was from 1775 to 1788, at which time the will was recorded. And here, the material question arises, whether, if void or voidable, it does not create such an adverse interest in the donee, as the statute of 1795 may attach upon, so as to vest a complete interest. And on this point, we think the court erred in rejecting the proof. For although the gift may have been void or voidable, the fact of delivery of possession attended it, and this must have put the party to his action to reinstate himself in the enjoyment of the property. The limitation to the action of detinue in Virginia, is five years; and here the supposed donee proves a possession of ten years.

There can, then, be but one doubt raised on the right of the defendant to the instruction here prayed, and to the admission of the evidence offered to the fact of a parol gift, and that is, whether he could avail himself of this defence in this mode. In the case of *Newby* v. *Blakley*, 3 Hen. & Munf. 57, a case strikingly resembling this in its circumstances, it was adjudged, that a plaintiff, in Virginia, may recover in detinue, upon five years' peaceable possession of a slave, acquired without force or fraud. And four months after that decision, and obviously without being apprised of it, this court, in the case of *Brent* v. *Chapman*, maintained the same doctrine. (5 Cranch *372] 358.) It follows, we think, that, on the same principle, *such a possession must constitute a good defence in Tennessee. To preclude the defendant from availing himself of the benefit of that evidence which would have sustained an action for the same property, by the person from whom he purchased it, would be to convert a good and valid title in Virginia, into a defeasible title in Tennessee; a sufficient title in a vendor, into a defeasible title in his vendee; and, by an indirect operation, to make the seller liable, where a direct action could not have been maintained against him to recover the property sold.

2. The second prayer is calculated to obtain of the court an instruction, that, after an indefinite loan to Guy, the father, a subsequent devise to his children, if intended to save the slaves from his creditors, was inoperative as to Guy, and purchasers for valuable consideration claiming under him, unless with actual notice of the will. On this, it is sufficient to remark, that as there were no creditors before the court, the court was under no obligation to speculate upon the possible effect of their interests upon the case. And this gets rid of the influence of the decision in *Fitzhugh* v. *Anderson*, on the cause, as will be more particularly shown in a subsequent part of this opinion. The defendant here was a purchaser from T. T. Guy, at the

time when the will of the grandfather was of record. How far purchasers are affected with record notice, is obviously a point of local law. And we understand, that much importance is attached to it in the jurisprudence of Virginia. Certainly, in ordinary *cases, where such a source of information is open to all, those who do not avail themselves of it [*373 come with an ill grace before a court to complain of imposition.

3. The third prayer was intended to maintain, that, on the circumstances of the case, the jury might infer both a deed, and the recording of that deed. Broad as this claim was, it is obvious, that the court was not bound to give the instruction, since it would have availed the party nothing, without the additional fact of the loss or extinction of the record also.

4. The fourth prayer had relation to the question, whether the right of action survived to the tenant in common, which has been already answered. As Thomas Terry Guy died, before his son John, the executory devise to John and the plaintiff became vested in possession. Their right of action then accrued, and that right survived to this plaintiff, whatever may be the ultimate distribution of the slaves, when recovered. This also was rightfully refused. And the same remark answers many of the exceptions taken to the charge which the court below did give, upon the sufficiency of the plaintiff's cause of action, and the form of laying it.

Other exceptions are taken to the legal doctrines of that charge ; one of which is, that, under the Virginia statute of frauds of 1785, the loan, with five years' possession, became a vested title in T. T. Guy ; another, that upon the general doctrines of courts of law, on the subject of frauds imputable where the possession remains *in one, and the right in another, [*374 this will should be adjudged a mere cover and evasion, or a new device for the perpetration of fraud. But on these subjects, we think it unnecessary to remark at any length ; the dates and facts do not bring the case within the operation of the statute of frauds of 1785 ; and, with regard to the general doctrine, it never has been supposed to extend to a purchaser with notice, much less to a purchaser, whom the local law affects with notice of the highest order. Had the defendant, in this instance, been a creditor of T. T. Guy, who had trusted him on the faith of this property, and now sought relief under the principle in *Twyne's Case*, the decision in *Fitzhugh* v. *Anderson*, 2 Hen. & Munf. 289, might have applied. That case was expressly decided upon the principle in *Twyne's Case*. The complainants were legatees of their grandfather, under a will that was not recorded, until three years after the creditors (who were defendants) had sold the son's slaves under execution ; slaves which he had held in possession for fifteen years, under a loan, which was never avowed, until the slaves were set up for sale, and which there was obviously much cause for bringing into serious suspicion.

Judgment reversed, and a *venire facias de novo* awarded.

*Walker and wife, Appellants, *v.* Cyrus Griffin's Heirs, Respondents.

Devise to classes.

Devise of the testator's estate, "One-fourth part to be given to the families of G. Holloway, W. B. Blackbourn and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway, than to any other of G. Holloway's children; to E. P. Bartlett in a greater proportion than any of A. Bartlett's children; the balance to be given to the families of C. and T. F. Griffin's children in equal proportion:" *Held*, that the children of C. and J. T. Griffin took *per stirpes*, and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family.[1]

Error to the Circuit Court of Kentucky. This cause was submitted without argument.

March 10th, 1826. Marshall, Ch. J., delivered the opinion of the court.—This case depends entirely on the will of Francis Peart, deceased. The testator had devised his estate to the county court of Woodford, in trust for purposes therein mentioned; after which he adds, "should the county court of Woodford not have a right to take into possession this donation of the within will, I do request one-fourth part to be given to the families of G. Holloway, William B. Blackbourn and A. Bartlett, to those of their children that my wife may think proper, but in a greater proportion
*376] to Francis *P. Holloway than any other of G. Holloway's children; to Elizabeth P. Bartlett in a greater proportion than any of A. Bartlett's children; the balance to be given to the families of Cyrus and John T. Griffin's children, in equal proportion."

The devise to the county court of Woodford was held void; and thereupon, the heirs of Cyrus Griffin, who was dead at the time the will was made, brought a friendly suit against the heirs of John T. Griffin, who was also dead, in the circuit court for the district of Kentucky, for a division of the property. The circuit court decided, that the children were entitled to it, in exclusion of the grandchildren, whose parents were living, and that all the children should take in equal proportion. From this decree, the heirs of John Taylor Griffin have appealed to this court.

It is apparent, that in the devise of one-fourth to the families of G. Holloway, William B. Blackbourn and A. Bartlett, the testator intended to designate the children, in exclusion of the grandchildren, because, he adds, "to those of their children that my wife may think proper:" obviously having the children only in his mind, and not taking grandchildren into view. When, in the same paragraph, and in the succeeding sentence, he uses the same word in the devise to the families of Cyrus and John T. Griffin, he must be supposed to have used it in the same sense, unless the additional words, "children to take in equal proportion," should show a change of

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[1] See Gring's Appeal, 31 Penn. St. 292; Cushney *v.* Henry, 4 Paige 345. But it is a general rule of construction, that when a testator designates the objects of his bounty by their relationship to a living ancestor, they take equal shares *per capita*. Risk's Appeal, 52 Penn. St. 269. S. P. Downing *v.* Marshall, 23 N. Y. 366; Gest *v.* Way, 2 Whart. 451; Witmer *v.* Ebersole, 5 Penn. St. 458; Walker *v.* Dunshee, 38 Id. 430. But, like all technical rules of construction, this must give way to the clearly expressed intent of the testator. Risk's Appeal, *ut supra*.

intention, and that the property *was given to the children of the families, and not to the families themselves. The use of the words, families of Cyrus and John T. Griffin's children, to designate the grandchildren of Cyrus and John T. Griffin, would certainly be an unusual as well as awkward mode of describing them, and we think there is no necessity for resorting to this construction. The introduction of these words is to be readily accounted for. In the preceding devise, the testator had directed the children of two of the familles, to take unequally. In this, he intended them to take equally ; and therefore, makes that provision.

The more difficult inquiry is, whether the property is to be divided into two equal parts, the one to be assigned to the family of Cyrus, and the other to the family of John T. Griffin ; or is to be divided equally among all the children of the two stocks. In solving this difficulty, it becomes necessary again to resort to the preceding sentence. The families of G. Holloway, Wm. P. Blackbourn and A. Bartlett, take, each family, as a single devisee. Whatever may be the number of persons composing the family, and however unequal may be their number, they take, collectively, distinct and equal shares, by families ; each family constituting an individual devisee. This would be, we think, the natural import of the words, if unexplained by others. But we think, this construction is strengthened by the residue of the *sentence. The testator adds, "to those of their children that my wife may think proper, but in a greater proportion [*378 to F. P. Holloway, than to any other of G. Holloway's children, to E. P Bartlett in a greater proportion than to any of A. Bartlett's children. These words show, that the inequalities intended by the testator were between children of the same family, not between the families. Francis P. Holloway was to have more, not than any of those who took under the devise, but than any other of G. Holloway's children. So, with respect to Elizabeth P. Bartlett. In each case, the share of the family is to be distributed among the children of the family, at the discretion of the wife ; that discretion being limited so far only that F. P. Holloway's should have more than any other of G. Holloway's children, and E. P. Bartlett more than any of A. Bartlett's children. We think it perfectly clear, that the families take in equal proportions.

It is reasonable to suppose, that the same intention was preserved with regard to the families of Cyrus and John T. Griffin, and the words must receive the same construction, if not controlled by those with which they are connected. Had the devise been to the families of Cyrus and John T. Griffin, the natural and obvious construction would have been, that the families took equally. We are, then, to inquire, what is the effect of the additional words, "children in equal proportion." Cyrus Griffin and John T. Griffin were both death, Cyrus leaving four, and John T. Griffin two children, who were living at *the death of the testator, and were the objects of this [*379 devise. Had he intended them to take equally, the natural mode of expressing that intention, would have been to devise the property to the children of Cyrus and John T. Griffin. They would then have taken individually, and not by families; but the testator directs them to take by families. Why, then, are the words, "children in equal proportion," added ? The testator had, in the preceding sentence, devised a part of the same property to three families, and had directed that the children of each should

take unequally. Proceeding immediately to the two families of the Griffins it was natural, though not necessary, to express his wish that the children should take equally. But neither in this, nor in the preceding devise, does he mingle the children of the different families in one mass. He speaks of them severally, by families. We are, therefore, of opinion, that the children of Cyrus and John T. Griffin take by families, and that the property devised to them is to be divided into two equal parts, one moiety to be assigned to each family.

DECREE.—This cause came on to be heard, on the transcript of the record from the circuit court for the district of Kentucky, &c.: On consideration whereof, this court is of opinion, that the children of Cyrus and John T. Griffin took the property devised to them in the will of Francis Peart, deceased, by families: This court is, therefore, of opinion, that
*380] the decree of the *circuit court is erroneous, insomuch as it directs the said property to be divided among the said children *per capita*, and not *per stirpes*, and ought to be reversed; and this court doth so far reverse the same; and in all things else, it is affirmed. And the cause is remanded, to the said circuit court, that further proceedings may be had therein according to law.

DOE *ex dem.* PATTERSON *v.* WINN and others.

Land-law of Georgia.

In general, the validity of a patent for lands can only be impeached for causes anterior to its being issued, in a court of equity; but where the grant is absolutely void, as, where the state has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law.

The laws of Georgia, in the year 1787, did not prohibit the issuing of a patent to any one person for more than 1000 acres of land; the proviso in the act of assembly of the 17th of February 1783, limiting the quantity to that number, is exclusively confined to head-rights.

CERTIFICATE of Division from the Circuit Court of Georgia.

February 24th, 1826. This cause was argued by *Berrien* and *Wilde*, for the plaintiff; and by *White*, for the defendant.

March 8th. THOMPSON, Justice, delivered the opinion of the court.—
*381] This case comes up from the circuit court for *the district of Georgia, and the question presented for decision appears by a certificate of division of opinion in that court, as to the admissibility of the grant offered in evidence on the part of the plaintiff.

The certificate states, that the plaintiff, to maintain his action, offered in evidence a patent, purporting to be a grant, in due form of law, from the state of Georgia to one Basil Jones, for 7300 acres of land, including the premises in question. And also, the warrant of survey upon which the said tract of land was laid off and surveyed, and the minutes of the court which granted the warrant. The defendant's counsel objected to the grant's going to the jury, affirming the same to be void in law, inasmuch as no grant could issue under the laws of the state for so great a number of acres as are comprised in the said grant. On which question so made the court was divided in opinion. The broad ground assumed in the objection is,

that the patent was absolutely void, and not even *primâ facie* evidence of title, The question, as stated, does not distinctly present to the court the point that was probably intended to be submitted. The objection alleges the patent to be void, because, by the laws of Georgia, no grant could issue for so great a number of acres as 7300, without stating the limitation as to the number of acres. But, from the argument, it is understood, that the limitation contended for on the part of the defendant, *is to 1000 acres, and that all grants for a greater quantity are absolutely void. [*382

How far it is within the province of a court of law to entertain inquiries tending to impeach a patent, is a question upon which conflicting opinions have been held; particularly in the different state courts in this country. By some, the patent is considered only *primâ facie* evidence of title, and open to extrinsic evidence to empeach its validity. By others, that the defect must appear upon the face of the patent, to authorize a court of law to pronounce it invalid; and that unless the defect does so appear, the patent is only voidable, and recourse must be had to a court of chancery to vacate it. By others, it has been considered, that the powers of a court of law were not so broad as laid down in the former of these opinions, nor so limited as in the latter, but that a court of law may inquire, whether the patent was issued without authority, or against the prohibition of a statute, or whether the state had title to the land granted. It is unnecessary, if not improper, at this time, to enter into a examination which of these opinions is best founded in principle. For, so far as the question applies to the present case, it has been settled by this court in the case of *Polk's Lessee* v. *Wendell et al.*, 9 Cranch 87. In that part of the case to which I refer, the exceptions under consideration were for causes not apparent on the face of the patent; and the proposition stated for decision is, whether in any, and in what cases, it is allowable, in an action of ejectment, to impeach *a grant from the state, for causes anterior to its being issued. It is said, that the laws [*383 for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are, in general, directory, and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is presupposed. That every pre-requisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would be extremely unreasonable to avoid a grant in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title, from its commencement to its consummation in a patent. But in order to guard against the conclusion that this doctrine would lead to, closing the door against all inquiry into any matter whatever, beyond the grant, for the purpose of avoiding it, the court adds, that the great principles of justice and of law would be violated, if there did not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined, if it had been acquired by the violation of principles essential to the validity of a contract; but that a court of equity is the more eligible tribunal, in general, for these questions, *and they ought to be excluded from a court of law. But the [*384

court say, there are cases in which a grant is absolutely void (or inoperative), as, where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

This doctrine was again recognised and sanctioned by this court, five years afterwards, when the same cause (5 Wheat. 293) was a second time under consideration; and it is in coincidence with the rule settled in the supreme court of New York, in the case of *Jackson* v. *Lawton*, 10 Johns. 23. We may, therefore, assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But in general, other objections and defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent; and we are not aware of any contrary rule prevailing in the state courts of Georgia. But so far as we have any information on the subject, the practice there is in accordance with the rule laid down by this court

The objection in this case to the admissibility of the grant in evidence, is, that it was issued without the authority of law, and in violation of certain statutes of the state of Georgia, which, it is alleged, prohibit the issuing
*385] of a grant to *any one person for more than 1000 acres of land; and if the statutes referred to will warrant this contruction, the objection was well taken, and can be sustained in a court of law. And this leads to an examination of those statutes, as applicable to the grant in question.

The grant bears date on the 24th of May 1787, and is for 7300 acres of land, in the county of Franklin, described by metes and bounds, and referring to a plat of the same, thereunto annexed. No consideration is expressed in the grant, nor any designation of the nature of the rights which made up the quantity of land mentioned in the grant, but it is in the common form prescribed by statute. The proceedings of the court of Franklin county, on the application of Basil Jones, accompany the grant, by which it is ordered, that he have 7300 acres in lieu of part of old warrants of John Peter Wagnor—bounty reserved. This shows that the aggregate quantity of land mentioned in the grant was made up of sundry old warrants, and affords also an inference of the existence of a practice of consolidating a number of warrants in one grant; and there is nothing in the land laws of Georgia, prior to the year 1794, at variance with such a practice. The limitation as to quantity will be found to relate to warrants for head-rights, and not to grants; and as warrants were transferrible, no objection existed to their being united in one grant.

The land law of Georgia is comprised under several statutes, passed at
*386] different periods, varying *and modifying the system, occasionally, as policy required. But all being *in pari materia*, are to be looked to as one statute, in explaining their meaning and import. Under these laws, there were various ways in which persons became entitled to rights, and could obtain warrants for land; such as head-rights, according to the number of a family; bounties to soldiers and to citizens, and likewise for the encouragement of certain manufactures, &c. And for the purpose of ascertaining and determining whether applicants were entitled to warrants, a land court was instituted in each county, to receive applications for lands, and grant war-

rants for surveys to such as should show themselves entitled to land, according to the provisions of the land laws. A county surveyor was required to be appointed by each county, who was authorized to lay out and survey to any person who should apply to him, the land for which a warrant had been obtained. And he was required to record, in an office to be kept for that purpose, all surveys by him made, so as to enable those who had any objections to make to the passing of the grant, to enter a *caveat*, which was to be tried by a jury of twelve men, sworn to try the matter according to law and equity. And under the act of July 17th, 1783 (Prince's Dig. 266, § 36), this was declared to be final and conclusive. An appeal was afterwards given to the governor and executive council (§ 56 of the Dig.), who were required and empowered to proceed to decide such *caveats*, in manner *and form as they should think most conducive to justice; and expressly declaring, that from their decision there should be no [*387 appeal. And this was the existing law at the time the grant in question issued. By a subsequent statute (Dig. § 83), the power of hearing and determining such appeals, and signing grants, was vested in the governor alone.

To permit an inquiry whether a warrant, obtained under such guards and checks, was authorized by law, would be opening the door to endless litigation, and against the spirit and policy of the land laws in general, as well as the letter of the statute, which provides for *caveats*, and which declares the ultimate decision thereon to be final and conclusive. If the validity of the warrants cannot be called in question, the issuing of the grant follows, as matter of course, and cannot be said to be without authority, unless the statute prohibits the issuing of a grant for more than 1000 acres of land.

The act relied upon on the part of the defendant, as containing such prohibition, is that of the 17th of February 1783 (Dig. § 32), and is to be found in the proviso to the first section. The enacting clause relates entirely to head-rights, and declares, that each master or head of a family, shall be allowed, as his own head-right, and without any other or further charges than the office and surveying fees, 200 acres; and shall also be permitted to purchase, at the rates therein specified, a further quantity, according to the number of head-rights in such family: *provided the quantity of land granted and sold to any one person shall not exceed 1000 acres, and [*388 that such person do live on and cultivate a part of the said land twelve months, before he shall be entitled to a grant for the same.

The word "granted" is said to be used here in its technical sense, as synonymous with patent, and to imply a general prohibition to issue a grant to any one person for more than 1000 acres. Admitting this to be the sense in which the term is used, the consequence would not follow that is contended for. The term is here used in the proviso; the office of which is, to limit and restrict the operation of the enacting clause. The enacting clause relates entirely to head-rights, and is without limitation as to quantity; that depended on the number of the family. The master or head of the family is allowed 200 acres as his own head-right, on paying office and surveying fees, and is permitted to purchase, at the rate therein mentioned, any further quantity, according to the number of head-rights in his family. The proviso, however, limits the quantity to 1000 acres; but the limitation is upon

the subject matter of the enacting clause, to wit, head-rights. The enacting clause speaks of two modes of acquiring these head-rights. One, a gratuity allowed to the head of the family; the other, a purchase; and the words granted and sold, as used in the proviso, may well be construed in reference to these two modes of acquiring land. And the proviso is equivalent to saying, that no one person *shall be allowed, on his own head-right, and on the purchase of head-rights in his family, more than 1000 acres. But this does not prohibit him from purchasing other warrants, and including all in one grant, when it is issued.

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That the word granted, as here used, has reference to the warrant or incipient step towards acquiring the title, and not to the consummation of it by grant, is evident, both from the subsequent part of the proviso, and from the use of the same word, as synonymous with warrant, in other parts of the land laws. By the proviso, the person to whom land is granted and sold, is required to live on, and cultivate a part of the said land twelve months, before he shall be entitled to a grant for the same. To give to the word granted, in the former part of the sentence, the same meaning as to the word grant in the latter part, would involve gross inconsistency. This construction is corroborated by the enacting clause in the third section of the same act, containing, substantially, a like provision, that every person applying for head-rights as aforesaid, shall, previous to his obtaining a grant for his land, or having it in his power to dispose of the same (otherwise than by will), settle and improve a part of such tract or tracts as he may obtain a warrant and survey of, &c. And in a subsequent act, passed the 23d of December 1789 (Dig. § 85), the very word granted is used as the act of the land court, whose authority extended only to the issuing of warrants, and not grants. The enacting clause *gives to three or more justices of the peace, in their respective counties, the same powers that had been exercised by four justices, and an assistant justice, under a former act; provided that the said three or more justices shall each of them sign all warrants for land by them granted.

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Other parts of these land-laws might be referred to to show that this word is not always used in a technical sense, as synonymous with patent. And that it is not so used in the proviso to the act of 1783, we think is very evident; and throughout all these laws, so far as we have been able to discover, whenever there is a limitation to 1000 acres, it is applicable to the warrant, and not to the grant.

It is clearly to be inferred, from various parts of these land laws, that warrants were transferrible. Thus, in one of the earliest acts passed on the subject, in the year 1777 (Dig. 261), it is provided, that all persons who have had lands ordered them, and have not taken out grants for the same, or sold their warrants or rights, or are either dead, or left the state, such person or persons as have bought such warrants, or rights and titles, and continued in this state, shall have such lands granted them, agreeably to such order or warrant so purchased. And, the prohibition afterwards, in the year 1794 (Dig. 280), to survey or renew transferred warrants, necessarily implies, that previous to that time, such transfers were sanctioned by the land laws; and if so, there could be no reason why a number of such *warrants should not be consolidated, and included under one grant, although the aggregate quantity might exceed 1000 acres. There

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might be very good reason for putting this limitation upon warrants for head-rights, as the settlement and improvement of the country might be thereby promoted.

That grants for more than 1000 acres were sanctioned, is evident from the act of the 23d of December 1789 (exemplification produced), fixing the fees of the officers of the state; by which the governor is allowed $6 for signing a grant of land exceeding 1000 acres. So also, in the act to revise and amend the above act, passed the 18th of December 1792 (Dig. 173), the governor is allowed, on all grants above 1000 acres, at and after the rate of $2 for every thousand acres therein contained. (Dig. 173.)

Upon the whole, therefore, without pursuing this examination further, we are satisfied, that, in the year 1787, when the grant in question was issued, the land laws of Georgia did not prohibit the issuing of a patent to any one person for more than a thousand acres; and that the grant offered on the trial is not, therefore, void in law, and should have been admitted in evidence.

CERTIFICATE.—This case came on, &c.: On consideration whereof, this court is of opinion, and directs it to be certified to the said circuit court, that the evidence offered in the court below *by the plaintiff, and to the competency of which objection was made, and upon which question the opinions of the judges of the said court were opposed, was competent evidence, on the part of the plaintiff, to sustain the issue on his part, &c. [*392

UNITED STATES *v.* AMEDY.

State records.—Destroying vessels.

Under the act of the 26th of May 1790, c. 38, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts, in the courts of other states, and of the Union. No other formality is required than the annexation of the seal; and in the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act.

Under the crimes act of the 26th of March 1804, c. 393, § 2, on an indictment for destroying a vessel, with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers *de facto* the policy was executed, and to prejudice whom the vessel insured was destroyed; without proving the existence of a legal corporation authorized to insure, or a compliance on the part of such corporation, with the terms of its charter, or the validity of the policy of insurance.

The terms "any person or persons," in the act, extend to corporations and bodies politic, as well as to natural persons.

CERTIFICATE of Division from the Circuit Court of Virginia. The prisoner, John B. Amedy, was indicted in the circuit court of Virginia, under the act *of congress of the 26th of March 1804, c. 393,(*a*) for destroying a vessel, with intent to prejudice the underwriters, and after a verdict [*393

(*a*) Which provides (§ 2.), "That if any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy, any ship or vessel, of which he is owner in part or in whole, or in anywise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel,

of guilty, his counsel moved the court for a new trial upon the following grounds:

1. That the exemplification of the acts of the legislature of the state of Massachusetts, incorporating the Boston Insurance Company (who were the underwriters), given at the trial, was not admissible in evidence, as a sufficient verification thereof. The papers given in evidence were printed copies of the acts, with certain erasures and interlineations in writing, and to the copy of each act was annexed a separate attestation in the following
*394] words: "A true copy, *attest, Edward D. Bangs, secretary." The copies were attached together, and exemplified under the great seal of the state of Massachusetts, with the following certificate annexed:

"Commonwealth of Massachusetts, Secretary's Department, November 12th, 1825.

"I certify, that the printed copies of the following acts, viz: 'An act to define the powers, duties and restrictions of insurance companies;' 'An act authorizing the several insurance companies in this commonwealth to insure against fire;' 'An act to incorporate the Boston Insurance Company;' 'An act to incorporate the Commonwealth Insurance Company;' and 'An act in addition to an act, entitled, an act to incorporate the Commonwealth Insurance Company;' to which printed copies this certificate is annexed, have been by me compared with the original acts on file in this office, and that the same are now true copies of the said original acts, except the usual attestation of enactment, and signatures subjoined to each act. In testimony whereof, I hereunto set my hand, and have affixed the seal of said commonwealth, the day and year above mentioned.

(Signed) EDWARD D. BANGS, Secretary of the Commonwealth."

2. That before the policy of insurance underwritten by the Boston Insurance Company could be given in evidence, it was necessary to prove, that the subscription to the stock, and the payment of such subscription, as required by the act of incorporation, had actually been made. The policy
*395] of insurance was admitted *in evidence by the court below, without proof that the subscription to the stock had actually been made; it being proved that there was a company in Boston, called the Boston Insurance Company, doing the business of insurance, and paying losses when incurred, and that the paper produced was executed, after the manner in which they usually made their policies of insurance.

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the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death." It is stated, in a note to the case of the United States *v.* Johns, 4 Dall. 412, that the second member of the above section is so inaccurately expressed, that the attorney of the district (Mr. Dallas) thought, at first, there must have been some error of the press; but the secretary of state informed him, that the printed copy was found, upon a comparison, to agree exactly with the roll. See the analogous English statutes, 4 Geo. I., c. 12, § 3, and 11 Geo. I., c. 29; 1 Abbott on Ship. 167-8.[1]

[1] The master of a vessel is liable to indictment for wilfully destroying her, with intent to defraud the underwriters, though her owner be on board, and consent to, and command her destruction. United States *v.* Jacobson, 2 City Hall Recorder 131. So, a minor, who ships, without the knowledge of his parents, may be convicted under the first section of the statute, of the offence of setting fire to the vessel, as a person belonging to her. United States *v.* Lockman, 11 Law Reporter 151.

3. That the policy ought to have been proved to be executed by the authority of the company, in such manner as to be legally binding on them.

4. That the court instructed the jury, "that it was not material, whether the company was incorporated or not; and it was not material whether the policy were valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy; but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the underwriters."

The judges of the court below having been divided in opinion upon the motion for a new trial, the case was brought before this court upon a certificate of that division.[1]

March 13th. *Worthington*, for the prisoner, argued, that, in order to convict him of the offence charged in the indictment, it was necessary that the policy of insurance should be a valid contract. The intent with which an act is done is not susceptible of direct proof. The only means by which it can be established is, by evidence of *facts from which it may be directly inferred. If the probable consequence of the act done is to [*396 produce the result from which the intent is inferred, the inference may be reasonable; but when, by no possibility, the result could occur, how can a fraudulent intent be inferred? If, in this case, the policy were valid, the probable consequence of the destruction of the vessel is a prejudice to the underwriters, from which might be fairly inferred, in the absence of explanatory testimony, a design to prejudice. But if the policy was void, no such consequence could possibly happen, and no inference can arise, from it alone, of a design to produce such a consequence. The strongest analogous cases are those of forgery, in which the distinction appears clearly to have been taken. In those cases, it has been determined, that where the probable consequence of the act was to defraud, the intent might be inferred. But, where such was not the case, as where the instrument was void on its face, and therefore, could not deceive, if ordinary vigilance was exerted, the intent could not be inferred. *Jones's Case*, 2 East P. C. 952. Thus, where one Wall was indicted and convicted of the forgery of a will, void under the statute of frauds, the conviction was held to be erroneous. 2 East P. C. 953; *Moffat's Case*, Ibid. 954; 2 Leach C. C. 483. This question appears to have been decided in England, in the *case of the *King* v. *Gillson*, [*397 1 Taunt. 95. In that case, the prisoner was indicted under the statute of 43 Geo. III., c. 58, § 1, for feloniously setting fire to a house, with intent to defraud the London Insurance Company. A policy was produced, regularly executed, covering goods in Wood-street, on which was indorsed a memorandum, stating that the goods were removed to Old Boswell Court, and that the removal was allowed. This memorandum was not stamped. The question arose, whether the written contract, being void by the revenue laws, for want of a stamp, was properly admitted in evidence, and it was determined, that the evidence was not admissible. In the case of the *United States* v. *Johns*, 4 Dall. 412, this point was decided, and the court held, that

[1] But see United States *v.* Daniel, 6 Wheat. 542, where it was decided, that a division of opinion on a motion for a new trial, cannot be certified to this court; in such case, the motion fails, and the circuit court must proceed to judgment. This case, therefore, was *coram non judice*.

it was necessary to prove a valid policy. If, then, the validity of the policy is essential to the offence, it becomes necessary in this case to show a legally subsisting corporation, capable of executing a valid policy of insurance, and a policy legally executed. On the first point, it might be contended on the part of the prosecution, that though it may be necessary to prove a party actually contracting, yet that proof of a corporation *de facto* would be sufficient. But it was insisted, a corporation exists by its charter alone. It is that which controls its operations, and settles the mode and extent of its obligations. If the validity of the policy be necessary, it is surely essential,
*398] to show that the *body which executes it was legally empowered to do so, and that the act itself was performed in pursuance of those powers. This question was so decided in the case of the *United States* v. *Johns*. It was insisted, that the papers given in evidence did not afford evidence of these facts, because they were described in the certificate as printed papers, whereas, they are partly written; and they were so loosely attached to the paper to which the seal is affixed, as not to afford satisfactory evidence that they were the papers intended to be verified. If, however, the papers should be deemed sufficiently authenticated, still it is necessary, in order to show a valid policy, to exhibit evidence that the corporation went into operation according to the terms of its charter. *Henriques* v. *Dutch West India Co.*, cited in 2 Ld. Raym. 1535; 4 Com. Dig. 468, note *a* (Am. ed.). It was also insisted, that a corporation was not a "person," within the meaning of the act of congress. This point was raised in the case of the *United States* v. *Johns*, but not decided. It appears, however, to have been determined in England, in the case of the *King* v. *Harrison*, 1 Leach C. C. 180; 2 East P. C. 927, 988.

The *Attorney-General*, for the United States, argued, that the evidence given of the acts of the legislature of Massachusetts incorporating the Boston Insurance Company, who where the underwriters intended to be
*399] prejudiced by the *felony, was sufficient, under the act of congress of the 26th of May 1790, c. 38, prescribing the manner in which the public acts, &c., of each state shall be authenticated, so as to give them full faith and credit in every other state. All that the statute requires, in respect to legislative acts, is, that the seal of the state should be affixed, and that obviates every objection which had been made to the exemplification in this case.

It was further contended, that proof that the company actually carried on the business of insurance was sufficient, in a public criminal prosecution, without showing that they were legally authorized to transact it. It was immaterial, whether there was a valid policy or not. The guilt of the act consists in the act itself, and the *animus* with which it was committed. It was analogous to the cases of forging a will, where the act was intended to defraud, not the party whose signature is forged, but third persons, and it turns out the testator was alive. Hawk. P. C. c. 70, § 7; 2 East P. C. 948. The guilt in such cases cannot depend upon the certainty that the party would have the benefit of the crime, had his attempt been successful. In the case of the *King* v. *Gillson*, the objection was not to the proof of the policy, but to the written indorsement or memorandum, which a particular statute had specially declared inadmissible in evidence, unless stamped. It was, on its

face, inadmissible, and the existence of the insurance *could not, therefore, be established. As to the requisition of proof that the conditions of the incorporating act had been complied with, it was a sufficient answer to say, that the party was estopped from denying it, by receiving a policy executed by the company. To require proof of a valid contract, would be to go into the whole case, as a civil action, and would require an investigation of the whole law of insurance. Whether the term "person or persons," in a statute, includes such artificial persons, as a corporation, had never been decided in this country. The supposed authority cited in the negative (2 East P. C. 988; 1 Leach C. C. 215), was entitled to the less weight, as it rested merely upon a MS. note of Mr. Justice BULLER, was decided without argument, and is contrary to the analogy of the law which regards corporations as persons, for all civil purposes. Lord Coke, in commenting on the statute 31 Eliz., ch. 7, concerning the erection of cottages, where the term used is, "no person shall," &c., says, "this extends as well to persons politic and incorporate, as to natural persons whatsoever." 2 Inst. 736. The other authorities are to the same purpose, and consider the term *persons* as including those artificial beings called corporations, as well as natural persons. 1 Mod. 164; 1 Wooddes. 195; 1 Bl. Com. 476.

Coxe, for the prisoner, in reply, stated, *that in order to determine the questions in the case, it was important to consider the [*401 character of the offence created by the statute, and charged in the indictment. In ordinary cases of crime, the act charged is, in itself, criminal; the intent to commit the offence is legally inferred from the act itself. In murder, the act of killing draws after it the legal inference of the malice prepense; in larceny, the act of taking the property of another proves the *animus furandi*, and so in other instances. The intent, or mental design, is, in all these instances, proved by the act, and this intent is co-extensive with the act done. In the present case, however, the act done by the accused is innocent and legal in itself. He was the owner of the vessel—so charged in the indictment. In that character, he might destroy his own property, without being chargeable with any evil disposition or design. The simple act of destruction is, then, evidence of no criminality. Whence, then, does the criminality arise? From the intent to prejudice the underwriter. This intent is the hidden operation of the mind, legally to be inferred from certain facts positively proved. Those facts, which alone can warrant this inference, are, first, that such a person exists as the indictment charges that he designed to prejudice; second, that such person was in the situation which made such act likely to prove prejudicial. The first, therefore, requires that such a party should be in existence; the second, that his relation should be proved to subsist.

*It is essential, then, that it should appear in proof, that there was [*402 such a corporation as the Boston Insurance Company, because, unless such a party existed, the law cannot infer the design to prejudice it. It is equally essential, that a valid policy of insurance should be proved, because, unless that party was placed in the situation in which it could be injured by the destruction of the vessel, it is impossible that such a design can be inferred. These circumstances, then, are of the very essence of the crime charged, and must be established by plenary proof. How, then, is the exist-

ence of the corporation to be proved? In cases in which it is a plaintiff, it must also prove its existence; and this is to be done by the production of the charter, or the act of incorporation. 2 Ld. Raym. 1535. It cannot be pleaded in abatement by a defendant, sued by a corporation, that there is no such corporation, because, as that fact must be necessarily proved as part of the title, it is included in the general issue. In the case of the *United States* v. *Johns*, 4 Dall. 412 (more fully, as to this point, reported in a MS. statement of the case by Mr. Justice WASHINGTON[1]) on the indictment under this act of congress, proof of the act of incorporation was required and produced.

That there should be a valid and subsisting policy, is equally essential. Unless there was such a policy, covering the identical property, upon the very voyage in which the vessel was engaged, *covering such a risk, *403] and known to the accused, the law cannot intend that he designed to prejudice the underwriter. The rule of law is, that if every fact laid in the indictment may be true, and yet the accused may be innocent of any offence, the indictment is defective. 1 Doug. 153. If essential to lay it in the indictment, it is equally essential to establish it by testimony. Unless, therefore, it be proved, that there was a valid policy, there could be no underwriter who could be injured. There might be a policy covering the vessel against capture by the enemy, against destruction by fire, upon a different voyage from that which the vessel was pursuing. Under such circumstances, the law would not infer the intention to prejudice the underwriter. The case of the *King* v. *Gillson*, 1 Taunt. 95, appears decisive of this question, so far as its authority is recognised. And in the case of the *United States* v. *Johns*, the court held, it was essential to prove a valid subsisting policy.

As to the supposed analogous cases of forgery, cited on the part of the prosecution, all cases of forgery necessarily imply, that the instruments are in themselves invalid; that they are false in reality, is of the essence of the crime, which consists in the representation of such void instruments to be valid, with intent to deceive somebody. Such deception is practised upon third persons, not upon those whose names are forged. Were a man indicted for representing a forged *will to be a genuine one, *404] with intent to defraud a person shown to be dead, or never to have been *in rerum naturæ*, it might bear upon the former point raised in this case. Upon this point, they can have no bearing whatever. Unless the instrument charged to be forged is proved to be false, there can be no conviction for forgery. Unless, in this case, the policy is proved to be valid, we insist, the same conclusion follows. The essence of that crime is the representation of a false instrument to be a genuine one; the gist of the offence here is, that a party was in such a predicament that he might be injured by the act of the prisoner, and, consequently, that the policy was a valid one. The deception in that case might be equally successful, and therefore, equally injurious, whether the bill purported to be made by a dead man or by a living one, whether the person who purported to be the drawer of a bill of exchange, was in existence or not; and therefore, that circumstance could make no difference. In this case, no person could

[1] 1 W. C. C. 363.

be injured, unless there was a valid policy of insurance, and therefore, the proof of such policy is essential.

If it be essential, that a valid policy should be proved (which, in itself, includes the proof of a legally subsisting corporation), in what manner, and by what species of evidence, is this to be made out? By producing the act of incorporation or charter. Was, then, the exemplification of the acts of the Massachusetts legislature, in this case, sufficient? The statute of congress directs, that the legislative acts of *the several states should be proved by the annexation of the great seal. But this provision was [*405 merely in affirmance of the common law, and was not designed to dispense with any of the rules of the common law. The seal of the state proves itself, and may also prove the truth of the certificate which it purports to sanction, but that certificate ought to show, in its terms, that it was affixed by some one having authority to affix it. These papers are, evidently, from the face of them, torn from some printed book, full of erasures and interlineations not enumerated in the certificate. These printed papers are not connected directly with the seal. The seal is on a distinct piece of white paper, and by a single thread these pretended acts of the legislature are connected with that. Some essential parts are again connected with those through which the thread passes by wafers. Does the seal prove these? If a thread or wafer were now to be used to connect either, or any of these sheets, with a newspaper, it would be equally well authenticated. These acts are not fully given. They do not include the evidence of enactment, nor do they contain the attestation of those officers whose signatures are essential. These are constituent parts of every legislative act. They are all upon the original rolls. The evidence offered is, then, merely of extracts, or parts of the acts, not entire copies.

It is not only essential, that the act should be exhibited, but it should also be proved that the company went into existence, and continued to *subsist. The grant of the charter must be accepted by the voluntary [*406 consent of those whom it designed to incorporate, otherwise it will be void. 4 Com. Dig. 468, note *a* (Am. ed.). The corporation might also have become extinct—it may have been dissolved—the charter may have been forfeited.

As to the question whether a corporation is a person, within the meaning of the act of congress, the case from Leach and East is the only one which has been referred to, in which the question has occurred in a criminal prosecution. It has been suggested, that it is doubtful whether such a question was, in fact, decided. East states it positively; in the last edition of Leach, the assertion is reiterated, and it is sanctioned by the last editor of Comyn's Digest, and other authorities. 4 Com. Dig. 468, note *t;* Russ. on Crimes 1495.

March 16th, 1826. STORY, Justice, delivered the opinion of the court.—The first question for consideration is, whether the evidence of the act of incorporation of the Boston Insurance Company, disclosed upon the record, was admissible as a sufficient verification thereof. It is matter of most serious regret, than an exemplification so loose and irregular, should have been permitted to have found its way into any court of justice. As it has, it is our duty to decide upon its legal sufficiency. It *is [*407

under the seal of the state, and verified by the signature of its secretary.

It is said, that this is not enough, and that it ought to be shown, that the secretary had authority to do such acts. This objection must be decided by an examination of the act of congress of the 26th of May 1790, prescribing the mode in which the public acts, records and judicial proceedings of each state shall be authenticated, so as to take effect in every other state. That act provides, "that the acts of the legislatures of the several states, shall be authenticated by having the seal of their respective states affixed thereto." No other or further formality is required; and the seal itself is supposed to import absolute verity. The annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof, and competent authority to do the act. We know, in point of fact, that the constitution of Massachusetts has declared, "that the records of the commonwealth shall be kept in the office of the secretary." But our opinion proceeds upon the ground, that the act of congress requires no other authentication than the seal of the state.

The other objections to the exemplification are, that the acts are printed copies, with erasures and written interlineations, not so annexed as to afford perfect certainty that they are the identical copies to which the secretary's certificate was originally annexed. We think these objections cannot be maintained in point of law. *The copies must be presumed to be the original copies, in the same state in which they were originally annexed. Any subsequent alteration or subtraction would be a public crime of high enormity; and the commission of a crime is not to be presumed. The certificates of the secretary, taken together, show that he did not mean to state that the printed copies had not been varied by writing, so as to be true copies, for he adds the phrase, they are now true copies of the original acts. The original print is still visible throughout, and the alterations in writing are mere verbal alterations, not in the slightest degree varying the sense or effect of any single clause in which they occur; and, to afford additional proof of identity, the secretary has on each copy annexed his own signature, with an attestation of its being a true copy. There is, therefore, no presumption, from the face of the papers, or otherwise, of any alteration or addition, since the seal of the state was annexed. The annexation of the usual attestation of the enactment and signatures to the acts was not necessary. It is sufficient, that their existence and time of legal enactment is shown. Our opinion, therefore, upon this question is, that the papers were properly admitted in evidence.

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The next question is, whether, before the policy of insurance, underwritten by the Boston Insurance Company, could be given in evidence, it was necessary to prove, that the subscription to the stock, and the payment of such subscription *as required by the act of incorporation, had been made. In our opinion, it was not. This is not the case where a suit is brought by the corporation to enforce its rights, where, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence. The case of *Henriques and Van Moyses* v. *Dutch West India Company*, cited in 2 Ld. Raym. 1535, as decided before Lord KING, whatever may be its authority, was of that sort, and therefore, carries with it an obvious distinction; nor is this the case of a

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quo warranto, where the government calls upon the company to establish its legal corporate powers and organization. The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. Under such circumstances, we think, nothing more was necessary for the government to prove, than that the company was *de facto* organized, and acting as an insurance company and corporation. The very procurement of a policy by the prisoner, to be executed by the company, was of itself *primâ facie* evidence for such a purpose. In cases of the murder of officers, it is not necessary to prove that they are officers, by producing their commissions. It is sufficient to show that they act *de facto* as such. In cases of piracy, it has been held sufficient to establish the proprietary title to the ship, by evidence of actual possession of the party claiming to be owner. *These are analogous cases, and furnish strong illustrations of the general principle. [*410

The same answer may be given to another objection, and that is, that the policy ought to have been proved to be executed by the authority of the company, in such manner as to be binding on them. The actual execution of the policy by the known officers, of the company *de facto*, is sufficient.

The next question arises upon the instruction of the court, "that it was not material, whether the company was incorporated or not; and it was not material, whether the policy were valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy; but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the actual underwriters." We think this opinion correct. The act of congress of the 26th of March 1801, ch. 40, on which this indictment is framed, declares, "that if any person shall, on the high seas, wilfully and corruptly cast away, &c., any ship or vessel, of which he is owner, &c., with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, &c., the person or persons offending therein, &c., shall suffer death. The law punishes the act, when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or shall underwrite, a policy thereon, which, for ought the prisoner *knows, is valid; and does not prescribe that the policy should be valid, so [*411 that a recovery could be had thereon. It points to the intended prejudice of an underwriter *de facto*. The case of the *King* v. *Gillson*, 1 Taunt. 95, 2 Leach 1007, did not turn upon this point. That was an indictment for maliciously setting fire to a house, with intent to defraud the London Assurance Company of houses and goods from fire. It was necessary to prove that the household goods in the house had been actually insured for the prisoner by the company. A policy had been executed by the company, on these goods, in another house, and subsequently, upon the removal of the prisoner to the house set on fire, a memorandum was indorsed on the policy, agreeing that the removal of the goods should be allowed. This memorandum was unstamped, and by statute was not admissible in evidence. Six judges against five held the evidence inadmissible, upon the ground, that the prohibition was intended to be universal. The existence, therefore, of the insurance itself, could not be established. If there had been proof that

the p)licy was executed, the question might have arisen, whether it was necessary further to prove its legal validity in all other respects. The argument at the bar, drawn from the known law as to forgeries, is, we think, pertinent. In those cases, when they depend on the common law, actual prejudice is not necessary to be proved ; and, of course, the validity of the instrument is entirely waived.

*412] Another question, not raised in the court below, has been argued here, and upon which, at it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is, that a corporation is not a *person* within the meaning of the act of congress. If there had been any settled course of decision on this subject, in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736 establishes, that they are so deemed within the purview of the penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz., ch. 7, respecting the erection of a cottage, where the word used is, "no person shall," &c., says, "this extends as well to persons politic and incorporate, as to natural persons whatsoever." In the case of the *King* v. *Harrison*, 1 Leach 180, 2 East P. C. 927, 988, it may, perhaps, be matter of some doubt, whether the point was actually decided by the court. But, if it was, it mainly rested upon a peculiarity of construction which grew out of the statute of 31 Geo. II., ch. 22, § 78, which professed to cure doubts of the meaning of these words in other antecedent statutes upon similar subjects, leaving that on which the indictment was

*413] framed untouched. Finding, therefore, no authority at *common law, which overthrows the doctrine of Lord Coke, we do not think that we are entitled to engraft any such constructive exception upon the text of the statute.

Upon the whole, it is to be certified to the circuit court of Virginia, that the decisions of that court, upon the points of law arising at the trial, were correctly decided.

CERTIFICATE.—This cause came on to be heard on the certificate of division of opinions of the judges of the circuit court, &c. : On consideration whereof, it is adjudged by the court, that it be certified to the said circuit court, that the points of law ruled by the said circuit court at the trial of the cause, and upon which the same court, upon a motion for a new trial, were divided in opinion, were, in all respects, correctly decided by the said court at the said trial.

The ANTELOPE: The Vice-Consuls of Spain and Portugal, Libellants.

Explanation of the former decree of the court in the same cause. 10 Wheat. 66.

CERTIFICATE.—A mandate having issued to the Circuit Court for the

*414] District of Georgia, to *carry into execution the decree of this court pronounced at the February term 1825, to deliver certain Africans, in the said decree mentioned, to the Spanish consul, for Spanish claimants, and the judges of that court having been divided in opinion,

respecting the mode of designating the said slaves so to be delivered to the United States, whether the same should be made by lot, or upon proof on the part of the Spanish claimant, it is ordered to be certified to the said circuit court of Georgia, that in executing the said mandate, the Africans to be delivered must be designated by proof made to the satisfaction of that court.

WILLIAMS, Plaintiff in error, *v.* The PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Error to joint judgment.

Where there is a joint judgment against several defendants, and one only sues out the writ of error, without joining the others, it is irregular; but if the others refuse to join in it, *quære?* whether the plaintiff may not have summons and severance?[1]

March 8th, 1826. In this case, in which *Wright* was for the *plaintiff in error, and *Webster*, for the defendants :— [*415

MARSHALL, Ch. J., stated, that the writ of error must be dismissed, it having issued irregularly. The judgment in the circuit court of Ohio was a joint judgment, upon a joint action for money lent, against three defendants; and the writ of error was sued out by one of the defendants, in his own name only, without joining the others. The court was of opinion, that the writ of error ought to have been in the name of the three; and if the others should refuse to join in it, that it would deserve consideration, whether the present plaintiff might not have summons and severance.

Writ of error dismissed.

BARNES and others *v.* WILLIAMS.

Special verdict.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a *venire facias de novo.*[1]

February 6th, 1826. This case was argued by *Wickliffe* and **Talbot*, for the plaintiffs; and by *White* and *Isaacks*, for the defendant. [*416

MARSHALL, Chief Justice, stated, that, upon inspecting the record, it had been discovered, that the special verdict found in the case was too imperfect to enable the court to render a judgment upon it. The claim of the plaintiffs being founded upon a bequest of certain slaves, it was essential to a recovery at law, that the assent of the executor to the legacy should be proved. Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict,

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[1] Wilson *v.* Life and Fire Ins. Co., 12 Pet. 140; Todd *v.* Daniel, 16 Id. 521; Fotteral *v.* Floyd, 6 S. & R. 315. See Fenner *v.* Bettner, 22 Wend. 621; Thompson *v.* Valarino, 3 Den. 179.

[1] McArthur *v.* Porter, 1 Pet. 626.

intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff. So, as to the defendant's defence under the statute of limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued. It was not stated, that the plaintiff and defendant were ever resident in the same state, at the same time. Although it was found, that E. D. Barnes, one of the plaintiffs, came into the state of Tennessee, after he arrived at the age of twenty-one years, and more than three years before the suit was brought, yet it was not found, that during any part of that time, the defendant, Williams, was resident in that state. The case was, therefore, too
*417] imperfectly *stated to enable the court to decide the questions upon which the opinions of the judges of the circuit court were opposed and the cause was remanded to that court, with directions to award a *venire facias de novo.*

Ordered accordingly.

UNITED STATES *v.* KELLY and others.

Endeavoring to make a revolt.

Although the crimes act of 1790, c. 36, § 12, does not define the offence of "endeavoring to make a revolt," it is competent for the court to give a judicial definition of it.

The offence consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command, or against his will to take possession of the vessel, by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[1]

CERTIFICATE of Division from the Circuit Court of Pennsylvania. The defendants, Kelly and others, were indicted in the circuit court for the district of Pennsylvania, for that the defendants, on the 24th of December 1824, being seamen on board a merchant vessel of the United States, called the Lancaster, on the high seas, feloniously endeavored to make a revolt in the said vessel, contrary to the act of congress of the 30th of April 1790, c. 36, § 12.

The defendants were found guilty,[2] and moved the court in arrest
*418] *of judgment, upon the ground, "that the act of congress does not define the offence of endeavoring to make a revolt, and that it was not competent to the court to give a judicial definition of a crime heretofore

[1] United States *v.* Smith, 1 Mason 147; United States *v.* Sharp, Pet. C. C. 118; United States *v.* Smith, 3 W. C. C. 78. A combination among the seamen to refuse to do duty on board, under a new master, duly appointed, is an endeavor to make a revolt. United States *v.* Haines, 5 Mason 272; United States *v.* Cassidy, 2 Sumn. 582; United States *v.* Nye, 2 Curt. 225. So, if they combine to refuse to do duty, until the master comply with some improper request on their part. United States *v.* Gardner, 5 Mason 402. If the crew combine together not to do duty, it is an endeavor to make a revolt, though no orders be afterwards actually given. United States *v.* Barker, 5 Mason 404; United States *v.* Borden, 1 Sprague 374. A preconcerted plan, however, is not necessary to bring a case within the act. United States *v.* Morrison, 1 Sumn. 448. But it is necessary that there should be some effort or act, to stir up others of the crew to disobedience. United States *v.* Savage, 5 Mason 460.

[2] See 4 W. C. C. 628.

unknown." The opinions of the judges of the court below being divided upon this motion, the case was certified to this court for determination.

March 9th, 1826. The cause was submitted, without argument, by the *Attorney-General*, for the United States—no counsel appearing for the prisoners.

March 10th. WASHINGTON, Justice, delivered the opinion of the court. —This case comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the eastern district of Pennsylvania, upon the following point assigned by the defendants as a reason in arrest of judgment, viz., "that the act of congress does not define the offence of endeavoring to make a revolt, and it is not competent to the court to give a judicial definition of an offence heretofore unknown."

This court is of opinion, that although the act of congress does not define this offence, it is, nevertheless, competent to the court to give a judicial definition of it. We think, that the offence consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of *the vessel by assuming the goverment and navigation of her, or by transferring their obedience from the lawful commander to some other person. [*419

Certificate accordingly.

UNITED STATES *v.* TAPPAN and others.

Duties on imports.

The words "true value," in the 11th section of the duty act of the 20th of April 1818, c. 361, mean the actual cost of the goods to the importer, at the place from which they were imported, and not the current market value of the goods at such place.

If the collector, in fact, suspect that the goods are invoiced below the current market value thereof, at the place from which they were imported, but do not suspect that they were invoiced below the true and actual cost thereof to the importer, he has no right to direct an appraisement.

But whenever, in the opinion of the collector, there is just ground to suspect that the invoice does not truly state the actual cost of the goods, he may direct the appraisement, and is not bound to disclose the grounds upon which he forms that opinion, whether it is formed from his knowledge or information of the current market price of the goods, or other circumstances affording gronnd to suspect the invoice to be fraudulent.

Certificate of Division from the Circuit Court of Massachusetts.[1]

March 7th, 1826. This cause was argued by the *Attorney-General* and *Blake*, for the plaintiffs; and by *Webster*, for the defendant.

March 13th. THOMPSON, Justice, delivered the opinion of the court.— *This is an action of debt upon a duty bond, under the act of the 20th of April 1818. Upon the trial of the cause in the circuit court of Massachusetts, the following questions arose: [*420

[1] See s. c. 2 Mason 393, where the case appears to have been brought before the circuit court, by writ of error from the district court. It is difficult to perceive, how there could have been division of opinion in such a case, as the district judge could not sit in the circuit court. United States *v.* Lancaster, 5 Wheat. 434.

1. Whether the words "true value," in the 11th section of the act of the 20th of April 1818, meant the current market value of such goods, at the place from which they were imported, or the true and actual cost thereof to the importer, at such place?

2. Whether, if the collector did, in fact, suspect that the goods were invoiced below the current market value thereof, at the place from which they were imported, but did not suspect that they were invoiced below the true and actual cost thereof to the importer, the collector had a right to direct an appraisement?

3. Whether, if, in the opinion of the collector, there was just ground to suspect that the goods were invoiced below the current market value of the same, at the place from whence they were imported, then the said collector had a right to direct the same to be appraised in the manner prescribed in the 11th section of the before-mentioned act of congress?

Upon which questions, the judges of the circuit court were opposed in opinion, and they are brought up to this court for decision.

It seemed to be admitted on the argument at the bar, that the answers to these questions would depend in a great measure, if not entirely, upon a more general inquiry with respect to the basis on which the *ad valorem* rate *421] of duties is to be *estimated; whether upon the actual cost of the goods, or the current market value thereof, at the place from which they were imported. That, prior to the act of 1818, *ad valorem* duties were to be estimated upon the actual cost of the goods, cannot admit of a doubt. In one of the earliest acts of congress passed on this subject, in the year 1789 (1 U. S. Stat. 41), this was assumed as the basis. The act declares, that the *ad valorem* rates of duty upon goods, wares and merchandise, at the place of importation, shall be estimated, by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same, and ten per cent. on the actual cost thereof, if imported from any other place or country, exclusive of charges. In the act passed but a few days before (1 U. S. Stat. 26), after the enumeration of certain articles subject to an *ad valorem* duty, it is declared, "that on all other goods, wares and merchandise, five per cent. on the value thereof, at the time and place of importation," shall be laid. The word *value*, as here used, cannot be understood in any other sense than the words actual cost, in the act passed only twenty-seven days after. It would be unreasonable to suppose, that, in the former act, market value was established as the basis, and in the latter, a new rule introduced, under the term actual cost, with a view to any change of the basis. It is more reasonable to suppose, that value and actual cost, were intended to import the same meaning. And in *422] other parts of the laws on *this subject, where these terms are used in reference to the rule by which the duties are to be estimated, they are to taken in the same sense, and to be understood as a varied mode of conveying the same idea. (1 U. S. Stat. 411.) In the act of 1799, the same basis, actual cost, is expressly adopted as the rule by which *ad valorem* duties are to be estimated (Ibid. 673); and that such was the rule, previous to the act of 1818, was not denied on the argument, as it certainly could not be, with the least color of plausibility. And if this be so, there ought to be a very clear expression of the legislative will, before a rule which had governed the practice on this subject for nearly thirty years, should be consid-

ered as abolished, and a new one adopted. And we think, the act of 1818 (3 U. S. Stat. 433), will not justify such a conclusion. If any parts of the act, when separately considered, would seem to warrant such a construction, the whole, when taken together, admits of no such interpretation, and would, indeed, be directly at variance with the fourth section of the act, which, in terms, adopts the rule first laid down in the act of 1789, and which has been continued in all the subsequent laws, "that the *ad valorem* rates of duties, upon goods, wares and merchandise, shall be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any island, port or place, beyond the same, and ten per cent. on the actual cost thereof, if imported from any other place," &c.

It has been contended, however, on the *part of the United States, [*423
that, by the terms true value, as used in several parts of the act of 1818, and particularly in the 11th section, it was intended to substitute the current market value, instead of actual cost, as the basis upon which *ad valorem* duties are to be estimated. The subject-matter of this section is, to provide for the detection of fraudulent invoices, and fix the rule by which the duties are to be estimated, when the invoice price is below the actual cost. The law requires (2 U. S. Stat. 121) that the invoices of all goods imported into the United States, and subject to an *ad valorem duty*, shall contain a true statement of the actual cost of such goods. And no entry of the goods can be made, unless the original invoice is produced, and oath made that it contains a just and true account of the cost of such goods. (3 U. S. Stat. 729.) And to enforce a compliance with these injunctions, by putting into the hands of the collectors more efficient means of detecting all evasions of the law, was one of the principal objects of this 11th section of the act of 1818. It requires the collector, whenever, in his opinion, there shall be just grounds to suspect that goods, subject to an *ad valorem* duty, have been invoiced below their true value, at the place from which they were imported, to have them appraised. This power is, to act upon a supposed case of fraud, attempted to be practised on the government, by making out the invoice below the actual cost. The great object to which the attention of the collector is directed, is to ascertain *the cost, that [*424
being the basis on which the duties are to be estimated. And if the invoice is false, the proper inquiry to detect it is, as to the market value of the goods, and to compare that with the invoice price. And for the purpose of ascertaining such market value, the collector is authorized to appoint appraisers, who are sworn to report, according to the best of their knowledge and belief, the true value of the goods, when purchased, at the place from whence the same were imported. The appraisers have, however, no concern with the actual cost of the goods. Their duty is confined to the value thereof, at the place of importation. And the law has declared what shall be the effect of a variance between the value so reported, and the invoice price. A small difference will not draw after it any penalty. The appraised value must exceed the invoice price 25 per cent., or no addition to the ratio of duty is imposed. The appraised value is, of necessity, assumed as the price upon which the duties are to be estimated, where the difference between that and the invoice price is 25 per cent. In that case, the invoice is deemed fraudulent, and to be laid out of view; and, of course, no evidence of the cost of the goods. And the 12th section expressly declares,

that the appraised value, in such case, shall be considered the true value, upon which the duty is to be estimated. Or, in other words, so far as respects the rule by which the duties are to be ascertained, the true value, *425] as found by the appraisers, shall be deemed the actual *cost. Where the appraised value shall be less than the invoice value, the duty is to be charged on the invoice value, in the same manner as if no appraisement had been made.

So also, in the oath required by the 5th section of this act, true value imports nothing more nor less than actual cost. Any other construction would place it out of the power of any man to take the oath, where the goods were purchased at a rate at all differing from the market price. The law requires the invoice to be made out according to the actual cost, and this to be sworn to ; and if true value means anything else than actual cost, the oath could not he taken. This is not a separate and distinct oath from that which is required by the act of 1799, and which is to accompany the invoice. The act declares it to be, not an additional oath, but facts in addition to the oath required by law, which addition is, that "the invoice produced by him exhibits the true value of such goods, wares or merchandise, in their actual state of manufacture, at the place from which the same were imported." There can be but one invoice and one oath, and that invoice must be made out according to the actual cost, and it necessarily follows, that true value imports the same thing under a varied mode of expression. If it was permitted to make out two invoices of the same goods, one according to the actual cost, and the other according to the market value, and dis- *426] tinct oaths annexed to each, it might remove the difficulty *suggested; but that is not allowable. And no statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable, without incurring the guilt of perjury. If, then, the basis upon which *ad valorem* duties are to be estimated, has not been changed by the act of 1818, from the actual cost to the market value of the goods at the place of importation, as we are satisfied it has not, the answer to the first question certified to this court will be, that the words "true value," in the 11th section of the act of 1818, import the same thing as actual cost.

And this, as was conceded on the argument, will dispose of the other questions, and require that they should be answered in the negative so far as, from the form in which they are propounded, they will admit of a direct answer. In explanation, however, of this answer, it is proper to observe, that the 11th section of the act, to which the questions are pointed, is intended to clothe the collector with enlarged powers to guard against fraudulent invoices. Whenever, in his opinion, there shall be just grounds to suspect that the invoice does not truly state the actual cost of the goods, he may direct an appraisement. How, or by what means, that opinion is made up, no one has authority to inquire, or a right to control. Ordinarily, it will be founded from his own knowledge, or the information he gets from others, of the market price of the goods, and if that should differ widely *427] from the invoice prices, it will afford grounds for suspecting *the invoice to be fraudulent. For, as a general course of business, it is to be presumed, that goods are purchased at the common market price. The authority of the collector to direct an appraisement, is regulated, however, entirely by his own suspicion that the invoice is untrue, and does not

state the actual cost of the goods as required by law. Whether this suspicion be well founded or not, is not matter of inquiry. So far as respects the authority of the collector to direct the appraisement, he is governed altogether by his own opinion of the grounds of suspicion. Whether these suspicions were well or ill founded, and the consequences resulting there from, will depend upon after inquiry before the appraisers, and their decision thereupon. But the collector cannot be called upon to avow, or show the grounds upon which his suspicion rests. The law has vested him with an uncontrolled discretion on this subject, to be regulated and governed by his own opinion, of the sufficiency of the grounds on which he suspects the invoice to be below the true value or actual cost of the goods.

These answers must, accordingly, be certified to the circuit court, upon the questions submitted to this court.

CERTIFICATE.—This case came on to be heard, on the certificate of the difference of opinion of judges, &c.: On consideration whereof, this court is of opinion, and directs it to be certified to the said circuit court, that the words "true *value," in the 11th section of the act of congress of the 20th of April 1818, do mean the actual cost thereof to the importer, [*428 at the place from which the same was imported; and that the second question, upon which the opinions of the said judges were opposed, viz., whether, if the collector did, in fact, suspect that the goods were invoiced below the current market value thereof, at the place from which they were imported, but did not suspect that they were invoiced below the true and actual cost thereof to the importer, the collector had a right to direct an appraisement? be answered in the negative; and do also direct it to be certified, that the third question, on which the opinions of the said judges were opposed, viz., whether, if, in the opinion of the collector, there was just ground to suspect that the goods were invoiced below the current market value of the same, at the place from whence they were imported, then the said collector had a right to direct the same to be appraised in the manner prescribed in the eleventh section of the before-mentioned act of congress? be likewise answered negatively.

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*CHACE and others, Appellants, *v.* VASQUEZ, Consul-General of [*429 Portugal, Respondent.

Appeal.

On a libel *in personam* for damages, if the court decree that damages be recovered, and that commissioners be appointed to ascertain the amount thereof, no appeal will lie from such a decree, until the commissioners have made their report; this not being a final decree.

APPEAL from the Circuit Court of Maryland. The libel in this case was *in personam* against the owners of the private armed vessel La Fortuna, stated to be owned by American citizens, for the recovery of damages for the illegal seizure, &c., of the Portuguese ship Monte Allegre and cargo, which, by a previous decree of the court, had been restored to the libellants, no damages having been claimed in the libel *in rem.* (7 Wheat. 250.)

A decree *pro formâ* was taken for the libellants in the circuit court, and commissioners were ordered to be appointed to assess the damages; but the

appeal was taken before the commissioners were appointed, upon the ground that no libel could be sustained *in personam*, in such cases.

*430] *February 15th, 1826. *D. Hoffman*, for the respondent, stated, that the appeal might be considered as well taken. The case of the *The Palmyra*, 10 Wheat. 502, was distinguishable from this, as the damages there claimed were a part only of an entire decree *in rem* and *in personam;* but that here the sole inquiry is, whether any libel *in personam* could be sustained, which was an objection that covered the whole libel, and the entire decree; that although the report of the commissioners, when made, might be appealed from, yet the inquiry was only as to the amount; and that if no libel could be sustained, and expensive and tedious investigation would be saved, by first establishing the point that a libel *in personam* cannot be sustained in such cases.

THE COURT were of opinion, that the case was embraced by the principle decided in the case of *The Palmyra*, since an appeal would still lie from the damages, when ascertained; but that, had the decree of the circuit court dismissed the libel, such decree would have been final.

Appeal dismissed.

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*431] *MILLS, Plaintiff in error *v.* The PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Notice of non-payment.—Rule of court.

No precise form of notice to the indorser of a promissory note is necessary;[1] and it is not necessary to state, in the notice, who is the holder; nor will a mistake as to the date of the note vitiate the notice, if it convey to the party a sufficient knowledge of the particular note which has been dishonored.[2]

It is not necessary, that the notice should contain a formal allegation, that it was demanded at the place where payable; it is sufficient, that it state the fact of non-payment of the note, and that the holder looks to the indorser for indemnity.[3]

By the general law, demand of payment of a bill or note must be made on the third day of grace, but where a note is made for the purpose of being negotiated at a bank, whose custom is to demand payment, and give notice on the fourth day, that custom forms a part of the law of the contract; and it is not necessary that a personal knowledge of the usage should be brought home to the indorser, for that purpose.

The general rule of law, requiring proof of the title of the holders of a note, may be modified by a rule of court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him.[4]

ERROR of the Circuit Court of Ohio.

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[1] Reedy *v.* Seixas, 2 Johns. Cas. 337.

[2] A notice of non-payment is insufficient, if there be two or more notes in existence, and over-due, to which it would equally apply. Cook *v.* Litchfield, 9 N. Y. 279. But a notice is sufficient, if it reasonably apprise the indorser of the particular instrument in which he is sought to be charged, though he may have indorsed several notes of like tenor, only distinguished by a number on the margin, which is not referred to in the notice. Hodges *v.* Shuler, 22 N. Y. 114. A notice is sufficient, though the note be misdescribed, if there be no other in existence to which the description could be applied, and the indorser could not have been misled. Cayuga County Bank *v.* Worden, 1 N. Y. 413; S. C. 6 Id. 19. S. P. Bank of Cooperstown *v.* Woods, 28 Id. 545, 551.

[3] See Ransom *v.* Mack, 2 Hill 587.

[4] Odenheimer *v.* Stokes, 5 W. & S. 175; McAdams *v.* Stilwell, 13 Penn. St. 90. And see Miller *v.* Weeks, 22 Id. 89; McGovern *v.* Hoesback, 53 Id. 176.

Mills v. United States Bank.

March 8th, 1826. This cause was argued by *Wright*, for the plaintiff in error; and by *Webster*, for the defendants in error.

March 13th. STORY, Justice, delivered the opinion of the court.—*This is a suit originally brought in the circuit court of Ohio, by the [*432
Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for $3600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of *non assumpsit*, upon which issue was joined; and upon the trial, the jury retured a verdict for the Bank of the United States, for $4641; upon which, judgment was rendered in their favor. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which, the present writ of error has been brought to this court.

By the bill of exceptions, it appears, that the evidence offered by the plaintiffs in support of the action, "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist, in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit:

"Chilicothe, 20th of July 1819.

Dollars 3600.

"Sixty days after date I promise to pay to Peter Mills, or order, at the office *of discount and deposit of the Bank of the United States, at [*433
Chilicothe, three thousand six hundred dollars, for value received.

WOOD & EBERT."

Indorsed, "Pay to A. Adair or order, Peter Mills.

"Pay to Horace Reed or order. A. Adair.

"Pay to the P. Directors and Company of the Bank of the U. States, or order. Horace Reed."

On the upper right-hand corner of the note is also indorsed, "3185. Wood & Ebert, 3600 dollars, Sep. 18–21."

It was proved, that this note had been sent to the office at Chilicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proved by the deposition of Levin Belt, Esq., Mayor of the town of Chilicothe, that, on the 22d day of September 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which, the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy:

"Chilicothe, 22d of September 1819.

"Sir—You will hereby take *notice, that a note drawn by Wood
*434] & Ebert, dated the 20th day of September 1819, for 3600 dollars, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States, at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectively,

"Peter Mills, Esq." LEVIN BELT, Mayor of Chilicothe."

It was further proved by the plaintiffs, that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange, on the day after the last day of grace (that is, on the 64th day), that the Branch Bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place, ever since. No evidence was given of the handwriting of either of the indorsers.

The court charged the jury: 1. That the notice being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due. 2. That if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note, made by the notary, in the notice given to that defendant, does not impair the liability
*435] of the said defendant, and the plaintiffs *have a right to recover. 3. That should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment and to protest and give notice, on the 64th day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury, "that before the common principles of the law relating to the demand and notice necessary to charge the indorser, can be varied by a usage and custom of the plaintiffs, the jury must be satisfied, that the defendant had personal knowledge of the usage or custom, at the time he indorsed the note; and also, that before the plaintiffs can recover as the holder and indorsee of a promissory note, they must prove their title to the proceeds, by evidence of the indorsements on the note;" which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's (Mills's) counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant, at Chilicothe, was sufficient to charge him as indorser. The court was of opinion, that it
*436] was sufficient, if there was no other *note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant.

It is contended, that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank, when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whomsoever he may be; and it is time enough for him to ascertain the true title of the holder, when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained, that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party, of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the *parties, the time and place of payment, and the indorsement, were truly and accurately described. [*437
The error, too, was apparent on the face of the notice. The party was informed, that on the 22d of September, a note, indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank, when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficent, that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence, to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment, and notice, is, by necessary implication, an assertion of right by the holder, founded upon his having complied *with the requisitions of law against the indorser. In point of fact, [*438
in commercial cities, the general, if not universal, practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment. Upon the point, then, of notice, we think there is no error in the opinion of the circuit court.

Another question is, whether the usage and custom of the bank, not to make demand of payment until the fourth day of grace, bound the defendant, unless he had personal knowledge of that usage and custom. There is no doubt, that according to the general rules of law, demand of payment

ought to be made on the third day, and that it is too late, if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of *Renner* v. *Bank of Columbia*, 9 Wheat. 582, that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least, so far as to bind their rights. In the present case, the court is called upon to take one step farther; and upon the principles and reasoning of the former case, it has come to the conclusion, that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties
*439] are bound by that usage, whether they have a personal *knowledge of it or not. In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

Another question propounded by the defendant is, whether the plaintiffs were entitled to recover, without establishing their title to the note, as holders, by proof of the indorsements. There is no doubt, that by the general rule of law, such proof is indispensable on the part of the plaintiffs, unless it is waived by the other side. But in all such cases, the defendant may waive a rule introduced for his benefit; and such waiver may be implied from circumstances, as well as expressly given. It is in this view, that the rule of the circuit court of Ohio, of 1819, which has been referred to at the bar, deserves consideration. That rule declares, "that hereafter, in any actions brought upon bond, bill or note, it shall not be necessary for the plaintiffs, on trial, to prove the execution of the bond, bill or note, unless the defendant shall have filed, with his plea, an affidavit, that such bond, bill or note, was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays, upon objections at trials, which were frivolous and unconnected with the merits. If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported. But it attempts no such thing; it does not deny to the party
*440] *the right to demand proof of the execution or indorsement of the note at the trial; but it requires him, in effect, to give notice, by affidavit, accompanying the plea, that he means to contest that fact, under the issue. If the party gives no such notice, and files no such affidavit, it is on his own part a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardship in such a rule; it subserves the purposes of justice, and prevents the accumulation of costs; it follows out, in an exemplary manner, that injunction of the judiciary act of the 2d of March 1793, ch. 22, which requires the courts of the United States "to regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially, to that end, to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant, in the present case, he had no right to insist upon the proof of the indorsements.

Another objection now urged against the judgment is, that the count demands $3600 only, and the jury gave damages amounting to $4641. But there is no error in this proceeding, since the *ad damnum* is for a larger

sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in *the declaration; but the jury have a right to add interest, by way of damages, for the delay. [*441

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood & Ebert, in order to help the misdescription; and that the case proved was of several liabilities of the defendants, which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the court to take cognisance of them.

Upon the whole, it is the opinion of the court, that the judgment ought to be affirmed, with costs.

Judgment affirmed.

Miller's Heirs *v.* McIntire and others.

Land-law of Kentucky.

Quære? Whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of Kentucky, from prolonging the time for surveying one entry to the prejudice of another?

By the construction of the act of Kentucky of 1797, granting further time for making surveys, with a proviso, allowing to infants, &c., three years after their several disabilities are removed, to complete surveys on their entries; if any one or more of the joint-owners be under the disability of infancy, &c., it brings the entry within the saving of the proviso, as to all of the other owners.

Appeal from the Circuit Court of Kentucky.

*March 3d, 1826. This cause was argued by *Sheffey*, for the appellants; and by *Talbot*, for the respondents. [*442

March 13th. Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the United States for the district of Kentucky, by which the bill of the plaintiffs was dismissed *pro formâ*.

An original bill was filed by Miller's heirs, in the year 1808, to obtain from the defendants therein mentioned, the legal title to lands in their possession, to which the plaintiffs claimed the equitable right, under a prior entry. The decree made by the court, in that cause, against several of the defendants, was brought before this court by appeal, and in that case, the court determined in favor of the entry under which the title of the plaintiffs arose. (2 Wheat. 316.) An amended bill was filed in 1815, against the present defendants in error, who, in their answer, contend, among other things, that the title of the plaintiffs has been forfeited, by failing to make their survey within the time prescribed by the laws of Virginia; and that the compact between the two states restrained Kentucky from varying in any manner the laws by which titles originating anterior to the separation are to be governed.

Henry Miller, for whom the entry was made, died in March or April

1796, having first made his last will in writing, by which he devised his
*443] *lands to be sold for the benefit of all his children, many of whom were minors.

The time allowed for making surveys, by the first law on that subject, had expired, but the time had been prolonged, first, by the legislature of Virginia, and afterwards, by that of Kentucky, until after the death of Miller, and the act of 1797, which gave still further time, contained a saving of the rights of infants. In April 1804, while the saving still existed, the survey was made.

In the case formerly decided in this court, it was determined, that Miller's heirs came within the saving of the act of 1797, but the compact between the two states was not then brought into view, and the counsel for the appellees insist, that it applies to this case, and restrains the legislature of Kentucky from prolonging the time for surveying one entry, to the prejudice of another. On this point, a difference of opinion exists among the judges. Some think, that a second entry is not authorized by the land law of Kentucky, and that no title can be acquired unter it. A grant, therefore, that is founded on it, is totally void, and the grantee cannot hold the land under it, even after the original entry became forfeited. The land, on such forfeiture, became vacant, and it was competent to the legislature to grant it, by an original warrant, or to revive or to continue the right held under the first entry. Others are of opinion, that a subsequent entry is not absolutely void, but has been considered as a valid appropriation of the land,
*444] unless it shall *be encountered by a better title. That the removal or extinguishment of that better title, leaves the holder of a grant, founded on a junior entry, the true legal owner of the land it purports to convey. They think, the practice of the court, to direct the elder grantee to convey to the person claiming the equitable title, is strong evidence of the prevailing opinion, that a subsequent locator acquired a conditional interest, which might be ripened into title, by the failure of the person holding the original entry to proceed as directed by law. But they think also, that this mere possibility could not attach itself absolutely to the land, until it became vacant by the *laches* of the person who had made the first appropriation. Until such vacancy actually occurred, the power remained with the state to give further time to perfecting titles. Limitations of time, in this respect, were intended chiefly for the benefit of the state, since it was not the course of the government to tax unpatented lands. The state, therefore, might grant indulgences in this respect, without giving just cause of complaint to a person, whose interest, if he had any, was potential, not vested; was rather a pre-emption, to the exclusion of others subsequent to himself, than a positive acquisition which could in any manner interfere with the rights of the person who had made a previous appropriation. Without determining either of the points on which this difference exists, the court is of opinion, that Miller's heirs are within the saving of the act giving further time to
*445] the *owners of lands to survey the same, and for returning plats and certificates to the register's office, passed in the year 1797, and may maintain this suit, if no other objection exists to the title.

There seems to have been some confusion at the trial, respecting testimony, and from the manner in which the cause is brought up, the parties are placed under circumstances in this court which throw difficulties in the

way of the investigation of the title on its real merits. We do not think such a defence is made out by the defendants, as to justify an affirmance of the decree dismissing the bill; nor are we satisfied, that the state of the record is such as to enable this court safely to decree, that the defendants shall convey the lands they hold within the patent of the plaintiffs. The decree, therefore must be reversed, and the cause remanded to the circuit court, that further proceedings may be had therein, according to equity.

DECREE.—This cause came on, &c.: On consideration whereof, this court is of opinion, that the right of the plaintiffs was preserved by the act giving further time to the owners of the lands to survey the same, and for returning plats and certificates to the register's office, passed in the year 1797, and that the survey on which the patent was founded was made in time: This court doth, therefore, reverse the decree of the circuit court, dismissing the bill of the plaintiffs, and doth remand the cause to the said circuit court, that further proceedings may be had therein, according to equity.

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*CARNOCHAN & MITCHEL *v.* CHRISTIE and another. [*446

Award.—Cross-bill.

An award must decide the whole matter submitted to the arbitrators; it must not extend to any matter not comprehended in the submission; and it must be certain, final and conclusive of the whole matter referred.[1]

Where the arbitrators determined that the plaintiffs should be entitled to a credit of a certain sum, on account of sales of lands to the defendant, provided "they shall grant, or cause to be granted, to the said W. C. (the defendant), a clear, unincumbered, and satisfactory title" to the lands, without limiting any time within which the title should be made: *Held*, that the award was void, as not being final and conclusive.

A court of equity either enforces an award as it is made, or sets it aside, if in any respect defective; but it is contrary to its practice, to confirm the award so far as it extends, and to supply omissions by decree of the court.

Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established, without a cross-bill filed by the defendant.[2]

APPEAL from the Circuit Court of Georgia.

March 10th, 1826. This cause was argued by *Webster* and *Berrien*, for the appellants; (*a*) and by **Emmet* and *D. B. Ogden*, for the respondents.(*b*) [*447

(*a*) They cited, as to the necessity of a cross-bill by the defendants, in order to establish the conveyances, 2 Madd. Ch. 329; 2 Atk. 133; 1 Ball. & Beat. 217; 2 Cox 78 As to the manner in which a court of equity acts upon an award, either by confirming it *in toto* or rejecting it, 1 Bro. C. C. 389; 3 Id. 163; 1 Ves. jr. 365; 2 Id. 22; 4 Bro. C. C. 117, 536. As to the necessity of the award extending to all the matters of reference, 7 East 81. As to the uncertainty and inconclusiveness of the award, 7 T. R. 69.

(*b*) To show that an award might be good in part, and void as to the residue, they cited 5 Wheat. 394; 3 Desauss. 11; 14 Johns. 36; Kyd on Awards 243, 261, and the cases there collected.

[1] For a further decision in this case, see 6 Pet. 61.

[2] De Groot *v.* United States, 5 Wall. 419.

[3] The more modern course of proceeding is, to dispense with the cross bill, and make the same decree upon the answer to the original bill, that would be made, if a cross-bill had been filed, if the defendant submits in his answer to

March 14th. MARSHALL, Ch. J., delivered the opinion of the court. — Carnochan & Mitchel, the plaintiffs, were merchants in Georgia, who had extensive commercial transactions with the defendant, William Christie, a merchant of Liverpool, in the course of which the former became indebted to the latter to a large amount. In 1819, John Carnochan, one of the firm of Carnochan & Mitchel, visited England, in the expectation of selling immense tracts of land he had purchased in Florida, and, during his residence in that country, his partner, Peter Mitchel, relying, probably, on the sale of lands, continued to draw heavily on the defendant, William Christie, without making correspondent remittances. Carnochan being unable to sell his lands, and thus to place funds in the hands of Christie, these bills produced great embarrassments, and frequent communications between the parties, in the course of which, Carnochan pressed Christie most earnestly to proceed with his acceptances, and promised to secure him by the pledge of his Florida lands, and property in Georgia. At length, deeds of these lands, and other property, were executed, and the accounts settled between
*448] the parties. An account was stated, and signed *by them, showing a balance of 43,293*l.* 6*s.* 4*d.*, due to Christie, for which sum Carnochan gave the promissory note of Carnochan & Mitchel, dated ———.

Soon after the execution of these deeds, Carnochan returned to Georgia, and considerable payments were made. But the debt still remaining considerable, the agent of Christie caused the deeds to be recorded, and apprehensions were entertained, that he would proceed to sell the property. In June 1820, Carnochan & Mitchel filed their bill in the circuit court of the United States for the district of Georgia, alleging that the account was unfairly settled, to the great injury of the plaintiffs; that it contains many erroneous charges, and omitted to give credits to which the plaintiffs are entitled, and that Carnochan was induced to sign it, and to give the note for the amount, in consequence of his situation, which placed him in the power of the defendant. That the deeds also were executed under duress, and consequent imposition. The bill prayed that the account might be resettled, that the deeds might be cancelled, and the defendant enjoined from proceeding under them. The injunction was awarded.

The defendant, Christie, filed his answer, denying all the material allegations of the bill.

Numerous exhibits were filed, and several depositions taken. In December 1821, the parties agreed to refer the case to arbitrators, and the following submission was entered on the record:

*449] * "Carnochan & Mitchel
v.
William Christie and William Jenner, } In equity.

"We agree to the reference. The arbitrators to determine all matters in controversy, as exhibited in the pleadings, with the understanding, that the stated account is not to be opened further that to permit the complain-

a performance of the real agreement between the parties; the answer is viewed in the light of a cross-bill, and becomes the foundation for a proper decree by the court. This practice has been adopted, as most convenient and expeditious in settling definitively the rights of the parties, and for the sake of saving further litigation and expense. Bradford *v.* Union Bank, 15 How. 69, and authorities there cited.

ants to establish by proof, the errors in the same, as alleged in their bill and exceptions; the items which compose the alleged error of four thousand pounds, to be distinctly stated and specified by the complainants, within twenty days from this date. The defendant, William Christie (if he desire it), to have one hundred and twenty days to produce documents or vouchers to answer the said items, upon giving the complainants notice, within ten days after receiving such specification. The parties to proceed in the arbitration, upon ten days' notice, after the expiration of the time allowed the complainants to exhibit their specification above mentioned. This submission to be made an order of court. The arbitrators to make their award within one hundred and twenty days, unless prevented by the requirement of time by the said William Christie as aforesaid, from this date, and return the same to the next term of this court; which award, when so made, shall be final and conclusive between the parties, subject to those exceptions which arise upon awards or decisions of arbitrators. Claims to *commissions [*450
mutually abandoned, and the amount decreed by the arbitrators to be paid in two instalments, at six and twelve months from the date of the decree, and sufficient security for the fulfilment of the award be given by Carnochan & Mitchell to William Christie. The arbitrators to have the power of examining witnesses upon oath, and calling for documents which they may deem necessary; but the said William Christie shall be excused from producing any such document, if he will depose that the same is not in his possession, on this side of the Atlantic. The arbitrator, under this submission, chosen and selected by the complainants, is William Gaston, Esq., and the arbitrator chosen and selected by the defendant, William Christie, is Samuel Nicholas, Esq.; the said arbitrators, in case of disagreement, to name an umpire. The arbitrators to decide whether William Christie is entitled to a distinct and separate interest in the Florida lands, as he alleges, or to an undivided interest in the proceeds of the same, as alleged by Carnochan & Mitchel. If they decide in favor of complainants upon this point, then the whole property shall be placed in the hands of trustees mutually appointed by the parties, with authority to sell the same, or such part thereof as may be necessary, and appropriate the proceeds to William Christie, on his own account, and to the credit of the balance, which shall be found due to him, until the same is extinguished, in the proportion of the respective interests of William Christie and Carnochan & Mitchel. If they *decide [*451
in favor of the defendant upon this point, then it is agreed, that an immediate partition of the property shall be made, and the part allotted to Carnochan & Mitchel shall be placed in the hands of such trustees, and the same, or such parts as may be necessary, to be sold, and the proceeds appropriated in like manner to the payment of the balance found due to William Christie, by Carnochan & Mitchel, until the same is paid. That, as soon as that balance is paid, the deeds and other incumbrances held by said William Christie, with the settled account and note of Carnochan & Mitchel, are to be delivered up. That it shall be referred to the said arbitrators to determine whether the payment of the balance should be made in England at par, or here."

On the 14th of February 1822 the following award was returned, and filed in court.

"In the Sixth Circuit Court of the United States, District of Georgia.

Carnochan & Mitchel
v.
Christie & Jenner. } In equity.

"ARBITRATION.—The undersigned arbitrators, chosen and selected by the above-named parties, as will more fully appear by reference to the submission calling them to perform this duty, under date of the 28th of December 1821, beg leave to report and award the following result, after the
*452] most patient hearing of the parties aforesaid, and a *careful examination of the books, papers, letters and vouchers which have been submitted to their inspection, and also after giving all matters and things in controversy the most mature deliberation.

"1st. That William Christie place to the credit side of his account with the late firm of Carnochan and Mitchel, the sum of $18,546.55, as an amount paid by said Carnochan & Mitchel, through Mitchel, Nephew & Co., of Havana, to Messrs. John & James Inerarity, for sixteen shares. or 80,000 acres of land, bought by Carnochan & Mitchel, by order, and for account of, William Christie, of said John & James Inerarity, lying in the territory of West Florida; that the said Carnochan & Mitchel be also credited with an accumulating interest on said amount from the dates of payment, which precise periods will more fully appear by reference to an affidavit made by Colin Mitchel, at Havana, on the 19th day of October 1821; said interest to be calculated at and after the rate of five per centum per annum; provided, nevertheless, that the said John Carnochan and Peter Mitchel shall grant, or cause to be granted, unto the said William Christie, a clear, unincumbered and satisfactory title, to the said sixteen shares, or 80,000 acres of land lying in West Florida as aforesaid.

"2d. William Christie to place to the credit side of his account with the
*453] late firm of Carnochan *& Mitchel, the sum of 10,000*l.* sterling, or $44,444.44, being in payment to Carnochan & Mitchel for thirty shares, or 150,000 acres of land, lying in the tertitory as aforesaid of West Florida; the said sum of $44,444.44, to draw an accumulating interest to the credit of the said Carnochan & Mitchel, at and after the rate of five per centum per annum. The period when said interest shall commence to be calculated, shall be from the day of the date of the title, which title is referred to in the provision next following: provided, nevertheless, that the said John Carnochan and Peter Mitchel shall grant, or cause to be granted, unto the said William Christie, a clear, unincumbered and satisfactory title of the said thirty shares, or 150,000 acres of land, lying in the territory of West Florida as aforesaid.

"3d. William Christie to place to the credit side of his account, with the late firm of Carnochan & Mitchel, the one, half amount of the sterling cost of a case of merchandise, marked AP. (56) number fifty-six, shipped to A. H. Putnam & Co., in the year 1816, amounting to the sum of 91*l.* 8*s.* 7*d.*, as the whole cost; one-half to be thus credited is 45*l.* 14*s.* 3½*d.*, or $203.16,
*454] without placing any interest whatever to the credit *of Carnochan & Mitchel, on this amount, no interest considered as of right accruing on this credit.

"4th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel, one-third of the net proceeds of

twenty-one bales of cotton, the whole amount of net proceeds of twenty five bales of cotton, and also the whole amount of net proceds of thirty-nine bales of cotton, with an accumulating interest from the date, when in funds from the sale of same, at and after the rate of five per centum per annum: provided, nevertheless, that the said John Carnochan & Peter Mitchel shall grant to said William Christie, the bonds of Bainbridges & Brown, of London, indemnifying the said William Christie against any future claimants whatever, for the net proceeds of said twenty-five bales of cotton; and also, against all such unascertained charges as now exist, or may hereafter exist, against the thirty-nine bales of cotton as aforesaid.

"5th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel, one-half the amount of 350*l.* sterling, paid for deeds, &c., one-half to be borne by the said William Christie, and the other half by Carnochan & Mitchel, being $777.77, with interest at five per centum per annum as aforesaid, from the period of the debit in the books of said William Christie.

"6th. William Christie to place to the credit *side of his account with the late firm of Carnochan & Mitchel, a discount paid by Carnochan & Mitchel on Virginia bank-notes, received from John Gruve, on account of William Christie, amounting to $2210, at two and a half per cent. is $55.25, with interest, at five per centum per annum, from the date of receipt of said money. [*455

"7th. William Christie to place to the credit side of his account with the late firm of Carnochan and Mitchel, the sum of $60.75, for attaching money in the hands of R. Harvey, of Augusta, with interest of five per centum per annum, from the date of such charge in the books of Carnochan & Mitchel.

"8th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel, two-thirds amount of the expenses on loading the ships Ocean and Aberdeen, the whole amounting to $243.75; two-thirds of which, to be credited as aforesaid, is $162.50, with interest as aforesaid, at the rate of five per centum per annum, from the date of such charge in the books of Carnochan & Mitchel.

"9th. Carnochan & Mitchel to place to the credit side of their account with William Christie, the sum of four pounds sterling, or $17.70, paid by the latter to Captain Munro, with interest, as aforesaid, at the rate of five per centum per annum from the *date of such advance, as entered in the books of William Christie. [*456

"10th. Carnochan & Mitchel are to account to William Christie for a libranza, amounting to $300, transmitted to Colin Mitchel, of Havana, for collection; also for a piece of red cloth and some thread, remaining on hand unsold.

"11th. The undersigned distinctly award and determine, that the amounts expressed in the first, second and fourth preceding items of this instrument of award, cannot be considered as sums to the credit side of William Christie's account with Carnochan & Mitchel, until all the conditions annexed to those respective items are fulfilled. The amounts expressed in items third, fifth, sixth, seventh and eight, are without any condition, and are, of course, to be immediately placed to the credit of Carnochan & Mitchel, in the account of William Christie.

"12th. The undersigned arbitrators award, and hereby decide, that the interest of William Christie in the Florida lands, meaning thereby the 80,000 acres, and 150,000 acres, mentioned in items first and second of this instrument of award, is an undivided interest.

"13th. The undersigned arbitrators award, and hereby decide, that William Christie is entitled to debit and credit Carnochan & Mitchel, in account, at the rate of five per centum per annum interest, annually, as same as heretofore, or shall hereafter become due, so that each *annual accumulation of interest shall become principal, and be considered as same.

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"14th. The arbitrators feel themselves unqualified to decide upon a bill of charges exhibited by William Christie as his expenses in prosecuting this suit, together with other charges that have been incurred, incidental to the same, both in England and this country, and would beg leave, with the consent of both parties, to refer the same to his honor, the judge, to decide on whom, in this controversy, such expenses can most properly fall.

"15th. The arbitrators do hereby award and decide, that any balance that is now due, or shall be hereafter paid by Carnochan & Mitchel to William Christie, shall be considered as money due and payable in England at par. If, therefore, the sum is paid by Carnochan & Mitchel to William Christie in the United States, it must be in British sterling, at the current rate of exchange between the two countries.

16th. Whereas, William Christie has this day exhibited to the undersigned arbitrators his entire account current with the late firm of Carnochan & Mitchel, with interest calculated thereon up to the 16th instant, we have duly examined the same, and believe it to be a just and faithful account, showing an amount of 30,483*l.* 1*s.* 2*d.*, or $135,480.25, due him from Carnochan *& Mitchel, and which sum we do hereby award unto the said William Christie as the basis upon which a final settlement of accounts shall take place between him and the said Carnochan & Mitchel. It is to be distinctly understood by both parties in this controversy, that this amount of (30,483*l.* 1*s.* 2*d.* sterling, or) $135,480.25, as now awarded to William Christie, is subject to all such deductions as are mentioned in the preceding items of this instrument of award; namely, the unconditional items to be immediately deducted; the conditional items to be deducted as the provisions of those conditions shall be removed by Carnochan & Mitchel, as will more fully appear is intended by the arbitrators, by reference to the eleventh item of this instrument of award: provided, nevertheless, that such amounts as are awarded to the credit of Carnochan & Mitchel in the preceding items of this instrument of award, as are hereby credited in the account current, as aforesaid, of William Christie, shall be considered always as settled, by being placed in said account to the credit of Carnochan & Mitchel, and, of course, cannot be deducted again, as might be inferred, without this explanation, under the name of a proviso to this item the sixteenth.

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"17th. This item the arbitrators beg leave to introduce as explanatory, rather than having any specific award or decision thereon, affecting the *parties in controversy, by observing, that the actual amount that it may be desirable to ascertain may be due from Carnochan & Mitchel to William Christie, at any future day, arising from the account now referred to of William Christie, and also the deductions to be made from the

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same, growing out of this instrument of award, may be known, by ascertaining whether Carnochan & Mitchel have removed the conditions annexed to items first, second and fourth; and, if found to be removed, then the whole amount now awarded in their favor (under conditions) will be placed to their credit in the account of William Christie; which, on supposition of being removed and placed at their credit at this period of time, would leave a balance due from Carnochan & Mitchel to William Christie, of a sum within the amount of $70,000.

(Signed,) SAM. NICHOLAS,
WM. GASTON."

"Savannah, February 13th, 1822."

Exceptions were taken to this award; and on the 23d of December 1822, an interlocutory decree was pronounced by the circuit court, affirming the award, and referring the cause to the register, "to report the precise amount due the defendant, absolutely, according to the principles established by the award; also, the amount due hypothetically, should the complainants fail to fulfil the conditions imposed by the award; in which undertaking he shall be at liberty to invoke the aid of the arbitrators, or either of them. *He must also report to the court the titles proposed to be given by the complainants to the defendant [*460 Christie, for the several purchases of the Florida lands, should any difficulty arise between the parties on the legal sufficiency of the titles." The court also directed the parties to join in a transfer of the Florida lands to trustees, for the purpose of raising the money due under the award, when instructed to do so under order of the court.

The report of the register was made, showing the sum due according to the award, should a title be made to Christie for the Florida lands he had purchased; and also the sum which would be due, should no such deeds be made. At the same term, on the return of this report, a final decree was pronounced, affirming the award, and affirming also the register's report; and directing the parties to join in a transfer of their whole interest in the Florida lands to trustees, "in trust to hold the same in pursuance of the said submission, and the award made thereon." The injunction was dissolved, and the bill dismissed.

The plaintiffs appealed from this decree, and contend, that the award ought to be set aside, because, 1st. The arbitrators have not decided the whole matter that was submitted to them. 2d. They have decided and awarded what was not submitted. 3. The award is uncertain.

*1. In support of the exception founded on the failure of the arbi- [*461 trators to decide on the whole matter submitted to them, it is alleged by the plaintiffs, that the duress under which the deeds of trust, executed in England, were obtained constituted a very essential part of the controversy, on which the award is entirely silent. It is undoubtedly true, that this is a "matter in controversy, as exhibited in the pleadings," and would be submitted to the arbitrators by the general words of the first sentence, describing the extent of the submission, if it were not withdrawn from them in a subsequent part of the same instrument. But we think it is withdrawn. After directing that the arbitrators shall ascertain the balance due on the account, the agreement of submission adds, "that as soon as that balance is paid, the

deeds and other incumbrances held by the said William Christie, with the settled account and note of Carnochan & Mitchel, are to be delivered up." This is, we think, a waiver of any objection to the manner in which those deeds were obtained, and an admission that they should remain in the hands of Christie, as a security for the debt, until it should be discharged.

The second omission with which this award is charged, is the failure to decide on the claim of the plaintiffs to a credit for Christie's proportion of the expenses incurred in the settlement of the Florida lands. This, too, was undoubtedly a matter of controversy. But we think it has been decided. The *arbitrators have allowed to the plaintiffs several credits
*462] claimed by them, but have not expressed their rejection of any item which may have been made and disallowed. Instead of introducing into the award the several items which may have been claimed and disallowed, they award a specific sum to the defendant, with a declaration that the several items enumerated in the preceding part of the award as credits to which the plaintiffs are entitled, are to be deducted therefrom. This is, we think, a rejection of all credits not enumerated.

The failure to decide on the allegation made in the bill, and denied in the answer, that 50,000 acres, part of the interest in the Florida land sold to the defendant, was a mere donation, made under expectations which were entirely disappointed. This also is, we think, decided in the award. The 2d article directs a credit of 10,000*l.* sterling to be given to Carnochan & Mitchel, being in payment to them for thirty shares, or 150,000 acres of land, lying in the territory of West Florida. This, we think, asserted the title of the said Christie to the whole quantity of land, and negatives the right of the plaintiffs to reclaim any part of it.

2. The second objection to the award is, that the arbitrators have exceeded their power, in requiring the plaintiffs to give a clear unincumbered title to the Florida lands. The plaintiffs are not required to give a title.
*463] This is not a substantive and independent part *of the award, directing them to do a particular act, for the neglect of which they would be liable to damages, or for the enforcing of which an attachment might issue. This part of the award is not compulsory. If the plaintiffs choose to waive the credit for the purchase-money, they are left at liberty to do so, and to withhold the title, in which case the award affords the defendant no coerceive means to compel a conveyance. But had this article of the award been peremptory, it is by no means clear, that the arbitrators would have exceeded their power in making it. That power extends to all matters in controversy, as exhibited in the pleadings, unless it be restrained by other parts of the submission. The title which the defendant might rightfully demand was one of these matters. The plaintiffs contend in their bill, that the defendant was perfectly acquainted with the state of the title, and was bound to take it, such as it was; and there are strong circumstances to support their pretensions, at least, so far as respects the 80,000 acres purchased from the Inerarities. The defendant insists that they were bound to make him a clear title, and relies to prove this on a memorandum at the foot of a stated account, in these words:

"Memorandum.—From the balance due to me on this account as *per contra*, there is to be deducted, as agreed on between Messrs. Carnochan & Mitchel and myself, in lieu of 150,000 acres, or 30 shares of their purchase

of Apalachicola lands, held in trust for them by Mr. Colin *Mitchel, on his and their executing to me a proper title for the same, the sum of 10,000 pounds." The memorandum proceeds in like manner to state, that on a title for the 80,000 acres, there shall be deducted the sum of 6583*l.* 8*s.* 6*d.*

The question, what was a proper title, was for a court to decide, under all the circumstances of the contract, and was transferred to the arbitrators by the submission, unless it be withdrawn from them by a subsequent clause of that instrument. The plaintiffs contend, that it is withdrawn by the provision, that, if the arbitrators should decide that Christie was entitled to an undivided interest of the proceeds of the Florida lands, then the whole property shall be placed in the hands of trustees, "with authority to sell the same, or such part thereof as may be necessary, and appropriate the proceeds to William Christie, on his own account, and to the credit of the balance which shall be found due to him, until the same is extinguished in the proportion of the respective interests of William Christie and of Carnochan & Mitchel." The 12th article of the award decides, that the interest of William Christie in the Florida lands, is an undivided interest. The plaintiffs insist, that the parties have themselves provided for the state of things produced by this decision. They have directed that all the lands shall be placed in the hands of trustees, to be sold by them, so far as may be necessary for the payment of the debt due to Christie. They have agreed on what *shall be done if the lands were held in common, and that on which they have agreed is inconsistent with what the arbitrators have done. There is, undoubtedly, some confusion on this part of the submission, which renders the construction difficult. It directs, that the interest of Christie, as well as that of Carnochan & Mitchel, shall be sold, and the proceeds applied to the individual credit of Christie, and to the credit of Canrochan & Mitchel, on their debt to Christie, in proportion to their respective interests in the land. This may be readily done, should the lands be sufficient to discharge the debt. Should they be insufficient, and should the insufficiency arise from want of title in Carnochan & Mitchel, Christie gives the credit absolutely, although he had contended that the right of the plaintiffs to the credit depended on the validity of the title they sold. This consideration may enter into the construction of the submission, if the words be doubtful, but cannot control the arangement of the parties, if that be intelligible. We rather incline to the opinion, that as the whole property, including the inerest of Christie, was to be placed in the hands of trustees, to be sold on joint account, that the conveyance of a title to Christie could not be contemplated as a preliminary measure. But it is unnecessary to give any positive opinion an this point, because, we think, the award must be set aside because it is uncertain, and not final in a very material point. [*465

3. The arbitrators have determined that Carnochan & Mitchel *are entitled to a credit of $63,290.99, on account of the sales of lands to Christie, provided they "shall grant, or cause to be granted, to the said William Christie, a clear, unincumbered and satisfactory title" to the said lands. No time is limited by which this title shall be made. The question, then, whether this credit is to be allowed, or disallowed, is left indefinitely open. Consequently, the award is not final. It does not settle the accounts between the parties. If it be said, that the court may prescribe some time by which the title shall be made, the answer is, that if the arbitrators could [*466

refer that question to the court, they have not done so. They have left it entirely open. But the award ought itself to settle finally and conclusively the whole matter referred to them. It is contrary to the principle of a general reference, that the court should take the award so far as it goes, and supply all omission by its decree. The award ought to be in itself a complete adjustment of the controversies submitted to the arbitrators.

This award, therefore, ought to be set aside, and the decree affirming it reversed, and the cause remanded to the circuit court. The case will, then, stand before that court as it did previous to the submission. The court may dissolve the injunction, so far as it should be perfectly satisfied that the plaintiffs are indebted to the defendant; and Christie may either avail himself *of the deeds he has received, or file a cross-bill praying the aid of the court.

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DECREE.—This cause came on, &c.: On consideration whereof, this court is of opinion, that there is error in the decree of the circuit court in affirming the award made by the arbitrators in this cause, which said award ought to have been set aside, because the same is not certain and final: It is, therefore, decreed and ordered, that the said decree be reversed and annulled, and that the cause be remanded to the circuit court, with directions to set aside the said award, and to take such further proceedings in the said cause as may be equitable and just.

UNITED STATES *v.* ORTEGA.

Foreign minister.

An indictment under the crimes act of 1790, c. 36, § 37, for infracting the law of nations, by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers and consuls," within the 2d section of the 3d article of the constitution of the United States.

The circuit courts have jurisdiction of such an offence, under the 11th section of the judiciary act of 1789, c. 20.

Quære? Whether the jurisdiction of the supreme court is not only original, but exclusive of the circuit court, in "cases affecting ambassadors, other public ministers and consuls," within the true construction of the 2d section of the 3d article of the constitution?

CERTIFICATE of Division from the Circuit Court for the Eastern District of Pennsylvania.

*March 16th, 1826. WASHINGTON, Justice, delivered the opinion of the court.—The defendant, Juan Gualberto de Ortega, was indicted in the circuit court of the United States for the eastern district of Pennsylvania, for infracting the law of nations, by offering violence to the person of Hilario de Rivas y Salmon, the charge d'affaires of his Catholic Majesty, the King of Spain, in the United States, contrary to the law of nations, and to the act of the congress of the United States in such case provided.[1] The jury having found a verdict of guilty, the defendant moved in arrest of judgment, and assigned for cause, "that the circuit court has not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister." The opinions of the judges of that

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[1] See 4 W. C. C. 531.

court upon this point being opposed, the cause comes before this court upon a certificate of such disagreement.

The questions to which the point certified by the court below gives rise, are, first, whether this is a case affecting an ambassador or other public minister, within the meaning of the second section of the third article of the constitution of the United States? If it be, then, the next question would be, whether the jurisdiction of the supreme court in such cases, is not only original, but exclusive of the circuit courts, under the true construction of the above section and article?

The last question need not be decided in the present case, because the court is clearly of *opinion, that this is not a case affecting a public minister, within the plain meaning of the constitution. It is that of [*469 a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States, and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution, or in the costs attending it.

It is ordered to be certified to the circuit court for the eastern district of Pennsylvania, that that court has jurisdiction of the matter charged in the indictment, the case not being one which affects an ambassador or other public minister.

Certificate accordingly.(*a*)

(*a*) The constitution of the United States provides (art. 3, § 2), that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different *states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." And [*470 that, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

The crimes act of 1790, c. 36, § 25, enacts, "That if any writ or process shall at any time be sued forth or prosecuted by any person or persons in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein, respectively, whereby the person of any ambassador, or other public minister, of any foreign prince or state, authorized and received as such by the president of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void, to all intents and purposes whatsoever. § 26. That in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors, prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed

10. That the supreme court has appellate jurisdiction of all civil suits brought in the courts of the Union, having original jurisdiction of the suit, whether a minister or consul is a party, and the matter in dispute exceeds the sum of two thousand dollars.

In criminal cases arising in the courts of the Union, no writ of error, or other appellate process, to remove the cause to the supreme court, has been provided by congress; and the only mode in which such cases can be revised in this court, is upon a certificate where the opinions of the judges of the circuit court are opposed. United States *v.* La Vengeance, 3 Dall. 297; United States *v.* More, 3 Cranch 159; Ex parte Kearney, 7 Wheat. 42. Consequently, a criminal case affecting a consul, can only be revised in this court, upon a division of opinion of the judges of the court below, certified under the 6th section of the judiciary act of the 29th of April 1802, c. 291.

The question as to what is the law by which cases affecting ambassadors, other public ministers and consuls, are to be determined in the courts of the Union, in the absence of any legislative provisions by congress applicable to the particular case, would lead into too wide a field of discussion to be embraced by the present note. It is *475] obvious, that the law of nations would, in some *instances, form the rule of decision; in others, such as civil causes arising out of contract, and questions of property, the laws of the several states would form the rule; but in what manner the jurisdiction of the national courts is to be exercised, in prosecutions against consuls, for offences not declared penal by any act of congress, is a subject on which a great contrariety of opinions has prevailed. In its more general application, this has been stated as a question, whether the United States, as a national government, have any common law, or, in other words, whether the courtsof the United States have any common-law jurisdiction. In a late essay upon the nature and extent of the jurisdiction of the courts of the United States, Mr. Du Ponceau has proposed a very elegant and ingenious solution of this problem, by assuming a distinction between the common law as a source of power, and as a means for its exercise. From the common law, considered in the first point of view, he contends, that in this country no jurisdiction can arise; while, in the second, every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application. He denies its capacity to confer any powers on the courts of the Union, which they do not possess by the written code of the national government; but he insists, that as a system of jurisprudence, it is the national law of the Union, so far as it has not been altered by the constitution, or by acts of congress. Thus, in the case of consuls, it is the constitution which gives the jurisdiction *in personam*, but it is the local law of the state (whether common or statute) which must furnish the rule of decision, in the absence of any regulation by congress applicable to cases affecting them. And in this view, the learned author insists, that the 34th section of the judiciary act of 1789, c. 20, making the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise provide, rules of decision in trials at common law, in the courts of the Union, in cases where they apply, includes both criminal and civil cases. But the question, for all practical purposes, is settled in this court according to the authority of the case of the United States *v.* Hudson and Goodwin (7 Cranch 32), in which it was determined, that the courts of the Union cannot exercise a common-law jurisdiction; although it is still considered as open for discussion, whenever a case shall arise rendering it necessary to reconsider that decision. See the United States *v.* Coolidge, 1 Wheat. 415.

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