# REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES,

FEBRUARY TERM 1823.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. VIII.

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.

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Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.—Mr. Justice TODD was absent, from indisposition, during the whole of this term; and Mr. Justice LIVINGSTON was absent, from the same cause, from Monday, the 24th of February, until the end of the term.

# MEMORANDUM.

On the 18th of March, a few days after the close of the present term, died the Honorable Brockholst Livingston, an associate justice of this court, in the sixty-sixth year of his age. He was appointed in 1806, being at that time a judge of the supreme court of New York, and having before occupied an eminent rank at the bar of that state. He had served his country with distinguished military reputation, during the war of the revolution, and subsequently filled several important civil stations at home and abroad. He was an accomplished classical scholar, and versed in the elegant languages and literature of the southern nations of Europe. At the bar, he was an ingenious and learned advocate, fruitful in invention, and possessing a brilliant and persuasive elocution. On the bench, his candor and modesty were no less distinguished, than his learning, acuteness and discrimination. His genius and taste had directed his principal attention to the maritime and commercial law; and his extensive experience gave to his judgments in that branch of jurisprudence a peculiar value, which was enhanced by the gravity and beauty of his judicial eloquence. In private life, he was beloved for his amiable manners and general kindness of disposition, and admired for all those qualities which constitute the finished gentleman. He died with the deep regret of all who knew him; leaving behind him the character of an upright, enlightened and humane judge, a patriotic citizen, and a bright ornament of the profession. *Isque et oratorum in numero est habendus, et fuit reliquis rebus ornatus atque elegans.*

# A TABLE

OF THE

## NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

# A TABLE

OF THE

## CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

### A



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## M

# RULE OF COURT.

FEBRUARY TERM, 1823.

No cause will hereafter be heard, until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court.

# CASES DETERMINED

IN THE

# SUPREME COURT OF THE UNITED STATES.

## FEBRUARY TERM, 1823.

### GREEN and others *v.* BIDDLE.

*Constitutional law.—Mesne profits.—Obligation of contracts.*

The act of the state of Kentucky, of the 27th of February 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States, but it was repealed by a subsequent act of the 31st of January 1812, to amend the said act; and the last-mentioned act is also repugnant to the constitution of the United States, as being in violation of the compact between the states of Virginia and Kentucky, contained in the act of the legislature of Virginia, of the 18th of December 1789, and incorporated into the constitution of Kentucky.

By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands, who succeeds in his suit, is entitled to an account of mesne profits, received by the occupant, from some period prior to the judgment of eviction or decree.[1]

At common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bonâ fide* or a *malâ fide* possessor, is liable to the true owner for all the rents and profits which he has received: but the disseisor, if he be a *bonâ fide* occupant, may recoup the value of the meliorations made by him, against the claim of damages.[2]

*Equity allows an account of rents and profits in all cases, from the time of the title accrued (provided it does not exceed six years), unless under special circumstances; as, [*2
where the defendant had no notice of the plaintiff's title, nor had the deed, in which the plaintiff's title appeared, in his custody, or where there has been *laches* in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody; in all which, and other similar cases, the account is confined to the time of filing the bill.

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[1] A recovery in ejectment is conclusive of the right to mesne profits; but not as to the length of the defendant's possession. Bailey *v.* Watson, 6 Binn. 450; Lane *v.* Harrold, 72 Penn. St. 267; Stephens *v.* Stroenider, 92 Id. 233. And see Miller *v.* Henry, 84 Id. 83.

[2] The action for mesne profits being an equitable one, every equitable defence may be set up. Murray *v.* Gouverneur, 2 Johns. Cas. 438; Ewalt *v.* Gray, 6 Watts 427. Compensation is the measure of damages; and therefore, a *bonâ fide* occupant may be allowed for permanent improvements, made by one whose title he has purchased. Morrison *v.* Robinson, 31 Penn. St. 456; Walker *v.* Humbert, 55 Id. 407; Kille *v.* Ege, 82 Id. 102; Jackson *v.* Loomis, 4 Cow. 168. A *bonâ fide* occupant, under color of title, who has made permanent and valuable improvements, may show that they are a full compensation for the use of the premises. Ege *v.* Kille, 84 Penn. St. 338. And see Stark *v.* Starr, 1 Sawyer 15; New Orleans *v.* Gaines, 15 Wall. 624.

By the civil law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonâ fide* possessor, who not only supposes himself to be the true owner of the land, but who is ignorant that his title is contested by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and not even to these, unless they were consumed.

Distinction between these rules of the civil and common law, and of the court of chancery, and the provisions of the acts of Kentucky, concerning occupying claimants of land.

The invalidity of a state law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract.

Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.[1]

The compact of 1789, between Virginia and Kentucky, was valid, under that provision of the constitution which declares, that "no state shall, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power"—no particular mode, in which that consent must be given, having been prescribed by the constitution; and congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions mentioned in the compact.

The compact is not invalid, upon the ground of its surrendering rights of sovereignty which are inalienable.

This court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different states of the Union.

The prohbition of the constitution embraces all contracts, executed or executory, between private individuals, or a state and individuals, or corporations, or between the states themselves.[2]

*3] THIS was a writ of right, brought in the Circuit *Court of Kentucky, by the demandants, Green and others, who were the heirs of John Green, deceased, against the tenant, Richard Biddle, to recover certain lands in the state of Kentucky, in his possession. The cause was brought before this court upon a division of opinion of the judges of the court below, on the following questions:

1. Whether the acts of the legislature of the state of Kentucky, of the 27th of February 1797, and of the 31st of January 1812, concerning occupying claimants of land, are constitutional or not; the demandants and the tenant both claiming title to the land in controversy under patents from the state of Virginia, prior to the erection of the district of Kentucky into a state?

2. Whether the question of improvements ought to be settled under the above act of 1797, the suit having been brought before the passage of the act of 1812, although judgment for the demandant was not rendered, until after the passage of the last-mentioned act?

The ground, upon which the unconstitutionality of the above acts was asserted, was, that they impaired the obligation of the compact between the states of Virginia and Kentucky, contained in an act of the legislature of the former state, passed the 18th of December 1789, which declares, "that all private rights and interests of lands, within the said district (of Kentucky) derived from the laws of Virginia, prior to such separation, shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in this state." This compact was

*4] *ratified by the convention which framed the constitution of Kentucky, and incorporated into that constitution as one of its fundamental articles.

[1] Bronson *v.* Kinzie, 1 How. 316.

[2] Bridge Proprietors *v.* Hoboken Co., 1 Wall. 117; Spooner *v.* McConnell, 1 McLean 338.

The most material provisions in the act of 1797, which were supposed to impair the obligation of the compact of 1789, and therefore, void, are the following: 1. It provides, that the occupant of land, from which he is evicted by better title, shall, in all cases, be excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record. 2. That the successful claimant is liable to a judgment against him for all valuable and lasting improvements made on the land, prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation. 3. As to improvements made, and rents and profits accrued, after notice of the adverse title, the amount of the one shall be deducted from that of the other, and the balance added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case may require. But it is provided, by a subsequent clause, that in no case shall the successful claimant be obliged to pay for improvements made after notice, more than what is equal to the rents and profits. 4. If the improvements exceed the value of the *land in its unimproved state, the claimant shall be allowed the privilege of conveying the land to the [*5
occupant, and receiving in return the assessed value of it, without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he declines doing this, he shall recover possession of his land, but shall then pay the estimated value of the improvements, and also lose the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions: 1. That the peaceable occupant of land, who supposes it to belong to him in virtue of some legal or equitable title, founded on a record, shall be paid by the successful claimant for his improvements. 2. That the claimant may avoid the payment of the value of such improvements, at his election, by relinquishing the land to the occupant, and be paid its estimated value in its unimproved state. Thus, if the claimant elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different instalments. If he fail to do this, or if the value of the improvements exceeds three-fourths of the unimproved land, an election is given to the occupant, to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to *pay the value of the land, if unimproved, by instalments, with [*6
interest. But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths of the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest; which if he fail to do, judgment is to be entered against him for such value, the claimant releasing his right to the land, and giving bond and security to warrant the title. If the value of the improvements do not exceed three-fourths of the value of the unimproved land, then, the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land; but he may claim a judgment for the value of his improvements; or take the land, giving bond and

security, as before mentioned, to pay the estimated value of the land. 3. The exemption of the occupant from the payment of the rents and profits, extends to all such as accrued during his occupancy, before judgment rendered against him, in the first instance: but such as accrue after such judgment, for a term not exceeding five years, as also waste and damage, committed by the occupant, after suit brought, are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant. 4. The amount of such rents and profits, damages and waste, and also the value of the improvements, and of the land without
*7] the improvements, *are to be ascertained by commissioners, to be appointed by the court, and who act under oath.

February 16th, 1821. The cause was argued, at February term 1821, by *Talbot* and *B. Hardin*, for the demandants—no counsel appearing for the tenant.

They contended, that the acts of the state legislature in question, were inconsistent with the true meaning and spirit of the compact of 1789, their avowed scope and object being to change the existing condition of the parties litigant, respecting the security of private rights and interests of land, within the territory of Kentucky, derived from the laws of Virginia prior to the separation. These acts do not merely attempt to alter the mode of prosecuting remedies for the recovery of rights and interests thus derived (which possibly they might do), but essentially affect the right and interest in the land recovered. They seek to accomplish this, by diminishing or destroying the value of the interest in controversy, by compelling the successful claimant and rightful owner of the land, to pay the one-half, and, in some instances, the entire value of the land recovered; not the actual value of the amelioration of the land, while held by the occupying claimant, but the expense and labor of making the improvements. But the acts are framed in the same spirit and with the same object; both are adapted to change the relative condition of the parties, to the great prejudice of the rightful owner. The principal object in view, in the act of 1797, was to exempt the occupant of his liability for waste committed by him, or rents and profits
*8] received by him, prior *to the commencement of the suit for the land, although he may, when he first took possession, have had full notice of the plaintiff's title, and consequently, be a *malâ fide* possessor. The act of 1812, purporting to be an amendment of the former act, with the avowed purpose of still further protecting the interests of the occupant, completely exempts him from all liability for waste committed, or for rents and profits received, before the judgment or decree in the suit. In no possible case, can the right owner recover more than five years' rent, although the litigation may, and frequently does, last a much longer period; whilst he is subjected to the payment of all improvements made at any period of the suit, down to the time of final judgment, to be set off against the amount of his claim for rents and profits, abridged and limited as it is by this act.

The object of the compact was plainly to secure to all persons deriving titles under the then existing laws of Virginia, the entire and perpetual enjoyment of their rights of property, against any future legislative acts of the state of Kentucky, which, it was foreseen, might be passed under the influence of local feelings and interests. The compact did not merely intend

to secure the determination of the titles to land by those laws, but also the actual enjoyment of the rights and interests thus established. It did not intend to give the true owner a right to recover, and then to couple that right with such onerous conditions as to make it worthless: to compel him to repurchase his own land, by indemnifying the occupant (often *a *malâ fide* possessor), not for his expenses and labor in improving the [*9 value, but frequently, in the deterioration of the land, to the great injury of the owner. The "rights and interests," of which the compact speaks, were not only to be rendered valid and secure, by preserving the modes and forms of proceeding for the assertion of those rights, but by preserving the existing provisions of law and rules of equity, under which the practical object and end of a suit are to be attained—the possession and enjoyment of the land, unburdened with any unjust conditions, extorted by fraud and violence. Its letter and spirit both forbid the interpretation, by which laws are made to exempt the occupant from his liability to account for the mesne profits, upon the pre-existing principles of law and equity; and by which that exemption is extended to every period of time, from his first taking possession, down to his being actually ejected, without any regard to the circumstances by which the original character of his possession may be entirely changed, by notice of a better title, of which he might have been originally ignorant. And is not the loss or injury resulting from the diminution of the value or amount recovered and actually received by the true owner, by taking one-half the value of the land, to pay for the estimated value or cost of the pretended ameliorations, of the same extent, as if, upon a recovery of an entire tract of land, the judgment was to be declared satisfied by delivering possession of a moiety only? Do, then, the rights and interests of land, as they were derived from the laws of Virginia, remain valid *and secure, under these acts of the legislature of Kentucky? If, by validity and security, be meant injury, forfeiture and destruc- [*10 tion, then, indeed, the terms of the compact are amply satisfied. But if an entire and complete protection of these rights and interests, as to their value, use and enjoyment by the true owner, was intended; then, the laws in question (the avowed object and intention, as well as the practical operation of which is to better the condition of the occupant, at the expense of the true and lawful owner, by compelling the latter, after he has recovered a formal judgment, establishing the validity of his title, to purchase the execution of that judgment, by the performance of conditions which the laws existing in 1789 did not require), are a gross violation of the compact, and consequently, unconstitutional and void. If, in short, that which cannot be done directly, ought not to be permitted to be done indirectly and circuitously, the legislature of Kentucky were no more authorized to enact rules or regulations, by the operation of which the land recovered by the real owner is incumbered with a lien, to the amount of half, or any other proportion of its value, for the benefit of the occupant, and to indemnify him for his fault or misfortune in claiming under a defective title, than they would have been, to produce the same effect, and to equalize the condition of the parties, by dividing the specific land between them.

March 5th, 1821. STORY, Justice, delivered the opinion of the court. [*11 —*The first question certified from the circuit court of Kentucky, in

this cause, is, whether the acts of Kentucky, of the 27th of February 1797, and of the 31st of January 1812, concerning occupying claimants of land, are unconstitutional? This question depends principally upon the construction of the 7th article of the compact made between Virginia and Kentucky, upon the separation of the latter from the former state—that compact being a part of the constitution of Kentucky. The 7th article declares, "that all private rights and interests of lands, within the said district, derived from the laws of Virginia, shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in this state." We should have been glad, in the consideration of this subject, to have had the benefit of an argument on behalf of the tenant; but as no counsel has appeared for him, and the cause has been for some time before the court, it is necessary to pronounce the decision, which, upon deliberation, we have formed.

So far as we can understand the construction of the 7th article of the compact, contended for by those who assert the constitutionality of the laws in question, it is, that it was intended to secure to claimants of lands their rights and interests therein, by preserving a determination of their titles, by the laws under which they were acquired. If this be the true and only import of the article, it is a mere nullity; for, by the general principles
*12] of law, and from the necessity of the case, titles to *real estate can be determined only by the laws of the state under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty, must have, the exclusive right of regulating the descent, distribution and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish, in which it had its origin; for no title can be acquired, contrary to those laws; and a title good by those laws cannot be disregarded, but by a departure from the first principles of justice. If the article meant, therefore, what has been supposed, it meant only to provide for the affirmation of that which is the universal rule in the courts of civilized nations, professing to be governed by the dictates of law.

Besides, the titles to lands can, in no just sense, in compacts of this sort, be supposed to be separated from the rights and interests in those lands. It would be almost a mockery, to suppose, that Virginia could feel any solicitude, as to the recognition of the abstract validity of titles, when they would draw after them no beneficial enjoyment of the property. Of what value is that title, which communicates no right or interest in the land itself? or how can that be said, to be any title at all, which cannot be asserted in a court
*13] of justice *by the owner, to defend or obtain possession of his property? The language of the 7th article, cannot, in our judgment, be so construed. The word title does not occur in it. It declares, in the most explicit terms, that all private rights and interests of lands, derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia,

and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky, does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional.

The only question, therefore, is, whether the acts of 1797 and 1812 have this effect. It is undeniable, that no acts of a similar character were in existence in Virginia, at the time when the compact was made, and therefore, no aid can be derived from the actual legislation of Virginia, to support them. The act of 1797 provides, that persons evicted from lands to which they can show a plain and connected title in law or equity, without actual notice of an adverse title, shall be exempt from all suits for rents or profits, prior to actual notice of such adverse title. It also provides, that commissioners shall be appointed by the court pronouncing the judgment of eviction, to assess the value of all lasting and valuable improvements *made on the land, prior to such notice, and they are to return the assessment thereof, after subtracting all damages to the land by waste, &c., [*14 to the court; and judgment is to be entered for the assessment, in favor of the person evicted, if the balance be for him, against the successful party, upon which judgment, execution shall immediately issue, unless such party shall give bond for the payment of the same, with five per cent. interest, in twelve months from the date thereof. And if the balance be in favor of the successful party, a like judgment and proceedings are to be had in his favor. The act further provides, that the commissioners shall also estimate the value of the lands, exclusive of the improvements; and if the value of the improvements, shall exceed the value of the lands, the successful claimant may transfer his title to the other party, and have a judgment in his favor against such party for such estimated value of the lands, &c. There are other provisions not material to be stated.

The act of the 31st of January 1812, provides, that if any person hath seated or improved, or shall thereafter seat or improve, any lands supposing them to be his own, by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall be proved to belong to another, the charge and value of such seating and improving, shall be paid by the right owner, to such seater or improver, or his assignee, or occupant so claiming. If the right owner is not willing to disburse so much, an estimate is to be made of the value of the lands, exclusive of the seating *and improvements; and also of the value of such seating and [*15 improvements. If the value of the seating and improving exceeds three-fourths of the value of the lands, if unimproved, then the valuation of the land is to be paid by the seater or improver; if not exceeding three-fourths, then the valuation of the seating and improving is to be paid by the right owner of the land. The act further provides, that no action shall be maintained for rents or profits, against the occupier, for any time elapsed before the judgment or decree in the suit. The act then provides for the appointment of commissioners to make the valuations; and for the giving of bonds, &c., for the amount of the valuations, by the party who is to pay the same; and in default thereof, provides that judgment shall be given against the party for the amount; or if the right owner fails to give bond, &c., the other party may, at his election, give bond, &c., and take the land. And the act then proceeds to declare, that the occupant shall not be evicted

or dispossessed, by a writ of possession, until the report of the commissioners is made, and judgment rendered, or bonds executed in pursuance of the act.

From this summary of the principal provisions of the acts of 1797 and 1812, it is apparent, that they materially impair the rights and interests of the righful owner in the land itself. They are parts of a system, the object of which is to compel the rightful owner to relinquish his lands, or pay for all lasting improvements made upon them, without his consent or default;
*16] and in many cases, *those improvements may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed, and no possession obtained for the lands, unless upon the terms of complying with the requisitions of the acts. They, therefore, in effect, create a direct and permanent lien upon the lands, for the value of all lasting improvements made upon them; without the payment of which, the possession and enjoyment of the lands cannot be acquired. It requires no reasoning to show, that such laws necessarily diminish the beneficial interests of the rightful owner in the lands. Under the laws of Virginia, no such burden was imposed on the owner. He had a right to sue for, recover and enjoy them, without any such deductions or payments.

The 7th article of the compact meant to secure all private rights and interests derived from the laws of Virginia, as valid and secure under the laws of Kentucky, as they were under the then existing laws of Virginia. To make those rights and interests so valid and secure, it is essential, to preserve the beneficial proprietary interest of the rightful owner, in the same state in which they were, by the laws of Virginia, at the time of the separation. If the legislature of Kentucky had declared by law, that no person should recover lands in this predicament, unless upon payment, by the owner, of a moiety, or of the whole of their value, it would be obvious, that the former rights and interests of the owner would be completely extinguished *pro tanto*. If it had further provided, that he should be compelled to
*17] sell the same, at *one-half or one-third of their value, or compelled to sell, without his own consent, at a price to be fixed by others, it would hardly be doubted, that such laws were a violation of the compact. These cases may seem strong; but they differ not in the nature, but in the degree only, of the wrong inflicted on the innocent owner. He is no more bound, by the laws of Virginia, to pay for improvements, which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests.

It is the unanimous opinion of the court, that the acts of 1797 and 1812 are a violation of the 7th article of the compact with Virginia, and therefore, are unconstitutional. This opinion renders it unnecessary to give any opinion on the second question certified to us from the circuit court.(a)

(a) Present MARSHALL, Chief Justice, and JOHNSON, LIVINGSTON, TODD, DUVALL and STORY, Justices.

March 12th, 1821. *Clay*, as *amicus curiæ*, moved for a rehearing in the cause, upon the ground, that it involved *the rights and claims of numerous occupants of land in Kentucky, who had been allowed by [*18 the laws of that state, in consequence of the confusion of the land titles, arising out of the vicious system of location under the land law of Virginia, an indemnity for their expenses and labor bestowed upon lands of which they had been the *bonâ fide* possessors and improvers, and which were reclaimed by the true owners. He stated, that the rights and interests of those claimants would be irrevocably determined by this decision of the court, the tenant in the present cause having permitted it to be brought to a hearing, without appearing by counsel, and without any argument on that side of the question. He, therefore, moved, that the certificate to the circuit court, of the opinion of this court upon the questions stated, should be withheld, and the cause continued to the next term, for argument.

Motion granted.

March 8th–11th, 1822. *Montgomery*, for the demandant, made three points: 1st. That this court is invested with the power of questioning the validity of the legislative acts of Kentucky, under which the tenant claims, both by the national constitution and the state constitution of Kentucky. 2d. That the acts of Kentucky, so far as they respect the present controversy, are null and void. 3d. That the act of 1812 cannot be applied to the case, consistently with the provisions of the constitution of Kentucky and of the United States.

*1. He denied, that this court was bound by the exposition, given by the state courts, to that part of the state constitution now drawn [*19 in question, even in a case of which the national judiciary had cognisance merely from the character of the parties litigant, as being citizens of different states: and still less, where the subject-matter in controversy was connected with that provision of the United States constitution, which secured the inviolability of contracts against state legislative acts. Such a doctrine would furnish an effectual *recipe* for sanctioning injustice by the forms of law, by giving to local decisions a much more extensive effect than had ever been before attributed to them. Unquestionably, the adjudications of the state courts, where they have become a settled rule of property, are, in general, to be regarded as conclusive evidence of the local law; but where the interpretation of the fundamental law of the state is involved, and especially, where that interpretation depends upon the constitution of the Union, (which is the supreme law), the state courts must necessarily be controlled by the superintending authority of this court. This depends upon a principle peculiar to our constitutions, and which distinguishes them from every free and limited government which has been hitherto known in the world. In England, the legislative power of parliament is not only supreme, but it is absolute, and (so far as depends upon written rules) despotic and uncontrollable by any other authority whatever. 1 Bl. Com. 160–62. But various *limitations upon the legislative power are contained in the constitution of Kentucky; and that of the United [*20 States contains other restraints upon the legislative power of the several states, and gives to the national judiciary the authority of enforcing them, especially, in controversies arising between citizens of different states, as the present case does.

2. He stated, that the second point would be maintained by establishing two propositions: 1st. That the legislative acts in question are repugnant to the terms of the compact of 1789, between the states of Virginia and Kentucky, which is made a fundamental article of the constitution of Kentucky: 2d. That the acts are repugnant to that constitution, in depriving the demandant of the trial by jury.

The terms used in the compact, "rights and interests of land," import something more than a mere formal title. A right of property necessarily includes the right to recover the possession, to enter, to enjoy the rents and profits, and to continue to possess, undisturbed by others. Jac. Law Dict. tit. Right, 536; Co. Litt. § 445, 447; *Altham's Case*, 8 Co. 299; Plowd. 478. He who has a right to land, and is in possession, has a right to be maintained in that possession, and in the use of the land and its fruits; and he who has a right to land, but is out of possession, has a right to recover the possession or seisin. These are the qualities and incidents of a right to land, at common law; none of which had been taken away by the statute, at the time the compact was made. *As to the word "interest," it might have been inserted *ex abundanti cautela*, to protect rights which, at the time of the compact, were not yet carried into grant. The term *interest*, as applied to land, according to many authorities, may be something different from a right to land in fee-simple; yet it cannot be doubted, that he who has a fee-simple has an interest in the land. A term for years is an interest, and so is the right both of mortgagor and mortgagee. It is, then, quite clear, that the term "rights and interests of land" means a great deal more than the mere use and possession of the evidence of title.

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What, then, were the pre-existing rules of law and equity, with reference to which the compact of 1789 is to be construed? By the common law, then in force in Virginia, and by the statute of 1785, the remedy by writ of right was given to him who had the fee; and if the demandant recovered his seisin, he might also recover damages, to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded. 1 Virg. Rev. Code 33. In cases where an ejectment was brought, the party might have his separate action for the mesne profits, which could only be restrained in its operation by the statute of limitations of five years. As to the system of positive equity, which had been established at the period referred to, and which it was supposed was not infringed by the legislative acts now in question, it will be found, that the cases where the court of chancery *has interfered, may be reduced to the following classes: 1. Where the party came into equity in order to disembarrass his legal title of difficulties resulting from the defect of evidence at law, and also prayed a decree for the mesne profits. 2. Where the title was merely equitable, chancery has decreed both as to the title and for the mesne profits. 3. So also, in cases of dower, the title as well as the mesne profits has been decreed. 4. In cases where infants are interested, the title and mesne profits have both been determined. In all these cases, the plaintiff sought relief, as well touching the title, as for an account of the mesne profits; and the claimant has, therefore, been allowed, for valuable and lasting improvements, *bonâ fide* made. In the first and second classes, the account for mesne profits has been taken from the time of bringing the suit

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only, because the plaintiff had improperly lain by with his title. But where that fact does not appear, the account is always carried back to the time the title accrued. 2 Vern. 724 ; 1 Atk. 524–26 ; 2 Ibid. 83, 283 ; 3 Ibid. 130–34 ; 2 P. Wms. 645–46 ; 1 Madd. Ch. 73–75 ; 1 Wash. 329. There is no case where a bill has been filed by the occupant, claiming the value of his improvements against the right owner. The cases where it has been allowed, are where the title and an account of rents and profits constituted the matter of the complainant's bill, and where the defendant resisted the relief sought, by setting up some color of title in himself, with a *claim for the improvements. This went upon the favorite maxim of the [*23 court of chancery, that he who will have equity must do equity. But though no case, where the occupant was the plaintiff, is to be found, before 1789, yet it is admitted, there are certain maxims and principles of equity, which, combined with the peculiar state of land titles in Kentucky, would authorize a court of equity to relieve. Yet it is quite evident, that a party coming with his bill for relief, after a recovery had against him at law, must have stood upon a very different ground than the complainants in the cases above referred to. His application must have been to the extraordinary powers of the court ; he must have come in under the rule that he who will have equity must do equity ; he would not have been permitted to gain by the loss of the other party.(a) Upon a bill brought after a recovery in a real action, the account would have been carried back to the time of his first taking possession : complete equity would have been done, by making a full estimate of the value of the rents and waste on one side, and of the improvements on the other ; the want of notice of the defendant's title could not have been considered as important, since he would stand upon his judgment at law : but the decree would be for the balance of the account thus taken. After a recovery of mesne profits, in the action of trespass, *following a recovery in ejectment, if the occupant had not pleaded the stat- [*24 ute of limitations, he might have brought his bill, and the matter would have been adjusted in the same mode ; but if he had pleaded the statute, and thus deprived the true owner of a part of his indemnity, he could not stand before the court as a party willing to do equity, and consequently, could not have equity. But even supposing that a bill would be retained in such a case, most certainly, the same rule of limitations, which deprived the proprietor of a part of his damages, would also be applied to the improvements made before the time of limitation. Admitting, too, that with respect to questions between the owner of the title, as complainant, claiming relief, as well touching the title as for the rents and profits, and the other party, all the cases cannot be reconciled, yet there is a very decided preponderance in favor of the doctrine now maintained ; and with respect to a naked claim for improvements, there is no contradiction whatever.

As to the terms " valid and secure," which are used in the compact with reference to the rights and interests of land derived from the laws of Virginia, they must import the permanent validity and security of whatever is included in, or incident to, the complete enjoyment of those rights and interests. This validity and security is impaired by the acts of the state legis-

(a) *Locupletiorem neminem fieri cum alterius detrimento et injuria jura naturæ æquum est.* L. Jure Naturæ, 206, de Div. Reg. Jur. Antiq.

lature now in question. By the common law, connected with the statute of Virginia, before cited, the demandant in a writ of right was entitled to
*25] recover, *together with his seisin, such damages as the jury might think him entitled to, for the detention of the land, and for the waste committed upon it, extending back to the time when the occupant entered upon the land. But by the act of 1797, § 1, he is to recover no damages for the use of the land, before actual notice, nor even subsequent to that notice, unless the suit is brought within a year. By the third section of the act of 1812, his damages for the detention are not to commence until the final judgment or decree in the courts of original jurisdiction. Under the first act, his right to damages is greatly diminished; under the second, it is almost annihilated. But suppose the respective rights of the parties are tested by the settled doctrines of positive equity; the tenant, in the present case, seeking equity from a party who had a clear legal right, would have been compelled to do complete equity. He would have received an equitable allowance for his improvements, if *bonâ fide* made; but the judgment of the demandant would not have been disturbed; the value of the improvements would have been compared with the amount of his damages, and a decree rendered according to the result of that comparison. In the case of a recovery by ejectment, followed by the action of trespass for mesne profits, which was the undoubted right of the owner of the land, as the law stood in 1789, the right of the plaintiff is diminished by the acts now in question. Under the old law, he could not be restricted from inquiring into the damages sustained, from
*26] the time the defendant entered upon *the land, down to the time of suit brought, unless the defendant pleaded the statute of limitations. But if the occupant insisted on that defence, he could have no remedy in equity. The act of 1812 also makes the giving a bond for the value of the improvements, a condition to the recovery of possession, thus depriving the true owner of his pre-existent absolute right to the appropriate writ of execution. It is clear, then that the rights of the proprietor of the land are impaired by the statutes in question; they are neither determined by the same laws, nor by the same principles of equity incorporated into new laws.

Nor can these statutes be supported on the principles of abstract justice. It is not only a maxim of the court of chancery, but of every wise legislator that equality is equity. So also, one ought not to gain by the loss of another, who was in no fault. From these two maxims, the corollary may be drawn, that where the respective capitals of two individuals are equal, and their occupations, skill and industry are the same, their condition in the social state (so far as it depends upon legislative regulations) ought to be precisely the same. Not that one may not benefit by turns of good fortune, without sharing his gains with the other; but that the law should not take from the one to give to the other, rendering the one richer, to make the other poorer, without some fault of the latter. Here, the counsel illustrated the application of this principles, by putting a variety of cases which might
*27] occur under the *statutes, to show the extreme injustice and inequality of their operation.

Nor does the fourth article of the compact of 1789, warrant the passage of the acts under consideration. It merely gives to Kentucky the power of requiring lands to be improved and cultivated after six years. That this article does not apply to the present case may be shown by several consider-

ations: 1. The acts in question do not, by their terms, purport to be in execution of such a power. 2. A power to require the owners of land to improve and cultivate for the general welfare, is one thing; and a power to take away the property of one citizen and give it to another, is a very different thing. 3. A law requiring improvement and cultivation, and declaring a forfeiture for non-compliance, would only be applied to unoccupied lands; whereas, the lands to which alone the acts are applied are actually improved and cultivated. The true owner is prevented, by the acts of him who has usurped the possession, from personal compliance.

It may be contended, that there are certain ancient statutes of Virginia recognising the same obnoxious principles with the recent acts of Kentucky. But the only statute at all partaking of this character was that (called) of the 13th of Charles II., but in fact passed immediately after the restoration. This statute was entirely retrospective in its operation, and was intended to apply to a peculiar state of things existing during the civil wars and the commonwealth, as distinctly appears, both by the preamble and the enacting *clauses. It contained, however, no provision for depriving the true owner of the rents, &c., and was actually repealed in 1748. [*28

As to the second particular proposition, under this general head, the constitution of Kentucky expressly declares (art. 10, § 6), that "the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." The law of Virginia prescribed this mode of trial as to writs of right, with all its details, and amongst others, that the damages of the demandant for the detention of the land should be assessed by the jury. An arbitrary tribunal of commissioners is substituted for this ancient mode of trial, by the acts, the validity of which is now drawn in question. Thus is not only the amount of damages to which the demandant was entitled, under the old law, diminished to a pittance, but even that is to be liquidated by a tribunal far more unfavorable to him than a jury.

3. The third general point would follow as a corollary from the proof of the two following propositions, or either of them: 1. That the act of 1812 is repugnant both to the United States constitution and that of Kentucky, as being retrospective in its operation upon vested rights, and as impairing the obligation of contracts. 2. That it is repugnant to the constitution of Kentucky, in determining, by the legislative department, a matter which is exclusively cognisable by the judicial.

And first, the state constitution provides, art. 10, § 18, that "no *ex post facto* law, nor law *impairing contracts, shall be made;" and the national constitution declares, art. 1, § 13, that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The terms of the prohibition are very similar, and the substance is absolutely the same. In the case at bar, the injury to the demandant was committed long before the passage of the act of 1812, which has interposed and violently deprived him of his remedy, even *pendente lite*. Considering the two prohibitions against *ex post facto* laws, and against laws impairing the obligation of contracts, together, they will be found to afford a complete protection to vested rights of property, and to apply precisely to the present case. All rights of action are founded either upon contracts or upon torts; they are either *ex contractû* or *ex delicto*. The framers of our constitutions, by the prohibitions against impairing the obli- [*29

gation of contracts, intended to protect all rights dependent upon contract from being diminished or destroyed; and they could not certainly have intended to leave injuries to property arising *ex delicto* wholly unredressed, or to leave the remedy to the caprice of the state legislatures. Doubtless, the more generally received opinion is, that this prohibition of *ex post facto* laws is to be restricted to criminal matters; but there are great authorities to the contrary. The commentator on the laws of England, in laying down the maxim of political philosophy, that *ex post facto* laws ought not to be passed, does, indeed, illustrate his position by a criminal case; and probably,
*30] some have been misled, *by taking the example for the rule. 1 Bl. Com. 46. Dr. Paley, however, lays down the rule without any qualification whatever. Paley's Moral & Political Philos. 444.

But supposing this first proposition to be questionable, there certainly can be no doubt as to the second. By the constitution of Kentucky, it is declared, that "the powers of government shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." And by the second section of the same article, that "no person, or collection of persons, shall exercise any power properly belonging to either of the others; excepting in the instances hereinafter expressly directed or permitted." Now, it cannot be denied, that a particular controversy, arising out of facts, which, by an existing law, give the parties a right to certain remedies in the courts, is a matter exclusively of judicial cognisance, But here, the legislative department has adjudicated upon it, by interfering with these remedies, after a *lis pendens*, so as to take away the property of one and give it to another party. It is an adjudication discharging the tenant from a just claim, which the demandant had against him under the former law, without any equivalent or indemnity to the latter. That this adjudication has been clothed with the forms of public and general legislation, and includes every case of the
*31] same class, can make no *difference. This is an example of that very sort of legislation which Dr. Paley reprobates, and calls double; it being the exercise both of judicial and legislative power. Such legislative acts do not discriminate between different cases, according to their peculiar circumstances, as the judicial authority would do. Thus, the act of 1812 confounds together the case of the person lying in wait with his title, to take an unfair advantage of the compact, and that of the rightful owner, who has constantly and openly pursued his claim; cases of infancy and of full age; of fair and fraudulent settlement: in short, all circumstances and qualities are indistinguishably blended in one sweeping act of retrospective injustice.

*Bibb*, contrà, contended, that the substantial effect of the acts of 1797 and 1812, went merely to allow the grantee from the commonwealth, who, under faith in his grant, has made valuable and lasting improvements, the amount of those improvements; and to exempt him from accounting for rents and profits, down to the time when he begins to be a *malâ fide* possessor, by resisting the better title of the true owner. That the acts did not apply even to cases of disputed boundaries, but only to cases of conflicting titles; nor to cases of fraud, or of lands previously cultivated and improved.

He entered into a detail of the provisions of the laws, of the practice under them, and of the exposition they had received from the courts; and contended, 1st. That the principle of the act of 1812, is a *principle of [*32 natural equity and justice, as to permanent improvements by a *bonâ fide* possessor. 2d. That the principle of postponing the accounts of rents and profits, is the true chancery rule, and such as is familiarly applied in the practice of courts of equity. 3d. That the laws are not repugnant to the compact of 1789.

1. The circumstances under which the country, where this momentous question arises, was settled, are to be considered. The manner in which it was colonized, and in which the titles to land were first acquired, and the consequent confusion of conflicting claims and litigation, are unfortunately, but too well known to the court. Under these difficult circumstances, all that the local legislature has done, is, to assert the principle of natural justice and artificial equity, that he who takes possession of vacant lands, under a *primâ facie* legal title, and makes valuable and lasting improvements, shall be considered as a *bonâ fide* possessor. Such is the well-established rule of the court of chancery, as to improvements, which must pass with the freehold, to the party asserting his paramount title. It is applied, where a vendee, under an agreement for a sale, takes possession: so also, where a mortgagee is in possession, the court never permits a redemption without paying for permanent improvements. If, then, the party has a right, in similar cases, to an indemnity, is it any objection, that the statute has defined a rule, declaring what requisites shall be indispensable? *What better [*33 evidence of *bona fides* can there be, than a grant under the great seal?

There is a great variety of claims, consisting of different grades or classes, complicating the titles to lands in Kentucky, and depending not merely on legal doubts, but on questions of evidence of great difficulty. 1 Bibb's Rep., Preface. What is the opposing claim, which is of such validity as *primâ facie* to convert the occupant into a *malâ fide* possession? The local tribunals have laid down the only safe practical rule, which is, that the positive decision of a court of record shall alone be sufficient. All grants are by record, and the patent can only be repealed by matter of record. There must be a *scire facias* to repeal the patent; and in the case of escheat, a regluar inquisition is indispensable. Until the grant of the commonwealth is annulled, a person claiming and holding under it, cannot be considered as a *malâ fide* possessor. The validity of the laws in question, has been confirmed by innumerable decisions; and they have been always strictly confined in their operation to cases of conflicting titles under grants, and have never been extended to protect a *malâ fide* possession. 1 Marsh. (Ky.) 443; 2 Ibid. 214; 3 Bibb 298; 4 Ibid. 461; 1 Marsh. 246, 247.

2. The general principle of equity is settled by a series of decisions, both in England and in this country. A leading case on this subject, is that of the *Duke of Bolton* v. *Deane*, Prec. Ch. 516. There, the *doctrine [*34 was established, that if the lessor suffers the lessee to hold over, equity will not compel the tenant to account for mesne profits, unless the lessor was hindered from entering, by fraud, or some extraordinary accident. The same principle is laid down, as to mesne profits, in several other adjudged cases. Eq. Cas. Abr., tit. Mesne Profits; 1 Atk. 526. And wherever there has been any default or *laches* on the part of the true owner in

asserting his title, the account is restrained to the filing of the bill. *Dormer* v. *Fortescue*, 3 P. Wms. 136. So, where a man suffers another to build on his ground, without setting up a right till afterwards, a court of equity will compel the owner to permit the builder to enjoy it quietly. *East India Co.* v. *Vincent*, 2 Atk. 83. The same principle has been recognised by our own courts, and is also to be found among the maxims of the Roman law. *Southall* v. *McKean*, 1 Wash. 336; 2 Domat's Civ. Law 432, Strahan's Translation; Kames' Eq. 189, (1st ed.) 270.

3. As to the compact of 1789, between Virginia and Kentucky, it is a treaty for good faith; a mere recognition of the principles of natural law and morality. A change of sovereignty does not usually make any change in proprietary interests in the soil; and the compact is merely declaratory of that principle of public law. The Louisiana treaty contains stipulations for the protection of the property of the inhabitants, but it has never been construed to limit the sovereign rights of the United States over the domain of that province. *Neither did the compact of 1789 intend to limit the sovereignty of Kentucky. It is merely a stipulation for the conservation of titles in their integrity; for fair and impartial legislation upon the rights of property which were originally derived from the laws of Virginia. It could not have meant to prevent the modification of remedies in the courts, and generally what is called the *lex fori*. According to the doctrine contended for on the other side, the legislature of Kentucky could not even extend the time for entering surveys; than which nothing could be more absurd and extravagant.

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But the true principles by which the compact is to be interpreted have already been settled by this court. In *Bodley* v. *Taylor*, 5 Cranch 223, it is laid down, that if the same measure of justice be meted to the citizens of each state; if laws be neither made nor expounded, for the purpose of depriving those who are meant to be protected by the compact, of their rights; no violation of the compact can be said to exist. This case also determines the principle, that the decisions of the local courts are to be followed: and the inconveniences which would flow from shaking the system of land titles established by the uniform series of their adjudications, is insisted on as a reason for adhering to the rules of property thus established. Ibid. 234. So also, this court has solemnly sanctioned the act of Kentucky, giving further time for surveys; as well as *the statute of limitations of that state; and the act concerning champerty and maintenance. 2 Wheat. 324; 1 Ibid. 292.

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The system of legislation now in question, does but follow the maxims laid down by Montesquieu, that the laws should encourage industry; that the more climate, and other circumstances, tend to discourage the cultivation of the earth, the more should the legislator excite agriculture; and that those laws which tend to monopolize the lands, and take from individuals the proprietary spirit, augment the effect of those unfavorable circumstances. Esprit des Lois, lib. 14, c. 6, 8, 9, 11. Here, though it is acknowledged that the titles are to be decided according to the laws of Virginia, existing at the epoch of the compact, a new proprietary interest has grown up since, not foreseen nor provided for. The possessor in good faith has covered the face of the country with his own property, the fruits of his toil and industry,

which it is not just that the owner of the unimproved land should take from him, without an indemnity.

Again, how can this court interfere, after the settled decisions of the local courts has confirmed the validity of these laws, and thus disturb the rules of property which have been firmly established; and that, too, in a case where the parties on both sides, really interested in the controversy, are citizens of the same state? The subject is not within the jurisdiction of the court, either as to the character of the parties really interested, or *as to the subject-matter of the controversy. The jurisdiction originally given by the constitution has been defined and limited by the [*37 judiciary act, and is not co-extensive with what might have been granted by congress under the constitution. *United States* v. *Bevans*, 3 Wheat. 336, 387, 390; *United States* v. *Wiltberger*, 5 Ibid. 93. The states may, with the consent of congress, make compacts or agreements with each other; but they cannot make a treaty, even with the consent of congress. The judicial power then does not extend to such compacts, considering them as treaties, nor does that clause of the constitution, which prohibits the states from making any law impairing the obligation of contracts, apply to the present case. That prohibition can only be fairly construed to extend to contracts between private individuals, or, at most, between a state and individuals. An agreement or compact between two different states, in their sovereign capacities, and respecting their sovereign rights, can never, by the utmost latitude of construction, be brought within the grasp of a prohibition, which was evidently intended merely for the protection of private rights, growing out of private contracts, or out of a grant from the state vesting a proprietary interest in the grantee.

The only remaining question then is, whether this court can declare a state law void, as being repugnant to the constitution of the state, contrary to the uniform decisions of the state courts, who are the rightful exclusive expounders of their own local law? It is *conceived, that this point [*38 is irrevocably settled by the decisions of this court. *Calder* v. *Bull*, 3 Dall. 386. But even supposing this to be a mistaken inference, it is quite clear, from the uniform language and conduct of the court, that it will not declare an act, whether of the state or national legislature, to be void, as being repugnant to the fundamental law, unless in a very clear case. Besides, there is the less necessity for the interference of the court in the present case, as the compact itself provides a tribunal for the adjustment of any disputes which may arise under it; and that stipulation, if it does not entirely exclude the jurisdiction of any other tribunal in all cases arising under it, will, at least, furnish a motive for great caution on the part of the national judiciary in a case where, if citizens of Kentucky alone are interested, they ought to be bound by the decisions of their own courts; and if the rights of citizens of Virginia are involved, it depends upon the pleasure of that state to create the tribunal by which they are to be determined.

*Clay*, on the same side, stated, that the great question in the cause was, what is that paramount rule, with which these laws are to be compared, and if found repugnant, to be declared void by this court. If the jurisdiction now to be exercised arises under that clause of the national constitution, prohibiting the individual states from making any law impairing the obliga-

tion of contracts, then the court may draw to its cognisance *the subject-matter in controversy. But if otherwise, then it can only acquire jurisdiction by the character of the parties litigant, as being citizens of different states, and so entitled to the protection of the federal *forum*. The first inquiry then would be, whether there was any subsisting compact between the states of Virginia and Kentucky upon which the jurisdiction of the court could fasten?

If there be a compact, it must be between parties capable of making it; upon a subject on which they might constitutionally stipulate; and made in a form warranted by the constitution. Waiving the question as to the parties, he would contend, 1st. That the supposed compact had not been constitutionally made; and 2d. That if the compact is to be interpreted as restraining the state of Kentucky from passing the laws in question, the restraint itself would be unconstitutional and void.

1. Both by the original articles of confederation and the existing national constitution, the states are prohibited from treating or contracting with each other, without the consent of congress. The terms of the prohibition in the constitution are very strong: "*no* state shall, without the consent of congress, enter into any agreement or compact with another state, or a foreign power." It extends to all agreements or compacts, no matter what is the subject of them. It is immaterial, therefore, whether that subject be
*40] harmless or dangerous to the Union. There is here no *room for interpretation. "*Any* agreement or compact," are the words, and all contracts between the states, without the consent of congress, are interdicted. To make, therefore, the supposed compact binding, it must have been entered into with that consent. It is not now insisted that (though perhaps it may be), that this consent must precede the compact. All that will be asked is (what cannot be denied), that it must either precede or follow the compact. In the present case, there is no pretence for alleging a subsequent express assent. Was there, then, a prior one? The act of Virginia did not even profess to ask the consent of congress to the compact. All that it demanded was, that congress should consent to the admission of the proposed state into the Union, &c., and congress has not even responded to all that was asked. What it has assented to, can only be ascertained by resorting to the language it has thought fit to use. The act of February 4th, 1791 (by which alone the will of congress on this subject is signified), merely declares the consent of that body to the erecting of the district of Kentucky into a separate and independent state, and its reception into the Union upon a certain day. Beyond what was asked of it, congress has not gone; as to the rest of the matters connected with these, it was altogether passive. There was, then, no compact. It was a mere negotiation; for the people of Kentucky did not meet in convention, until 1792, when it is supposed that their assent to the compact was given.

*41] *But it may be said, that though congress did not expressly consent, yet it acquiesced in the compact, which is equivalent. This is what is denied. The consent of congress being required, it must be evidenced by some positive act. Congress is a collective body, or, rather, it consists of three bodies, each of which participates in the exercise of the legislative power of the nation. The forms and ceremonies of passing laws must be observed. The doctrine of acquiescence cannot apply to the exercise of

such a sovereign power. Did the house of representatives? did the senate? did the president, acquiesce? How do you ascertain it? Their silence cannot be interpreted into acquiescence. It was not necessary for them to interpose, in order to prevent that, which, without their consent, would be a mere nullity. If they had actually interposed, by an express prohibition, in the the most solemn form, it could not make the compact more void than it was before. Being a nullity, from an inherent defect in its original formation, it could not be made more so, by any extraneous act. Never having existed, its existence could not be destroyed by any conceivable power whatever. Indeed, to set up the doctrine, that congress can tacitly acquiesce in agreements, unconstitutionally made between the states, would be of most dangerous and fatal consequences. It would sanction whatever agreements the several states might choose to make with each other, and introduce chaos into the confederacy, by engagements between its different members, inconsistent with *each other, and conflicting with the duties they all [*42
own to the Union. All the analogies of the constitution are against such a doctrine. Various prohibitions of the exercise of different powers by the states, without the consent of congress, are contained in the constitution. Thus, they are prohibited, without that consent, from laying imposts or duties on imports or exports, except such as are necessary for executing the inspection laws; or any tonnage duty; and from keeping troops or ships in time of peace; and from engaging in war, unless actually invaded, or in such imminent danger as will not admit of delay. These prohibitions are all connected in the same clause with the prohibition against their making contracts with each other. Yet, surely, it cannot be pretended, that in all these cases the consent of congress can be inferred from its silence. It is true, that the consent of congress to such acts, has not always been asked by the states. But it was their duty to have asked it; and the acts are mere nullities, unless the consent be obtained.

2. If the supposed compact is to be interpreted to restrain the state of Kentucky from passing the laws in question, such restraint would be unconstitutional. It is incontestable, that there are some attributes of sovereignty, of which a state cannot be deprived, even with the concurrence of congress and the state itself. The true theory of our government is, that of perfect equality among the members of the Union. Whatever sovereign powers one has, each and all have. A state may *refuse to allow another [*43
state to be carved out of its territory; but if it consents to the formation of a new state, such new state becomes invested with all the sovereign attributes of every old one. Congress may refuse to admit a new state; but if it admits it, the state stands in the Union, freed and liberated from every condition which would degrade it below its compeers. Whatever one state can do, all can do. The pressure of the whole on all the parts, is equal, and all the parts are equal to each other. This implied prohibition extends to every compact, in every form, by which a state attempts to deprive itself of its sovereign faculties. The sovereignty of a state cannot exist, without a territorial domain upon which it is to act; and there can be no other restrictions upon its action within its own territory, but what is to be found in its own constitution, or in the national constitution. Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory. If that territory happens to be in a waste and

wilderness state, it may pass laws to reclaim it; to encourage its population; to promote cultivation; to increase production. That any of the old states can pass such laws, is incontestable; and if they may rightfully do it, then Kentucky may do the same. If, then, there be no compact constitutionally made, and could have been none, with the power of restricting the state legislature from passing the laws in question, there is no fundamental rule, with the violation of which they stand chargeable.

*44] *But it may be said, that this rule is incorporated into the state constitution. To this it is answered, that the incorporation of the supposed compact into the state constitution, did not make it a compact, if otherwise it wanted the requisite sanctions under the federal constitution. If it were inserted, upon the mistaken supposition of its being a binding contract, does the insertion produce any effect? Is it not to be considered as the insertion of that which, being before void, remains null, notwithstanding the insertion? That it is not made a compact by the insertion, is clear: for the prohibition upon the states, to contract or agree, without the consent of congress, is a prohibition to contract or agree in any form, constitutional or otherwise.

But although it has not the properties of a compact, it may possibly be contended, that it is nevertheless a part of the constitution of Kentucky, and therefore, binding upon the legislature of the state. The convention of Kentucky proceeded upon the notion that it was a compact. If, in that, they were mistaken, ought it to be treated in a character which was never intended? Can it be treated in that character? There are reciprocal provisions in it. Supposing it to be no compact, those stipulations on the part of Virginia, which formed the considerations of stipulations on the part of Kentucky, would not be binding on Virginia. It would, therefore, be most unjust, to hold Kentucky bound for grants, the equivalents for which she cannot enforce. If one party is not bound, the other ought to be deemed

*45] free: and *the incorporation of the compact into the constitution of Kentucky, ought to be considered as proceeding upon the erroneous supposition; it was the compact, emphatically, that was made a part of the constitution. If there were no compact, nothing was inserted: or it was the will of one party, expressed in the most solemn form, to which there was wanting the will of the other, or the federal sanction, to make it a compact. If, notwithstanding the freedom of Virginia from any obligations, Kentucky is to be regarded as bound by her separate constitutional act, then, the question is, what did she intend by that act? Who is to expound it? Are we to look for the meaning of the constitution of a state, within the state itself, or are we to look abroad for foreign interpreters? It need not be denied, that in case of an appeal to the federal tribunals, by citizens of other states, against the acts of local legislation, upon the ground of repugnance to the state constitutions, they may pronounce on that repugnancy. But it must be a clear case of repugnancy, to justify them in annulling the state law. And after all the departments of a state government had united in giving an exposition to its constitution, which had been uniformly acted on for a series of years, and become a rule of property, this court would solemnly pause, before it overturned such a construction. This court, in *Bodley* v.

*46] *Taylor*, 5 Cranch 223, determined, that it would follow the decisions of one department only (the judiciary) in respect to *the land laws

of Virginia, although it intimated strong doubts of their correctness. The ground on which this determination justly proceeds, is a regard to the peace of society, a respect for the rights of property, and the prevention of those disorders which would flow from opposite and conflicting rules.

The convention, by inserting the declaration in the constitution, that the compact was to be considered as a part of it, could not have intended to prevent the passage of the laws for the benefit of the occupying claimants, because the first of those laws preceded the formation of the last constitution. The state court of last resort has affirmed the consistency of the law with the compact; and, conseqently, its consistency with the constitution. 4 Bibb 52. Thus, we have the deliberate adoption of that system by the legislative authority, almost contemporaneously with the date of the compact; the formation of the present constitution, without disapproving of that system; and an adherence to it by the legislative authority, for a long series of years, during which it has reviewed it, expressly adhered to its principle, and given it a more expansive effect.

3. If the compact is to be treated as one made with all necessary solemnities, the jurisdiction of this court cannot attach, until the party charged with a violation of it has refused to constitute the tribunal of the compact. The 8th article of the compact provides for *a special tribunal. That provision is as much a part of the compact as any other. It is admitted, that rights, which existed prior to and independent of the compact, cannot be affected by the decisions of that tribunal. But whatever rights spring out of the compact, originate with it, and are liable to be affected by it. They rest, coupled with all the conditions which the enactment that gave them birth has imposed upon them. If the party complained of, for violating the compact, had refused to co-operate in the constitution of the tribunal of the compact, then the jurisdiction of this court might attach, under that branch of the distribution of judicial powers, which gives it cognisance of controversies between the states (if congress had made provision for giving effect to that part of the constitution); or, perhaps, the court might, in such case, exercise jurisdiction as between the individuals interested. If there be cause of complaint, it is by Virginia against Kentucky. But Virginia has never (until recently) complained—she has acquiesced: and Kentucky, so far from refusing to create the tribunal of the compact, has offered to refer to it this very matter. [*47

It will probably be contended, that this provision is like the ordinary stipulation in policies of insurance, and other contracts for referring to arbitration, which has never been held to exclude the jurisdiction of the ordinary courts of the land. But the grounds on which the courts of Westminster have assumed jurisdiction in such cases is *that of their transcendent authority. 2 Marsh. Ins. 679. If it were *res integra*, there would certainly be great reason to contend, that, in these cases, the *forum domesticum* stipulated for by the parties ought to have exclusive jurisdiction. But, be this as it may, there is this plain distinction, that the courts of Westminster Hall have a general jurisdiction over the realm, whilst this court is one of limited jurisdiction, having special cognisance of a few classes of cases only. So far as that jurisdiction results from the will of the states, who are parties to the compact, it must be taken with the restrictions which that will imposes. The parties, in effect, say, "we make such a contract; [*48

if we differ about its interpretation, or execution, we will constitute a special tribunal to decide that difference." Congress might, indeed, give you jurisdiction over the compact, by providing a mode in which your constitutional jurisdiction over controversies between the states shall be exercised. But all jurisdiction over sovereign states (however derived), is limited by the very nature of things. Suppose, this were a foreign treaty, and provided for a reference to the arbitration of a foreign sovereign, would you take jurisdiction in that case?

Supposing, however, that the court should feel itself compelled to take cognisance of the present cause, as being a private controversy between citizens of different states, it will exercise its power with the most deliberate caution. This court is invested with the most important trust that was
*49] *ever possessed by any tribunal, for the benefit of mankind. The political problem is to be solved in America, whether written constitutions of government can exist. They certainly cannot exist, without a depositary somewhere of the power to pronounce upon the conformity of the acts of the delegated authority to the fundamental law. This court is that depositary, and I know not of any better. But the success of this experiment, so interesting to all that is dear to the interests of human nature, depends upon the prudence with which this high trust is executed.

4. The compact, supposing it to be valid and binding, does not prohibit the passage of these laws. The mode by which private individuals could acquire a part of the public domain in Virginia, as prescribed by the act of 1748, was by a survey, accompanied with certain specified improvements. Leigh's Rev. Virg. Laws, 333. If not settled within three years, the grant was forfeited, without any formal proceeding to repeal the patent. In 1779, commenced the calamitous system under which Kentucky now suffers. In order to raise a revenue, and provide for the defence of the frontier, the previous survey was dispensed with; and hence the conflicting claims which now cover the whole surface of the country. At the period of the separation of the two states, the titles acquired under the law of 1779 were incom-
*50] plete, and in every stage of progression, from the entry *to the patent. Virginia was about to part with the sovereignty; that is, with the power of consummating the titles and fulfilling her engagements. If she made no provision; if she obtained no guarantee for the complete execution of her engagements; if she exposed those who had acquired the right to, or interests in, land from her, to the uncontrolled action of the new sovereignty, she might justly be reproached with infidelity to her engagements. Faithful to these, the stipulation in question was inserted. The object, and the only object of it, was to notify the new state that it must not abuse its power, to the detriment of persons claiming under Virginia, and to proclaim to those persons her parental attention to their interests. It was to announce to them, and to the new state, that their titles were to remain valid and secure, under the new sovereign. It was a devolution upon the new sovereign of all the duties towards them of the old sovereign, and nothing more. It was to bind the new state so far as Virginia was bound, but to leave it as free as she would have been, had there been no separation. Virginia could have had no imaginable motive to prevent the new state from exercising all the accustomed rights of sovereignty. On the contrary, she displayed a solicitude for the admission of the new state into the Union, making it a

condition of its independence. In conformity with this view, is the language of the third article: it provides, "that all private rights and interests of lands, within the said district, derived from the laws of Virginia, prior to such separation, *shall remain valid and secure, under the laws of the proposed state, and shall be determined by the laws now existing in [*51 this state." If the reason for using the terms "rights and interests," be attended to, it will be seen, that it is a guarantee for the security of the title, and nothing but the title. It is no restriction upon the new sovereignty as to any public policy which it might think fit to adopt. All the parts of the compact are to be taken together, and one article may serve to expound another, where there is ambiguity. What is meant by the third, may be ascertained by the fourth condition. That is a clear recognition of the right of the new state to enforce cultivation or improvement, by forfeiture or other penalty. It expressly recognises the right to exercise that power forthwith, as to citizens; and as to non-residents, merely leaves a reasonable time (six years) to enable them to settle and improve. It admits the right of the state to effect the object, by forfeiture or other penalty. If the parties to the compact had intended, by a provision for the security of the title, to exclude the legislative authority from acting at all upon the subject, would they have left that subject exposed to the most formidable action of the sovereign power, by forfeiture or other penalty?

The courts of Kentucky, the people of Kentucky, the legislature of Kentucky, have all proceeded upon the principle of the perfect validity of the titles derived from the laws of Virginia. Everybody is interested in the preservation of those titles. The legislative system of Kentucky *does not begin to act, until the system of Virginia has had its complete effect. [*52 After the decision upon the title, and after it has been pronounced valid; after the terms of the compact are completely fulfilled, the laws of Kentucky commence their operation. When they do operate, it is not upon the title, but upon the subject. It is not on account of any defect in the title, that they operate at all. They spring from those considerations of policy which a sovereign state has a right to weigh and give effect to. The title is admitted; but from other causes *dehors* the title, the owner of it is not compelled to pay for the title, nor for the land, which he had a right to only in its native state: but he is compelled (on ground of public policy) to pay for something which is not inherent in the title, which does not naturally belong to the land. If this be not according to the true interpretation of the compact, then the erection of Kentucky into an independent state was a solemn mockery. It was a grant of the sovereignty, without a capacity to exercise it; and a transfer of the sovereign power of Virginia to the new state, with a prohibition to the exercise of any sovereign power. If the compact restrains her from legislating on the subject to this extent, it goes a great deal further, and exempts the subject entirely from her legislative jurisdiction. She could not tax the lands of non-residents; nor subject the land to the payment of debts in any novel manner; nor make a new law of descents; nor establish a ferry; nor lay out a road; nor build a town. In short, she can exert no sovereign power *whatever over the subject. [*53 For if those considerations of public policy, which led her to adopt the system of compensation to the *bonâ fide* occupant, cannot prevail, neither could similar considerations, in any other case, prevail to authorize her legis-

lative interference. The Virginia code of 1789, must immutably govern the territory.

But it may be said, that the words of the third article must mean something more than a mere security of the title, according to the laws under which it is derived; otherwise, the insertion of the article was utterly useless, since it would create no obligation other than that what would exist without it. The answer to this is, that the necessity of such a stipulation grew out of the very extraordinary state of land titles in Kentucky. Even, however, if this reason had not existed, instances might be cited, without number, of similar precautions in international pacts and treaties. Such are, among others, the cession by Virginia of her western territory to congress, which contains a confirmation to the settlers of Kaskaskias, Vincennes, &c., of their possessions and titles; the Louisiana treaty; and the Florida treaty; all of which contain similar confirmations.

It may, however, be urged, that the rights and interests in land, as derived from the laws of Virginia, cannot be valid and secure, if these acts have their effect: that there would be a nominal compliance with the compact, but a real violation of it. If the laws operated on the title; if they obstructed or defeated it, the argument would indeed *have weight.
*54] It would, however, at the same time, be equally applicable to a case of forfeiture for non-settlement or non-cultivation; for in that case, too, it might be said, that you admit the title, but forfeit the land. So, in all other cases where the state exercises its right of eminent domain, it might be said, that the title was acknowledged, but the land taken away. The ground on which the laws repose, is not that of any inherent taint or defect in the title. It is one of policy, founded on the peculiar condition of the country; the multitude of dormant claims to the same land; the non-assertion of their titles by adverse claimants; and the necessity of encouraging improvement. The decisions of this court conform to these principles of interpretation. In *Wilson* v. *Mason*, 1 Cranch 45, 91, the court says, "it must be considered as providing for the preservation of titles, not for the tribunals which should decide on those titles." The laws are of universal and impartial application. They apply as well between citizens of the state, as between them and non-residents. Such an application of them was considered by the court, in *Taylor* v. *Bodley*, 5 Cranch 223, as a conclusive test of their validity.

5. If the compact limited the action of the new sovereignty to the situation of the Virginia laws respecting real property, in all cases whatever, at the period of the separation; still, it is insisted, that the principle on which the occupying-claimant laws are founded, had been recognised by that *state, and was then in force, and that Kentucky had a right to con-
*55] stitute the tribunals which should execute it, and to direct its application. That the whole subject of remedy devolved on the new state, is too clear a proposition to be contested. It might refuse to establish courts of justice at all; it might adopt the civil law, or the Napoleon code; it might abolish the court of chancery. In *Wilson* v. *Mason*, 1 Cranch 45, 91, this doctrine was substantially held. The principle of the acts in question, was first adopted, by a law of the colony of Virginia, enacted in 1643. 1 Hen. Dig. Laws of Virg. Preface 15. It seems, that this law never was repealed; and by it, even the occupant, without color of title, was exempted from the payment of rents, on eviction. But on general principles of law and equity,

such as they have been recognised in every system of jurisprudence which has prevailed among civilized nations, the meliorations by a *bonâ fide* possessor are to be paid for, on eviction by the true owner; and such possessor is also exempt from responsibility for rents and profits. Kames' Prin. Eq. 26–8, 189. The whole law of prescription proceeds by the same analogy. *Southall* v. *McKean*, 1 Wash. 336, is an adjudication on that principle, posterior to the separation, in a case occuring prior to it. *Lowther* v. *Commonwealth*, 1 Hen. & Munf. 201, proceeded on the same ground; and the case of a party claiming under the state, is much stronger than if he claimed under a private individual. The principle, then, being *in existence in the parent state, it was competent to the new state to modify it, and direct its application. The cases are numerous, where a principle originally applied by courts of equity, is adopted by the legislature, and being incorporated into a statute, is enforced by the courts of law as a legal rule. Such are the cases of set-off, of penal bonds, and the remedy of creditors against devisees. [*56

6. At all events, the laws are not wholly repugnant to the compact, in their application to every species of action or suit; and the court will discriminate between the void and the valid provisions. The two laws provide, in substance, 1. That there shall be no allowance of rents and profits, prior to notice. 2. A definition of what shall be considered as notice. By the act of 1797, it is the commencement of a suit, or the delivery of a certified copy of the record on which the party claims, and the bringing a suit within a year. By the act of 1812, it is the rendering a judgment or decree. 3. That the occupant shall be paid for all valuable and lasting improvements, subject, by the act of 1797, to the restriction, that the value of such improvements, after notice, shall not exceed the amount of the rents and profits, after notice. 4. That the occupant shall be chargeable with all waste or damage committed on the land. 5. That he shall hold possession until the balance due to him is secured or paid. 6. That a sworn board of commissioners shall liquidate the account between the parties. 7. The right of election given by the act of 1812.

*Are all, and if not all, which of these principles contrary to the compact? Is the repugnancy in the principles adopted, or the mode of executing them? As to what is that notice which shall convert a *bonâ fide* into a *malâ fide* possession, it is so uncertain in itself, that it cannot be denied, that the legislature has a right to establish a rule of positive institution on that subject. As to the remedy, it may certainly change the form of action, and the proceedings in any action; or convert an equitable into a legal right, with its appropriate legal remedy. Or it may forfeit the whole property, for non-cultivation or non-improvement. [*57

This court is not a mere court of justice, applying ordinary laws. It is a political tribunal, and may look to political considerations and consequences. If there be doubt, ought the settled policy of a state, and its rules of property, to be disturbed? The protection of property should extend as well to one subject as to another: to that which results from improvements, made under the faith of titles emanating from the government, as to a proprietary interest in the soil, derived from the same source. It extends to literary property, the fruit of mental labor. Here is a confusion of the proprietary interest in the land, with the accession to its value, from the industry of man

fairly bestowed upon it. The wisdom of the legislature is tasked to separate the two, and do exact justice to the claimants of each. The laws now in question are founded upon that great law of nature, which secures the right
*58] resulting from occupation and bodily labor. The laws *of society are but modifications of that superior law. If there be doubt respecting their validity, considerations of convenience and utility ought to prevail, in a case where the settled order of a great people would be disturbed. Conquerors themselves respect the religion, the laws, the property of the vanquished: and surely, this court will respect those rules of property which had their origin in early colonial times, which were adopted by the parent state, and have been so long acquiesced in and confirmed by inveterate habit and usage among the people where they prevail.

*B. Hardin*, for the demandant, in reply, stated, that the cause divided itself into the following questions: 1. What are the laws of Virginia respecting a compensation for ameliorations by a *bonâ fide* possessor (for no other could be entitled), and his accountability for rents and profits, at the time the compact was made? 2. Whether the consent of congress was given to the compact, in the manner required by the constitution of the United States? 3. What is the true exposition of the compact? 4. The exposition of the legislative acts of Kentucky, of 1797 and 1812, and an examination of the question, how far they depart from the laws of Virginia on the same subject-matter, existing in 1789? 5. Whether this court has jurisdiction over the cause, and power to declare the acts of Kentucky null
*59] and void, as being repugnant to the compact, *and the constitution of the United States; and whether it will exercise that jurisdiction and power in the present case?

1. The laws of Virginia, respecting this matter, in force at the time of the compact, could only consist of such parts of the common law of England as had been adopted in that state; of the system of equity, and the principles of the civil law, applicable to the question; or, of the then existing local statutes respecting it. The rule of the common law, as to the action for mesne profits, is well ascertained to be, that the plaintiff is entitled to the mesne profits from the time of the demise laid in the declaration in ejectment, and that the tenant cannot set off his improvements made upon the land. Runn. Eject. 437–8. At law, then, the occupant was not entitled to compensation for his meliorations: and in equity, the universal rule is, that the rents and profits are to be accounted for; though, under some circumstances, the *bonâ fide* occupant will be allowed to deduct the value of his improvements, *i. e.*, of the increased value of the land. 1 Madd. Ch. 73–4. But, both by the chaucery rule, and that of the civil law, the *bona fides* of his possession ceases the moment he has notice of the adverse better title. In the case cited on the other side, of *Southall* v. *McKean*, 1 Wash. 336, the court of appeals of Virginia did not mean to impugn the rule uniformly
*60] applied by the English court of chancery. It went on the *ordinary ground, that he who will have equity must do equity: and that if a party purchases land, with notice of another's equitable title, but that other lies by, and neglects to assert his right for a long time, during which, valuable improvements are made, the purchaser ought not, in equity, to lose these improvements. Still less does the case of *Lowther* v. *Commonwealth*, 1 Hen.

& Munf. 201, impugn the rule. It decides nothing more than that where land is sold with warranty, and the vendee is evicted, he shall recover of the vendor, not the value of the land at the time of eviction, but the purchase-moneys, with interest.

2. The consent of congress was given to the compact between Virginia and Kentucky, in the manner required by the constitution of the United States. No particular form of words is necessary to signify this assent. Congress had the compact before them, and have agreed to the agreement for the formation of the new state, and its admission into the Union. The state courts have repeatedly and constantly recognised the validity of the compact (1 Marsh. Ky. 199; *Brown* v. *McMurray*, MS. decision of the court of appeals of Kentucky); and if this court were now to determine it to be void, Kentucky would be compelled to recede the whole country south of Green river, which was one of the equivalents she received for the stipulations on her part. The compact is also recognised as valid and binding by the sovereign authority of the people of Kentucky, *being incorporated into the state constitution, and thus made a part of their fundamental law. [*61

3. As to the interpretation of the compact (supposing it valid), if that on the other side be correct, the compact is merely declaratory of the public law, as applicable to the case. It is a well-established principle, that changes of sovereignty work no change in the rights of property in the soil; and this applies even to such rights acquired by governments *de facto*, established by violence, against legal right. The stipulations inserted in the treaties, and other public pacts, referred to on the other side, are merely in affirmation of this principle of universal law. Such is the stipulation in the third article of the Louisiana treaty, that "the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, property and the religion they profess." Such a general provision must be considered as merely declaratory of what the high contracting parties understood and admitted to be the law of nations, as to the effect of a change of sovereignty on proprietary interests of private individuals. But how much broader and stronger is the provision in the compact, that "all rights and interests of land, derived from the laws of this state (*i. e.*, Virginia) shall remain valid and secure, and shall be determined by the laws now existing in this state." It must surely have been meant to protect, not merely the naked title, but the beneficial enjoyment of the interest in the land. The public law of the world, and the constitution of the United States, would have been *sufficient to protect the mere naked title. *Fletcher* v. *Peck*, 6 Cranch 143, *per* JOHNSON, J. "*All* private rights and interests," legal and equitable, were to "remain valid and secure." The term valid is applicable to rights, and the term secure, to interests, and both to each. But the provision does not stop here. These "rights and interests" are to be determined by the laws now existing in this state." Most certainly, this was not intended to prevent Kentucky from making general regulations on the subject of real property, and the remedies applicable to it, so far as they make a part of the *lex fori*. But she stipulates, that she will not affect injuriously "private rights and interests," of land derived under the laws of Virginia, *i. e.*, the beneficial proprietary interest in land. The MS. case of *Brown* v. *McMurray*, shows that this exposition [*62

has been given to the compact by the court of appeals of Kentucky. So also, the circuit court in that district has determined that the act of assembly of Kentucky, of 1814 (5 Litt. Laws of Ky. 9), which alters the statute of limitations of 1808, as to real actions (4 Ibid. 56), by taking away the proviso in favor of non-residents, is void, as being repugnant to the compact, not merely as an alteration of the remedy, but as rendering invalid and insecure the rights and interests of land derived under the laws of Virginia.

As to the objections made on the other side to our interpretation of the compact, that it impugns *the right to the pursuit of happiness, which is inherent in every society of men, and is incompatible with *63] these inalienable rights of sovereignty and of self-government, which every independent state must possess, the answer is obvious: that no people has a right to pursue its own happiness to the injury of others, for whose protection, solemn compacts, like the present, have been made. It is a trite maxim, that man gives up a part of his natural liberty, when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, this liberty is well exchanged for the advantages which flow from law and justice. The sovereignty of Kentucky will not be impaired by a faithful observance of this compact in its true spirit. It does not prevent her from making any general regulations of police and revenue, which any other state may make; but it does prevent her from confiscating the property of individuals, under the pretext of a mere modification of the law, as to improvements made by occupying claimants. There can be no doubt, that sovereign states may make pacts with each other, limiting and restraining their rights of sovereignty as to proprietary interests in the soil. Such conventions are not inconsistent with the eminent domain which the law of nations attributes to them. Here, the sole object of the compact is perpetually to secure the vested rights of private individuals from violation by legislative acts. It is in furtherance of the most sacred duty which society owes to its members. And even if it stipulated a special restraint upon the legislative *power, in respect to the public *64] revenue, it would not be the less obligatory. All the new states, on their admission into the Union, uniformly bind themselves not to tax the lands of the United States. Various other restraints upon their sovereign powers have been voluntarily consented to by the states: such, for example, as that contained in the act for the admission of Louisiana into the Union, which provides that all the legislative proceedings shall be conducted in the English language.

But this compact, so far from interfering with the revenue of Kentucky, plainly recognises her right to tax the lands: and if it did not, it is clear, that she might exercise the right, since she could not exist or support her civil government without a revenue. The means involve the end; and therefore, she may not only tax, but sell the lands to enforce payment. Nor is there anything in the compact, interfering with the legislative authority of the state, to regulate the course of descents, or the liability of real estates for the payment of debts. An alteration of the law of descents does not affect the right, title or interest in land, as derived from the laws in force at the epoch of the compact: unless, indeed, the new law of descents be retrospective in its operation. Nor is it denied, that the remedies in the courts of law and equity, the *lex fori*, may be modified, as the wisdom of the legisla-

ture shall deem expedient. The forms of action, real and possessory, may be changed; the remedy, whether legal or equitable, may be adapted to the purposes of justices; *the period of limitations, and the mode of execution; all these may be modified and altered, according to the fluctu- [*65
ating wants of society, provided they do not have an unjust retrospective operation upon vested rights. All these changes in the civil legislation of the state may be made, and the titles to land, as acquired under the laws of Virginia, will still remained unimpaired.

4. A fair exposition of the legislative acts of 1797 and 1812, will show that they operate to invalidate the rights and interests of land, derived under the laws of Virginia. And first, as to the law of 1812. It was intended for the protection of any person "peaceably seating or improving any vacant land, supposing it to be his own in law or equity." The land not being occupied by the true owner, it is not necessary (under this law) that the party occupying it should *bonâ fide* and honestly believe it to be his own property: but only that he should believe it to be so, from the circumstance of "having a connected title." The law supplies him with his ground of belief, or rather it substitutes a fact in the place of his belief. The state courts, whose peculiar province it is to interpret the local law, have expressly determined, that the words "supposing them to be his own," &c., are satisfied, if the party had that foundation for his supposition. No matter how much *mala fides* there may be, if the possession was vacant, and he can deduce a connected paper title. This interpretation goes far beyond the ancient chancery rule, and therefore, the statute goes beyond the *principle of that rule. Besides, the rule of [*66
equity only pays the occupant for the increased value of the land: not for "improvements" (in the sense which local usage has given to that word, as indicating any fixtures annexed to the freehold), but only for actual ameliorations in the value of the land. The statute, on the contrary, compensates him for accessions to the property, which are really deteriorations, instead of ameliorations, of its value to the real owner. The terms used by the legislature—"the charge and value of seating and improving," shows evidently that it meant to transcend the rule of equity, which according to Lord Kames, goes to make compensation for ameliorations only. The whole discussion in the legislature turned on these emphatic words "charge and value;" and various amendments were proposed to strike them out of the bill, and to proceed on the true chancery principle of taking a fair account between the parties, of rents and profits on the one side, and the actual amelioration of the property on the other.

5. The law in question is both a violation of the compact and the national and state constitutions; and the court will declare it void. It is void by its retrospective operation, in giving compensation for work and labor antecedent to the epoch of the compact of 1789, and even back to the first settlement of the country; and that, too, whether this work and labor bestowed upon the land, actually deteriorated or ameliorated its value. It may be admitted, that it is not an *ex post facto* law in the sense of the constitutional prohibition, *as that is only applied to penal matters. But upon general [*67
principles, all retrospective laws, whether civil or criminal, are unjust, and contrary to the fundamental maxims of universal jurisprudence. The nature of the social state, and of civil government itself, prescribes some

limits to the legislative power, independent of the express provisions of a written constitution. *Fletcher* v. *Peck*, 6 Cranch 135. What is a retrospective law, has been well defined by one of the learned judges of this court, and it is a definition which admits of an accurate and practical application: "Upon principle, every statute, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disablity, in respect to transactions already past, must be deemed retrospective;" STORY, Justice, in *Society, &c.* v. *Wheeler*, 2 Gallis. 139. There is something in the very nature of all just legislation, which prevents its being retrospective. It necessarily deals with future, and not with past transactions. 4 Wheat. 578 n.

The statute now in question is retrospective, in releasing rights of action already vested. By the pre-existing local law, the successful claimant was entitled to recover the mesne profits, even in a real action. But this act deprives him of this right, as to rents and profits previously acquired, and even antecedent to the compact itself; and repeals the saving clause in the former act, as to infants, &c. It is, in effect, a law releasing A. from the right of action which B. has against him.

*68] *But even considered as a prospective enactment, the law operates unjustly and oppressively, because the lawful owner is compelled to pay, not merely for the actual ameliorations in the land, not its increased value only—but the expense incurred by the occupant in making pretended improvements, whether they are merely useful or fanciful, and matter of taste and ornament only, dictated by his whim and caprice. He is not even liable for waste, unless committed after suit brought; and may destroy the timber, constituting, perhaps, the sole value of the land, without being called to any account.

If the law be partly constitutional, and partly not, the whole must fall; and there can be no doubt, that the character of the parties, as being citizens of different states, gives the court cognisance of the cause, and jurisdiction to pronounce the law a nullity. If you have jurisdiction, you must decide according to law. But you cannot so decide, without looking to see whether the acts of the state legislature are repugnant to the state constitution. This repugnancy has been frequently made the ground of decision in the federal courts, where the character of the parties gave them jurisdiction of the cause. *Society, &c.* v. *Wheeler*, 2 Gallis. 105.

But the acts are clearly void, as being repugnant to the constitution of the United States. They are laws impairing the obligation of contracts, within the spirit of all the decisions of this court, according to which, it is

*69] immaterial, whether the *sovereign states of the Union are parties to the contract, or whether it is made between private individuals. *Fletcher* v. *Peck*, 6 Cranch 87; *New Jersey* v. *Wilson*, 7 Ibid. 164; *Terrett* v. *Taylor*, 9 Ibid. 43; *Dartmouth College* v. *Woodward*, 4 Wheat. 518. The special tribunal provided by the compact, cannot oust the transcendent jurisdiction of this court. Even according so the maxims of private jurisprudence, an agreement to submit to arbitration cannot be pleaded in bar, without an award actually made; and this must apply in a case where the agreement, though made by the high contracting parties, was intended exclusively for the benefit of private individuals, and for the protection of private rights.

February 27th, 1823. WASHINGTON, Justice, delivered the opinion of the court.—In the examination of the first question stated by the court below, we are naturally led to the following inquiries: 1. Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia, prior to the separation of Kentucky from that state, as valid and secure under the above acts, as they were under the laws of Virginia, on the 18th of December 1789? If they were not, then, 2d. Is the circuit court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia, existing at the above period, unconstitutional?

The material provisions of the act of 1797, are as follows: *1st. That the occupant of land, from which he is evicted by better title, [*70 is, in all cases, excused from the payment of rents and profits, accrued prior to actual notice of the adverse title, provided his possession, in its inception, was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record. 2d. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land, prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation. 3d. As to improvements made, and rents and profits accrued, after notice of the adverse title, the amount of the one was to be deducted from that of the other, and the balance was to be added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case should require. But it was provided by a subsequent clause, that in no case should the successful claimant be obliged to pay for improvements made after notice, more than what should be equal to the rents and profits. 4th. If the improvements exceed the value of the land, in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it, without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he should decline doing this, he might recover possession of *his land, but then he must [*71 pay the estimated value of the improvements, and lose also the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions: 1. That the peaceable occupant of land, who supposes it to belong to him, in virtue of some legal or equitable title, founded on a record, is to be paid by the successful claimant for his improvements: 2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated value in its unimproved state; thus, if he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different instalments. If he fail to do this, or if the value of the improvements exceed three-fourths the value of the unimproved land, an election is given to the occupant, to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to pay the assessed value of the land, if unimproved, with interest, and by instalments. But if the claimant is not willing to pay for the improve-

ments, and they should exceed three-fourths the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment is to be entered
*72] against *him for such value; the claimant releasing his right to the land, and giving bond and security to warrant the title. If the value of the improvements does not exceed three-fourths that of the land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements, or take the land; giving bond and security, as before mentioned, to pay the estimated value of the land. The exemption of the occupant from the payments of the rents and profits, extends to all such as accrued during his occupancy, before judgment rendered against him, in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant, after suit brought, are to be deducted from the value of the improvements; or the court may render judgment for them against the occupant. The amount of such rents and profits, damages and waste; also the value of the improvements, and of the land, clear of the improvements, are to be ascertained by commissioners, to be appointed by the court, and who act on oath.

These laws differ from each other only in degree; in principle, they are the same. They agree in depriving the rightful owner of the land, of the rents and profits received by the occupant, up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter
*73] *act to the time of the judgment rendered against the occupant They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

They differ in the following particulars: 1. By the former act, the improvements to be paid for must be valuable and lasting; by the latter, they need not be either. 2. By the former, the successful claimant was entitled to a deduction from the value of the improvements, for all damages sustained by the land, by waste or deterioration of the soil by cultivation, during the occupancy of the defendant; by the latter, he is entitled to such a deduction, only for the damages and waste committed after suit brought. 3. By the former, the claimant was bound to pay for such improvements only as were made before notice of the adverse title; if those made afterwards should exceed the rents and profits which afterwards accrued, then he was not liable, beyond the rents and profits, for the value of such improvements; by the latter, he is liable for the value of all improvements made up to the time of the judgment, deducting only the rents and profits accrued, and the damage and waste committed after suit brought. 4. By the former, the claimant might, if he pleased, protect himself against a judgment for the value of the improvements, by surrendering the land to his adversary, and
*74] giving bond and security to warrant the title; but he was not *bound to do so, nor was his giving bond and security to pay the value of the improvements, a pre-requisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land. By the latter act, the claimant is bound to give such bond, at the peril of losing his land; for if he fail to give it, the occupant is at liberty to keep the land, upon giving bond and security to pay the estimated value of it, unimproved; and even

this he may avoid, where the value of the improvements exceeds three-fourths that of the land, unless the claimant will convey to the occupant his right to the land; for upon this condition alone, is judgment to be rendered against the occupant, for the assessed value of the land.

The only remaining provision of these acts, which is at all important, and is not comprised in the above view of them, is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements, and of the rents and profits; and this is the same, or nearly so, in both: so that it may be safely affirmed, that every part of the act of 1797 is within the purview of the act of 1812; and, consequently, the former act was repealed, by the repealing clause contained in the latter. In pursuing the first head of inquiry, therefore, to which this case gives rise, the court will confine its observations to the act of 1812, and compare its provisions with the law of Virginia, as it existed on the 18th of December 1789.

The common law of England was, at that period,* as it still is, the law of that state; and we are informed by the highest authority, that a right to land, by that law, includes the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it. (*Altham's Case*, 8 Co. 299.) In *Liford's Case* (11 Ibid. 46), it is laid down, that the regress of the disseisee revests the property in him, in the fruits or profits of the land, as well those that were produced by the industry of the occupant, as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee or disseisee; "for," says the book, "the act of my disseisor may alter my action, but cannot take away my action, property or right; so that, after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor, in such case, is to recoup their value against the claim of damages." The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb* v. *Rawlyns*, Cro. Eliz. 540. (See also Bull. N. P. 87.) *[75

Nothing, in short, can be more clear, upon the principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession *and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may, indeed, subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions. A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch. 93; Co. Litt. 4 *b*. "For what," says Lord COKE, in this page, "is the land, but the profits thereof." *[76

Thus stood the common law in Virginia, at the period before mentioned;

and it is not pretended, that there was any statute of that state less favorable to the rights of those who derived title under her, than the common law. On the contrary, the act respecting writs of right declares, in express terms, that "if the demandant recover his seisin, he may recover damages, to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded;" which damages could be nothing else but the rents and profits of the land. (2 vol., last Revisal, p. 463.) This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the common
*77] *law, in all real actions, except in assize, which was considered as a mixed action. (Co. Litt. 257.) But in trespass *quare clausum fregit*, damages were always given at common law. (10 Co. 116.) And that the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits, in an action of trespass, was not, and could not, be questioned by the counsel for the tenant in this case.

If, then, such was the common and statute law of Virginia, in 1789, it only remains to inquire, whether any principle of equity was recognised by the courts of that state, which exempted the occupant of land from the payment of rents and profits to the real owner, who has successfully established his right to the land, either in a court of law or of equity? No decision of the courts of that state was cited, or is recollected, which in the remotest degree sanctions such a principle. The case of *Southall* v. *McKean*, which was much relied upon by the counsel for the tenant, relates altogether to the subject of improvements, and decides no more than this: that if the equitable owner of land, who is conusant of his right to it, will stand by, and see another occupy and improve the property, without asserting his right to it, he shall not, in equity, enrich himself by the loss of another, which it was in his power to have prevented, but must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner, in the adverse possession of a person who he found engaged in making
*78] valuable improvements on the *property, was little short of a fraud, and justified the occupant in the conclusion, that the equitable claim which the owner asserted, had been abandoned. How different is the principle of this case from that which governs the same subject, by the act under consideration. By this, the principle is applicable to all cases, whether at law or in equity—whether the claimant knew or did not know of his rights, and of the improvements which were making on the land, and even after he had asserted his right by suit.

The rule of the English court of chancery, as laid down in 1 Madd. Ch. 72, is fully supported by the authorities to which he refers. It is, that equity allows an account of rents and profits, in all cases, from the time of the title accrued, provided that do not exceed six years, unless under special circumstances; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where there has been *laches* in the plaintiff in not asserting his title; or where the plaintiff's title appeared by deeds in a stranger's custody; in all which cases, and others similar to them in principle, the account is confined to the time of filing the bill. The language of Lord HARDWICKE, in *Dormer* v. *Fortescue* (3 Atk. 128), which was the case of an infant plaintiff, is remarkably strong: "Nothing," he observes, "can be

clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits, from the time when his title accrued." His Lordship afterwards adds, that *"where the title of the plaintiff is purely equitable, that court allows the account of rents and profits, from the time the title accrued, unless under special circumstances, such as have been referred to." [*79

Nor is it understood by the court, that the principles of the act under consideration can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognised by the laws of Virginia, or by the decisions of her courts. The exemption of the occupant, by that law, from an account for profits, is strictly confined to the case of a *bonâ fide* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially, if that be followed up by a suit to recover the possession. After this, he becomes a *malâ fide* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land. (Just. lib. 2, tit. 1, § 35.) There is another material difference between the civil law and the provisions of this act, altogether favorable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits or profits of the land which were produced by his own industry, and not even to those, unless they were consumed; if they were realized, and contributed to enrich the occupant, *he is accountable for them to the real owner, as he is for all the natural fruits of the land. (See Just., the section above quoted; Lord Kames, b. 2, c. 1, p. 411, *et seq.*) Puffendorf, indeed (lib. 4, c. 7, § 3), lays it down in broad and general terms, that fruits of industry, as well as those of nature, belong to him who is master of the thing from which they flow. By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn, or however they may have been employed, which were received by him prior to the judgment of eviction. [*80

But even these doctrines of the civil law, so much more favorable to the rights of the true owner of the land than the act under consideration, are not recognised by the common law of England. Whoever takes and holds the possession of land to which another has a better title, whether by disseisin, or under a grant from the disseisor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not; and the owner may even seize them, although removed from the land, as has already been shown by *Liford's Case*. We are not aware of any common-law case, which recognises the distinction between a *bonâ fide* possessor, and one who holds *malâ fide*, in relation to the subject of rents and profits; and we understand *Liford's Case* as fully proving, that the right of the true owner to the mesne profits, is equally valid against both. How far this distinction *is noticed in a court of equity has already been shown. [*81

Upon the whole, then, we take it to be perfectly clear, that, according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant, from some period

prior to the judgment of eviction or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands, under Virginia, less valid and secure than they were under the laws of Virginia, by depriving them of the fruits of their land, during its occupation by another, its provisions, in regard to the value of the improvements put upon the land by the occupant, can, with still less reason, be vindicated. It is not alleged by any person, that such a claim was ever sanctioned by any law of Virginia, or by her courts of justice. The case of *Southall* v. *McKean* has already been noticed and commented upon. It is laid down, we admit, in *Coulter's Case* (5 Co. 30), that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. (See also, Bro. tit. Damages, pl. 82, who cites 24 Edw. III. 50.) If any common-law decision has ever gone beyond the principle here laid down, we *have not been fortunate enough to meet with it. The *82] doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord Kames considers to be the law of nature. His words are, "it is a maxim suggested by nature, that reparations and meliorations bestowed upon a house, or on land, ought to defrayed out of the rents. By this maxim, we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents levied by the *bonâ fide* possessor." He cites Papinian, l. 48, *de rei vindicatione.*

Taking it for granted, that the rule, as laid down in *Coulter's Case*, would be recognised as good law by the courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property (which, necessarily, mean valuable and lasting improvements), made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor, for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements, to whatever extent they may exceed that of the profits; not on the ground of set-off against the profits, but as a substantive demand. For the account for improvements is carried down to the day of the judgment, although the occupant was for a great part of the time a *malâ fide* possessor, against whom no more can be off set, but the rents and profits accrued after suit brought. Thus, it may happen, that the occupant, who may have enriched himself to any amount, by the natural, as well as the industrial, *products of land, to which he had no legal title *83] (as by the sale of timber, coal, ore or the like), is accountable for no part of those profits but such as accrued after suit brought; and on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura.* If the principle which this law asserts, has a precedent to warrant it, we can truly say, that we have not met it. But we feel the fullest confidence in saying, that it is not to be found in the laws of Virginia, or in the decisions of her courts.

But the act goes further than merely giving to the occupant a substantive claim against the owner of the land, for the value of the improvements,

beyond that of the profits received since the suit brought. It creates a binding lien on the land, for the value of the improvements, and transfers the right of the successful claimant in the land, to the occupant, who appears, judicially, to have no title to it, unless the former will give security to pay such value, within a stipulated period. In other words, the claimant is permitted to purchase his own land, by paying to the occupant whatever sum the commissioners may estimate the improvements at, whether valuable and lasting, or worthless and unserviceable, to the owner, although they were made with the money justly and legally belonging to the owner; and upon these terms only, can he recover possession of his land. If the law of Virginia has been correctly stated, *need it be asked, whether the right and interest of such a claimant is as valid and secure under this act, [*84 as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think, this can hardly be asserted. If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court, as he might have done in a Virginia court, if the separation had not taken place, and to demand a trial of his right, by the same principles of law which would have governed his case in the latter state. What those principles are, has already been shown.

If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then, an act, declaring, that no occupant should be evicted but upon the terms of his being paid the value, or double the value of the land, by the successful claimant, would not be chargeable with that consequence, since it cannot be denied, but that the principle of both laws would be the same. The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation. *Upon this principle it is, that if a creditor [*85 agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.

2. The only remaining question is, whether this act of 1812 is repugnant to the constitution of the United States, and can be declared void by this court, or by the circuit court from which this case comes by adjournment? But, previous to the investigation of this question, it will be proper to relieve the case from some preliminary objections to the validity and construction of the compact itself. 1st. It was contended by the counsel for the tenant, that the compact was invalid *in toto*, because it was not made in conformity with the provisions of the constitution of the United States: and if not invalid to that extent, still, 2d. The clause of it applicable to the point in controversy, was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are inalienable.

1st. The first objection is founded upon the allegation, that the compact was made without the consent of congress, contrary to the tenth section of

the first article, which declares, that "no state shall, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power." Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent
*86] *of congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is, has congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition, that the general government should, prior to a certain day, assent to the erection of the district of Kentucky into an independent state, and agree, that the proposed state should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July 1790, the convention of that district assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said district should become a separate state on the 1st of June 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the president of the United States to congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a state, upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February 1791, congress passed an act, which, after referring to
*87] *the compact, and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said district into a separate and independent state, upon a certain day, and receiving her into the Union. Now, it is perfectly clear, that, although congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent state, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But congress, after recognising the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of congress, without which, Kentucky could not have become an independent state; and then it would follow, that she is, at this moment, a part of the state of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument, would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true.

2d. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the cor-
*88] rectness *of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the

government of the United States, as well as to the several state governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, amongst many others, of the restrictions alluded to. If it be answered, that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact, the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was that if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow, that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive, why the admission of the conclusion *involved in the argument should invalidate an express article of the compact, in relation to a quite different subject. The [*89 agreement, that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state, contains a plain, intelligible proposition, about the meaning of which, it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the state, in some other respect? The court cannot perceive how this proposition could be maintained.

But the fact is, that the consequence drawn by counsel from a literal construction of this article of the compact, cannot be fairly deduced from the premises, because, by the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation. The admission of this principle never has been imagined by any person, as rendering his right to property less valid and secure than it would be, were it excluded; and, consequently, it would be an unnatural and forced construction of this article of the compact, to say, that it included such a case.

We pass over the other observations of counsel upon the construction of this article, with the following remark: that where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, *is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no [*90 man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest on his own understanding of a law, until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question, whether this court has authority to declare the act in question unconstitutional and void, upon the ground, that it impairs the obligation of the compact? This is denied for the following reasons · It is insisted, in the first place, that this court has

no such authority, where the objection to the validity of the law is founded upon its opposition to the constitution of Kentucky, as it was, in part, in this case. It will be a sufficient answer to this observation, that our opinion is founded exclusively upon the constitution of the United States. 2d. It was objected, that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this court is excluded. If this be so, it must be admitted, that all controversies which involve a construction of the compact, are equally excluded from the jurisdiction of the state courts of Virginia and Kentucky. How, then, are those controversies, which, we were informed by the counsel on both sides, crowded the federal and state courts of Kentucky, to be settled? The answer, we presume would be, by commissioners, to be appointed by those states. But none such
*91] have *been appointed; what then? Suppose, either of those states, Virginia, for example, should refuse to appoint commissioners? Are the occupants of lands, to which they have no title, to retain their possessions, until this tribunal is appointed, and to enrich themselves in the meantime, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it. But how happens it, that the questions submitted to this court have been entertained, and decided, by the courts of Kentucky, for twenty-five years, as we were informed by the counsel? Have these courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion. The answer, in a few words, to the whole of the argument, is to be found in the explicit language of that provision of the compact, which respects the tribunal of the commissioners. It is to be appointed in no case but where a complaint or dispute shall arise, not between individuals, but between the commonwealth of Virginia and the state of Kentucky, in their high sovereign characters.

Having thus endeavored to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not
*92] less *than the power of this court, as well as of every other court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoyed by the constitution itself, and too firmly established by the decisions of this and other courts, to be now shaken; and that those decisions entirely cover the present case. A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous: and in *Fletcher* v. *Peck*, the chief justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; and that a state has no more

power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guarantied to claimants of land lying in that state, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by passing *any law which rendered those rights less valid and secure. [*93

It was said by the counsel for the tenant, that the validity of the above laws of Kentucky, have been maintained by an unvarying series of decisions of the courts of that state, and by the opinions and declarations of the other branches of her government. Not having had an opportunity of examining the reported cases of the Kentucky courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe, that the principles decided by the court of appeals of that state, in the case of *Brown* v. *McMurray*, a manuscript report of which was handed to the court, when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that state, we need only observe, that whilst the legislature has maintained the opinion, most honestly, we believe, that the acts of 1797 and 1812 were consistent with the compact, the objections of the governor to the validity of the latter act, and the reasons assigned by him in their support, taken in connection with the above case, incline as strongly to suspect, that a great diversity of opinion prevails in that state, upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences, and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which *we have laboriously given to the case, it was, that it might be favorable to the validity of the laws; [*94 our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out.

The above is the opinion of a majority of the court. The opinion given upon the first question proposed by the circuit court, renders it unnecessary to notice the second question.

JOHNSON, Justice.—Whoever will candidly weigh the intrinsic difficulties which this case presents, must acknowledge, that the questions certified to this court, are among those on which any two minds may differ, without incurring the imputation of wilful or precipitate error. We are fortunate, in this instance, in being placed aloof from that unavoidable jealousy which awaits decisions founded on appeals from the exercise of state jurisdiction. This suit was originally instituted in the circuit court of the United States; and the duty now imposed upon us is, to decide, according to the best judgment we can form, on the law of Kentucky. We sit, and adjudicate, in the present instance, in the capacity of judges of that state. I am bound to decide according to those principles which ought to govern the courts of that state when adjudicating between its own citizens.

The first of the two questions certified to this court is, whether the laws, well-known by the *description of the occupying-claimant laws of Kentucky, are constitutional? The laws known by that denomination are the acts passed the 27th of February 1797, and the 31st of January [*95

1812. The general purport of the former is, to give to a defendant in ejectment, compensation for actual improvements, innocently made upon the land of another. The practical effect of the latter, is, to give him compensation for all the labor and expense bestowed upon it, whether productive of improvement or not.

The two acts differ as to the time from which damages and rents are to be estimated, but concur, 1st. In enjoining on the courts the substitution of commissioners, for a jury, in assessing damages. 2d. In converting the plaintiff's right to a judgment, after having established his right to land, from an absolute, into a conditional right; and, 3d. Under some circumstances, in requiring, that judgment should be given for the defendant, and that the plaintiff, in lieu of land, should recover an assessed sum of money, or, rather, bonds to pay that sum, *i. e.*, another right of action, if anything.

The second question certified is, on which of these two acts the court shall give judgment, and seems to have arisen out of an argument insisted on at the trial, that as the suit was instituted prior to the passage of the last act, it ought to be adjudicated under the first act, notwithstanding that the act of 1812 was in force when judgment was given.

*96] *As the language of the first question is insufficiently general to embrace all questions that may arise, either under the state, or United States constitution, much of the argument before this court turned upon the inquiry, whether the rights of the parties were affected by that article of the United States constitution which makes provision against the violation of contracts? The general question I shall decline passing an opinion upon. I consider such an inquiry as a work of supererogation, until the benefit of that provision in the constitution shall be claimed, in an appeal from the decision of a court of the state. There is, however, one view of this point, presented by one of the gentlemen who appeared on behalf of the state, which cannot pass unnoticed. It was contended, that the constitution of Kentucky, in recognising the compact with Virginia, recognises it only as a compact; and therefore, that it acquires no more force under that constitution, than it had before; and that but for the constitution of Kentucky, questions arising under it were of mere diplomatic cognisance; and were not, by the constitution, transmuted into subjects of judicial cognisance. I am constrained to entertain a different view of this subject; and, without passing an opinion on the legal effect of the compact, in its separate existence, upon individual rights, I must adopt the opinion, that when the people of Kentucky declared, that "the compact with the state of Virginia, subject to such alterations as may be made therein, agreeably to the mode pre-

*97] scribed by the *said compact, shall be considered as part of this constitution," they enacted it as a law for themselves, in all those parts in which it was previously obligatory on them as a contract; and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that constitution. Had it been enacted in the ordinary form of legislation, notwithstanding the absurdity insisted on of enacting laws obligatory on Virginia, it is certain, that the maxim, *utile per inutile non vitiatur*, would have been applied to it, and it would have been enforced as a law of Kentucky, in every court of justice sitting in judgment upon Kentucky rights. How much more so, when the people thought proper to give it the force and solemnity of a fundamental law.

I, therefore, consider the article of the compact which has relation to this question, as operating on the rights and interests of the parties, with the force of a fundamental law of the state; and, certainly, it can, then, need no support from viewing it as a contract, unless it be, that the constitution may be repealed by one of the parties, but the contract cannot. While the constitution continues unrepealed, it is putting a fifth wheel to the carriage, to invoke the contract into this cause. It can only eventuate in crowding our dockets with appeals from the state courts. I consider, therefore, the following extract from the compact, as an enacted law of Kentucky: "That all private rights and interests of lands within (Kentucky) derived from the laws of Virginia prior to (their) separation, shall remain valid *and secure under the laws of the proposed state, and shall be determined [*98 by the laws (existing in Virginia at the time of the separation)." The alterations here made in the phraseology, are such as necessarily result from the adaptation of it to a legislative form. The occupying-claimant laws, therefore, must conform to this constitutional provision, or be void; for a legislature, constituted under that constitution, can exercise no powers inconsistent with the instrument which created it. The will of the people has decreed otherwise, and the interests of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.

To constitute the sovereign and independent state of Kentucky was, unquestionably, the leading object to the act of Virginia of the 18th of December 1789. To exercise unlimited legislative power over the territory within her own limits, is one of the essential attributes of that sovereignty; and every restraint in the exercise of this power, I consider as a restriction on the intended grant, and subject to a rigorous construction. On general principles, private property would have remained unaffected by the transfer of sovereignty; but thenceforth would have continued subject, both as to right and remedy, to the legislative power of the state newly created. The argument for the plaintiff is, that the provision now under consideration goes beyond the recognition or enforcement of this principle, and restrains the state of Kentucky from any legislative act that can in any way impair, or incumber, or vary the beneficiary *interests which the grantees of [*99 land acquired under the laws of Virginia. Or, in other words, that it creates a peculiar tenure in the lands granted by Virginia, which exempts them from that extent of legislative action to which the residue of the state is unquestionably subjected. It must mean this, if it means anything. For, supposing all the grantees of lands, under the laws of Virginia, in actual possession of their respective premises, unless the lands thus reduced into possession be still under the supposed protection of this compact, neither could they have been at any time previous. The words of the compact, if they carry the immunity contended for beyond the period of separation, are equally operative to continue it ever after.

But where would this land us? If the state of Kentucky had, by law, enacted, that the dower of a widow should extend to a life-estate in one-half of her husband's lands, would the widow of a Virginian, whose husband died the day after, have lost the benefit of this law, because the laws of Virginia had given the wife an inchoate right in but one-third? This would be cutting deep, indeed, into the sovereign powers of Kentucky, and would

be establishing the anomaly of a territory over which no government could legislate; not Virginia, for she had parted with the sovereignty; not Kentucky, for the laws of Virginia were irrevocably fastened upon two-thirds of her territory.

But it is contended, that the clause of the compact under consideration, must have meant more *than what is implied in every cession of ter- *100] ritory, or it was nugatory to have inserted it. I confess, I cannot discover the force of this argument. In the present case, it admits of two answers; the one is to be found in the very peculiar nature of the land titles created by Virginia, and then floating over the state of Kentucky. Land they were not, and yet all the attributes of real estate were extended to them, and intended by the compact to be preserved to them, under the dominion of the new state. There was, then, something more than the ordinary rights of individuals in the ceded territory to be perpetuated, and enough to justify the insertion of such a provision as a necessary measure. But there is another answer to be found, in the ordinary practice of nations, in their treaties in which, from abundant caution, or, perhaps, diplomatic parade, many stipulations are inserted for the preservation of rights which no civilian would suppose could be affected by a change of sovereignty. Witness the frequent stipulations for the restoration of wrecked goods, or goods piratically taken; witness also, the third article of the treaty ceding Louisiana, and the sixth article of that ceding Florida, both of which are intended to secure to the inhabitants of the ceded territory, rights which, under our civil institutions, could not be withheld from them.

But let us now reverse the picture, and inquire, whether this stipulation of the compact, or of the constitution, prescribed no limits to the legislative power of Kentucky over the ceded territory. Had the state of Kentucky, immediately after it was organized,* passed a law, declaring, that *101] wherever a plaintiff in ejectment, or in a writ of right, shall have established his right in law to recover, the jury shall value the premises claimed, and instead of judgment for the land, and the writ of possession, the plaintiff shall have his judgment for the value so assessed, and the ordinary process of law to recover a sum of money on judgment; who is there who would not have felt that this was a mere mockery of the compact, a violation of the first principles of private right, and of faith in contracts? Yet such a law is, in degree, not in principle, variant from the occupying-claimant laws under consideration, and the same latitude of legislative power which will justify the one, would justify the other.

But again, on the other hand (and I acknowledge that I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me), who can doubt, that where private property had been wanted for national purposes, the legislature of Kentucky might have compelled the individual to convey it, for a value tendered, notwithstanding it was held under a grant from Virginia, and notwithstanding such a violation of private right had been even constitutionally forbidden by the state of Virginia? Or who can doubt the power of Kentucky to regulate the course of descents, the forms of conveying, the power of devising, the nature and extent of liens, within her territorial limits? For example, by the civil law, the workman who *102] erects an edifice, acquires a lien on both the building and the land it stands upon, *for payment of his bill. Why should not the

state of Kentucky have adopted this wise and just principle into her jurisprudence? Or why not have extended it to the case of the laborer who clears a field? Yet, in principle, the occupying-claimant laws, at least, that of 1797, was really intended to engraft this very provision into the Kentucky code, as to the innocent improver of another man's property. It was thought, and justly thought, that as the state of Virginia had pursued a course of legislation in settling the country, which had introduced such a state of confusion in the titles to landed property, as rendered it impossible for her to guaranty any specific tract to the individual, it was but fair and right, that some security should be held out to him for the labor and expense bestowed in improving the country; and that where the successful claimant recovered his land, enhanced in value by the labors of another, it was but right that he should make compensation for the enhanced value. To secured this benefit to the occupying claimant, to give a lien upon the land for his indemnity, and avoid the necessity of a suit in equity, were, in fact, the sole objects of the acts of 1797. The misfortune of this system appears to have been, that to curtail litigation, by providing the means of closing this account-current of rights and liabilities in a court of law, and in a single suit, so as to obviate the necessity of going into equity; or of an action for mesne profits on the one side, and an action for compensation on the other, appears to have absorbed the attention of the legislature. The consequence of *which is, that a course of proceeding, quite inconsistent with the simplicity of the common-law process and a curious *debit* and *credit* of [*103 land, damages and mesne profits, on the one hand, and of *quantum meruit*, on the other, has been adopted, exhibiting an anomaly well calculated to alarm the precise notions of the common law.

But suppose, that instead of imposing this complex mode of coming at the end proposed, the legislature of Kentucky had passed a law simply declaring, that the innocent improver of lands, without notice, should have his action to recover indemnity for his improvements, and a lien on the premises so improved, in preference to all other creditors; I can see no principle on which such a law could be declared unconstitutional; nor anything that is to prevent the party from enforcing it in any court having competent jurisdiction. But the inconsistency which strikes every one in considering the laws as they now stand is, that one party should have a verdict, and another, finally, the judgment. That, *eodem flatu*, the plaintiff should be declared entitled to recover land, and yet not entitled to recover land.

After thus mooting the difficulties of this case, I am led to the opinion, that if we depart from the restricted construction of the article under consideration, we are left to float on a sea of uncertainty, as to the extent of the legislative power of Kentucky over the territory held under Virginia grants; that if, obliged to elect between the assumed exercise, and the utter extinction of the power of Kentucky over the subject. It would *adopt the former; that every question between those extremes, is [*104 one of expediency or displomacy, rather than of judicial cognisance, and not to be decided before this tribunal. If compelled to decide on the constitutionality of these laws, strictly speaking, I would say, that they in nowise impugn the force of the laws of Virginia, under which the titles of land-holders are derived, but operate to enforce a right acquired subse-

quently, and capable of existing consistently with those acquired under the laws of Virginia. I cannot admit, that it was ever the intention of the framers of this constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be for ever chained down to a state of hopeless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, &c., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky—and yet, no power on earth existing to repeal or to alter, or to effect those accommodations to the ever-varying state of human things, which the necessities or improvements of society may require. If anything more was intended than the preservation of that very peculiar and complex system of land laws then operating over that country, under the laws of Virginia, it would not have extended beyond the maintenance of those great leading principles of the fundamental laws of that state, which, so far as they limited the legislative power of the state of Virgina over the rights of *individuals, became, also, blended with the law of the
*105] land, then about to pass under a new sovereignty. And if it be admitted, that the state of Kentucky might, in any one instance, have legislated as far as the state of Virginia might have legislated on the same subject, I acknowledge, that I cannot perceive where the line is to be drawn, so as to exclude the powers asserted under, at least, the first of the laws now under consideration. But it appears to me, that this cause ought to be decided upon another view of the subject.

The practice of the courts of the United States, that is, the remedy of parties therein, is subject to no other power than that of congress. By the act of 1789, the practice of the respective state courts was adopted into the courts of the United States, with power to the respective courts, and to the supreme court, to make all necessary alterations. Whatever changes the practice of the respective states may have undergone since that time, that of the United States courts has continued uniform; except so far as the respective courts have thought it advisable to adopt the changes introduced by the state legislatures. The district of Kentucky was established while it was yet a part of Virginia. (Judiciary Act, September 24th, 1789.) The practice of the state of Virginia, therefore, was made the practice of the United States courts in Kentucky. Now, according to the practice of Virginia, the plaintiff, here, upon making out his title, ought to have had a verdict and judgment in the usual form. Nor can I recognise the right of the state of Kentucky *to compel him, or to compel the courts of the United
*106] States, to pass through this subsequent process before a board of commissioners, and afterwards, to purchase his judgment in the mode prescribed by the state laws. I do not deny the right of the state to give the lien, and to give the action for improvements; but I do deny the right to lay the courts of the United States under an obligation to withhold from a plaintiff the judgment to which, under the established practice of that court, he had entitled himself.

It may be argued, that the courts of the United States in Kentucky, have long acquiesced in a compliance with these laws, and thereby have adopted this course of proceeding into their own practice. This, I admit, is correct reasoning; for the court possessed the power of making rules of practice;

and such rules may be adopted by habit, as well as by framing a literal rule. But the facts, with regard to the circuit court here, could only sustain the argument of to the occupying-claimant law of 1797, since that of 1812 appears to have been early resisted. Here, however, I am led to an inquiry which will equally affect the validity of both laws, viewed as rules of practice; as affecting a fundamental right, incident to remedies in our courts of law.

It is, obviously, a leading object of these laws, to substitute a trial by a board of commissioners, for the trial by jury, as to mesne profits, damages and a *quantum meruit*. Without examining how far the legislative power of Kentucky is adequate *to this change in its own courts, I am perfectly satisfied, that it cannot be introduced by state authority into [*107 the courts of the United States. And I go farther: the judges of these courts have not power to make the change; for the constitution has too sedulously guarded the trial by jury (seventh article of Amendments); and the judiciary act of the United States both recognises the separation between common law and equity proceedings, and forbids that any court should blend and confound them.

These considerations lead me to the conclusion, that the defendant is not entitled to judgment, under either of the acts under consideration, even admitting them to be constitutional; but if, under either, certainly under that alone which has been adopted into the practice of the United States courts in Kentucky.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Kentucky, on certain questions upon which the opinions of the judges of the said circuit court were opposed, and which were certified to this court for their decision by the judges of the said circuit court, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the act of the said state of Kentucky, of the 27th of February 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United *States, but that the same was repealed by the act of [*108 the 31st of January 1812, to amend the said act; and that the act last mentioned is also repugnant to the constitution of the United States.

The opinion given on the first question submitted to this court by the said circuit court, renders it unnecessary to notice the second question. All which is ordered to be certified to the said circuit court.

## La Nereyda: The Spanish Consul, Libellant.

*Title under condemnation as prize.—Further proof.*

*Quære?* Whether a regular sentence of condemnation, in a court of the captor, or his ally, the captured property having been carried *infra prædia*, will preclude the courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties and neutral obligation?

Whoever claims under a condemnation, must show, that he is a *bonâ fide* purchaser, for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors.

Whoevever sets up a title under any condemnation as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself.

Where an order for further proof is made, and the party disobeys, or neglects to comply with its injunctions, courts of prize generally consider such disobedience or neglect as fatal to his claim.

Upon such an order, it is almost the invariable practice for the claimant (besides other testimony) to make proof, by his own oath, of his proprietary interest, and to explain the other circumstances of the *transaction; and the absence of such proof and explanation always leads to considerable doubts.

*109]

*Quære?* Whether a condemnation in the court of an ally, of property carried into his ports by a co-belligerent, is valid?

Appeal from the Circuit Court of Maryland. This was an allegation filed by the Spanish consul against the brig Nereyda, a public vessel of war belonging to the king of Spain, stating, that the vessel had been captured by the privateer Irresistible, John O. Daniels, master, in violation of the laws, treaties and neutral obligations of the United States.

The claim given in by Henry Child, as agent in behalf of the claimant, Antonio Julio Francesche, set up a title in him acquired under a sale in pursuance of a sentence of condemnation, as prize to the captors, pronounced by the vice-admiralty court at Juan Griego, in the island of Margaritta, in Venezuela.

The capture was made under an alleged commission from Jose Artegas, chief of the Oriental Republic of Rio de la Plata, and the prize carried into Juan Griego, as to a port of an ally in the war, for adjudication. The capturing vessel was built, owned, armed and equipped in the port of Baltimore, and having provided herself with the commission, sailed from that port on a cruise, and captured the Nereyda at sea, in the year 1818. The sentence of condemnation was pronounced, and the alleged sale took place, in March 1819, and the name of the captured vessel having been changed to that of "El Congresso de Venezuela," and a commission obtained for her as a privateer, from the government of Venezuela, she set sail for Baltimore, *under the command of Henry Childs, who was the original prize-master, where she arrived, and was libelled as before stated. It appeared in evidence, that the vessel had continued, from the time of the capture, under the direction and control of Daniels and Childs, both of whom were citizens of the United States, and domiciled at Baltimore. No bill of sale to Francesche was produced, and no other evidence of his purchase, except a certificate from the auctioneer. A decree of restitution to the claimant was pronounced in the district court, which was affirmed, *pro formâ*, in the circuit court, and the cause was brought by appeal to this court.

*110]

La Nereyda.

March 13th, 1822. The cause was argued, at the last term, on the original evidence, by *Harper* and *D. Hoffman*, for the appellant, and by *Winder*, for the respondent.

*D. Hoffman*, for the appellant, contended: 1. That the court is competent to restore this property to the appellant, by the general principles of the *jus gentium*, without any reference to the proof that the neutrality and laws of this country have been violated by the captors, but on the sole ground, that this taking on the high seas was not *jure belli*, but wholly without commission, as Jose Artegas does not represent a state or nation, or a power at war with Spain. That the principles established by cases recently decided in this court, do not impugn the doctrine contended for, as they occurred in the case of commissions *granted by such of the South American provinces, as our government, in the opinion of the court, had recognised to be engaged in a civil war with Spain. That our government, and this court, having, in no instance whatever, recognised Artegas, as engaged in a war with Spain, he is as incompetent to grant commissions of prize, as any other individual in the Spanish provinces. That this court therefore, as an instance court, will decree restitution and damages, as in ordinary cases of maritime tort. [*111

2. That the neutrality and laws of this country having been violated by the captors, this court will decree restitution, on that ground, even if the authority under which they acted were, in other respects, fully competent.

3. If the court has the power to restore this property, either on the ground of the total inability of Artegas to issue commissions of prize, or in vindication of our violated laws and neutrality, it will look behind the condemnation of any court, for the existence of these facts, and if they be found to exist, will wholly disregard the condemnation, and consider it rather as an aggravation than an extenuation of the wrong.

4. That this court, in restoring this property, on the ground of violated neutrality and laws, will not disturb the decree of condemnation, or in any degree impugn the received doctrine of the conclusiveness of admiralty decrees, as said condemnation was made without any reference to our laws, or inquiry as to the ownership or equipment of the privateer.

*5. That there is no sufficient proof of the condemnation, which is relied on; that this court will require the exhibition at least of the libel, in order to disclose the grounds of the prize proceedings. [*112

6. That the vice-admiralty of Juan Griego must be regarded by this court as wholly incompetent to pass on this prize, first, because there is no evidence whatever of an alliance between Venezuela and the Banda Oriental; and if the alliance were proved, then, secondly, because this sentence was passed by the court of an ally, and not by a court of the belligerent captor, sitting in the country of an ally.

7. That the evidence of the claimant's purchase is not sufficient; and if it were, his title would be affected by those infirmities which attached to the right of the captors.(*a*)

(*a*) These points having been argued by Mr. Hoffman, in the preceding cases of The Gran Para (7 Wheat. 471), The Santa Maria (Id. 409), and The Arrogante Barcelones

8. That under the circumstances of this case, the new commission granted to the Nereyda, by the government of Venezuela, after its condemnation, and the alleged purchase of it by Francesche, can afford it no protection in this court; that the doctrine of the immunity of sovereign rights, when it has an extra-territorial operation, is altogether inapplicable to the present case.

9. That as the evidence in this cause connects the court of Juan Griego, its proceedings, and *the commission of the Nereyda, with the mani- *113] fest violators of our laws of neutrality, and the treaty with Spain, and evinces the whole to be a congeries of frauds practised on our laws by our own citizens, aided and sustained by foreigners, this court will maintain the integrity of those laws, and pay no more regard, and, perhaps, less, to the commission, than to the condemnation.

And first, as to the effect of the commission: most of what has already been submitted to the court as to the inefficiency even of a genuine sale of such a privateer to the government of any of the South American provinces, and the inability of a condemnation, even of a competent court, to deprive this tribunal of its restoring power, will apply with equal, and perhaps, greater force, to the immunity claimed for this prize, from the commission with which she is now clothed. If this immunity be allowed, it must be on the ground, that the sovereignty of Venezuela would be improperly subjected to judicature, and that this commission imparts to the vessel the same privilege from arrest or detention, which is due in certain cases to a sovereign or his ambassadors. This is founded wholly on an assumption, first, of the fact, that sovereignty is by this proceeding brought into judicature; and secondly, of a principle, that sovereignty cannot, in any case, be thus dealt with; both of which, it is presumed, are untenable. We contend, that the restoration of this prize, notwithstanding the commission, would, in no degree, affect the rights or dignity of the government of Venezuela; and that if our laws have *been violated, the power of restitution cannot *114] be impaired, even if the rights of sovereignty were implicated; that the government of Venezuela, even if regarded, in all respects, as that of a free and independent state, has no sovereign rights in this country, when they come in collision with our own; that all sovereignty is, in its nature, as a general rule, local, and that its extra-territorial operation is to be found only in a few cases of exception to that rule.

This commission, like the condemnation, is a sovereign act, good for some purposes, and wholly inoperative as to others. The commission would justify the capture of Spanish property; that power this court cannot call in question; but the commission is not good to disarm this court of a power which it would otherwise possess, viz., of restoring this vessel, because gained by the unlawful use of American means. The taking of this vessel, by our citizens, *per se*, rendered her justiciable in this court; she is liable to the jurisdiction of American admiralty tribunals, at any remote period, and into whatsoever hands she may have come, whether by condemnation, *bonâ fide* sale, or otherwise; and though, in the exercise of this power, such

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(Id. 496), he referred the court to his former arguments, which will be found reported in those cases.

condemnation, sale or commission, may be rendered (in a degree) inoperative, this is only an incidental or collateral effect; the court would not directly impugn either; it merely restores the possession to those from whom, *quoad* this country, it had been illegally wrested. And if, subsequently, the condemnation, sale or commission could benefit those claiming under them, *or either of them, this court would have no power to disturb such possession or title. [*115

The commission which has been given to this prize, is not sustained by any principles similar, or equivalent, to those on which the force of condemnations ordinarily rests. It can seek no aid from the doctrine of comity; it can claim no exemption from the binding operation of an actual, or supposed, notice of a proceeding, in which all the world is a party; it can demand no privilege from the doctrine of the absolute co-equality of all nations. On what principle, then, can the commission shield the vessel from the power of this court? These cruisers bear the flag, and are clothed with the commissions of the country of their adoption; and yet we know, that this court, in vindication of the laws of the land, would condemn them, on informations filed under the neutrality acts; and this, too, even were they public or national vessels of war. 1 Wheat. 253. Sovereignty, no doubt, would be as much implicated in the one case, as in the other. It may, however, be said, that the Nereyda never violated the laws of this country, but that it is the capturing vessel which is *in delicto;* true, but the very ground on which the *res subjecta* is now claimed, is, that it never vested in the captors, so far as concerns this country. The innocence of the *res capta*, and the illegal means used for its acquisition, are the very grounds of our libel, and the foundation on which the power of this court reposes. If the capturing *vessel has broken our laws, and the fruit of its illegal act be within the reach of this court, no power is competent to arrest its arm. If a [*116 commission or condemnation of the prize could effect this, legislation would be worse than vain; it would be clothing foreign powers with the right of dispensing with our most solemn, important and penal laws; and in the present case, it would be yielding to an unknown, undefined, self-created power, not only the rights of nations in their fullest extent, but the privilege of seducing our own citizens to the violation of our laws; and this, too, with perfect impunity, as the personal sanctions of the laws are not only extremely dificult to be enforced, but there is no occasion for the offenders to come within the reach of our courts.

The cases of *The Exchange*, 7 Cranch 116, and *The Cassius*, 3 Dall. 123, will probably be relied on, as establishing the doctrine, that the commission conferred on this vessel by the government of Venezuela, as the sovereign act of a state or nation, so effectually screens the vessel from judicial cognisance, that this court dare not examine into the cause, but must leave the vessel in the undisturbed possession of those holding the commission. If we analyze this celebrated case of *The Exchange*, and collate its facts and principles with that now under adjudication, we shall find them to stand on grounds essentially different: 1. The seizure of the Exchange was made by the sovereign power of France, from an American *citizen who had violated his neutrality, and had thereby become *quasi* an enemy [*117 of that country. 2. The seizure was in the exercise of what was claimed by France as a belligerent right. 3. The Exchange, when she returned into

our waters, was actually and *bonâ fide* a public vessel of war, held by the Emperor Napoleon, *jure coronæ*, and bore the flag and commission of a national ship of war. 4. The Exchange was in the possession of a sovereign who claimed a title in her, and who had done no act by which he could be subjected to judicature. 5. The case of the Exchange rested on the personal character and immunity of sovereigns, and an immunity was claimed for this vessel only as extensive as that which is allowed in the three cases, of the sovereign himself, his ambassadors, and his armies *in transitû*. 6. The Exchange entered the port of Philadelphia in distress, and sought an asylum *bonâ fide*. During this time, she demeaned herself with strict propriety, and no act was done manifesting a consent to submit to judicature, nor by our government to exact it. 7. The libel against the Exchange involved the question of sovereign title as well as possession. It was a petitory suit, of which this court could have no jurisdiction whatever. 8. There was a suggestion by the law-officer of the government, on behalf of the French sovereign, and the case was wholly *coram non judice*, even if the Exchange had not been a national vessel of war. 9. The Exchange was not seized on the high seas; it was a seizure within a port of the French empire, by order of the sovereign, *118] under his Rambouillet *decree. There was, therefore, no case within the admiralty. The taking was neither a capture, nor a maritime tort; the court was, consequently, compelled to leave the possession undisturbed. 10. Its being, at the time of the seizure, American property, could in no way invest this court with the power of restitution, even had it been a maritime seizure *jure belli*. The legality of all captures is to be judged by the courts of the captor, unless in the two excepted cases of a violation of our territorial limits in effecting the capture, and equipment, ownership or augmentation of the force of the vessel in this country. The Exchange was embraced by neither exception.

Setting aside the question of the sovereign's title, the case of the Exchange presented nothing more than the ordinary case of an American vessel, which, after being seized *jure belli*, for a violation of her neutrality, returned to this country; the legality of which seizure, it must be admitted, belonged exclusively to the courts of France. The violation of her neutrality rendered her *quoad hoc* a belligerent. Nay, the very suggestion filed by the attorney-general, was avowedly for the purpose of maintaining our neutrality inviolate; and although the decree to which she had rendered herself obnoxious, might have been a most arbitrary, and even wanton departure from the law of nations, this was not a matter for our courts, but for our government, to judge of, and to remedy; for had the government declared *119] the Rambouillet decree contrary to the law of nations, still, this *court could not have restored the Exchange. *Williams* v. *Amroyd*, 7 Cranch 423. This principle alone would have justified the court in refusing to restore the Exchange to its former owner. The case of the Exchange was made to rest on two distinct points, either of which was sufficient to decide the cause. First, whether the court could restore American property, which might have been unjustly or illegally seized by a foreign government. This was, in truth, the only essential point. The cases of *The Betsey*, 2 Pet. Adm. 330; *Del Col* v. *Arnold*, 3 Dall. 333, and some others, seemed to sanction the right of restoring, simply on the ground of its being American property. A second question was, therefore, made, which, though

but auxiliary, assumed, in the course o the argument, the chief importance. It was contended, that as the Exchange was now the property of a sovereign, which had been admitted into our country by implied consent, and which, during her stay, had done no act to terminate that permission, this court must regard the vessel as entitled to the same immunity as would be due to ambassadors, or foreign troops passing by consent through our country. Much learning and eloquence were, no doubt, displayed in the argument of this point; but it is conceived, that had the doctrine, since so clearly laid down in the case of *The Invincible*, 2 Gallis. 36, 1 Wheat. 238, been at that time as well defined and understood *as it is at present, the case of [*120
the Exchange would have been decided, without reference to the question of sovereign immunity.

The following points of comparison occur between the Exchange and the case now under adjudication: 1. The Nereyda was not seized by any sovereign power, but by Daniels, a private individual, a citizen of the United States, acting under an authority wholly unknown to this court, because in no way recognised by this government. 2. The Nereyda never was, and is not, at this time, a public vessel of war of the government of Venezuela; but a privateer, the private property of Daniels, and in his, or, perhaps, Francesche's possession. The commission under which she now appears, imports nothing more than an authority in Childs, her commander, to capture Spanish property; but it does not render her national or public property. The commission, in the case of the Exchange, on the contrary, was also an evidence or muniment of the sovereign's title. The restitution of the Nereyda would deprive an individual of his possession; but the restitution of the Exchange could not have been effected, without judging of the validity of the original seizure, annulling the commission, and pronouncing a sovereign's title wholly void. 3. The Nereyda is expressly claimed on behalf of a private individual. Neither Francesche nor Childs makes any mention of any possession or property being in the government of Venezuela. This proceeding then, does not call on sovereignty to submit to judicature; and the commission *cannot require of us to consider that as national [*121
property, which the whole history of the case proves to be a mere private possession. 4. The Nereyda entered our waters voluntarily, and for the express purpose of obtaining an unlawful equipment, and the very persons who brought her here, had violated our laws, and subjected themselves, and the property in their possession, to the jurisdiction of our courts. No asylum, therefore, was, granted to the Nereyda, and her officers and crew. The United States cannot be supposed to have admitted the Nereyda, exempt from all inquiry as to her real character, and as to the conduct of those in whose possession she was found. But the Exchange not only arrived here in distress, and demeaned herself with strict propriety, but those who had her in possession had never violated our laws, nor was she ever capable of restitution by this court; she entered our ports under an acknowledged and certain immunity. No cession, then, of territorial jurisdiction can be inferred from the entry of the Nereyda into our waters; and her commission, even if it made her a national vessel, would not, under the circumstances of the case, protect her, allowing the doctrine of sovereign immunity its greatest latitude. Sovereignty is essentially local in its operation; the moral equality of all nations establishes this as an aphorism in public law. Beyond a

nation's dominions, sovereignty has, ordinarily, no operation; its extra-territorial power is but an exception to a well-known rule; and if we for a moment attend to the principle which supports the exception, we shall
*122] *find it, in all cases, to rest on the consent, express or implied, of that nation within whose territory the immunity is claimed. The three exceptions so forcibly illustrated in the judgment of the court in the case of *The Exchange*, show the local nature of sovereignty, and strongly evince the special grounds on which the deviation from the general rule is justified. But even in the excepted cases, if there be not the utmost good faith, if there be any circumstances to negative the implication of consent, or any facts unknown at the time of an express compact, which would have prevented such compact, had they been disclosed, the immunity would at once cease.

The claim of immunity for the Exchange, was exacted only to the extent of, and made to rest on those principles which protect from detention or arrest, 1st, a sovereign entering the territory of another; 2d, ambassadors; and 3d, the troops of a foreign prince, to whom a right of passage had been allowed. Now, if a sovereign should enter the dominions of another, without such implied or express consent; or if, after he has entered with consent, he should commit an act *malum in se*, or against the *jus gentium*; or if it be discovered that an ambassador had, prior to his appointment, committed some capital offence against the country to which he is sent; or if the troops, in their passage, should violate the rights of persons, or of property—it is presumed, neither of them would be shielded from the penal law of the country. 4 Inst. 152; 3 Bulst. 28; Molloy, B. 1, ch. 10, § 12. If
*123] this be correct, the commission granted *to the Nereyda cannot, on principle, screen her from the restoring power of this court. The vessels of all nations, public as well as private, may seek an asylum in our ports. During this, we have, ordinarily, no jurisdiction over them. The consent, however, under which they enter, is always subject to the qualification that they have not previously violated our laws or hospitality, and that they are in no other respect amenable to judicature. If the Nereyda had not been taken by United States arms, this court could not have interfered in behalf of the Spanish sovereign, from whom his rebellious subjects had taken her. The commission, then, it is presumed, can no more protect her from the power of this court, that the solemn and public documents by which an ambassador is made the representative of his sovereign, could shield him from the criminal law of the country in which he resides, and whose laws he had previously violated, unknown to that country.

The libel in this case does not involve the question of title. As relates to Venezuela, even the right of possession of this prize is not implicated. If this were a petitory suit, this court would disclaim any interference. 2 Bro. Civ. & Adm. Law, 110, 113, 114, 115, 117; 7 Cranch 120, 121. But the question simply is, whether those who have gained a possession, or their representatives, by means illegal in reference to our laws, shall be permitted to retain that possession against its original possessors, in the very country
*124] whose laws have been violated. *The Nereyda being at one time subject to the jurisdiction of this court (had she come into our possession), the court will not permit that to be done indirectly, which could not be done directly. This contingent jurisdiction can no more be annihi-

lated or impaired by the act of a nation or state, than by an individual. As to this country, the taking was an absolute nullity. There was a deep-seated infirmity in the original capture, which could not be cured by the condemnation, nor by Francesche's purchase, even if it had been genuine. For if the condemnation be not sufficient, no act done in execution of that judicial sentence, could be thus operative: *debile fundamentum fallit opus;* and Francesche could succeed only to the title of Daniels, whatever that was. Nor could the commission rehabilitate or perfect the title. It does not pretend to assert a title in any one, nor does it design to confer a title on Francesche, or to intimate any claim of property in the government granting it. This sovereign act, then, imports nothing further than an authority to that vessel to capture Spanish property.

In the case of *The Exchange*, the prominent difficulty was, that its possessor, being a sovereign, could not be brought into court. But in the present case, those claiming under the commission, have not only voluntarily appeared and claimed the Nereyda, but they have expressly submitted the case to the jurisdiction of this court. The claimant asked for, and received, the Nereyda, on stipulation; this cancels or waives every objection *to jurisdiction, if any existed. *The Abby*, 1 Mason 364; 2 Bro. Civ. & Adm. Law 398. Not that it is meant to assert, in general, that consent can confer jurisdiction; but that wherever a court has jurisdiction of the subject-matter, but not of the person, consent would remove the objection. If, on the other hand, the court has no jurisdiction over the subject-matter, but of the persons only, it would not be competent to act from the consent of the parties. In the case now before the court, there is no one act of the claimant, or of others, indicating any interest in this proceeding on the part of the government of Venezuela; but the case is impressed throughout with the character of a mere private and individual claim. [*125

In the case of *The Cassius*, a prohibition was allowed on the ground, 1st. That the prize itself had been carried *infra præsidia;* 2d. That the question of damages should follow the main question, which belonged exclusively to the court of the captor; 3d. That as the Cassius was, and ever had been, the property of a sovereign nation, and not a mere privateer, our courts had no power to make her respond in damages; 4th. That there was no proof that the commander of the Cassius was an American citizen; 5th. That the treaty with France gave the exclusive cognisance, in all cases of prizes made by their vessels of war, to the courts of France.

Is there any point in this case which militates against the restitution of the Nereyda? In the *case of *The Cassius*, the court very properly decided, that the privateer should not respond in damages for the captured property; as this had been taken *infra præsidia capientium*, and the court of the captors having the exclusive right to judge of the legality of the capture, the question of damages should follow the main question. It also assumed the doctrine, which has been subsequently fully established in the case of *The Invincible*, 1 Wheat. 238, viz., that the power of this court to take the *res capta* from the possession of a belligerent, and restore it to its former owner, could only be brought into action, where the neutrality or territorial jurisdiction of this country had been violated by the captor. The case of *The Cassius* is, in all its points, good law; it is nothing more than the ordinary case of calling on this court to decree damages for an illegal [*126

capture of American property ; no one will pretend to say, that this can be done, unless the court acquires a jurisdiction, by reason of the existence of either of those facts which take the case out of the control of the general rule, which gives to the courts of the captors the sole right of judging of the validity of all captures. American ownership in the thing captured is not sufficient *per se*, and in the case of *The Cassius*, no other fact appeared in proof. Further, if we advert to the fact, that the Cassius was subsequently prosecuted on an information for an illegal outfit, which, on that proceeding, *127] was proved, *and she condemned, maugre her commisssion (1 Wheat. 253), the case of *The Cassius*, on the civil proceeding, cannot be regarded as any authority to establish the doctrine of sovereign immunity, when the rights of two sovereigns come in collision.

*Winder*, contrà, contended : 1. That there was no competent claimant before the court. The vessel libelled, originally belonged, as was asserted, to the king of Spain, and was libelled by the Spanish consul, who cannot be considered by this court as authorized in his general character to appear for his government, when its sovereign rights are drawn in question in our tribunals. He must show some special authority for this purpose. *The Anne*, 3 Wheat. 435.

2. The capture was made *jure belli*, under a regular commission from Artegas, the chief of one of the South American provinces, engaged in the present war between Spain and her colonies. The existence of this civil war is notorious. It has been recognised by various acts of our government ; and the consequent right of all the parties engaged in it, to carry on hostilities against each other, has been repeatedly admitted by this court, and is laid down by all the text-writers on the law of nations. The Oriental Republic, or Banda Oriental, is that portion of the ancient vice-royalty of La Plata, lying between the river Uruguay and Brazil ; which, for a long *128] period, and at the time *the present capture was made, carried on hostilities both against its parent country, Spain, and against Portugal, independent of the government established at Buenos Ayres. This fact is stated in the president's message of the 17th of November 1818, and in the reports of our commissioners, transmitted with it (4 Wheat. app'x, 23, note 2) ; and is sufficient to authorize the court to allow to Artegas all the rights of war, according to the principles already settled as applicable to this subject. It is impossible to make any intelligible distinction, in this respect, between the different governments which have successively sprung up in different parts of South America. The rights of war must be allowed to all, or to none. Their existence as governments *de facto*, is matter of history and public notoriety ; and the United States have since acknowledged the independence of all of them as they now exist, without pretending accurately to adjust their conflicting claims of territorial jurisdiction among each other.

3. The capture having been made under a lawful commission, was carried into a port of Venezuela, an ally or co-belligerent with the Banda Oriental in the war with Spain, and there condemned as prize to the captors, in the regular court of the ally. The present claimant asserts his claim as a purchaser under that sentence of condemnation. The fact of the connection between the different Spanish provinces in the war with the parent

country, is mentioned by the president *in different communications to congress, and he has the exclusive authority of determining the relations of foreign states. There is no doubt, that a valid condemnation may be pronounced in the court of the captor's country, where the prize is lying in the port of an ally in the war. And if his ports may be used for this, and all other hostile purposes, it is not perceived, why the aid of his courts may not be imparted for the purpose of consummating that title which is acquired by capture, and bringing *infra præsidia*. Indeed, it seems to be settled by the authority of text-writers on the law of nations, and by express adjudications, that this may be done. 2 Brown's Adm. & Civ. Law 257–81; *Oddy* v. *Bovill*, 2 East 479. It must be mere matter of arrangement and mutual convenience between the co-belligerents themselves, and no neutral, or other nation, can have any right to complain. The validity of the capture is inquired into by a court of prize, having an inherent capacity to make the investigation, and to do justice to the claimants as well as the captors. Such was our own practice, during the war of the revolution, when congress authorized our prize courts to condemn prizes taken by French cruisers, and brought into the ports of the United States. 5 Wheat. app'x, 123. But even supposing the court of Venezuela not to be competent to adjudicate on the capture by its ally, yet the thing taken being once in its possession, and being the property of Spain, its enemy, it *might proceed to condemn it as such, and the condemnation must give a valid [*130 title against all the world.

4. The captured vessel, having been thus condemned as prize, was sold, and fitted out as a privateer, under a commission from the government of Venezuela. It is insisted, that this condemnation, and the commission thus obtained, are alone sufficient to prevent the court from inquiring into her former history. The vessel comes into our ports under the general license which both South American and Spanish cruisers enjoy of frequenting them; and so long as she does not abuse that hospitality, by augmenting her force, contrary to our laws, has a right to remain, and depart at pleasure. This was the principle established in the case of *The Exchange*. It was not upon the ground, that the vessel had become the property of the French emperor by a regular condemnation as prize, but that she bore his flag and commission, and coming into our ports under a general permission, was not amenable to the jurisdiction of our courts, any more than that sovereign himself, or his ambassador, would have been. Whether the ship be a public, or a private armed vessel, can make no difference. It is sufficient, that she bears the commission of the state, and is engaged in the service of the state. To exert any jurisdiction over her, is to exert a jurisdiction over the sovereign rights of that state, of whose military force she constitutes a part, and, from the nature of the present war, an important part. You may, indeed, by a prospective regulation, revoke the *permission which you have [*131 granted to the cruisers of the South American states, provided your act of revocation be impartial, and extend to those of Spain also. But you cannot violate, in a particular case, the permission you have already granted, and draw to your judicial cognisance the sovereign rights of a state, which is co-equal, in the view of the law of nations, with the oldest and proudest sovereignty in the world.

The learned counsel also referred to his arguments in other analogous

cases before the court at the same term, which will be found reported in those cases. *The Santissima Trinidad* (7 Wheat. 290); *The Gran Para* (Ibid. 484); *The Arrogante Barcelones* (Ibid. 498, 516).

*Harper*, for the appellant, in reply, noticed, 1. The preliminary objection which had been urged on the part of the respondent, that the Spanish consul had no competent authority to institute the present proceeding. This objection admitted of several answers. In the first place, it was to be recollected, that it was not the sovereignty, or the sovereign rights of the Spanish government, that were here in question. It was a mere right of property, held and claimed by the king, in trust, indeed, for the nation, but still a right of property. Some doubts had been raised, how well founded it was not then necessary to inquire, whether a sovereign could be brought into judicature to defend any of his rights; but surely it had never been doubted, *132] that he *might go there, if he thought fit, to assert his rights of property. This was the daily practice of our own, and every other government, that respected the laws, and did not act in all cases by its arbitrary will. If the king of Spain could appear voluntarily in a court of justice, to assert his rights of property, surely, he migl t appear by his agent, his proctor or his attorney. The consul is the general agent for asserting in courts of justice the rights of his countrymen, and of his government, so far as they related to property. Here, the consul claims; not, however, in his own name, or for himself, but in the name, and for the rights of his government. As to the case of *The Anne*, which has been cited on the other side (3 Wheat. 435), the claim was not founded on a right of property, but of violated sovereignty. During the war between the United States and Great Britain, an American privateer had taken a British vessel, on the coast of Hispaniola, and, as was alleged, within the Spanish jurisdiction. Spain was neutral; and there being no acknowledged Spanish minister, the Spanish consul interposed a claim, to protect the neutral rights of his government, and complain of their violation. He had no extraordinary powers; and the court decided, that for this purpose, his ordinary powers were not competent. But surely, it does not follow from this decision, that if the vessel taken had been a public ship of Spain, he might not have interposed a claim for the property; for he is peculiarly intrusted with the rights of property, *133] *while those of sovereignty are confided to the ambassador or public minister.

But in the second place, if the public minister of Spain alone can act, in a matter of this kind, he has acted here. An express written authority has been produced, from him to the consul, to claim in this very case, for the king of Spain. Surely, if the king of Spain may come into court to prosecute his rights, he may come by his attorney, his proctor or his solicitor, as the case may require. The Canton of Berne once filed a bill in the English high court of chancery, 9 Ves. 347; and surely, the Canton of Berne must have appeared by a solicitor. And how was this solicitor appointed? Unquestionably, as the proctor was in the present case, by the accredited minister of the sovereign.

2. He then proceeded to consider the principal questions in the cause, the first of which related to the validity of the commission under which the capture complained of was made, which he contended, was invalid, and did

not authorize the capture. The commission relied on is from Jose Artegas, styling himself "Chief of the Oriental Republic," and "Protector of the Orientals;" and the question is, whether any such republic, community or government is known to this court. This depends upon their recognition by the government of this country, through the president, its constitutional organ for such purposes. This recognition certainly need not include Artegas *by name, as the chief of the supposed republic, government or community; because, when once their existence is properly made [*134 known to this court, the persons who, from time to time, act as their chief officers, must be taken to be so. But the government itself must have been acknowledged by the proper authority, before its existence can be noticed, or its acts treated as valid, by this court. The question, then, is, has any such government as that of "the Oriental Republic," or "the Orientals," been recognised by the government of the United States? For the decision of this question we must refer to the various acts of recognition which have been done by the president.

The only message of the president to congress, which contains a distinct recognition of the different South American governments, is that of the 17th of November 1818. 4 Wheat. app'x, 24, note 2. It states, "that the government of Buenos Ayres declared itself independent, in July 1816, having previously exercised the powers of an independent government, though in the name of the king of Spain, from the year 1810. That the Banda Oriental, Entre-Rios, and Paraguay, with the city of Santa Fè, all of which are also independent, are unconnected with the present government of Buenos Ayres; that Chili has declared itself independent, and is closely connected with Buenos Ayres; that Venezuela has also declared itself independent, and now maintains the conflict with various *success; and that [*135 the remaining parts of South America, except Monte Videc, and such other portions of the eastern bank of the La Plata, as are held by Portugal, are still in the possession of Spain, or in a certain degree under her influence." Here we find various countries distinctly enumerated, of some of which the governments are noticed, but no mention whatever of the "Orientals," or the "Oriental Republic." A country called the "Banda Oriental," indeed, is mentioned, and we may conjecture, but are nowhere informed, that it constitutes the whole, or a part of this supposed republic. It is mentioned in connection with two other countries, called "Entre-Rios," and "Paraguay." Do they also form parts of "the Orientals," of whom Jose Artegas is the protector; or of the "Oriental Republic," of which he claims to be the chief? We are nowhere informed by the president; and although it might be plausibly conjectured, yet we know the fact to be otherwise. Paraguay, we know, historically, to be altogether separate from the Banda Oriental, and to have a chief of its own, one Francia, who is said to style himself "Consul," and to conduct his government according to the forms of the Roman commonwealth. Venezuela is spoken of in the message as a distinct community, and we know it by that name. Chili is mentioned in the same manner, as a distinct community of that name, and, consequently, capable of having a government. Three other countries, or communities, are named in connection; but we are not *informed, [*136 whether they constitute the territory of one government, of two, or of three; and no mention whatever is made of any such government, com-

munity or people, as the "Orientals," or the "Oriental Republic." We are, then, left wholly in the dark by the president on this point; and we cannot look beyond his messages for information, which he alone is authorized to give. We cannot look to the reports of the commissioners, for the recognition of this government. This recognition appertains to the president alone, as the constitutional organ of the nation for all such purposes. He has, indeed, thought fit to lay before congress the reports of the commissioners, as his justification for the step which he took, in recognising some of these governments, and for declining to recognise others. But he cannot have intended, by this act, to transfer the decision of this great question of national policy to this court, or to any other department of the government; and if he had intended to do so, it was not in his power. And if we look to the reports of the commissioners, we shall find abundant matter to justify the president in forbearing to recognise this pretended government. These reasons exist in its unsettled, irregular and ephemeral character. We were fully informed, by these reports, of the existence and pretensions of Artegas, of the nature of his government, and the countries over which it claimed to extend. One of the reports, that of Mr. Rodney, speaking of the people of the Banda Oriental, and Entre-
*137] Rios, says, that they "have *been compelled to give up everything like civil avocations, and to continue without any regular kind of government, under the absolute control of a chief, who, whatever may be his political principles or professions, in practice, concentrates all power, legislative, executive and judicial, in himself."

3. But admitting the commission to be valid, there was no valid condemnation of the property captured under its authority. The paper produced as a condemnation, purports to be the sentence of a prize court of Venezuela, sitting at Juan Griego, or Gregorio, in the island of Margaritta, within the territory of that republic. It is objected to this condemnation, first, that it is not proved; and secondly, that it was pronounced by a court which had no jurisdiction. The objection to the proof rests on two grounds. In the first place, the sentence is not certified under the seal of any court, or by any person who appears, or is stated or proved to be, the officer of any court. The person who certifies this sentence, is stated and proved to be, "the Notary of the Marine, at Juan Griego, in Margaritta;" but we are nowhere informed, that he is charged with, or executes the functions of clerk or register of the admiralty court, whose sentence this purports to be, or that he is in any manner employed by it, or authorize to authenticate its proceedings. In the next place, this sentence, admitting it to be properly authenti-
*138] cated, appears alone. It is *unaccompanied by any part of the proceedings in the cause in which it purports to have been pronounced. Before the sentence, decree or judgment of any court whatever, can be given in evidence, it must be shown, that it was pronounced in a cause depending before that court, and within its jurisdiction. This is a universal rule, and applies, for the plainest reasons, to the decisions of prize courts, and of all other courts of justice. Without the production of the proceedings, it will always be impossible to ascertain whether the court had jurisdiction of the case; a point always, and in all cases, examinable, and which must always be established, before the sentence, judgment or decree can be given in evidence. For this reason, the libel and claim, in admiralty and prize

cases, must be produced, in order to let in the sentence. Not being produced here, the sentence, however well authenticated, must be disregarded.

But if received, it can produce no effect; because it appears, on its face to be the sentence of a court which had no jurisdiction in the case which it undertook to adjudicate. The commission under which the vessel and cargo in question were captured, as prize of war, was granted by Artegas, as chief of the Orientals, and protector of the Oriental Republic government, which, if it have any such existence as can be noticed here, is entirely distinct from that of Venezuela, in the prize court of which, sitting at Juan Griego, in the island of Margaritta, the condemnation took place.

But it is said, that Venezuela was the ally of Artegas in the war; and that *the prize court of an ally may condemn. We deny both these positions. How does it appear, that Venezuela was the ally of Artegas? The fact is not stated by the president, in any of his public communications to congress. Nor do the commissioners to South America, whose reports he communicated to the legislature, say anything of such an alliance, or anything from which it must, or even could be, inferred. The president, indeed, states to congress, as the commissioners has done to him, that both Artegas and Venezuela were at war with Spain. But does it follow, that they were in alliance with each other? We have lately learned, that war has broken out between the Turks and the Persians? It may very soon break out between Russia and the Turks. Will the Russians and Persians, in that case, be *ipso facto* allies in the war against Turkey? Alliance means a connected union of efforts and means; and not merely an accidental coincidence of objects. It follows, that the president, by declaring to congress that Artegas and Venezuela were both engaged in war with Spain, did not declare that Artegas and Venezuela were allies. But admitting that he had declared it, still his declaration would not be competent evidence of such a fact. When the question relates to the existence of a government, it is proper to refer it to the decision of the chief magistrate, who is intrusted by the constitution with the care and management of our relations with other countries and governments; he must, of necessity, therefore, be constituted the judge, and the sole judge, of the fact of their existence, upon which the exercise of these important functions must depend. As these relations, moreover, must often depend on the state of peace or war in which foreign goverments may be, as it respects each other, it may be proper, that the president should be constituted, for many purposes, the judge, and even the sole judge, of the existence of a state of war between certain nations; because, out of such a state may grow very important relations between us and them. But what relations can arise out of the fact of their being allies in the war, or each carrying it on separately, by his separate counsels and means? None whatever. It is a mere matter of fact, which, like any other matter of fact, may affect the rights or interests of individuals, but cannot in any way, become a public concern. Those, consequently, who may wish to set it up, in the course of a judicial proceeding, as the foundation of any right or claim, must prove it, as every other fact is proved. As well might it be attempted to prove, by an executive communication, the fact of capture, or of spoliation of papers, or any other fact on which either party in a prize proceeding might

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rely, as this fact, of alliance between Artegas and Venezuela, in the war against Spain.

Admitting it, however, to be proved, it immediately brings up the second question, whether the prize courts of one ally are competent to take cognisance of captures made under commissions from the other. We insist, *141] that they are not, according *to the best established principles of prize law. In this opinion, the most eminent advocates, the soundest elementary writers, and the highest judicial tribunals, with one voice, unite. They all lay it down as an elementary principle, universal in its application, and subject to no exception, that the question of "prize, or no prize, belongs exclusively to the courts of the captors' country." In the case of *The Invincible*, 1 Wheat. 246, that most eminent and distinguished advocate, now unhappily no more, who so long adorned and enlightened this court, and whose opinions had almost acquired the authority of judicial decisions, treats this rule as an axiom, about which there could be no dispute. Mr. PINKNEY there says, that "if there be any rule of public law better established than another, it is, that the question of prize is solely to be determined in the courts of the captors' country. The report on the memorial of the king of Prussia's minister, refers to it as the customary law of the whole civilized world. The English courts of prize have recorded it; the French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lays, as an elementary principle, at the very foundation of that law." The judgment of this court, in the same case, fully supports the doctrine. It speaks of a sentence as prize, under a com- *142] mission from a power *at war, as the "act of the sovereign;" as entitled to exemption from scrutiny, "except in the courts of that sovereign;" and as not subjecting the captors to any question whatever, in any other court, until those of his sovereign shall have decided, that the seizure was not authorized by the commission. It expressly asserts, that "the exclusive cognisance of prize questions is yielded to the courts of the capturing power;" and admits this exclusive cognisance, as a general principle.

So, in the case of *The Estrella*, 3 Wheat. 308, the court says, "we have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize; this is not denied, nor has the court ever felt any disposition to intrench on this rule; but on the contrary, whenever it occurred, as in the case of *The Invincible*, it has been governed by it." It is stated to be a rule "well established by the customary and conventional law of nations;" and the reasons on which it rests are stated in a clear and satisfactory manner. The rule is there placed on three grounds: 1. The dignity of the sovereign who grants the commission; which would be impaired, if any tribunal but those authorized by himself were permitted to take cognisance of the acts done under that commission; in other words, if any one but himself were allowed to super- *143] intend the conduct of his agents and officers: *2. The efficient restraint and control of those officers and agents; to whom a power most liable to abuse is confided by the prize commission: and 3. The responsibility of their sovereign and nation, for the acts of unlawful violence which they may commit against neutrals, should those acts be sanctioned by their own government, through its prize courts. Undoubtedly,

all these reasons, and especially the first two, require, that the cognisance of questions of prize should be confined exclusively to the courts of the captors' country; and these reasons apply as strongly to the courts of an ally, as to those of a neutral. The courts of the ally, like those of the neutral, are destitute of the means of inflicting punishment on the captor, if, in making the seizure, he have violated the instructions of his government, acted contrary to its general policy, or exceeded the authority conferred by the commission. Equally with the courts of a neutral, they are without the means of ascertaining what was the policy of the commissioning government, or its general rules and regulations, or what particular instructions accompanied the commission. It is the practice of every government to require sureties from those to whom it grants commissions of prize, for their proper conduct under the commission, and for the observance of their instructions. These sureties must reside in the country where the commission is granted. Consequently, they must be out of the reach of the government and courts of an ally, as much as of a neutral; and, consequently, the security must be wholly unavailing, if the *prizes made under the commission, or by color of it, may be carried into the ports of an [*144 ally, and adjudicated in his courts. Not being able to reach the sureties, they would be equally unable to reach the property of the principal offender, which would also be in his own country. No decree for damages, or even for costs, however flagrant the case might be, could be enforced against his sureties or his property. Nothing would be left but the imprisonment of his person; and, as he would have offended against no law of the ally, would have infringed none of its orders or instructions, it would be extremely doubtful, at least, how far any penal proceedings could be supported against his person. All that could be done, would be, to rescue his illegally acquired booty from his grasp, by a sentence of restitution. It is easy to see, how utterly inadequate this remedy must often prove, and how greatly the temptation to take the chance of succeeding in an illegal and unauthorized seizure must be increased, by such a state of impunity.

It cannot escape observation, that nowhere, by no writer or advocate, nor in any adjudged case, is any distinction taken, or hinted at, between the case of an ally, and that of a neutral, in the application of this rule. It is everywhere laid down, absolutely, and without exception; and in a very recent case, *The Josefa Segunda*, 5 Wheat. 358, it is taken for granted by this court, and forms the basis of its decision.

*If we advert to the foundation of the prize jurisdiction, we shall find reasons equally strong, for confining it exclusively to the courts [*145 of the captors' country. This jurisdiction is declared by this court, in the case of *Hudson* v. *Guestier*, 4 Cranch 296-7, to be founded entirely on the "possession" of the *res capta*. "The seizure vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts." And again, "possession of the *res*, by the sovereign, has been considered as giving jurisdiction to his courts." Now, let it be asked, who had possession of the Nereyda, while she lay at Juan Griego? Certainly not the government of Venezuela; but that of Artegas, through its agent and officer, the commander of the capturing vessel. This court asserts most positively, in the case just cited, "that the possession of the captor is, in principle, the possession of its sovereign." They add, "he, the captor, is

commissioned to seize in the name of the sovereign, and is as much an officer appointed for that service, as one who, in the body of a county, serves a civil process." Then, the possession of the *res capta* was in the government of Artegas ; and as it is the possession of the *res*, by the sovereign, that gives jurisdiction to his courts, it follows inevitably, that the courts of Venezuela, the government of which had no possession of the captured property, could take no cognisance of the capture ; and, consequently, that the sentence of
*146] the court of Juan Griego is *void, for want of jurisdiction in the court by which it was pronounced.

Let it not be imagined, that the possession was altered, or in any manner affected, by the bringing of the captured property into the port of the ally. This court has emphatically declared, in the same case before cited, that "the sovereign whose officer has, in his name, captured a vessel as prize of war, remains in possession of that vessel, and has full power over her so long as she is in a situation in which that possession cannot be rightfully divested." The same doctrine is asserted by all the judges, in the case of *Rose* v. *Himely*, 4 Cranch 268, although there was much difference of opinion among the judges on other points. Could, then, this possession have been rightfully divested by the government of Venezuela, within whose territory the captured vessel had been brought? In the case of a neutral territory, this court has expressly adjudged, in *Hudson* v. *Guestier*, 4 Cranch 297, that it could not. Upon what principle, then, could it be divested by the government of an ally? Ought not the captor to have as much immunity, as much safety, as many privileges, in the ports of his friend and ally, his co-belligerent, as in those of a mere neutral? How could he be deprived of the possession? It could only be by an act of violence ; and that, *ex vi termini*, would be wrongful. So far from being rightful, it would be an act of hostility and war.

*147] But might not the captor, it may be asked, part *from his possession, and transfer it to the sovereign of the ally, so as to give jurisdiction to the courts of the latter? I answer, that he could not ; because, the possession belongs to his sovereign, and not to him. He is merely the agent of the sovereign, for taking and holding the possession ; and having no authority to transfer the possession, he could not rightfully transfer it, so as to affect the right of his sovereign, to whom it belongs. It would be a breach of faith and duty in him, to make the transfer ; and to accept it, would be a wrongful act on the part of the allied sovereign, upon which, according to a universal principle of law, no right could be founded. The captor, it is true, has an interest in the prize, by the grant of his sovereign ; but until a legal condemnation, that interest is inchoate and contingent. In the meantime, he has no power over it, except that of conducting it into a place of safety, and keeping it safely, till it can be brought to adjudication in the courts of his sovereign.

The treatise of Dr. Brown on the Civil and Admiralty Law (vol. 2, p. 257, 281), and the case of *Oddy* v. *Bovill*, in the English court of K. B. (2 East 479), have been cited on the other side, to show that the courts of one ally may take cognisance of prizes made under the commissions of the other. But Dr. Brown cites no authority, and offers no reasons in support of his doctrine ; which is evidently a mere mistake, arising from his having confounded the courts of an ally with prize courts of the capturing power,

sitting *within the territory of his ally. This was the case in *Oddy* v. *Bovill*, and in the cases there cited from Robinson's reports. The case of *Oddy* v. *Bovill* related to a Danish vessel, captured by the French, and condemned by the French consul, at Malaga, exercising there, by the consent of Spain, the powers of a prize court of France, at a time when those two nations were at war against Great Britain, as allies. The question was, whether the condemnation was valid; in other words, whether the French prize court had jurisdiction of the case. The decision of the court of K. B. (two judges only being present) was in favor of the jurisdiction. It might here be remarked, that the determination of an English court of common law, on such a question, made long since our independence, possesses no intrinsic authority here; and that a single case, decided by two judges only, out of four, or rather out of twelve, has very little authority anywhere. But waiving these objections, let it be asked, to what does this decision really amount? Does it affirm the principle contended for; that the prize courts of one ally may take cognisance of questions of prize, arising under captures made by the other? Certainly not. It establishes nothing more than this; that one ally may, with the assent of the other, establish prize courts of his own, within the territory of that other. This is obviously a very different principle, and entirely free from the objections to which the other is liable. It preserves entire, that great and beneficial rule of public law, founded on the most solid reasons of general *safety, convenience and benefit, that questions of prize shall be exclusively reserved to [*149 the courts of the captor's country. The French court, sitting in Malaga, was as much a French court, to all intents and purposes, as if it had sat in Marseilles or Brest. Its location in a Spanish port, was a matter in which Spain alone had any concern. It was wholly indifferent to the opposite billigerent, and to neutrals. Its proceedings and decrees were exactly the same in the one case as in the other. The dignity of the French government was as well preserved, the court had the same control over the captors, the same means of judging how far their conduct was conformable to the instructions, laws and policy of their government, and the same means of enforcing decrees against them, for costs and damages. Recourse could as effectually be had to their property or their sureties; and, in case of need, to their government, for redress. The rule is, therefore, maintained in this case, and all its beneficial objects are secured. Whereas, by extending this jurisdiction to the courts of the ally, this great and beneficial rule is wholly subverted.

These remarks on the case of *Oddy* v. *Bovill*, apply fully to those which are there cited from Robinson's reports. The first of them, that of *The Christopher*, 2 Rob. 273, by no means comes up to the case just commented on. It was the case of a British ship, taken by the French, and carried into a port of Spain, then the ally of France; from *whence the papers [*150 were sent to Bayonne in France. The ship was there libelled in the prize court, and condemned; and the objection to the validity of this condemnation, was, not that it was pronounced by the court of an ally, or by a court of the captors' government, sitting in the territory of an ally; but that when it was pronounced, the *res capta* was within the territory of the ally. This objection was overruled by Sir W. SCOTT, on the principle repeatedly affirmed by this court, that the possession of the captor, for and in behalf of

his government, which is the foundation of the prize jurisdiction, continued in the couutry of the ally. This principle, after much hesitation, was afterwards extended by him, in the case of *The Henrick and Maria*, 4 Rob. 52, to the case of captured property, carried into a neutral port, and lying there when it was condemned in a court of the captors' country. He declared his own opinion to be different, but held himself bound by a practice long established in the court where he presided.

The other cases from Robinson, relied on in *Oddy* v. *Bovill*, are those of *The Harmony*, *The Adelaide*, and *The Betsey Cruger*. They are all referred to in a note to the case of *The Christopher*, 2 Rob. 172, and were all cases of condemnations by French prize courts, sitting in the territory of Holland, while that power was an ally of France, in the war against Great Britain. The vessels were all condemned by the French commissary of marine, at
*151] Rotterdam. The two first cases *occurred in 1799; and an order for further proof being passed, the question of law respecting the legality of such condemnations was reserved. In the third case, that of *The Betsey Cruger*, in 1800, it was given up by the counsel, and the legality of the condemnation was admitted by the court. But still, it was a condemnation, not by the court of the ally, as in the case at bar, but by the court of the captors' country, in strict conformity to the rule for which we contend.

Some general expressions of Sir W. Scott, in pronouncing his judgment in the case of *The Christopher*, are supposed to countenance the doctrine of condemnation by the courts of an ally. But these expressions must be modified and restrained by reference to the subject-matter. He was speaking of a case of condemnation by a court of the captors' country, sitting in that country, while the *res capta* was in the territory of an ally. To such a case alone, was his attention directed; and in reference to such a case alone, are his expressions to be considered. Taken, as they must be, with this limitation, they leave untouched the rule for which we contend.

It has been urged, on the other side, that the mere presence of the captured property in the territory of Venezuela, then at war with Spain, gave its courts a right to treat that property as enemy's property, and to proceed against it as prize. But we are to recollect, that this property was brought there by the captors, in the possession of whose government it was, by force
*152] of the seizure; and that this possession, thus acquired, *could not rightfully be divested or disturbed. The property did not come thither as the property of Spain, the enemy of Venezuela; but as the property of the captors, her allies, from whom she had no right, or pretence of right, to take it by force. The sovereign of the captors had the possession. The right of the original owner was provisionally divested and destroyed by the capture; and, in this state of things, it could not be considered, or proceeded against, by the government of Venezuela itself, and much less by its prize courts, as the property of Spain. Venezuela herself considered the matter in this light. She did not interfere with the possession of the captors, or their rights of property, Her courts merely attempted, at the instance of the captors, and for their benefit, to exercise, in relation to this property, that prize jurisdiction which belonged exclusively to the courts of their own country.

4. Admitting, however, the sentence of condemnation to be valid; there is still another ground on which the claim set up under it ought to be re-

jected by this court. It is admitted, that Daniels is a citizen of the United States, resident, with his family, in Baltimore; and it is in proof, that the vessel with which he made this capture, was fitted out, armed and manned in the Chesapeake. If, then, he shall appear to be the real claimant, and not Francesche, in which name Childs professes to claim, his case is exposed to the full operation of that maxim of law, which declares, that no rights can be founded on a wrong: *Quod ex maleficio non oritur actio.* He appears, in that *case, in a court of the United States, to ask its aid in the assertion of a claim founded on a direct violation of our laws and treaties. [*153 The acts of congress expressly forbid, under severe penalties, the armament of vessels within our territory, by our citizens or others, to cruise against any nation with whom we are at peace; and the 14th article of the treaty of 1795, with Spain, expressly stipulates, that no American citizen shall take a commission from any foreign power, to cruise against Spain, her people or property, on pain of being treated as pirates. Although it might be difficult, as this court remarked on a former occasion, to enforce the penalty of piracy against Daniels, there can be no doubt, that if he be the real claimant, his claim is founded on his violation of the laws and treaties of his own country. Here the learned counsel argued minutely upon the facts, to show, that the alleged sale to Francesche was fraudulent, or had never taken place. He also insisted upon the want of a bill of sale, or some equivalent document, as a fatal objection to the claim of the pretended purchaser. *The Bello Corrunes*, 6 Wheat. 170; *The Conception*, Ibid. 239.

5. If, however, Francesche must be considered as a real purchaser for himself; and our objections to the commission under which the capture was made, and to the condemnation founded on it, are to be regarded as invalid; we still insist, than the captured property ought to be restored, *on the ground of the illegal outfit of the capturing vessel. Here, we are met by two objections; one founded on the condemnation in the prize court of Venezuela, by which it is alleged, that all inquiry on the subject is closed; and the other, on the commission of prize granted by the government of Venezuela to the captured vessel, after the condemnation. The first of these objections rests on the ground, and both the capture and the condemnation are valid. We have endeavored to show, that neither of them is so; because the Oriental Republic, of which Artegas, in granting the commission under which the capture was made, claims to act as the chief, is not a government acknowledged by ours, so as to be known to our courts of justice; and because the prize court of Venezuela had no jurisdiction of the capture, admitting it to have been rightfully made. But if the capture and condemnation be free from these objections, what is the effect of the sentence, in withdrawing from our courts the power of protecting and enforcing our neutrality? This is a momentous question, novel in itself, and of the utmost importance in its consequences to the peace and honor of this nation. In discussing it, we must first turn our attention to the peculiar state of things to which it applies, to the nature of the war out of which it arises, and to the character and structure of the courts for whose decisions such an effect is claimed. [*154

In adverting to the state of things to which this question applies, we cannot but remark, that the *nations of South America, now engaged in war against Spain, are composed of colonies heretofore kept in a [*155

most rigid and slavish state of dependence on the mother country, and studiously debarred from all means of acquiring general knowledge, habits of self-government, or an acquaintance with the rules and principles of public law, as practised or acknowledged by civilized states. Hence, they may be expected to be, and are, in fact, much more anxious to find means of annoying their enemy, than capable of judging how far those means might be consistent with the rights of neutral and friendly nations. They are, moreover, wholly destitute of the elements of maritime power. Their former masters restrained them from commerce, ship-building, and navigation; for all of which, indeed, their country, from its want of ports, is peculiarly unfit. Their pursuits and habits are essentially agricultural. They are destitute of ships, equipments, ship-builders, and mariners. For a naval force, consequently, the want of which they have always severely felt, they must look to foreigners; and there are none so near as the United States, or so ready to aid them, as that portion of our maritime population, which is ever more eager for enterprise and gain, than scrupulous of means.

The manner in which the war has been carried on between the South Americans and Spain, and in which it will, no doubt, continue to be carried on, while it exists, is peculiarly calculated to inflame the resentments of both parties, and to render each more and more eager to seize on every *156] *means of distressing its enemy. The South Americans, too, from the infant state and imperfection of their systems of finance, the disturbed state of their country, and their great sacrifices and efforts, are extremely deficient in revenue, and little able to maintain, or to provide a regular naval force for the public service. They cannot take North American vessels into pay, and commission them as public ships. Their only resource, consequently, is to engage and encourage private adventurers, by granting them privateering commissions; and they, unfortunately, find multitudes in this country, who, through lust of gain, or a restless and irregular spirit of enterprise, catch eagerly at this bait. The profits of these irregular adventures depend, almost entirely, on the power of bringing the prizes into the United States; where alone they can find an adequate and advantageous market. Our laws inflict restitution to the former owners, as one of the means, and by far the most efficacious, of restraining these proceedings, so incompatible with our honor, peace and true interest. Our courts rigorously and successfully enforce this penalty of restitution. The other, and more penal enactments, are much more easily eluded, by the various artifies and subterfuges which such persons know but too well how to employ. An attempt is now made to elude this penalty also, by the intervention of South American courts of prize. Let this attempt succeed; let such a sentence as that now relied on, be once declared by this court to be a bar to all inquiry concerning the violation of our laws, our treaties *157] *and our neutral obligations, by means of which a capture may have been effected; and what prize, seized by forces provided or augmented in our ports, will ever enter them unprovided with such a sentence? Can we shut our eyes to the character and composition of the courts where these decrees are pronounced; to the course of proceeding by which they are produced; to the means by which they may be, and in fact are, procured? Can we conceal from ourselves, what has passed in this very case, and the manner in which the sentence relied on appears to have been obtained? Can

we forget, what has passed on this subject, in other cases which have been heard during the present term? With all these instructive lessons before our eyes, can we declare, that the doctrine of the conclusiveness of the sentences of prize courts will apply, under such circumstances as are connected with this class of cases, and to such an extent, as to shut out all inquiry into those antecedent violations of our laws, in which the captures originated? If such a declaration shall be made by this high tribunal, pronouncing, in the last resort, the maritime law of the country, most certainly, no future capture will be made, under a South American commission, the fruits of which will not find their way hither immediately, clothed with this protecting mantle; and this certainty of success and impunity, will multiply tenfold the number of depredators, armed and equipped in our ports, to sally forth and seize the property of our neighbors, our friends and our own citizens. *That we are at liberty to look to considerations of this sort, in the application of established maxims, and rules of law, to [*158 new combinations of circumstances, is not only manifest from the nature of the thing, and the general practice of all courts in analogous cases, but has been emphatically asserted by one of the members of this tribunal, in a very learned and elaborate judgment, which contains many important principles, and cannot fail to attract great attention.(*a*)

Our laws against arming and equipping vessels in our waters, to cruise against our friends, cannot be enforced; our treaties on this subject cannot be executed; our peace and our honor cannot be preserved—if it shall be adjudged by this court, that a sentence of condemnation such as this, precludes all inquiry into the measures and means by which the force for making the capture was provided. Considerations of such magnitude would justify and require a modification of the principle on which this doctrine of conclusiveness rests, in its application to cases of this description, if it were so extensive as to embrace them.

But we deny that it does embrace them. The principle is merely this; that as prize courts are open to all the world, all the world are parties to a prize proceeding, and it, therefore, concludes all the world. There may be some objections to the terms in which this proposition is commonly stated, and to the correctness of the reasoning *which it embraces; but it [*159 may be admitted to be true, in relation to those matters, which come, or might have come, rightfully before the prize court. Such are all questions of prize or no prize, and all their incidents. But the rule has never been held to extend, nor do any of the reasons, solid or fanciful, on which it rests, extend, to matters which could not, or did not, come rightfully before the prize court pronouncing the sentence. Such are all cases where it had no jurisdiction. The point of its jurisdiction, though asserted by it ever so formally and positively, is always open to inquiry; and where it has gone beyond its jurisdiction, its acts are treated as nullities. Why? Because those matters did not, and could not, come rightfully before it. So, its sentence will be disregarded, unless the libel on which it was founded be shown; because, without the libel, it cannot appear that there was jurisdiction; or, consequently, that the matters adjudicated came rightfully before the court.

(*a*) *Per* Mr. Justice STORY, in the case of The Jeune Eugenie, since reported in 2 Mason 409.

Now, it is quite clear, that this violation of our neutral duties, and our laws, by providing or augmenting, within our territory, the force by which this capture was effected, never did come, and never could have come, before the prize court at Margaritta. That court had no knowledge of our laws, and nothing to do with their enforcement. There neither was, nor could be, any party in the proceedings, who had a right to make the objection. It could not have been made by the former owners; who would have been told, and correctly told, that as they were enemies, their property was liable to condemnation, *however it might have been seized; that they had
*160] nothing to do with the mode or the means of capture; and that it belonged to the government of the United States alone, whose rights were alleged to have been infringed, to assert and protect those rights, and to complain of the violation of its laws. This would have been a solid and sufficient answer to the former owners. As to the United States, they had not then acknowledged the government of Venezuela, and, consequently, could have no minister or diplomatic agent there, to interpose for the protection of their rights. The question, therefore, never could have been raised or adjudicated in the prize court of Venezuela, which had no jurisdiction over it, nor any means of bringing it into judgment. The sentence, consequently, of this prize court, is not conclusive on the question of antecedent violation of our laws, committed by making the capture, or preparing or augmenting the force by means of which it was made. These violations formed no part of the question of prize or no prize, or of any of its incidents; and, consequently, could never have come rightfully, and, in fact, did not come at all, before the court pronouncing this sentence. Therefore, they make no part of the sentence, which is not in the least impugned or impeached, by inquiring into them, or inflicting on their authors the penalty of restitution.

Where, indeed, is the difference between this and any other penalty, pronounced by our laws against similar violators? Will it be pretended, that we cannot proceed criminally against these *captors, for arming,
*161] fitting or recruiting in our waters, because the fruits of their offence have been adjudged to them as prize, by the prize court of Venezuela? I presume not; and if the sentence cannot screen them from one part of the punishment, upon what ground can it be considered as sufficient to screen them from another? Does this court, in ordering restitution, impeach the sentence, or meddle with it, in any manner whatever? Does it inquire, whether the sentence was right or wrong? Certainly not; but admitting, that the sentence rightly disposed of the question of prize or no prize, and all its incidents, it seizes the goods, when found within our jurisdiction, as forfeited by the violation of the law, and restores them to the former owner, as part of the penalty of this offence. This is the substance, although the form is different.

6. The last question in the cause is, whether the commission of prize, granted to this captured vessel by the government of Venezuela, after the condemnation, can shut out all inquiry into the antecedent violation of our laws, by means of which the capture was effected. Much of what has already been said, as to the effect of condemnation itself, will apply here. We cannot but know, how easily such commissions at this may be obtained, how readily they are granted, and how certainly every prize ship would be

clothed with one, if it were pronounced here to have the effect of preventing all inquiry into the means or place of capture. The mischief, indeed, thus produced, would be less formidable than the *other; because it would apply only to vessels, which are by far the least important [*162 objects of capture; but so far as it goes, it would render our laws for the preservation of our neutrality a complete nullity. And upon what principle can it be contended, that a foreign commission of prize will produce such effects? Upon the principle of comity, it is answered; upon the ground of implied assent, under which the public ships of friendly states come into our ports, and which protects them from molestation while here. But this immunity is granted so long as they comport themselves well; and has never been considered as protecting them from the consequences of violating our laws.

To this point the case of *The Cassius*, 1 Dall. 121, 2 Ibid. 365, is full and express. The Cassius was not merely a vessel bearing a French commission of prize, but a public ship of the French government, regularly commissioned as a part of the French navy. But she had been fitted out within our territory, in contravention of our laws; and coming, afterwards, within our jurisdiction, under the French flag, and a regular commission, she was proceeded against to forfeiture for this offence. The decision is cited, relied on, and sanctioned by this court, in the case of *The Invincible*, 1 Wheat. 253; and it is declared, that "there could be no reason suggested for creating a distinction (in relation to the restitution of prizes made in violation of neutrality) *between the national and the private armed [*163 vessels of a belligerent." In this case, indeed, of the Cassius, the vessel which was subjected to the operation of the law, notwithstanding her foreign commission, had herself committed the offence of illegal outfit. But this circumstance can make no difference in the application of the principle of comity, and implied license. If that principle would not protect the offending vessel herself, though clothed with a public commission, and the flag of the navy, *à fortiori*, I apprehend, it will not protect the spoil, the fruit of the offence. Why should it protect one more than the other? One is the instrument of the offence, and the other is its product. The offence is committed in relation to both. To punish the offence, and by punishing to restrain its commission, is the object in both cases. This furnishes the reason of the application, which is as strong, at least, in one case as in the other; indeed, it is much stronger, so far as the practical consequences of the two acts are concerned; for the capturing ship may avoid our ports, after she has been well equipped; but the captured ship, which is either to be sold or equipped, must come here for a purchaser, or for equipment. Therefore, in every case, she will be sure to come under the protecting cover of a commission, if you once declare such a cover sufficient.

The cases of *The Exchange*, 7 Cranch 116, and *The Invincible*, 1 Wheat. 250, have been relied on to support the doctrine *of immunity, in [*164 application to this case. But neither of them resemble it in its great and distinguished feature of violation of our neutrality. The Exchange was an American vessel, seized by a French force at St. Sebastian, in Spain, and conducted to Bayonne, where she was taken into the service of the French government, and regularly commissioned as a part of the French marine. She was, afterwards, sent to sea, and on her passage to the East Indies,

was compelled to put into one of our ports by stress of weather. While here, she was libelled by the former owner, on the ground, that she had been unlawfully seized, and, consequently, that he never had been divested of his property. The French commander produced his commission; and the question was, whether this vessel, not having been in any manner connected, either as instrument or subject, with a violation of our neutrality, was protected by the comity of nations, and the implied license under which she entered our waters. This is manifestly a question altogether different from that now under consideration. There was no violation of our laws, or our neutral obligations, as in the present case. The vessel had demeaned herself peaceably and correctly, while within our territory; and though seized, undoubtedly, in a violent and unjustifiable manner, the seizure was not made by means acquired or increased within our territory. It was, in some measure, analogous to the case of a British, or a Portuguese vessel, seized on the high seas, by a cruiser regularly fitted out in Venezuela, and commis-
*165] sioned to cruise *against Spain. We could not inquire into the legality of this seizure; which might be illegal on the ground of unneutral conduct on the part of the captured vessel. Even if it were one of our own vessels, we could not institute this inquiry, but must, in both cases, remit the question to the domestic *forum* of the captor. But this case of *The Exchange* has no analogy whatsoever to the case now in question; where the demand of restitution is founded expressly on the violation of our neutrality, our treaties and our laws.

Neither has the case of *The Invincible* any analogy to this. That was the case of a French privateer, taken by a British cruiser, during the war between Great Britain and France, retaken by an American cruiser, we also being then at war with Great Britain, and brought by the re-captor into an American port, where he libelled her for salvage. While these proceedings were pending, a claim for damages was interposed by certain American citizens, who alleged, that the Invincible, before her capture by the British, had plundered them at sea. And the question was, whether this claim could be sustained, or the claimant must be left to seek his remedy against the privateer, in the courts of France. This court decided, that the seizure of the American property was an exercise of the rights of war, which must depend for its justification or condemnation on the circumstances of the case. Consequently, that it involved the question of prize or no prize, which belonged exclusively to the courts of the captors' country. In this respect,
*166] they said, there was no *difference between the case of the Invincible, and those of the Cassius and the Exchange; that is, between a private armed ship, and a ship belonging to the national marine. They were all parts of the public force, though raised and supported in different manners; and the legality or illegality of their conduct in making any capture, being a question of prize or no prize, equally belonged to the exclusive cognisance of their domestic tribunals. This principle, it is quite clear, had no analogy to that now advanced in support of the claim of the captors. There was no illegal outfit; no violation of our neutrality or our laws, was alleged or pretended. The act complained of was a capture, as of enemy's property, under a regular French commission, by a vessel regularly fitted out in the French territory. This capture might be a good prize, according to the law of nations, by reason of some unneutral conduct in the owner, or his agents,

which rendered him, *pro tanto*, a belligerent. Consequently, it was a simple question of prize or no prize, and was most correctly adjudged to belong exclusively to the courts of the captors' country. But had a violation of our neutrality been alleged, either in making the capture, or in preparing the means of making it, the case would so far have resembled ours, and a different course would, no doubt, have been pursued.

March 15th, 1822. The cause was continued to the next term, under the following order for further proof:

*ORDER.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of [*167 Maryland, and on certain exhibits and depositions filed by consent, and was argued by counsel: On consideration whereof, this court doth direct and order, that the respondent have liberty to produce a copy of the libel or other paper on which the sentence of condemnation in the proceedings mentioned was founded, or to account for the non-production of such document; and that the parties be at liberty to take any proof which may tend to show, that the sale of the Nereyda was, or was not, real, and that Antonio Julio Francesche, in the proceedings mentioned, was, or was not, a *bonâ fide* purchaser for himself, and is, or is not, the present owner of the said vessel.

February 7th, 1823. The cause was again argued by the same counsel, on the further proof produced at the present term.

March 8th. STORY, Justice, delivered the opinion of the court.—This cause was heard at the last term, and an order was then made, requiring the claimant to produce a copy of the libel, or other paper on which the sentence was founded, or to account for the non-production of such document; and also requiring the production of further proof of the reality of the asserted sale of the Nereyda, and of the proprietary interest of the asserted owner. The cause has now been argued upon the further proof brought in by the parties, and stands for the judgment of the court.

*The Nereyda was a Spanish ship of war, and was captured by the privateer Irresistible, of which John D. Daniels was commander, [*168 and Henry Childs (the claimant), a lieutenant, under an asserted commission of the Oriental Republic of Rio de la Plata, and was carried into Margaritta, in Venezuela, and there condemned as prize to the captors, by the vice-admiralty court of that island. A sale is asserted to have been there made of her to the claimant, Francesche, after condemnation, for the sum of $30,000. She soon afterwards left Margaritta, under the command of Childs, who was the original prize-master, and arrived at Baltimore, the place of residence of Childs and Daniels, who are both American citizens; and her subsequent history, after seizure and delivery upon stipulation or bail to the claimant, shows, that she has continued exclusively under the control, management and direction of the same persons.

The order to produce the libel, or to account for the omission, was made upon the fullest consideration by the court. Whoever sets up a title under a condemnation, is bound to show, that the court had jurisdiction of the cause; and that the sentence has been rightly pronounced, upon the appli-

cation of parties competent to ask it. For this purpose, it is necessary to show who are the captors, and how the court has acquired authority to decide the cause. In the ordinary cases of belligerent capture, no difficulty arises on this subject, for the courts of the captors have general jurisdiction of prize, and their adjudication is conclusive *upon the proprietary
*169] interest. But where, as in the present case, the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality. The courts of another nation, whether an ally, or a co-belligerent only, can acquire no general right to entertain cognisance of the cause, unless by the assent, or upon the voluntary submission, of the captors. In such a case, it is peculiarly proper to show the jurisdiction of the court, by an exemplification of the proceedings anterior to the sentence of condemnation. And in all cases, it is the habit of courts of justice, to require the production of the libel, or other equivalent document, to verify the nature of the case, and ascertain the foundation of the claim of forfeiture as prize.

Notwithstanding the direct order for the production of the libel in this case, none has been produced; nor has the slightest reason been given, to account for its non-production. The general usage of maritime nations, to proceed, in prize causes, to adjudication in this manner, either by a formal libel, or by some equivalent proceeding, is so notorious, that the omission of it is not to be presumed on the part of any civilized government, which professes to proceed upon the principles of international law. How, then, are we to account for the omission in this case? If, by the course of proceeding in Venezuela, a libel does not constitute any part of the acts of its courts, that could *be easily shown. The neglect to show this, or in any
*170] manner to account for the non-production of the libel, if it exists, cannot but give rise to unfavorable suspicions as to the whole transaction. And where an order for further proof is made, and the party disobeys its injunctions, or neglects to comply with them, courts of prize are in the habit of considering such negligence as contumacy, leading to presumptions fatal to his claim. We think, in this case, that the non-production of the libel, under the circumstances, would justify the rejection of the claim of Francesche.

Upon the other point, as to the proprietary interest of Francesche, under the asserted sale, there is certainly very positive testimony of witnesses to the reality of the sale to him, and to his ability to make the purchase. And if this testimony stood alone, although it is certainly not, in all respects, consistent or harmonious, no difficulty would be felt, in allowing it entire judicial credence. But it is encountered by very strong circumstances on the other side; and circumstances will sometimes outweigh the most positive testimony. It is remarkable, that from the institution of this cause up to the present time, a period of nearly four years, Francesche has not, by any personal act, made himself a party to the cause. He has never made any affidavit of proprietary interest; he has never produced any document verified by his testimony; he has never recognised the claim made in his behalf; he has never, so far as we have any knowledge, advanced any money for the defence of it. Yet, the brig is admitted *to have been
*171] a valuable vessel, and was purchased, as is asserted, for the large sum

of $30,000. Upon an order of further proof, it is the usual, and almost invariable practice, for the claimant to make proofs, on his own oath, of his proprietary interest, and to give explanations of the nature, origin and character of his rights, and of the difficulties which surround them. This it is so much the habit of courts of prize to expect, that the very absence of such proofs always leads to considerable doubts. How are we to account for such utter indifference and negligence on the part of Francesche, as to the fate of so valuable a property? Is it consistent with the ordinary prudence which every man applies to the preservation of his own interest? Can it be rationally explained, but upon the supposition, that his interest in this suit is nominal, and not real.

This is not all. Immediately after the ostensible sale to Francesche, the Nereyda was put in command of Childs, an American citizen, who was an utter stranger to him, so far as we have any means of knowledge, and sailed for Baltimore, the home port of the Irresistible, and the domicil of Daniels and Childs. There is no evidence, that she has ever revisited Margaritta, and there is positive evidence, that she has, for the three last years, be in habits of intimacy with the ports of the United States. Where are the owner's instructions, given to the master, on his departure to Baltimore? Where is the documentary evidence of Francesche's ownership? Where are the proofs of his disbursements for the vessel, *during her subsequent voyages? From the time of her voyage to Baltimore, she has remained under [*172 the management of Daniels or Childs, or some other apparent agent of Daniels. She has undergone extensive repairs, her rig has been altered, heavy expenses have been incurred, and a new master has been appointed to her. Under whose authority have all these acts been done? Where are the orders of Francesche for these acts? Daniels has constantly been connected with the vessel; he has superintended her repairs; he or his agents have paid the bills; he is the reputed owner of the vessel; and he has been consulted as to the material operations. How can all these things be, and yet the real owner be a foreigner, a Venezuelian? How can he be presumed to lie by, without any apparent interposition in the destiny of his own vessel.

There are some other extraordinary circumstances in the case. The Nereyda arrived at Margaritta, under the command of Childs, as prize-master; and in a few days afterwards, Daniels arrived there with the Irresistible. The crew of the latter vessel ran away with her; and Daniels then sailed in the Nereyda, in pursuit of the privateer, and of course, on a voyage for his own peculiar benefit. How is this reconcilable with the supposition of a real sale to Francesche? What interest had the latter in regaining the Irresistible, or subduing a revolted crew? Why should his vessel, after that object was accomplished, have gone to Baltimore? Why should he intrust to strangers, for a voyage in which he had no apparent interest, *so valuable a property? If he made any contract for that voyage, why is not that contract produced? These are questions [*173 which it seems very difficult to answer, in any manner useful to the asserted proprietary interests of Francesche. Yet the facts, to which allusion is here made, are drawn from the further proof of the claimant; and this further proof, it is not immaterial to observe, comes, not from Margaritta, where Francesche resided, and for aught that appears, still resides; but from Laguayra, with which he is not shown to have any immediate connection.

Looking, therefore, to all the circumstances of the case, the fact of the unchanged possession of the captors, the habits of the vessel, the apparent control of the property by Daniels, the utter absence of all proper documentary proofs of ownership, instructions, disbursements, and even connection with her, on the part of the claimant, we think that there is the strongest reason to believe, that no real sale ever took place, and that the property remains still in the original captors, unaffected by the asserted transfer. The positive evidence is completely borne down by the strong and irresistible current of circumstantial evidence which opposes it. Upon both grounds, therefore, viz., the omission to produce the original libel, or account for its non-production, and the insufficiency of the proofs of proprietary interest, the court are of opinion, that the cause must be decided against the asserted claim.

*174] If this be so, then, as it is clear, that the original *outfit of the privateer Irresistible was illegal, upon the principles already established by this court, the property of the Nereyda remains in his majesty the King of Spain, and ought to be restored accordingly. The decree of the circuit court is, therefore, reversed, and the Nereyda is ordered to be restored to the libellant, with costs of suit.

Decree reversed.

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## Hunt *v.* Rousmanier's Administrators.

*Revocation of power by death.—Reformation of contract in equity.—Parol evidence.*

A letter of attorney may, in general, be revoked by the party making it, and is revoked by his death.

Where it forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or if not so made, is deemed irrevocable in law.

But a power of attorney, though irrevocable during the life of the party, becomes (at law) extinct by his death.

But if the power be coupled with an interest, it survives the person giving it, and may be executed after his death.[1]

To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power.

How far a court of equity will compel the specific execution of a contract intended to be secured by an irrevocable power of attorney, which was revoked by operation of law, on the death of the party.[2]

The general rule, both at law, and in equity, is, that parol testimony is not admissible to vary a written instrument; but in cases of fraud and mistake, courts of equity will relieve.

It seems, that a court of equity will relieve in a case of mistake of law merely.[3]

Hunt *v.* Rousmanier's Administrators, 2 Mason 244, 342, reversed.

*175] *Appeal from the Circuit Court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January 1820, for the loan of $1450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the repayment of the money. The sum requested

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[1] Hutchins *v* Hebbard, 34 N. Y. 24.

[2] See s. c. 1 Pet. 1.

[3] See United States Bank *v.* Daniel, 12 Pet. 32; Upton *v.* Tribelcock, 91 U. S. 50; Snell *v.* Insurance Co., 98 Id. 85.

was lent; and on the 11th of January, the said Rousmanier executed two notes for the amount; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier. The bill further stated, that on the 21st of March 1820, the plaintiff lent to the said Rousmanier the additional sum of $700, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged, that on the *6th of May 1820, the said Rousmanier died insolvent, having paid only $200 on the said notes. The plaintiff gave notice of his claim; and on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them, for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it. The defendants demurred generally, and the court sustained the demurrer; but gave the plaintiff leave to amend his bill. (2 Mason 244.) [*176

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry; and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed, that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument, the demurrer was sustained, *and the bill dismissed. From this decree, the plaintiff appealed to this court. The cause was argued at the last term. [*177

March 1st, 1822. *Wheaton*, for the appellant, stated, that the question in this case was, whether, under the agreement mentioned in the original and amended bill, by which the plaintiff was to have a specific security on certain vessels belonging to the defendants' intestate, for the repayment of a loan of money made to him in his lifetime, by the plaintiff, a court of equity will compel the defendants to give effect to that security, by joining in a sale of the vessels, or in any other manner? That the original intention and contract of the parties was, to create a permanent collateral security on the vessels, in the nature of, or equivalent to, a mortgage, is explicitly averred in the bill, and, of course, admitted by the demurrer. But it

is supposed by the court below, that they have failed to give effect to this their intention and contract, not from any mistake of fact, or accident, but from a mistake of law, in taking a letter of attorney with an irrevocable power to sell, instead of an absolute or conditional bill of sale. It is said, that this power, though irrevocable during the lifetime of the intestate, was revoked, on his death, by operation of law, not being a power coupled with an interest in the thing itself, but only coupled with an interest in the execution of the power, which is supposed to expire with the death of the party *178] creating it, in the same manner as a mere naked *power; and it is, therefore, concluded, that this is not a case where a court of equity will relieve.

1. But it is conceived, that this conclusion proceeds upon the idea, that the original contract between the parties was entirely merged and extinguished in the execution of the instruments which were executed, and which, by the accident of the death of one party, have turned out to be insufficient in point of law to give effect to that contract. Here was no mistake of law in the formation of the original contract. The law was fully understood in respect to all the facts on which the contract was founded. The loan, and the terms on which it was granted, were lawful; the intestate was the owner of the vessels, and legally competent to hypothecate them for his just debts; he did actually contract to give the plaintiff a specific, permanent lien upon them, as collateral security for the payment of the notes. The mistake is not in the facts, nor the law, nor in the contract, but in the remedy upon the contract. It was not necessary that the contract should be reduced to writing at all, or evidenced by any written instrument, for it is not within the statute of frauds, like an agreement for the sale of lands, &c. There was a complete legal contract, but, by the mistake of the parties, the mode selected for its execution is defective at law. This contract still subsists in full force, and is not extinguished and discharged by the writings, which have turned out to be inadequate means of giving effect to it. The contract was not for a power to sell, but for a specific security; not for a pledge of *179] the property, *which was to expire on the death of the party, but for a permanent lien upon it. It is an unquestionable rule of law, that all previous negotiations are extinguished and discharged by the contract itself; but the legal and just import of this rule it, that where the parties have definitively concluded a contract, all previous terms, propositions and negotiations concerning it, are merged in the contract itself; and this is equally true, whether the contract be in writing, or by parol only. It does not, therefore, follow, that the contract is extinguished, but the contrary. The contract clearly exists, and is supposed by all the authorities to exist; but is not to be affected by the negotiations of the parties which preceded its final completion.

The contract, in this case, is not merged and extinguished in the writing; the power looks to something future, to be done by virtue of it, and pursuant to the contract: the power is not the contract; it is a means by which a future act was to have been done, in fulfilment of the contract by one of the parties. It cannot be pretended, that the parties meant, that the power should embrace the whole contract between them, on both sides; neither does it. The agreement is not, and was not intended to be set out. The loan, the terms on which it was made, the negotiable notes, the assignment of the policy, all exist, inde-

pendently of the power, and are binding engagements. The power was intended as a means in the hands of the plaintiff to coerce the intestate to the performance of his agreement; it was not *intended as evidence at all, and, at most, it is evidence of part of the contract only; of the [*180 means which the parties had selected to carry into effect the contract, but which does not preclude a resort to other means, that having failed by accident. It cannot be denied that, according to the whole current of authorities, parol evidence is admissible to correct errors and mistakes in the written instrument. But how can this be reconciled with the notion, that the parol contract is extinguished by the writing? For, if the writing alone is the contract, all idea of mistake is utterly and necessarily excluded. The writing, in that case, would be the original, and to admit parol proof, would be, not to correct, but to alter the original. And perhaps, it may be well doubted, whether the power, in this case, can be considered as legal, direct written evidence of any part of the contract. If A. sells his ship to B., and gives him a power of attorney to take possession of her, it can hardly be considered, that this power is the direct written evidence of the contract, it is a power growing out of the contract, and given to aid its execution. The undisputed execution of the instrument by which the power was given, is evidence of its being a voluntary act, and by inference, proves, that it was agreed to be given, but is not the direct evidence of the contract itself. There is an essential difference between a contract to perform a particular thing, and the actual performance of that thing. Here, the contract was for a specific lien on the vessels, and to secure that lien, the power was given; it is evidence of an after-act *intended to be done under the con- [*181 tract, rather than direct evidence of the contract itself.

It must be admitted, that there was originally a contract for a lien, by mortgage, bill of sale, or some other mode; nor can it be successfully contended, that the power of attorney, when adopted, operated either as an extinguishment of the original contract, or as a waiver of all other security; thus narrowing down that instrument, the original contract for a lien, in the same manner, and with like legal effect, as if the original contract was for that identical instrument, and nothing more. The contract was for a legal and valid security on the vessels; and the parties, by adopting the power, did not change, nor mean to change, the contract, but to execute it in part. It was a mode, and the parties believed, a good and sufficient mode, of securing the lien, pursuant to the contract. It has now proved insufficient of itself. The contract, however, remains the same as at first, a contract for security, and wholly unexecuted; and if the particular instrument adopted by the parties to carry it into effect, proves insufficient for that purpose, it clearly entitles the injured party to the interposition of a court of equity.

2. It cannot be denied, that, in some cases, mistakes in a written instrument may be corrected by parol evidence. But it is said, by the court below, that this is not one of those cases; that here is no mistake of fact; that the power contains the very language and terms the parties intended it should contain, and that to grant relief in such a case, *would be in [*182 opposition to the whole current of authorities. But it is submitted, that such is not the rule upon this subject. It would seem to be an inference, from the decision of the circuit court, that no relief can be granted, unless something is omitted, which was expressly agreed to be inserted, or

something inserted more than was agreed ; that the errors to be corrected are such as have occurred in omissions or additions, in drawing up the written instrument, but not the errors in its legal import and effect ; that if the formal instrument, and the language, are used, which the parties intended should be used, no relief can be had, although that instrument does not contain the legal intentions of the parties. But, it is humbly conceived, that the distinction, as here applied, is not supported by the authorities. If too much is inserted, or something is omitted, in the written instrument, it may be corrected by parol evidence, because it does not contain the meaning and intention of the parties. And if every word, and no more, is inserted, which the parties designed to have inserted, yet, if those words do not embrace and import the meaning and intention of the parties, it is as clear a mistake and misconception as the other, and the contract is as effectually defeated by the mistake in the one instance as the other. The true foundation for the admission of parol evidence, is, that the instrument does not speak the legal, though it may the verbal, language of the parties ; it does not speak the legal import of their contract, as they intended it should.

*183] And *wherever the intention of the parties will be defeated by a defect in the instrument, that defect may be proved and corrected by parol evidence, whether it arises from omission or addition, or from insufficient and inapt language and terms of the instrument. When it is satisfactorily proved by parol, that there is a mistake in the instrument, as to its provisions, or a misconception of its legal import and effect, so that the intentions of the parties will, in either instance, be defeated, it is clearly a case of equitable cognisance, and a subject of equitable jurisdiction and relief. 2 Freem. 246, 281 ; Newland on Contracts, 348, 349 ; 3 Ves. jr. 399 ; 1 Johns. Ch. 607 ; 1 Ves. sen. 317, 456 ; 1 Bro. C. C. 341 ; 1 P. Wms. 277, 334 ; 2 Vern. 564 ; 3 Atk. 203 ; 2 Eq. Cas. Abr. 16 ; Sudg. Vend. 481 ; 3 Atk. 388. ; 2 Ves. jr. 151 ; 1 Ch. Rep. 78 ; 2 Vent. 367 ; 1 Vern. 37.

3. Again, the plaintiff is entitled to the benefit of his lien, upon the ground, that the contract has been, on his part, fully performed ; and even if no writing whatever had been executed, he would be entitled to the performance of it by the other party. Part performance has always been considered as obviating the necessity of written evidence, and gives to the performing party the benefit of specific relief against his negligent and faithless adversary. It has, indeed, been questioned, in several cases (arising under the statute of frauds, and touching an interest in lands), whether the payment of a small part of the consideration-money, would take the case out of the statute, as amounting to part performance. But in all, or

*184] *nearly all, these cases, the payment was of what is called earnest money, to bind the bargain, and not in the nature of a substantial, beneficial payment of part of the consideration-money. But even if it be a principle, that part payment does not exempt the case from the provisions of the statute, yet, it is conceived, that the rule does not extend to a case where the contract stated in the bill is distinctly admitted, and where the full consideration has actually been advanced and paid. Wherever the party has completely and fully executed his part of the contract, whether by payment of money, or other acts, the rule in equity is, I apprehend, almost universal, to coerce the other party to a specific execution of the contract on his part. Newland on Cont. 181 ; 1 Ves. 82 ; 7 Ibid. 341 ;

3 Atk. 1; 2 Ch. Cas. 135; 4 Ves. 720, 722; 1 Vern. 263; 3 Ch. Rep. 16; Tothill 67; Roberts 154; 1 P. Wms. 282 277; 1 Madd. Ch. 301; 2 Eq. Cas. Abr. 48.

As to the cases which are supposed to lay down a general and inflexible rule, that a mistake of parties as to the law, is not a ground for reforming the instrument, they will all be found to resolve themselves into cases, where there was no other or previous agreement, than what was contained, or meant to be contained, in the instrument itself. Thus, in a leading case on this subject, *Ld. Irnham* v. *Child*, 1 Bro. C. C. 91, where an annuity was granted, but no power of redemption contained in the deed, it being erroneously supposed by the parties, that it would make the contract usurious, Lord THURLOW refused *to relieve. But here, the whole contract was unquestionably merged in the deed; and therefore, the [*185 Lord Chancellor refused to add a new term to the agreement, upon the ground, that it was intentionally omitted by the parties, upon a mistake of the law. But in the case now before the court, there was no intentional omission in the instrument, upon a mistake of law or fact, for the instrument was never meant by the parties, to contain the terms of the contract. It was merely intended as an instrument or means, to carry the contract into effect, and I have already endeavored to show, that the contract might well subsist, and be carried into effect without it. Not so with the grant of the annuity in *Lord Irnham* v. *Child*. But there are many cases in the books, where the party has been relieved from the consequence of acts founded on ignorance of the law (*Landsdowne* v. *Landsdowne*, Mosely 364; *Pusey* v. *Desbouvrie*, 3 P. Wms. 315; *Pullen* v. *Ready*, 2 Atk. 591); and I am unable to reconcile these cases with the idea, that there is any universal rule on this subject, still less that it can be applied to the present case.

4. Lastly, the power was unquestionably intended by the parties to be irrevocable for ever, and to transfer an interest in the thing itself, or the authority of disposing of it for the benefit of the plaintiff; and even admitting, *argumenti gratiâ*, that this intention has failed at law, by the death of the party, still, it is insisted, that a *court of equity will now compel the personal representatives to do what it would have compelled [*186 their intestate to do, if the intention had been defeated by any other accident, during his lifetime. It was an equitable lien or mortgage; and such a lien will be enforced in equity, against the claims of all other creditors, although imperfect at law. 3 Johns. Ch. 315. So too, an agreement for a mortgage, and an advance of money thereon, binds the heir and creditors. 3 Ves. 582; 1 Atk. 147. And a deposit of title deeds, even a part of the title papers, upon an advance of money, without a word passing, creates an equitable mortgage. *Russel* v. *Russel*, 1 Bro. C. C. 269. *A fortiori*, ought an express agreement for a lien, to be specifically enforced in equity. The power is one coupled with an interest, not merely in the execution of the power, but in the thing itself, at least, in the view of a court of equity; and the only reason why it is not effectual at law, to secure the specific lien stipulated, is on account of its being made in the form of a letter of attorney, authorizing the plaintiff to sell in the name of the grantor. Even admitting, that such a power cannot be executed, *qua* power, after the death of the grantor; still, the instrument containing the power recites, that it was given as collateral security for the payment of the notes; and in case of

loss of the vessel, or freight, authorizes the plaintiff to receive the amount to become due on the policy of insurance *on the same, which was *187] also assigned. Here, then, is an equitable lien or mortgage, and equity will now compel the administrators to put the party in the same situation as if such lien or mortgage had been perfected. *Burn* v. *Burn*, 3 Ves. 573.

*Hunter*, for the respondents, stated, that the first question was, whether the letters of attorney were powers coupled with an interest, or only personal authorites, which expired with the intestate? This question was fully investigated by the learned judge in the court below, and determined in favor of the defendants. "In his judgment, these were not powers coupled with an interest, in the sense of the law. They were naked powers, and as such, by their own terms, could be executed only in the name of Rousmanier, and therefore, became extinct by his death." This question, arising on the original bill, seems now to be abandoned by the plaintiff's counsel, and it is, therefore, unnecessary to argue it anew. The court will be in possession of the able opinion referred to; it exhausts the subject, and it would be useless to repeat, and presumptuous to add to, or vary its arguments. A single authority, however, may be added, on account of the coincidence of the facts in the case, to that now under discussion. "One being indebted to B., makes a letter of attorney to him, to receive all such wages as shall *after become due to him, then goes to sea, and dies; this authority *188] is determined, so that he cannot compel on account of wages, if any due at making the letter of attorney, much less of what after became due, but the administrator must pay according to the course of the law." *Mitchel* v. *Eades*, Prec. in Ch. 125.

2. As to the amended bill, it entirely disappoints the liberal intentions of the judge in granting it. He said, that courts of equity would relieve where the instruments have been imperfectly drawn up by mistake, or where, by accident, the parties have failed in executing their agreements. The amended bill refers neither to accident or mistake, nor to any facts tending to prove their existence. It excludes and negatives the supposition of accident or mistake. The whole matter (it appears) was done upon advice, with the assistance of counsel learned in the law. The security which the plaintiff ultimately received, was that which he preferred. He could, at the time, have taken that kind of security he seems now to desire. He rejected the offer of a mortgage, or bill of sale, and elected to take these powers of attorney. They were the most convenient for both parties, and so far was either party from being surprised or mistaken, that what was done appears as the judicious result of mutual and advised deliberations. Neither party had reference to the death of the other; it may be admitted, that it was the death of Rousmanier, which frustrated Hunt's expectation of indemnity; but where *an event happens, without default on the other side, *189] although expectation may be frustrated, and that expectation grounded, too, on the true intent of the parties, yet equity will not give relief. 1 Ves. 98–9; 2 Atk. 261. The case presents no mistake or misconception. Fraud is not suggested; and it is admitted, there is no mistake either of omission or addition. It is clear, that the parties intended, not an ordinary sale, or assignment of the vessels in question; yet the plaintiff

seeks to have the same effect produced by his powers of attorney, as if they were grand bills of sale or mortgages.

In the cases that have arisen upon the redeemability of annuities, where the parties, by mutual and innocent error, left out of the deed a provision for redemption, under an idea that, if inserted, it would make the transaction usurious, there being no charge of fraud in the omission, the court would not grant relief. They could see no mistake. Lord ELDON says, the court were desired to do, not what the parties intended, but something contrary thereto. They desired to be put in the same situation as if they had been better informed, and had a contrary intention. It is admitted, that the plaintiff's security was to be by powers of attorney; and why should the court now turn them into bills of sale, or mortgages, or any security equivalent to these, but different from those originally and deliberately taken. See Phillips' Evid. 451; 6 Ves. 332; 1 Bro. C. C. 92; 3 Ibid. 92. *It was the fault of the plaintiff, that he waived taking a mortgage or bill of sale; and no maxim of equity is better established than [*190 this, "that no man is entitled to the aid of a court of equity, when the necessity of resorting to that court is created by his own fault."

It seems to be admitted, that there was no mistake in point of fact; it is, in substance, urged, that there was a mistake in point of law; both parties, assisted by counsel, were mistaken in supposing a defeasible to be an indefeasible security; that powers of attorney, deriving their sole force from the life of the constituent, were perpetually obligatory, though death, and the law, decreed otherwise. No case is cited, which has gone the length of deciding, that a transaction, taintless of fraud, undisturbed by accident, and unaffected by mistake in fact, has been rescinded and reversed, because the parties innocently misconceive the law. All the cases are of a contrary tendency. Every party stands upon his own case, and his counsel's "wit." In the case of *Pullen* v. *Ready*, 2 Atk. 587, 591, Lord HARDWICKE, in substance, says, if parties act with counsel, the parties shall be supposed to be acquainted with the consequences of law, and nothing is more mischievous, than to decree relief for an alleged mistake, in a matter in which, if there was any mistake, it was that of all the parties, and no one of them is more under an imposition than the other. Every man, says Mr. Chancellor KENT, *must be charged, at his peril, with the knowledge of the law; there is no other principle that is safe or practicable in the common inter- [*191 course of mankind. Courts do not undertake to relieve parties from their acts and deeds fairly done, on a full knowledge of facts, though under a mistake of the law. *Lyon* v. *Richmond*, 2 Johns. Ch. 51, 60. I never understood, says Lord ELDON (*Underhill* v. *Horwood*, 10 Ves. 209, 228), that though this court, upon the ground of a mistake (in point of fact), would reform an instrument, that, therefore, it would hold, that the instrument has a different aspect from that which belongs to it at law. Lord THURLOW, long before, refused to add a new term to an agreement, upon the ground, that it was intentionally omitted upon a mistake of the law. *Irnham* v. *Child*, 1 Bro. C. C. 91. And the master of the rolls subsequently adhered to this doctrine. *Lord Portmore* v. *Morris*, 2 Bro. C. C. 219; *Marquis of Townsend* v. *Stangroom*, 6 Ves. 328, 382. It was substantially upon this view of the case, that the learned judge in the court below decided, that the demurrer to the amended bill was well taken. "He could peceive no ground

for the interference of a court of equity. There was no mistake in the execution of the instruments; they expressed exactly what the parties intended they should expeess; this security was the choice of the plaintiff; in the event,.it has turned out unproductive; but this is his misfortune, and affords no ground to give him a preference over other creditors." As a creditor, he
*192] obtains his share—*legal payment of his note. The administrators, as trustees for all the creditors, are bound to exert themselves to prevent a priority which they believe to be unsanctioned by law. They contend for equality, they act on the defensive; they are solicitous to avoid an evil, they have no hope of receiving a gain; and they who are so placed (*de damno evitando certantes*) may take advantage, if it may be so called, of the error of another. This, says Lord Kames, is a universal law of nature, and is especially applicable as to creditors. Principles of Equity 26, 27, 162.

The reasoning of the counsel for the appellant, has no reference to the facts of the case. It strips the case of all its facts and circumstances, and goes upon the general intention of the deceased intestate to give his creditor a permanent and specific security. This general intention was consummated and ascertained by a particular and detailed execution, in the very mode which the creditor preferred. The powers of attorney are now regarded by the plaintiff's counsel as non-existent. To give motion and progress to their argument, they would remove this obstruction; and to do this, they are obliged to attempt (merely human as they are) that which the schoolmen long ago (without impiety) said was impossible even with Deity: *Quod factum est, Deus ipse non potest revocare.* But, at first, the powers of attorney were resorted to, and set up as charging the defendants, and that
*193] upon their own strength and validity, without the *suggestion of mistake or insufficiency; they were the foundation of the original bill. Having chosen to begin his pursuit on the writing exclusively, and in perfect confidence of its validity, is it competent to the plaintiff, by an amendment to his bill, to resort to verbal negotiations, merely introductory of the final settlement and consummate act between the parties, in which all negotiations were merged, beyond the power of revival? The existence of the powers is at first not only asserted, but they are endowed with a continued existence beyond the life of their author. As this is found to be impossible, they are now to be considered as nothing; far from being a specific performance of the general intention, they are not the contract, nor any evidence of it. They are overthrown, for the purpose of erecting upon their overthrow a firmer fabric of obligation, out of loose equities and verbal negotiations. There seems, in this course, to be too much inconsistency for sound and safe reasoning. Administrators must, necessarily, be ignorant of the private verbal communications of the parties, and they are left defenceless, and liable to impositions which cannot be detected nor repelled. The case of *Haynes* v. *Hare*, determined by Lord Loughborough (1 H. Bl. 664), is, as to many of its facts, and all its points of law, similar to the one now under consideration. The court then said, there is nothing so dangerous as to permit deeds and conveyances, after the death of the parties to them, to be
*194] liable *to have *new terms* added to them, on the disclosure of an attorney, in a matter in which he could meet with no contradiction. See *Poole* v. *Cabanes*, 8 T. R. 328.

3. Even if we could suppose the existence of a mistake, yet a review of

all the leading cases would not furnish one, in any degree analogous to the present, in which relief has been granted. In the case of *Graves* v. *Boston Marine Insurance Company*, the plaintiffs, in the bill, grounded themselves on the allegation, that their case was but the common one of a mistake in using inapt words to express the meaning of the parties. (2 Cranch 430.) The proof, as to the intention of one of the parties, was perfectly satisfactory, and as to the other, it pressed so heavily on the court, that they acknowledged there were doubts and difficulties in the case. But they decided against relief; they shrank from the peril of conforming a written instrument to the alleged intention of the party plaintiff, upon a claim not asserted until an event made it his interest so to do. In a case between the original parties, unaffected by death or insolvency, where no new and third party sought mere equality of condition, the court appeared to have acted upon the principle, that they had before them a written instrument, not in itself doubtful, and they repelled the recourse to parol testimony, or extraneous circumstances, to create a doubt, where the instrument itself was clear and *explicit. See *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 282; *Souvelage* v. *Arden*, Ibid. 252. The doctrine of the cases under the statute of frauds, applies *à fortiori*, for, by the common law, an attorney must be made by deed. Co. Litt. 401; 2 Roll. Abr. 8; 1 Bac. Abr. 314, tit. Authority. [*195

4. But again, admitting, *argumenti gratiâ*, the existence of a mistake, can a plaintiff claim, on that account, relief, admitting that a defendant could. A defendant, in a proper case, is privileged to show a mistake, as matter of defence, and for the purpose of rebutting the plaintiff's equity; but no English case can be shown, where the plaintiff has been allowed to give parol evidence varying a written instrument on the ground of mistake. Phillips' Evid. 454; *Woolan* v. *Hearn*, 7 Ves. 211; *Higginson* v. *Clowes*, 15 Ibid. 516; *Clinan* v. *Cooke*, 1 Sch. & Lef. 38, 39, determined by Lord Redesdale. These cases, of the highest authority, and determined on great consideration, show the difference of right and condition, as to plaintiff and defendant, of evidence offered for the different purpose of resisting a decree, and that offered for obtaining it. The difference exists in the code of every civilized nation. *Favorabiliores rei potius quam actores habentur*, is the maxim of the civil law; *potior est conditio defendentis*, is the familiar language of our own. These, and other similar maxims, are of universal prevalence, and uncontradicted reception, and equally applicable in concerns civil and criminal. Both parties are the object of equal protection; but to make that *protection equal, a certain position and condition is assigned to the defendant; he is so placed, that he may not be overcome by surprise; the law seeks for actual, not nominal, reciprocity; the relative condition of the parties enters into the account; even-handed justice first corrects the balance, by making the proper allowances, before she weighs the merits of the cause. Looking to the statute of frauds, or to the pre-existing rule of the common rule (*à fortiori*, applicable in the instance of a power of attorney, which cannot be but with deed), we must conclude, that, in a case like this, the defendants are not to be charged, unless they have agreed to be so, by writing; and if there be a writing, it excludes a reference to what may have been the previous talk or negotiation, the original proposition, or the rejected offer. There is a writing or deed, which [*196

does not charge the present defendants, and there the case ought to end. It is not necessary to invoke the aid of arguments drawn from public policy, or to exhibit the sad inconveniences that would result from the plaintiff's success. The impolicy of permitting a transaction of the kind exhibited by the plaintiff's bill, is obvious. It is contrary to what ought to be the openness of commercial dealing, and to the entire spirit of the commercial laws, that requires publicity in transfers of property, demands that possession should accompany the grant, permits the control of the possessor to prove the ownership, and avoids or limits secret trusts and liens. Secret letters of
*197] attorney, granting a power to sell, especially in the case of ships, *without delivery, without a change of papers, without notice to the government, or to the mercantile public, are fraught with dangerous consequences, and could hardly be supported as against creditors, though the life of the constitutent still sustained their existence and efficacy. Upon the whole, it is submitted, that it is the aim of the plaintiff's counsel unduly to amplify equitable jurisdiction, and to extend an unwarrantable relief, upon the ground of mistake, in a case where no mistake exists, and where, even if it did, his right or faculty of availing himself of it is denied. "*Optima est lex qua minimum reliquit arbitrio judicis; optimus judex qui minimum sibi.*"

*Wheaton*, for the appellant, in reply, first remarked, that the whole of the argument submitted by the counsel for the respondents, proceeded upon a mistaken assumption, that the entire contract between the parties was merged in the written power, and that this instrument is the only admissible evidence of the terms and conditions on which the loan was made. But the demurrer admits all the facts stated in the original and amended bill, as if the same were proved by parol testimony; all the terms and conditions of the contract were not intended to be reduced to writing by the parties, nor are they required by any positive law to be so expressed; and the power itself was merely incidental to the contract, and intended, like the transfer of the policy of insurance, as a means of carrying it into effect. It might as
*198] well be contended, that the transfer of the policy *was the entire contract, as that the letter of attorney embraced all its terms and conditions. The true question is, whether, under all the circumstances of the case, an equitable lien was created, which a court of chancery will carry into effect?

Nor was it meant to be admitted, that this was not a power coupled with an interest, in the sense of the law. It was merely meant to insist, that even if that point were conceded, it formed no obstacle to the interference of a court of equity, in the present case. But it is, with very great deference, submitted, that this is not a mere naked power, according to the definition given of it by Chief Justice (now Chancellor) KENT. *Bergen* v. *Bennett*, 1 Caines Cas. 1. That learned and accurate lawyer says, "a power simply collateral, and without interest, or a naked power, is, where, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor hath by the instrument creating the power, any estate whatever; but when a power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land." In the text of Co. Litt. 1, 66, the deed of feoffment was made

to one person, and a letter of attorney to deliver seisin, to another, who was a mere stranger. But here, the power is given by a debtor to his creditor, and is expressly declared to be given as collateral security for the debt. And in the case cited from Precedents in Chancery 125, the power *did not purport, on its face, to be given as a collateral security, nor was there any evidence of a contract for a lien or security on the wages. [*199

Nor do we proceed solely on the ground of a mere mistake, either in fact or law. We ask to have the contract executed, in good faith, by the personal representatives of the debtor, precisely as he would have been compelled to carry it into effect, if its execution had been prevented by any other accident than that of his death. It is perfectly clear, that both parties intended to create a specific lien; and the lien is supposed to be as valid now, as in the life time of the intestate; for it is submitted to be a well-established principle of equity (with very few exceptions, of which this case is not one), that when the party is holden to the specific execution of a contract, his personal representatives are equally holden. If the power is now defective in securing a lien, it was equally so in his lifetime. No legal or equitable right is, in this respect, lost by his death. 2 Madd. Ch. 112; 1 Ibid. 41; 4 Bro. C. C. 472; 17 Ves. 489.

The respondent's counsel assumes it to be a settled doctrine of equity, that a plaintiff is never permitted to show, by parol proof, that there has been a mistake or misapprehension in a written contract, the execution of which he seeks to enforce; and that the rule which permits the introduction of such proofs, is exclusively confined to the defendant, against whom the contract is sought to be enforced. It is true, that Lord REDESDALE, *in *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, seems to be of that opinion; and in a few other cases, relief has been denied on that ground. But all these were cases arising under the statute of frauds, and nearly all of them respected an interest in lands; and in all such cases, parol proof, when offered to vary or materially affect a written contract, is certainly received with great circumspection and reserve. It is, however, submitted, that the rule stated by the respondent's counsel, is not founded in principle; and that parol evidence to show mistakes in written instruments, is, in equity, equally open to both parties. And it will be found, that in almost all the cases where the plaintiff has failed in seeking the aid of parol proof, it was not because any such rule was interposed, but because his evidence of the supposed mistake was not clear and satisfactory. The case referred to in 2 Cranch 419, is of this description. The court, in that case, would have afforded the plaintiff relief, if he had been able to prove the mistake which he alleged in the policy. The same principle is adopted in 2 Johns. Ch. 274, 630; and if there were any doubts growing out of some of the English decisions, they would be dissipated by the learned and able investigation of Mr. Chancellor KENT, 2 Johns. Ch. 585, where all the authorities are carefully reviewed, and it is clearly established, that no distinction is made, in this respect, between the party plaintiff or defendant, but that the benefit of the rule is impartially extended to both. [*200

*The cause was continued to the next term, for advisement. [*201

March 14th, 1823. MARSHALL, Ch. J., delivered the opinion of the court.—The counsel for the appellant objects to the decree of the circuit

court on two grounds. He contends, 1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry. 2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

1. We will consider the effect of the power of attorney. This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable, in terms, or if not so, is deemed irrevocable in *law. 2 Esp. 565.
*202] Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think, it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (§ 66), by Lord Coke, in his commentary on that section (52 *b*), and in Willes' Reports (105 note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in *Combes' Case*, 9 Co. 766. In that case, it was resolved, that "when any has authority, as attorney, to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed
*203] by himself. A conveyance *in the name of a person, who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale, in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary, that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should

purport to be executed by him, even by attorney, after his death; for, the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire, what is meant by the expression, "a power coupled with an interest?" It is an interest in the subject on which the power is to be *exercised? or is it an interest in that which is pro- [*204
duced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of *the person making it. But if the interest, or [*205
estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected, without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A., to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the

contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A., to sell for the use of B., inserted in a conveyance to A., of the thing *206] *to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised, after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title, not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not, as the first case put would suppose. We know, that a power to A., to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given had no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.[1]

The general rule, that a power of attorney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends *207] *to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.[2]

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death. It remains to inquire, whether the appellant is entitled to the aid of this court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the Nereus and Industry to the payment of the money advanced by the plaintiff, on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this court will enable it to carry this intent into execution, when the instrument relied *208] on by both parties has failed to accomplish its object. The respondents insist, that there is no defect *in the instrument itself; that

[1] See Cassidy v. McKenzie, 4 W. & S. 208; Wells v. Sloyer, 1 Clark (Pa.) 516.
[2] See Taylor v. Benham, 5 How. 233.

it contains precisely what it was intended to contain, and is the instrument which was chosen by the parties, deliberately, on the advice of counsel, and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony. The counse, for the appellant contends, with great force, that the cases in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain or vary it, by parol evidence. That in this case, the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument, to enable the party to have the benefit of it, leaving the agreement still in full force, in its orignal form. That this parol agreement, not being within the statute of frauds, would be enforced by this court, if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the court will enforce the agreement against general creditors. This argument is entitled to, and has received, very deliberate consideration.

The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself, in the form intended by both the parties? The bill states an offer on the part of Rousmanier *to give a mortgage on the vessels, either in the usual form, or in the form of [*209 an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is, generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessels; and it alleges, that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and a irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans. This is the case made by the amended bill; and it appears to the court, to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

It is contended, that the letter of attorney does not contain all the terms of the agreement. Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the *agreement stipulated. The agreement consisted [*210 of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the Nereus and Industry, on the part of Rousmanier. The money was advanced, the notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as much an execution of that part of the agreement which stipulated a collateral

security, as the notes are an execution of that part which stipulated that notes should be given.

But this power, although a complete security, during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose, that the power would, in law, expire with Rousmanier. The question for the consideration of the court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article; and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them; can a court of equity direct a new security of a different character to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them? This question has been very elaborately argued, and every case has been cited which could be *211] *supposed to bear upon it. No one of these cases decides the very question now before the court. It must depend on the principles to be collected from them.

It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument. This rule is recognised in courts of equity as well as in courts of law; but courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention. In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court; and that mistake is in the law. The fact is, in all respects, what it was supposed to be. The instrument taken, is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

In general, the mistakes against which a court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet *212] some of them bear a considerable *analogy to that under consideration. Among these, is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be, that the bond was joint, from a mere mistake of the law, and that the court will relieve against this mistake, on the ground of the pre-existing equity, arising from the advance of the money, it must be admitted, that they have a strong bearing on the case at bar. But the judges in the courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In *Simpson* v. *Vaughan*, 2 Atk. 33, the bond was drawn by the obligor himself, and under circumstances which induced the court to be of opinion, that it was intended to be joint and several. In *Underhill* v. *Horwood*, 10 Ves. 209, 227, Lord ELDON, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says, "the

court has inferred, from the nature of the condition, and the transaction, that it was made joint, by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation."

All the cases in which the court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supppsed mistake in drawing the bond. It was not until *the case of *Sumner* v. *Powell*, [*213 2 Meriv. 36, that anything was said by the judge who determined the cause, from which it might be inferred, that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the master of the rolls (Sir W. GRANT) indicated very clearly an opinion, that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added, "so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation." Had this case gone so far as to decide, that "the credit previously given" was the sole ground on which a court of equity would consider a joint bond as several, it would have gone far to show, that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far; it does not change the principle on which the court had uniformly proceeded, nor discard the idea, that relief is to be granted, because the obligation was made joint, by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will not be presumed by the court, in a case where no equity existed antecedent to the obligation, where no advantage was received *by, and no credit given [*214 to, the person against whose estate the instrument is to be set up. Yet, the course of the court seems to be uniform, to presume a mistake, in point of fact, in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required; the existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion, that the bond was made joint, from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

The case of *Landsdowne* v. *Landsdowne* (reported in Mosely), if it be law, has no inconsiderable bearing on this cause. The right of the heir-at-law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title. The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and if he was ignorant of anything, it was of the *law, which gave him, as [*215 eldest son, the estate he had conveyed to a younger brother. Yet he

was relieved in chancery against this conveyance. There are certainly strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity. In the case of *Lord Irnham* v. *Child*, 1 Bro. C. C. 91, application was made to the chancellor to establish a clause, which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument, by consent. It is true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say, how much has been the influence of that statute on them.

The case cited by the respondent's counsel from Precedents in Chancery, *216] is not of this description; *but it does not appear from that case that the power of attorney was intended, or believed, to be a lien In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that the should create, a specific lien and security on the said vessels." We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a court of equity is incapable of affording relief. The decree of the circuit court is reversed; but as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directs the cause to be remanded, that the circuit court may permit the defendants to withdraw their demurrer, and to answer the bill.

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Rhode Island, and was argued by counsel: on consideration whereof, this court is of opinion, that the said circuit court erred, in sustaining the demurrer of the defendants, and dismissing the bill of the complainant: it is, therefore, *217] decreed and ordered, that the decree of the said circuit *court in this case, be and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.

GOLDSBOROUGH, Plaintiff in error, *v.* ORR, defendant in error.

*Independent covenants.—Attachment.*

Where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other.[1] Application of this principle to the peculiar circumstances of the present case.[2]

Under the act of assembly of Maryland of 1795 (c. 56), if the defendant appears and dissolves the attachment, a declaration and subsequent pleadings, are not necessary, as in other actions, but the cause may be tried upon a short note.

It seems, under the same act, that an attachment will not lie, in a case *ex contractû*, for unliquidated damages, for the non-delivery of goods; but where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, an attachment will lie.

ERROR to the Circuit Court of the District of Columbia.

February 7th and March 15th, 1822. THIS cause was argued at the last term by *Lear*, for the plaintiff in error, (*a*) and by *Jones*, for the defendant. (*b*)

*March 19th, 1823. STORY, Justice, delivered the opinion of the court.—This is a case originating under the attachment act of Maryland of 1795 (ch. 56), and brought to this court upon a writ of error to the circuit court of the district of Columbia, for Washington county. The suit was brought by Orr, the defendant in error, on what is technically called a short note, expressing the true cause of action, as follows: [*218

Howes Goldsborough, Esq.

To Benjamin G. Orr, Dr.

| | | |
|---|---|---|
| May 5, 1818. | To the west house of four, on P street, south, between 4½ street, west, and Water street, with the four lots adjoining to the west . . . . | 4500 00 |
| | To the house on P street, south, adjoining the above house on the east side, and lot No. 21, on O street, south, | 4500 00 |
| February 15, 1819. | To lots Nos. 9 and 10, and part of 11, containing ——— square feet, 12½ cents per foot, . | 1906 00 |
| | | $10906 00 |
| By amount of your account up to 17th of April 1819, | . | 7896 11 |
| | | $2919 89 |

Errors excepted, 4th of June 1819.

BENJAMIN G. ORR.

(*a*) Citing 1 Jac. Law Dict. 160; 3 Har. & McHen. 347; 1 Har. & Johns. 491; 6 East. 614; 1 H. Bl. 863; 3 East 93.

(*b*) Citing 1 Com. Dig. 598, B.

[1] Railroad Co. *v.* Howard, 13 How. 68; Grant *v.* Johnson, 5 N. Y. 247; Edgar *v.* Boies, 11 S. & R. 445; Stevenson *v.* Kloppinger, 5 Watts 420.

[2] Covenants are to be construed as dependent or independent, according to the intention of the parties and the good sense of the case; technical words must give way to such intent. McCrelish *v.* Churchman, 4 Rawle 26; Bredin *v.* Agnew, 3 W. & S. 300; Wright *v.* Smyth, 4 Id. 527. And see Lippincott *v.* Law, 68 Penn. St. 314; Fame Ins. Co.'s Appeal, 83 Id. 396

*The original defendant, Goldborough, appeared and dissolved the attachment, by putting in special bail, and pleaded *non assumpsit*, upon which issue was joined, and a verdict found for the plaintiff for the above balance of $2919.89, with interest. A bill of exceptions was taken at the trial, in substance as follows:

The plaintiff in this case, to support the issue joined, on his part offered in evidence the account marked A, which is as follows, to wit:

Howes Goldsborough, Esq.

Bo't of Benjamin G. Orr,

| | |
|---|---|
| May 5, 1818. The west house of four houses on P street, south, between 4½ street, west, and Water street, with four lots adjoining to the west, . . . . | 4500 00 |
| Cr. | |
| By his note, payable to A. J. Comstock, on the 1st of February 1819, . . . . . | 1190 24 |
| By do., payable to A. J. Comstock, on the 1st of August 1819, . . . . . | 1238 09 |
| | $2428 33 |
| To balance due Benjamin G. Orr, payable in lumber, at usual lumber-yard prices, of which some part has already been delivered to his orders, . . . . | $2071 6 |

BENJAMIN G. ORR,
H. GOLDSBOROUGH,

Washington, May 5, 1818.

*220] *The agreement marked B, which is as follows, to wit:

It is agreed between Benjamin G. Orr, of the city of Washington and Howes Goldsborough, of the state of Maryland, as follows, to wit: The said Orr sells to said Goldborough the three-story brick house adjoining the one now in the possession of Commodore Rodgers, on P street, south, with the coach-house and stable adjoining, and the lot on which they stand, being numbered three, and a lot numbered twenty-one, on O street, south, for $4500. The said Orr also sells to said Goldsborough, lots Nos. 9 and 10 and part of 11, in the same square, with the water-privilege thereto belonging for twelve and a half cents for each square foot which they contain, all of which sales are to be paid for in lumber, in the city of Washington, at the usual lumber-yard prices; one-half thereof to be deliverable the present year, the other half in the year 1819, as it may be wanted by the said Orr. The said Orr further agrees to take of the said Goldsborough as much more lumber, which added to the amount of the above property, when calculated in money, as will make the whole amount to $10,000. And for such further amount, to give his note, payable on the 15th day of February, in the year 1819, to the said Goldsborough. The titles to be made on demand, and the delivery of the lumber to be guarantied by Commodore Rodgers.

Washington, May 5th, 1818.

BENJAMIN G. ORR,
H. GOLDSBOROUGH.

*I do hereby guaranty, that H. Goldsborough shall deliver the lumber mentioned in the within contract, on condition that B. G. Orr, on his part, complies with the stipulation on his part, also mentioned in this said instrument of writing.

JOHN RODGERS.

And the receipt marked C, which is as follows, to wit:

Received of Benjamin G. Orr, his note, payable on the 15th day of February 1819, for the sum of $3594, in compliance with his agreement, dated the 5th day of May 1818.

H. GOLDSBOROUGH.

And further proved by a witness, that late in the winter, or in the spring of 1819, the defendant refused to deliver any more lumber to the orders of the plaintiff; the balance of lumber due under said contracts being duly demanded of the defendant, by agent of the plaintiff; and it was admitted, that the said houses and lots mentioned in said contracts, had been duly conveyed according to agreement. And the defendant thereupon proved, that he delivered lumber to the orders of the plaintiff to the amount of $7986.11, according to a particular account thereof, which was produced, which includes the same amount of $2428.33, mentioned in the first account A, the notes therein mentioned being payable in lumber, and the lumber given *in discharge of the same, being charged in the general account B; and that he delivered lumber to the plaintiff's order, whenever called [*222 for, until the 15th of February 1819, when the note filed in the cause, and mentioned in this defendant's receipt, fell due; that then, the said note not being paid by plaintiff, the defendant refused to deliver any more lumber, and the plaintiff requested said defendant to give him further time, until some day in the April following, to pay the said note (at which time he promised to take it up), and to continue the delivery of lumber to his orders, as he might want it, until that day; and the witness, who was the defendant's agent, would have gone on to deliver the whole quantity, if it had been called for, before the time limited as aforesaid for the payment of the note, in April, not having been restricted by defendant's orders as to quantity; and that on the said day of April, the plaintiff again made default in paying the said note, and the defendant then refusing to deliver any more lumber, this suit was brought. If they believe the facts above stated to be true, the plaintiff is not entitled to recover in the suit. Which direction the court refused to give. To which refusal, the defendant, by his counsel, excepts, &c.

And the parties have since annexed to the record, as a part thereof, the following explanatory statement:

| | | |
|---|---|---|
| Whole amount of the purchase-money of the house and lots sold by the agreement, B, viz: | | |
| *House, with coach-house, &c., and lot 21, . . | $4500 | [*223 |
| Lots 9, 10, and part of 11, at 12½ cents per square foot, 1906 | | |
| | | $6406 00 |
| Do. for the other house and lots sold as *per* account A, | | 4500 00 |
| Total amount for both houses, and all the lots under both contracts . . . . . | | 10,906 00 |

| | | |
|---|---|---|
| Of this amount, Goldsborough had delivered lumber on account of Orr, to the amount stated in the account D (including all the credits stated in the account A) | | $7986 11 |
| Leaving a balance to be delivered on account of the houses and lots sold and conveyed by Orr to Goldsborough, for which judgment is now recovered, with interest | | 2919 89 |
| | | 10,906 00 |
| In order to complete the contract B, so as to make the whole amount in *lumber to be taken by *224] Orr under that contract . . . . | $10,000 | |
| He gave the note mentioned, for . . . . . | | $3594 00 |
| To which, adding the purchase-money for the house and lots sold by that contract . . . . . | | 6406 00 |
| Makes the total amount to be taken in lumber under that contract . . . . . | | $10,000 00 |

Upon the argument of the cause in this court, the principal question has been, whether the failure of Orr to pay the note of $3594, constitutes a good defence to this suit. That there is a balance due to Orr of $2919.89, for property actually conveyed by him to Goldborough, under the agreements stated in the case, is most manifest; and the only point open for consideration is, whether the payment of the note is a condition precedent to the recovery of that balance. This must be decided by the terms of the written agreement B; for if the contract on one side be not dependent upon the performance of the contract on the other, or if they be not mutual and concurrent contracts, to be performed at the same time, there can be no doubt, that the defence is unsupported. And, upon full consideration, we are all of opinion, that the contracts are not dependent or concurrent, by the true and necessary interpretation of that agreement.

*225] The agreement on the part of Orr was *literally complied with. The titles to the property sold were duly made, the note was duly given, and Orr was at all times ready to receive the lumber, according to his rights under the agreement. It is observable, that one moiety of the lumber was deliverable in 1818; and as to this, it is clear, that the payment of the note could not be a condition precedent. The other moiety was deliverable in the year 1819, as it was wanted by Orr, and, of course, he might elect to demand the whole before, as well as after the note became due, at his pleasure. If this be so, it could not be within the contemplation of the parties, that the delivery of the lumber should be dependent upon the payment of the note, for the whole might be rightfully demanded, before it became due. Nothing is better settled, both upon reason and authority, than the principle, that where the acts stipulated to be done, are to be done at different times, the stipulations are to be construed as independent of each other. The parol enlargement of the time of payment of the note, cannot be admitted to change the nature of the original agreement; nor is there any pretence so say, that there was any waiver of the original agreement, even supposing that, in point of law, such a waiver could be insisted upon,

in a case circumstanced like the present. For the parties recognised the existence of that agreement, and lumber continued to be delivered under it, as Orr required. If, indeed, any waiver were to be implied, it would be a waiver by Goldsborough of a payment of the note, as a condition precedent to the delivery of *the lumber. But the parol contract does not, in any degree, vary the legal rights or obligations of the parties. The court below was, therefore, right in refusing the instruction prayed for by the counsel for the defendant. [*226

After the argument, some difficulties occurred as to the nature and form of the proceedings under this attachment act; but upon hearing the parties again, our doubts are entirely removed. One of the doubts was, whether, in cases of attachment, if the defendant appeared and dissolved the attachment, there ought not to be a declaration and subsequent pleadings, according to the course in ordinary actions. Upon the terms of the acts respecting attachments, we should have inclined to the opinion, that such a declaration, and such pleadings, were necessary. But the practice is shown to have been otherwise, and that practice has been solemnly adjudged by the court of appeals of Maryland to be in conformity to law.(*a*) We have no disposition to disturb this construction.

Another doubt was, whether an attachment will lie, in a case *ex contractû*, for unliquidated damages for non-delivery of goods. The act of 1795 gives the remedy, upon the creditor's making oath, &c., that the debtor is *bonâ fide* indebted to him in a sum certain, over all discounts, "and at the same time producing the bond or bonds, bill or bills, protested bill or bills of exchange, promissory *note or notes, or other instrument or instruments in writing, account or accounts, by which the debtor is so indebted." This enumeration would seem to include such cases only of contract as were for payment of money, either certain in themselves, or for which debt, or *indebitatus assumpsit*, or actions of that nature, would lie. It does not seem to include a contract for the delivery of goods, or doing any other collateral act.(*b*) But however this may be, and we give no opinion respecting it, we are satisfied, that upon the contract in the present case, the plaintiff is entitled to a specific sum in money, so as to bring himself within the purview of the act. The value of the property sold was estimated in money; and though it was payable in lumber, yet if, upon demand, the defendant refused to deliver the lumber, he lost the benefit of that part of the contract, and the plaintiff became entitled to receive the sum stipulated to be paid in money. [*227

Some objections were taken by the defendant to the preliminary proceedings in this suit; but it is unnecessary to consider them, because, whatever might have been their original defects, they are waived by going to trial upon the merits. The judgment of the circuit court is, therefore, affirmed, with costs.(*c*)

Judgment affirmed.

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(*a*) Samuel Smith and others *v.* Robert Gilmor and others, Garnishees of Wilhelm and Jan Willink, 4 Har. & Johns. 177.

(*b*) See, under the act of 1715, ch. 40, State *v.* Beall, 3 Har. & McHen. 347.

(*c*) The editor having been favoured with a MS. note of the case of Smith *v.* Gilmor, cited by the court in the preceding case, determined in the court of appeals of

Maryland (since reported in 4 Har. & Johns. 177), takes the liberty of adding it, for the information of the learned reader.

*228] *Samuel Smith and others *v.* Robert Gilmor and others, Garnishees of Wilhelm and Jan Willink.

APPEAL from Baltimore County Court. In this case, an attachment issued, on the 2d of February 1805, in the names of the present appellants, against the lands, tenements, goods, chattels and credits of Wilhelm and Jan Willink, under and in virtue of a warrant from a justice of the peace of Baltimore county, directed to the clerk of the county court of that county, accompanied by an affidavit and account, pursuant to the directions of the act of assembly of 1795, ch. 56. At the same time, the plaintiffs prosecuted a writ of *capias ad respondendum* against the defendants, and filed a short note, stating that the suit was brought to recover the sum of $14,094.84, due from the defendants to the plaintiffs, on account, and a copy thereof was sent with the said writ indorsed, "to be set up at the court-house door by the sheriff." The attachment was returned by the sheriff, laid in the hands of Robert Gilmor and others (the appellees), and the writ of *capias ad respondendum* was returned *tarde*. The garnishees being called, appeared, and by their counsel pleaded, that Wilhelm and Jan Willink did not assume, &c., and that at the time of laying the attachment, &c., they had no goods, &c., of the said Willinks in their hands. The general replication was put in to the last plea, and issues were joined. Verdict for the plaintiffs for $12,775, current money, damages. Motion by the garnishees in arrest of judgment, and the reason assigned was, because no declaration had been filed in the case. The county court sustained the motion, and arrested the judgment. The plaintiffs appealed to this court.

The case was argued in this court by *Winder*, for the appellants, and by *Martin* and *Harper*, for the appellees.

The court of appeals reversed the judgment of the county court, and rendered judgment of condemnation on the verdicts, for the plaintiffs, for $12,775, current money, damages, together with $1975.93, current money, additional damages and costs.

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*229] *SEXTON *v.* WHEATON and wife.

*Post-nuptial settlement.*

A voluntary post-nuptial settlement, made by a man who is not indebted at the time, upon his wife, is valid against subsequent creditors.[1]

The statute 13 Eliz. c. 5, avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors.

But it does not apply to subsequent creditors, if the conveyance be not made with a fraudulent intent.

What circumstances will constitute evidence of such a fraudulent intent.

APPEAL from the Circuit Court for the District of Columbia, and county of Washington.

This was a bill brought by the appellant, Sexton, in the court below, to subject a house and lot in the city of Washington, the legal title to which was in the defendant, Sally Wheaton, to the payment of a debt for which the plaintiff had obtained a judgment against her husband, Joseph Wheaton, the other defendant. The lot was conveyed by John P. Van Ness, and Maria, his wife, and Clotworthy Stepenson, to the defendant, Sally Wheaton, by deed, bearing date the 21st day of March 1807, for a valuable consideration, acknowledged to be received from the said Sally. And the plaintiff claimed to subject this property to the payment of his debt, upon the

[1] Mattingly *v.* Nye, 8 Wall. 370; Barker *v.* Barker, 2 Woods 87. And see note to this case, in 1 Am. Lead. Cas. 37 (5th ed.) where the authorities on this subject are fully reviewed.

ground, that the conveyance was fraudulent, and therefore, void as to creditors.

The circumstances on which the plaintiff relied *in his bill, to support the allegation of fraud, were, that the said house and lot [*230 were purchased by the defendant, Joseph, who, contemplating, at the time, carrying on the business of a merchant, in the said city of Washington, procured the same to be conveyed to his wife; and obtained goods on the credit of his apparent ownership of valuable real property. That for the purpose of obtaining credit with the commercial house of the plaintiff, in New York, he represented himself, in his letters, as a man possessing real estate to the value of $20,000, comprehending the house in question, besides 100 bank shares, and other personal estate. That the defendant, Sally, knew, and permitted these representations to be made. That the defendant, Joseph, in the presence of the defendant, Sally, applied to General Dayton, the friend of the plaintiff, to be recommended to a commercial house in New York, and in the statement of his property, as an inducement to make such recommendation, he included the premises. That the defendant, Sally, permitted this misrepresentation, and did not undeceive General Dayton, although she had many opportunities of doing so.

In support of these allegations, the plaintiff annexed to his bill several letters written by the defendant, Joseph, in the city of Washington, to the plaintiff, in the city of New York, soliciting a commercial connection, and advances of goods on credit. The first of these letters was dated the 2d of September 1809. The letters stated, that the plaintiff's house had been recommended to the defendant by their mutual friend, General Dayton; *represented the defendant's fortune as considerable, spoke of the [*231 house in which he was to carry on business as his own, and held out the prospect of regular and ample remittances.

The bill further stated, that, upon the faith of these letters, and on the recommendation of General Dayton, the plaintiff advanced goods to the defendant, Joseph, to a considerable amount, who failed in making the promised remittances; and on the plaintiff's withholding further supplies of goods, and pressing for payment, he avowed his inability to pay, declared himself to be insolvent, and then stated, that the house in controversy was the property of his wife. Some arrangements were made, by which the goods in the store, and the books of the defendant, Joseph, were delivered to the plaintiff; but after paying some creditors who were preferred, a very small sum remained to be applied in discharge of a judgment which the plaintiff had obtained, in January 1812, for the sum of $8249.29. On this judgment, an execution was issued, by which the life-estate of Joseph Wheaton was taken and sold for $300, the plaintiff being the purchaser.

The bill prayed, that the property, subject to the plaintiff's interest therein under the said purchase, might be sold, and the proceeds of the sale applied to the payment of his judgment. It further stated, that improvements to a great amount had been made, since the conveyance to Sally Wheaton, and prayed, that, should the court sustain the said *con- [*232 veyance, the defendant, Sally, might be decreed to account for the value of those improvements.

The answers denied that the house and lot in contest were purchased, in the first instance, by Joseph Wheaton, or conveyed to his wife, with a view

to his entering into commerce; and averred, that they were purchased for Sally Wheaton, and chiefly paid for, out of the profits made by her industry, and saved by her economy in the management of the affairs of the family, while her husband was absent executing the duties of his office as sergeant-at-arms to the house of representatives. The answers also stated, that in January 1807, when the conveyance was made, Joseph Wheaton was sergeant-at-arms to the house of representatives, expected to continue in that office, had no intention of going into trade, and had no knowledge of the plaintiff. The design of going into commerce was first formed in the year 1809, when, being removed from his office, and having no hope of being re-instated in it, he turned his attention to that object, as a means of supporting his family. He, then, in a letter dated the 24th of August, applied to General Dayton, as a friend, to recommend him to a house in New York, and received from that gentleman a letter, dated the 29th of the same month, which was annexed to the answer. In this letter, General Dayton says, "pursuant to your request, I recommend to you the house of Messrs. Sexton & Williamson, with which to form the sort of connection which you propose in New York. They have sufficient capital," &c. "The proper course
*233] will be for *you to write very particularly to them, stating your present advantageous situation, your prospects and plans of business, and describing the nature and extent of the connection which you propose to form with them, and then refer them to me, for my knowledge of your capacity, industry, probity," &c.

The defendant, Joseph, in his answer, stated, that in consequence of this letter, he wrote to the said house of Sexton & Williamson. He admitted, that his account of his property was too favorable, but denied having made the statement for the purposes of fraud, but from having been himself deceived respecting its value. He denied having ever told General Dayton that the house was his, and thinks he declared it to be the property of his wife. Sally Wheaton denied, that she ever heard her husband tell General Dayton, that the house was his property; that she ever in any manner contributed to impose on others the opinion, that her husband was more opulent than he really was; or ever admitted, that the house she claims was his. She admitted, that she saw a letter prepared by him to be sent to Sexton & Williamson, in the autumn of 1809, which she thought made too flattering a representation of his property, and which she, therefore, dissuaded him from sending, in its then form. She then hoped that her persuasions had been successful.

The answers of both defendants stated, that Joseph Wheaton was free from debt, when the conveyance was made, and insisted, that it was made *bonâ fide*.

*234] *The court below dismissed the bill, and from this decree the plaintiff appealed to this court.

February 5th. *Key*, for the appellants, argued: 1. That the evidence in the cause was insufficient to prove the fact alleged, that the house in question was purchased with the funds of the wife. The case of *Slanning* v. *Style*, 3 P. Wms. 335–37, which is the stronger, as it excepts creditors from the operation of the right where it exists, goes to show, that it was not bought with funds which could be considered as hers. The fund accruing

from the thrift and economy of the wife, does not constitute her separate estate. 1 Cas. in Ch. 117. Still less, could such an accumulation for her separate use, from the presents of her friends, or as a compensation for services rendered her husband, be warranted by any case or principle.

2. If, then, the purchase was not made with the separate property of the wife, were the circumstances of the husband such, at the time this settlement was made, as to justify him in making it, to the prejudice of subsequent creditors? All the cases concur in showing, that he cannot do so, and that the subsequent creditors may impeach it. *Fletcher* v. *Sidley*, 2 Vern. 490; *Taylor* v. *Jones*, 2 Atk. 600; *Fitzer* v. *Fitzer*, Ibid. 511; *Stillman* v. *Ashdown*, Ibid. 481; *Hungerford* v. *Earle*, 2 Vern. 261; Roberts on Fraud. Convey. 21–30; Atherly's Fam. Settlem. 212, 230–36. And it makes no difference, that it is the case of a settlement by a purchase, and the deed taken *to the wife. This notion of certain elementary writers (Fonbl. 275; Sugd. 424; Roberts 463), has been exploded, and the authorities are decisive against it. *Peacock* v. *Monk*, 1 Ves. 127; *Stillman* v. *Ashdown*, 2 Atk. 481; 2 Vern. 683; 4 Munf. 251; *Partridge* v. *Gopp*, Ambl. 596; Atherly's Fam. Settlem. 481. Nor is there any difference between a deed to defaud subsequent creditors, and one to defraud purchasers. *Anderson* v. *Roberts*, 18 Johns. 515. And a subsequent sale, after a voluntary settlement, creates the presumption of fraudulent intent in the previous settlement, under the statute 27 Eliz. Roberts on Fraud. Conv. 34. If so, there is the same ground for similar presumption, where debts are contracted after a previous voluntary settlement. This must especially apply, where the settlement is of all the settler's property, and the debts are large, and contracted almost immediately after the settlement. [*235

3. But supposing the settlement was fairly made, here is evidence of collusion of the wife, in the misrepresentation which was made to the prejudice of creditors, and she is bound by it. The principle is well established, that the property of a married woman, or that of an infant, may be rendered liable to creditors by their concurrence in acts of fraud. Roberts 522; Sugd. 480; Fonbl. 161; 1 Bro. C. C. 358; 2 Eq. Cas. Abr. 488.

*Jones*, for the respondents, contrà, insisted, that many of the cases cited on the other side, *might be disposed of upon their peculiar circumstances, without touching upon the general doctrine for which he contended. He admitted, that whether a settlement was within the letter of the statutes relating to fraudulent conveyances or not, if there was actual fraud, a court of equity would lay hold upon it, and redress the injured party. But the settler must be indebted, at the time of the execution of the deed, in order to set it aside on that ground. And there must be an allegation, and proof of that fact, or the bill will be dismissed. *Lush* v. *Wilkinson*, 3 Ves. 384; *Battersbee* v. *Farrington*, Swanst. 106; *Stevens* v. *Olive*, 1 Bro. C. C. 90. According to the original rudeness of the feudal system, the husband and wife were considered as one person, and all her rights of property were merged in his. But this is a doctrine wholly unknown to the civilized countries governed by the Roman code; and courts of equity have constantly struggled to mitigate its rigor. For this purpose, they consider the husband as a trustee for the wife, in order to preserve her property to her separate use. It does not follow, that because voluntary settlements are [*236

void against subsequent purchaser, that they are, therefore, void against subsequent creditors. There is a well-established and well-known distinction in this respect between the statute 13 Eliz. and the statute 27 Eliz. Taking the present case, then, as a mere voluntary conveyance, on good consideration, independent of actual fraud, it must stand. Whatever discre-
*237] pancy there may be in some of the old cases, this *is now the settled doctrine in England. Thus, in the case of a voluntary bond, and arrears under it, a conveyance to secure those arrears was sustained against creditors. *Gillam* v. *Locke*, 9 Ves. 612. So also, the substitution of a voluntary bond by another is good. *Ex parte Barry*, 19 Ves. 218. And a post-nuptial settlement is only void as against creditors at the time. *Williams* v. *Kidney*, 12 Ves. 136. A voluntary conveyance in favor of strangers is valid against subsequent creditors, the party making it not being indebted at the time. *Holloway* v. *Millard*, 1 Madd. 414; *Hobbs* v. *Hull*, 1 Cox 445; *Jones* v. *Bolter*, Ibid. 288. And in a very recent case, a voluntary settlement by a husband, not indebted at the time, was established against subsequent creditors. *Battersbee* v. *Farrington*, 1 Swanst. 106. See also, *Jones* v. *Bolter*, 1 Cox 288. But this is not a mere voluntary conveyance on a moral obligation; it is for a valuable consideration in the wife's services. 3 P. Wms. 337. The case cited from 1 Cas. in Ch. 117, has no bearing on the present question, and has been overruled since. Besides, the case of *Slanning* v. *Style*, 3 P. Wms. 337, is better vouched, more modern, and of greater authority in every respect. The pretext of collusion, in actual fraud between the husband and wife, in the present case, is utterly devoid of any foundation in the evidence.

*238] *February 13th, 1823. MARSHALL, Ch. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:—The allegation, that the house in question was purchased with a view to engaging in mercantile speculations, and conveyed to the wife for the purpose of protecting it from the debts which might be contracted in trade, being positively denied, and neither proved by testimony, nor circumstances, may be put out of the case.

The allegation, that the defendant, Sally, aided in practising a fraud on the plaintiff, or in creating or giving countenance to the opinion, that the defendant, Joseph, was more wealthy than in truth he was, is also expressly denied, nor is there any evidence in support of it, other than the admission in her answer, that she had seen a letter written by him to the plaintiff, in the Autumn of 1809, in which he gave, she thought, too flattering a picture of his circumstances. This admission is, however, to be taken with the accompanying explanation, in which she says, that she had dissuaded him, she had hoped successfully, from sending the letter in its then form. This fact does not, we think, fix upon the wife such a fraud as ought to impair her rights, whatever they may be. The plaintiff could not know that this letter was seen by the wife, or in any manner sanctioned by, or known to her. He had, therefore, no right to suppose, that there was any waiver of her interest, whatever it might be, nor had he a right to assume anything
*239] against her, or her claims, in consequence *of his receiving this letter. The case is very different from one in which the wife herself makes a misrepresentation, or hears and countenances the misrepresentation of her

husband. The person who acts under such a misrepresentation, acts under his confidence in the good faith of the wife herself. He has a right to consider that faith as pledged; and if he is deceived, he may complain that she has herself deceived him. But in this case, the plaintiff acted solely on his confidence in the husband. If he was deceived, the wife was not accessory to the deception. She contributed nothing towards it. When she saw and disapproved the letter written by her husband, what more could be required from her, than to dissuade him from sending it in that form? Believing, as we are bound to suppose she did, that the letter would be altered, what was it incumbent on her to do? All know and feel, the plaintiff as well as others, the sacredness of the connection between husband and wife. All know, that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other. Will any man say, that Mrs. Wheaton, seeing this letter, remonstrating against it, and believing that it would be altered, before sending it, ought to have written to this stranger in New York, to inform him, that her husband had misrepresented his circumstances, and that credit ought not to be given to his letters? No man will say so. Confiding, as it was natural and *amiable in her to confide, in his integrity, and believing that he had imposed on himself, and meant no imposition on another, it was natural for her to suppose, that his conduct would be influenced by her representations, and that his letter would be so modified as to give a less sanguine description of his circumstances. We cannot condemn her conduct. [*240

A wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. But this is not such a case; and we consider the rights of Mrs. Wheaton as unimpaired by anything she is shown to have done. Had the plaintiff heard this whole conversation, as stated in the answer; had he heard her express her disapprobation of the statements made in the letter, and dissuade her husband from sending it, without changing its language; had he seen them separate, with a belief on her part, that the proper alterations would be made in it, he would have felt the injustice of charging her with participating in a fraud. That act cannot be criminal in a wife, because it was not communicated, which, if communicated, would be innocent. Admitting the representations of this letter to be untrue, they cannot be charged on the wife, since she disapproved of them, and believed that it would not be sent, in its exceptionable form. So much is a wife supposed to be under the control of her husband, that the law in this district will not permit her estate to pass by a conveyance executed by herself, until she has been *examined, apart from her husband, by persons in whom the law confides, and has declared to them, that she has executed the deed freely, and without constraint. It would be a strange inconsistency, if a court of chancery were to decree, that the mere knowledge of a letter, containing a misrepresentation respecting her property, should produce a forfeiture of it, although she had not concurred in its statements, had dissuaded her husband from sending it, and believed he had not sent it. [*241

Without discussing the conduct of Mr. Wheaton in this transaction, it is sufficient to say, that it cannot affect the estate previously vested in his wife. The cause, therefore, must depend on the fairness and legality of the con-

veyance to her. The allegation, that the purchase-money was derived from her private individual funds, is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove, that the consideration, in point of law, moved from her. It must, therefore, be considered as a voluntary conveyance; and, if sustained, must be sustained on the principle, that it was made under circumstances which do not impeach its validity, when so considered.

The bill does not charge Mr. Wheaton with having been indebted in January 1807, when this conveyance was made. The fact, that he was indebted, cannot be assumed. Indeed, there is no ground in the record for assuming it. The answers aver, that he was not indebted, and they are not *242] contradicted by any testimony in the cause. *His inability to pay his debts in 1811 or 1812, is no proof of his having been in the same situation, in January 1807. The debts with which he was then overwhelmed, were contracted after that date. This conveyance, therefore, must be considered as a voluntary settlement made on his wife, by a man who was not indebted at the time. Can it be sustained against subsequent creditors?

It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law. The law which is considered by the plaintiff's counsel as limiting this power, in the case at bar, is the statute of 13 Eliz., ch. 5, against fraudulent conveyances, which is understood to be in force in the county of Washington. That statute enacts, that "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments," &c., "which feoffments," &c., "are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others, of their just and lawful actions," &c., "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all plain dealing, bargaining, and chevisance between man and man. Be it, therefore, declared," &c., "that all and every feoffment," &c., "made to, or for, any intent or purpose before *243] declared and expressed, shall be *from henceforth deemed and taken (only as against that person," &c., "whose actions," &c., "shall or might be in any wise disturbed," &c.) "to be clearly and utterly void."

In construing this statute, the court have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors. With respect to subsequent creditors, the application of this statute appears to have admitted of some doubt. In the case of *Shaw* v. *Standish* (2 Vern. 326), which was decided in 1695, it is said by counsel, in argument, "that there was a difference between purchasers and creditors, for the statute of 13 Eliz. makes not every voluntary conveyance, but only fraudulent conveyances, void as against creditors; so that, as to creditors, it is not sufficient to say, the conveyance was voluntary, but must show they were creditors, at the time of the conveyance made, or, by some other circumstances, make it appear, that the conveyance was made with intent to deceive or defraud a creditor." Although this distinction was taken in the case of a subsequent purchaser, and was, therefore, not essential in the cause which was before the court, and is advanced only by counsel in argument,

yet it shows, that the opinion, that a voluntary conveyance was not absolutely void as to subsequent creditors, prevailed extensively.

In the case of *Taylor* v. *Jones* (2 Atk. 600), a bill was brought by creditors to be paid their debts out of stock, vested by the husband, in trustees, for the benefit of himself for life, of his wife for life, and, afterwards, for the benefit of children. Lord *HARDWICKE decreed the deed of trust to be void against subsequent as well as preceding creditors. There are circumstances in this case, which appear to have influenced the chancellor, and to diminish its bearing, on the naked question of a voluntary deed being absolutely void, merely because it is voluntary. Lord HARDWICKE said, "now, in the present case, here is a trust left to the husband, in the first place, under this deed; and his continuing in possession is fraudulent as to the creditors, the plaintiffs." His Lordship afterwards says, "and it is very probable, that the creditors, after the settlement, trusted Edward Jones, the debtor, upon the supposition that he was the owner of this stock, upon seeing him in possession." This case, undoubtedly, if standing alone, would go far in showing the opinion of Lord HARDWICKE to have been, that a voluntary conveyance would be void against subsequent, as well as preceding creditors; but the circumstances, that the settler was indebted at the time, and remained in possession of the property, as its apparent owner, were certainly material; and although they do not appear to have decided the cause, leave some doubt, how far this opinion should apply to cases not attended by those circumstances. [*244

This doubt is strengthened by observing Lord HARDWICKE's language, in the case of *Russell* v. *Hammond*. His Lordship said, "though he had hardly known one case, where the person conveying was indebted at the time of the conveyance, *that the conveyance had not been fraudulent, yet that, to be sure, there were cases of voluntary settlements that were not fraudulent, and those were, where the persons making them were not indebted at the time, in which case, subsequent debts would not shake such settlements." It would seem, from the opinion expressed in this case that *Taylor* v. *Jones* must have been decided on its circumstances. [*245

The cases of *Stillman* v. *Ashdown*, and of *Fitzer* v. *Fitzer and Stephens*, reported in 2 Atkyns, have been much relied on by the appellant; but neither is thought to establish the principle for which he contends. In *Stillman* v. *Ashdown*, the father had purchased an estate, which was conveyed jointly to himself and his son, and of which he remained in possession. After the death of the father, the son entered on the estate, and the bill was brought to subject it to the payment of a judgment against the father, in his lifetime. The chancellor directed the estate to be sold, and one moiety to be paid to the creditor, and the residue to the son. In giving his opinion, the chancellor put the case expressly on the ground, that this, from its circumstances, was not to be considered as an advancement to the son. He says, too, "a father, here, was in possession of the whole estate, and must, necessarily, appear to be the visible owner of it; and the creditor too would have had a right, by virtue of an *elegit*, to have laid hold of a moiety, so that it differs extremely from all the other cases." *In the same case, the chancellor lays down the rule which he supposed to govern in the case of voluntary settlements. "It is not necessary," he says, "that a man should be actually indebted, at the time of a voluntary settlement, to make it [*246

fraudulent; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside." The real principle, then, of this case is, that a voluntary conveyance to a wife, or child, made by a person not indebted at the time, is valid, unless it were made with a view to being indebted at a future time.

In the case of *Fitzer* v. *Fitzer and Stephens*, the deed was set aside, because it was made for the benefit of the husband, and the principal point discussed was the consideration. The Lord Chancellor said, "it is certain, that every conveyance of the husband, that is voluntary, and for his own benefit, is fraudulent against creditors." After stating the operation of the deed, he added, "then, consider it as an assignment which the husband himself may make use of, to fence against creditors, and, consequently, it is fraudulent." This case, then, does not decide, that a conveyance to a wife, or child, is fraudulent against subsequent creditors, because it is voluntary, but because it is made for the benefit of the settler, or with a view to the contracting of future debts.

The case of *Peacock* v. *Monk*, in 1 Vesey, turned on two points. The first was, that there was a proviso to the deed, which amounted to a power
*247] of revocation, which, the chancellor said, *had always been considered as a mark of fraud; and, 2. That, being executed on the same day with his will, it was to be considered as a testamentary act.

In the case of *Walker* v. *Burrows* (1 Atk. 94), Lord HARDWICKE, adverting to the stat. 13 Eliz., said, that it was necessary to prove, that the person conveying was indebted, at the time of making the settlement, or immediately afterwards, in order to avoid the deed. Lord HARDWICKE maintained the same opinion in the case of *Townshend* v. *Windham*, reported in 2 Vesey. In that case, he said, "if there is a voluntary conveyance of real estate, or chattel interest, by one, not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors, appears, that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted." A review of all the decisions of Lord HARDWICKE, will show his opinion to have been, that a voluntary conveyance to a child, by a man, not indebted at the time, if a real and *bonâ fide* conveyance, not made with a fraudulent intent, is good against subsequent creditors.

The decisions made since the time of Lord HARDWICKE maintain the same principle. In *Stephens* v. *Olive* (2 Bro. C. C. 90), Edward Olive, by
*248] deed, dated the 7th of May *1774, settled his real estate on himself for life, remainder to his wife for life, with remainders over for the benefit of his children. By another deed, of the same date, he mortgaged the same estate to Philip Mighil, to secure the repayment of 500*l.* with interest. On the 6th of March 1775, he became indebted to George Stephens. This suit was brought by the executors of George Stephens, to set aside the conveyance, because it was voluntary, and fraudulent as to creditors. The master of the rolls held, "that a settlement, after marriage, in favor of the wife and children, by a person not indebted at the time, was good against subsequent creditors;" "and that, although the settler was indebted, yet, if the debt was secured by mortgage, the settlement was good."

In the case of *Lush* v. *Wilkinson*, the husband conveyed a leasehold estate in trust, to pay, after his decease, an annuity to his wife for life, and after her decease, the premises charged with the annuity for himself and his executors. A bill was brought by subsequent creditors, to set aside this conveyance. The master of the rolls sustained the conveyance, and, after expressing his doubts of the right of the plaintiff to come into court, without proving some antecedent debt, said, "a single debt will not do; every man must be indebted for the common bills for his house, although he pays them every week; it must depend upon this, whether he was in insolvent circumstances at the time."

In the case of *Glaister* v. *Hewer* (8 Ves. 199), where the husband, who was a trader, purchased *lands, and took a conveyance to himself and [*249 wife, and afterwards became bankrupt and died, a suit was brought by the widow, against the assignees, to establish her interest. Two questions arose: 1. Whether the estate passed to the assignees, under the statute of 1 James I., ch. 15; and if not, 2. Whether the conveyance to the wife was void as to creditors. The master of the rolls decided both points in favor of the widow. Observing on the statute of the 13th of Eliz., he said, that the conveyance would be good, supposing it to be perfectly voluntary; "for," he added, "though it is proved, that the husband was a trader, at the time of the settlement, there is no evidence, that he was indebted at that time; and it is quite settled, that, under that statute, the party must be indebted at the time." On an appeal to the Lord Chancellor, this decree was reversed, because he was of opinion, that the conveyance was within the statute of James, though not within that of Elizabeth.

In the case of *Battersbee* v. *Farrington and others* (1 Swanst. 106), where a bill was brought to establish a voluntary settlement in favor of a wife and children, the master of the rolls said, "no doubt can be entertained on this case, if the settler was not indebted at the date of the deed. A voluntary conveyance by a person not indebted, is clearly good against future creditors. That constitutes the distinction between the two statutes. Fraud vitiates the transaction; but a settlement, *not fraudulent, by [*250 a party not indebted, is valid, though voluntary." From these cases it appears, that the construction of this statute is completely settled in England. We believe, that the same construction has been maintained in the United States. A voluntary settlement in favor of a wife and children, is not to be impeached by subsequent creditors, on the ground of its being voluntary.

We are to inquire, then, whether there are any badges of fraud attending this transaction which vitiate it. What are those badges? The appellant contends, that the house and lot contained in this deed, constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought, on that account, to be deemed fraudulent. This fact is not clearly proved. We do not know the amount of his estate in 1807; but if it were proved, it does not follow, that the conveyance must be fraudulent. If a man, entirely unincumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of *Stephens* v. *Olive*, the whole real estate appears to have been settled, subject to a mortgage for a debt of 500*l.*, yet, that settlement was sustained. The proportional magnitude of the estate conveyed may awaken suspicion, and

strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. A man who makes such a conveyance, necessarily impairs *251] his credit, and, *if openly done, warns those with whom he deals not to trust him too far; but this is not fraud.

Another circumstance on which the appellant relies, is the short period which intervened between the execution of this conveyance and the failure of Joseph Wheaton. We admit, that these two circumstances ought to be taken into view together; but do not think that, as this case stands, they establish a fraud. There is no allegation in the bill, nor is there any reason to believe, that any of the debts which pressed upon Wheaton, at the time of his failure, were contracted before he entered into commerce in 1809, which was more than two years after the execution of the deed. It appears, that, at the date of its execution, he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart. In the case of *Stephens* v. *Olive*, the debt was contracted in less than twelve months after the settlement was made; yet it could not overreach the settlement. These circumstances, then, both occurred in the case of *Stephens* v. *Olive*, and were not considered as affecting the validity of that deed. The reasons why they should not be considered in this case as indicating fraud, are stronger than in England. In this district, every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another *252] on the faith of his real property, *knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in Joseph Wheaton. His creditors, therefore, never had a right to trust him, on the faith of this house and lot.

A circumstance much relied on by the appellant, is the controversy which appears to have subsisted, about that time, between the post-office department and Wheaton. This circumstance may have had some influence on the transaction; but the court is not authorized to say that it had. The claim of the post-office department was not a debt. On its adjustment, Wheaton was proved to be the creditor instead of debtor. It would be going too far, to say, that this conveyance was fraudulent, to avoid a claim made by a person who was, in truth, the creditor, where there is nothing on which to found the suspicion, but the single fact that such a claim was understood to exist.

The claim for the improvements stands on the same footing with that for the lot. They appear to have been inconsiderable, and to have been made before these debts were contracted.

Decree affirmed.(*a*)

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(*a*) Mr. Atherley, in his able treatise on the Law of Marriage and other Family Settlements, controverts, on principle, the doctrine, that a voluntary settlement is good against subsequent creditors, if the settler was not indebted at the time he made it, although he admits, that it is the law in England, as established by the decisions of the courts of equity, pp. 230–37, 175, 176, 209–20. See also Reade *v.* Livingston, 3 Johns. Ch. 481.

## *United States v. Wilson.

*Insolvent discharge.*

An insolvent debtor who has received a certificate of discharge from arrest and imprisonment, under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States.[1]

This cause was brought before this court upon a certificate of a division of opinion between the judges of the Circuit Court for the Southern District of New York.

The defendant was taken, on the 16th of July 1819, in execution, by the marshal, upon a judgment obtained against him at the suit of the United States, in the district court for the southern district of New York, and committed to the custody of the sheriff of the city and county of New York, under an act of the legislature of the state of New York, passed April 1813,(*a*) and subsequently received his *certificate of discharge under [*254 the act of the said state, passed April 1819, entitled, "an act for abolishing imprisonment for debt."(*b*) A motion was made in the court below, for the defendant's discharge from custody on the *ca. sa.* issued against him at the suit of the United States; and on the question, whether he was entitled to his discharge, the judges were divided in opinion, and the division was thereupon certified to this court.

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(*a*) Which provides, "that it shall be the duty of the sheriff of the several cities and counties of this state, and the duty of the keeper of the city-prison of the city of New York, to receive into their respective jails, and safely keep, all prisoners who shall be committed to the same, by virture of any process to be issued under the authority of the United States, until they shall be discharged by the due course of the laws thereof, the United States supporting such of the said prisoners as shall be committed for offences against the said United States: Provided always, that persons committed in the city of New York on civil process only, be committed to the jail in the custody of the sheriff of the said city; and persons committed in the said city, charged with any offence whatever, be committed to the jail in the custody of the keeper of the city-prison of the said city; and in case any prisoner shall escape out of the custody of any sheriff or keeper to whom such prisoner may be committed as aforesaid, such sheriff or keeper shall be liable to the like actions and penalties as he would have been, had such prisoner been committed by virture of any process issuing under the authority of this state; and such sheriff or keeper into whose custody any such prisoner shall be so committed, is hereby authorized to take to his own use, such sums of money as shall be payable by the United States, for the use of the said jails."

(*b*) Which provides, in substance, for the exemption of insolvent debtors from imprisonment, upon their making an assignment of their property for the benefit of their creditors.

[1] Glenn *v.* Humphreys, 4 W. C. C. 424; United States *v.* Hewes, Crabbe 307. But see United States *v.* Tetlow, 2 Lowell 159, 163, where the whole subject, as affected by the act of congress of 1867, received a learned and exhaustive consideration, by Judge Lowell, who arrived at the conclusion, that the United States, as plaintiff in an action at common law, was not exempt from the provisions of that statute, by virtue of their prerogative.

February 14th, 1823. The cause was briefly argued by the *Attorney-General* for the United States,(*a*) and by *Wheaton*, for the defendant.(*b*)

*255] *THE COURT directed the following certificate to be sent to the circuit court.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the United States court for the second circuit, and southern district of New York, on the question on which the judges of that court were divided, and which was certified to this court: on consideration whereof, this court is of opinion, that the said Joseph Wilson, who was in execution under

*256] a judgment obtained *by the United States, is not entitled to a discharge of his person, under the act of the state of New York, entitled, "an act abolishing imprisonment for debt," passed April 1819. All which is directed to be certified to the circuit court for the second circuit and southern district of New York.(*c*)

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(*a*) He referred to the act of congress of June 6th, 1798, c. 66, § 1, which provides, "that any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, which he shall be unable to pay, may, at any time after commitment, make application in writing to the secretary of the treasury, stating the circumstances of his case, and his inability to discharge the debt; and it shall, thereupon, be lawful for the said secretary to make, or require to be made, an examination and inquiry into the circumstances of the debtor, either by the oath or affirmation of the debtor (which the said secretary, or any other person by him specially appointed, are hereby authorized to administer) or otherwise, as the said secretary shall deem necessary and expedient, to ascertain the truth; and upon proof being made, to his satisfaction, that such debtor is unable to pay the debt for which he is imprisoned, and that he hath not concealed, or made any conveyance of his estate, in trust, for himself, or with an intent to defraud the United States, or deprive them of their legal priority, the said secretary is hereby authorized to receive from such debtor, any deed, assignment or conveyance of the real or personal estate of such debtor, if any he hath, or any collateral security, to the use of the United States; and upon a compliance, by the debtor, with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case, it shall be lawful for the said secretary, to issue his order, under his hand, to the keeper of the prison, directing him to discharge such debtor from his imprisonment under such execution, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the said debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor."

(*b*) He cited Sturges v. Crowninshield, 4 Wheat. 136; Houston v. Moore, 5 Ibid. 1, and referred to the judiciary act of 1789, c. 20, § 34; the bankrupt act of 1800, c. 173, § 61, and the priority act of 1799, c. 128, § 65.

(*c*) See United States *v.* Hoar, 2 Mason 311, where it was determined, that the local statutes of limitation of the different states do not bind the United States, in suits in the national courts, and cannot be pleaded in bar of an action by the United States against individuals. In that case, it was held, that the statutes of limitation of Massachusetts did not apply even to suits by the state government, in the state courts, and that the 34th section of the judiciary act of 1789, c. 20, which provides, "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," could not have meant to enlarge the construction of the statue of Massachusetts. "It is most manifest" (says Mr. Justice STORY, in delivering the judgment of the circuit

court in the case referred to), "that these terms give the same efficacy, and none other, to those statutes, in the federal, that they have (*proprio vigore*) in the state courts. And yet, unless this doctrine of enlargement can be maintained, it is difficult to perceive, on what ground, the case of the defendant can be supported. The statutes of Massachusetts could not originally have contemplated suits by the United States, not because they were in substance enacted before the federal constitution was adopted, on which I lay no stress; but because it was not within the legitimate exercise of the powers of the state legislature. It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and therefore, however general the words may be, they are always restrained to persons and things over which the jurisdiction of the state may be rightfully exerted. And if a construction could ever be justified, which should include the United States, at the same time that it excluded the state, it is not to be presumed, that congress could intend to sanction a usurpation of power by a state, to regulate and control the rights of the United States. In the language of the act of 1789, it could not be a case where the laws of the state could apply. The mischiefs, too, of such a construction, would be very great. The public rights, revenue and property, would be subject to the arbitrary limitations of the states; and the limitations are so various in these states, that the government would hold its rights by a different tenure, in each." 2 Mason 315.

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## *Greeley and others *v.* United States. [*257

### *Collusive capture.*

Collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under the prize act of June 26th, 1812, § 3. If such breach appear upon demurrer, the defendants are not entitled to a hearing in equity, under the judiciary act of 1789, § 26.

This cause came before the court upon a certificate of a division of opinion between the judges of the Circuit Court of Maine.

It was an action of debt, originally brought in the district court of Maine, by the United States, against the defendants in that court, Greeley and others, upon a bond executed by them on the 17th of December 1813, under the prize act of June 26th, 1812, c. 430, § 3, as owners of the private armed vessel, called the Fly, conditioned, that "the owners, officers and crew of the said armed vessel, shall observe the laws and treaties of the United *States, and the instructions which shall be given, according to law, for the regulation of their conduct, and satisfy all damages and [*258 injuries which shall be done or committed, contrary to the tenor thereof, by such vessel, during her commission, and deliver up the same, when revoked by the president of the United States."

The defendants pleaded a performance of this condition; to which the district-attorney replied, that on the 15th day of December 1813, at a place called St. Johns, the same being a colony and dependency of Great Britain, certain goods, &c., the same being of the growth, produce and manufacture of Great Britain, or some colony or dependency thereof, the importation whereof into the said states, then and for a long time afterwards, and at the time of bringing the same into the said district of Maine, was, by law, prohibited, were put on board a certain vessel or schooner, called the George, with the intention to import the same into the said states, contrary to the true intent and meaning of the statute in such case made and provided, and with the knowledge of the master of the said schooner George; and after-

wards, in pursuance of said intention, the said schooner did depart from the said place of lading, to wit, St. Johns, and there, afterwards, on the high seas, by way of collusion, and with intent to evade the statute aforesaid, and under color of capture by the private armed vessel, called the Fly, aforesaid, to import the said goods, &c., into the said states, contrary to the true intent and meaning of the statute aforesaid, the said schooner George, so *259] *laded as aforesaid, was taken possession of by the said Dekoven, by and with the said private armed vessel, called the Fly, whereof the said Dekoven then and there was master as aforesaid, on the high seas; and afterwards, on the 24th day of January 1814, the said schooner George, and the goods, &c., aforesaid, were brought into the port of Ellsworth, in the said district of Maine, and the goods, &c., were, then and there, under color of capture, by said Dekoven, his officers and crew, in and with said schooner Fly, imported, in manner aforesaid, into the said states, contrary to the true intent and meaning of the statute aforesaid. Other pleadings followed (which it is not necessary to state), ending with a demurrer, upon which the district court was of opinion, that the plaintiffs were entitled to judgment.

The defendants, thereupon, moved for a hearing in chancery upon the making up of the judgment on the bond declared on, which motion was denied, and judgment rendered for the United States. The cause was then brought by writ of error to the circuit court, the judges of which were divided in opinion upon the following questions, which were, thereupon, certified to this court.

1. Whether an American private armed vessel, duly commissioned, making collusive captures of enemy's property, during the late war with Great Britain, and under color of such capture, introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1st, 1809, c. 195, revived and continued in force by the act of March *260] 2d, 1811, c. 306, thereby *broke the condition of the bond given pursuant to the third section of the statute of June 26th, 1812, c. 430, requiring, "that the owners, officers and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States?"

2. Whether, if such proceeding on the part of such private armed vessel, be a breach of the condition of said bond, and such breach appear upon demurrer, the defendants can, by law, claim a hearing in chancery, under the judiciary act of September 24th, 1789, c. 20, § 26?

February 14th, 1823. The cause was briefly agued by *Webster*, for the plaintiffs in error, and by *Pitman*, for the United States.

THE COURT directed the following certificate to be sent to the circuit court.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the court of the United States, for the first circuit, in the district of Maine, on the points on which the judges of that court were divided in opinion, and was argued by counsel: on consideration whereof, this court is of opinion:

1. That an American private armed vessel, duly commissioned, making collusive captures of enemy's property, during the late war with Great Bri-

tain, and under color of such captures, introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1st, 1809, c. 195, revived and continued in *force by the act of March 2d, 1811, c. 306, thereby broke the condition of the bond given pur- [*261 suant to the third section of the statute of June 26th, 1812, c. 430, requiring "that the owners, officers and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States."

2. That where such breach appears upon demurrer, the defendants cannot, by law, claim a hearing under the judiciary act of September 24th, 1789, c. 20, § 26. All which is directed to be certified to the circuit court of the United States for the first circuit and district of Maine.

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## The Experiment.

### *Collusive capture.*

In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another, captured on the same cruise.

A commission obtained by fraudulent misrepresentations, will not vest the interests of prize. But a collusive capture, made under a commission, is not, *per se*, evidence that the commission was fraudulently obtained.

A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

Appeal from the decree of the Circuit Court of Massachusetts, affirming the decree of the district court of Maine, by which the sloop Experiment and cargo were condemned to the United States, as having been collusively captured by *the private armed schooner Fly. The facts [*262 (so far as necessary) are stated in the opinion of this court.

February 11th. *Webster*, for the appellants, argued, that this case was distinguishable in its circumstances from that of *The George*, 1 Wheat. 408, 2 Ibid. 278, captured by the same privateer, and adjudged by this court to be a collusive capture.

*Pitman*, for the United States, argued upon the facts, with great minuteness and ability, to show, that the capture was made *malâ fide*. He also contended, that the captors, who had obtained their commission for the fraudulent purpose of violating the laws of the United States, and who had been detected by this court in an attempt to impose on it, in a former case (*The George*, 1 Wheat. 408; 2 Ibid. 278), could not be entitled to derive any benefit from their commission, even supposing the capture, in the present instance, not to be collusive. The court had already settled certain principles analogous to that on which he insisted. Thus, it has been determined, that if a neutral ship-owner lend his name to cover a fraud with regard to the cargo, this will subject the ship to confiscation. *The St. Nicholas*, 1 Wheat. 417; *The Fortuna*, 3 Ibid. 236. So, if a party attempt to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not *be [*263 entitled to restitution of that portion which he may ultimately establish as his own. *The Dos Hermanos*, 2 Wheat. 76. And in the case of *The Anne*, 3 Ibid. 448, the court distinctly recognise the principle, that fraud

will forfeit all rights to which captors might otherwise have been entitled under their commission. He also cited authorities to show, that the court would take notice of facts which came judicially into their view, in the case with which this was so closely associated, and would severely scrutinize the conduct of the same parties in a similar transaction. *The Argo*, 1 Rob. 158; *The Juffrow Elbrecht*, Ibid. 126.

February 14th, 1823. STORY, Justice, delivered the opinion of the court. —This is a prize cause, brought by appeal from the circuit court of Massachusetts, affirming, *pro formâ*, the decree of the district court of Maine. The sloop Experiment and cargo are confessedly British property, and were captured by the privateer Fly, during the late war, and brought into port, and proceeded against by the captors in the proper court, for the purpose of being adjudged lawful prize. No claim was filed in behalf of the captured; but the United States interposed a claim, upon the ground, that the capture was fraudulent and collusive, and the cargo was introduced into the country, in violation of the non-importation acts then in force, which prohibited the
*264] importation of goods of British manufacture, *as the goods comprising this cargo certainly were. Upon the trial in the court below, the claim of the United States was sustained, and the capture being adjudged collusive, a condemnation was decreed to the government. From that decree the captors have appealed to this court; and the cause now stands for judgment, as well upon the original evidence, as the further proofs which have been produced by the parties in this court.

The privateer is the same whose conduct came under consideration in the case of *The George*, reported in 1 Wheat. 408, and 2 Ibid. 278, and was there adjudged to have been collusive. The present capture was made during the same cruise, by the same crew, and about six days only before the capture of the George. Under an order of the court, the original papers and proceedings in the case of *The George*, have been invoked into this cause; and after a long interval, during which the parties have had the most ample opportunities to clear the case of any unfounded suspicions, the decision of the court upon the arguments at the bar, is finally to be pronounced.

At the threshold of the cause, we are met by the question, whether a party claiming under a commission, which he has obtained from the government by fraud, or has used in a fraudulent manner, can acquire any right to captures made in virtue of such commission. Undoubtedly, a commission may be forfeited, by grossly illegal conduct; and a commission fraudulently obtained, is, as to vesting the interests of prize, utterly void. But a com-
*265] mission may be lawfully obtained, *although the parties intend to use it as a cover for illegal purposes. It is one thing to procure a commission by fraud, and another, to abuse it for bad purposes. And if a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void, merely because the parties privately intend to violate, under its protection, the laws of their country. The abuse, therefore, of the commission, is not, *per se*, evidence that it was originally obtained by fraud and imposition. The illegal acts of the parties are sufficiently punished, by depriving them of the fruits of their unlawful enterprises. A collusive capture conveys no title to the captors, not because the commission

The Experiment.

is thereby made void, but because the captors thereby forfeit all title to the prize property.

And after all, while the commission is unrevoked, it must still remain a question, upon each distinct capture, upon the evidence regularly before the prize court, whether there be any fraud in the original concoction, or in the conduct of the cruise. We cannot draw in aid the evidence which exclusively belongs to another cause, to fix fraud upon the transaction, unless so far as, upon the general principles of prize proceedings, it may be properly invoked. The present case, then, must depend upon its own circumstances.

It cannot, however, escape the attention of the court, that this privateer has already been detected in a gross case of collusive capture, on the same cruise, and under the same commission. This is a fact, of which, sitting as a court of admiralty, *we are bound to take notice; and it certainly raises a presumption of ill-faith in other transactions of the same parties, which can be removed only by clear evidence of honest conduct. If the circumstances of other captures, during the same cruise, are such as lead to serious doubts of the fairness of their character, every presumption against them is greatly strengthened; and suspicions once justly excited in this way, ought not to be easily satisfied. The captors have had full notice of the difficulties of their case, and after an order for further proof, which should awaken extraordinary diligence, they cannot complain that the court does not yield implicit belief to new testimony, when it comes laden with grave contradictions, or is opposed by other unsuspected proofs. [*266

Many of the circumstances which were thought by the court to be entitled to great weight in the decision of *The George*, have also occurred in the present case. The original equipment, ownership, shipping-articles, and conduct of the cruiser, are, of course, the same. The stay at Machias, the absence of Lieut. Sebor, the very suspicious nature of his journey, the apparent connection of that journey with persons and objects in the immediate vicinity of the place where the voyage of the prize commenced, are distinctly in proof. The bad equipment of the prize, her indifferent condition, and small crew for the voyage, the nature of her cargo, and the flimsy pretences set up for the enterprise, in the letters on board, are circumstances of suspicion, quite as strongly made *out, as in *The George*. The conduct of the prize, during her ostensible voyage, was still more striking. She was far out of the ordinary course of the voyage, without any necessity, or even plausible excuse. She chose voluntarily to sail along the American coast, out of the track of her voyage, even at the moment when she affected to have notice that the Fly was on a cruise; and she exposed herself to capture, in a manner that can scarcely be accounted for, except upon the supposition of collusion. The pretence set up for this conduct, is exceedingly slight and unsatisfactory. The circumstances of the capture, too, as they come from the testimony of some of the captors, as well as from a disinterested witness, are not calculated to allay any doubt. Here, as in *The George*, all of the prize crew, excepting one, were dismissed, without any effort to hold them as prisoners, and without any apparent reason for the dismissal. And if the testimony of one of the captors is to be believed, there is entire proof, that the prize was long expected, and came as a known friend, under preconcerted signals. It may be added, that the testimony of the captors is, in some material respects, inconsistent; and if the testimony [*267

of two disinterested and respectable witnesses is to be credited, the master of the prize, in opposition to his present testimony, admitted, in the most explicit manner, that the capture was collusive.

We do not think that it would conduce to any useful purpose, to review the evidence at large. It appears to us, to be a case, where the circum-
*268] stances *of collusion are quite as strong, if not stronger, than in *The George*. And we are, therefore, of opinion, that the decree of condemnation of the prize and her cargo, to the United States, ought to be affirmed, with costs.

Decree affirmed.

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SETH SPRING & SONS, appellants, *v.* SOUTH CAROLINA INSURANCE CO., GRAY & PINDAR, WILLIAM LINDSAY and JOHN HASLETT, respondents.

*Assignment for the benefit of creditors.—Interpleader.—Costs.—Lien of insurance broker.—Handwriting.*

An insolvent debtor has a right to prefer one creditor to another in payment, by an assignment *bonâ fide* made, and no subsequent attachment, or subsequently-acquired lien, will avoid the assignment.[1]

Such an assignment may include *choses in action*, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured, in case of a loss. It is not necessary, that the assignment should be accompanied by an actual delivery of the policy.

Upon a bill of interpleader, filed by underwriters, against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some, on the ground of special lien, and others, under the assignment, the rights of the respective parties will be determined. But on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendants whose claims are allowed, of the amount and origin of those claims.

On a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund; where the money is not brought into court, they must pay interest upon it.

*269] *An insurance broker is entitled to a lien on the policy, for premiums paid by him on account of his principal; and though he parts with the possession, if the policy afterwards come into his hands again, his lien is revived, unless the manner of his parting with it manifests an intention to abandon the lien. In such a case, an intermediate assignee takes *cum onere*.[2]

But in the case of other liens acquired on the policy, if it be assigned, *bonâ fide*, for a valuable consideration, while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee.

Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and being absent for four years, without having been heard from, is sufficient to let in secondary proof of his handwriting.[3]

APPEAL from the Circuit Court of South Carolina. This was a bill of interpleader, filed by the South Carolina Insurance Company, in the court below, on the 25th of April 1816, against the appellants, and Gray & Pindar, William Lindsay and John Haslett, praying, that they might file their answers, and interplead, so that it might be determined to whom the proceeds of a certain policy of insurance should be paid.

It appeared by the pleadings and the evidence in the cause, that this policy had been made on the 6th of May 1811, by the respondents, the South

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[1] S. P. Marbury *v.* Brooks, 7 Wheat. 556; S. C. 11 Id. 78; Tompkins *v.* Wheeler, 16 Pet. 106; Halsey *v.* Whitney, 4 Mason 206; Walker *v.* Adair, 1 Bond 156; Coolidge *v.* Curtis, Id. 222; Parrish *v.* Danford, Id. 345.

[2] See Sharp *v.* Whipple, 1 Bosw. 557.

[3] S. P. Conrad *v.* Farrow, 5 Watts 536; Towers *v.* McFerran, 2 S. & R. 44.

Carolina Insurance Company, upon a vessel called the Abigail Ann, then lying in Savannah, on a voyage to Dublin, or a port in St. George's Channel, for account of John H. Dearborne, and the respondents, Gray & Pindar, the latter of whom were merchants, residing at Charleston, South Carolina, and at that time part-owners of the ship, but on the 27th of May 1811, sold their interest therein *to Dearborne. On the 5th of July 1811, the vessel sailed on the voyage insured. It appeared, that the respondent, [*270 Lindsay, as the agent of the parties, had procured this policy to be underwritten. It also appeared, that Lindsay had delivered the policy to Gray & Pindar, for the use of Gray & Pindar, and Dearborne, without at the same time expressly claiming any lien upon it.

After the sailing of the Abigail Ann, Dearborne, and Gray & Pindar, jointly purchased and loaded another ship, called the Levi Dearborne, of which vessel and cargo Dearborne owned two-thirds, and Gray & Pindar one-third. In September 1811, this vessel sailed from Savannah for Europe, and Dearborne went in her. Before sailing, Dearborne had drawn bills on England, some of which were indorsed and negotiated by Lindsay, which were returned protested for non-acceptance, and Lindsay was compelled to pay them. Haslett also made advances to Dearborne, and took his bills on England, secured by a bottomry-bond on the ship Levi Dearborne. These bills also returned protested.

Before Dearborne left Savannah, certain misunderstandings arose between him and Gray & Pindar, which it was agreed should be referred to arbitrators. On the 21st of September 1811, the arbitrators, and one Harford, as umpire, awarded that Gray & Pindar should execute a bill of sale of the ship Abigail Ann, to Dearborne, and deliver to him the policy of insurance thereon, without unnecessary delay. Before he sailed, Dearborne directed Hartford to transmit to his wife, in the *district of Maine, to the care [*271 of Seth Spring & Sons, the bill of sale and policy of insurance, which had been thus awarded to him. The policy was subsequently sent by Harford to Lindsay, to be put in suit against the South Carolina Insurance Company.

The ship Levi Dearborne was obliged to put into New York, by stress of weather, and there, Dearborne, on the 28th of October 1811, made an assignment of the Abigail Ann, and of his interest in the ship Levi Dearborne, and of the policies upon both vessels, to S. Spring & Sons, to secure the payment of a debt due by Dearborne to them, amounting to about $16,000. The handwriting of Dearborne, and of the subscribing witness to the deed of assignment, were both proved; and one Maria Teubner, who testified to that of the subscribing witness, swore that she was one of his creditors, and had taken pains to obtain information of where he was, but without success. The last account of him was, that he had entered on board of an American privateer, during the late war, and had not been heard of, for four years. The assignment was made, subject to pay out of the cargo of the Abigail Ann, if it reached the hands of his correspondents in England, certain bills which he had drawn on them, in the confidence that they would be paid out of the cargo of the Levi Dearborne. Nothing was realized from that vessel and cargo, and the Abigail Ann was lost at sea.

An action was brought upon the policy on the Abigail Ann, in the names of Dearborne, and Gray & Pindar, *against the South Carolina Insurance Company, and judgment obtained against the latter, in 1815, for [*272

the sum of $9800. Dearborne died in March 1813. On the 24th of February 1812, Lindsay, on the return of the bills indorsed by him, issued an attachment, under the laws of South Carolina, against Dearborne, who was then absent from that state, and served a copy upon the South Carolina Insurance Company. On the 21st of May 1812, Haslett also issued an attachment against Dearborne, and served a copy on the South Carolina Insurance Company. No appearance was entered for Dearborne, in these attachment suits, and judgment was obained on Lindsay's, on the 19th of April 1813, and on Hazlett's, on the 10th of June 1815.

At the hearing in the court below, after the depositions, and regularly-proved exhibits in the cause, had been read, an order, signed by Harford, as agent for Dearborne, and S. Spring & Sons, on Lindsay, in favor of Haslett, was read in evidence, without notice to the appellants, or an order for its being read at the hearing.

The circuit court decreed, that the demand of Lindsay should be first satisfied and paid out of the fund; that of Gray & Pindar next; that of S. Spring & Sons next; that Haslett was entitled to the surplus, if any; and that S. Spring & Sons should account, and prove their claims against Dearborne, either by filing a cross-bill, or by answering upon interrogatories. From this degree, an appeal was taken by S. Spring & Sons to this court.

*273] *February 13th. *Wheaton*, for the appellants, stated: 1. That he would first clear the case of all extraneous matters, and for this purpose, would throw out of it both Haslett's and Lindsay's claim. The former was justly postponed to that of S. Spring & Sons, by the court below; he has not appealed, and could have no claim under the attachment suits, for Dearborne died before his suit was even commenced. The claim of Lindsay (so as it arises from his attachment), must also be rejected, on two grounds: 1st. The policy of insurance on the Abigail Ann had been transferred, long before his suit. 2d. It was abated by the death of Dearborne. This was understood to be the local law, as established by the decisions of the courts of South Carolina. *Crocker* v. *Radcliffe*, 3 Brev. 23. The order, dated the 23d of May 1813, and signed by Harford, as Dearborne's agent, and read in evidence as an exhibit, must also be excluded from the cause. There is no evidence, that he was the agent of Dearborne for this purpose; and even if he had been, the paper was irregularly introduced. It is the settled practice of the court of chancery, wherever anything like a regular practice prevails, that no exhibit can be proved at the hearing, without satisfactory reasons why it was not proved in the usual way, before the examiner; and if proved at the hearing, a cross-examination of the witnesses is always allowed. And an order must be previously obtained, or, at least, notice given. *Consequa* v. *Fanning*, 2 Johns. Ch. 481, and the cases there cited.

*274] *2. The decree below seems to be mainly founded on Harford's order, thus irregularly interpolated into the cause. Before the pretended liens of Gray & Pindar, and of Lindsay, had attached, the assignment had vested the property in the appellants, S. Spring & Sons. Lindsay, after he had delivered up the policy, and an intermediate transfer of it to *bonâ fide* purchasers, could not, by again obtaining possession of it, without the consent of such purchasers, regain his lien, even if he ever had one.

His possession was wrongful; and if rightful, he had no right to retain for a general balance. The lien of a policy-broker is confined to his general balance on policy transactions, and does not extend to other debts. *Olive* v. *Smith*, 5 Taunt. 57. Properly speaking, there is no such thing as a lien by contract. Liens are created by the law, and pledges by contract. But no express pledge is proved in this case. Neither can the analogy of the law of stoppage *in transitu*, be applied, where the property has already been transferred to a creditor or other *bonâ fide* purchaser.

3. In a bill of interpleader, all the parties are actors. Each party states his own claim, and the admission of no one is evidence against another. The appellants are not bound by the admission of the other co-defendants. They do not admit any such liens as are set up by the other parties, and no evidence is produced of their existence, except the order of Harford, which cannot be admitted. *Non constat*, when that order was executed. It *might have been, at the very moment before the hearing; and the bare possibility of this shows the danger of permitting it to be read in evidence, without notice, and without cross-examination. [*275

4. There are, besides, several formal objections. The plaintiffs below do not offer to bring the money into court, nor is there any affidavit accompanying the bill, and showing that it was filed without collusion. The want of this was a ground of demurrer, and they are clearly not entitled to their costs out of the fund. 1 Madd. Ch. 174, 181. The appellants are the only parties who, in answering, insist on their rights; the others merely pray to be dismissed.

*Cheves*, contrà, stated, that there were four claims in this case: 1. That of Haslett: 2. That of Lindsay: 3. That of Gray & Pindar: 4. That of the appellants, S. Spring & Sons.

1. The decree adjudges the surplus, if any, to Haslett, after payment of the other claims. But he has no claim upon the fund in controversy, unless it arises under his attachment. The case of *Crocker* v. *Radcliffe*, referred to on the other side, is not before the court in a shape in which the precise point decided can be known. The point said to have been ruled in that case, appears to have been determined otherwise in a previous case (*Kennedy* v. *Raguet*, 1 Bay 487), and the principle of this last decision appears *to be correct. The proceeding by attachment is a proceeding *in rem*, and therefore, ought not to abate by the death of the party. It is probable, that in *Crocker* v. *Radcliffe*, nothing had been attached upon the process, and therefore, the suit was adjudged to abate by the defendant's death; but in the present case, the fund in question was attached, and is bound by that attachment, subject only to the previous liens. [*276

2. Lindsay's claim is supported by the law of liens. Whitaker's Law of Lien, 26, 103–4. Though he may have parted with possession of the policy for a time, upon regaining it, his lien was re-established. Ibid. 121–2. But if the lien of Gray & Pindar, to whom he parted with the possession, be established, that will cover his claim, they being prior indorsers on the bills which from his demand, and their claim also embracing those bills.

3. The claim of Gray & Pindar is supported by express contract, as well as the general law of lien. The express contract is supported by the testi-

mony of Harford. The implied lien is supported by the possession of Lindsay, which was the possession of Gray & Pindar, until he delivered it to them, and afterwards, by the possession of Harford, whose possession also was their possession. Their lien embraces as well the bills which they indorsed for Dearborne, that were returned protested for non-payment, and
*277] were paid by Lindsay, as the sums they have actually paid. *The case of *Mann* v. *Shiffner*, 2 East 523, covers the whole of this claim. Manual possession is not necessary; it is the power to control the possession which gives the lien. Whitaker's Law of Lien, 105–6. The award did not impair the lien, without the acquiescence of Gray & Pindar, and the surrender of the possession of the policy; it did not even give a right to the possession. The only remedy was an action on the award. *Hunter* v. *Rice*, 15 East 100. But the award itself was not valid. The testimony of Harford proves, that the indemnity of Gray & Pindar for their indorsement of Dearborne's bills, was one of the points submitted, and as it was not determined, the award is void. *Mitchell* v. *Staveley*, 16 East 58.

4. The claim of the appellants, S. Spring & Sons, is not sufficiently proved. They have not proved either the deed of assignment under which they claim, or the debt for which they claim. The subscribing witness to the deed is not produced or examined. 5 Cranch 13; 4 Taunt. 46. The testimony to prove his handwriting is doubtful and improbable. The assignment alleges a debt of about $16,000. The evidence shows only that the appellants paid $2900 for the assignor, three or four years before, and that they became his surety for $1200 more, at the time of the assignment. These, and many other circumstances, give good reason to doubt the integrity of the transaction.

*278] The objections to the form of the bill, and to *the answer of the three first-mentioned claimants, cannot be sustained. 1. The only consequences of not offering in the bill to bring the money into court were, that the parties interpleaded might have moved the court to order the complainants to pay it into court; or, perhaps, they might have demurred. They have done neither, and they are now too late with their objection. 2. The same answer is applicable to the objection for want of an affidavit, that the bill was exhibited without fraud or collusion. They might have demurred, but they have not done so. 3. As to the omission of the answer (except that of the appellants) to pray for a decree other than their dismissal with costs: this is the common form prescribed by the books of practice, and will sustain a decree for the defendants, other than a decree of dismissal with costs. And even though the objection were, in general, well founded, it could not affect this decree, if it can be sustained on the merits; because, as to the appellants, they can only be satisfied, after payment of Lindsay, and of Gray & Pindar; and as to Haslett's claim, after the others are satisfied, his attachment will bind the surplus.

*Webster*, for the appellants, in reply, argued, that in this form of suit, being a bill of interpleader, even if S. Spring & Sons made out no title, it did not follow, that the decree must be affirmed. For aught that appeared, the right party might not yet be before the court; the personal representa-
*279] tives of Dearborne may be necessary parties. Every distinct claim stands on its own *merits; and even if Spring & Sons are not entitled,

the fund cannot be decreed to others, unless they prove themselves to be entitled.

There are two questions: 1. Can the decree, so far as it allows Lindsay's and Gray & Pindar's claims, be maintained? 2. Can their claims be preferred to those of Spring & Sons?

And first, as to Lindsay's claim. So far as it is founded upon the attachment-suit, it cannot be supported. The judgment against Dearborne, who was dead at the time, is a mere nullity. Besides, the property in the fund had actually been transferred to Spring & Sons, before the attachment was laid. If there was a previous lien, the party does not stand in need of the judgment. If there was not, the property was vested in others, by the assignment, and the judgment came too late. But he could have acquired no such lien as that which is now set up. There is no rule of law, which declares, that if a creditor gets, by any means whatsoever, possession of the effects of his debtor, he has thereby a lien, as of course. There is here no proof of an actual pledge; and a general lien he cannot have, because, although a broker has a lien for his general balance, on account of policy brokerage, it does not extend to other brokerage. The case cited from 5 Taunton is decisive to this point. If it be said, that he is not a broker, then the case is so much stronger against him, for he can have no brokerage balance for which to retain. Besides, he having once parted with the possession of the policy, *without insisting on his lien, it does not revive by returning to his possession again. [*280

As to Gray & Pindar's claim, it rests on two grounds: 1. A general lien: 2. A special agreement. But how can they claim a general lien? They are not insurance brokers. In order to make out a lien, they must show some course of trade, and some dealing and relation between the parties, to authorize it: a debt, and a liability are not alone sufficient. It is said, they had a lien, because they have never been divested of possession. But possession does not create a lien. There must be a right to claim. The assignment operated on the policy, in the hands of Gray & Pindar, just as if there had been an actual delivery to the assignees. A lien cannot exist by the party merely having the legal control. That control must be coupled with an interest in the thing. A trustee cannot set up a lien for debts generally, merely because the estate stands in his name. But, even supposing Gray & Pindar once had such a lien, it was defeated by the award, that the policy should be given up by them, to the order of Dearborne. The award here pleaded, is perfectly good on its face; it is completely binding on the parties, and cannot be in this way impeached. A party cannot claim, in equity, against an award, without impeaching it by bill. 1 Dick. 474. There is here no proof of partiality, or corruption, or excess of power; and nothing else will, in equity, *set aside an award. 3 Atk. 529; Ambl. 245; 1 Dick. 474; 2 Ves. jr. 15; 6 Ibid. 282. It is said, the [*281 award does not bind, because the arbitrators did not award an indemnity; and to support this position, a case is cited, where they would not act at all on the claim. That case is not this. There is no evidence that Gray & Pindar ever made any claim for indemnity before the arbitrators; and if they did, for aught that appears, it was rightly refused. The award, then, is clearly a bar to any claim existing before the time of the award. If there was any express agreement for the lien, before the award, it is merged in

the award; and there is no evidence of any such agreement subsequently made.

As to Harford's order, we do not object to its introduction, in point of form, but of substance. It is not proved; and if proved, it is a mere nullity. Harford signs it as attorney to Dearborne, who was then dead, and of Spring & Sons, whose attorney he never was. He never was even Dearborne's agent, for any other purpose than to transmit the policy to his wife.

As to the assignment to Spring & Sons, it is established by the decree, and that part of the decree is not appealed from. Spring & Sons have appealed, on account of the preference given to Lindsay and Gray & Pindar: but they have a right to stand on that part of the decree which declares the assignment to be well proved and valid. But the execution of the assign-
*282] ment is *sufficiently proved by the evidence. It is a clear case for admitting secondary evidence.

February 21st, 1823. LIVINGSTON, Justice, delivered the opinion of the court, and, after stating the case, proceeded as follows:—In reviewing these proceedings, the first question necessary to decide is, to whom the policy, mentioned in the complainant's bill, belonged, at the time of commencing the action on it. It does not appear, that the names of the parties interested in the Abigail Ann, were disclosed to the company, at the time of applying for insurance, or that their names were inserted in the policy. There is, however, no doubt, that when it was effected, Gray & Pindar, and John H. Dearborne, were the owners; but in what proportions does not appear, nor is it material now to be known, for whatever interest was held by Gray & Pindar, was regularly transferred to Dearborne, by their bill of sale, dated the 27th of May 1811 This bill of sale is for the whole ship, and its consideration is $5000. Some time after, in the same year, Gray & Pindar delivered to Henry Harford, as agent of Dearborne, the policy of insurance which had been made on it. Dearborne, being thus sole proprietor of the Abigail Ann and policy, on the 28th of October 1811, executed a bill of sale for the vessel, containing an assignment also of the policy, for valuable consideration, to John Spring, of the firm of Seth Spring & Sons.

Some objections were made to the proof of the execution of the instru-
*283] ment, but *they were not listened to below, nor are they regarded as well founded by this court. The proof was such as is required, where a party to a deed and the subscribing witness are both dead. The handwriting of both was proved, and Maria Teubner, who testified to that of the witness, left no reasonable ground to doubt of his death. She was a creditor of this witness, and had taken some pains to obtain information where he was, but without success: her last account of him was, that he had entered on board an American privateer, and had not been heard of for four years. The credit of this witness, although the subject of some animadversion, is not impeached by any testimony in the cause, nor by anything which she herself has testified.

It follows, then, that on the 28th of October 1811, Seth Spring & Sons became proprietors of the ship Abigail Ann, and of the policy mentioned in these pleadings, and *primâ facie* entitled to the whole of the moneys recovered on it, although the policy itself was not, at the time, put into their hands. Our next inquiry will be, whether any of the other parties, who are

now before us, have a lien on it, or any other title to these moneys, or to any part of them. The claim of Haslett may be considered as out of the question—it having been postponed by the circuit court to that of the appellants, and there being no appeal from this part of the decree.

Lindsay's demand will first be examined. This is made up of the premium paid for effecting the insurance; of an indemnity claimed by him for *indorsing two bills of exchange for Dearborne, amounting to 400*l.* sterling, and for having become his bail; of the customary commissions for his trouble and attention in conducting the suit against the underwriters, and of the amount of a judgment which he obtained, on the 19th of April 1813, against Dearborne, on an attachment issued out of the common pleas for the district of Charleston, and which had been served on the complainants. This attachment was sued out on the 24th of February 1812. No evidence is perceived in the proceedings in support of any one of these claims, except that which is founded on the judgment in the attachment. In his answer, Lindsay says that the policy was effected on his application, but nowhere pretends or alleges that he paid the premium for insuring the Abigail Ann, nor is there any proof *aliunde* of this fact. On the contrary, Gray & Pindar, in their answer, expressly state, that it was paid by them, and was probably allowed in their account against Dearborne, in making up the award hereinafter mentioned. Haslett, in his answer, asserts that it was advanced by him. Now, although the answer of one defendant be no evidence against another, yet, in the absence of all proof to the contrary, and where a party observes a profound silence on a subject to which his attention could not but be excited, such answer, not varying from any allegation on his part, furnishes some evidence that he could not make the assertion, because the fact was, in reality, otherwise. [*284

*If this fact of the payment of the premium had been made out, the court would have been disposed to award Mr. Lindsay payment out of the proceeds of the policy, for although he had once parted with it, yet, coming to his hands again, to be put in suit, his lien for the premium would revive and be protected, unless the manner of his parting with it had manifested an intention in him altogether to abandon such lien. [*285

His claim for a commission for conducting the suit against the underwriters, is inadmissible, it appearing from the testimony of Harford, who transmitted the policy to him, and who is the only witness on this subject, that he has no right to make any such charge. Harford considers himself entitled to this commission, and has accordingly charged it to Dearborne, in an account annexed to his deposition. Now, as this is the witness on whom all the defendants, except Seth Spring & Sons, principally rely, they cannot complain, if his testimony, when unfavorable, is allowed its full operation against them. It is evident, then, from the declaration of this witness, that he considered himself as the merchant who was prosecuting the suit, and that Mr. Lindsay was only employed to deliver the policy to a professional gentleman, to bring the action. There is another obstacle in the way of this claim, which is, that Lindsay, in the business of this suit, acted, as Harford himself says, as his (Harford's) agent. Now, there is not only no evidence of Harford himself being authorized by the owners of this policy, to bring any action on it, but it appears, that his detention of it was a violation of duty, *and that the action he brought, was [*286

more to answer his own purposes, and those of the other defendants, than to advance the interest of those whom he knew at the time to be assignees of the policy. In this state of things, nothing would be more unjust, than to permit this fund to be incumbered, as against Seth Spring & Sons, with the heavy charge of five *per centum*, in favor of any one of the parties, who, throughout the whole business, have had in view exclusively their own interest, and were acting in open hostility to those from whom they now demand this compensation. With what propriety can they now claim a commission from these gentlemen, when it is entirely or principally owing to their interference, that they have not to this day received any benefit from a judgment which was recovered for their use nearly eight years ago?

Lindsay's claim to receive any part of this fund, on account of the two bills of exchange for 200*l.* each, is equally unfounded. That he would have had a lien on the policy for this transaction, without an express contract (and none appears), even if he had never parted with its possession, is a proposition which may well be controverted; but if such lien ever existed (which is not asserted), it is not like that for the premium advanced for an insurance; the latter may well revive, in some cases, on a broker's being restored to the possession of a policy, which had once been out of his hands; it being no more than reasonable, that whoever acquires an interest in it, should generally take it, subject to such a charge. It *does not, how- *287] ever, follow, that liens, which may once have existed for other advances, or on other accounts, whether by agreement of the parties, or by the operation of usage or of law, should be placed on the same favored footing. If, while a policy is out of the hands of the insurance broker, as was the case here, it is assigned for valuable consideration and *bonâ fide*, it would be unjust, on its returning to his possession, to revive incumbrances, of which the assignee could have had no notice, nor any certain means of finding out; for he could not reasonably suspect, that such liens had ever existed in favor of one who had parted with the possession of the only thing by which they could have been enforced. Nor can it make any difference, whether the policy have been actually delivered to the assignee, provided the transfer were *bonâ fide* made, while out of the possession and power of the insurance broker. Upon the same principle it is, that a consignor loses his right to stop goods *in transitû*, although the consignee have become insolvent, after such consignee, having power to sell, has disposed of them, before their arrival, to a third person, unacquainted with any circumstance to taint the fairness of the transaction.

The next charge which Lindsay attempts to fix upon this fund, is an indemnification for becoming bail for Dearborne. Now, if a responsibility, so contingent and remote as one of this nature, could, by any possibility, without a very positive and express agreement, be turned into a lien on a policy of insurance, it does not appear, in what suits he *has thus *288] become bail, nor whether he has not been released by the death of the principal from all liability; and of course, any demand arising from such responsibility, if any ever existed, must be laid out of the question. And the answer which has already been given to his claim for indorsing certain bills of exchange, will also apply here.

The judgment obtained in the attachment-suit may be as easily disposed of. It is quite unnecessary to inquire, whether these proceedings abated by

the death of Dearborne, if he were dead at the time; for at the time of issuing the attachment, and, of course, long before judgment, Dearborne ceased to have any interest in this policy, the same having been already assigned to John Spring, of the firm of Seth Spring & Sons. No attachment, therefore, against Dearborne, although served on the company, could render the property of another liable for his debts. The attachment of Lindsay, it may incidentally be observed, furnishes some proof that he had no great confidence in the liens which he now asserts against this policy.

The title of Gray & Pindar remains to be examined. By their answer, they claim $502, as the premium paid for insurance on the Abigail Ann, and $50, paid as a commission for effecting the same. They likewise state, that large advances were made by them, between the 5th of April and 7th of August 1811, on account of the said ship, her cargo, pilotage and repairs; and they also, it seems, became the bail of Dearborne in two several actions, amounting *to $1000, which they have since become liable to pay; [*289 they were also indorsers of the two bills of exchange which were indorsed by Lindsay. After stating all these demands, they say, that upon closing the account between Dearborne and themselves, there was a balance in their favor of $1430.16, for which Dearborne gave them a bill of exchange on Logan, Lenon & Co., of Liverpool; that feeling uneasy and insecure from the responsibility resting on them, and aware that they could be indemnified only by a specific lien, they would not deliver to Dearborne the policy, but put it for safe-keeping into the hands of their friend, Henry Harford, for the express and avowed purpose of protecting them against all losses on the accounts aforesaid; the said policy being also intended as a security for certain debts due by Dearborne to Harford. Now, without looking any further than the answer of these gentlemen, it is most manifest, that none of the demands or responsibilities which are stated in it, were contracted on entered into, under any agreement or understanding with Dearborne himself, as Harford would have us believe, that they should be secured by a lien on this policy, but that such lien is set up solely on the ground of a subsequent understanding between them and Harford, to whom it was delivered, for the purpose of protecting them against loss. To derive any benefit from such a delivery, or such an assent on the part of Harford, it should appear (which is not the case), that they had a right to exact, and Harford a right to accept of *the policy on these terms. Unfortu- [*290 nately for these gentlemen, the testimony of their friend and witness, Mr. Harford, most incontestably establishes, that they were bound by the decision of persons of their own choice, of whom Harford himself was one, to deliver the policy, without annexing to such an act any condition or terms whatever; and also, that the authority of Harford extended only to its receipt and transmission to Mrs. Dearborne, the wife of Mr. John H. Dearborne. On the 21st of September 1811, which is subsequent to all their advances, indorsements and engagements for John H. Dearborne, he and Gray & Pindar submitted all their controversies to two arbitrators, who, in conjunction with Harford, as umpire, awarded that Gray & Pindar should pay to Dearborne $66.77, and surrender to him the policy on the Abigail Ann, without unnecessary delay. Now, this award could not have been signed by Harford, if he knew of any lien to which Gray & Pindar were entitled on this policy. It was said, that no notice could be taken of this

award; but coming, as it does, from a witness of the party, who was himself umpire, and not being impeached, this court cannot, without injustice, shut its eyes upon it. If a bill for its specific performance might have been entertained, which was not denied, what higher or better evidence can the court have of the rights of the respective parties, at the time of the transactions referred to in the answer of Gray & Pindar? If judges of their own selection have directed them, as they had a right to do, to surrender *this
*291] policy, without delay, and unconditionally, to Dearborne, this court must now presume (and it is a presumption with which neither Gray & Pindar, nor Harford, can be justly offended), that the policy was delivered to the latter, pursuant to the award; and if not, that any condition with which they thought proper to accompany such delivery, if not a breach of the arbitration bond, would, at least, be a trespass on good faith; and that no assent or understanding, on the part of Harford, who was without authority for this purpose, could confer any validity, or give any sanction to such an act. This award is also of importance, to show how entirely mistaken Gray & Pindar are, in supposing Dearborne, at the time they speak of, so largely in their debt, when it appears by this instrument, that the balance, although not a large one, was in his favor.

As to Hartford's power, it appears, from his own letters, that he had no other authority than to transmit the policy, when received, to the family of Dearborne. Accordingly, in a letter to Seth Spring & Sons, of the 26th of September 1811, he transmits, for Mrs. Dearborne, the bill of sale for the Abigail Ann. And in another letter of the 3rd of November following, to the same gentlemen, he apologizes for not sending on the policy, as it had not yet been received from Charleston. After this unequivocal evidence of what was his authority over this policy, it becomes quite unimportant to inquire, what agreements he may have made, or what orders he gave Lindsay respecting the proceeds of it. It is not too much *to say, that the
*292] one of the 13th of May 1813, in favor of Haslett, for the whole proceeds, after Lindsay's retaining for himself his legal claim and expenses, was a palpable violation of duty, or breach of instructions, towards Dearborne; and it was properly said by the circuit court, "that to vest any interest, hostile to that of Seth Spring & Sons, was certainly not in his power." Gray & Pindar having been originally interested in this ship and policy, on which there was some reliance by their counsel, places them, as it regards a lien, in a condition less favorable than if such ownership had never existed; for by such *overt* acts, as the execution of a bill of sale of the vessel, and a delivery of the policy, pursuant to the award, to the agent of Dearborne, they have done all in their power to inform the world, that they had no claim on either, for any demands against Dearborne.

There is error also, in that part of the decree, which directs Seth Spring & Sons to account for their claims on Dearborne. The complainants have no right to an account; and the defendants being called here only to interplead, and having failed to establish any claim on this fund, have as little right to such an account. They cannot, at any rate, require it, in the position in which they now stand as co-defendants with Seth Spring & Sons. It is but justice to remark, that for aught that appears in the present suit, there is no reason to suspect the integrity of the assignment to Seth Spring

& Sons; they appear to be respectable merchants, and to have been large creditors of *Dearborne.

It is the opinion of this court, that the decree of the circuit court [*293 be reversed, so far as it postponed the demand of the appellants to those of Lindsay and of Gray & Pindar, and directed them to account; and that instead thereof, a decree must be entered in their favor, for the whole amount recovered on the policy, with interest (the money not having been brought into court), at the rate of six per cent. per annum, from the time of rendering the judgment, the complainants deducting therefrom their costs of suit. The defendants must pay their own costs.

DECREE.—This cause coming on to be heard, and being argued by counsel of the respective parties: it is ordered, adjudged and decreed, that the decree of the circuit court for the district of South Carolina, in this case, be and the same is, hereby reversed and annulled: and this court, proceeding to pass such decree as the said circuit court for the district of South Carolina should have passed, doth further order and decree, that the complainants pay to the defendant, John Spring, of the firm of Seth Spring & Sons, the whole amount of the judgment recovered against them on the policy on the ship Abigail Ann, mentioned in the pleadings in this cause, with interest, at the rate of six per centum per annum, from the time of rendering such judgment, after deducting therefrom their costs of suit, to be taxed. And it is further ordered, adjudged and decreed, that the defendants in the said circuit court, respectively, pay their own costs.

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## *HUGHES v. UNION INSURANCE COMPANY OF BALTIMORE. [*294

*Debt on policy of insurance.—Deviation.*

Insurance for $18,000 on vessel, valued at that sum, and $2000 on freight, valued at $12,000, on the ship Henry, "at and from Teneriffe, and at and from thence to New York, with liberty to stop at Matanzas; the property warranted American:" the policy was executed in 1807; and in the same year, another policy was made, by the same underwriters, on freight for the same voyage to the amount of $10,000, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters, on the part of the plaintiff, who was both owner and master of the ship: "We are to clear out for New Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment; there will be three other persons on board that will have the remainder of the cargo in their care; we are to stop at the Matanzas, to know if their are any men-of-war off the Havana." The vessel sailed from Teneriffe, on the 17th of April 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul, in the representation: the cargo was shipped under a charter-party, executed by the plaintiff and Dumeste, representing New Orleans as the place of destination: The ship arrived at the Havana, on the 7th of July, having put into Matanzas to avoid British cruisers, and unloaded the cargo, which was there received by the Spanish owners, and the freight, amounting to $7000, paid to the plaintiff, who received it, "in full of all demands, for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." At the Havana, the ship took in a new cargo, belonging to merchants in New York, and was lost, with the greater part of the cargo, on the voyage from Havana to New York. An action of debt was brought on the first policy, for the value of the ship and freight; the sum demanded in the writ was $20,000, but the plaintiff *limited his demand at the trial, to $18,000 on the ship, [*295 and $420 for the freight actually earned on the voyage from Havana to New York: *Held*, that he was entitled to recover.

In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is

demanded and it is shown by the counts, to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances.

ERROR to the Circuit Court of Maryland.

This was an action of debt, upon a policy of insurance, in the usual form, dated on the 27th of May 1807, on the ship Henry, "lost or not lost," "at and from Teneriffe to Havana, and at and from thence to New York, with liberty to stop at Matanzas:" $18,000 were insured on the ship, valued at that sum, and $2000 on the freight, valued at $12,000; and the property was warranted American. On the 1st of June, in the same year, a policy was executed on the freight of the ship Henry, by the same company, for the same voyage, to the amount of $10,000; the whole freight being valued at $12,000. In this policy also, the property was warranted American; but there was no liberty to stop or touch at Matanzas, or any other place. Both these policies were effected under an order for insurance, by Henry Thompson, of Baltimore, as agent for the plaintiff, an American citizen, who was master for the voyage, as well as owner. The order bore date on the 18th of May 1807, and was in the following words:

*296] "Baltimore, May 18th, 1807.

"Gentlemen:—Insurance is wanted on $18,000, on the American ship Henry, Capt. Henry Hughes, and $12,000 on her freight, each valued at the same; at and from Teneriffe to Havana, and at and from thence to New York, against all risks. The Henry was expected to sail on or about the 12th ult.; she is a remarkably good vessel, about 270 tons burden, and now on her first voyage. Said ship and freight are the sole property of Capt. Hughes, who gives the following particulars in his letter of instructions to N. Talcott, of New York. 'We are to clear out for New Orleans; the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board, that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men-of-war off the Havana. When you make insurance, which I expect will be done low, you will state the whole of this business; so that there will be a right understanding of the voyage.' At what premium will you insure the above risks?

(Signed) HENRY THOMPSON."

The Henry sailed from Teneriffe on the 17th of April 1807, with a cargo
*297] for the Havana, *which belonged to Spaniards, but appeared as the property of John Paul Dumeste (the person mentioned in the order for insurance by the name of John Paul), a citizen of the United States, who went as supercargo. She took a clearance for New Orleans. This cargo was laden at Teneriffe, under a charter-party, which bore date the 10th of March 1807, and represented New Orleans as the port of destination, without any mention or notice of the Havana. The parties to it were Dumeste, and Henry Hughes, the master. The freight mentioned was $11,000; of which it was stipulated that $5000 should be paid at New Orleans, and the remaining $6000 at New York.

The ship proceeded to the Havana, where she arrived on the 7th of July; having put into Matanzas, on the 2d of June, to avoid British cruisers

then in sight, and unladed the cargo, which was there delivered to the real Spanish owners. The real freight to the Havana, amounting to $7000, was paid at Matanzas, to the plaintiff, who received it "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." It was proved, that this unlading did not produce any additional delay or increase of risk; for the ship left Matanzas and proceeded to Havana in ballast, as soon as there was any reasonable prospect of escaping the cruisers stationed in the way, and was enabled to proceed, sooner and more safely, by being in ballast, which put it in her power to keep closer in shore. At the Havana, she took in a new cargo, belonging *to persons in New York, and consisting of 120 boxes of sugar, at a freight [*298 of $3.50 the box. On the voyage, she sprang a leak, soon after which she transshipped a part of her cargo, consisting of 60 boxes, into the Rising Sun, a vessel bound to Norfolk, where the property was safely landed. Within about two days after the transshipment, the Henry sank, and was totally lost, with the rest of the cargo. The master and crew escaped in their boat. In attempting to make their way to New York, they were taken up at sea, in an almost desperate situation.

The freight was abandoned to the underwriters, and a demand was made of payment for that and the ship; which being refused, this action was brought to recover both. The sum demanded by the writ and declaration was $20,000, and the loss declared on was by the dangers of the seas, one of the perils mentioned in the policy. On the plea of *nil debet*, issue was joined, and the case went to trial.

At the trial, the plaintiff gave the charter-party in evidence, as one of the documents necessary or proper for establishing the neutral character of the vessel and freight; but there was no evidence of its having been, at any time, produced or mentioned to the defendants, or in any manner known to them. He also proved his own national character, and that of the ship, his interest in the ship and freight, the commencement and prosecution of the voyage, and the loss and abandonment. By an admission at the bar, he expressly limited his demand of freight to that earned on the 120 boxes *of sugar, amounting to $420; and renounced all claim to any further [*299 or other sum on that account.

The defendants then gave in evidence the separate policy on the freight, which is mentioned above; and also produced evidence, tending to show, that the plaintiff, in his management respecting the said ship, after the leak was discovered, was guilty of gross negligence, in not using such means as were in his power for conducting the said ship into a place of safety in the Delaware; and that he might have conducted her into a place of safety there, had he used those means.

The plaintiff then gave evidence of the causes, nature and duration of the delay at the Matanzas, as stated above, and of the effect produced on the risk, by unlading the cargo there. He also gave in evidence, that after the said leak was discovered, the plaintiff did all in his power, according to his skill and ability, to save the said ship, and to conduct her safely to her port of destination; and that there was no place of safety in the Delaware, to which the said ship could have been conducted, nearer, or more easily reached, in the state of the wind and weather at that time, than New York.

The defendants then prayed the opinion of the court, and their direction to the jury :

1. That if the jury should be of opinion, from the evidence, that the cargo shipped at Teneriffe, which the order for insurance of the 18th of May 1807, mentions, and which the charter-party, and the policy of insurance upon freight of the 1st of June 1807, read in evidence on this trial, also
*300] *mentions, was landed, and finally separated from the ship, at Matanzas, and was there delivered by the plaintiff, at the instance of the freighters, and accepted by the freighters, the plaintiff receiving from the said freighters $7000, in lieu of all demands upon the said charter-party, including the whole freight to the Havana ; and that a cargo of sugar, for an entirely new account and risk, to wit, for the account of risk of Le Roy, Bayard & McEvers, of New York, was, by the plaintiff, taken in at the Havana, with which the ship sailed upon her voyage to New York, as proved by the plaintiff's testimony, then the plaintiff is not entitled to a verdict for any freight, upon the issue and pleadings in this cause.

2. That if the jury should find, from the plaintiff's declaration, and the evidence, that the cargo shipped at Teneriffe, which the order for insurance, of the 18th of May 1807, mentions, and which the charter-party, and the policy of insurance upon freight, of the 1st of June 1807, read in evidence on this trial, also mention, was landed, and finally separated from the ship, at the Matanzas, by the freighters and the plaintiff, and was there delivered by the plaintiff, and accepted by the freighters, and their contract of freightment abandoned, the plaintiff receiving from the said freighters the sum of $7000, in lieu of all demands upon the said charter-party, including the whole freight to the Havana ; and that a cargo for an entirely new account and risk, to wit, for the account and risk of Le Roy, Bayard & McEvers,
*301] of New York, was, by the plaintiff, taken in at the Havana, *with which the ship sailed to New York, as proved by the plaintiff's testimony ; and further, that in the course of her said voyage to New York, a part of the said cargo was transshipped into the Rising Sun, as stated in the plaintiff's evidence ; and if they also find, that the risk was increased by taking in the new cargo aforesaid, and the transshipment aforesaid, beyond what it would have been, had the said ship proceeded in ballast from the Havana to New York, then the policy was wholly discharged, and the plaintiff cannot recover as to the vessel, on the issue and proceedings in this case.

3. That if the jury should be of opinion, from the evidence, that the plaintiff had an opportunity of causing the said ship, after the discovery of the leak, to be carried into the Delaware, or elsewhere, and there saved from the total loss which afterwards happened, and that he did not act with proper and reasonable care, in forbearing to do so, he is not entitled to recover in this action.

These directions were given by the court, who further instructed the jury, that this was a valued policy, on which an action of debt lies ; the sum claimed being specified by an agreement of the parties. But the whole must be recovered, or no part of it can be recovered. In this suit, the action is for two distinct sums, $18,000 on the ship, and $2000 on the freight. The party can recover either entire, and not the other ; but not a portion of
*302] either, without accounting for the residue. To these opinions and directions, the plaintiff *took a bill of exceptions, on which judgment

was rendered for the defendants, and the cause was brought by writ of error to this court.

February 6th. *Harper*, for the plaintiff, made the following points:— 1. That there was no connection whatever between the policy and the charter-party; which not having been made known to the underwriters, can make no part of the contract, nor in any manner affect it. 2. That the policy on the freight alone, however it might have been affected by the payment at the Havana, had an action been brought on it, cannot affect the present case; the policy in which expressly declares, that the whole freight on the whole voyage insured, should be valued at $12,000, of which only $2000 were to be covered by that policy; a declaration entirely conformable to the order on which both policies were made. 3. That the receipt of $7000 at the Havana, if it had been in full of all claims under the charter-party, could not affect the plaintiff's claim in this case; because the policy has no connection with the charter-party, and the freight now claimed arose on a voyage entirely different from the one described in that instrument. 4. That the receipt of the $7000 at the Havana was not in full satisfaction of all claims and rights under the charter-party; but merely "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo; that is, in full payment of the freight *due, under the charter-party or otherwise, on the cargo brought from [*303 Teneriffe, and landed at Matanzas. 5. That although the action brought is debt, and the sum declared for on account of freight is $2000, yet less may be recovered in such a case as the present; where the right to recover depends not on the contract alone, but on matter *dehors* and independent. *Incledon* v. *Crips*, 2 Salk. 658; s. c. under the name of *Ingledew* v. *Crips*, 2 Lord Raym. 814. 6. And consequently, that the first direction was wrong, and also the third, which applies to the form of the action; a point equally open under the first application.

And as to the second instruction, 1. That for the true construction and character of this contract, we are to look to the policy alone, or, at most, to that and the order for insurance. The charter-party not being referred to in the order, or in any manner made known to the defendants, cannot be taken into view. 2. That the policy and the order make two distinct voyages, or one voyage divided into two distinct parts; so that, at the termination of the first voyage, or of the first section, the first cargo might be discharged, and a new one taken in for the second section. 3. That the plaintiff thus having a right to take in a new cargo at the Havana, for the residue of the voyage, it was his duty to use all proper means for the pre servation of that cargo; and, consequently, *no delay, deviation, or [*304 increase of risk, arising from the use of such means, can affect his claim on the underwriters on the ship. 4. And consequently, that the second direction also was erroneous.

*D. B. Ogden*, contrà, argued, that the insurance was altogether restricted to the voyage mentioned and stipulated in the charter-party, and that the voluntary surrender of that contract, at the Matanzas, annihilated the contract of insurance on the freight. That the receipt of a compensation by way of compromise for the freight, as stipulated, on the voyage from the

Havana to New York, was, in fact, the receipt of the whole freight for that voyage. And that taking in a cargo at the Havana, not provided for by the charter-party, or mentioned in the representation to the underwriters, terminated the insurance on the vessel, and discharged the underwriters altogether. 1 Marsh. on Ins. 92, 93; *Thompson* v. *Taylor*, 6 T. R. 478; *Horncastle* v. *Stewart*, 7 East 400. He also insisted, that the direction of the court, as to the form of action, was correct. *United States* v. *Colt*, Peters C. C. 145, and the authorities there cited.

February 15th, 1823. JOHNSON, Justice, delivered the opinion of the court.—This suit was instituted on a policy of insurance on the ship Henry, and on the freight to be earned by her, on a voyage from Teneriffe to Havana, and thence to New York: $18,000 on the ship, and $2000 *305] *on the freight, were insured in this policy; and another sum of $10,000 on the freight, was insured in a distinct policy, by the same company. At the trial, the defendants prayed certain instructions to the jury, which the court gave, and added a further instruction in their favor, in pursuance of which, the jury found for the defendants below. The question is, whether the instructions so given were conformable to the law of the case. This must depend upon the construction of the policy, as modified by the representations made at the time of the contract.

The vessel, it appears, was at Teneriffe, when the order for insurance was written, and had engaged in the transportation of Spanish property, to be covered as American, in the manner specified in the representation. By the charter-party, John Paul Dumeste appears as the owner and affreighter of the goods, and the voyage stipulated for is precisely that insured against, to wit, from Teneriffe to Havana (under the disguise of New Orleans) with liberty to put into Matanzas, and from Havana to New York. There is no imputation of unfairness; the nature of the voyage was distinctly understood between the parties; and the only question which goes to the negation of the right of recovery of freight altogether, is raised upon the supposed termination of the voyage insured against, at Matanzas, and the actual receipt there of the whole freight insured. And as against the sum insured on the vessel, the defendants insist, that the act of taking in a cargo at *306] *the Havana, which was not permitted by the contract of insurance, avoided the contract. The argument is, that the insurance was altogether confined to the voyage stipulated for under the charter-party. And it has been contended, that the voluntary surrender of that contract at the Matanzas, put an end to the voyage, or to the adventure insured. That the receipt of a compensation, by way of compromise, for the $7000 freight, stipulated for on the voyage from Havana to New York, was in fact the receipt of the whole freight on that voyage. And lastly, that taking in a cargo at the Havana, not in contemplation under the charter-party or representation, put an end to the insurance on the vessel, and discharged the underwriters altogether.

It is obvious, that if this case be disposed of upon the contract, as exhibited on the face of the policy, the right of the plaintiff to recover would be unquestionable. The defendants, however, avail themselves of the right of insisting on the contract, such as it really was, in the intendment of the parties, whatever the policy might purport on its face. The benefit of

the same principle, therefore, cannot be withheld from their adversary; and accordingly, the existence of the charter-party becomes altogether an immaterial circumstance in the case. No mention of it was made in the representation; and the voyage might have been prosecuted without it. The representation was *the document to which the parties were referred for their respective undertakings. Engaging in a voyage different [*307 from that, whether with or without a charter-party, would have vitiated the contract. But a charter-party so strictly conforming to that representation, would only leave the parties where it found them; and answered no other purpose, than to furnish the authentic evidence of freight engaged, in case of loss, while sailing under it. And this is the whole effect of the cases cited to sustain this supposed intimate and mutual dependence between policies and charter-parties.

Has, then, the representation been complied with substantially? This depends upon the real nature of the voyage insured; in considering which, it is obvious, that although it was indispensable, that the American mantle should be thrown over the cargo, it was by no means so, that the cargo should continue to need the protection of that mantle. It would be as reasonable, to contend, that, if Spain had ceased to be a belligerent, or John Paul Dumeste, instead of being the nominal, had become the real owner of the cargo, the contract of insurance would have been avoided. We consider a representation of property, being covered as American, as substantially complied with, if the property be actually American: and as the presence and agency of John Paul Dumeste, had the cloaking of the property as their sole object, that his presence was dispensed with, when the cargo became actually American.

So much for the national character of the shipper. And as to his identity, we see nothing in *the contract to prevent the change which took place under the transactions at Matanzas and the Havana. It is very [*308 clear, that, provided John Paul Dumeste had continued in the capacity of supposed owner, the representation would have admitted of taking in a cargo from the Havana, belonging to any other Spanish subjects than the shippers from Teneriffe. The plaintiff, then, was not bound by anything in the representation, to hold the original shippers to their contract, but was left at large, as in all such carrying voyages, to do the best he could for himself, in earning freight; provided the cargo still continued covered as American. He was, then, at liberty to change the actual shipper; and he has done nothing more in compounding with the Spanish charterers, and putting his vessel up as a general ship at the Havana.

But it is contended, that by the composition made at the Matanzas, the plaintiff has actually received what he is now suing for, to wit, his freight from Havana to New York. Plausible as this argument appears, we are of opinion, that the facts will not sustain it. The sum received in composition, to wit, $7000 (from which, we presume, was deducted both primage and specific compensation, as stipulated for under the charter-party), could not have been for the hire of the vessel to New York. To say nothing of the difference in amount, what interest could the first charterers have had in sending her empty to New York? The true understanding of the arrangement is, that those shippers purchased *a release from the obligation to find a cargo for New York, and thus avoided paying the sum of [*309

$7000. The master then took the risk of not being able to procure a freight for the last port of his voyage. This was the consideration of the composition paid him, and events proved, that he made a very hard bargain for himself, and a very beneficial one for the underwriters. Had the vessel taken in full freight from the Havana for New York, it might have been a question, upon the loss happening, whether the underwriters were entitled to deduct the $7000 so received; but in the present state of facts, no question can be raised upon it, but that which has been raised, to wit, whether it operated as a receipt in full to the underwriters, for all freight that might, by possibility, be engaged on the remaining voyage. We have expressed our opinion that it did not.

With regard to that part of the instruction which was voluntarily given by the court, it is necessary to remark, that although it does not appear to have been moved by the defendants' counsel, yet it was on a point certainly presented by the case; and as it is one on which this cause may, by possibility, be again brought up to this court, it is proper now to decide it. So far as relates to the policy on the ship, there can be no difficulty. The plaintiff is entitled to the whole or nothing. We are of opinion, that he was entitled to the whole. But as the plaintiff demands only the sum of $420 for freight from the Havana, the question arises, whether, in this form of
*310] action, he could recover less than the *$2000 specified in the contract, and claimed by the writ. On this point, the court charged the jury, "that the whole must be recovered, or no part of it could be recovered; that the party could recover either of the two sums claimed, entire, without the other, but not a portion of either without accounting for the residue."

On this subject, this court is satisfied, that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for a less sum. Otherwise *non constat*, but the difference still remains due. That this is the law, where an entire sum is demanded in the writ, and shown by the counts to consist of several distinct debts, is established by the case of *Andrews* v. *De la Hay* (Hob. 178); that the law is the same, where an entire sum is demanded, and only half of it established, is laid down expressly in the case of *Speak* v. *Richards*, in the same book (209, 210), and adjudged in the case of *Grobbam* v. *Thornborough* (82), and in the more modern case of *Ingledew* v. *Crips* (2 Lord Raym. 814–16). Our own courts, in several of the states and districts, have also recognised and conformed to the same doctrine. And the same cases establish, that the requisite conformity between the writ and judgment, in the action of debt, may be fully complied with,
*311] either by the pleadings, the finding of the jury, or a *remitter* *entered by the plaintiff, either before or after verdict, or even after demurrer.

If, therefore, the instruction to the jury on this point, was intended to intimate, that they could not find for the plaintiff any less sum than the $2000 valued on the freight, we deem it exceptionable; inasmuch as the plaintiff had a right to claim a verdict for the freight established by the evidence, and enter a *remitter* for the difference.(*a*)

(*a*) This question respecting the action of debt, is so fully discussed and settled in the case of the United States v. Colt, Peters C. C. 145 that the editor has taken the

There was another question made by the defendants' counsel, on the argument, which had relation to the *quantum* of the sum to be recovered for freight under this policy. It was contended, that it ought to be reduced, by reference to the ratio which it bears to the other policy executed on the same freight. But we decline deciding the point, as well because it is not brought up under the bill of exceptions, as because we cannot discover how it can affect the interests of the parties, since both policies were executed between the same parties, upon the same representation.

Judgment reversed, and a *venire de novo* awarded.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the circuit *court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, [*312 this court is of opinion, that the said circuit court erred in the first and second instructions given to the jury, as prayed for by the defendants' counsel, and in the voluntary opinion of said circuit court, so far as the said opinion was intended to instruct the jury, that they could not find any less sum than two thousand dollars valued on the freight. It is, therefore, adjudged and ordered, that the judgment of the said circuit court of the United States for the district of Maryland, in this case, be and the same is hereby reversed and annulled: and it is further ordered, that said cause be remanded to said circuit court, with instructions to issue a *venire facias de novo*.

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## BUEL *v.* VAN NESS.

*Error to state court.—Forfeiture.*

The appellate jurisdiction of this court, under the 25th section of the judiciary act of 1789, c. 20, may be exercised by a writ of error issued by the clerk of the circuit court, under the seal of that court, in the form prescribed by the act of the 8th of May 1792, c. 137, § 9; and the writ itself need not state that it is directed to a final judgment of the state court, or that the court is the highest court of law or equity of the state.

The appellate jurisdiction of this court, in cases brought from the state courts, arising under the constitution, laws and treaties of the Union, is not limited by the value of the matter in dispute.

*Its jurisdiction in such cases extends to a case where both parties claim a right or title under the same act of congress, and the decision is against the right or title claimed by [*313 either party.

Under the 91st section of the duty act of 1799, c. 128, the share of a forfeiture to which the collector, &c., of the district is entitled, is to be paid to the person who was the collector, in office, at the time the seizure was made, and not to his successor in office, at the time of condemnation and the receipt of the money.

Jones *v.* Shore, 1 Wheat. 462, re-affirmed.

ERROR to the Supreme Court of Vermont, for the county of Chittenden, being the highest court of law in that state.

The plaintiff in error, Buel, brought an action of *assumpsit* against the defendant in error, Van Ness, in the state court. The declaration was for money had and received, and money lent and advanced, to which defendant pleaded the general issue, and upon the trial, the jury found the following special verdict:

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liberty of subjoining, in the Appendix to the present volume, Note II., the very able judgment of Mr. Justice WASHINGTON in that case.

That for the space of two years preceding the 15th day of February, in the year 1813, the said Samuel Buel was collector of the customs for the district of Vermont, having been theretofore duly appointed and commissioned by the president of the United States to that office, and sworn according to law, and taken upon himself the discharge of the duties of the office aforesaid; that during the time the said Buel was collector of the customs aforesaid, a certain quantity of fur and wine was seized in the said district, by one Joshua Peckham, an inspector of the customs within the said district, acting under the authority of the said Buel, as collector as aforesaid, as forfeited to the United States, for having been imported contrary to law; that
*314] the *said fur and wine, during the time the said Buel was collector as aforesaid, were duly libelled in the district court of the United States for the district of Vermont; that at the term of said court, in which the said fur and wine were libelled, as aforesaid, one Zalmon Atwood preferred his claim to the said fur and wine, in due form, in the said court, and then and there executed to the said United States, a bond in the sum of $1202.64, being the value of the said fur and wine, as appraised according to law, and conditioned for the payment of the said sum to the United States, in case the said fur and wine should be condemned; that afterwards, and while the said Buel was collector as aforesaid, to wit, at the term of the said court, holden at Rutland, within and for said district, on the 10th day of October, in the year 1812, such proceedings were had on said libel, that the said fur and wine were regularly condemned, as forfeited to the United States; that on the said 15th day of February, in the year 1813, the said Samuel Buel was, by the president of the United States, removed from the said office of collector for the district of Vermont; that on the same day, the said Cornelius P. Van Ness was duly appointed to the said office, and commissioned and sworn accordingly, and still continues to hold said office; that on the 10th day of May, in the year 1813, the said sum of $1202.64 was paid into court, in discharge of the said bond, into the hands of Jesse Gore, Esquire, clerk of the said court; that on the same day, the said sum of
*315] money was, *by the said Jesse Gore, paid into the hands of the said Cornelius P. Van Ness, Esquire, collector as aforesaid, to be by him distributed according to the laws of the United States; that the said Cornelius P. Van Ness, on the first day of July, in the year last aforesaid, paid into the treasury of the United States one moiety of the said sum of $1202.64, and that the said Cornelius P. Van Ness retains the remainder of the said sum, as belonging to him, as collector as aforesaid, and to the inspector who seized the said goods, and to the person who first informed of the said offence, notwithstanding the said Buel, before the commencement of the said action, to wit, on the fifth day of June, in the year 1813, at Burlington aforesaid, did demand the same of the said Van Ness. And if, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall seem to the court here, that the said Cornelius P. Van Ness is liable in law for the non-performance of the promises in said declaration contained, in manner and form as the said Samuel Buel complains against him, then the said jurors further upon their oath say, that the said Cornelius did assume and promise, in manner and form as the said plaintiff, in his said declaration hath alleged, and they assess the damages of him, the said Samuel, by the occasion of the non-performance of the said promises and under-

takings, at the sum of $672.47, and find for him to recover the said sum, with his costs; but if upon the whole matters aforesaid, by the jurors aforesaid, in form aforesaid found, *it shall seem to the court here, that the said Cornelius P. Van Ness is not liable in law, in manner and form [*316 as the said Samuel complains against him, then the jurors aforesaid, upon their oath say, that the said Cornelius P. Van Ness did not assume and promise, in manner and form as the said Samuel hath alleged against him and find for him to recover his costs.

Upon which, judgment was rendered by the state court for the defendant; and the cause was brought by writ of error to this court. The writ of error was issued by the clerk of the circuit court of Vermont, under the seal of that court, and in the usual form of writs of error to the judgments of the circuit courts of the United States.

February 12th. *Sergeant*, for the plaintiff, argued, that the judgment of the state court was erroneous, upon the settled decisions of this court. The collector, under whose authority the seizure was made, was clearly entitled to the moiety of the forfeiture given by the collection act of 1799, c. 122, §§ 89, 91, and not the collector who was in office at the time condemnation was pronounced, and the money actually received. *Jones* v. *Shore*, 1 Wheat. 462.

The *Attorney-General* contrà, argued: 1. That the writ of error, in this case, was not, upon its face, to a final judgment of the highest court of law of the state. This court is a court of a *limited and special jurisdic- [*317 tion, both by the constitution, and by the act of congress giving it appellate jurisdiction over the state courts, in certain cases. All persons who appear before it must bring themselves within the jurisdiction, either by the nature of the controversy, or the character of the parties. *Durousseau* v. *United States*, 6 Cranch 307; *Turner* v. *Bank of North America*, 4 Dall. 8. The writ of error is the instrument by which the record is to be brought into this court, and it must, therefore, exhibit, on its face, the appellate jurisdiction.

2. The writ does not appear to have emanated from the office of the clerk of this court, nor from any office authorized to issue it. The writ was issued by the clerk of the circuit court of Vermont. The act of May 1792, c. 137, § 9, directs the clerk of this court to send to the clerks of the circuit courts, the form of a writ of error, to be issued by the latter, under the seal of the circuit court. But this provision cannot apply to writs of error to judgments of the state courts.

3. It is not stated in the writ of error, nor does it appear, that the supreme court of the state of Vermont is the highest court of law or equity in the state, in which a decision could be had. *Non constat*, but there may be another still higher appellate tribunal, where the cause might have been carried.

4. The amount of the judgment is not sufficient to support a writ of error to this court. The 25th section of the judiciary act of 1789, c. 20, provides, that in all cases where this court has appellate *jurisdiction from the [*318 judgments or decrees of the state courts, they may be re-examined on a writ of error "in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained

of had been rendered or passed in a circuit court." One of those regulations is, that the matter in dispute must be of the value of $2000. And the policy of the law, or the supposed intention of the law-makers, cannot give jurisdiction by implication.

5. But if these formal objections should be overruled, he insisted, that the decision of the state court was not against a right claimed under a statute of the United States, within the 25th section of the judiciary act of 1789, c. 20, since both parties claimed the sum of money in controversy under the same act of congress. If the state court has committed any error, it is merely in misconstruing an act of congress, and not in deciding against any right, title, privilege or exemption claimed by the plaintiff under it. The decision is in favor of a party so claiming, and where that is the case, this court has no jurisdiction. *Gordon* v. *Caldcleugh*, 3 Cranch 268; *Matthews* v. *Zane*, 4 Ibid. 382.

6. The plaintiff was not entitled to judgment on the special verdict, because the inspector, who appears by it to have acted as seizing officer, must have been entitled by law to a proportion of the forfeiture, and therefore, the plaintiff could not have been entitled to the whole amount found by the jury.

*319] *Sergeant*, in reply, insisted, that it sufficiently appeared upon the record, that the judgment was final. The word judgment, implies that it was final, unless something appears to the contrary. The supreme court of Vermont is, in point of fact, the highest court of law or equity of that state. This court cannot compel a state court to represent itself as the highest court. It appears so to be, by the state constitution and laws; they are not foreign laws, and this court is bound to take notice of them. They are expressly made rules of decision in the national courts, by the judiciary act. As to the amount in controversy, it is immaterial. The object of the provision was to produce perfect uniformity in the decisions upon the laws, treaties and constitution of the Union. It stands upon different grounds from that where the character of the parties alone gives jurisdiction. There, the sole object was to secure impartial tribunals, in controversies between citizens of different states, and between aliens and citizens. The case is within the very letter of the act. It does not appear, how the defendant claimed. It appears, that the plaintiff claimed under a statute of congress. The decision was against his claim, and that is sufficient. To determine otherwise, would be to defeat the whole object of the provision, which was intended to secure uniformity in the construction of the statutes of congress throughout the Union.

February 18th, 1823. JOHNSON, Justice, delivered the opinion of the
*320] court.—This suit was instituted by the plaintiff *in error, late collector of the district of Vermont, against the collector, his successor in office. The sum sued for is one-half the proceeds of a seizure, made while Buel was in office, but not recovered until after he was superseded by the defendant. The right of Buel to the sum sued for, is not now to be questioned. It has already obtained the sanction of this court. *Jones* v. *Shore*, 1 Wheat. 462. But before the question was agitated here, a decision had already taken place in the state court, in favor of Van Ness, and the cause being now

brought up under the 25th section of the judiciary act, a number of exceptions have been taken to the plaintiff's right of recovery, which have no bearing whatever upon the right of action.

1. The first of the points made by the defendant's counsel is, "that the writ of error does not, upon its face, purport to be issued upon a final judgment of the highest court in the state." We see no reason why it should be so expressed. The writ of error is the act of the court; its object is to cite the parties to this court, and to bring up the record. How else is this court to ascertain whether the judgment be final? Nor can there be any danger of its being hastily or erroneously used, since it must be allowed either by the presiding judge of the state court, or a judge of the supreme court of the United States.

2. "That the writ does not appear to have emanated from the office of the supreme court, nor from any office authorized to issue it." *This [*321
is answered by reference to the seal on the face of the writ, which appears to be that of the circuit court of Vermont, and the signature of the clerk. A form of a writ of error has been designed by the judges of this court, and transmitted to the clerks of the respective circuits, by the clerk of this court, according to law. And this writ has duly issued from the circuit court, after being allowed by the circuit judge. What more does the law require? (See § 8, Act of May 8th, 1792.)

3. It is objected, "that it is not stated, nor does it appear, that the supreme court of the state of Vermont is the highest court in the state in which a decision in the suit could be had, and therefore the jurisdiction of this court is not shown." Nor was it necessary, at this stage of the proceedings, that it should have been shown. It has been before observed, that this writ is the act of the court, and if it has issued improvidently, the question is open, on a motion to quash it. No one is precluded by the emanation of the writ; and the right of the party who demands it, ought not to be finally passed upon by a judge at his chambers. It is a writ of common right, in the cases to which the jurisdiction of an appellate court extends, and the abuse of it is sufficiently guarded against, as suggested to the first exception.

4. It is contended, "that the amount of the judgment is not sufficient to ground an appeal or writ of error to this court." This is a new question. Thirty-four years has *this court been adjudicating under the 25th [*322
section of the act of 1789, and familiarly known to have passed in judgment upon cases of very small amount, without having before had its attention called to the construction of the 25th section now contended for. Nevertheless, if the received construction has been erroneously adopted, without examination, it is not too late to correct it now. But we think that it is not necessary to sustain our practice upon contemporaneous and long protracted exposition; that as well the words of the two sections under which we exercise appellate jurisdiction, as the reasons and policy on which those clauses were enacted, will sustain the received distinction between the cases to which those sections extend. The argument on this part of the case is, that the appellate jurisdiction conferred by the 25th section of the judiciary act of 1789, is restricted within the same limits, as to amount, with that conferred by the 22d section, under the influence of those words which enact, as to the cases comprised within the 25th section, "that they may be

re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error, the citation being signed, &c., in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered in a circuit court," &c. The fallacy of the argument consists in attaching too enlarged an application to the meaning of the word "regulation," as here used. It is
*323] obvious *from the context, as well as from its ordinary meaning and use, that its proper bearing is altogether confined to the writ of error, citation, &c., to be issued in a case which has been before fully defined, and not that it should itself enter into the descriptive circumstances by which those cases are to be identified, to which the appellate jurisdiction of the court is to be extended. By reference to the 22d section, it will be seen, that the sum to which the appellate power is confined in that section, is, in every case, the specific difference by which it is distinguished from every other case: and that the regulations under which the jurisdiction, in those cases, is to be exercised, constitute the subject of the remaining part of that section, and the whole of the 23d, as it does of various other sections scattered through the laws passed upon the same subject. And this construction is fully supported by reference to the political object of the two sections, as has been forcibly insisted upon by the defendant's counsel. Questions of mere *meum* and *tuum*, are those to which the 22d section relates; but those intended to be provided for by the 25th section, are noticed only for their national importance, and are deemed proper for an appellate tribunal, from the principles, not the sums, that they involve. Practically, we know, that experience has vindicated the foresight of the legislature in making this distinction.

5. The fifth point submitted by the defendant's counsel is, "that the decision of the state court was not against a right claimed under a statute
*324] of *the United States, within the provisions of the 25th section of the judiciary act; since both parties claimed the money in contest under the same act of congress." This point we consider as already decided in the case of *Matthews* v. *Zane* (4 Cranch 382); nor do we feel any difficulty in again deciding, that the principle which it asserts cannot be sustained. The simplest mode of meeting the proposition, is to negative it in its own terms. The decision of the state court was "against a right claimed under a statute of the United States." Buel's claim was altogether founded upon a statute of the United States. Nor was he a volunteer in the state court; for, being a citizen of the same state with the defendant, he could not, under the judiciary act of the United States, come, in the first instance, into the courts of the United States. Had it been otherwise, however, it would seem to be a question of expediency with the legislature, rather than one of construction for a court. The literal meaning of the terms of the 25th section embraces the plaintiff's case; as it would also have embraced that of the defendant, had the state court decided against his claim, under the same act. If the United States have jurisdiction over all causes arising under their own laws, congress must possess the power of determining to what extent that jurisdiction shall be vested in this court.

6. The sixth and last point made for the defendant, is, that the plaintiff
*325] was not entitled to judgment on the verdict, according to the facts found by the *jury. And under this head it is contended, "that the

inspector, acting as seizing officer, or informer, who appears in the special verdict, must have been entitled by law to a proportion of this forfeiture, and therefore, the plaintiff could not have been entitled to the whole amount awarded him by the jury in the alternative finding." It is not now necessary, nor are we in possession of the facts necessary to determine the relative rights of the collector, and the supposed informer. If Peckham was entitled in that character to share with this plaintiff, he is not precluded by this decision. He was no party to the action. And if his rights were intended to be set up against this plaintiff, they should have been distinctly found by the jury. Under the finding, as it actually exists, there is no right definitively ascertained but those of the two parties to the suit. The 6th section of the collection law requires no officer to be appointed for the district of Vermont but a collector. The presumption, therefore, is, that he is the only individual entitled to forfeitures in that district, until the contrary be shown. The 91st section, which vests the interest on which this suit is sustained, gives the whole to any one of the three distributees of the moiety, when there is but one officer for the district in which the seizure is made.

We are, therefore, of opinion, that the judgment be reversed, and a judgment entered for the plaintiff upon the other alternative of the verdict.

Judgment reversed.

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*Nicholls, Plaintiff in error, *v.* Webb, Defendant in error. [*326

*Protest of note.—Notary's books.*

No demand of payment or notice of non-payment, by a notary-public, is necessary, in the case of promissory notes.[1] A protest is (strictly speaking) evidence in the case of foreign bills of exchange only.

But it is a principle that memoranda made by a person, in the ordinary course of his business, of acts, which his duty, in such business, requires him to do for others, are, in case of his death admissible evidence of acts so done: *à fortiori*, the acts of a public officer are so admissible, though they may not be strictly official, if they are according to general usage, and the ordinary course of his office.

Therefore, the books of a notary-public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment, and notice of non-payment, of a promissory note.

Error to the District Court of Louisiana. This was a suit brought by petition, according to the course of proceedings in Louisiana,(*a*) by Webb, the defendant in error, against Nicholls, the plaintiff in error, upon a promissory note, dated the 15th of January 1819, made by one Fletcher, for the sum of $4880, payable to the order of Nicholls, at the Nashville Bank, and indorsed by Nicholls, by his agent, to Webb. The answer of the defendant below, denied such a demand and notice of non-payment, as were necessary to render *him liable as indorser.

At the trial, it appeared in evidence, that the note became due on [*327 the 18th of July, which was Sunday. The demand of payment of the maker

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(*a*) See 3 Wheat. 202, note *a*.

[1] Young v. Bryan, 6 Wheat. 46; Union Bank v. Hyde, Id. 572.

was made, and notice of non-payment to the indorser, was given, at the request of the plaintiff below, by one Washington Perkins, a notary-public, who died before the trial. The original protest was annexed to the plaintiff's petition, and was drawn up according to the usual *formula* of that instrument, stating a demand and refusal of payment at the Nashville Bank, on Saturday, the 17th of July (the 18th being Sunday), and that he, the notary, "duly notified the indorsers of the non-payment." The plaintiff offered this protest, among other evidence, to support his cause, together with the deposition of Sophia Perkins, the daughter of the notary. This witness stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to enter, exact copies of the notes, bills, &c., which he protested; and in the margin opposite to the copy of the protest, made memoranda, after notification to indorsers, if any, of the fact of such notification, and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition she annexed, and verified as true, a copy of the protest in this case. The copy of the protest stated the demand (as supposed by mistake) to have been made on the 19th, instead of the 17th of July 1819, and contained the following memorandum on the margin. *"Indorser duly notified in writing, 19th of July 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects, the protest was in the same form with that annexed as the original to the plaintiff's petition. The defendant below objected to the admission of this protest and deposition in evidence, but his objection was overruled by the court. Whereupon, the defendant excepted, and the jury returned a verdict for the plaintiff; upon which, the court, according to the usual practice in Louisiana, ascertained the sum due, and rendered judgment. The cause was then brought by writ of error to this court.

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February 15th, 1823. This cause was argued by *Eaton* and *C. J. Ingersoll*, for the plaintiff in error,(*a*) and by *Sergeant*, for the defendant in error.(*b*) But as the grounds of argument and the authorities are so fully stated in the opinion of the court, it has not been thought necessary to report their arguments.

February 22d. STORY, Justice, delivered the opinion of the court.— This is a writ of error to the district *court of Louisiana. The suit was brought by Mr. Webb, as indorsee, against Mr. Nicholls, as indorser of a promissory note, dated the 15th of January 1819, and made by Thomas H. Fletcher, for the sum of $4880, payable to Nicholls or order, at the Nashville Bank, and indorsed by Nicholls, by his agent, to the plaintiff. The note became due on the 18th of July, which being Sunday, the note, of

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(*a*) They cited Hingham *v.* Ridgway, 10 East 109; 1 Salk. 205; 2 Str. 1129; 7 East 279; 3 Burr. 1065, 1072; Chitty on Bills, 240, 273; 2 Camp. 177; 2 Caines 343; 12 Mass. 89; 2 Johns. 423; 2 Wash. 281.

(*b*) Citing Pritt *v.* Fairclough, 3 Camp. 305; Price *v.* Torrington, 1 Salk. 285; s. c. 2 Ld. Raym. 873; Pitman *v.* Maddox, 2 Salk. 690; Hagedorn *v.* Reid, 3 Camp. 379; Welsh *v.* Barrett, 15 Mass. 381.

course, was payable on the preceding Saturday. The cause came on for trial upon petition and answer, according to the usual course of proceedings in Louisiana, the answer setting up, among other things, a denial of due demand and notice of non-payment; and upon the trial, the jury returned a verdict for the plaintiff. The court, thereupon, ascertained the sum due, and entered judgment for the plaintiff, according to what is understood to be the usual practice of that state.

Several questions have been argued at the bar, which may be at once laid out of the case, since they do not arise upon the record; and we may, therefore, proceed to examine that alone upon which any judgment was pronounced in the court below.

From the issue in the cause, the burden of proof of due demand of payment, and due notice of the non-payment to Nicholls, rested on the plaintiff. It appears, that the demand was made, and notice given, at the request of the plaintiff, by one Washington Perkins, a notary-public, who died before the trial. The original protest was annexed to the plaintiff's petition, and contained the usual *language in this instrument, stating a demand, [*330
and refusal of payment, at the Nashville Bank, on the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." Among other evidence to support the plaintiff's case he offered this protest, together with the deposition of Sophia Perkins, the daughter of the notary. She stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to do it, exact copies of the notes, bills, &c.; and in the margin opposite to the copy of the protest made memoranda, after notification to indorsers, if any, of the fact of such notification, and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition, she annexed, and verified as true, a copy of the protest in this case. The copy of the protest states the demand (most probably by mistake) to have been made on the 19th, instead of the 17th of July 1819, and contains a memorandum on the margin: "Indorser duly notified in writing, 19th of July 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest is the same in form as that annexed to the petition. To the introduction of this deposition, as well as of the protest, as evidence, the defendant, Nicholls, objected, and his objection was overruled by the court, and the papers were laid before the jury. A bill of exceptions was taken to the decision of the court in so admitting this evidence; and the sole *question now before us, is, whether that decision was right. What [*331
that evidence might legally conduce to prove, or what its effect might be, if properly admitted, is not now a question before us. It was left to the jury to draw such inferences of fact as they might justly draw from it; and whether they were right or wrong in their inferences, we cannot now inquire.

It does not appear, that, by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary-public, or a protest made for non-payment, or notice given by a notary to the indorsers. And by the general commercial law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be

in cases of foreign bills of exchange; and in strictness of law, it is not an official act. But we all know, that, in point of fact, notaries are very commonly employed in this business; and in some of the states, it is a general usage so to protest all dishonored notes, which are lodged in, or have been discounted by the bank. The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy. We may, therefore, safely take it to be true, in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he
*332] was usually engaged. If *he had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice.(a)

The rules of evidence are of great importance, and cannot be departed from, without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence, which trench upon old and established principles. Still, however, it is obvious, that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord ELLENBOROUGH has very justly observed, that they must expand according to the exigencies of society. (*Pritt* v. *Fairclough*, 3 Camp. 305.) The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promis-
*333] sory notes. The rules of law require, that *due notice and demand should be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities to commerce, since few persons would be disposed to risk so much property upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt, that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants, and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties.

The general objection to evidence, of the character of that now before

(a) By the French law, inland bills of exchange and promissory notes, as well as foreign bills, are required to be protested; and the protest is the only evidence of demand, and refusal of payment, and notice of non-payment. Code de Commerce, liv. 1, tit. 8, art. 187, 175.

the court, is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath ; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove *facts, where ordinary prudence cannot guard us against the effects of human mortality? Vast sums of money depend upon [*334 the evidence of notaries and messengers of banks ; and if their memoranda, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive.

But how stand the authorities upon this subject? Do they as inflexibly lay down the general rule, as the objection seems to imply? The written declarations of deceased persons, and entries in their books, have been, for a long time, admitted as evidence, upon the general ground, that they were made against the interest of the parties. Of this nature are the entries made by receivers of money charging themselves, rentals of parties, and bills of lading signed by masters of vessels. More than a century ago, it was decided, that the entries in the books of a tradesman, made by a deceased shopman, were admissible as evidence of the delivery of the goods, and of other matters there stated within his own knowledge. *Price* v. *Lord Torrington*, 1 Salk. 285 ; s. c. 2 Ld. Raym. 873. So, in an action on a tailor's bill, a shop-book was allowed as evidence, it being proved, that the servant who wrote the book was dead, and that this was his hand, and he was accustomed to make the entries. *Pittman* v. *Maddox*, 2 Salk. 690. In the case of *Higham* v. *Ridgeway* (10 East 109), it was held, that the entry of a midwife in his books, in the ordinary course of his *business, of the birth of a child, accompanied by another entry in his ledger, of the [*335 charge for the service, and a memorandum of payment at a subsequent date, was admissible evidence of the time of the birth. It is true, that Lord Ellenborough, in giving his own opinion, laid stress upon the circumstance, that the entry admitting payment was to the prejudice of the party, and therefore, like the case of a receiver. But this seems very artificial reasoning, and could not apply to the original entry in the day-book, which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service. So that, in truth, at the time of the entry, it was not against the party's interest. And Mr. Justice Le Blanc, in the same case, after observing, that he did not mean to give any opinion as to the mere declarations or entries of a midwife who is dead, respecting the time of a person's birth, being made in a matter peculiarly within the knowledge of such a person, as it was not necessary then to determine that question, significantly said, "I would not be bound at present to say, that they are not evidence."

In the recent case of *Hagedorn* v. *Reid* (3 Camp. 379), in a suit on a policy of insurance, where a license was necessary, the original not being found, it was proved, that it was the invariable practice of the plaintiff's office (he being a policy-broker), that the clerk, who copies any license, sends it off by post, and makes a memorandum on the copy, of his having done so; and a copy of the license in question was produced from the plaintiff's letter-book, in the handwriting *of a deceased clerk, with a [*336

memorandum on it, stating, that the original was sent to Doorman; and a witness, acquainted with the plaintiffs mode of transacting business, swore, that he had no doubt the original was sent, according to the statement in the memorandum. Lord ELLENBOROUGH held this to be sufficient evidence of the license. And it *Pritt* v. *Fairclough* (3 Camp. 305), the same learned judge held, that the entry of a copy of a letter in the letter-book of a party, made by a deceased clerk, and sent to the other party, was admissible in evidence, the letter-book being punctually kept, to prove the contents of the letter so sent. And he observed, on that occasion, that, if it were not so, there would be no way in which the most careful merchant could prove the contents of a letter, after the death of his entering clerk. The case of *Welsh* v. *Barrett*, which has been cited at the bar from the Massachusetts reports (15 Mass. 381), is still more directly in point. It was there held, that the memoranda of a messenger of a bank, made in the usual course of his employment, of demands on promisors, and notices to indorsers, in respect to notes left for collection in the bank, were, after his decease, admissible evidence to establish such demands and notices. And the learned chief justice of the court, on that occasion, went into an examination of the grounds of the doctrine, and put the very case of a notarial demand and protest of notes, which had been suggested at the bar as a more correct
*337] course, as not *distinguishable in principle, and liable to the same objections as the evidence then before the court.

We are entirely satisfied with that decision, and think it is founded in good sense, and public convenience. We think it a safe principle, that memoranda made by a person, in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty. *A fortiori*, we think the acts of a public officer, like a notary-public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence. It is, therefore, the opinion of the court, that the evidence excepted to in this case was rightly admitted.

The variance between the copy, and the original protest, as to the time of the demand, might have been explained to the satisfaction of the jury at the trial; but it forms no ground upon which this court is called upon to express any opinion.

Judgment affirmed, with costs.

*FLECKNER, Plaintiff in error, *v.* The PRESIDENT, DIRECTORS and COMPANY of the BANK of the UNITED STATES, Defendants in error.

*Banking.—Discount.—Negotiability.—Usury.*

The act of the 10th of April 1816, c. 44, incorporating the Bank of the United States, does not, by the 9th rule of the fundamental articles, prohibit the bank from discounting promissory notes, or receiving a transfer of notes, in payment of a debt due the bank.

The Bank of the United States, and every other bank, not restrained by its charter, and also private bankers, on discounting notes and bills, have a right to deduct the legal interest from the amount of the note or bill, at the time it is discounted.[1]

The Bank of the United States is not restrained by the 9th rule of the fundamental articles of its charter, from thus deducting interest, at the rate of six per cent., on notes or bills discounted by it.

Banks and other commercial corporations may bind themselves by the acts of their authorized offices and agents, without the corporate seal.[2]

The negotiability of a promissory note, payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the notary before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that state, and other countries governed by the civil law.[3]

The statutes of usury of England, and of some of the states of the Union, expressly provide, that usurious contracts shall be utterly void; but without such a provision, they are not void, as against parties who are strangers to the usury.

The statute incorporating the Bank of the United State, does not avoid securities on which usurious interest may have been taken, and the usury cannot be set up as a defence to a note on which it is taken; it is merely a violation of the charter, for which a remedy may be applied by the government.

ERROR to the District Court for the District of Louisiana. This was a suit brought by the *defendants in error against the plaintiff in error, [*339 in the court below, upon a promissory note made by him, dated the 26th of March 1818, for the sum of $10,000, payable to the order of one John Nelder, on the 1st of March 1820.

The plaintiffs below, in their petition, made title to the note through several mesne indorsements, the last of which was, that of the President, &c., of the Planters' Bank of New Orleans, through their cashier, as agent. The answer of the defendant below set up several grounds of defence: 1. That the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading within the prohibitions of the charter of the Bank of the United States. 2. That the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per centum per annum was taken by the Bank of the United States. 3. That the cashier of the Planters' Bank had no authority to make the transfer. 4. That the making the promissory note by the defendant below was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as the part consideration of the purchase by him of a plantation and slaves, from the said Nelder, and that the notary, before whom the contract of sale was executed and recorded, wrote on the note the words "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction,

[1] Thornton *v.* Bank of Washington, 3 Pet. 36; Moore *v.* Bank of the Metropolis, 13 Id. 302.

[2] Chesapeake and Ohio Canal Co. *v.* Knapp, 9 Pet. 541; Insurance Co. *v.* Insurance Co., 19 How. 319.

[3] Brabston *v.* Gibson, 9 How. 263.

and could obtain knowledge of the circumstances under which it was given. *340] And the answer proceeded *to state, that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid, until the title was made good; and prayed, that the matters thus alleged and put in issue, might be inquired of by a jury.

The issue was joined, and it appeared in evidence on the trial, that the note in question was discounted for the Planters' Bank, by the Bank of the United States, and, after deducting for the time the note was to run, a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which was at that time indebted to the Bank of the United States in a large sum of money. The counsel for the defendant below moved the court to instruct the jury, upon this evidence, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." The court refused to give the instruction prayed for, but did instruct the jury, "that the acceptance of an indorsed note, in payment of a debt due, is not a trading in things prohibited by the act." The court also instructed the jury, that the discount taken by the Bank of the United States was not usurious, and would not defeat their right to recover the amount of the note.

It also appeared in evidence, that the board of directors of the Planters' Bank, on the 21st of October 1818, passed a resolution, "that the president *341] and cashier be authorized to adopt the *most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city (New Orleans), as well as all others presently due, and which may in the future become due to any banks of the city." The indorsement of the note was made to the Bank of the United States, on the 5th of September 1819; and before the commencement of the present suit, to wit, on the 27th of June 1820, the board of directors of the Planters' Bank passed another resolution, to which the corporate seal was annexed, declaring that the two notes of the defendant below (of which the note now in question was one) "were indorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank;" and that "the said board of directors do hereby ratify and confirm the said act of their said cashier, as the act of the president, directors and company of the Planters' Bank. Upon this evidence, the court instructed the jury, that the cashier had authority to indorse the note, and that his indorsement operated a valid transfer.

It further appeared in evidence, that the said note was originally given as a part consideration for the purchase-money of a plantation and slaves, purchased by the defendant below, of Nelder, with a covenant to warrant and defend. The contract of sale was drawn up, executed and recorded, *342] before a notary, according to the laws *and usages of the state of Louisiana. The notary, upon the giving of this note, and other notes, for the purchase-money, by the defendant below, wrote on each note the words "*ne varietur*." The court instructed the jury, that the writing of these words did not affect the negotiability of the note.

The defendant below excepted to these several instructions, and the jury found a verdict for the plaintiffs, on which judgment was rendered by the court below; and the cause was brought by writ of error to this court.

February 20th. *Harper*, for the plaintiff in error, argued: 1. That the purchase of the note in question, by the Bank of the United States, from the Planters' Bank, was a dealing or trading, within the 9th rule of the fundamental articles of the charter of the Bank of the United States, which provides, "that the said corporation shall not, directly or indirectly, deal or trade in anything, except bills of exchange, gold or silver bullion, or in the sale of goods, really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands."

2. He insisted, that the transfer of the note was usurious, as it was made in consideration of a discount, on which the interest was deducted at the time of making the discount, contrary to the provision of the same 9th rule, which declares, that the bank shall not "take more than at the rate of six per centum per annum, for or upon its loans or discounts." He admitted, that this practice of deducting the interest from the sum advanced, at the *time the discount was made, was according to the general usage of banks and private bankers. But he denied, that this usage was lawful, since it was plain, that by this means more than at the rate of six per cent. per annum was received by the bank upon the sums actually advanced. [*343

3. The cashier of the Planters' Bank had no authority to transfer the note. The transfer must have been made by the corporation, either under its common seal, which is the appropriate legal mode in which these artificial persons are to act; or under the resolution of the 21st of October 1818, which was supposed to constitute a special authority to the cashier to make the transfer. Upon this resolution, there were two questions: 1st. Whether it empowered the cashier to transfer the note by indorsement; and if not, 2d. Whether the vote of the 27th of June 1820, ratified the act so as to give it validity. Upon the first question, it should be observed, that the power, whatever its extent might be, was joint, to the president and cashier, and could not be exercised by either of these officers separately. But the power itself was merely to liquidate the debts due to the bank, which imports no more than an authority to ascertain and settle the amount of the debts. As to the supposed ratification; that which is void in its inception, cannot be made good by a subsequent act. It an attorney, not duly appointed, exceeds his authority, his acts cannot receive validity from a subsequent confirmation. The confirmation cannot relate back to, and connect itself with, an act absolutely void. The Planters' Bank could make *no contract respecting its corporate property but under its corporate seal, or through the instrumentality of an agent or attorney appointed under that seal. And a contract otherwise made, cannot be confirmed by a subsequent act, which is itself not under seal. [*344

4. The note, in its inception, was not a commercial transaction; it was given for the purchase of real property, and connected by the form of the contract, as executed before the notary, with the sale itself. So that its negotiability was partially restrained by this circumstance, and the title of the vendor to the property having failed, that fact affords a sufficient defence to the maker of the note, into whose hands soever it may have

come. And the inscription made by the notary upon the note itself, was intended to give notice to all the world, of the origin and nature of the transaction, by which its negotiability was restrained.

*Cheves* and *Sergeant*, contrà, contended: 1. That this note was either discounted for the Planters' Bank, or taken as security for, or in payment of a debt, deducting the discount, which is the same thing. The Bank of the United States is not prohibited from buying notes, nor from taking anything whatever in payment, or as security for debts *bonâ fide* due. Act of 1816, incorporating the bank, c. 44, §§ 7, 9, 11. And the great object of the trade of banking, as it is carried on by the private bankers and incorporated companies, is to discount bills and notes.

*345] 2. Even if *the transfer were usurious, it would not follow, that the contract was void. If usurious between the indorser and indorsee, it would not avoid the contract of the maker, or any previous indorser. Chitty on Bills 105–6. The state law, whatever it may be, does not affect the Bank of the United States, or its contracts, which are to be governed by the act of congress alone. That expressly authorizes the taking discounts on loans, and does not avoid the securities given, even for usury. Nor is this contract usurious by the state law, by which the legal rate of interest is eight per cent., where the parties have not contracted for a greater rate. Not only is it the universal practice of the commercial world, to take discount in advance, but the law has constantly sanctioned this practice, both in England and in this country. Chitty 107–8; 4 Yeates 223.

3. As to the indorsement by the cashier, it was within the scope of his general authority. *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 327. A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal. *Stackpole* v. *Arnold*, 11 Mass. 27; *Long* v. *Colburn*, Ibid. 97; *Northampton Bank* v. *Pepoon*, Ibid. 288. So, the authority may be implied from certain relations proved to exist between the person who acts as agent, and the party for whom he undertakes; and it may sometimes be inferred, from the subsequent ratification or acquiescence of the party who is to be *346] *charged by the writing. *Long* v. *Colburn*, 11 Mass. 97; *Emerson* v. *Providence Hat Manufacturing Co.*, Ibid. 237; *Erick* v. *Johnson*, 6 Ibid. 193. But, even supposing the general official character and authority of the cashier were not sufficient, the resolution of the 21st of October 1818, delegated a sufficient special authority, and was fully ratified and confirmed by the subsequent resolution. The notion that such acts of commercial corporations must be under seal, is exploded in this court. *Bank of Columbia* v. *Patterson*, 7 Cranch 299.

4. The note being negotiable on its face, some circumstance must be shown to restrain its negotiability. The character of the instrument does not depend upon the particular transaction out of which it arises, but upon the general nature of the instrument itself. If that be, in itself, a negotiable paper, it is equally so, in whatever service it may be employed; and if connected with a sale of lands, has all the same incidents as if given upon a purchase of a ship or goods. One of these incidents is, to pass freely by indorsement, transferring the legal and equitable right; and another is, that the indorsee, without notice, takes it free from every equity. But here,

the circumstances relied on would not constitute a legal defence, even in a suit brought by the payee. Here was a mere covenant to warrant and defend, and no actual eviction. See *Bender* v. *Fromberger*, 4 Dall. 441. Where the purchaser has a covenant in his deed, equity will not relieve him from the payment of a bond given for the purchase-money, *there being no eviction, but will leave him to his remedy at law upon the covenant. *Abbott* v. *Allen*, 2 Johns. Ch. 519. See also, 1 Ibid. 213. And, at law, the damages will be according to the injury actually sustained. 7 Johns. 358; 2 Wheat. 62 n. There was, therefore, no defence, either at law or in equity. And if the covenant were actually broken, the recovery would be in damages, which could not be settled in an action on the note. Consequently, the breach of covenant, as to part, at all events, would be no defence. Sugd. on Vend. 214–15; Chitty on Bills, 92–3; *Moggridge* v. *Jones*, 3 Camp. 38; 14 East 486. So, if there be a partial failure of consideration, it will not constitute a defence. *Greenleaf* v. *Cook*, 2 Wheat. 13; *Morgan* v. *Richardson*, 1 Camp. 40 n: *Tye* v. *Gwynne*, 2 Ibid. 346; *Solomon* v. *Turner*, 1 Stark. 51. The words "*ne varietur*," inscribed by the notary, were merely intended to identify the notes, as being those given on the contract of sale. [*347

February 28th, 1823. STORY, Justice, delivered the opinion of the court.—The Bank of the United States brought an action in the district court for Louisiana district, against William Fleckner (the plaintiff in error), upon a promissory note of Fleckner, dated the 26th of March 1818, for the sum of $10,000, payable to one John Nelder, or order, on the 1st of March 1820, for value received; and the bank, in their declaration by petition, made title to the same note through several mesne indorsements, *the last of which was that of the President, &c., of the Planters' Bank of New Orleans, through their cashier, as agent. The answer of Fleckner sets up several grounds of defence: first, that the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading, within the prohibitions of its charter; secondly, that the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per cent. per annum was taken by the Bank of the United States; thirdly, that the cashier of the Planters' Bank had no authority to make the transfer; fourthly, that the making of the promissory note was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as a part consideration for the purchase by Fleckner of a plantation and slaves from Nelder, and that the notary before whom the sale was executed and recorded, wrote on the note, "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer proceeds to state, that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid, until the title was made good; and it then prays, that the matters thus alleged and put in issue may be inquired of by a jury. The issue was joined, and on trial, the jury found a verdict for the Bank of the United States; and the cause now comes before *us upon a writ of error, and a bill of exceptions taken at the trial. [*348 [*349

The various grounds assumed by the answer, which are substantially the

same as taken by the exceptions, will be considered by the court in the order in which they have been mentioned.

And first, as to the alleged violation of the charter by the Bank of the United States, in purchasing the note in question. The act of congress of the 10th of April 1816, ch. 44, incorporating the bank, in the ninth rule of the fundamental articles, declares (§ 11, art. 9), that "the said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods, really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts." It certainly cannot be a just interpretation of this clause, that it prohibits the bank from purchasing anything but the enumerated articles, for that would defeat the powers given in other parts of the act. The 7th section declares, that the bank shall have capacity to purchase, receive, &c., lands, &c., goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding $55,000,000, and the same to sell, grant, demise, alien and dispose of. And where the act means to prohibit purchases of any particular thing, it uses the very term, as in the prohibition *of purchasing any public debt, *350] in this very clause. And certainly, there is no pretence to say, that if discounting promissory notes be a purchase in point of law, it could have been the legislative intention to include such an act in the prohibition. It is notorious, that banking operations are always carried on in our country by discounting notes. The late Bank of the United States conducted, and all the state banks now conduct, their business in this way. The principal profits of banks, and indeed, the only thing which make them more valuable than private stock, arises from this source. The legislature cannot be presumed ignorant of these facts; and it would be absurd to suppose, that it meant to create a bank, without any powers to carry on the usual business of a bank. The act contemplates throughout, an authority to make loans and discounts. It provides expressly for the establishment of offices of discount and deposit; and the very clause now under consideration, recognises the power of the bank to make loans and discounts, and restricts it from taking more than six per cent. on such loans or discounts. But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some *chose in action*, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer, than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or *drawback made upon its advances or loans of money, *351] upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. We must suppose that the legislature used the language in this its appropriate sense; and if we depart from this settled construction, there is none other which can be adopted, which would not defeat the great objects for which the charter was granted, and make it, as to the stockholders, a mere mockery. If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase, within the meaning of the 9th rule above stated (upon which serious doubts

may well be entertained), it is a purchase by way of discount, and permitted, by necessary inference, from the last clause in that rule.

The true interpretation, however, of that rule is, not that it prohibits purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the bank from doing the ordinary business of a trader or merchant, in buying and selling goods, &c., for profit, and uses the words "deal" and "trade," in contradistinction to purchases, made for the accommodation or use of the bank, or resulting from its ordinary banking operations. And that this is the true sense of the rule, is strongly evinced by the 12th section of the act, which enforces a penalty for the violation of this very rule. It enacts, that if the bank, "or any person or persons for, or to the use of the same, shall deal or trade in buying or selling goods, wares, merchandise or commodities whatsoever, *contrary to the provisions of this act, all and every person, &c., shall forfeit, &c., treble [*352 the value of the goods, &c., in which such dealing and trading shall have been." The words "dealing and trading" are used as equivalent in meaning, and they are connected with "goods, wares, merchandises and commodities," which words, in mercantile language, are always used with reference to corporeal substances, and never to mere *choses in action*. And as there is no reason to suppose, that the penalty was not intended to be coextensive with the prohibitions of the 9th rule, the exception of bills of exchange in that rule, was either inserted *ex majori cautela*, or designed to authorize the purchase and sale of bills of exchange, at a price above their par value. At all events, doubtful phraseology of this sort cannot be admitted to overrule a clear legislative intention of authorizing discounts; and if so, as there are no words restricting the discounts to any particular kind of paper, the right must equally apply to all kinds.

The evidence in the case shows, that the note in question was discounted for the Planters' Bank, by the Bank of the United States, and after deducting, for the time the note was to run, a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which, it seems, was then indebted to the Bank of the United States in a large sum of money. It is immaterial to the decision of the point now under consideration. whether the discount was for this purpose, or not, for whether the *proceeds were to be paid over, or carried to the general credit of [*353 the party, or applied to the payment of a pre-existing debt, the transaction was still, in substance, a discount, and therefore, not within the prohibitions of the 9th rule of the charter. The district judge, therefore, who sat at the trial, was perfectly correct in refusing to charge the jury, as the counsel for Fleckner requested, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." And he was equally correct in charging the jury, "that the acceptance of an indorsed note, in payment of a debt due, is not a trading in things prohibited by the act." And this was the whole of his charge on this point, brought up by the exceptions.

It may be added, upon this point, that even if the bank had violated the rule above stated, by this particular transaction, it is not easy to perceive, how that objection could be available in favor of Fleckner. The act has not pronounced, that such a violation makes the transaction or contract *ipso*

*facto* void ; but has punished it by a specific penalty of treble the value. It would, therefore, remain to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself, could, on this account, be avoided by a party to the original contract, who was not a party to the subsequent transfer.

*354] *The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended, that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is, the deduction of the interest from the amount of the note, at the time it was discounted ; and this, it is said, gives the bank at the rate of more than six p r cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts, generally, for the practice is believed to be universal ; and, probably, few, if any, charters, contain an express provision, authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed, that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious.

If, indeed, the law were otherwise, it would not follow, that the transfer
*355] to the bank of the present *note would be void, so that the maker of the note could set it up in his defence. The statutes of usury of the states, as well as of England, contain an express provision, that usurious contracts shall be utterly void ; and without such an enactment, the contract would be valid, at least, in respect to persons who were strangers to the usury. The taking of interest by the bank, beyond the sum authorized by the charter, would, doubtless, be a violation of its charter, for which a remedy might be applied by the government ; but as the act of congress does not declare, that it shall avoid the contract, it is not perceived, how the original defendant could avail himself of this ground to defeat a recovery. The opinion of the district judge, that the discount taken in this case was not usurious, and would not defeat the right of recovery of the plaintiffs, was, therefore, unexceptionable in point of law.

The next point is, whether the indorsement of the note, by the cashier of the Planters' Bank, was sufficient to transfer the property to the original plaintiffs. The evidence on this point was, that the board of directors of the Planters' Bank, on the 21st of October 1818, passed a resolution, "that the president and cashier be authorized to adopt the most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city (New Orleans), as well as all others presently due, and which may in the future become due to any banks of the city." The
*356] indorsement was made to the Bank of the United States, on the 5th of September *1819 ; and before the commencement of this suit, viz.,

on the 27th of June 1820, the board of directors of the Planters' Bank passed a resolution, to which the corporate seal was annexed, declaring, that the two notes of the defendant (of which the present note was one) "were indorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank, and that the said board of directors do hereby ratify and confirm said act of their said cashier, as the act of the president, directors and company of the Planters' Bank." The act incorporating the Planters' Bank has been examined by the court; and as to the appointment of the cashier, and the authority of the board of directors, it does not differ materially from acts incorporating other banks. It authorizes the president and directors to appoint a cashier, and other officers of the bank, and gives the president and directors, or a majority of them, "full power and authority to make all such rules and regulations, for the government of the affairs, and conducting the business of the said bank, as shall not be contrary to this act of incorporation." Act of 15th April 1811, 1 Martin's Dig. 568, *et seq.* It contains no regulations as to the duties of the cashier, nor any express authority for the corporation to make by-laws. The whole business of the bank is confided entirely to *the directors; and of course [*357 with them it would rest, to fix the duties of the cashier or other officers. Whether they have in fact made any regulations on this subject, does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *primâ facie* evidence, that they fell within the scope of his duty.

The first objection urged against this evidence is, that the corporation could not authorize any act to be done by an agent, by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law, that a corporation can only act through the instrumentality of its common seal, has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable, to affix the corporate seal as a confirmation of each individual act. And if *a general authority for such [*358 purposes, under the corporate seal, would be binding upon the corporation, because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise, is, to suppose, that the common law is superior to the legislative authority; and that the legislature cannot dispense with forms, or confer authorities, which the common law attaches to general corporations. Where corporations have

no specific mode of acting prescribed, the common-law mode of acting may be properly inferred; but every corporation created by statute, may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of *Bank of Columbia* v. *Patterson* (7 Cranch 299), and *Mechanics' Bank of Alexandria* v. *Bank of Columbia* (5 Wheat. 326), principles were established which settle the point, that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers. We have no doubt, therefore, upon the principles of the common law, that a vote of the board of directors of the Planters' Bank, was as full authority
*359] *for any act of this nature, to bind the corporation, as if it had passed under the common seal.

But it is to be recollected, that the rights and authorities, and mode of transacting business, of the Planters' Bank, depend, not upon the common law, but upon the charter of incorporation, and where that is silent, upon the principles of interpretation, and doctrines of the civil law, which has been adopted in Louisiana. The civil code of that state declares, that as corporations cannot personally transact all that they have a right legally to do, wherefore it becomes necessary for every corporation to appoint some of their members, to whom they may intrust the direction and care of their affairs, under the name of mayor, president, syndics, directors or others, according to the statutes and qualities of such corporations; it further declares, that the attorneys in fact, or officers thus appointed, have their respective duties pointed out by their nomination, and exercise them according to the general regulations and particular statutes of the corporation; that these officers, by contracting, bind the communities to which they belong, in such things as do not exceed the limits of the administration which is intrusted to them; and that if the powers of such officers have not been expressly fixed, they are regulated in the same manner as those of other mandatories. Civil Code La. tit. 10, ch. 2, art. 13 and 14. This is all that is contained upon the subject now under consideration, in the title of the
*360] code professing to treat of corporations, and *their rights, powers and privileges. There is nothing which, in the slightest degree, points to the necessity of using a corporate seal in appointing agents, or authorizing corporate acts; and the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official acts done by the officers of the corporation; and gives such acts a binding authority, if evidenced by a vote.

We may, then, dismiss this point, as to the necessity of the corporate seal, and proceed to consider another objection stated by the counsel for the original defendant. It is, that the cashier had no authority to make this transfer; that the resolution of the 21st of October 1818, did not confer it originally, and that the subsequent ratification, by the resolution of the 27th of June 1820, does not give any validity to an ineffectual and unauthorized transfer. We are very much inclined to think, that the indorsement of notes, like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least, if his office be like that of similar institutions, and his rights and duties are not other-

wise restricted.[1] The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, &c., to be used, from time to time, for the ordinary and extraordinary exigencies of the bank. He receives, directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes, and other property, when payments have been duly made. He draws checks, from time to time, *for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through [*361 whom, and by whom, the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds, as the moneyed capital, of the bank, to discharge its debts and obligations. And under these circumstances, the provision of the civil code, already cited, may be justly applied, that where his powers are not otherwise fixed, they are to be regulated as other mandatories, or rather, as other agents and factors. In point of practice, it is understood, and was so stated by one of the learned counsel, whose knowledge and experience upon this subject entitle his statement to the highest credit, that these duties are ordinarily performed by the cashiers of banks. And general convenience and policy would dictate this arrangement as most salutary to the interests of the banks. And it may be added, that the very act done by the cashier, in this case, with the approbation of the bank, affords some presumption that it was not a usurped authority.

But waiving this consideration, let us attend to the actual features of this case, upon the evidence. It is true, that the resolution of the 21st of October, does not directly, and in terms, authorize this transfer. It is not a resolution conferring a joint authority to the president and cashier, to indorse any note for the bank. It simply requires them to *take measures to liquidate the balance due to the original plaintiffs, and [*362 other banks. It is merely directory to them, and leaves them to decide as to the time, the mode and the means. As they were not restricted in these respects, they had a resulting right to employ any of the funds of the bank for this purpose, and the negotiable paper of the bank was equally within the scope of the authority, as the cash funds, if they should deem it proper to use them. They were at liberty to raise money for this purpose, from the general funds, in any way which the ordinary course of business would justify, and which they should deem the most effectual measures. They might, therefore, agree that the cashier should indorse the note in question, and should procure it discounted at the Bank of the United States, and the proceeds to be carried to their credit. The presumption that this was an exercise of authority, sanctioned by the president, as well as contemplated by the directors, is almost irresistibly proved by the fact, that the Planters' Bank has never complained of, but ratified and approved the whole trans-

[1] The cashier is the financial officer of the bank, and his authority to transfer its negotiable paper, for a legitimate purpose, is undoubted. Bank of New Haven v. Perkins, 29 N. Y. 554. Evidence of the powers habitually exercised by a cashier of a bank, with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided they be such as the directors of the bank may, without violation of its charter, confer on such cashier. Merchants' Bank v. State Bank, 10 Wall. 604. And see Matthews v. Massachusetts Bank, 1 Holmes 396.

action. Some criticism has been employed on the meaning of the word "liquidate," in the resolution above stated. It is said, to mean, not a payment, but an ascertainment of the debts of the bank. We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away, to lessen debts. And in common parlance, especially among merchants, to liquidate a balance, means, to pay it; and this, we are satisfied, was the sense in
*363] which the words were used in this resolution; *and, consequently, that the appropriation of this note to the payment of the debt, was within the scope of the authority given to the president and cashier.

But if this were susceptible of doubt, we think, that the subsequent resolution of the directors, of the 27th of June 1820, is conclusive. That resolution is not a mere ratification of the transfer, but declares, that the indorsement was made by the cashier, on the 4th of September 1819, by authority of the president and directors. It is, therefore, a direct and positive acknowledgment of its original validity, binding on the bank; and if so, it is binding upon all other persons who have not an adverse interest. But if it were only a ratification, it would be equally decisive. No maxim is better settled, in reason and law, than the maxim *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur;* at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject. See Civil Code of Louisiana, tit. 3, ch. 6, § 4.

We think, then, that the transfer in this case was made upon sufficient authority; and that, therefore, the opinion of the district judge, affirming the same doctrine, was perfectly correct.

The next point made by the counsel for the original defendant, is, that the writing of the words "*ne varietur*," upon the note, restricted its negotiability. It appeared in evidence, that the note in question was given as a
*364] part consideration for *the purchase-money of a plantation and slaves, purchased by Fleckner of Nelder. The instrument of conveyance was drawn, executed and recorded, before a notary-public, according to the usage in countries governed by the civil law. The notary, upon the giving of this and other notes, for the purchase-money, by Fleckner, wrote on each note the words in question. There is not the slightest evidence that, by the law or custom of Louisiana, the introduction of these words affects the negotiability of these notes; and without proof of such law or usage, this court certainly cannot infer the existence of such an extraordinary and inconvenient doctrine. Upon the face of the transaction, we should suppose, that the words were written merely for the purpose of ascertaining the identity of the notes; and the statement at the bar, that this is the explanation given by a very learned notary, confirms this supposition. The opinion of the district judge upon this point also, asserting that the words did not create any restriction upon the negotiability of the note, is, so far as we have any knowledge, a true exposition of the law.

It is unnecessary to pursue this subject further. The judgment of the court below is affirmed, with interest and costs.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the district court of the United States for the district of Louisiana, and was argued by counsel: On consideration whereof, it is adjudged and

ordered, that the *judgment of the said district court for the district of Louisiana, in this case, be and the same is hereby affirmed, with costs and damages, at the rate of eight per centum per annum, including interest on the amount of the judgment of the said district court.

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PHILIP NORBORNE NICHOLAS, Attorney-General of Virginia, *v.* RICHARD C. ANDERSON, Surveyor, &c.

*Surveyors' fees.*

Under the act of assembly of Virginia, of October 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, the state of Virginia has no right to call upon the person who was appointed one of the principal surveyors, to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the attorney-general of the state; to compel an account, not sufficiently averring the want of any private parties *in esse* to claim it.

*Quære?* Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, could maintain a suit in equity for an account?

APPEAL from the Circuit Court of Kentucky. This was a bill in equity, filed by, and in the name of, the Attorney-General of Virginia, under the authority of a special act of the legislature of that state, passed on the 15th of February 1813. *The bill charged, that the legislature of Virginia, by an act passed in October session 1783, among other things, [*366 provided, that all persons holding officers' and soldiers' warrants, by assignment, should pay down to the principal surveyor, at the time of the delivery of such warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, towards raising a fund for the purpose of paying all contingent expenses, &c., as will appear by reference to the act. That the deputations of officers, in pursuance of the said act, appointed two principal surveyors, one of whom was the defendant, and who immediately took upon himself the duties of the office, and exacted, in virtue of the act of 1783, from all the holders of the military warrants, the one dollar *per* one hundred acres above provided for. That the defendant had received a large sum of money in this way, and had refused to account for the same to the complainant, and the agents and attorneys appointed for this purpose, under the act of 1813. It further charged a misapplication of the money; and that the deputations of officers, under the act of 1783, did appoint superintendents, &c., but that most of them were long since dead, and the survivors had declined to act for many years. It proceeded to state the substance of the act of 1813, which authorized Colonel John Watts, the surviving superintendant, agent to settle with the defendant, and to receive the moneys remaining unappropriated in his hands, and if not paid, to sue for, and recover the same, in the name of the attorney-general of Virginia; and then charged, *that the defendant refused to account with Watts, and concluded with a prayer for an account, discovery and general relief. To [*367 this bill, the defendant demurred; and the circuit court of Kentucky, upon argument of the demurrer, held it valid, and dismissed the bill. The cause was then brought by appeal to this court.

February 13th. The *Attorney-General*, for the plaintiff, argued, that the state of Virginia still considered the defendant as an officer of that state, and he was so styled in the bill. Laws of Va., Ch. Rev. 210. The demurrer also admitted the fact. The authority given to the superintendents has expired. The defendant, who, as surveyor, has received large sums of money, under an act of the legislature of Virginia, is now called on to account for it. A special act has also been passed, to authorize the attorney-general to proceed in equity, under which the present bill was filed. The argument on the part of the defendant must be, that the deputations of officers no longer existing, the money belongs to him. The state, however, does not claim this money as beneficially entitled to it, but as a trustee for those who are so entitled. She claims, in virtue of her sovereignty, a right to superintend the execution of the law by her own officer. And it is a familiar and well-established principle, that wherever a trust fails, there is a resulting trust in the grantor, for the benefit of the *cestui que trusts*. So, *368] if a corporation be endowed for a particular purpose, *which fails, the funds revert back to the grantor by whom it was created or endowed. Co. Litt. 13 *b*; Godb. 211.

*Talbot*, contrà, insisted: 1. That the fees in question were for the exclusive benefit, and belonged of right to the owners of the warrants, under whose control, or that of the superintendants, it must always remain; and that, consequently, the state of Virginia had no authority, such as that pretended to be exercised by the special act of 1813, to vest in the attorney-general of that state, or any other person, a right to sue for the recovery of the sums of money supposed to be due from the defendant. The plaintiff has not shown any interest in the subject, entitling him to sue; nor can there be a resulting trust, where it is not shown that the original trustees are no longer *in esse*.

2. That the state of Virginia having, previous to the passage of the act authorized the erection of the district of Kentucky into an independent state, within the limits of which the defendant resided, and where he was to perform his official duties, he was no longer accountable to the state of Virginia, from whom he had not even derived his original appointment; nor could that state, by any legislative act, impose upon him the duty of answering the complaint stated in the bill.

February 24th, 1823. STORY, Justice, delivered the opinion of the *369] court; and after stating the case, proceeded as follows:—*The question in this case is, whether the demurrer was well taken. In support of the decree, two points are stated at the bar: 1st, that the plaintiff has not shown any interest in the subject, entitling the state of Virginia to maintain the bill; 2d. that if there was originally any resulting authority to the state, to compel an account, that power, by the erection of Kentucky into an independent state, devolved on the latter state, the defendant having been, and still continuing to be, a citizen of that state; and that it was not competent for the legislature of Virginia, in 1813, to pass a law, which should bind a citizen of Kentucky to account for official duties, which were not performed in virtue of any appointment made by the government of Virginia.

The Pitt.

It is unnecessary to consider the last objection, because we are of opinion, that the first is fatal to the bill. The act of 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, authorizes the deputations of officers, therein named, to appoint superintendants, in behalf of their respective lines, for the purpose of surveying the lands; and also to appoint two principal surveyors, and contract with them for their fees, &c. The third section of the act then provides, "that every person or persons holding officers' or soldiers' warrants, by assignment, shall pay down to the principal surveyors, at the time of the delivering such warrant or warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, towards raising a fund for the purpose *of supporting all contingent expenses; or, at the option [*370 of such holder or holders, the same may be held up, until the warrants of all the original grantees have been surveyed; the said surveyors to account for all the money so received, to such person or persons as the said deputations may direct." This is the clause upon which the bill is founded; and it is apparent, that in terms it provides for an accountability, not to the state, but to persons to be appointed by the deputations of officers; to those for whose benefit the fund was raised, and was to be applied, and not to the state, which had no interest whatsoever in it. Even, then, if by the death of all the deputations of officers, without making any appoinment, the authority intended by the act became incapable of being executed, there is no averment in the bill to that effect; on the contrary, the bill does admit that superintendents were appointed, of whom some are dead, and the survivors decline to act. If, therefore, under any circumstances, a resulting power could arise to the state to enforce an account, from the want of any proper private parties *in esse* to claim it, such a case is not stated by the bill. Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, might not maintain a suit in equity for an account, is not for us now to determine. It is sufficient, that the state of Virginia, by the very terms of the act, has delegated to other persons, whose existence is not denied, the authority to call the surveyors to account.

Decree affirmed, with costs.

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## *The Pitt: McNutt, Claimant. [*371

*Navigation laws.—Continuity of voyage.*

The non-intercourse act of the 18th of April 1818, c. 65, prohibits the coming of British vessels to the ports of the United States, from a British port closed against the commerce of the United States, either directly, or through an open British port; but it does not prohibit the coming of such vessels from a British closed port, through a foreign port (not British) where the continuity of the voyage is fairly broken.

Appeal from the Circuit Court of Delaware. This was an allegation of forfeiture, in the district court of Delaware, against the British sloop Pitt, under the non-intercourse act of April 18th, 1818, c. 65, the first section of which provides, "that from and after the 30th of September next, the ports of the United States shall be and remain closed against every vessel, owned, wholly or in part, by a subject or subjects of his Britannic majesty, coming

or arriving from any port or place in a colony or territory of his Britannic majesty, that is, or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel that, in the course of the voyage, shall have touched at, or cleared out from, any port or place in a colony or territory of Great Britain, which shall, or may, by the laws of navigation and trade aforesaid, be open to vessels owned by citizens of the United States, shall, nevertheless, be deemed *372] to *have come from the port or place in the colony or territory of Great Britain, closed as aforesaid against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching and clearing out from an intermediate and open port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter, the same, in violation of this act, shall, with her tackle, apparel and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The vessel in question, belonging to British subjects in the island of Jamaica, departed from the port of Kingston, in that island, on the 16th of August 1818, with a cargo belonging to the same owners, and a clearance for San Blas, and arrived at Old Providence, a small Spanish island on the coast of Honduras, on the 22d of the same month. At this island, the cargo was discharged, and another taken in, consisting principally of Caraccas cocoa, fustic and Spanish hides. She sailed from thence, on the 6th of September following, with orders to come to anchor off the light-house at Cape Henlopen, the western cape of the Delaware bay, and there wait instructions from the agents of the owners at Philadelphia. The vessel arrived off Fenwick's island, about 30 miles south of the Delaware, on the 29th of September 1818, when a pilot boarded her, and delivered to the master written instructions from the agents of the owners, not to enter the Delaware, but to proceed to Halifax or Bermuda. But the master *373] *stated, that his bread and water were insufficient for the voyage, and proceeded, off the capes of the Delaware, to procure a supply of those articles, but was compelled (as alleged) by stress of weather, on the 1st of October, 1818, to put into the Whorekiln roads, opposite to Lewiston, where the vessel was seized by the officers of the revenue for a breach of the act before mentioned.

The district court pronounced a decree of condemnation, which was reversed in the circuit court, and the case was then brought by appeal to this court.

February 27th. *Jones*, for the appellants, made the following points: 1. That the vessel, together with the cargo on board, was liable to forfeiture, as coming from Kingston, a closed and prohibited British port, within the true intent and meaning of the act of congress: and that it is immaterial, whether the voyage were direct, or a circuitous and trading voyage: whether it were a passage upon the seas from one port to another, or to several ports: in either case, Kingston was the *terminus à quo*. That she entered a port of the United States, after the 30th of September 1818, which consummated the forfeiture. 2. That the plea of distress, under which the entry was made, was wholly fictitious.

*Sergeant* and *McLane*, contrà, argued: 1. That the act excluded a vessel from the ports of the United States, only, 1st. When she is *coming directly from a prohibited port, in a colony or territory of Great Britain, to the United States; and 2d. When she is coming from such prohibited port, and touches at, and clears out from, a port in a colony or territory of Great Britain, which may be open to the vessels of the United States; and the voyage of the Pitt was of neither character. If she had sailed from Jamaica, which was closed against vessels of the United States, and had touched at, and cleared out from, any intermediate port, in a colony or territory of Great Britain, open to vessels of the United States, she would have been excluded by the law; but having sailed from Jamaica to a Spanish port, and thence, with a new cargo, to the United States, conditionally, her voyage was not prohibited. The object of the navigation act was to deprive British vessels of an indirect trade with the United States, through certain of their own ports, which they might leave open for that purpose, but it never designed to interfere with the direct or indirect trade with Spain or her colonies. [*374

The commercial convention concluded between the United States and Great Britain, on the 3d of July 1815, did not extend to the British colonies in the West Indies; but as to them, the navigation laws and colonial system of Great Britain continued in force, which the United States were at liberty to counteract by any regulations in their power. It was for this purpose, the act of congress was passed. It contemplated a partial, not a general non-intercourse system. It did not, of course, exclude the entrance of an English vessel, whether documented at home or in a colony, coming *with a cargo of British manufactures or colonial produce, from any other than a prohibited place, without having touched at, in the course of her voyage, any free port in the British colonies. Any article produced in the interdicted colony, may be imported into the United States, in a lawful way, from permitted ports in England, or her colonies, and, *à fortiori*, from the ports of any other foreign state. Such was the case of the Pitt; she cleared from Kingston for San Blas, and arrived at Old Providence, a Spanish island; there she discharged her cargo, took in another of a different character, and sailed thence, to proceed to Philadelphia or Halifax, as circumstances might warrant. Her ultimate destination was not to be determined, until the arrival off the coast of the United States, whither she could lawfully come. She was not on a direct voyage from a prohibited port to the United States, nor had she touched at and cleared out from a free port in the British colonies; nor was she even laden with a cargo of the growth or produce of the prohibited colonies. [*375

2. The vessel did not enter, or attempt to enter, the ports of the United States, in violation of the act of congress. This is a penal law, and is, therefore, to be construed strictly. Its general scope and design is, to prohibit the trade between the United States and the British ports, in British vessels; but where the entrance into the waters of the United States is not for the purpose of trade, or where it is compulsory, and not voluntary, or where it is *occasioned by necessity, or stress of weather, it is not a violation of the law. *The Concord*, 9 Cranch 387. There was evidently no intention, in any part of the voyage, to violate the law; and every reasonable precaution was taken to conform to and respect its provisions. The [*376

object of the vessel, in coming off the coast of Delaware, was not to enter the waters of the United States, but to receive instructions as to her ulterior destination. This it was lawful to do. This court has decided, that even under the rigorous non-intercourse system of 1809, a vessel from Great Britain had a right to lay off the coast of the United States, to receive instructions from her owners in New York; and if necessary, to drop anchor; and, in case of a storm, to make a harbor; and, if prevented by the crew from putting to sea again, might wait in the waters of the United States for provisions. *The Fanny*, 9 Cranch 181. This is the case, therefore, of a vessel bound from a Spanish to a British port, accidentally forced into the waters of the United States, for lawful purposes, and there prevented by the officers of the States, from prosecuting her voyage. The testimony in the case proves the necessity to be sufficiently urgent to authorize the entrance of the Pitt into the waters of the United States, under all circumstances, without violating the law; and though the act of congress designed to prohibit the trading of British vessels with the United States, from the colonies of
*377] Great Britain, it could not have *intended to deny the ordinary offices of humanity to such vessels, trading with other nations.

*Jones*, in reply, insisted, that the case was one of a fraudulent evasion of the act. The moment the *onus probandi* is thrown on a claimant, who in a revenue cause, sets up a plea of distress, to excuse the infraction of the law, he must show by the clearest evidence, that the necessity, under the compulsion of which he professes to have acted, was real. *The Josefa Segunda*, 5 Wheat. 354; *The New York*, 3 Ibid. 65. Entering the port, *infra fauces portus*, is not necessary; and there is more danger to the revenue laws, in vessels coming into these by-places, than of their entering ports which are made such by statute. The present voyage is within the mischiefs intended to be guarded against, by the prohibition of an indirect voyage, which are as great where the voyage is through a foreign port (not British) as through a British port, not closed against our trade.

March 1st, 1823. JOHNSON, Justice, delivered the opinion of the court. —This vessel, with her cargo, was condemned in the district court of Delaware, for a violation of the act of April 1818, entitled, "an act concerning navigation." That decree having been reversed in the circuit court, the cause is now brought up by appeal to this court.

Several grounds, in support of the latter adjudication, have been insisted
*378] on in the argument; but *the court deem it unnecessary to advert to more than one, as that will dispose of the case finally, and fix the most important point which it presents, to wit, the correct construction of the first section of the act in question. We are unanimously of opinion, that the construction insisted on by the claimant's counsel, is the only correct construction. It is perfectly clear, that the case of this vessel is not literally comprised within the provisions of this act; for it only prohibits a voyage from a closed port of Great Britain to a port of the United States; and the purport and effect of the latter part of the first clause, amounts to no more than a declaration, that the continuity of such voyage shall not be broken by the act of touching at, or clearing out from, any port of a colony or territory of Great Britain which may be open to American shipping.

But it has been contended, in behalf of the appellants, that although not

within the letter, it is within the mischief intended to be obviated by the statute, and, therefore, subject to the penalty. If, by this argument, it be intended to maintain, that acts done in fraud of a law, are acts in violation of the law, the principle may be conceded; but we fully concur in the views of the policy of this law, as explained by the claimant's counsel, and are satisfied, that the latter provisions of the first clause were solely intended to guard against the effects which the permission of a general trade at one or more of the British colonial ports, may have had in defeating the policy of the act altogether. The legislature had not in view a fair *unaffected trade through the ports of any other nation. It is obvious, that [*379 attempts might have been made to evade the law, by an affected trade through an intermediate port; and it is not to be supposed, that this government, or its courts, would have failed to check such an attempt; but we are fully satisfied, that this was not such a case. The evidence of fairness is full and unequivocal. There was time, even upon ordinary calculation, to have completed the voyage from Jamaica to Old Providence, and thence to Philadelphia, before the prohibition was by law to take effect, as is proved by the fact of her having arrived in the Delaware, at a time which left it doubtful whether she was, or was not, within the period specified for its suspension. The cargo, too, was taken in at the port of Old Providence, and was of a description well known to belong to the trade of that port, from its having been the depot of captures, and probably of a covered trade from the continent of South America. Everything conspires to exempt the vessel from the charge of fraudulent intention, and therefore, leaves no ground for the condemnation.

Decree of the circuit court affirmed.

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## *The Mary Ann: Plumer, Claimant. [*380

*Admiralty pleading.*

A libel of information, under the 9th section of the state-trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the ports of New York and Perth Amboy, without the master's having delivered the manifests required by law, to the collector or surveyor of New York and Perth Amboy, is defective—the act requiring the manifest to be delivered to the collector or surveyor of a single port.

Under the same section, the libel must charge the vessel to be of the burden of forty tons or more. In general, it is sufficient to charge the offence in the words directing the forfeiture; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.

Where the libel is so informal and defective, that the court cannot enter up a decree upon it, and the evidence discloses a case of forfeiture, this court will not amend the libel itself, but will remand the cause to the court below, with directions to permit it to be amended.

Appeal from the District Court of Louisiana. This was an allegation of forfeiture, in the court below, against the brig Mary Ann, for a violation of the act of March 2d, 1807, c. 77, prohibiting the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January 1808.

The libel contained two counts. The first alleged, that the brig Mary Ann, on the 10th of March 1818, sailing coastwise from a port of the United

States, to wit, the ports of New York and Perth Amboy, *to a port or place within the jurisdiction of the same, to wit, the port of New Orleans, and having on board certain negroes, mulattoes or persons of color, for the purpose of transporting them to be sold or disposed of as slaves, or to be held to service or labor, to wit, No. 1, Lydia, &c., did, laden and destined as aforesaid, depart from the ports of New York and Perth Amboy, where she then was, without the captain or commander having first made out and subscribed duplicate manifests of every negro, mulatto and person of color, on board said brig Mary Ann, and without having previously delivered the same to the collectors or surveyors of the ports of New York and Perth Amboy, and obtained a permit, in manner as required by the act of congress, in such case made and provided, contrary to the form of said act. The second count was, for taking on board thirty-six negroes, mulattoes or persons of color, previous to her arrival at her said port of destination, contrary to the act, &c.(*a*)

*382] *The court below condemned the vessel, as liable to forfeiture, under the act referred to, and the claimant appealed to this court.

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(*a*) The 9th section of the act on which this proceeding was grounded, provides, "that the captain, master or commander of any ship or vessel, of the burden of forty tons or more, from and after the first day of January 1808, sailing coastwise, from any port in the United States to any port or place within the jurisdiction of the same, having on board any negro, mulatto or person of color, for the purpose of transporting them, to be sold or disposed of as slaves, or to be held to service or labor, shall, previous to the departure of such ship or vessel, make out and subscribe duplicate manifests of every such negro, mulatto or person of color, on board such ship or vessel, therein specifying the name and sex of each person, their age and stature, as near as may be, and the class to which they respectively belong, whether negro, mulatto or person of color, with the name and place of residence of every owner or shipper of the same, and shall deliver such manifests to the collector of the port, if there be one, otherwise to the surveyor, before whom the captain, master or commander, together with the owner or shipper, shall severally swear or affirm, to the best of their knowledge and belief, that the persons therein specified were not imported or brought into the United States, from and after the first day of January 1808, and that, under the laws of the State, they are held to service or labor; whereupon, the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the said captain, master or commander, with a permit, specifying thereon the number, names and general description of such persons, and authorizing him to proceed to the port of his destination. And if any ship or vessel, being laden and destined as aforesaid, shall depart from the port where she may then be, without the captain, master or commander having first made out and subscribed duplicate manifests of every negro mulatto and person of color, on board such ship or vessel as aforesaid, and without having previously delivered the same to the said collector or surveyor, and obtained a permit, in manner as herein required, or shall, previous to her arrival at the port of her destination, take on board any negro, mulatto or person of color, other than those specified in the manifests as aforesaid, every such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned, in any court of the United States having jurisdiction thereof; and the captain, master or commander of every such ship or vessel, shall, moreover, forfeit, for every such negro, mulatto or person of color, so transported or taken on board, contrary to the provisions of this act, the sum of one thousand dollars, one moiety thereof to the United States, and the other moiety to the use of any person or persons who shall sue for and prosecute the same to effect."

The Mary Ann.

*February 10th. *D. B. Ogden*, for the appellant, argued: 1. That the libel was insufficient in its allegations, to sustain the sentence which had been rendered by the court below. It alleges, that the vessel sailed from the ports of New York and Perth Amboy, without the master's having made out the duplicate manifests required by law, and without his having previously delivered the same to the collectors or surveyors of the ports of New York and Perth Amboy. This is too vague and general. The act directs the manifest to be delivered to the collector or surveyor of a single port.

2. The libel alleges, that the manifest required by law, was not made out and delivered, before the vessel sailed. But this allegation, as laid, is disproved by the manifest itself, which is in evidence; and if the prosecutor intended to have availed himself of any defects in the manifest, those defects ought to have been specified in the libel. It ought to have charged the not specifying the manner, &c., if it was intended to rely on that objection.

3. The libel does not bring the case within the 9th section of the act, on which it is founded, by stating that the vessel was "of the burden of forty tons, or more." The clause of forfeiture, in the latter part of that section, although it is in general terms, "any vessel," &c., ought, upon every just principle of interpretation, to be restricted to the vessels of forty tons, or more, which are mentioned in the first part of the section. It is not sufficient to charge the offence in the very words of the statute, but the sense and effect of those words must be looked to, so as to *give the party notice of the precise offence meant to be charged. *The Hoppet*, 7 Cranch 389. [*384

The *Attorney-General*, contrà, insisted, that this case did not at all resemble that of *The Hoppet*, where the ship and the innocent goods were held not to be forfeited, because there was no charge applicable to them, inasmuch as they were not alleged to belong to the owner of the prohibited articles, the French wines. This libel of information does not merely contain a general reference to the law; it gives the party precise notice of the charge, and secures him against any other prosecution for the same offence, which is all that can reasonably be required. In the case of *The Samuel*, 1 Wheat. 9, there was a more serious objection to the form of the allegation, which, however, did not prevail. Those technical niceties, which were once insisted on, in criminal informations at common law, are not regarded in admiralty informations, which are modelled upon the more liberal and rational principles of the civil law. A libel may even allege the offence in the alternative of several facts, if each alternative constitute a substantive offence and cause of forfeiture. *The Caroline*, 7 Cranch 496. Here, it charges the non-delivery of a manifest, as required by the act, and the proof is, a delivery of a manifest, totally defective in every particular required by the act.

*March 1st, 1823. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—Several objections have been made to the libel in this case. The first is, that it alleges the brig Mary Ann to have sailed from the ports of New York and Perth Amboy, without the master's having first made out and subscribed the duplicate manifests required by law, and without his having previously delivered the same to the collectors or surveyors of the ports of New York [*385

and Perth Amboy, whereas, the act of congress directs the manifest to be delivered to the collector or surveyor of a single port. This objection is thought fatal. The libel either requires more than the law requires, and charges, as the cause of forfeiture, that the manifest was not delivered to the collectors or surveyors of two ports, while the law directs that it should be delivered to the collector or surveyor only of one; or it is too vague and uncertain, in not alleging, with precision, the port where the offence was committed. It is probable, that the district-attorney might be uncertain whether the brig sailed from the port of Perth Amboy or of New York; but this circumstance ought to produce no difficulty, since the offence might have been laid singly in each port, and charged expressly, in separate counts.

The second objection is this: The libel charges, that the manifest required by law, was not made out and delivered, before the vessel sailed. *386] *The counsel contends, that a manifest was delivered; that this charge is, therefore, disproved by the fact; and that if the libellant would avail himself of any defects in the manifest, they ought to be specified in the libel. Whether a libel, charging, generally, that manifests have not been made out and delivered, as required by the act of congress, would be considered as sufficiently disproved, by producing a manifest, not strictly conformable to law, is a question which belongs certainly to the merits of the cause, and which would deserve consideration on the inquiry, how far the defectiveness of the manifest was put in issue by such a libel. But certainly no particular defect can be alleged, when there is no manifest; and, of consequence, the allegation, that the manifests required by law were not made out, would be sufficient, on a demurrer. They are, of course, sufficient for the present inquiry.

Another objection, on which the court has felt great difficulty, is, that the libel does not state that the brig Mary Ann was "of the burden of forty tons or more." The 9th section of the act of congress, on which this prosecution was founded, enacts, that "the captain," &c., "of any ship or vessel, of the burden of forty tons or more," and "sailing coastwise," &c., "having on board any negro," &c., "shall, previous to the departure of such ship or vessel, make out and deliver duplicate manifests," &c. "And if any ship *387] or vessel, being laden and destined as aforesaid, shall depart from *the port where she may then be, without the captain, master or commander having first made out and subscribed duplicate manifests of every negro, mulatto and person of color, on board such ship or vessel, as aforesaid, and without having previously delivered the same to the said collector or surveyor, and obtained a permit, in manner as herein required," "every such ship or vessel," &c., shall be forfeited to the use of the United States."

The first step in this inquiry, respects the extent of the clause of forfeiture. Does it comprehend vessels under forty tons burden? Although the language of the sentence is general, yet those rules for construing statutes, which are dictated by good sense, and sanctioned by immemorial usage, which require that the intent of the legislature shall have effect, which intent is to to be collected from the context, restrain, we think, the meaning of those terms to vessels of the burden of forty tons and upwards. The burden enters essentially into the description of those vessels which cannot commit the offence prohibited by this section. Only vessels of forty tons or

more, are directed to make out and deliver the manifests prescribed by the act; and only such vessels could obtain the permit. The whole provision must have been intended for vessels of that burden only, or the words would have been omitted. When, then, the act proceeds, after prescribing the duty, to punish the violation of it, the words, "any ship or vessel," must be applied *to those ships or vessels only to which the duty had been prescribed. We understand the clause in the same sense, as it the word "such" had been introduced. [*388

The construction of this section may receive some illustration from the 8th and the 10th. The 8th section prohibits the commander of any ship or vessel, of less burden than forty tons, to take on board any negro, mulatto or person of color, for the purposes described in the 9th section, on penalty of forfeiting, for every such negro, &c., the sum of $800. But no forfeiture of the vessel is inflicted in this section. The words imposing forfeiture are, "and if any ship or vessel, being laden and destined as aforesaid." Now, the preceding part of the section, to which these words refer, is confined to vessels of forty tons and more. The act proceeds, "shall depart," "without the commander having first made out," &c., "duplicate manifests, as aforesaid;" showing that the general words, "any ship or vessel," meant those ships or vessels only which had been directed to make out these manifests; and without having obtained a permit "in manner as herein prescribed." Now, only a vessel of forty tons and more could obtain the permit directed. The section proceeds to enact, that every such ship or vessel shall be forfeited, and the commander thereof shall moreover forfeit, for every such negro, &c., the sum of $1000. It is perfectly clear, thas this pecuniary penalty is co-extensive with the forfeiture of the vessel. But it cannot extend to the commanders of vessels *under forty tons, because the eighth section has inflicted on the commanders of such vessels, for the same offence, the penalty of $800. The 10th section inflicts a penalty of $10,000 on the commander who shall land negroes, &c., transported coastwise, without delivering to the collector the duplicate manifests prescribed by the 9th section. This section was unquestionably intended to be co-extensive with the 9th, and is, in terms, confined to vessels of the burden of forty tons or more. [*389

We think, that the legislature has inflicted forfeiture for the failure to make out, subscribe and deliver a manifest, on those vessels only which are directed to perform those acts; that is, only on vessels of the burden of forty tons or more. The question, then, recurs, is the omission, to charge that the brig Mary Ann was a vessel of the burden of forty tons or more, fatal to this libel? It is, in general, true, that it is sufficient for a libel to charge the offence in the very words which direct the forfeiture; but this proposition it not, we think, universally true. If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature. In this case, if the brig Mary Ann be a vessel under forty tons, her commander is liable to a pecuniary penalty, but the court cannot pronounce *a sentence of forfeiture against her. If she be of the burden of forty tons or more, the commander is liable to a heavier pecuniary penalty, and the vessel [*390

is forfeited. The libel ought to inform the court, that the vessel is of that description which may incur forfeiture.

We think, therefore, that the sentence of the district court of Louisiana must be reversed, for these defects in the libel; but as there is much reason to believe, that the offence for which the forfeiture is claimed has been committed, the cause is remanded to the district court of Louisiana, with directions to permit the libel to be amended.

Decree reversed.

Decree.—This cause came on to be heard, on the transcript of the record of the district court of Louisiana, and was argued by counsel: On consideration whereof, this court is of opinion, that the libel filed in the said cause, is insufficient to sustain the sentence pronounced by the district court, because it does not state, with sufficient certainty, the port in which the offence charged therein was committed; and because also, it does not allege, that the brig Mary Ann was of the burden of forty tons or more: this court is of opinion, that the sentence of the district court of Louisiana, condemning the brig Mary Ann, her tackle, apparel and furniture, as forfeited to the United States, is erroneous, and doth reverse and annul the same: and this court doth further adjudge, order and decree, that the cause
*391] be remanded *to the court of the United States for the district of Louisiana, with directions to allow the libel to be amended, and to take such further proceedings in the said cause, as law and justice may require.

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## The Sarah: Hazard, Claimant.

*Seizures.*

In cases of seizures made on land, under the revenue laws, the district court proceeds as a court of common law, according to the course of the exchequer, on informations *in rem*, and the trial of issues of fact, is to be by jury; but in cases of seizures on waters navigable from the sea by vessels of ten or more tons burden, it proceeds as an instance court of admiralty, by libel, and the trial is to be by the court.[1]

A libel charging the seizure to have been made on water, when in fact, it was made on land, will not support a verdict, and judgment or sentence thereon; but must be amended or dismissed. The two jurisdictions, and the proceedings under them, are to be kept entirely distinct.

Appeal from the District Court of Louisiana. This was a libel of information in the court below, against 422 casks of wine, imported in the brig Sarah, and afterwards seized at New Orleans, alleging a forfeiture to the United States, by a false entry in the office of the collector of the port of New York, made for the benefit of drawback, on re-exportation, and stating, that the seizure was made on waters navigable from the sea by vessels
*392] *of ten or more tons burden.

In the progress of the cause, it appeared, that the seizure was in fact made on land; which fact was suggested to the court by the claimant's proctor, who moved, that the cause should be tried by a jury. The court, accordingly, directed a jury, which was sworn, and found a verdict for the United States. On this verdict, a sentence of condemnation was pronounced

[1] The Margaret, 9 Wheat. 421.

by the court; and the cause was brought to this court by appeal on the part of the claimant.

March 1st. *D. B. Ogden*, for the appellant, argued, that the decree must be reversed, on account of the multiplied irregularities in the proceedings. It was, in the words of the judiciary act of 1789, c. 20, § 9, "a civil cause of admiralty and maritime jurisdiction," according to the allegation of the libel, which stated the seizure to be on water. But it afterwards assumed the shape of an exchequer cause, and the trial was by jury, upon which the court rendered, not a judgment, but a sentence of condemnatien. The district court is both a court of admiralty, and a court of common law. In the former branch of its jurisdiction, it proceeds as an instance court, by a libel *in rem*, which is to be tried by the court (*The Vengeance*, 3 Dall. 297; *The Sally of Norfolk*, 2 Cranch 406; *The Betsey*, 4 Ibid. 443; *Whelan* v. *United States*, 7 Ibid. 112; *The Samuel*, 1 Wheat. 9); in the latter, it proceeds, in revenue causes, by an information *in rem*, which is to be tried by the jury. *The two jurisdictions, and the proceedings under each, are to be kept entirely distinct. One consequence of [*393 blending them together is apparent. Where the seizure is on water, the claimant has a right to further proof in this court, under certain circumstances; which he will be entirely deprived of, if the proceedings are to be according to the course of the common law, as the facts could not be reviewed by writ of error.

The *Attorney-General*, contrà, insisted, that a libel and an information were convertible terms. This was a libel of information, on which, as the seizure was on land, the party had a right to a trial by jury. That right was secured by the constitution, in all cases at common law, where the value in controversy exceeds twenty dollars; and in such cases, the facts tried by a jury cannot be re-examined, otherwise than according to the course of the common law. Amendments, art. 7. Here, an attempt is made to re-examine them by an appeal, and the cause may be dismissed from this court on that ground. Supposing the proceeding, however, to have been according to the course of the civil law, there is nothing to prevent the instance court of admiralty from trying facts by a jury, in the same manner as the court of chancery directs an issue. The *judices selecti* of ancient Rome, were a sort of jury, who acted under the superintendence of the *prætor*, as his assessors in the determination of questions of fact.

*March 4th, 1823. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—By the [*394 act constituting the judicial system of the United States, the district courts are courts both of common-law and admiralty jurisdiction. In the trial of all cases of seizure, on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burden and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas 297; *The Sally* (in 2 Cranch 406); and *The Betsy and Charlotte* (in 4 Cranch 443); that the trial is to be by the court. Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other

as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law.

The court for the Louisiana district, was sitting as a court of admiralty; and when it was shown, that the seizure was made on land, its jurisdiction ceased. The libel ought to have been dismissed, or amended, by charging that the seizure was made on land. The direction of a jury, in a case where the libel charged a seizure on water, was irregular; and any proceeding of the court, as a court of admiralty, after the fact that the seizure was made
*395] on land *appeared, would have been a proceeding without jurisdiction. The court felt some disposition to consider this impannelling of a jury, at the instance of the claimants, as amounting to a consent that the libel should stand amended; but, on reflection, that idea was rejected.

If this is considered as a case at common law, it would be necessary to dismiss this appeal, because the judgment could not be brought before this court but by writ of error. If it be considered as a case of admiralty jurisdiction, the sentence ought to be reversed, because it could not be pronounced by a court of admiralty, on a seizure made on land. As the libel charges a seizure on water, it is thought most advisable to reverse all the proceedings to the libel, and to remand the cause to the district court for further proceedings, with directions to permit the libel to be amended.

DECREE.—This cause came on to be heard, on the transcript of the record of the district court of Louisiana, and was argued by counsel: on consideration whereof, it is decreed and ordered, that the sentence of the district court for the district of Louisiana, condemning the said 422 casks of wine, as forfeited to the United States, be and the same hereby is reversed and annulled: and it is further decreed and ordered, that the cause be remanded to the said district court of Louisiana, with directions to allow the
*396] libel in this case to be amended, and to take such further proceedings *in the said cause as law and justice may require.(*a*)

(*a*) It is stated in the Life of Sir Leoline Jenkins, vol. 1, p. lxxxvii., that the admiralty, in England, had an original inherent jurisdiction of seizures for a breach of the navigation laws. See also his charge at the admiralty sessions for the cinque ports. (Id. p. xcv. *et seq.*) Charge at the Old Bailey sessions. Again, Sir L. Jenkins says, "Nor is there anything granted to the Lord Admiral in his commission, but what he was possessed of, long before those commissions grounded upon the statute of piracy were known; for, by the inquisition taken at Queenborough, 49 Edw. III., and by the statutes of the Black Book in the Admiralty, much ancienter than that inquisition, the transporting of prohibited goods particularly, and so of other offences, was to be inquired of, and tried before the Lord Admiral; and in the articles usually given in charge at the admiralty sessions of England, to this day, the inquiry after transporters of prohibited goods is given in charge to the jury," &c. (Id. vol. 2, p. 746.) So also, he says, in a letter to Sir Thomas Exton, July 2, 1675, "the course would be the same in every other case; for instance, in carrying prohibited goods, such as would confiscate the ship, where the judgment" (jurisdiction) "remains in the admiralty, as some you know do this day, though such judgments, in many cases, have been of late transferred to other courts by act of Parliament." (Id. vol. 2, p. 708.) But Sir James Marriot says, in the case of The Columbia, in 1782, that "the court of admiralty derives no jurisdiction in cases of revenue (appropriated by the common law to the court of exchequer), from the patent of its judge, or the ancient jurisdiction of the crown in the person of its Lord High Admiral. The first statute which places

judgment of revenue in the plantations with the courts of admiralty, is the 12 Car. II." (2 Bro. Civ. & Adm. Law 492, note 3.) But in Great Britain, all appeals from the colonial vice-admiralty courts in those causes, are to the high court of admiralty, and not to the privy council, which is the appellate tribunal in other plantation causes. This point was determined in 1754, in the case of The Vrow Dorothea, before the high court of delegates, which was an appeal from the vice-admiralty judge of South Carolina, to *the high court of admiralty, and thence to the Delegates. The [*397 appellate jurisdiction was contested, upon the ground, that prosecutions for the breach of the navigation, and other revenue laws, were not, in their nature, causes civil and maritime, and under the ordinary jurisdiction of the court of admiralty, but that it was a jurisdiction specially given to the vice-admiralty courts by stat. 7 & 8 Wm. III., c. 22, § 6, which did not take any notice of the appellate jurisdiction of the high court of admiralty in such cases. The objection, however, was overruled by the delegates, and the determination has since received the unanimous concurrence of all the common-law judges, on a reference to them from the privy council. (2 Rob. 246.) Whether this jurisdiction of the colonial courts of vice-admiralty over seizures for a breach of the revenue laws was a part of the original admiralty jurisdiction, inherent in those courts, or was derived from the statutes of Charles II. and William III., it is certain, that it was uniformly exercised by those courts in this country, before the revolution; and such seizures upon water were very early determined by this court to be "cases of admiralty and maritime jurisdiction," within the meaning of those terms as used in the constitution. But revenue seizures, made on land, have been uniformly left to their natural *forum*, and to their appropriate proceeding, which is an exchequer information *in rem*. These informations are not to be confounded with criminal informations at common law, or with an information of debt, which is the king's action of debt. They are civil proceedings *in rem*, and may be amended in the district court where they are commenced, or in the circuit court, upon appeal. (Anon., 1 Gallis. 22.) But if merits appear in this court, and an amendment is wanted to make the allegations correspond to the proof, the amendment will not be made by this court, but the cause will be remanded, with directions to permit an amendment, and for further proceedings. (The Edward, 1 Wheat. 261–4; The Caroline, 7 Cranch 496, 500; The Anne, Id. 570.)

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## *The Frances and Eliza: Coates, Claimant. [*398

*Navigation laws.—Continuity of voyage.*

**If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture, under the act of April 13th, 1818, c. 65, by touching at an intermediate British closed port, from necessity, and in order to procure provisions, without trading there.**

Appeal from the District Court of Louisiana. This was an allegation of forfeiture, against the British ship Frances and Eliza, in the court below, for a breach of the act of congress, of the 18th of April 1818, c. 65, the first section of which is in these words:

"That from and after the 30th day of September next, the ports of the United States shall be and remain closed against every vessel, owned, wholly or in part, by a subject or subjects of his Britannic Majesty, coming or arriving from any port or place in a colony or territory of his Britannic Majesty, that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel, that, in the course of the voyage, shall have touched at, or cleared out from, any port or place, in a colony or territory of Great Britain, which shall or may be, by the ordinary laws of navigation and trade aforesaid, open to

vessels owned by citizens of the *United States, shall, nevertheless, be deemed to have come from the port or place in the colony or territory of Great Britain, closed, as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching at and clearing out from an intermediate and open port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter the same, in violation of this act, shall, with her tackle, apparel and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The libel set forth, in the words of the act, that the Frances and Eliza was owned, wholly or in part, by subjects of his Britannic Majesty, and had come from the port of Falmouth, in the Island of Jamaica, a colony of his Britannic Majesty, which port was closed against citizens of the United States, and that she attempted to enter the port of New Orleans, in the United States, contrary to the provisions of the act before recited. To this libel, William Coates, master of the vessel, put in an answer, denying the allegations in the libel, and claiming her as the property of Messrs. Herring & Richardson, of London. The material facts appearing on record, are these:

The Frances and Eliza sailed from London, in the month of February 1819, for South America, having on board about 170 men for the service of the patriots. They arrived at Margaritta, in April, where the troops were disembarked. The vessel remained on the coast of Margaritta, until No-
*400] vember, *when Captain Coates, by order of Mr. Gold, agent of the owners, took command of her. Captain Storm, who originally was the master, died on the passage, and was succeeded by the first master, who died at Margaritta. Captain Coates was directed by the agent to proceed with the Frances and Eliza to New Orleans, and there to procure freight to England, or the continent. The death of the agent, in the month of October, obliged him to remain some time at Margaritta, to arrange his affairs in the best manner he could. Having a scanty supply of salt provisions, and being without fresh provisions, which were not to be had at Margaritta, he did not sail from that port until the 8th of November. Proceeding on the voyage, he met an American schooner, off the west end of St. Domingo, the master of which supplied him with a cask of beef. He had at this time, 29 souls on board; and in the prosecution of the voyage, being off the coast of Falmouth, in the island of Jamaica, the Frances and Eliza hove to, within four or five miles of the shore, and the master went into Falmouth in his boat, for provisions, of which they were much in want, having only three days' supply on board, and to get his name indorsed on the ship's register: on the day following, he returned with a small supply, which being insufficient, he went again the next morning, to endeavor to increase his stock, and succeeded in getting enough to enable him to proceed to New Orleans. That he landed one passenger at Falmouth, and took two from thence to
*401] New Orleans: the passenger landed, was a physician, *who had sailed from London with the troops, but left the service in distress, and took his passage in the Frances and Eliza to New Orleans. When at Falmouth, he found his professional prospects there favorable, and determined to remain; and George Glover, a mariner, had leave of the agent of the owners to work his passage from Margaritta to New Orleans. Upon

leaving Margaritta, the master took with him a letter of recommendation from the agent of the owners, to R. D. Shepherd & Co., of New Orleans, which letter he presented on his arrival. When he had proceeded about half way up the Mississippi, the Frances and Eliza was hailed by an officer on board the revenue-cutter, the answer was, that she was from Jamaica; the captain being asked "what he was doing off Jamaica," answered, that he "went in to get his name indorsed on the register, and to obtain a freight for England;" to which the officer replied, that he was under the necessity of seizing his vessel for a breach of the navigation act; he then said he went in to get provisions.

Upon this testimony, the district court condemned the vessel, as forfeited to the United States; and the claimant appealed to this court.

February 24th. *D. B. Ogden*, for the appellant, argued, that the vessel, on sailing from Margaritta, was really bound to New Orleans, and not to Falmouth, in the island of Jamaica; that even supposing she was bound to Falmouth, it was a mere alternative destination, depending on her being able to procure freight there; and that, as she in *fact embraced the other branch of the alternative, and went to New Orleans, this must be considered as her original destination. [*402 That the real object of touching at Falmouth was to obtain provisions, of which she was in want, and not to procure freight; and that even if touching there for the purpose of procuring freight, could bring her within the operation of the act, it was impossible to attribute that effect to a mere touching to get necessary provisions. That the act, according both to its policy, and its true legal construction, makes the clearing out, and sailing from a prohibited port, the criterion of illegality, and not the mere touching at it for whatever purpose; and that the touching at Falmouth, be its purpose what it might, did not make it the *terminus à quo* of the supposed illegal voyage, and, consequently, did not bring the vessel within the purview of the act. He also insisted on the defectiveness of the libel, in alleging an attempt to enter a port of the United States, when, in fact, the vessel did actually enter.

The *Attorney-General*, contrà, insisted, that the allegation was sufficient to support the sentence, in stating, that the vessel "attempted to enter the port of New Orleans, contrary to the provisions of the act," &c. She did actually enter the river, and was attempting to get up to New Orleans. But an attempt is included, necessarily, within the actual entry, and the prohibition is in the alternative, "shall enter, or attempt to enter." As to the British port, from which the vessel came or arrived, the statute does not require, that the *vessel should actually enter *infra fauces portûs*, or that she should take a cargo on board, in the closed port. To insist [*403 upon an actual entry of the harbor, or an actual trading, would make the law wholly ineffectual. The first destination of the vessel was evidently to Falmouth, there to seek for a cargo. Failing in that, her destination was changed to the United States. Such a course of navigation is manifestly against the policy of the law, which was intended to cut off all trade or intercommunication with the closed ports. The legislative intention must be regarded in the construction of laws of trade and revenue, and it is the habit of all maritime courts to regard it. *The Eleanor*, Edw. 158.

*Harper*, for the appellant, in reply, insisted, that the object of the act being to counteract the exclusive system of Great Britain in favor of her colonial monopoly, and the carrying trade connected with it, the circumstance, that a vessel, in the course of a voyage, not prohibited, touched at a prohibited port, was not sufficient to bring it within the mischief intended to be avoided. The language of the act is, " coming or arriving from a port," &c. This cannot apply to a port where she never entered. She never came to anchor, but stood on and off. The port of Falmouth could not, therefore, be regarded as the *terminus à quo* of the voyage. The prohibitions of this statute are not like the belligerent prohibitions to enter
*404] a blockaded port, and the intention of the *master has nothing to do with it. Even supposing that he went to seek for a cargo, he would not have brought it to the United States, and, consequently, did not go for the purpose of violating the law. The criterion of a breach of the law is, the clearing out and sailing from a closed port. The touching at an intermediate open port, will not, certainly, break the continuity of a voyage which has been commenced at an interdicted port. But then it must have been actually commenced there; and, in this case, the *terminus à quo* was an innocent port.

March 5th, 1823. DUVALL, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—In the argument of this cause, it was contended by the attorney-general, that touching at Falmouth, with the intention to get freight there, and coming from that port to a port in the United States, brought the Frances and Eliza within the operation of the navigation act; it being the policy of the law to prevent all communication between vessels of the United States and British ports, which were closed against them. On behalf of the owners, it was contended, that if the Frances and Eliza was bound to Falmouth, it was a mere alternative destination, depending on her being able to get freight there; and that as she in fact embraced the other branch of the alternative, and went to New Orleans, this must be considered as her original destination.

*405] If the destination of the Frances and Eliza *from Margaritta to New Orleans, was real, not colorable; and if the touching at Falmouth was for the purpose of procuring provisions, of which the ship's crew was really in want, there was not a violation of the navigation act. The evidence in the cause seems to justify the conclusion, that her real destination was to New Orleans. The order of Mr. Gold, agent of the owners, to the master, to take command of the vessel and proceed to New Orleans, and there to endeavor to procure a freight to England or the continent; the letter of recommendation from John Guya, merchant, to Messrs. R. D. Shepherd & Co., requesting their aid to the master to accomplish that purpose, taken in connection with the circumstance of Glover's taking his passage in the vessel, with the leave of the agent, from Margaritta to New Orleans, establish the fact in a satisfactory manner. It appears to have been understood, by all who had any concern with the vessel, that her destination was to New Orleans.

The Frances and Eliza did not enter the port of Falmouth, but stood off and on, four or five miles from the harbor, for a few days, during which time the master went on shore to get provisions, of which he was in want. Whether he endeavored to procure freight there, is a fact not ascertained by

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the testimony. It is certain, that he did not obtain it, because it is admitted, that the vessel sailed in ballast to New Orleans. His real object in going on shore at Falmouth, appears to have been to procure provisions, of which the ship's crew were much in want. And there is no *evidence of any act done by him, which can be construed into a breach of the act concerning navigation. The policy of that act, without doubt, was to counteract the British colonial system of navigation; to prevent British vessels from bringing British goods from the islands, in exclusion of vessels of the United States, and to place the vessels of the United States on a footing of reciprocity with British vessels. The system of equality was what was aimed at. The landing a passenger there, who casually got employment, and for that reason chose to remain on the island; and the taking in two passengers there, on of which was a boy and a relative, and the other taken, passage free, to New Orleans, are not deemed to be acts in contravention of the true construction of the navigation act. [*406

The log-book was supposed to furnish some suspicious appearances, but, on examination, was found to contain no material fact which could govern in the decision. It is the unanimous opinion of the court, that the sentence of the district court ought to be reversed, and that the property be restored to the claimant.

Decree reversed.

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## *The Luminary: L'Amoureaux, Claimant. [*407

### *Burden of proof.*

A case of forfeiture, under the 27th section of the registry of vessels act, of December 31st, 1792, c. 146, for the fraudulent use of a register, by a vessel not actually entitled to the benefit of it. Where the *onus probandi* is thrown on the claimant, in an instance or revenue cause, by a *primâ facie* case, made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case, by the production of papers and other evidence, which must be in his possession, or under his control, condemnation follows, from the defects of testimony on the part of the claimant.

Appeal from the District Court of Louisiana.

February 24th, 1823. This cause was argued by *D. B. Ogden*, for the appellant, and by the *Attorney-General*, for the respondent.

March 5th. Story, Justice, delivered the opinion of the court.—This is a libel for an asserted forfeiture, founded on a violation of the 27th section of the act of 31st of December 1792, c. 146, concerning the registering and recording of ships and vessels.(*a*) The libel charges, that the certificate of registry or record of the schooner, made to one John C. King, as owner, was fraudulently or knowingly used for the said schooner, on a *voyage at and from Baltimore to Cayenne, and at and before her subsequent arrival at New Orleans, she not being entitled to the benefit thereof. The claimant put in a denial to the allegation of forfeiture; and upon a hearing [*408

(*a*) Which provides, "that if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture."

in the district court of Louisiana, a decree of condemnation was pronounced, upon which an appeal has been taken to this court.

The facts of the case are these: The vessel sailed from Baltimore, about the first of August 1820, under the command of a Captain James Smith, having on board a Mr. Desmoland, who was owner of a part of the cargo, and being bound on a voyage to Cayenne. A letter of instructions was delivered to the master by the ostensible owner, John C. King, which, among other things, after stating the voyage, and ordering a delivery of the cargo agreeable to the bill of lading, contained the following directions: "Mr. Joseph Desmoland, who goes out in the vessel, will provide you with everything necessary for that purpose. You will, as soon as you are required by this gentleman, deliver to him the schooner Luminary, with her boats, &c., having care to retain in your possession the register, and every other paper. Mr. Desmoland will discharge the crew agreeably to the laws of the United States; and this also you will be careful to see executed, and bring your proof thereof. As to yourself, Mr. Desmoland is to pay you according to agreement, that is to say, your wages due, and two months extra, sixty dollars per month. The remainder of the crew to receive the like pay, that *409] is to say, two months *extra wages." "You will, also, during the whole voyage, abide by and follow the instructions of Mr. J. Desmoland."

It is difficult to read this letter, and not at once perceive, that the voyage of the vessel was to end at Cayenne, and that her master and crew were to be discharged, the register separated from the vessel, and all the usual proceedings had, which are contemplated by our laws, where a vessel is transferred or sold in a foreign port. The vessel was thenceforth to be under the sole government and direction of Mr. Desmoland, and all authority and control of the former owner was to cease. The question naturally arises, how this could happen? If the vessel was transferred to Mr. Desmoland, at Baltimore, it admits of an easy explanation. If she was to be sold by him at Cayenne, for the account of the former owner, as his agent, it would seem more consonant to the ordinary course of business, that the instructions should have been conditional, and should have stated the expectation of sale, and have provided for the event of an unsuccessful attempt of this nature. Mr. Desmoland would have been referred to as an agent, for there could be no reason to conceal that agency. At all events, the true nature of the case lies within the privity of King and Desmoland; and they have the full means to explain the transaction, if it be innocent. There must exist, in the possession of Mr. Desmoland, the documents under which he derived title from King, whatever that title may be; and his silence, after the most *410] ample opportunity for explanation, and for the production *of these papers, affords a strong presumption, that, if produced, they would not aid his cause or prove his innocence.

The schooner arrived at Cayenne, and from thence she was dispatched to New Orleans by Mr. Desmoland, under the command of the same master, with the same register, and was entered at New Orleans, as an American vessel. Mr. L'Amoureaux came on board her at Cayenne, and the laconic instruction given by Mr. Desmoland to the master, for the voyage, were in these words: "I hereby desire Captain James Smith, on his arrival at New Orleans, to deliver the schooner Luminary, with all her tackle, &c., to Fran-

çois L'Amoureaux, who goes in the same vessel. Cayenne, 1st of October 1820." At New Orleans, Mr. L'Amoureaux claimed the vessel as his own, and desiring to procure for her a new register, as an American vessel, he induced the master to execute a bill of sale to him of the schooner, for the sum of $1000, as agent of King, the former owner. The master, whose testimony is marked by the most studied attempts of evasion, admits, that he he had no authority from King to execute this bill of sale, that he never received any consideration for it, and that he gave it simply because Mr. Desmoland had given him the instructions above stated. He concludes, and the conclusion seems irresistible, if Mr. L'Amoureaux ever obtained title to the property, and she is not now the concealed property of Mr. Desmoland, that he purchased her at Cayenne. Mr. L'Amoureaux now claims her from the court as his own property, and as no *other origin is shown to his title, if he have any, it must be referred to a purchase while at [*411 that port. In what manner the purchase was made, and how the contract of sale was executed, are not disclosed; yet the materiality of a full disclosure cannot be denied. If Mr. Desmoland sold in the name, and as agent of King, the bill of sale would show it, and Mr. L'Amoureaux would possess it, among his muniments of title. If he sold as owner, then he must have become so, before the schooner departed from Baltimore, and, of course, the vessel was sailing, during the whole voyage, under a register which she was not entitled to use, and under circumstances which the law prohibited. Why, then, has Mr. L'Amoureaux kept from the eyes of the court his title deeds? It they would not prove the justice of the suspicions, which the uncommon circumstances of the case necessarily excite, it seems incredible, that they should be suppressed. The suppression, therefore, justifies the court in saying, that the United States have made out a *primâ facie* case, and that the burden of proof to rebut it, rests on the claimant.

But it has been asked, what motive could Mr. Desmoland, or Mr. L'Amoureaux, have for this disguise? If no adequate motive could be assigned, it would make it more difficult to account for the extraordinay posture of the case. But as human motives are often inscrutable, the inadequacy of any apparent cause ought not to outweigh very strong circumstantial evidence of a transfer. For if the facts are such, that they cannot be accounted for rationally, except upon the supposition of a *sale, there would be equal difficulties in rejecting the inference of that fact. [*412 But Mr. Desmoland may have had many motives to conceal the purchase. We do not know his national character, or his private situation. He might have been embarrassed; his national character might have exposed him to capture or detention by ships of war; he might have wished to reserve the benefit of selling higher, by selling abroad to an American citizen, who could thus re-invest her with the American character. But if Mr. Desmoland were a Frenchman, and meant to carry on a trade with New Orleans, and to preserve the apparent American ownership, through the instrumentality of Mr. L'Amoureaux (and this is not an unnatural presumption), then, he had an adequate motive for the disguise. The act of the 15th of May 1820, ch. 126, had imposed a very high tonnage duty on French vessels entering the ports of the United States; and as this act was meant as a countervailing measure, to press heavily on French shipping, it was an important object, to evade the payment of that duty, by sailing under the

American flag. Now, Mr. L'Amoureaux has not shown any title from Mr. Desmoland, and if he be the confidential agent of the latter, the whole proceeding is just what we should expect, with a view to this object. The apparent residence of Mr. Desmoland at Cayenne, fortifies this presumption. There would be no absurdity, though there would be illegality, in such conduct. The parties cannot complain, that the court, in a case left so bare of *all reasonable explanation, construe their silence into presumptive guilt.

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JOHNSON, Justice. (*Dissenting.*)—It is not pretended, that the evidence in this case makes out any specific offence against this vessel. A number of circumstances are collected into one view, which, as the court do not understand, they consider as sanctioning an inference of guilt, and making out a cause of forfeiture. After giving to these circumstances the utmost weight that can be required, they can be made to amount to no more than the groundwork of a conclusion, that the vessel had been sold to Desmoland, at Baltimore, or L'Amoureaux, at Cayenne, and had afterwards sailed under her original American register. *Argumenti gratiâ*, I will concede either fact; and yet I maintain that this vessel cannot be condemned, either under the libel, in its present form, or under the facts thus assumed.

It will be observed, that there is no evidence whatever in the record, relative to the national character of these individuals; or, if any, it goes to show that L'Amoureaux was an American citizen. Now, it is certain, that they must come within the description of citizens or aliens. But if citizens, the offence of owning a vessel, and not changing her register, is no cause of forfeiture; the 14th section of this act expressly imposes a pecuniary penality for his offence. In order, then, to maintain this forfeiture, it became indispensable, that these individuals, or at least one of them, *should have been made out in evidence to be an alien. No such fact is proved; and this alone is fatal to the purposes of this libel. Both facts, that of being an alien, and that of using the American register, must concur, in order to make out the offence.

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2. But had the fact been established in evidence, that one of these individuals was an alien, or even both of them, still, I maintain, that this condemnation ought to be reversed. This libel, it will be observed, is preferred expressly under the provisions of the 27th section of the registering act. By that section, it is enacted, that "if any certificate of registry or record, shall be fraudulently and knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent and meaning of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." The offence, as laid in the libel, is, "that at and after the departure of this vessel on a voyage, on which, on or before the 1st day of August last, she sailed from the port of Baltimore to Cayenne, and at and before her subsequent arrival at New Orleans, from Cayenne aforesaid, which was, &c., a certain certificate of registry or record thereof, made and delivered in pursuance of an act of congress, entitled, an act, &c., to a certain John C. King, of the city of Baltimore aforesaid, mariner, as the owner thereof, was fraudulently or knowingly used for the said vessel, she not then being, to wit, &c., actually entitled *to the benefit thereof, according to the true intent of the said act."

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The Luminary.

To the decree of forfeiture, founded upon this libel, I entertain two objections, either of which is fatal. In the first place, the forfeiture made out in evidence, is not one comprised within this 27th section. If Desmoland and L'Amoureaux were American citizens, it has already been shown, that no forfeiture attaches; but whether they be citizens or aliens, there exist in this act express provisions, by distinct sections, that embrace their cases. The 14th section relates to the case of an American citizen, and the 16th section to that of an alien or foreigner, who shall cover his interest by an existing register, after a transfer of property in the vessel. I cannot imagine upon what principle this libel can be maintained, under the provisions of the 27th section, when the evidence brings the vessel directly within the 14th or 16th section, if it brings her within the penalties of the law at all. If the answer be, that although the case of this vessel be specifically legislated upon, in distinct sections, yet the 27th will cover the same ground, and she may be libelled under either; my answer is, that the conclusion of law is directly the reverse. I ask no other evidence to show, that this case was not intended to be comprised within the 27th section, than the fact, that in another section of the same act, the case is specifically provided for. And such is unquestionably the truth. The 27th section was not intended to embrace the two offences specifically provided for in the 14th and 16th sections. *These two sections create two substantive offences, one or the other, or both of which, has been committed in this case, or no offence has been committed. Those offences can arise only upon the event of a *sale* by the owner of a ship; but the registers of vessels that have been condemned, or captured, or wrecked, or otherwise destroyed, may be fraudulently used to cover other vessels of corresponding built; and these, and various other unidentified offences, are those against which the 27th section was intended to operate. [*416

And this leads me to my second objection to sustaining the condemnation under the allegations in this libel. The allegations are too vague and general, and I would as soon sustain an indictment for piracy or murder, without any specific allegations, as a libel in which the offence is not set forth with such convenient certainty as to put the claimant on his defence. It is true, that the same technical niceties are not necessary in a libel, as the wary precision of the common law requires in indictments; and the rule, as usually laid down, is generally correct, viz., that the offence may be laid in the words of the act. But it is obvious, that this rule can only apply to those laws which create a substantive offence, not those which generalize, and create offences by classes. In the case before us, the offence created by either the 14th or 16th section of this law, may well be laid in the words of the law; each describes but one offence, and that must invariably be the same. Not so with the 27th section; under it, especially, after the present *decision, a variety of offences may be comprised, distinguishable both into classes and individuals. There cannot be a more striking illustration of these remarks, than that which this case presents; had the libel counted upon the 14th or 16th section, instead of the 27th, the claimant might, perhaps, have been prepared to meet those specific charges, in a manner which would have explained those supposed ambiguities which have now proved fatal to him. [*417

These observations have been made, under the admission, that the

evidence in the cause countenanced the conclusion, that a sale of this vessel had taken place, before she left Baltimore. If she was not sold, until she reached Cayenne, and was then sold, deliverable in New Orleans, there has been no offence committed. And even if sold to L'Amoureaux, an American citizen, it was no cause of forfeiture. And this, I think, the evidence fully establishes. There is one fact in the cause, which must put down the idea of her having been sold, before she left Baltimore. She took in a cargo at that place, and Desmoland was one of the shippers. Smith, whose testimony I see no just ground for impeaching, expressly swears, that the freight of this outward voyage was paid at Baltimore, to King, the American owner. Why he should receive, and Desmoland pay, the freight of this voyage, after she became the property of the latter, it is difficult to discover. Nor is it less difficult to imagine, what purpose it would have answered, for
*418] her to retain her original character on a voyage to Cayenne, *upon the supposition that she had become the property of a Frenchman. Nothing but heavy duties and alien disabilities could have resulted from it. So far from having a motive to retain the original American character, his interests would have dictated exactly the reverse. If a contract of sale did take place in Baltimore, the vessel deliverable in Cayenne, this was no offence against the registering act; the American citizen was entitled to use the American character to facilitate the sale, or enhance the price of his vessel, by a contract to deliver her at a particular port.

But it has been argued, that by assuming the fact of the sale to Desmoland, at Baltimore, all the evidence in the cause may be explained with consistency. I have already stated some facts, from which I infer directly the reverse; facts which appear to me altogether inconsistent with the idea of a sale at Baltimore. But let it be admitted, that such a consequence would follow from this hypothesis, and it is still necessary to go further. No innocent solution of these supposed difficulties ought to be practicable, before the inference of guilt can fasten upon this vessel. Yet, the most rational and simple solution of every difficulty, will be found in another hypothesis, altogether innocent and probable. Let it be supposed, that Desmoland was the agent of King, for the sale of this vessel at Cayenne, and every fact in the case will be fully reconciled with the idea of King's interest having still remained in him. It was of course, that on a sale
*419] taking place at Cayenne, the master *should deliver her up to Desmoland's order. That she was then to put off her American character, is proved by the instructions to Smith to bring back the register; and as the master and his crew would then be left to find their way home from a distant country, they were to receive two months' extra wages. I see nothing in all this but consistency and fairness. Everything shows, that she was not to continue trading under her American character; and yet, the prosecution of such an intent, and of such an intent alone, would have comported with the fraud now imputed to her, to wit, that of evading the newly-imposed tonnage duty on French vessels.

With regard to the supposed transfer to L'Amoureaux, at Cayenne, I consider him as acknowledged in the record to be an American citizen; and I have already shown, that an actual sale to him, at Cayenne, would not subject the vessel to forfeiture, for making the voyage to New Orleans, under her original register. It was impossible, that he could take out a new

register at Cayenne; and the apprehension of incurring some penalty or forfeiture, would naturally suggest the measure, which Smith supposes was adopted, of purchasing under a stipulation to deliver the vessel at New Orleans. In the choice between guilt and innocence, it is the construction which he has a right to expect a court of justice will give of his conduct.

Now can I perceive how any unfavorable inference can be drawn from the circumstance of *Smith's signing the bill of sale at New Orleans. [*420 It is obvious, that King expected to sell the vessel in Cayenne, and to separate her thus from the American marine. There was, therefore, no order taken for effecting that formal transfer which was necessary, under our laws, for the purpose of perpetuating her American character. I see no reason why we should not rather suppose these men ignorant than fraudulent They were imposing upon no one; and if the collector could be induced to issue a new register, upon Smith's bill of sale, it was all that L'Amoureaux stood in need of; since King's letter to Smith, and Desmoland's order to deliver the vessel, were sufficient muniments of title, against all the rights of King. I see nothing but fairness in the transaction; and the necessities of L'Amoureaux's business may have well rendered it convenient to wait, until King could transmit a regular power of attorney from Baltimore.

It is asked, why did not Desmoland and others come forward with evidence to explain all these transactions? I confess, it appears to me, that the record supplies the answer. They could not have had a serious apprehension of the fate they have met with. It is enough for them, to prove themselves innocent, after evidence of fraud has been produced against them. Thinking, as I clearly do, that upon the evidence before the court they were entitled to a decree in their favor, I cannot perceive, that any further explanation of their conduct ought to have been required. There was no sufficient allegation in the libel; *no evidence of a sale [*421 to Desmoland; none of his alien character, if there had been a sale to him; the sale to L'Amoureaux did not subject her to forfeiture; and not a fact had been made out in evidence, which was not even more reconcilable with a state of innocence than a state of guilt. I confess, I think it a hard case.

Decree affirmed, with costs.

HUGH WALLACE WORMLEY, THOMAS STRODE, RICHARD VEITCH, DAVID CASTLEMAN and CHARLES MCCORMICK, appellants, *v.* MARY WORMLEY, wife of Hugh Wallace Wormley, by GEORGE F. STROTHER, her next friend, and JOHN S. WORMLEY, MARY W. WORMLEY, JANE B. WORMLEY and ANNE B. WORMLEY, infant children of the said Mary and Hugh Wallace by the said STROTHER, their next friend, respondents.

*Breach of trust.—Parties.*

A trustee cannot purchase, or acquire by exchange, the trust property.[1]

Where the trustee in a marriage settlement has power to sell, and re-invest the trust property, whenever, in his opinion, the purchase-money may be laid out advantageously for the *cestuis que trust*, that opinion must be fairly and honestly exercised, and the sale will be void, where he appears to have been influenced by private and selfish interests, and the sale is for an inadequate price.

*422] *Quære?* How far a *bonâ fide* purchaser, without notice of the breach *of trust, in such a case, is bound to see to the application of the purchase-money?

Where the purchase-money is to be re-invested upon trusts that require time and discretion, or the acts of sale and re-investment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase-money.[2]

But wherever the purchaser is affected with notice of the facts, which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud, will not avail him, if the transaction be such as a court of equity cannot sanction.

A *bonâ fide* purchaser, without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase-money is actually paid.[3]

This court will not suffer its jurisdiction in an equity cause to be ousted, by the circumstance of the joinder or non-joinder of merely formal parties, who are not entitled to sue, or liable to be sued, in the United States courts.

Wormley *v.* Wormley, 1 Brock. 330, affirmed.

APPEAL from the Circuit Court of Virginia. The original bill was filed by the respondents, Mary Wormley, and her infant children, suing by their next friend, against the appellants, Hugh W. Wormley, her husband, Thomas Strode, as trustee, Richard Veitch, as original purchaser, and David Castle-

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[1] The rule which prohibits a trustee from purchasing the trust property is not founded on the assumption that he is thereby guilty of fraud—it is one of public policy independent of the question of fraud. Webb *v.* Dietrich, 7 W. & S. 401; Chorpenning's Appeal, 32 Penn. St. 315. Such purchase, however, is not absolutely void, it is only voidable by the *cestuis que trust*. Prevost *v.* Gratz, Pet. C. C. 364; s. c. 6 Wheat. 481. A court of equity will not avoid it, at the instance of a stranger, when the *cestui que trust* has made no objection. McCarty *v.* Van Dolfsen, 5 Johns. 43; Herbert *v.* Smith, 6 Lans. 493. Such purchase may be ratified by an assent on the part of the *cestui que trust* to an appropriation of the purchase-money to his use. Beeson *v.* Beeson, 9 Penn. St. 279. But a ratification can only be based upon a full knowledge of all the circumstances, after a deliberate examination. Campbell *v.* McLain, 51 Penn. St. 200; Parshall's Appeal, 65 Id. 224. Where, however, trust-property is sold under hostile proceedings, upon an incumbrance existing prior to the creation of the trust, and the trustee is without funds to pay off such incumbrance, and did not procure the sale to be made, he is not incapacitated from becoming the purchaser for his own benefit. Fisk *v.* Sarber, 6 W. & S. 18; Chorpenning's Appeal, 32 Penn. St. 315; Meanor *v.* Hamilton, 27 Id. 137; Parshall's Appeal, 65 Id. 294; Jewett *v.* Miller, 10 N. Y. 402. And see Marsh *v.* Whitmore, 21 Wall. 178.

[2] See Pennsylvania Life Ins. Co. *v.* Austin, 42 Penn. St. 257; White *v.* Carpenter, 2 Paige 217; Field *v.* Schieffelin, 7 Johns. Ch. 150.

[3] That a vendee has given mortgages for the purchase-money, does not entitle him to protection as a *bonâ fide* purchaser, without notice; there must be an actual payment. Union Canal Co. *v.* Young, 1 Whart. 410. And see Christie *v.* Bishop, 1 Barb. Ch. 105; Harris *v.* Norton, 16 Barb. 264; Spicer *v.* Waters, 65 Id. 227.

man and Charles McCormick, as mesne purchasers from Veitch of the trust property, for the purpose of enforcing the trusts of a marriage-settlement, and obtaining an account, and other equitable relief. The bill charged the sale to have been a breach of the trusts, and that the purchasers had notice.

In contemplation of a marriage between Hugh W. Wormley and Mary Wormley (then Strode), an indenture of three parts was executed, on the 5th of August 1807, by way of marriage-settlement, to which the husband and wife, and Thomas Strode, her brother, as trustee, were parties. *The indenture, after reciting the intended marriage, in case it shall take effect, and in bar of dower and jointure, &c., conveys all the [*423 real and personal estate held by Hugh W. Wormley, under a certain indenture specified in the deed, as his paternal inheritance, to Thomas Strode, in fee, upon the following trusts, viz: "for the use, benefit and emolument of the said Mary and her children, if any she have, until the decease of her intended husband, and then, if she should be the longest liver, until the children should respectively arrive at legal maturity, at which time, each individual of them is to receive his equal dividend, &c., leaving at least one full third part of the estate, &c., in her possession, for and during her natural life; then, on her decease, the landed part of the said one-third to be divided among the children, &c., and the personal property, &c., according to the will, &c., of the said Mary, at her decease. But if the said Mary should depart this life, before the decease of the said Hugh W. Wormley, then he is to enjoy the whole benefits, emoluments and profits, during his natural life, then, to be divided amongst said Wormley's children, as he, by will, shall see cause to direct, and then this trust, so far as relates to T. Strode, to end, &c.; and so, in like manner, should the said Mary depart this life, without issue, then this trust to end, &c. But should Wormley depart this life, before the said Mary, and leave no issue, then the said Mary to have and enjoy the whole of said estate, for and during her natural *life, and then to descend to the heirs of the said Wormley, or as his [*424 will relative thereto may provide."

Then follows this clause: "And it is further covenanted, &c., that whenever, in the opinion of the said Thomas Strode, the said landed property can be sold and conveyed, and the money arising from the sale thereof, be laid out in the purchase of other lands, advantageously for those concerned and interested therein, that then, and in that case, the said Thomas Strode is hereby authorized, &c., to sell, and by proper deeds of writing, to convey the same; and the lands so purchased shall be in every respect subject to all the provisions, uses, trusts and contingencies, as those were by him sold and conveyed. And it is further understood by the parties, that the said Hugh W. Wormley, under leave of the said Thomas Strode, his heirs and assigns, shall occupy and enjoy the hereby conveyed estate, real and personal, and the issues and profits thereof, for and during the term of his natural life, and after that, the said estate to be divided agreeably to the foregoing contingencies."

The property conveyed by the indenture consisted of about 350 acres of land, situate in Frederick county, in Virginia. The marriage took effect, and there are now four children by the marriage, for a short time after the marriage, Wormley and his wife resided on the Frederick lands; and a negotiation was then entered into by Wormley and the trustee, for

the exchange of the Frederick lands, for lands of the trustee, in the
*425] county of Fauquier. Various reasons were suggested *for this exchange, the wishes of friends, the proximity to the trustee, and the other relations of the wife, and the superior accommodations for the family of Wormley. The negotiation took effect; but no deed of conveyance or covenant of agreement, recognising the exchange, was ever made by Wormley; and no conveyance of any sort, or declaration of trust, substituting the Fauquier lands for those in the marriage-settlement, was ever executed by the trustee. Wormley and his family, however, removed to the Fauquier lands, and resided on them for some time. During this residence, viz., on the 16th of September 1810, the trustee sold the Frederick lands, by an indenture, to the defendant, Veitch, for the sum of $5500; and to this conveyance, Wormley, for the purpose of signifying his approbation of the sale, became a party. The circumstances of this transaction were as follows: The trustee had become the owner of a tract of land in Culpepper county, in Virginia, subject to a mortgage to Veitch and one Thompson, upon which more than $3000 were then due, and a foreclosure had taken place; to discharge this debt, and relieve the Culpepper estate, was a leading object of the sale, and so much of the trust-money as was necessary for the extinguishment of this debt, was applied for this purpose. At the same time, Strode, as collateral security to Veitch, for the performance of the covenant of general warranty contained in the indenture, executed a mortgage upon the Fauquier lands, then in the possession
*426] of Wormley. In *1811, Veitch conveyed the Frederick lands to the defendants, Castleman and McCormick, for a large pecuniary consideration, in pursuance of a previous agreement, and by the same deed, made an equitable assignment of the mortgage on the Fauquier lands. About this time, Wormley having become dissatisfied with the Fauquier ands, a negotiation took place for his removal to some lands of the trustee, in Kentucky; and upon that occasion, a conditional agreement was entered into between the trustee and Wormley, for the purchase of a part of the Kentucky lands, in lieu of the Fauquier lands, at a stipulated price, if Wormley should, after his removal there, be satisfied with them. Wormley accordingly removed to Kentucky with his family; but becoming dissatisfied with the Kentucky lands, the agreement was never carried into effect. Afterwards, in April 1813, Castleman and McCormick, by deed, released the mortgage on the Fauquier lands, in consideration, that Veitch would enter into a general covenant of warranty to them of the Frederick lands; and on the same day, the trustee executed a deed of trust to one Daniel Lee, subjecting the Kentucky lands to a lien, as security for the warranty in the conveyance of the Frederick lands, and subject to that lien, to the trusts of the marriage-settlement, if Wormley should accept these lands, reserving, however, to himself, a right to substitute any other lands, upon which to charge the trusts of the marriage-settlement. At this period, the dissatisfaction of Wormley was known to all the parties, and Wormley was
*427] neither a party, nor assented to the deed; and *Castleman and McCormick had not paid the purchase-money. In August 1813, the trustee sold the Fauquier lands to certain persons by the name of Grimmar and Mundell, without making any other provision for the trusts of the marriage-settlement.

At the hearing, the court below pronounced a decree, declaring, "that the exchange of land, made between the defendants, Hugh W. Wormley and Thomas Strode, is not valid in equity, and that the defendant, Thomas Strode, has committed a breach of trust, in selling the land conveyed to him by the deed of the 5th of August 1807, for purposes not warranted by that deed, in misapplying the money produced by the said sale, and in failing to settle other lands to the same trusts as were created by the said deed; and that the defendants, Richard Veitch, David Castleman and Charles McCormick, are purchasers, with notice of the facts which constitute the breach of trust committed by the said Thomas Strode, and are, therefore, in equity, considered as trustees; and that the defendants, David Castleman and Charles McCormick, do hold the land conveyed, &c., charged with the trusts in the said deed mentioned, until a court of equity shall decree a conveyance thereof. The court is further of opinion, that the said defendants are severally accountable for the rents and profits arising out of the said trust property, while in possession thereof, and that the said defendants, Castleman and McCormick, are entitled to the amount of the incumbrances from which the land has been relieved by any of *the defendants, and of the value [*428
of the permanent improvements made thereon, and of the advances which have been made to the said Hugh Wallace Wormley, by any of the defendants, for the support of his family; the said advances to be credited against the rents and profits, and the value of the said permanent improvements, and of the incumbrances which have been discharged, and which may not be abated by the rents and profits, to be charged on the land itself; and it is referred to one of the commissioners of the court, to take accounts according to their directions, and report," &c.

The court, afterwards, partially confirmed the report which had been made, reserving some questions for its future decision: "and it being represented on the part of the plaintiffs, that they had removed to the state of Kentucky, and are about removing to the state of Mississippi, and that it will be highly advantageous to them to sell the trust estate, and to invest the proceeds of sale in other lands, in the state of Mississippi, to the uses and trusts expressed in the deed of August 5th, 1807; and it appearing also, that there is no fund, other than the trust estate, from which the sum due to the defendants, Castleman and McCormick, can be drawn, this court is further of opinion, that the said trust estate ought to be sold, and the proceeds of sale, after paying the sum due to the defendants, Castleman and McCormick, invested in other lands in the state of Mississippi, to the same uses and trusts," &c. The sale, therefore, was decreed; commissioners were appointed to make it; the *proceeds to be first applied in satisfac- [*429
tion of the sums found due by the commissioners' report, and the balance to be paid to the trustee, to be invested by him in lands lying in Mississippi, "for which he shall take a conveyance to himself in trust, for the uses and trusts expressed in the deed of the 5th of August, 1807, &c., and the court being of opinion, that Thomas Strode is an unfit person to remain the trustee of the plaintiff, doth further order, that he shall no longer act in that character," &c., and proceed to appoint another in his stead, of whom bond and surety was required.

So much of this last decretal order as directs a sale of the property therein mentioned, was suspended, until the further order of the court,

"unless the said David Castleman and Charles McCormick shall sign and deliver to the marshal, or his deputy, who is directed to make the said sale, an instrument of writing, declaring, that should the decree rendered in this cause be reversed in whole or in part, they will not claim restitution of the lands sold, but will consent to receive in lieu thereof, the money for which the same may be sold; which instrument of writing the marshal is directed to receive, and to file among the papers in the cause in this court."

So much of the decretal order as directs the land to be sold to the highest bidder, was subsequently set aside, and until the appointment of a trustee, the marshal directed to receive propositions for the land, and to report the same to the court, which would give such further directions respecting
*430] the sale of the said land as shall then appear *proper. Whereupon, the defendants appealed from all the decrees pronounced in the cause.

February 21st. *Jones*, for the appellants, argued: 1. That in point of fact, all the arrangements of the trustee for exchanging and disposing of the trust estate, were not only fair and honest, but a discreet exercise of his authority; highly beneficial to the *cestuis que trust*, and entirely to their advantage.

2. That whether they were so or not, was no concern of the purchasers under the trustee: he being invested, by the terms of the trust, with a clear discretion, which invited all the world to treat with him, as with one having a complete authority to act, upon his own opinion of what was discreet and expedient in the administration of the trust, and not as with one executing a defined duty or authority, either purely ministerial, or mixed with a limited discretion over the subordinate details.

3. That the selling of the trust estate, and the investing of the proceeds, were, in their nature, and by the terms of the deed, to be two distinct substantive acts, in the exercise of the discretionary authority vested in the trustee; and were not to be done *uno flatâ:* therefore, the purchaser claiming a title under one consummate act, in the exercise of that discretion, was not responsible for any subsequent indiscretion or fraud of the trustee, in the progressive execution of the trust. Wherever the deed confers an immediate power of sale, for a purpose which cannot be immediately defined and
*431] ascertained, but must be postponed for *any period of time, however short, the purchaser is not bound to see to the application of the purchase money. *Balfour* v. *Welland*, 16 Ves. 150. It is observed by Sir W. GRANT, master of the rolls, that the doctrine, binding the purchaser to see to the application of the money, has been carried further than any sound equitable principle will warrant. Ibid. 156. But it has never been extended to a case like the present, where the mode in which the money is to be invested, depends upon a variety of contingent and complicated circumstances, which are submitted to the judgment and discretion of the trustee. Where the trust is, to pay debts and legacies, the purchaser is discharged by payment to a trustee. Co. Litt. 290 *b*, Butler's note 1, § 12.

But it might, perhaps, be said, that the authority to sell is combined with that to apply the proceeds. But he contended, that they were entirely independent and unconnected. They might, indeed, be associated in the mind of the trustee, but that remaining a secret in his breast, could not affect an innocent purchaser with the consequences of any subsequent error or fraud

of the trustee. Where, indeed, the *cestui que trust* is no party to the sale, nor to the original deed creating the trust, there may be more room for the application of the doctrine, as to the purchaser seeing to the application of the money. Such are deeds of assignment, for the payment of debts, in which the creditors are frequently not, originally, parties. *And in the case cited, the master of the rolls says, that the circumstance of the creditors coming in and executing the deed, consummates the authority of the trustee, to give a valid discharge for the purchase-money of an estate sold by him. *Balfour* v. *Welland*, 16 Ves. 157. But here, the *cestuis que trust* are not only parties to the deed creating the trust, but assenting to the very transaction now complained of. [*432

4. So that if the mere discretion of the trustee be not competent, *per se*, strictly to justify the purchasers under him, and to protect their title; still, the peculiar circumstances of this case give them a superinduced equity against the claims of the *cestuis que trust:* 1st. The previous consultation and deliberate approbation of the respective parents, and other disinterested friends of such of the *cestuis que trust* as were *sui juris*. 2d. The agency of those who were *sui juris*, in soliciting and recommending the measure in question, their active co-operation in it, and their subsequent acquiescence. 3d. The approbation of the parents of such of the *cestuis que trust* as were not *sui juris*. These circumstances would have afforded sufficient evidence of the expediency of the measure, to have induced a court of chancery, upon the application of the parties, to have sanctioned and directed it. Consequently, all the present plaintiffs are divested of every pretension to equitable relief: and so far as the claim is urged, for the advantage of those who were *sui juris*, and who, by their active co-operation and implicit acquiescence *encouraged and promoted the sale, it must be repudiated by the court as inequitable and unconscientious. Wormley and wife were the efficient *cestuis que trust*. The equitable proprietary interest was in them. They were both *sui juris*. A married woman is considered as a *feme sole* as to property settled to her use, whether in possession or reversion, and she may dispose of it, unless particularly restrained by the terms of the settlement. *Sturges* v. *Corp*, 13 Ves. 190.(*a*) [*433

There is no such universal, inflexible rule, as that the trustee cannot change the trust estate. 2 Fonbl. Eq. 88, note *f*; 1 Ibid. 191–6; *Fraser* v. *Bailey*, 1 Bro. C. C. 517. If he had a discretionary power, it signifies not how the payment was made, and whether a credit was given or not. Nor is this such a purchase, by the trustee himself, as will invalidate the sale in respect to *bonâ fide* purchasers. *Whichcote* v. *Lawrence*, 3 Ves. 740; *Lister* v. *Lister*, 6 Ibid. 631; *Ex parte James*, 8 Ibid. 348; *Coles* v. *Trecothick*, 9 Ibid. 246; *Randall* v. *Errington*, 10 Ibid. 423. It is not a sale by himself to himself. He does not unite both the characters of vendor and vendee, and therefore, it does not involve the mischiefs meant to be corrected by the rule. The consent of the *cestuis que trust* who are *sui juris*, confirms the sale, at least, as to these innocent purchasers.

5. But if all these positions should be overruled, *he insisted, that [*434

(*a*) See, on the subject of the power of a *feme covert* over her separate estate, the Methodist Episcopal Church *v.* Jaques, 3 Johns. Ch. 77, and Ewing *v.* Smith, 3 Dessausure 417.

the decree of the court below was erroneous in its details: because it should, in the first instance, have decreed, as against the trustee himself, an execution of the trust; and in the alternative of his failure and inability, the repayment of the purchase-money by Veitch, the original purchaser from the trustee; and the land in the hands of the appellants, Castleman and McCormick, who were purchasers with a general warranty from Veitch, as he was from the trustee, should have been the last resource, after the others had been exhausted; and then only, to raise the money due, giving Castleman and McCormick an option to retain the land, by paying the money; instead of decreeing the land to be sold, at all events, for the benefit of the *cestuis que trust*. The appellants ought not to have been held to account for the mesne profits; because Wormley, the only person yet entitled to receive them, was a party to the sale, and was clearly competent to alien the estate, and the rents and profits, during his life; he being sole *cestui que trust* for life; and thus, if the sale is to be set aside at all, for the benefit of his wife and children, it can only be to the extent of protecting and securing their future and contingent interests.

6. He also contended, that the bill must be dismissed for want of jurisdiction. Wormley, the husband, is made a party defendant, though he is a citizen of the same state with his wife and infant children, who are plaintiffs. *Strawbridge* v. *Curtis*, 3 Cranch 267; *New Orleans* v. *Winter*, 1 Wheat. 94.

*435] *The *Attorney-General*, contrà, argued: 1. That the trustee had broken every one of the trusts he had undertaken to perform, on assuming the fiduciary character. If he, therefore, were now in the actual possession of the Frederick lands, if he had conveyed them, and taken back a reconveyance to his own use, there could be no question, that a court of equity would hold these lands, in his possession, subject to the original trusts. But if the appellants purchased with knowledge of the trusts, and of the breach of trust, equity converts them into trustees, with all the liabilities of the original trustee. *Adair* v. *Shaw*, 1 Sch. & Lef. 862; *Sanders* v. *Dehew*, 2 Vern. 271; 2 Fonbl. Eq. 152; 15 Ves. 350; *Bovey* v. *Smith*, 1 Vern. 149; s. c. 2 Cas. in Ch. 124. He argued upon the facts, to show, that they were chargeable with this knowledge. Although they had denied, in the answer, all fraud on their own part, and all knowledge of fraud in others, yet they do not deny a knowledge of such facts as affects them with the consequences of the trustee's misconduct.

2. It may be laid down as a general proposition, that trustees are incapable of becoming the purchasers of the trust subject. The two characters of buyer and seller are inconsistent: *Emptor emit quam minimo potest, venditor vendit quam maximo potest.* Sugd. on Vend. 422–3, and cases there cited. Where the trust is for persons not *sui juris*, as *femes covert*, infants, and the like, the court will, under no circumstances whatever, be they ever so fair between the parties (as consulting friends, &c.), confirm a

*436] purchase of the *trust property by the trustee, unless it be done under the immediate authority and sanction of the court. *Davidson* v. *Gardner*, Sugd. on Vend. 206. It cannot be established even by a sale at public auction, or before a master. Ibid. 427. The only mode in which it can be done, is by a previous decree of permission, which the court will not grant, unless where it is clearly for the benefit of the *cestui que trust*. Ibid.

432. A sale made without such permission, may, or may not, be confirmed, at the option of the *cestui que trust.* 5 Ves. 678; 6 Ibid. 631. And in order to set aside a purchase by a trustee, it is not necessary to show, that he has made any advantage by his purchase. *Ex parte James,* 8 Ves. 348; *Ex parte Bennett,* 10 Ibid. 393. But the whole of this subject has been so thoroughly examined by Mr. Chancellor KENT, in several cases determined by him, that it is unnecessary to do more than to give the court a general reference to the authorities cited by him. *Green* v. *Winter,* 1 Johns. Ch. 27; *Schieffelin* v. *Stewart,* Ibid. 620; *Davoue* v. *Fanning,* 2 Ibid. 252. The rule is applicable with peculiar force to the present case, because here the purchase was not under the sanction of the court, nor at a master's sale, nor at auction, where the trustee resists a fair competition; there was no payment of the purchase-money to the use of any of the *cestuis que trust;* and (if we were bound to show, that the trustee has made an advantage) he has made all *the advantage. If Strode had been a trustee merely for the purpose of sale, he could not have acquired the trust fund by purchase. [*437
But his was not a mere power to sell; it was a power to sell, whenever he could, in his honest opinion, invest the proceeds of the sale, advantageously, in other lands to be settled to the same uses. The sale, without a re-investment, was a breach of trust. Those who purchased under him had notice of the breach of trust.

3. The general principle is, that a purchaser from a trustee is bound to see to the application of the purchase-money. But that principle is stated with this limitation, that he is only thus bound, where the trust is of a defined and limited nature, and not where it is general and unlimited, as a trust for the payment of debts generally. Sugd. on Vend. 367. That is, if the trust be of such a nature that the purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, or of debts which are scheduled or specified, the purchaser is bound to see that the money is applied accordingly; and that, although the estate be sold under a decree of a court of equity, or by virtue of an act of parliament. Ibid. 368. And Mr. Sugden says, that those most strongly disposed to narrow this rule, do still hold, that where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the *trust of which [*438
they have notice. Ibid. 373. This is what Sir W. GRANT says, in the case cited on the other side, with this addition, that "where the sale is made by the trustee, in performance of his duty, it seems extraordinary, that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money." *Balfour* v. *Willard,* 16 Ves. 151. But here, the sale was made, not in performance of the trustee's duty, but in violation of it; and the supposed assent of the husband and wife, to the breach of trust, will not cure it. *Thayer* v. *Gold,* 1 Atk. 615.

March 12th, 1823. STORY, Justice, delivered the opinion of the court; and after stating the case, proceeded as follows:—Such is the general outline of the case; and in the progress of the investigation, it may become necessary to advert to some other facts with more particularity.

And the first question arising upon this posture of the case is, whether

Strode, the trustee, by the sale to Veitch, has been guilty of any breach of trust. And this seems to the court to be scarcely capable of controversy. That there are circumstances in the case, which raise a presumption of bad faith on the part of the trustee, and expose him to some suspicion, cannot
*439] escape observation. But assuming him to have acted with *entire good faith, his proceedings were a plain departure from his duty. In respect to the supposed exchange of the Fauquier for the Frederick lands, it is impossible for a moment to admit its validity. In the first place, it was not made between parties competent to make it. Wormley had no authority over the estate, after the marriage-settlement. The chief object of that settlement was, to secure the property to the use of the wife and children, during the joint lives of the husband and wife. And though it is said, in another part of the deed, that Wormley shall occupy and enjoy the estate, and the issues and profits thereof, during his life, yet this was to be, under leave of the trustee; and to suppose that he thus acquired an equitable interest for life, is to defeat the manifest and direct intention of the other clauses in the deed, which avow the whole object to be, the security of the estate, during the same period, for the use of the wife and children. The true and natural construction of this clause is, that it points to the discretion which the trustee may exercise, as to allowing the husband to occupy the estate, and take the profits, for the maintenance of the family, whenever the trustee perceives it may be safely done, without involving the trustee in any responsibility, to which he might be exposed, by such a permission, without such an authority. But at all events, the right to dispose of the equitable fee to any one, much less to the trustee himself; did not exist in Wormley; and any exchange attempted to be made by him, however benefi-
*440] cial, would have been utterly void. But no *exchange was, in fact, consummated. It is true, that the removal to the Fauquier lands took place, upon an agreement to this effect; but no definitive conveyance was ever made; and the trustee himself never settled, and never took a step towards settling, the Fauquier estate upon the trusts of the marriage-settlement, as it was his indispensable duty to do, if he meant to conduct himself correctly. As to the substituted Kentucky lands, the transaction was still more delusive. The agreement for the substitution was merely conditional, depending upon the subsequent election of Wormley, and his dissent put an end to it. As to the conveyance to Lee, ostensibly for the trusts of the settlement, it can be viewed in no other light than an attempt to cover up the most unjustifiable proceedings. That conveyance was not executed, until after the dissent and dissatisfaction of Wormley were well known; and so far from its containing any valid performance of the trusts, it expressly gives a prior lien to the purchasers of the Frederick lands, as security for their covenant of warranty; and to complete the delusion, the trustee reserved to himself the authority to substitute any other lands, leaving the trusts to float along, without fixing them definitively upon any solid foundation. If we add, that the Fauquier lands were mortgaged to the purchasers for the same covenant; and that this mortgage was discharged only for the purpose of selling the property to Grimmar and Mundell, we shall come irresistibly to the conclusion, that the trustee never was
*441] in a situation *to give an unincumbered title on either the Fauquier or Kentucky lands, to secure the trusts; and that if he was, he never,

in fact, executed any conveyance for this purpose. In every view, therefore, of this part of the case, it is clear, that no valid exchange did, or could take place; and that as there was no equitable or legal transmutation of the property from the *cestuis que trust*, it remained in the trustee, clothed with all the original fiduciary interests.

But independent of these considerations, there is a stubborn rule of equity, founded upon the most solid reasoning, and supported by public policy, which forbade any such exchange. No rule is better settled, than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor, he must always desire to sell as high. and as purchaser, to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters. If there be any exceptions to the generality of the rule, they are not such as can affect the present case. On the contrary, if there be any cogency in the rule itself, this is a strong case for its application; for, by the very terms of the settlement, the trustee was invested with a large discretion, and a peculiar and exclusive confidence was placed in his judgment. Of necessity, therefore, it was contemplated, that his judgment should be free and impartial, and unbiassed by personal interests. The asserted *exchange, so far at least as it affects to justify or confirm the proceedings of the trustee, may, therefore, be at once laid out of the [*442 question.

Then, was the sale to Veitch a breach of trust? The power given to the trustee by the settlement, is certainly very broad and unusual in its terms; but it is not unlimited. The trustee had not an unrestricted authority to sell, but only when, in his opinion, the purchase-money might be laid out advantageously for the *cestuis que trust*. It is true, the sale and re-investment are to be decided by his opinion; which is an invisible operation of the mind. But his acts, nevertheless, are subject to the scrutiny of the law; and if that opinion has not been fairly and honestly exercised, if it has been swayed by private interests and selfish objects, if the sale has been at a price utterly disproportionate to the real value of the property, and the evidence demonstrate such facts, a court of equity will not sanction an act which thus becomes a fraud upon innocent parties.

Much ingenuity has been exercised, in a critical examination of the nature of the power itself, as it stands in the text of the settlement. It is contended, that the acts of sale, and of re-investment, are separate and distinct acts, and the power to sell is, therefore, to be disjoined from that of re-purchase, so that the sale may be good, though the purchase-money should be misapplied. How far a *bonâ fide* purchaser is bound, in a case like the present, to look to the application of the purchase-money, need not be decided in this case. There is much reason in the doctrine, that where the *trust is defined in its object, and the purchase-money is to be [*443 re-invested upon trusts which require time and discretion, or the acts of sale and re-investment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase-money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence, than those

who have bought under an apparently authorized act. But in the present case, it seems difficult to separate the acts from each other. The sale is not to be made, unless a re-investment can, in the opinion of the trustee, be advantageously made. He is not to sell upon mere general speculation, but for the purpose of direct re-investment. And it is very difficult to perceive, how the trustee could arrive at the conclusion, that it was proper to sell, unless he had, at the same time, fixed on some definite re-investment, which, compared with the former estate, would be advantageous to the parties. Although, therefore, the acts of sale and purchase, are to be distinct, they are connected with each other; and, at least, as to the trustee, there cannot be an exercise of opinion, such as the trust contemplated, unless he had viewed them in connection. If he should sell, without having any settled intention to buy, leaving that to be governed by future events, he would certainly violate the confidence reposed to him. *A fortiori*, if he should
*444] sell, with an intention, not to re-invest, but to speculate, for the *purpose of relieving his own necessities, or of appropriating the trust fund indefinitely to his own uses.

Now, in point of fact, what has the trustee done in this case? He has sold the trust property, to pay his own debts. He has never applied the proceeds to any re-investment. To this very hour, there has been no just and fair application of the purchase-money. The Fauquier lands are gone, the Kentucky lands have been rejected, and are loaded with liens; and there is nothing left but the personal responsibility of the trustee, embarrassed and distressed as he must be taken to be, unless the trusts are still fastened to the Frederick lands. Can it then be contended for a moment, that there is no breach of trust, when the sale was not for the purposes of re-investment? When the party puts his right to sell, not upon an honest exercise of opinion, at the time of sale, but upon a distinct anterior transaction, invalid and incomplete, by which he became clothed with the beneficial interest of the estate? When he claims to be, not the disinterested trustee, selling the estate, but the trustee purchasing, by exchange, the trust fund, and thus entitled to deal with it according to his own discretion, and for his own private accommodation, as absolute owner? Where the purchase-money is to be applied to extinguish his own debts; and there is no proof of his means to replenish, or acquire an equal sum from other sources? In the judgment of the court, the sale was a manifest breach of trust. It was,
*445] in no proper sense, an execution of the power. The power, *in the contemplation of the trustee, was virtually extinguished He sold, not because he intended an advantageous re-investment; but because he considered himself the real owner of the estate. The very letter, as well as the spirit of the power, was, therefore, violated; for the trustee never exercised an opinion upon that, which was the sole object of the power to sell, an advantageous re-investment.

The next point for consideration is, whether the defendants, Veitch, and Castleman and M'Cormick were *bonâ fide* purchasers of the Frederick lands, without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts; and their general denial of all knowledge of fraud, will not help them, if, in point of law, the transaction is repudicated by a court of equity.

If they were *bonâ fide* purchasers, without notice, their title might have required a very different consideration.

And first, as to Veitch. The deed to him contained a recital of the marriage-settlement, and the power authorizing the sale. He, therefore, had direct and positive notice of the title of the trustee to the property. There is the strongest reason to believe, that he was fully cognisant of the exchange of the Frederick and Fauquier lands, negotiated between Wormley and the trustee. The certificate from Wormley, respecting the exchange, and expressing satisfaction with it, which was procured a few days before the sale, and which Veitch now produces, shows that he *must have [*446 had a knowledge of the exchange. Its apparent object was, to ascertain the state of the title. The removal of the Wormley family, and their known residence, at this time, on the Fauquier lands, strengthen this presumption. If he knew of the exchange, he could not but know, that he purchased of the trustee an estate, which he claimed as his own, in a bargain with an unauthorized person, and that the trustee was, at the same time, the vendor and purchaser. He also knew, that the sale to himself was not in execution of the power, or for the purpose of re-investment; for according to the other facts, the exchange had already effected that, and no further re-investment was contemplated. He took a mortgage, as additional security, for the warranty, on the sale of the Fauquier lands, not even now alleging, that he did not know their identity. And under these circumstances, he could not but know, that there had been no actual conveyance or declaration of trust of the Fauquier lands, in execution of the trust, for, otherwise, the trustee could not have mortgaged them to him. He, therefore, stood by, taking a conveyance from the trustee of the trust estate, knowing, at the same time, that no re-investment had been made, which could be effectual, and that no re-investment was contemplated as the object of the sale; and, so far as his mortgage could go, he meant to obtain a priority of security, that should ride over any future declaration of trust.

This is not all. The very sale of the trust fund was to be, not for re-investment, but to pay a large *debt due to himself, upon which [*447 a decree of foreclosure of a mortgaged estate had been obtained; and he could not be ignorant, that the application of the trust fund to such a purpose, was a violation of the settlement, and afforded a strong presumption, that the trustee had no other adequate means of discharging the debt, or of buying other lands advantageously in the market. And yet, with notice of all these facts, the deed itself, from the trustee to Veitch, contains a recital, that the sale was made "with the intention of investing the proceeds of such sale in other lands, of equal or greater value." This was utterly untrue, and could not escape the attention of the parties. Veitch then had full knowledge of all the material facts, and he does not even deny it in his answer; for that only denies the inference of fraud, which is a mere conclusion of law from the facts, as they are established. Purchasing, then, with a full knowledge of the rights of Mrs. Wormley and her children, and of the breach of trust, Veitch cannot now claim shelter in a court of equity, as a *bonâ fide* purchaser for a valuable consideration.

The next question is, whether Castleman and M'Cormick are not in the same predicament. In the judgment of the court, they clearly are. They purchased from Veitch, whose deed gave them full notice of the trust, and

they could not be ignorant of the recital in it, since their title referred them to it. They must have perceived, that the sale to Veitch, in order to be valid, must have been with a view to re-investment of the purchase-money
*448] *in other real estate. It was natural for them to inquire, whether the sale had been made under justifiable circumstances, and whether there had been any such re-investment. Previous to the sale to Veitch, they had entered into a negotiation with the trustee himself, for a direct purchase of the Frederick lands; and on that occasion, became acquainted with the fact, that the trustee was largely indebted to Veitch, and that one object of the sale was, to apply the proceeds to the payment of that debt. How then could they be ignorant, that the proceeds of the sale, which was very soon afterwards made to Veitch, were to be applied to extinguish the same debt, and that the transfer was not in execution of the trust, but to administer to the trustee's own necessities? This is not all. Before the execution of the deed to them, they knew of the arrangement respecting the Fauquier lands, and that Wormley had become dissatisfied with the bargain. They knew that these lands had not been settled by the trustee, upon the trusts of the settlement, and they took an equitable assignment of the mortgage, from Veitch, of the same lands. It may be said, that the evidence of these facts is not positively made out in the record; but if it be not, the circumstantial evidence fully supports the conclusion. The answer itself of Castleman and McCormick, does not deny notice of these facts. It states, indeed, that they supposed, the transaction with Veitch fair, because they were satisfied, that the trustee never received more from Veitch than what he has
*449] given the *cestuis que trust* credit for. *Was it a fair execution of the trust, so to sell the estate, and to give credit for the proceeds? To apply them to pay the trustee's debts, and relieve his necessities? To sell, without any definite intention as to a re-investment? They also deny all knowledge of fraud. But this is a mere general denial, and does not negative the knowledge of the facts, from which the law may infer fraud.

The subsequent conduct of Castleman and McCormick shows, that they were not indifferent to the execution of the trust; but that they felt no interest to secure the rights of the *cestuis que trust*. They were privy to the removal to Kentucky, and exhibited much anxiety to have it accomplished. They knew, subsequently, the dissatisfaction of Wormley with that removal, and with the Kentucky lands. Yet they, in the year 1813, relieved the Fauquier lands from their own incumbrance, and enabled the trustee to dispose of it for other purposes than the fulfilment of the trusts for which it had been originally destined. And throughout the whole, their conduct exhibits an intimate acquaintance with the nature of their own title, and the manner and circumstances under which it had been acquired by Veitch, and the objections to which it might be liable. And they ultimately took the general warranty of Veitch, upon releasing their claim on the Fauquier lands, as a security for its validity.

There is a still stronger view which may be taken of this subject. It is a settled rule in equity, that a purchaser, without notice, to be entitled to
*450] protection, must not only be so, at the time of the *contract or conveyance, but at the time of the payment of the purchase-money. The answer of Castleman and McCormick does not even allege any such want of notice. On the contrary, it is in proof, that upwards of $3000 of the pur-

chase-money was paid in the autumn of 1813, and the spring of 1814. And this was not only after full notice of the anterior transactions, but after the commencement of the present suit. It appears to us, therefore, that the circumstances of the case can lead to no other result, than that Castleman and McCormick were not purchasers, without notice of the material facts constituting the breach of trust; and that, therefore, the Frederick lands ought, in their hands, to stand charged with the trusts in the marriage-settlement. The leading principle of the decree in the circuit court was, therefore, right.

Some objections have been taken to the subordinate details of that decree; but it appears to us, that the objections cannot be sustained. The decree directs an account of the rents and profits of the Frederick lands, while in possession of the defendants. It further directs an allowance of the amount of all incumbrances which have been discharged by the defendants, and of the value of any permanent improvements made thereon, and also of any advances made for the support of Wormley's family. These advances are to be credited against the rents and profits; and the value of the improvements, and of the discharged incumbrances, not recouped by the rents and profits, are to be a charge on the land itself. A more *liberal decree could not, in our opinion, be required by any reasonable view of the case. [*451

An objection has been taken to the jurisdiction of the court, upon the ground, that Wormley, the husband, is made a defendant, and so all the parties on each side of the cause are not citizens of different states, since he has the same citizenship as his wife and minor children. But Wormley is but a nominal defendant, joined for the sake of conformity, in the bill, against whom no decree is sought. He voluntarily appeared, though, perhaps, he could not have been compelled so to do. Under these circumstances, the objection has no good foundation. This court will not suffer its jurisdiction to be ousted, by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done, without prejudice to the rights of others.(a)

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(a) The general rule and its exceptions, as to who are necessary parties to a bill in equity, are so fully and clearly laid down by Mr. Justice STORY, in the case of West v. Randall (2 Mason 181–90), and the principles of practice asserted in the judgment, are so closely connected with the above position in the principal case in the text, that the editor has thought fit to subjoin the following extract. It is only necessary to state, that the case was of a bill filed by an heir, or next of kin, for a distributive share of an estate.

"It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants, in the subject-matter of the bill, ought to be made parties to the suit, however numerous they may be. The reason is, that the court may be enabled to make a complete decree between the parties, may prevent future litigation, by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits. Mitf. Eq. Pl. 29, 144, 220; Coop. Eq. Pl. 33, &c., 185; 2 Madd. 142; Gilb. For. Rom. 157, 158; 1 Harris. Ch. Pr. ch. 3, p. 25 (Newl. ed); Leigh v. Thomas, 2 Ves. 312; Cockburn v. Thompson, 16 Id. 321; Beaumont v. Meredith, 3 Ves. & B. 180; Hamm v. Stevens, 1 Vern. 110. When all the parties are before the court,

*JOHNSON, Justice.—After the most careful examination of this voluminous record, I think it *due to the parties defendant, to express the opinion, that I cannot discover any evidence of fraud in any part of their transactions.

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it can see the whole case; but it may not, where all the conflicting interests are not brought out upon the bill. Gilbert, in his *Forum Romanum*, p. 157, states the rule, and illustrates it with great precision. 'If,' says he, 'it appears to the court, that a very necessary party is wanting; that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings, that the defendant is only tenant for life, and consequently, the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees, none of which will be bound either by the decree, or by the account to be taken of the testator's effects, and each of these legatees may draw the account in question over again at their leisure; or where several persons are entitled, as next of kin, under the statute of distributions, and only one of them is brought in to a hearing; or where a man is entitled to the surplus of an estate, under a will, after payment of debts, and is not brought in; or where the real estate is to be sold under a will, and the heir-at-law is not brought in: in these, and all other cases, where the decree cannot be made uniform, for as, on the one hand, the court will do the plaintiff right, so, on the other hand, they will take care that the defendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties, and whose fault it was that it was not done.' The cases here put are very appropriate to the case at bar. That in respect to legatees, probably refers to the case of a suit by one residuary legatee, where there are other residuary legatees; in which case, it has often been held, that all must be joined in the suit. Parsons *v.* Neville, 3 Bro. C. C. 365; Cockburn *v.* Thompson, 16 Ves. 321; Sherrit *v.* Birch, 3 Bro. C. C. 229; Atwood *v.* Hawkins, Rep. temp. Finch 113; Brown *v.* Rickets, 3 Johns. Ch. 553. But where a legatee sues for a specific legacy, or for a sum certain on the face of the will, it is not, in general, necessary, that other legatees should be made parties, for no decree could be had against them, if brought to a hearing (Haycock *v.* Haycock, 2 Ch. Cas. 124; Dunstall *v.* Rabett, Finch 243; Attorney-General *v.* Ryder, 2 Ch. Cas. 178; Atwood *v.* Hawkins, Rep. temp. Finch 118; Wainwright *v.* Waterman, 1 Ves. jr. 311); and in general, no person, against whom, if brought to a hearing, no decree could be had, ought to be made a party. De Golls *v.* Ward, 3 P. Wms. 310, note. And when a party is entitled to an aliquot proportion only of a certain sum in the hands of trustees, if the proportion and the sum be clearly ascertained and fixed, upon the face of the trust, it has been held, that he may file a bill to have it transferred to him, without making the persons entitled to the other aliquot shares of the fund, parties. Smith *v.* Snow, 3 Madd. 10. The reason is the same as above stated, for there is nothing to controvert with the other *cestuis que trust*. I am aware, that it has been stated by an elementary writer of considerable character, that one of the next of kin of an intestate may sue for his distributive share, and the master will be directed by the decree, to inquire and state to the court, who are all the next of kin, and they may come in under the decree. Coop. Eq. Pl. 39, 40. This proposition may be true, *sub modo*; but that it is not universally true, is apparent from the authority already stated. See Bradwin *v.* Harpur, Ambl. 374, 2 Madd. 146; Gilb. For. Rom. 157.

"This rule, however, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties, is not without exception. As Lord ELDON has observed, it being a general rule, established for the convenient administration of justice, it must not be adhered to in cases, to which, consistently with practical convenience, it is incapable of application. Cockburn *v.* Thompson, 16 Ves. 321. And see S. P. Wendell *v.* Van Rensselaer, 1 Johns. Ch. 349. Whenever, there-

*The proposed exchange between the Frederick and Fauquier lands, was made openly and deliberately, *upon consultation with friends [*455 of the *cestuis que trust*, and, obviously, had many prudential *con- [*456 siderations to recommend it. That Wormley and his family

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fore, the party supposed to be materally interested is without the jurisdiction of the court; or if a personal representative be a necessary party, and the right of representation is in litigation in the proper ecclesiastical court; or the bill itself seeks a discovery of the necessary parties; and, in either case, the facts are charged in the bill, the court will not insist upon the objection; but, if it can, will proceed to make a decree betweed the parties before the court, since it is obvious, that the case cannot be made better. Mitf. 145, 146; Coop. Eq. Pl. 39, 40; 2 Madd. Ch. Pr. 143; 1 Harris. ch. 3. Nor are these the only cases; for where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties from a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want or parties will be repelled, and the court will proceed to a decree. Yet, in these cases, so solicitous is the court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to show it to be erroneous, and award a rehearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger or injury or injustice. Coop. Eq. Pl. 39; 2 Madd. 144, 145; Cockburn *v.* Thompson, 16 Ves. 321. Among this class of cases, are suits brought by a part of a crew of a privateer against prize-agents, for an account, and their proportion of prize-money. There, if the bill be in behalf of themselves only, it will not be sustained; but if it be in behalf of themselves, and all the rest of the crew, it will be sustained, upon the manifest inconvenience of any other course; for it has been truly said, that no case can call more strongly for indulgence, than where a number of seamen have interests; for their situation, at any period, how many were living, at any given time, how many are dead, and who are entitled to representation, cannot be ascertained (Good *v.* Blewitt, 13 Ves. 397; Leigh *v.* Thomas, 2 Ibid. 312; contrà Moffa *v.* Farquherson, 2 Bro. C. C. 338; acc. Brown *v.* Harris, 13 Ves. 552; Cockburn *v.* Thompson, 16 Ibid. 321); and it is not a case, where a great number of persons, who ought to be defendants, are not brought before the court, but are to be bound by a decree against a few. So also is the common case of creditors suing on behalf of the rest, and seeking an account of the estate of their deceased debtor, to obtain payment of their demands; and there the other creditors may come in and take the benefit of the decree. Leigh *v.* Thomas, 2 Ves. 312; Cockburn *v.* Thompson, 16 Ibid. 321; Hendricks *v.* Franklin, 2 Johns. Ch. 283; Brown *v.* Ricketts, 3 Ibid. 553; Coop. Eq Pl. 39, 186. But Sir John STRANGE said, there was no instance of a bill by three or four, to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors. Leigh *v.* Thomas, 2 Ves. 312; Coop. Eq. Pl. 39. And legatees seeking relief, and an account against executors, may sue in behalf of themselves and all other interested persons, when placed in the same predicament as creditors. Brown *v.* Ricketts, 3 Johns. Ch. 553. Another class of cases is, where a few members of a voluntary society, or an unincorporated body of proprietors, have been permitted to sue in behalf of the whole, seeking relief, and an account, against their own agents and committees. Such was the ancient case of the proprietors of the Temple Mill Brass-Works (Chancey *v.* May, Prec. Ch. 592); and such were the modern cases of the Opera House, the Royal Circus, Drury Lane Theatre, and the New River Company. (Lloyd *v.* Loaring, 3 Ves. jr. 773; Adair *v.* New River Company, 11 Ibid. 429; Cousins *v.* Smith, 13 Ibid. 542; Coop. Eq. Pl. 40; Cockburn *v.* Thompson, 16 Ves. 321.) There is one

must have starved, had they remained *upon the lands in Frederick,
*458] is abundantly proved; and no worse consequences could have
*happened to them, from either of these exchanges. It is satis-
*459] factorily shown also, that the exchange *for the Fauquier land

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other class of cases, which I will just mention, where a lord of a manor has been permitted to sue a few of his tenants, or a few of the tenants have been permitted to sue the lord, upon the question of a right of common; or a parson has sued, or been sued by, some of his parishioners, in respect to the right of tithes. In these and analogous cases of general right, the court dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility, of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore, binding, in a sense, that right. 2 Madd. 145; Coop. Eq. Pl. 41; Mitf. Pl. 145; Adair *v.* New River Company, 11 Ves. 429. But even in the case of a voluntary society, where the question was, whether a dissolution and division of the funds, voted by the members, was consistent with their articles, the court refused to decree, until all the members were made parties. Beaumont *v.* Meredith, 3 Ves. & B. 180. The principle upon which all these classes of cases stand, is, that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil, as it can consider other persons as *quasi* parties to the record, at least, for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeoparded. Of course, the principle always supposes, that the decree can, as between the parties before the court, be fitly made, without substantial injury to third persons. If it be otherwise, the court will withhold its interposition.

"The same doctrine is applied, and with the same qualification, to cases where a material party is beyond the jurisdiction of the court, as, if the party be a partner with the defendant, and resident in a foreign country, so that he cannot be reached by the process of the court. There, if the court sees, that without manifest injustice to the parties before it, or to others, it can proceed to a decree, it acts upon its own notion of equity, without adhering to the objection. Coop. Eq. Pl. 35; Mitf. Pl. 146; Cowslad *v.* Cely, Prec. Ch. 83; Darwent *v.* Walton, 2 Atk. 519; Whalley *v.* Whalley, 1 Ves. 484, 487; Milligan *v.* Milledge, 3 Cranch 220. The ground of this rule is peculiarly applicable to the courts of the United States; and therefore, if a party, who might otherwise be considered as material, by being made a party to the bill, would, from the limited nature of its authority, oust the court of its jurisdiction, I should strain hard to give relief, as between the parties before the court; as, for instance, where a partner, or a joint trustee, or a residuary legatee, or one of the next of kin, from not being a citizen of the state, where the suit was brought, or from being a citizen of the state, if made a plaintiff, would defeat the jurisdiction, and thus destroy the suit, I should struggle to administer equity between the parties properly before us, and not suffer a rule, founded on mere convenience and general fitness, to defeat the purposes of justice. Russell *v.* Clarke, 7 Cranch 69, 98.

"I have taken up more time in considering the doctrine as to making parties, than this case seemed to require, with a view to relieve us from some of the difficulties pressed at the argument, and to show the distinctions (not always very well defined) upon which the authorities seem to rest. Apply them to the present case. The plaintiff claims, as heir, an undivided portion of the surplus, charged to be in the defendants' hands and possession. No reason is shown on the face of the bill, why the other heirs, having the same common interest, are not parties to it. The answer gives their names, and shows them within the jurisdiction of the court, and as defendants, they might have been joined in this suit, without touching the jurisdicton of the court, for they are all resident in this state. As plaintiffs, they could not be joined, without ousting our jurisdiction, for then some of the plaintiffs would have been citizens of the same

was highly advantageous. Taking money, as the most correct comparison of *value, it appears, that the Frederick land, after being long hawked about for sale, and having $1000 added to its value by Strode, in the extinction of the mother's life-estate, sold for no more than [*460

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state as the defendants. Strawbridge v. Curtiss, 3 Cranch 267. Now, in the first place, the other heirs might, if parties, controvert the very fact of heirship in the plaintiff, and that would touch the very marrow of his right to the demand now in question. The fact, however, is not denied or put in issue by the answer, and therefore, as to the present defendants, it forms no ground of controversy. But they insist, that the present suit will not close their accounts; and that the other heirs may sue them again, and controvert the whole matter now in litigation, and thus vex them with double inconveniences and perils. This is certainly true; and it is as certain, that they could not be made plaintiffs, without ousting the present plaintiff of his remedy here. They might have been made defendants; but the question is, whether the plaintiff is compellable so to make them, unless they deny his heirship, or they collude with the defendants. If there be no controversy between him and them, he could have no decree against them, at the hearing; and it would be strange, if, when he has nothing to allege against him, he must still name them as defendants in his bill. I agree to the general doctrine, that where a residuary legatee sues, he must make the other residuary legatees parties; and I think it analogous to the present case. But there the rule would not apply, if the other residuary legatees were in a foreign country, or without the reach of the jurisdiction of the court. The case of the next of kin, put by Gilbert, in the passage before cited, is indentical with the present. Gilb. For. Rom. 157, 158. But there, the same exception must be implied. And even in a case where a mistake in a legacy, of an aliquot part of the personal estate, was sought to be rectified, and the next of kin were admitted to be necessary parties (as to which, however, as the executor represents all parties in interest as to the personal estate, a doubt might be entertained, whether, under the peculiar circumstance of this case, they were necessary defendants, Peacock v. Monk, 1 Ves. 127; Lawson v. Barker, 1 Bro. C. C. 303; 1 Eq. Cas. Abr. 78, p. 13; Anon., 1 Ves. 261; Wainwright v. Waterman, 1 Ves. jr. 311), the court dispensed with their being made parties, it appearing that they were numerous, and living in distant places, and the matter in dispute being small, and the plaintiff a pauper. Bradwin v. Harpur, Ambl. 374. The rule is not, then, so inflexible, that it may not fairly leave much to the discretion of the court, and upon the facts of the present case, it being impossible to make the other heirs plaintiffs, consistently with the preservation of the jurisdiction of the court, or to make them defendants, from any facts which can be truly charged against them; I should hesitate a good while before I should enforce the rule; and if the cause turned solely upon this objection, I should not be prepared to sustain it. Russell v. Clark, 7 Cranch 69, 98. There is, indeed, a difficulty upon the face of the bill, that it shows no reason why the other heirs were not made parties, as plaintiffs; and if there had been a demurrer, it might have been fatal. But the answer seems to set that right, by disclosing the citizenship and residence of the other heirs; and in this respect, relying on the facts as a defence, it may well aid the defects of the bill.

"There is, however, a more serious objection to this bill for the want of parties; and that is that the personal representative of William West is not brought before the court, and for this no reason is assigned in the bill. Now, it is to be considered, that the bill charges the defendants with trust property, personal as well as real, and prays an account, and payment of the plaintiff's distributive share of each. I do not say, that the heir, or next of kin, cannot, in any case, proceed for a distributive share, against a third person, having in his possession the personal assets of the ancestor, without making the personal representative a party; but such a case, if at all, must stand upon very special circumstances, which must be charged in the bill. The administrator of the deceased is, in the first place, entitled to his whole personal estate, in trust

$5500, a sum satisfactorily proved to be its full value at the time; whereas, the Fauquier land, after Wormley's refusal to take it, was sold for $8000. So that the two tracts then stood, in comparison of value, as $4500 to $8000. And that Strode was fully sensible of the great difference in value, and satisfied to bear the loss, is positively proved, by the fact, that when Wormley *461] resolved to move to Kentucky, *they established the value of the Fauquier lands between themselves at $7000; and Strode actually gave an acknowledgment to Wormley for $6500, the balance of the $7000, after dividing with him the sum paid for his mother's life-estate.

The case is one in which, it is true, the conduct of the defendants is greatly exposed to misrepresentation and misconstruction; but when reduced to order, and examined, the circumstances admit of the most perfect reconciliation with the purest intentions. It is true, that Strode was in debt; that it was necessary to sell the Fauquier lands, to satisfy his creditors; that the money arising from the Frederick land was applied to the payment of Strode's debts; but there was nothing iniquitous in all this. It is perfectly explained thus: the Fauquier land must be sold to pay Strode's debts; the situation of the Wormleys on the trust estate was so bad, that no change could make it worse; the removal to the Fauquier lands was thought advisable by all their friends; where then was the fraud in letting them have the Fauquier lands, at an under price, and paying his debts out of the actual proceeds of the trust estate? The money arising from the latter was, under

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for the payment of debts and charges, and as to the residue, in trust for the next of kin. The latter are entitled to nothing, until all the debts are paid; and they cannot proceed against the immediate debtor of the deceased, in any case any more than legatees or creditors, unless they suggest fraud and collusion with the personal representative, and then he must be made a party, or some other special reason be shown for the omission. Newland *v.* Champion, 1 Ves. 105; Utterson *v.* Mair, 4 Bro. C. C. 270; s. c. 2 Ves. jr. 95; Alsagar *v.* Rowley, 6 Ves. 751; Bickley *v.* Donington, 2 Eq. Cas. Abr. 78, 253. It is, therefore, in general, a fatal objection in a bill for an account of personal assets, that the administrator is not a party; nor is this objection repelled, if there be none at the time, unless there be some legal impediment to a grant of administration. Humphrey *v.* Humphrey, 3 P. Wms. 348; Griffith *v.* Bateman, Rep. temp. Finch 334. Now, upon the facts of this case, it is apparent, that William West died insolvent; and if so, it would be decisive against the plaintiff's title to any portion of the personalty. And as to the real estate, as that is also liable, in this state, to the debts of the intestate, this fact would be equally decisive of his title to any share in the real trust property. This shows, how material to the cause, the personal representative of the intestate is, since he is, *ex officio*, the representative, in cases of this sort, of the creditors. But upon the general ground, without reference to these special facts, I think that the personal representative of William West, not being a party is a well-founded objection to proceeding to a decree. I am aware, that a want of parties is not necessarily fatal, even at the hearing, because the cause may be ordered to stand over to make further parties (Anon., 2 Atk. 14; Coop. Eq. Pl. 389; Jones *v.* Jones, 3 Atk. 111); but this is not done of course; and rarely, unless where the cause, as to the new parties, may stand upon the bill and the answer of such parties. For if the new parties may controvert the plaintiff's very right to the demand in question, and the whole cause must be gone over again, upon a just examination of witnesses, it seems at least doubtful, whether it may not be quite as equitable to dismiss the cause, without prejudice, so that the plaintiff may begin *de novo*. Gilb. For. Rom. 159. If this cause necessarily turned upon this point alone, I should incline to adopt this course."

this arrangement, the price of the former. It was, in fact, paying his debts with the price of his own property, not that of the trust estate.

It has been argued, that the sale of the trust estate was not made with a view to re-investment; but the evidence positively proves the contrary. It goes to show, that the re-investment was the leading object, and actually took place, previous to *the sale of the trust estate. And even if that construction of the power be conceded, which would require the sale [*462 and re-investment to be simultaneous acts, or that which would render the purchaser liable for the application of the purchase-money, the facts of the case would satisfy either exigency. For the re-investment was actually made simultaneously with the sale; or, if it was not finally consummated, the cause is to be found altogether in the anxiety of the defendants to satisfy a capricious man, and the ignorance of Strode in supposing himself justified in yielding to Wormley's judgment or will.

Had Strode actually sold the Fauquier lands; paid off his incumbrances from the purchase-money; then sold the Frederick land; and re-invested the fund in a re-purchase of the Fauquier lands, there could not have been an exception taken to the sufficiency of the re-investment. And then the transaction would, in a moral point of view, have been necessarily regarded as favorably as I am disposed to regard it. Yet, it is unquestionable, that, thus stated, it presents a correct summary of the whole transaction, as made out in the evidence. It has, however, been put together so as to admit of distorted views; and such will ever be the case, where men expose themselves to suspicion, by mixing up their own interests with the interests of others placed under their protection. I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice and ingratitude in the conduct of the latter.

*Nevertheless, there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that [*463 hallowed orison, "lead us not into temptation." One of these is, that a trustee shall not be permitted to mix up his own affairs with those of the *cestui que trust.* Those who have examined the workings of the human heart, well know, that in such cases, the party most likely to be imposed upon is the actor himself, if honest; and, if otherwise, that the scope for imposition given to human ingenuity, will enable it generally to baffle the utmost subtlety of legal investigation. Hence, the fairness or unfairness of the transaction, or the comparison of price and value, is not suffered to enter into the consideration of the court, on these occurrences; but the rule is positive and general, that the *cestui que trust* may be restored to his original rights against the trustee, at his option. And where infants, &c., are interested, they will be restored or not, with a view solely to the benefit of the *cestuis que trust.* It is unquestinable, from the evidence, that both Veitch, and Castleman and McCormick, must be affected by both legal and actual notice of the transactions of Strode. They are, therefore, liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me, to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which requires this adjudication, may, in many cases, be a hard one, but it is a fixed rule, and has the sanction of public policy.

**Decree affirmed, with costs.**

## *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven and William Wheeler.

*Foreign charitable corporations.—Effect of treaty of peace.*

A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it is created by a charter from the government.

The capacity of private individuals (British subjects) or of corporations, created by the crown, in this country, or in Great Britain, to hold lands or other property in this country, was not affected by the revolution.

The proper courts in this country will interfere to prevent an abuse of the trusts confided to British corporations, holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts; but neither those courts, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property.

The property of British corporations, in this country, is protected by the 6th article of the treaty of peace of 1783, in the same manner as those of natural persons; and their title, thus protected, is confirmed by the 9th article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding for the defect of alienage.

The termination of a treaty, by war, does not divest rights of property already vested under it.

Nor do treaties, in general, become extinguished, *ipso facto*, by war, between the two governments.

Those stipulating for a permanent arrangement of territorial, and other national rights, are, at most, suspended during the war, and revive at the peace, unless they are waived by the parties, or new and repugnant stipulations are made.

The act of the legislature of Vermont, of the 30th of October 1794, granting the lands in that state, belonging to "The Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it.

*465] *This case came before the court upon a certificate of a division in opinion of the judges of the Circuit Court for the district of Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that court. The material facts, upon which the question of law arose, were stated in a special verdict, and are as follows:

By a charter granted by William III., in the 13th year of his reign, a number of persons, subjects of England, and there residing, were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts," in order that a better provision might be made for the preaching of the Gospel, and the maintenance of an orthodox clergy in the colonies of Great Britain. The usual corporate powers were bestowed upon this society, and, amongst others, it was authorized to purchase estates of inheritance to the value of 2000*l. per annum*, and estates for lives or years, and goods and chattels, of any value. This charter of incorporation was duly accepted by the persons therein named; and the corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the king of Great Britain.

On the 2d of November 1761, a grant was made by the governor of the province of New Hampshire, in the name of the king, by which a certain tract of land, in that province, was granted to the inhabitants of the said province, and of the king's other governments, and to their heirs and

*466] *assigns, whose names were entered on the grant. The tract so granted was to be incorporated into a town, by the name of New Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." The

tract of land, thus granted, was divided among the grantees by sundry votes and proceedings of a majority of them; which, by the law and usage of Vermont, render such partition legal. The premises demanded by the plaintiffs, in this ejectment, were set off to them in the above partition, but they had no agency in the division, nor was it necessary, by the law and usage of Vermont, in order to render the same valid.

On the 30th of October 1794, the legislature of Vermont passed an act, declaring, that the rights to land in that state, granted under the authority of the British government, previous to the revolution, to "The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay, and to their use for ever. The act then proceeds to authorize the selectmen of each town, to sue for and recover such lands, if necessary, and to lease them out, reserving an annual rent, to be appropriated to the support of schools. Under this law, the selectmen of the town of New Haven executed a perpetual lease of a part of the demanded premises, to the defendant, William Wheeler, on the 10th of February 1800, reserving an annual rent of $5.50; immediately after which, the said Wheeler entered *upon the land so leased, and has ever since held the possession thereof. Similar donations [*467 were made, about the same time with the above grant, to the plaintiffs, of lands lying within the limits of Vermont, by the governor of New Hampshire, in the name of the king; but the plaintiffs never entered upon such lands, nor upon the demanded premises, nor in any manner asserted a claim or title thereto, until the commencement of this suit.

The verdict found a number of acts of the state of Vermont respecting improvements or settlements, and also the limitation of actions; but as the discussions at the bar did not involve any questions connected with those acts, those parts of the special verdict need not be more particularly noticed.

Upon this special verdict, the judges of the court below were divided in opinion upon the question, whether judgment should be rendered for the plaintiffs or defendants, and the question was thereupon certified to this court.

The cause was argued, at the last term, by *Hopkinson*, for the plaintiffs, and by *Webster*, for the defendants, and continued to the present term for advisement.

February 15th, 1822. *Hopkinson*, for the plaintiffs, stated, that the act of the legislature of Vermont, of the 30th of October 1794, could have no effect upon the title of the corporation, unless the principle upon which it purports to have been enacted, is sound and legal. Two reasons are assigned in the preamble *to the act: 1. That, by the custom and usages of [*468 nations, no aliens can, or of right ought, to hold real estate in a country to whose jurisdiction they cannot be made amenable. 2. That the plaintiffs being a corporation erected by, and existing within a foreign jurisdiction, to which they alone are amenable, by reason whereof, at the time of the late revolution of this state, and of the United States, from the jurisdiction of Great Britain, all lands in the state, granted to the plaintiffs, became vested in the state, and have since that time remained unappropriated, &c. If these positions were true, then the plaintiffs cannot recover, independently of this act, which has no other effect than to vest the land, or the title thus

accrued, in the state, or their grantees, the town-schools. If, on the other hand, the position was untrue, the right of the plaintiffs remains unimpaired, and they are entitled to recover possession of the lands in the present action. Against these positions, he would contend: 1. That the general position, that no alien can hold real property in this country, is contradicted, at least as to all titles vested in British subjects, prior to the 4th of July 1776, by the uniform and settled decision of this and other courts; both upon the general principle, that the division of an empire makes no change in private rights of property, and under the operation of the treaties between the United States and Great Britain. 2. That, independently of these treaty provisions, the title of an alien is not divested from him, nor vested in the state, until office found.

*469] *1. There is no general law or custom of nations, preventing aliens from holding lands in the different states of the world. It depends upon the municipal law of each particular nation, and, in this country, upon that of the several states in the Union. There are various regulations on the subject, in the different states; and *non constat*, by the special verdict, but what aliens, in general, may hold lands in Vermont. Be this as it may, the treaties of 1783 and 1794, form a paramount law in that state, and in all the states. In the case of the *Society, &c.* v. *Wheeler*, 2 Gallis. 127, this same corporation was sought to be defeated in its right to recover its lands in New Hampshire, not merely as aliens, but as alien enemies. But the court held, that a license from the government to sue might be presumed, there being no evidence to the contrary; and as to the general principle of the right of an alien to bring an action for real property, Mr Justice STORY said, that there was "no pretence for holding, that the mere alienage of the demandants would form a valid bar to the recovery in this case, supposing the two countries were at peace; for, however it might be true, in general, that an alien cannot maintain a real action, it is very clear, that either upon the ground of the 9th article of the treaty of 1794, or upon the more general ground, that the division of an empire works no forfeiture of rights previously acquired, for anything that appears on the present

*470] *record, the present action might well be maintained."

The treaty of 1783 forbids all forfeitures on either side. That of 1794 provides, that the citizens and subjects of both nations, holding lands (thereby strongly implying that there were no forfeitures by the revolution), shall continue to hold, according to the tenure of their estates; that they may sell and devise them; and shall not, so far as respects these lands, and the legal remedies to obtain them, be considered as aliens. In the case of *Kelly* v. *Harrison*, 2 Johns. Cas. 29, which was that of an alien widow of a citizen of the United States, the supreme court of New York held, that the plaintiff was entitled to recover dower of lands, of which her husband was seised, prior to the 4th of July 1776, but not of lands subsequently acquired. The British treaties were not considered by the court as bearing on the case. It was, therefore, the naked question, of the effect of the revolution, even upon a contingent right to real property, acquired antecedent to the revolution. In the same case, Mr. Chief Justice KENT says, "I admit the doctrine to be sound (*Calvin's Case*, 7 Co. 27 *b*; Kirby 413), that the division of an empire works no forfeiture of a right previously acquired. The revolution left the demandant where she was before." (Ibid.

32.) The case of *Jackson* v. *Lunn*, 3 Johns. Cas. 109, gives the same principle, and *also recognises the treaty of 1794, as confirming the title of persons holding lands. [*471

In *Harden* v. *Fisher*, 1 Wheat. 300, which was also under the treaty of 1794, this court held, that it was not necessary for the party to show a seisin in fact, or actual possession of the land, but only that the title was in him, or his ancestors, at the time the treaty was made. The treaty applies to his title, as existing to that epoch, and gives it the same legal validity as if he were a citizen. In a subsequent case, *Jackson* v. *Clark*, 3 Wheat. 1, where the point was, whether an alien enemy could make a will of lands in New York, or convey his estate in a manner, the court would not hear an argument, it being settled by former decisions.(*a*) In *Orr* v. *Hodgson*, 4 Wheat. 453, the court confirmed the same doctrine, and also determined, that the 6th article of the treaty of 1783, was not meant to be confined to confiscations *jure belli;* but completely protected the titles of British subjects from forfeiture by escheat, for the defect of alienage. But the great leading case on this subject, is that of *Fairfax* v. *Hunter*, 7 Cranch 603, s. c. 1 Wheat. 304, where the operation of the treaty of 1794 was determined, as confirming the titles of British subjects, even where there had been a previous cause of forfeiture, but no office found, or other proceeding to assert the right of the state. And in *Terrett* v. *Taylor*, 9 Cranch 43, which was *the case of an ecclesiastical corporation, it was held, that the dissolution of [*472 the regal government no more destroyed the right to possess and enjoy the property, then it did of any other corporation or individual, the division of an empire creating no forfeiture of vested rights or property,

2. At all events, the alien lost no right, and the state acquired none, until office found. It is firmly settled by the uniform decisions of this court, and of the most respectable state courts, that an alien may take an interest in lands, and hold the same against all the world, except the government, and even against it, until office found. *Fairfax* v. *Hunter*, 7 Cranch 603; 1 Wheat. 304; *Craig* v. *Leslie*, 3 Ibid. 563; *Jackson* v. *Beach*, 1 Johns. Cas. 399; *Jackson* v. *Lunn*, 3 Ibid. 109. If, then, the plaintiffs are to be considered as aliens, and labor under no other disability, it is clear, that their title to the lands in question remains unimpaired, and as it existed previous to the 4th of July 1776; and this upon three grounds: 1. Of the general law on the division of an empire. 2. Of the operation of the treaties of 1783 and 1794. 3. On the ground, that the title of the state acquired by forfeiture, if any, had not been asserted by, nor that of the plaintiffs divested by, an inquest of office. And, consequently, that the first position assumed by the legislature of Vermont to justify its act, is unfounded in law.

The second ground taken by the legislature is, *that the plaintiffs having become a foreign corporation, by the resolution, could not [*473 continue to hold lands in this country after that event. This presents the single question, whether an alien corporation is in a different situation, in this respect, from an alien individual? On the part of the plaintiffs, we contended, that all the legal principles and rules which go to protect the title of an individual, will equally avail to protect that of a corporation; and that, whether the security of the former is founded upon the general

(*a*) 8 Wheat. 12, note, and the authorities there collected.

law as to the division of an empire, or upon the peculiar stipulations of the treaties of 1783 and 1794, or the defect of an inquest of office. In this case, although the trust is in aliens, the use is to citizens of our own country; and the forfeiture would, therefore, only affect those in whom the beneficial interest is vested. On what ground, can it be insisted, that a British corporation, holding lands in this country, in trust for British subjects, prior to the declaration of independence, forfeited the lands, at that epoch, and that they became *ipso facto* vested in the state where they lie, without office found, or other equivalent legal ceremony? If there be no such principle of law, and if, where the whole interest is British, it is protected, why should it not be equally protected, where the real beneficial interest is American, and the trusteeship only is British? It is obvious, that the revolution has nothing to do with the question. The position assumed by the legislature of Vermont, must stand or fall, independent of that circumstance, and its introduction only *tends to confuse the inquiry. The broad position is, that at no time, nor under any circumstances, can a foreign corporation, or trustee, hold lands in this country, for any use whatever. And why is it thought indispensably necessary, that the corporation, which in this case is the trustee, should be locally within our jurisdiction? The answer will be, undoubtedly, in order to prevent neglect or abuse of the trust. But that is probably a matter between the trustee and the *cestuis que trust;* and it is a strange remedy, to take the property from both, least the former should impose upon the latter. If abuses should be found to exist, an appropriate legal remedy may easily be found. In England, alienage is no plea in abatement, in the case of a corporation. By the old law, an abbot or prior alien, could have an action real, personal or mixed, for anything concerning the possessions or goods of the monastery, because they sue in their corporate capacity, and not in their own right to carry the effects out of the kingdom. Co. Litt. 129 *a*. The circumstance, that the execution of the trust is in England, is here regarded. A corporation can have no local habitation. The disability must result from the character of the individual members. Thus, it is held, that a body corporate, as such, cannot be a citizen of any particular state of the Union; and its right to sue, or not to sue, in the federal courts, depend solely upon the character of the individual members. *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57; *Bank of the United States* v. *Deveaux*, Ibid. 61.

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*Whatever danger there may be from a foreign corporation holding lands in this country, it can only be a reason for restraint and regulation, but not for confiscation and forfeiture. If the execution of the trust can be regulated otherwise than according to the charter, it must be from the necessity of the case only; and the legislative interference must not go beyond providing an adequate remedy by some appropriate judicial proceeding. To say, that the corporation, so far as respects these lands, is dissolved by the revolution, is to say, that the lands are forfeited by the revolution. The trust remains, the corporate body remains, the land remains; but all connection between them (that is, the right of the corporation to hold in trust for the same purposes) is dissolved by the separation of the empire. It is only necessary to state this proposition, to show its inconsistency with the the well-established principles of law.

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*Webster*, contrà, contended: 1. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution. 2. That the Society for Propagating the Gospel, being in its politic capacity a foreign corporation, is incapable of holding lands in Vermont, on the ground of alienage; and that its rights are not protected by the treaties of 1783 and 1794. 3. That if those rights were so protected, the effect of the late war between the United States and Great Britain, was such, as to put an end to those treaties, and, consequently, to rights derived *under them, unless they had been revived by the treaty of peace at Ghent, which was not done. [*476

He argued, on the first and second points, that the dismemberment of the British impire dissolved this corporation, so far as respects its capacity to hold lands in this country, not merely because they are aliens, but from the peculiar circumstances of the case. The society is such a corporation as cannot hold lands in England, under the statutes of mortmain, without a license from the crown, which they have in their charter. But this license does not extend to authorize them to hold lands in the colonies. The statutes of mortmain do not extend to the colonies. *Attorney-General* v. *Stewart*, 2 Meriv. 143. In the interpretation of treaties, the probable intention of the framers is to be taken as the guide, and the sense of the terms they use is to be limited and restrained by the circumstances of the case.(*a*) The British treaties are to be construed, not only as to *the sort of title meant to be protected, but also the sort of persons and property meant to be protected. The mere personal disability of British subjects to hold lands, is taken away. They are protected against escheat. But corporations, such as this, ought to be considered as impliedly excepted from this provision. This might well be contended, even as to those who have beneficial proprietary interests, and *à fortiori*, as to such as are mere trustees. In the present case, the revolution has violently separated the trustees from the property, and from the *cestuis que trust*. The former are in a foreign country, the latter are here. Can it be imagined, that the treaties meant to take from the courts of equity of this country the ordinary power of enforcing the trust, or of changing the trustee, in case of abuse or inability to perform his trust, independent of the statute of Elizabeth? But if the legislature cannot change the trustee, neither can the courts. Reciprocity lies at the foundation of all treaties between nations. But the English court of chancery has determined, that it cannot enforce a trust connected with a charity in this country. Thus, Lord THURLOW took the administra- [*477

(*a*) Vattel, *Droit des Gens*, lib. 2, c. 17, § 270. Entrons main-tenant dans le détail des regles sur lesquelles l'interprétation doit se diriger, pour être juste et droite. 1. Puisque l'interprétation legitime d'un acte ne doit tendre qu'a découvrir la pensée de l'auteur, ou des auteurs de cet acte, dès qu'on y rencontre quelque obscurité, il faut chercher quelle a été vraisemblablement la pensée de ceux qui l'ont dressé, et l'interpréter en conséquence. C'est la regle générale de toute interprétation. Elle sert particuliérement à fixer le sens de certaines expressions, dont la signification n'est pas suffisament déterminée. En vertu de cette regle, il faut prendre ces expressions dans le sens le plus étendu, quand il est vraisemblable que celui qui parle a eu en vue tout ce qu'elles désignent dans ce sens étendu: et au contraire, on doit en resserer la signification, s'il paroît que l'auteur a borné sa pensée à ce qui est compris dans le sens le plus resserré."

tion of a charity, under an appointment by the trustees, and a plan confirmed by a decree of the court, out of the hands of William and Mary college, in Virginia, because the trustees had become foreign subjects, by the separation of the two countries; and even denied costs to the college, because its
*478] existence as a corporation had not been, and could not be *proved, since the revolution. *Attorney-General* v. *City of London*, 1 Ves. jr. 243; 3 Bro. C. C. 171. So also, where the State of Maryland claimed certain bank stock, which had been vested in the hands of trustees, in England, by the colony of Maryland, before the revolution, the claim was rejected by Lord ROSSLYN, upon the ground, that the colonial government, which existed under the king's charter, was dissolved by the revolution, and though Great Britain had acknowledged the state of Maryland, yet the property that belonged to a corporation, which had thus become a foreign corporation or been dissolved, could not be transferred to a body which did not exist under the authority of the British government. The new state could take only such rights of the old as were within their jurisdiction, and the fund, no object of the trust existing, must be considered as *bona vacantia*, at the disposal of the crown. *Barclay* v. *Russell*, 3 Ves. jr. 424; *Dolder* v. *Bank of England*, 10 Ibid. 354.

In the case now before this court, either the corporation is dissolved, or it has become a foreign corporation. If it still exists, for any purpose, it may forfeit its franchises for *non-user*, or *misuser*. If its franchises are forfeited, a forfeiture of its property follows, as a matter of course. But how is a *quo warranto*, or any other process, to go against it from our courts? And if the proceeding is in the English courts, to whom is the
*479] property to revert? It is plain, that it can revert to *no other than the grantor, *i. e.*, the state of Vermont representing the crown. Here, the state, instead of proceeding in a court of equity to enforce a trust, or to present a new scheme for the administration of the charity, has proceeded to escheat the property, for defect of alienage in those who claim the legal title. This it has done directly, by a legislative act, and not through an inquest of office, or any analogous ceremony, which was unnecessary. *Smith* v. *Maryland*, 6 Cranch 286; *Fairfax* v. *Hunter*, 7 Ibid. 622.

Upon the third point, he argued, that even supposing the treaties of 1783 and 1794 protected the rights of property of the plaintiffs, whether beneficial or fiduciary, yet the late war abrogated such provisions of those treaties as were not revived by the peace of Ghent. The general rule certainly is, that
*480] whatever subsists by treaty, is lost by war.(*a*) Peace merely restores the two nations to their natural state.(*b*) *Foreigners cannot, inde-

(*a*) Marten's Law of Nations, lib. 2, c. 1, § 8. Vattel, lib. 3, c. 10, § 175: "Les conventions, les traites faits avec une nation, sont rompus on annullés par la guerre qui s'éleve entre les contractans; soit parce qu'ils suppose tacitement l'etat de paix, soit parceque chacum pouvant dépouiller son ennemi de ce qu'il lui appartient, lui ôte les droits qu'il lui avoit donnés par des traités. Cependant il faut excepter les traités où on stipule certaines choses en cas de rupture; par exemple le temps qui sera donné aux sujets, de part et d'autre, pour se retirer; la neutralité assurée d'un commun consentement à une ville, ou à une province, &c. Puisque, par des traités de cette nature, on veut pourvoir à ce qui devra s'observer en cas de rupture, on renonce au droit de les annuller par la déclaration de guerre."

(*b*) Vattel, lib. 4, c. 1, § 8: "Les effets généraux et nécessaires de la paix sont de

pendent of conventional stipulations, by the general usage of nations, or by the common law, hold lands in this country. This pre-existing law, therefore, revives; there being no recognition in the treaty of Ghent of the articles of the former treaties, excepting British subjects from the operation of the rule.

March 12th, 1823. WASHINGTON, Justice, delivered the opinion of the court, and, after stating the case, proceeded as follows:—It has been contended by the counsel for the defendants, 1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution: 2d. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace: 3d. That if they were so protected, still, the effect of the last war between the United States and Great Britain, was to put an end to that treaty, and, consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done.

1. Before entering upon an examination of the first objection, it may be proper to premise, that this society is to be considered as a private eleemosynary *corporation, although it was created by a charter from the crown, for the administration of a public charity. The endowment [*481 of the corporation was to be derived solely from the benefactions of those who might think proper to bestow them, and to this end, the society was made capable to purchase and receive real estates, in fee, to a certain annual value, and also estates for life, and for years, and all manner of goods and chattels, to any amount.

When the defendants' counsel contends, that the incapacity of this corporation to hold lands in Vermont, is a consequence of the revolution, he is not understood to mean, that the destruction of civil rights, existing at the close of the revolution, was, generally speaking, a consequence of the dismemberment of the empire. If that could ever have been made a serious question, it has long since been settled in this and other courts of the United States. In the case of *Dawson's Lessee* v. *Godfrey* (4 Cranch 323), it was laid down by the judge who delivered the opinion of the court, that the effect of the revolution was not to deprive an individual of his civil rights; and in the case of *Terrett* v. *Taylor* (9 Cranch 43), and of *Dartmouth College* v. *Woodward* (4 Wheat. 518), the court applied the same principles to private corporations existing within the United States at the period of the revolution. It is very obvious, from the course of reasoning adopted in the last two cases, that the court was not impressed by any circumstance peculiar to such corporations, which distinguished them, in *this respect, from natural persons; on the contrary, they were [*482 placed upon precisely the same ground. In *Terrett* v. *Taylor*, it was stated, that the dissolution of the regal government, no more destroyed the rights of the church to possess and enjoy the property which belonged to it, than it did the right of any other corporation or individual, to his or its own property. In the latter case, the chief justice, in reference to the corpora-

reconcilier les ennemis et de fair cesser de part et d'autre toute hostilité. Elle remet les deux nations dans leur état naturel."

tion of the college, observes, that it is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the revolution; and the same sentiment was enforced, more at length, by the other judge who noticed this point in the cause.

The counsel, then, intended, no doubt, to confine this objection to a corporation consisting of British subjects, and existing in its corporate capacity, in England, which is the very case under consideration. But if it be true, that there is no difference between a corporation and a natural person, in respect to their capacity to hold real property; if the civil rights of both are the same, and are equally unaffected by the dismemberment of the empire, it is difficult to perceive, upon what ground, the civil rights of a British corporation should be lost, as a consequence of the revolution, when it is admitted, that those of an individual would remain unaffected by the same circumstance.

But it is contended by the counsel, that the principle so firmly established, in relation to corporations *existing in the United States, at the period *483] of the revolution, is inapplicable to this corporation, inasmuch as the courts of Vermont can exercise no jurisdiction over it, to take away its franchises, in case of a forfeiture of them, by *misuser* or *non-user*, or in any manner to change the trustees, however necessary such interference might be, for the due administration and management of the charity. If this be a sound reason for the alleged distinction, it would equally apply to other trusts, where the trustees happened to be British subjects, residing in England, and entitled to lands in Vermont, not as a corporate body, but as natural persons, claiming under a common grant. The question of amenability to the tribunals of Vermont, would be the same in both cases, as would be the consequent incapacity of both to hold the property to which they had an unquestionable legal title, at the period of the revolution.

It is very true, as the counsel has insisted, that the courts of Vermont might not have jurisdiction in the specified cases; and it is quite clear, that were they to exercise it, and decree a forfeiture of the franchises of the corporation, or the removal of the trustees, the plaintiffs would not be less a corporation, clothed with all its corporate rights and franchises. But it is not perceived by the court, how this exemption of the corporation from the jurisdiction of a foreign court to forfeit its franchises, or to interfere in its management of the charity, can destroy, or in any manner affect its civil *484] rights, or its capacity to hold and enjoy the property legally *vested in it. It would surely be an extraordinary principle of law, which should visit such a corporation with the same consequences, on account of a want of jurisdiction in the courts of the country where the property lies, to inquire into its conduct, as would happen, if, after such an inquiry, judicially made, the corporation should be found to have forfeited its franchises; in other words, that the possibility that the corporation might commit a forfeiture, which the law will not presume, or might require the interference of a court of chancery to enforce the due administration of the charter, which might never happen, should produce a forfeiture, or something equivalent to it, of the very funds which were, in whole, or in part, to feed and sustain the charity. This, nevertheless, seems to be the amount of the argument, and it is deemed by the court too unreasonable to be maintained, unless it appeared to be warranted by judicial decisions. It would seem,

that the state in which the property lies ought to be satisfied, that the courts of the country in which the corporation exists, will not permit it to abuse the trusts confided to it, or to want their assistance, when it may be required to enable it to perform them in a proper way.

Were it even to be admitted, that the legislature of Vermont was competent to pronounce a sentence of forfeiture of the property belonging to this corporation, upon the ground of its having abused, or not used its franchises, still, the act of 1794 does not profess to have proceeded upon that ground. The only reasons assigned in the *preamble of the act, for depriving the plaintiffs of this property, are: 1. That, by the custom [*485 and usages of nations, aliens cannot, and ought not to hold real estate in a country to whose jurisdiction they cannot be made amenable: and 2. That this corporation, being created by, and existing within, a foreign jurisdiction, all lands in the state, granted to the said society, became vested, by the revolution, in that state. For aught that appears to the contrary, the society was, at the moment when the act passed, fulfilling the trusts confided to it, in the best manner for promoting the benevolent and laudable objects of its incorporation. It may further be remarked, that the effect of this act is not merely to deprive the corporation of its legal control over the charity, so far as respects the property in question, but to destroy the trusts altogether, by transferring the property to other persons, and for other uses, than those to which they were originally destined by the grant made to the society.

The case chiefly relied upon by the defendants' counsel, in support of his first point, was that of the *Attorney-General* v. *City of London* (1 Ves. jr. 247, and 3 Bro. C. C. 171), under the will of Mr. Boyle, which directed the residue of his estate to be laid out, by his executors, for charitable and other pious uses, at their discretion. They purchased, under a decree of the court of chancery, the manor of Brafferton, which they conveyed to the City of London, upon trust, to lay out the rents and profits in the advancement of the Christian religion among infidels, as the Bishop *of London, and [*486 one of the executors, should appoint, such appointment to be confirmed by a decree of the court of chancery. The trustees appointed a certain part of the rents and profits to be paid to an agent in London, for the college of William and Mary, in Virginia, for the purpose of maintaining and educating in the Christian religion, as many Indian children as the fund would support; the president, &c., of the college to transmit accounts of their receipts and expenditures yearly to the court of chancery, and to be subject to certain rules then prescribed, and to such others as should thereafter be adopted, with the approbation of the court. This appointment was ratified by a decree of the court of chancery. The object of the information was, to have the disposition of this charity taken from the college, and that the master should lay before the court a new scheme for the future disposition of the charity. The new scheme was ordered by the chancellor, upon the ground, that the college, belonging to an independent government, was no longer under the control of the court. The difference between that case and the present is, that in that, the president, &c., of the college were not the trustees appointed by the will of Mr. Boyle, or by his executors, to manage the charity, but were the mere agents of the trustees for that purpose, or rather the servants of the court of chancery, as they are styled by the counsel for the college, in the administration of the charity, subject to

such orders and rules as might be prescribed by the trustees, and sanctioned
*487] by the *chancellor. The college had a mere authority to dispose of the charity, but without any interest whatever in the fund. The trustees resided in England, and there too was the fund. The president, &c., of the college derived all their authority from the trustees, and from the court of chancery. To that court, they were accountable, and were necessarily removable by the court, whenever it should appear to the chancellor to be necessary for the due administration of the charity. In the present case, the plaintiffs were, at the period of the revolution, entitled to the legal estate in the land in question, under a valid and subsisting grant; and the only question is, whether the estate so vested in them, was divested by the revolution, and became the property of the state? We have endeavored to show that it was not.

The case of *Barclay* v. *Russell* (3 Ves. 424), was also mentioned by the defendants' counsel, and ought, therefore, to be noticed by the court. That was a claim on the part of the state of Maryland, of certain funds which had been vested in trustees in London, before the American revolution, by the old government of Maryland, in trust for certain specific purposes. The case is long, and rather obscurely reported; but in the case of *Dolder* v. *Bank of England* (10 Ves. 352), the Lord Chancellor states the ground upon which the claim was rejected. His Lordship observes, that "that was a case in which the old government existed under the king's charter, and a revolution
*488] took place, though the new government *was acknowledged by this country. Yet, it was held, that the property, which belonged to a corporation existing under the king's charter, was not transferred to a body which did not exist under his authority, and therefore, the fund in this country was considered to be *bona vacantia*, belonging to the crown. Another, and, perhaps, a more intelligible reason, is assigned in the case itself, namely, that the funds were vested by the old government, in the hands of the trustees, by the act of 1733, for certain specific trusts, the execution of which was then rendered impossible. "There is no specific purpose," says the chancellor, "that the will of the present government can point out, for which purpose, according to the original creation of the trust, I can direct the trustee to transfer. It is, therefore, the common case of a trust, without any specific purpose to which it can be applied; the consequence of which is, that the right to dispose of this money is vested in the crown." Now, it is quite clear, that if the premises upon which this case was decided were correct, the conclusion is so. The old government was treated as a corporation, which ceased to exist as such, by the new form of government, deriving its name, its existence, and its constitution, from a totally different source from that under which the old corporation existed. The old corporation no longer existed, the consequence of which was precisely that which would take place, in case of the dissolution of any private corporation;
*489] their *legal rights would cease, and would not descend or pass to the new corporation. So too, if the specific purpose for which the trust was created had ceased, the disposition of the fund clearly devolved upon the crown. But in this case, the plaintiffs exist, at this day, as a corporation, precisely as it did before the revolution; and the specific purposes to which the trust was to be applied, by the terms of the charter, still remain the same. The cases, therefore, are totally unlike each other.

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this court, in the case of *Orr* v. *Hodgson* (4 Wheat. 453), in which it was decided, that the 6th article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*. The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends, that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the 6th article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future *loss or damage, either in his person, liberty or property," &c. The terms in which this article is expressed are [*490 general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed, that there shall be no future confiscations, in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed? We can discover no sound reason, why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable or other purposes, or as natural persons for their own use. We have seen, that the exemption of either, or all of those persons, from the jurisdiction of the courts of the state where the property lies, affords no such reason.

It is said, that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority, before, during and subsequent to the revolution, up to the year 1794, when the legislature of Vermont granted it to the town of New Haven; and the only question is, whether this grant was not void *by force of the 6th article of the above treaty? We think it was. Was it meant to be contended, that the plaintiffs are [*491 not within the protection of this article, because they are not persons who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow, that a corporation cannot lose its title to real estate, upon the ground of alienage, since, in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject? In the case of the *Bank of the United States* v. *Deveaux* (5 Cranch 86), it was stated by the court, that a corporation, considered as a mere legal entity, is not a citizen, and therefore, could not, as such, sue in the courts of the United States, unless the rights of the members of it, in this respect, could be exercised in their corporate name. It was added, that the name of the corporation could not be an alien or a citizen; but the

corporation may be the one or the other, and the controversy is, in fact between those parties and the opposing party.

But even if it were admitted, that the plaintiffs are not within the protection of the treaty, it would not follow, that their right to hold the land in question was divested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which *492] they could not be deprived *for the cause of alienage, but by an inquest of office; and no grant of the state could, upon the principles of the common law, be valid until the title of the state was so established. (*Fairfax's devisee* v. *Hunter's lessee*, 7 Cranch 503.) Nor is it pretended by the counsel for the defendants, that this doctrine of the common law was changed by any statute law of the state of Vermont, at the time when this land was granted to the town of New Haven. This case is altogether unlike that of *Smith* v. *State of Maryland* (6 Cranch 286), which turned upon an act of that state, passed in the year 1780, during the revolutionary war, which declared, that all property within the state, belonging to British subjects, should be seized, and was thereby confiscated to the use of the state; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land (even if that could be legally done), grants the same to the town of New Haven.

3. The last question respects the effect of the late war between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendant's counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil *493] rights derived *under it, unless they had been revived and preserved by the treaty of Ghent. If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy, solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was divested. But if the court has been correct in its opinion upon the two first points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1704, remains unaffected by the last war, it not appearing from the verdict, that the land was confiscated, or the plaintiffs' title in any way divested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it. If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty, extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that

rights of property *already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended *while it lasts; and unless they are [*495 waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the circuit court.

Certificate for the plaintiffs.

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## Daly's Lessee *v.* James.

### *Executory devise.—Power of sale.*

J. B. devises all his real estate to the testator's son, J. B., jun., and his heirs lawfully begotten; and, in case of his death without such issue, he orders A. Y., his executors and administrators, to sell the real estate, within two years after the son's death; and he bequeaths the proceeds thereof to his brothers and sisters by name, and their heirs for ever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike; all the brothers and sisters die, leaving issue; then A. Y. dies, and afterwards J. B., jun., the son, dies without issue: "Heirs," is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., jun., the devise to them failed to take effect.

*Quære?* Whether a sale by the executors, &c., under such circumstances, is to be considered as valid in a court of law?

However this may be, a sale, thus made, after the lapse of two years from the death of J. B. jun., is without authority, and conveys no title.

*Quære?* Under what circumstances, a court of equity might relieve, *in case the trustee [*496 should refuse to exercise the power, within the prescribed period, or should exercise the same, after that period?

A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y.

Smith *v.* Folwell, 1 Binn. 546, followed.

Daly v. James.

ERROR to the Circuit Court of Pennsylvania. This was an action of ejectment, brought in the court below, by the plaintiffs in error, to recover the possession of a messuage and lot, in the city of Philadelphia. The special verdict in the case stated, that on the 8th of August 1768, John Bleakley, of Philadelphia, being then in London, made and duly executed his last will, as follows:

"In the name of God! Amen. I, John Bleakley, of Philadelphia, Esquire, now in London, and shortly bound to Philadelphia, being in perfect health, and of sound and disposing mind, memory and understanding, and considering the certainty of death, and the uncertainty of the time thereof, do therefore make and declare this my last will and testament, in manner following, that is to say: First, and principally, I commend my soul to God! and my body to the earth or sea, as he shall please to order. And as for and concerning my worldly estate, I give, devise and bequeath the same in manner following, that is to say: first, I will and desire that all my just debts and funeral expenses (if any) be fully paid and satisfied, as soon as conveniently may be, after my decease. Also, I give and bequeath to my brother, David Bleakley, living in the north of Ireland, the sum of ten pounds sterling. Also, I give and bequeath to my brother, William Bleakley, living near Dungannon, the sum of ten pounds sterling. Also, I
*497] *give and bequeath to my sister, Margaret Harkness, of Dungannon, the sum of one hundred pounds sterling. Also, I give and bequeath to my sister, Sarah Boyle, wife of the Rev. Mr. Boyle, the sum of ten pounds sterling. Also, I give and bequeath to my cousin, Archibald Young, of Philadelphia, an annuity of thirty pounds, Pennsylvania money, to be paid to him out of the rents and profits of my real estate, on the 25th day of March, in every year, during the joint lives of him, the said Archibald Young, and my son, John Bleakley, or his heirs lawfully begotten. But in case of the decease of my said son, without issue lawfully begotten as aforesaid, in the lifetime of the said Archibald Young, then the said annuity is to cease; and in lieu thereof, I give and bequeath unto the said Archibald Young, and his assigns, the sum of four hundred pounds sterling, payable out of the proceeds of my real estate, when the same is sold and disposed of, according to the intention of this my will, hereinafter mentioned, and before any dividend is made of the proceeds of my said estate. And this legacy or bequest is made to my said cousin, Archibald Young, not only for the natural affection I have and bear to him as a relation, but also as a full compensation for the services he has already rendered me, and in lieu of his commissions for the trouble he may hereafter have in the execution of this my will. All the rest and residue of my estate, real and personal, of what nature, kind or quality the same may be or consist, and herein before not
*498] particularly disposed of, I give, *devise, and bequeath to my son, John Bleakley, and his heirs lawfully begotten; and in case of the decease of my said son, without such issue, then I do direct and order my said cousin, Archibald Young, his executors or administrators, to sell and dispose of my real estate, within two years after the decease of my said son, John Bleakley, to the best advantage. And I do hereby give and bequeath the proceeds thereof to my said brothers, David Bleakley and William Bleakley, and my said sisters, Margaret Harkness and Sarah Boyle, and their heirs for ever, or such of them as shall be living at the decease of my

said son, to be divided between them, in equal proportions, share and share alike, after deducting out of such proceeds the sum of 400*l.* sterling, herein before given and bequeathed to the said Archibald Young, immediately on the decease of my said son, without issue, in lieu of the annuity above mentioned. And in case my said son should die, before he attains the age of twenty-one years, without issue lawfully begotten, as aforesaid, then my will and mind is, that the remainder of my personal estate, hereby intended for my said son, at his own disposal, if he should live to attain the age of twenty-one years, shall go to, and be divided amongst my said brothers and sisters, with the proceeds of my real estate, as is herein before directed to be divided. And I do hereby nominate and appoint the said Archibald Young, and my said son, John Bleakley, executors of this my will, hereby revoking, and making void, all former wills, codicils and bequests, by me, at any time or times, *heretofore made, and do ordain this will to be as and for my last will and testament. In [*499 witness whereof," &c.

The testator died in the month of January 1769. His brothers and sisters all died, leaving children (who are still alive) at or about the following periods, viz: Sarah Boyle, between the years 1760 and 1770; William, in the year 1775; David, in the year 1790, and Margaret Harkness, in the year 1794. The children were of full age, or nearly so, when the above will was made, and were personally known to the testator. Archibald Young died in May 1782, having duly made and executed his last will and testament, whereby he appointed Robert Correy his executor, who, on the 24th of April 1797, made his last will and testament, and thereof appointed Eleanor Correy and James Boyd, the executors, and died in June 1802.

John Bleakley, the son, died on the 3d of September 1802, without issue, and of full age, having previously executed his last will and testament, whereof he appointed J. P. Norris, his executor, and thereby directed his real and personal estate to be sold, and the proceeds, after paying certain legacies, to be divided among certain of his relations. On the 25th of May 1803, the said Norris, for a valuable consideration, sold and conveyed the premises in dispute to W. Folwell, who, on the 21st of April 1810, conveyed the same, for a valuable consideration, to the defendant. On the 1st of February 1805, Eleanor Correy and James Boyd, the executors of R. Correy (who was the *executor of A. Young), by deed, bargained and sold the premises in question to James Smith, which deed was afterwards [*500 cancelled; and subsequently, on the 27th of March 1820, they sold and conveyed the said premises to the lessor of the plaintiff, who, at the time of his purchase, had notice of the death of the brothers and sisters of John Bleakley, in the lifetime of his son.

Upon this special verdict, judgment having been rendered, *pro formâ*, for the defendant, in the court below, the cause was brought by writ of error to this court.

February 25th. *Wheaton*, for the plaintiff, stated, that the will of J. Bleakley, senior, was, in effect, a devise of an estate-tail to the testator's son, with a remainder over to his executor, A. Young, &c., in trust to sell, in case of the son's dying without issue, and the proceeds to be distributed equally among his brothers and sisters, and their heirs (as a *designatio per-*

*sonæ*), or such of them as should be living at the son's death. But the first difficulty in the cause was, a determination of the supreme court of Pennsylvania, upon an ejectment brought in that court under the same will. The state court there held, that the word "heirs" was a word of limitation; and none of the brothers and sisters being alive at the death of the son, J. Bleakley, junior, the object of the power to sell had failed; their issue were not entitled, and a sale by the executors of Young conveyed no title; although
*501] it was admitted, that the power might be *executed by Young's executors, if the object of sale had continued. *Smith* v. *Folwell*, 1 Binn. 546. This decision was that of two judges only,(*a*) and could hardly be considered as a binding authority, even in the state courts, whatever respect might be felt for the great abilities of the learned judges by whom it was pronounced. This is not one of those cases where the decisions of the state courts, on questions of local law, establish rules of property, which this court will not disturb; but it is a mere question of the interpretation of a will, depending entirely on the rules of the common law.

There are two questions for consideration: 1. Whether the power or trust to sell, now exists? and 2. How the distribution of the proceeds of the sale is to be made?

The second question is certainly subordinate to the first. For if there be an absolute power to sell (as will be contended), then the disposition of the fund is a matter to be determined between the trustees, and those who may claim it in a court of equity; but it cannot interfere with a paramount authority to sell. But it has been supposed, that if the object for creating the fund no longer exists, the power is gone with it. The second question, therefore, will be considered first; not meaning, however, to admit, that the
*502] one is a corollary from the other. Reasons may have existed, *to induce the testator to desire a sale, at all events, and the fact of its not being in express terms, restricted to any particular event, goes to prove, that it was to be made under all circumstances, except only the son's having issue. Such is the necessary ambiguity of all human language, that particular words, used in a will, or any other writing, must be taken in their most usual technical sense, or not, according to other considerations. One of the most important of these considerations, is the design of the writer, as manifested by the general scope of the writing itself. What, then, was the intention of the testator, and who were the objects of his bounty as manifested by the will itself? We contend, that he intended to devise all his property, and to retain it in his own family. The first and great rule in the exposition of wills, is the intention of the testator expressed, which, if consistent, with the rules of law, shall prevail. Cas. temp. Talbot 43; 2 Burr. 770; 1 Fonbl. Eq. 413; *Hodgson* v. *Ambrose*, Doug. 323. To this, all other rules are but subsidiary or suppletory. Sir W. Jones, Isæus, Com. 308. Supposing this to be the design of the testator, the means are appropriate to the end. He gives to his cousin, A. Young, a small pecuniary annuity, burdened with onerous duties, and to his son, the mere usufruct of the residue, unless he should have children; in which event only, the restraint on alienation is removed. The first great object of the testator's

(*a*) Tilghman, Ch. J., and Yeates, J.; Smith, J., died after the argument, and before judgment, and Breckenridge, J., dissented.

bounty, *then, was his son. The second class of objects was his brothers and sisters; and the third class was the children of his brothers and sisters.

Had the brothers and sisters survived the son, they would, unquestionably, have succeeded, by the executory devise, on the occurrence of the sole contingency, viz., the death of the son, without issue, lawfully begotten. Did the devise extend beyond the brothers and sisters? It is clear, that it was not, in terms, restricted to the brothers and sisters personally—the terms of it contemplate something more. The words are, "to my said brothers, &c., and my said sisters, &c., and their heirs for ever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike." Whatever may be the technical meaning of the word heirs, &c., the use of them certainly shows that the testator looked beyond the brothers and sisters. The opposite construction rejects words which the testator has thought fit to use; and it is a well-established principle, that no words in a will shall be rejected, that can bear any construction. *Barry* v. *Edgeworth*, 2 P. Wms. 575. The opposite argument must also take for granted, that the words "such of them as shall be living," &c., refer to brothers and sisters merely. But this supposition is contradicted, both by fair grammatical construction, and the general scope of the will. *Fiat relatio proximus antecedenti:* the word "them" is in immediate juxtaposition with *the word "heirs." The whole scope and object of the will, is, to provide for the family; and to restrict this devise to the [*504 brothers and sisters, is to defeat this object. The intention of the testator was evidently to dispose of his property, not to leave it floating and precarious. The death of his brothers and sisters was naturally to have been expected; but of their children, some of them would probably be alive, should the son die without issue. It was not for the purpose of giving a fee-simple, that the word "heirs" was introduced; for it was personal property which was devised, and which would pass absolutely, without words of inheritance. The children of his brothers and sisters were personally well known and dear to him. They were, therefore, the natural objects of his bounty; and this extrinsic circumstance may aid in the construction.

But what is the meaning of the word "heirs," as coupled with the words "brothers and sisters?" It may mean: 1. Heirs-at-law; in which case, whilst it bears the most technical meaning, it will consist with a liberal and rational interpretation. The proceeds go to the brothers, &c.; if any of them are dead, to the heir-at-law of the deceased, standing *in loco parentis*, and the surviving brothers, &c.; if all are dead, leaving children, to the heirs-at-law of all; if all are dead, and some have left no children, and therefore, no heirs-at-law; except the children of the others, then to the surviving heirs-at-law. 2. Or, it may mean children. It is thus used in popular discourse and writings not technical: "If children, then *heirs," says St. Paul. Rom. viii. 17.[1] The testator himself uses it in this [*505 sense, in at least one other part of his will. He says, "I give and bequeath to my son, John Bleakley, and his heirs lawfully begotten; and in case of his decease, without such issue," &c. And this use of the word is perfectly legal. Thus, in *Jones* v. *Morgan:* "It is first necessary to determine upon the whole of the will, whether, by the word heirs, the testator meant that

[1] Vulg. "if sons, heirs also."

succession of persons so denominated by the law. If that appear to be the intention, the rule in *Shelley's Case* must, in all events, take place. But when the word is used in any other sense, the rule is not applicable, and the limitation must have its effect, as if proper words had been made use of." 1 Bro. C. C. 206. So, in *Popham* v. *Bampfield*, "It was agreed, that the word heirs was not always, and of necessity, to be intended as a word of limitation. Thus, in 2 Vent. 311, a devise to A., for life, remainder to the heirs male of the body of A., now living—these were words of purchase. So, in *Lisle* v. *Gray*, T. Raym. 279, 1 Jones 114, lands were limited to A. for life, &c., the words heirs, male, were understood to signify sons." 1 P. Wms. 59; s. p. Ibid. 87, 142, 754; 2 Ibid. 471; 1 Eq. Cas. Abr. 194; 3 Bro. P. C. 467; 2 Ves. 646; 1 Vent. 225; 2 Ld. Raym. 873, 1407; 2 Salk. 679; 1 Doug. 323. And in *Darbison* v. *Beaumont*, "devise to the heirs male of J. S., begotten; J. S. having a son, and the testator taking notice that J. S. was
*506] then *living, a sufficient description of testator's meaning, and such son shall take, though (strictly speaking) he is not heir." "As to the objection, that, Mr. Long being living, there could not, in a legal sense, be any heir male, &c., it was answered, that the intent of the testator, by the devise (which was the only matter in question), did plainly appear, &c. That the word heir had, in law, several significations: in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir-apparent, which supposes the ancestor to be living; and in this latter sense, the word heir is frequently used in statutes, law-books and records." 1 P. Wms. 232; s. p. 1 Vent. 344; 2 Lev. 232; T. Raym. 330; 2 W. Jones 99; Pollexf. 457. By way of analogy, it may also be mentioned, that the word "issue" is frequently taken as a *descriptio personæ*. Cruise's Dig. tit. 38, Devise, c. 10, § 33–5.

The rule in *Shelley's Case* has been frequently broken in upon in favor of last wills. Once fix the intention, and the word heirs may as well be a word of purchase as a word of limitation. And it may even be taken as a word of purchase in a deed, if such be the intention of the grantor. *Lisle* v. *Gray*, T. Raym. 315; s. p. *Walker* v. *Snow*, Palm. 349. So also, in marriage articles. *Honour* v. *Honour*, 1 P. Wms. 123; *Bale* v. *Coleman*, Ibid. 142; *Trevor* v. *Trevor*, Ibid. 612; *West* v. *Errisey*, 2 Ibid. 394. This is
*507] not upon the principle, that the rules of property are different *in chancery from what they are at law; that notion was long since completely exploded. *Watts* v. *Ball*, 1 P. Wms. 108; *Philips* v. *Philips*, Ibid. 35. But the rule has been still more frequently relaxed in the case of devises, for very obvious reasons. *Archer's Case*, 1 Co. 66; *Luddington* v. *Kime*, Ld. Raym. 203; *Backhouse* v. *Wells*, 1 Eq. Cas. Abr. 184; 1 Vent. 184; Ld. Raym. 1561; *Bagshaw* v. *Spencer*, 1 Ves. 142. Several attempts have been made, both by judges and elementary writers, to classify the cases, in which, by an exception to the rule, the word *heirs* is construed as a word of purchase; but all the exceptions will be found to turn upon the intention of the testator. And when it is said, that this intention must not be contrary to the rules of law, this *dictum* does not apply to the technical sense of the terms used by the testator. It merely applies to the legality of the object which he wishes to effect; *e. g.*, the testator wishes to create a perpetuity; any words, however untechnical, which import the idea, are sufficient; but the law will not permit a perpetuity to be created at all. This distinction

is clearly stated by Lord Keeper HENLEY: "It was argued, that if the intent was plain, yet, if the testator had used words which, by the rules of law, imported a different signification, the rule of law, and not the intent, would prevail; but there was no such rule applicable to this case. In case of a will, the intent shall prevail, if not contrary to law; the meaning of which is, if the limitations are such as the law allows; but it does not mean, that the words must be taken in such signification as the law imposed on them. If words, which, in *consideration of law, were generally taken as words of limitation, appear in a will to be very plainly intended as words of purchase, they must be considered as such, both in courts of law and equity." *Austen* v. *Taylor*, Ambl. 376; S. P. Sir W. Jones, Isæus, 307. [*508

But admitting, *argumenti gratiâ*, that if the children of the testator's brothers and sisters take in character of heirs, they must take in quality of heirs, *i. e.*, by descent; they may take in this manner, consistently with the rules of law. Either it is a contingent executory devise to their parents, or, as it is commonly called, an executory interest; or it is a contingency or possibility coupled with an interest. In the first case, although the devisees die before the contingency happens, their children will take by descent. *Gurnell* v. *Wood*, 8 Vin. Abr. 112; Willes 211; S. P. *Goodright* v. *Searle*, 2 Wils. 29; *Porter* v. *Bradley*, 3 T. R. 143; *Weale* v. *Lower*, Pollexf. 54; *Vick* v. *Edwards*, 3 P. Wms. 372; 1 H. Bl. 30, 33; 3 T. R. 88. If it be a contingency or possibility coupled with an interest, they may take in the same manner. *King* v. *Withers*, 3 P. Wms. 414; *Perry* v. *Phillips*, 1 Ves. jr. 254; *Selwyn* v. *Selwyn*, 2 Burr. 1131; *Roe* v. *Jones*, 2 H. Bl. 30. It is now the settled text-law, that these contingent estates are transmissible to the heirs of the devisee, where such devisee dies before the contingency happens, and if not disposed of before, will vest in such heirs, when the contingency happens; though formerly *an opinion prevailed, that they could not pass by a will made previous to their vesting. Fearne's Cont. Rem. 534, 537; Cas. temp. Talb. 123; 2 Ves. 119; 1 Str. 131; 2 Atk. 618; Watk. Desc. 14; Cruise's Dig. tit. 38, Devise, C, 3, § 18–21; C, 20, § 43–53; 2 Bl. Com. 290. [*509

If it should be objected, that this is a double contingency, which is bad; the answer is, that there is no rule of law which prohibits a limitation on a double contingency, or a contingency on another contingency. A limitation may be good, though made to depend on any number of contingencies, if they be collateral to, or independent of each other, and may all happen within the legal time of limitation. In *Routledge* v. *Dorril*, 2 Ves. jr. 358, a grandchild took on a limitation dependent on no less than four contingencies.

It is a well-established doctrine, that where a class or denomination of heirs, indefinitely, are intended to be embraced, the word *heirs* is a word of limitation; but where particular or special persons are constituted the stock of a new descent, it operates as a word of purchase. Harg. Law Tracts, 561; *Jones* v. *Morgan*, 1 Bro. C. C. 206. Here, the devise is to the brothers and sisters, and such of their heirs as may be living at a particular time. Heirs general, therefore, could not have been meant; but only the heirs of each brother, and of each sister, *i. e.*, the children of each brother and sister. The term is restricted (supposing it to be a devise of the realty) to such as

should be heir *of such of the brothers and sisters as were dead when J. Bleakley, jun., died, without leaving issue. The heirship must be established by the known canons of descent; but when ascertained, the objects defined would still take by purchase. The word *heirs* is, indeed, a word of limitation, for the purpose of ascertaining who are to take; but after it has performed that office, the objects who are to take are in by purchase, and not by descent. And herein, it is humbly apprehended, consists the radical defect in the argument of the learned judges of the state court. If the word *heirs* necessarily compelled all who take under it, to take in quality of heirs, then the argument, that they must take *per stirpes*, and not *per capita*, might have its difficulties. But this word does not operate, exclusively, either as a word of purchase or of limitation. That it is often a word of purchase, has been before shown; and in the common case of a devise "to A. for life, remainder to the heirs of B., who leaves a daughter, and his wife encient with a son; on the death of B. the daughter takes, under the description of heir, by purchase, and she shall not be divested by the subsequent birth of a son." *Goodwright* v. *Wright*, 1 Str. 30; 2 Doug. 499 n.; Watk. Desc. 208. So also, in the case of an estate to A. for life, remainder to the right heirs of B., or of an executory devise to the right heirs of A., the canons of descent are referred to, for the purpose of ascertaining who are the right heirs; and after this is ascertained, such persons *take by purchase. It does not follow, that because the word *heirs* is a word of limitation, that the heirs, when ascertained, must take as heirs; for there are many cases where terms of limitation operate only *sub modo* as such, viz., for the purpose of defining the objects who are to take in quality of purchasers. Thus, if a remainder be limited in gavelkind, or borough English lands, to the right heirs of A., the common law points out the eldest son as the heir, contrary to the custom, which gives the land, in the one case, to all the sons, and in the other to the youngest son. "For," says Mr. Watkins, "notwithstanding we may thus have recourse to the law of descents, to ascertain the persons who are to take, yet, when they are once ascertained, they take as purchasers. Watk. Desc. 226; Co. Litt. 220 *a*; *Brown* v. *Barkham*, 1 Str. 42. So, if lands be devised to the right heirs of A., who leaves two daughters, they are both his heirs; but they take not as parceners (for to do this they must take by descent), but as joint-tenants, or in common, *i. e.*, as purchasers. *Counden* v. *Clerke*, Hob. 33; 3 Leon. 14, 24. In general, purchasers take *per capita*, and those who claim by descent, take *per stirpes*; but if the intention of the grantor or devisor can be better promoted by purchasers taking *per stirpes* than *per capita*, there is no inflexible rule of law to prevent it. In the present case, we hold, that the intention is plain, and that all claiming as heirs of those brothers and sisters would take *per stirpes*, even *though they take by purchase; but whether they take in one way or the other, is quite immaterial, provided it be shown, that the brothers and sisters personally were not the sole objects of the testator's bounty, and, consequently, need not survive J. Bleakley, jun.

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The same construction has been adopted, respecting personal property, under the statute of distributions, 29 Car. II., c. 3. Where there is a bequest of personalty to the relations or next of kin of A., the statute furnishes the rule; *i. e.*, ascertains who are the persons comprehended within

these words; and these persons may take *per capita*, though if distributed, in such case, under the statute, they would take *per stirpes*. Prec. Ch. 401; 1 Atk. 470; 2 P. Wms. 385. That these children are entitled to take, as purchasers, under the word *heirs*, is manifest, as none can claim by descent, unless the subject of the limitation vests, or might have vested, in the ancestor, *qua* ancestor. But here, no estate in land was ever contemplated to vest in the brothers or sisters named, or in either of them. The entire estate in the land, vested either in Bleakley, jun., or in Young, the executor, &c., and the proceeds of a sale, *i. e.*, personalty only, was to be paid over to such persons as satisfied the description entitled, at the time of Bleakley, jun., his death without issue. Under no possible circumstances or view of the case, could these children take in quality of heirs; because nothing ever did or could vest in their parents as ancestors; and the *subject itself [*513 of the devise was not real property, but money, of which heirship cannot with legal accuracy be predicated. It is, therefore, manifest, that if they take at all, it must be as purchasers, and that the word *heirs* may be used for the purpose of ascertaining who are embraced within the scope of the testator's bounty; and, having performed that duty, it is *functus officio*, and ceases to operate as a word of limitation. Co. Litt. 13 *a*, 298 *a*; Watk. Desc. 233; *Swain* v. *Burton*, 15 Ves. jr. 365.

The next question in the cause is, whether the power to sell exists in those who have exercised it, and under a sale from whom, the plaintiff claims title? And this divides itself into two inquiries: 1. Whether there is in any person, now existing, an authority to sell? 2. Whether the event has taken place, which, in the contemplation of the testator, was to occasion its exercise?

1. It is a familiar principle, that no execution of a trust shall fail, for want of a trustee. On a total failure, chancery will appoint one; but if the individual named by the testator is wanting, it devolves on the person who succeeds to the general rights and duties with which it is coupled. Here, the direction of the testator himself extends it beyond the first individual named. The trust, as it is created, extends not only to the executors, but to the administrators of A. Young, who may be total strangers. But even if it were not so; the power given to one, will extend, by operation *and construction of law, to his executors, and so on from executor [*514 to executor. 8 Vin. Abr. 465, P, c, citing 2 Bulst. 291; 19 Hen. VI., fol. 9; 8 Vin. 467, pl. 16; 2 Brownl. 194; Bulstr. 219; 1 Ch. Cas. 180; 2 Bl. Com. 506. And by the local law of Pennsylvania, the distinction between a power to sell, and a devise of the land to be sold, is taken away, and the executors have the same interest in the one case as in the other. 3 Sm. Laws 433. The remainder in fee, then, on the death of Bleakley, jun., vested in the executors, &c., for the purpose of sale. The will of the testator was, that it should be sold, on the occurrence of that event. It is immaterial, for what reason. It is sufficient, that it was his will. The direction to sell is mandatory, and not a mere discretionary authority. The time within which it was to be performed is immaterial. Its performance might have been retarded by many accidents.

2. The event has occurred, which, in the contemplation of the testator, was to occasion the exercise of the power to sell. The language of the will, on this point, is unambiguous and clear. "In case of the decease of my

said son, without issue, *then*, I do direct and order," &c. It is made to depend on the single event of his decease without issue. How the proceeds are to be distributed, is another and a distinct question; they are not made dependent upon each other. If the brothers and sisters had all lived, they
*515] could not have entered into possession of the real property; they *could only have compelled an execution of the trust, by the preliminary measure of a sale.

*Sergeant*, contrà, stated, that this case had been submitted to the highest court of Pennsylvania, where it was decided against the title now in question, so long since as 1809. He admitted, that a verdict and judgment in ejectment were not conclusive, and that a second ejectment might be brought on the same title. But the decision of a competent court, of the highest resort, solemnly rendered, on a question of law, submitted to them by the parties, ought to be decisive of what the law is on that question, as between the parties, and all claiming under them, with notice. It would be conclusive on that court, and on all inferior jurisdictions: and where there is concurrent jurisdiction, the rule is, that the tribunal which first gets possession, has exclusive possession of the cause and of its incidents. Here, the question was upon the law of Pennsylvania, as it regarded land in that state: not the statute law, which is written, but the common law, as shown by the decisions of her courts, and modified by usage and custom, or the peculiar adoption and application of its principles. Had this case been first submitted to the circuit court, and brought here by appeal, a decision of the supreme court of the state, in another case, in all respects similar, would be of the highest authority. And it is fit that it should be so, for the sake of uniformity in the settlement of the law; or else the peculiar judicial consti-
*516] tution of this country might be productive *of the greatest confusion. Suppose, the decision of this court should be different from that of the state court; it is not a case in which, by the constitution and laws of the Union, this court has any superiority that would give its decision a binding effect. There would, consequently, be an irreconcilable conflict of decisions. The decision of the supreme court of Pennsylvania must, therefore, be regarded as of the highest authority, and ought to be followed, unless flatly absurd and unjust.

But considering the will, independent of the authority of the decision in the state court, it is obvious, that the testator did not mean to provide for the disposition of his estate, in every event that might happen, except by the residuary clause in favor of his son. If he had said, or had clearly intimated, that he meant, in no case, to die intestate, so as to let in the heir, this might have been considered as a pervading intention, that would influence the interpretation of the will. But this was not necessary, for the law had provided an heir, in whose favor the affections of the testator would coincide with the provisions of the law. The heir is a favorite of the common law, and is not to be disinherited, but by express words, or by necessary implication. That implication can only exist, where there is a plain intention not to die intestate. But here, the intention was merely to provide for certain persons, whom the testator, for reasons known only to himself, chose to consider as
*517] objects of his bounty, in certain events. So far he meant to restrain *his son, and no further. From his having done so, it is impossible

to infer an intention to provide for other persons, or for other events, as there might be, in a case where there was a manifest design not to die intestate.

The will must be interpreted by itself, and then it will appear that the testator had in view: 1. His son, to whom he gives a clear estate-tail in the realty, and an absolute estate in the personalty, on certain terms. 2. A. Young, to whom he gives an annuity of 30*l.* a year, during the joint lives of himself and the son, or the son's issue: and to whom, in the event of his surviving the son, and the son dying without issue, or the issue failing in his lifetime, he gives 400*l.* in lieu of the annuity, to be paid out of the proceeds of the sale of his estate. A. Young could, then, certainly, take nothing, but in the case specified, of the son dying without issue, or the issue failing, in the lifetime of Young. It is put in place of the annuity, and, in case of issue, the annuity is to be continued. 3. The brothers and sisters of the testator. If the son die, leaving A. Young, the right of A. Young is vested: and then (*i. e.*, A. Young surviving the son, and the son dying without issue), the testator's will is, that the property shall be sold by A. Young, his executor, &c., and the proceeds, after paying his 400*l.* to the four brothers and sisters, by name, and their heirs, or such of them as shall be living at the son's decease. And that this was meant only of his brothers and sisters, is evident, *from the subsequent bequest to them of his personal estate. We say, then, that the power to sell was limited to arise upon [*518 the contingency: 1. Of John, the son, dying without issue, in the lifetime of A. Young, or of the issue failing, in the lifetime of A. Young; or, 2. Of his dying without issue, leaving one or more of the brothers or sisters of the testator. And that neither of these contingencies having happened, the fee, which was in the son by descent, was discharged from the power, and was devised by his will.

But it may be asked, why should the disposition in favor of the brothers and sisters be made dependent upon the life of A. Young? The answer is, because it was first and chiefly for the sake of A. Young, that the sale was to be made; and there is no more reason, as regards the intention of the testator, for limiting the disposition, in case of issue failing, than in case of the son's dying leaving no issue. And yet the former is clearly done, and was indispensable. Suppose, J. Bleakley, jun., had left a child, who survived A. Young one day, and then died. The reversion in fee would then go to the heir of John, the son, so as to merge and destroy the estate-tail, and all intermediate contingent estates. Fearne on Rem. 343, 353 (7th ed.). The contingent limitation is only good by way of executory devise. J. Bleakley, jun., took a vested estate-tail by the will, and the reversion in fee by descent. The descent was immediate, liable to open and let in the power, *upon the happening of the contingency upon which the power was to arise. After the failure of the estate-tail, the fee would be in the [*519 son and his heirs, until the power was exercised, no estate being given to A. Young. This could only be done by executory devise. 2 Ves. jr. 269. There is no preceding particular estate to support the remainder. The fee by descent is no particular estate. It must, therefore, be considered a contingent limitation, good only by way of executory devise. As a contingent remainder, it might be barred by common recovery, but not as an executory devise. Fearne on Rem. 419, 423–4, 429. It is, besides, the creation of an

estate of freehold, to commence *in futuro*, by the exercise of a power collateral to the estate, and therefore, also, must be an executory devise. As an executory devise cannot be destroyed by an alteration of the preceding limitation, nor barred by a recovery, to avoid perpetuity, the contingency must be one to happen within a reasonable time, *i. e.*, a life or lives in being, and twenty-one years and a few months thereafter.

Now, let us consider, whether it is so limited, and what the limitation is. Dying without issue, or failure of issue, legally imports an indefinite failure of issue, as it respects both personal and real estate, but especially the latter, "for there the interest of the heir is concerned, which is always much favored at law." Fearne on Rem. 476. In the case of personal *estate, it has
*520] indeed been often construed to mean a dying without issue, living at the time of the death. And in the case of real estate, it has been sometimes so construed. But this has been only from necessity, to support the limitations over, and effectuate the legal intention of the testator. *Dansey* v. *Griffiths*, 4 Maule & Selw. 61; and see 5 Mass. 500. And it has, therefore, never been so construed, where there was an express limitation in the will to the contrary, or of equivalent legal effect. Where, then, there is a limitation sufficient to maintain and preserve the subsequent dispositions, such implication is unnecessary. And where there is a limitation expressed, inconsistent with such implied limitation, the implication is impossible. Such inconsistency is equally great, whether the actual limitation is shorter or longer than the implied limitation. The limitation in this will is, the dying of J. Bleakley, jun., without issue, in the lifetime of A. Young; which includes his so dying, leaving no issue, or leaving issue which fail in the lifetime of A. Young. It is not a double contingency, but a single contingency, embracing both events. The limitation, too, is sufficient to support the ultimate disposition. If so, there can be no limitation to dying without issue, &c. The words are, "I give to my cousin, A. Young, &c., an annuity, &c., during the joint lives of him, the said A. Young, and my son, J. Bleakley, or
*521] his heirs lawfully begotten; but in *case of the decease of my said son, without issue lawfully begotten, as aforesaid, &c.

If it be said, that the subsequent words, which contain the disposition in favor of the brothers and sisters, are different; "and in case of the decease of my said son, without such issue," and ought to be construed a dying without issue, living at the time of his death, I answer, that they cannot be so interpreted here; because, 1. They are connected with the antecedent words, in the prior part of the will, "herein after mentioned, and before any dividend is made of the proceeds of my said estate;" and with the words in the subsequent part, "after deducting out of the proceeds," &c. 2. It would make the bequest to A. Young depend upon one contingency, and that to the brothers and sisters upon another; whereas, they are painly connected together, and made to depend upon one contingency. 3. These same identical words are before used, as equivalent to a failure of issue, "during the joint lives of him, the said A. Young, and my son, J. Bleakley, or his heirs lawfully begotten; but in case of the decease of my said son without issue," &c.

As a limitation, the life of his brothers and sisters, who were *in esse*, would answer equally well as the life of A. Young. But it must be admit-

ted, that there is no express limitation of that kind in the will. And it would follow, that if there be not a limitation to the life of A. Young, there is none at all. Under this head, however, I shall contend, 1. That the distribution was to be made among *such of the brothers and sisters as should be living at the time when the contingency happened: [*522 2. As none were then living, and A. Young was dead, there was no object for the exercise of the power, and therefore, the power was never brought into existence.

Such was the opinion of a majority of the judges of the state court; and it is the natural and obvious reading of the will. The proceeds are given to the brothers and sisters by name, to be divided between them, in equal proportions, share and share alike; which imports, that he had some definite idea, whom it was to be divided amongst. But if there were any doubt, the bequest of the personal estate, which refers to the former, makes it quite plain. The legal construction is the same; for it cannot be denied, that *heirs* is, generally, a word of limitation, and only descriptive of the quantity of estate meant to be given. Strike out the words "and their heirs for ever," and all doubt is dissipated. Strike out the words of contingency, "or such of them of shall be living at the decease of my said son," and would not the whole vest in the ancestor, and the heir take by descent? In either case, suppose one to die in the lifetime of the testator, would not the legacy lapse? But the words "for ever," unequivocally stamp the character of limitation. The supposition that *heirs* is to be a word of purchase, in one event only, goes on the ground, that the same word is to be construed, according to circumstances, in senses entirely different. *That is to say, that in the mind of the testator, and at the time of making the will, it was understood to be a word both of limitation [*523 and of purchase. It would follow, then, that if one of the brothers and sisters died, in the lifetime of the testator, the heirs would take by purchase. There could, therefore, be no such thing as a lapsed legacy or devise, if the word *heirs* be used; and some new mode must be invented of describing the quantity of the estate.

This construction is liable to another objection, that it strikes out an entire clause. It is manifest enough, that the testator thought it was real estate, and therefore, used the word heirs. He might well think so, as it was to be real estate, up to a certain point. How this estate was to be regarded, might not have been generally understood, at the time when this will was made. It was, probably, Lord HARDWICKE who first decided, that land to be converted into money, or money to be laid out in land, were to be considered "by the transmutation of a court of equity." 3 Atk. 256. Besides, the legatee might, in such case, perhaps, have an election. 1 Madd. 395; 1 P. Wms. 130, 389. At law, it is still real estate; that is, supposing A. Young to be either dead, or his legacy paid. And it deserves to be remarked, that the testator drops these words, when he speaks of what he himself deems personal estate.

Our construction is the only reasonable and practicable one. *Heirs*, standing alone, is never a word of purchase; and when it is a word of purchase, *it always means, that the heir is to take in exclusion of the [*524 ancestor. Pow. on Dev. 236–7, 239, 241. Thus, where an estate is given to the ancestor for life, the heir may take by purchase, so that the

estates will not unite. Where the ancestor takes no estate at all, an heir may take by purchase, as the first taker; the word heir being then a *descriptio personæ*, or individual designation.

But supposing it to be otherwise, we must take one of two alternatives: 1. That if some of the brothers and sisters were living, and some dead, those who were living, and the heirs of those who were dead, should take. In that case, the heirs must take *per capita*, as purchasers. 2. That if the brothers and sisters were all dead, the heirs of all would take. In this case also, they must take *per capita*. That could not be the intention. But even as words of purchase, *heirs*, standing alone, and without qualification, is a designation only of the person or persons who, by law, are heirs. It can never mean children or issue. Pow. on Dev. 242–3. Then, what heir is it to be? The heir by the law of Ireland, of England, or of Pennsylvania? If restricted to the issue of the brothers and sisters (which is a still further construction), and all are to take equally, then, there might be every possible variety in the circumstances and character of these children, which must have been unknown to the testator, and are unknown to the court. *525] But there is a flat legal bar to such a construction; *and that is, that the limitation to the children would be upon a double contingency, which is bad.

But it is said, that the contingent interest is descendible, and would go to the children. Doubtless, it might; but that must depend upon the nature of the contingency. If, then, A. Young being dead, and all the brothers and sisters being dead, there was no object remaining for the power, did the power itself ever come into existence? It never existed in A. Young, because he died before the contingency happened; and it could not be derived from him to his executors or administrators. But supposing it might; then, at law, it expired at the end of two years from the death of J. Bleakley, jun., and before the deed to Smith. 15 Hen. VII., fol. 12. To be sure, equity would not suffer it to perish, if there were objects for its exercise. But, even in equity, it expired with the expiration of its object. Sugd. on Powers, 459, 460, 468, 470; *Bradley* v. *Powell*, Cas. temp. Talb. 193; *Yates* v. *Phettiplace*, 2 Vern. 416; *Tournay* v. *Tournay*, Prec. Ch. 290; *Roper* v. *Radcliffe*, 9 Mod. 171; *Croft* v. *Slee*, 4 Ves. jr. 60. Here, all the objects were completely at an end.

It is, however, contended, that the use is subordinate to the power, and the sale is to be made, at all events. But that makes the end subcervient to the means. The purpose was contingent, and therefore, the power was made contingent. No good purpose is to be answered, by prolonging the *526] *existence of the power. It may, perhaps, only be meant, that the whole is to be considered as the personal estate of the testator, and go according to the statute of distributions. The consequence would then be, that he would die intestate. But there is no case which goes so far, and no reason for it. If it were personal estate, at the death of Bleakley, jun., then it all goes to him by will; and he surviving A. Young, and the brothers and sisters of the testator, took the whole absolutely in possession. He would have the right of election, and he makes his election by his will.

*D. B. Ogden*, for the plaintiff, in reply, argued, that the adjudication in the state court had no other authority here, than the opinion of the same

learned men would have upon any other question of general law. It was not conclusive, as a *res judicata*, even in the state court; and by what magic could the doctrines on which it was founded, be considered as conclusive in another *forum?* A judgment in ejectment is never conclusive at law; and how can a decision in another suit, on the same devise, or another devise, be considered as conclusive on a tribunal having concurrent jurisdiction? The question was not upon the local law, of which the state courts are the exclusive expounders; it arose not upon the statute, or the common law of Pennsylvania (if any such there be), but upon that law which is expounded at Westminster, and at Washington.

The intention of the testator is the great polar *star in the interpretation of wills. If there be ambiguity in the particular words [*527 used by the testator, you may not only look at the general scope and design of the will, as manifested on its face; but you may go out of the will, and inquire into the state of the testator's family, in order to ascertain whether particular persons might probably be the objects of his bounty. 1 Ball & Beatty 431. It would be strange, indeed, if wills were the only writings in which the necessary imperfection of human language might not be supplied, by a view of all those extrinsic considerations which may be supposed to have influenced the writer's mind, and caused him to use words in one sense or another. It appears in the case, that the testator had just left his relations in Ireland, his native country, where his brothers and sisters, and their children, then were, the latter being of age, or nearly so, and that his will was made in London, on his way to this, his adopted country. Next to his son, his brothers and sisters, and nephews and nieces, were probably nearest his heart.

It is admitted, that the son took an estate-tail. The question has been supposed to be, what became of the reversion, on the failure of issue? But whether it descended on the son, or was devised to the testator's brothers and sisters, is immaterial; because, the question is, whether the fee, in whomsoever it may now be, is still subject to the power of sale created by the will. He might charge the reversion, after the estate-tail *had [*528 expired. And he has not only empowered, but ordered and directed, A. Young, his executors, &c., to sell. His object, doubtless, was, to convert the real property into money, in order that it might go to his relations in Ireland, who would, probably, never come to this country. If a testator says, "I will my heir shall sell the land, and does not mention for what purpose, it is in the breast of the heir at-law, whether he will sell it or no, &c. But when a testator appoints an executor to sell, his office shows, that it is intended to be turned into personal assets, without leaving any resulting trust in the heir." 2 Atk. 568.

It is apparent, that the testator considered himself as disposing of personal property. The subsequent legacy of his personal estate shows, that he considered it as one common fund. It is a mistake to suppose, that Lord HARDWICKE established, for the first time, in 1746, the rule of equity, that land devised to be sold and converted into money, shall be considered as personal property. Such had always been the doctrine of the court of chancery. The order to sell is absolute, not coupled with any condition whatsoever, nor depending on the lives of his brothers and sisters. If nothing had been said about the distribution of the proceeds, they would go, of

course, to the personal representatives. The subsequent clause is merely intended to describe how the proceeds were to be divided, and not to indi-
*529] cate the quantity of interest in what had thus become *personal property, by its very destination, before it had been actually sold. As to the word *heirs*, it must surrender its ordinary technical meaning, in order to subserve the intention. And it is clear, that it may be a word of purchase, wherever it is necessary for that purpose. Thus, it sometimes means children, and sometimes *issue* indefinitely. Fearne on Rem. 466. If the words "their heirs," were stricken out of this clause, the property, being personal, would be vested absolutely in the brothers and sisters. The words, therefore, must have been added, for some other purpose than to create a limitation. All the legatees, except one, and probably that one, were alive, at the death of the testator. There was, then, no lapsed legacy. There was a clear contingent remainder to the brothers and sisters, which was transmissible to their representatives. The words, "their heirs for ever," were intended as words of purchase, and to substitute the children or grandchildren for the original parents, in order to effect the great intention of the testator, which was, to keep the estate in his own family. He supposed, he had prevented his son from aliening it, by the entail, and that he had provided for the case of his son's dying without issue, by the direction to sell, and the disposition of the proceeds. All his intentions are to be frustrated, by the construction contended for on the other side.

As to the supposed difficulties about the distribution of the proceeds among those who are entitled, that question is not now before the court.
*530] *It is sufficient, that there is an object for the present exercise of the power. It is immaterial, in what proportions those who are entitled are to take. When they shall file their bill on the equity side of the court, it will be time enough to consider that question.

The case cited from the Year Book, 15 Hen. VII., has nothing to do with the present question. That was a feoffment, on condition that the feoffee, who was the party in interest, should not alien; and not the case of a trust. The time within which the power was to be executed, is immaterial, it being merely incidental to the general object of the testator. Suppose, the executor of A. Young, and all the others by whom the power was to have been executed, had neglected or refused; are the *cestuis que trust* to be disappointed? Would not a court of equity compel the execution, or supply the defective execution? And if so, will it not confirm what has been already done? It may, indeed, be admitted, that the trust will not be enforced, or the execution of it confirmed, if the object for which it was created no longer exists. But here, the first object was to convert the real property into money, and then to distribute it. But if the property is to be considered as real estate, it would vest in him who was heir-at-law of the original donor, at the time of the expiration of the particular estate. J. Bleakley, jun., had, indeed, a right to dispose of this reversionary interest,
531] but he never exercised that right. There *is nothing in his will showing an intention to devise it. Watk. on Desc. 110, 153.

March 1st, 1823. WASHINGTON, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—The material question to be decided is, whether the power given to A. Young, his execu-

tors and administrators, to sell the real estate of the testator, was legally exercised? If it was not, then the plaintiff in error, who claims under a sale made by the executor of Young, acquired no title under it, and the judgment below is right.

It was contended by the counsel for the defendant, that by the death of Young, as well as of the brothers and sisters of the testator, in the lifetime of John Bleakley, the son, the devises to them, to arise out of the power to sell, never took effect; and, consequently, there being no person in existence, at the death of the son, to receive the proceeds of the sale, or any part of them, the power was unduly exercised. The premises upon which the above argument is founded, as well as the conclusion drawn from them, being controverted by the counsel on the other side, our inquiries will be confined to those two points.

With respect to the devise of the 400*l.* to A. Young, a majority of the court is of opinion, that by the words, as well as from the obvious intention of the testator, that sum was not to be raised, except in the event of the death of John *Bleakley, the son, without issue, in the lifetime of [*532
Young. During the joint lives of the son, or his issue, and Young, the latter was to receive an annuity of 30*l.* out of the rents and profits of the real estate. But if the son should die without issue, in the lifetime of the said Young, the annuity was, in that event, to cease, and the 400*l.* was to be raised for his use, out of the proceeds of the real estate, when the same should be sold, according to the intention of the will, as thereafter mentioned. The contingency on which the devise of the 400*l.* was to take effect, is in no respect connected with that on which the devise of the proceeds to the brothers and sisters was to depend. The 400*l.* is expressly given in lieu of the annuity, in case Young should survive the son, without issue, in which event it was to cease.

The contingency upon which the devise of the proceeds of the real estate to the brothers and sisters was to take effect, was the death of the son without issue; and since it was possible, that the particular estate of the son might endure beyond the life of Young, the power to sell, for the benefit of the brothers and sisters, is extended to his executors and administrators. It is true, that by the clause which gives the power to sell, taken independent of the devise to Young, it would seem as if the 400*l.* was, at all events, to be first deducted out of the proceeds of the sale, and paid to him, in the same event as the residue was to be paid to the brothers and sisters, that is, on the death of the son without issue. But the *two clauses must, of [*533
necessity, be taken in connection with each other, the one as containing the bequest to Young, and the contingency upon which it was to take effect; and the other, as pointing out the fund out of which it was to be satisfied. If the former never took effect, it is clear, that the latter was relieved from the burden imposed upon it. A very good reason appears for making the devise of the 400*l.* to Young, to depend upon his surviving the son, without issue, since it would be, in that event only, that he would want it; the annuity, which it was intended to replace, continuing until that event happened. But no reason is perceived, why the devise over to the brothers and sisters of the testator, or the execution of the power for their benefit, should have been made to depend on the same event; a trustee to

sell being provided, in the executors of Young, in case he should die, before the power could be executed.

Having shown, it is believed, that the devise of the 400*l.* to Young never took effect, in consequence of his death in the lifetime of John Bleakley, the son, it becomes important to inquire, whether the devise to the brothers and sisters of the testator failed, in consequence of their having all died in the lifetime of the son. The operative words of the will are, "I give the proceeds thereof (of his real estate) to my said brothers and sisters, and their heirs, for ever, or such of them as shall be living at the decease of my son, to be divided *between them in equal portions, share and share alike." The court has felt considerable difficulty in construing the above clause, with a view to the intention of the testator, to be collected from the whole of the will, and of the circumstances stated in the special verdict. Some of the judges are of opinion, that the devise is confined, both by the words and by the apparent intention of the testator, to the brothers and sisters who should be living at the death of the son without issue, considered the word "heirs" as a word of limitation, according to its general import, and that there is no evidence of an intention in the testator, to give the part of a deceased brother or sister to his or her children, which ought to control the legal meaning of that word, when used as it is in this clause. On the contrary, they think, that the use of it in the devise of the proceeds of the real estate, and the omission of it in the devise of the personal estate, and yet declaring that the latter is to be divided amongst his brothers and sisters, with the proceeds of his real estate, as therein before directed to be divided, strongly indicates the intention of the testator to give the proceeds of the real estate to the same persons who were to take the personal estate. Others of the judges are of opinion, that an intention to give the proceeds of the real estate to the children of a deceased brother or sister, as representing their ancestor, is fairly to be collected from the will, which strongly intimates that the testator did not *mean to die intestate, as to any part of his real or personal estate.

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Upon a question of so much doubt, this court, which always listens with respect to the adjudications of the courts of the different states, where they apply, is disposed, upon this point, to acquiesce in the decision of the supreme court of Pennsylvania, in the case of *Smith's Lessee* v. *Folwell* (1 Binn. 546), that the word *heirs* is to be construed to be a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect by their deaths in the lifetime of the son. Whether the conclusion to which that court came, and which was pressed upon us by the plaintiff's counsel, that the contingencies on which the power to sell was to arise, having never happened, the sale under the power was without authority, is well founded in a court of law, need not be decided in this case, because the majority of the court are of opinion, that by the express words of the will, the sale was limited to the period of two years after the decease of John Bleakley, the son. The circumstance of time was, no doubt, considered by the testator as being of some consequence, or else it is not likely that he would so have restricted the exercise of the power. But whether it was so or not, such was the will and pleasure of the creator of the power, and that will could only be fulfilled by a precise and literal exercise of the power. The trustee acts, and could act, only in virtue of a special authority con-

ferred upon him by the will; he must act, then, in the way, *and under the restrictions which accompany the authority. If an adjudication were wanted to sanction so plain and obvious a principle of law, it is to be found in a case reported in the Year Book, 15 Hen. VII. 11, 12.

Under what circumstances a court of equity might relieve in case the trustee should refuse to exercise the power, within the prescribed period, or should exercise the same after that period, need not be adverted to in this case, since this is a question arising in a case purely at law.

The sale in this case, then, having been made about eighteen years after the death of John Bleakley, the son, the trustee acted without authority, and the sale and conveyance was absolutely void at law.

JOHNSON, Justice. (*Dissenting.*)—I have no hesitation in conceding that if all the objects had failed, for which the power in this will was created, the power itself ceased, both at law and in equity. Those objects were, 1. The raising of the legacy of 400*l.* for Young: 2. The sale and distribution of the testator's estate among his own relatives. If neither of these objects remained to be effected, the power under which the plaintiff makes title, was at an end.

The words on which the legacy depends are these, "but in case of the decease of my said son, without issue, as aforesaid, in the lifetime of the said Archibald Young, then the said annuity is to *cease; and in lieu thereof, I give and bequeath unto the said A. Young, and his assigns, the [*537 sum of 400*l.* sterling, payable out of the proceeds of my real estate, when the same is sold and disposed of, according to the intention of this my will herein after mentioned, and before any dividend is made of my said estate." The question which this clause presents is, whether the legacy was given upon the single contingency of the son's death without issue, or upon the double contingency of his death without issue, in the lifetime of A. Young.

This question appears to me to be settled by the testator himself; for in a subsequent part the will, speaking of this same legacy, and of course with reference to the clause bequeating it, he says, "the sum of 400*l.* sterling, herein before given and bequeathed to the said A. Young, immediately on the decease of my said son without issue." The testator, then, has attached this construction to his own words; and that the clause containing this bequest will well admit of that construction, is obvious; for there is no necessity for joining the first member of the sentence, which contains the double contingency, to the last member, which contains the bequest. And the effect of the will, without this connection (which I cannot but think forced and unnecessary), will be, to give the pecuniary legacy absolutely, on the event of the son's death without issue, but at the same time to declare, that the annuity should no longer run on, whenever this bequest took effect. This would literally be giving it in lieu of the annuity, and would fully [*538 satisfy those words in the will. Indeed, this construction appears irresistible, when we consider another part of the will. The power to sell is extended to the executors and administrators of A. Young. They, therefore, were authorized to sell, in the event of the death of the son without issue, although he should survive A. Young. Yet we find the testator, when obviously contemplating the event of the son's surviving Young, expressly directing the payment of this legacy, before the proceeds should be distributed

among the devisees over. This could only be consistent with a bequest, upon the single contingency of the son's death without issue, independently of Young's survivorship.

Nor is there the least ground for contending, that this bequest is upon a contingency too remote, since the sale and devise over are expressly limited to take effect upon the death of the son, thereby restricting the generality of the words *issue* and *heirs*, so as to mean issue living at his death This, too, is consistent with those acknowledgments of the testator of a debt of gratitude to A. Young, and not only of a debt to accrue, but of a subsisting debt. The annuity is given *in præsenti:* and so is is its substitute, the legacy. The words are, "I give and bequeath," thus vesting a present interest, although the payment is deferred to a future time and event. The views of the testator are easily explained: if his son or his issue took the estate, his bounty to Young was to be limited to the annuity. But if it
*539] should go over to his collateral *kindred, the testator enlarges his bounty, and gives this substitute for the annuity, at the same time that he frees his estate from a charge that would embarrass the sale.

Nor can I possibly admit the doctrine, that the power to sell was, either at law or in equity, limited to the duration of two years after the death of the son without issue. The words are, "then I direct and order my said cousin, A. Young, his executors and administrators, to sell and dispose of my real estate, within two years after the decease of my said son." Here, the words are clearly imperative, and their effect is, both to confer the power generally, and to exact the execution of it in two years. The intention of the testator must prevail, both at law and in equity, in construing his words; and when they will admit of a construction which will make the power commensurate with the views of the testator in creating it, I hold that to be the true construction, both in law and equity. It is only when the power given admits not of this latitude by construction, that the aid of courts of equity is resorted to, in order to carry into effect the views of the testator. By possibility, the executors of A. Young may have been minors, as may not have proved his will, until the two years had expired, or a sale during that time may have been stayed by injunction, or by the want of purchasers; and it would be difficult to show why, in any one of these events, the power should have ceased. Certainly, no reason can be extracted from the provisions of the will, whence an intention could be inferred, to restrict the
*540] power to sell to the *period of two years. Everything favors the contrary conclusion. For whose benefit was this injunction to sell, within the specified period, imposed upon the executor? Clearly, for that of the brothers and sisters, in order that, under it, they may have compelled the executor to proceed to sale, within the time limited. It would be strange, then, if a provision so clearly intended for their interests, should have put it in the power of the executor, either wilfully, or by *laches*, to defeat their interests, and let in the heir-at-law.

This is not the case of a mere naked power—it is a power coupled with a trust. The executor was to sell, that he might possess himself of the value in money, and distribute it among the *cestuis que trust.* In such cases, it has been well observed, that "the substantial part is to do the thing," and that "powers of this kind have a favorable construction in law, and are not resembled to conditions, which are strictly expounded." I am, therefore, of

opinion, that the words creating this power will well admit of being construed into a general devise of the power, and that the object intended to be answered, necessarily requires that construction.

The *dictum* cited from the Year Books, therefore (besides that it has not been very correctly translated), has no application to this case; since it supposes the actual restriction under the will, which I deny to be imposed, in the present instance, upon the true construction of its words.

Being, therefore, of opinion, that both the legacy to Young, and the power to sell, subsisted *at the date of the sale to the plaintiff, these views of the case are sufficient to sustain the sale to the plaintiff; and [*541 the subsequent questions would arise, only upon the distribution of the remainder of the purchase-money, after satisfying the legacy. Nevertheless, I will make a few remarks upon that part of the will which relates to the devise over to the testator's family, since it serves to elucidate, by another application, the principle upon which I have formed my opinion respecting the legacy to A. Young.

On the subject of the devise over to his brothers and sisters, the testator has again been his own expositor. It is very clear, that if the words, "or such of them as shall be living at the decease of my said son," stood alone and unexplained, the relative *them* might be applied grammatically, with more propriety, to the word "heirs," than to the words "brothers and sisters;" and thus, perhaps, give those words the effect of words of purchase. But the testator himself gives these words a distinct application, in the latter part of his will, when disposing of his personal estate; concerning which he says, that it shall be "divided among my brothers and sisters, with the proceeds of my real estate, *as* hereinbefore directed to be divided." Under the words here used by the testator, it is clear, that the brothers and sisters only could take, and not the brothers' and sisters' children, thus restricting the word "heir" to its natural and appropriate signification; from which, it can be converted into a word of purchase, only by the clear and controlling intent of the testator. This *construction is further [*542 supported, by those words which require a distribution of the proceeds of the real estate equally, share and share alike, to the legatees; a distribution which could not take place *per stirpes*, or in the event of one or more brothers surviving, and the death of the rest, leaving issue, living at the death of the son. On this point, therefore, I concur with the supreme court of Pennsylvania; and only regret that I cannot concur both with that court and this, on the other bequest.

Upon the question so solemnly pressed upon this court in the argument, how far the decision of the court of Pennsylvania ought to have been considered as obligatory on this court, I would be understood as entertaining the following views: As precedents entitled to high respect, the decisions of the state courts will always be considered; and in all cases of local law, we acknowledge an established and uniform course of decisions of the state courts, in the respective states, as the law of this court; that is to say, that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts. But a single decision on the construction of a will, cannot be acknowledged as binding efficacy, however it may be respected as a precedent. In the present instance, I feel myself

sustained in my opinion upon the legacy to A. Young, by the opinion of one of the three learned judges who composed the state court.

Judgment affirmed.

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*543] *Johnson and Graham's Lessee *v.* William McIntosh.

*India. grants.*

A title to lands, under grant to private individuals, made by Indian tribes or nations north-west of the river Ohio, in 1773 and 1775, cannot be recognised in the courts of the United States.[1]

Error to the District Court of Illinois. This was an action of ejectment for lands in the state and district of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts:

1st. That on the 23d of May 1609, James I., king of England, by his letters-patent of that date, under the great seal of England, did erect, form and establish Robert, Earl of Salisbury, and others, his associates, in the letters-patent named, and their successors, into a body corporate and politic, by the name and style of "The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony of Virginia," with perpetual succession, and power to make, have and use a common seal; and did
*544] give, grant and confirm unto this company, and their successors, *under certain reservations and limitations in the letters patent expressed, "All the lands, countries and territories, situate, lying and being in that part of North America called Virginia, from the point of land called Cape or Point Comfort, all along the sea-coast, to the northward, two hundred miles; and from the said Cape or Point Comfort, all along the sea-coast to the southward, two hundred miles; and all that space and circuit of land lying from the sea-cast of the precinct aforesaid, up into the land throughout from the sea, west and north-west; and also all the islands lying within one hundred miles along the coast of both seas of the precinct aforesaid; with all the soil, grounds, rights, privileges and appurtenances to these territories belonging, and in the letters-patent particularly enumerated:" and did grant to this corporation, and their successors, various powers of government, in the letters-patent particularly expressed.

2d. That the place, called in these letters-patent, Cape or Point Comfort, is the place now called and known by the name of Old Point Comfort, on the Chesapeake bay and Hampton roads; and that immediately after the granting of the letters-patent, the corporation proceeded, under and by virtue of them, to take possession of parts of the territory which they describe, and to form settlements, plant a colony, and exercise the powers of government therein; which colony was called and known by the name of the colony of Virginia.

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[1] S. P. Mitchel *v.* United States, 9 Pet. 712; Clark *v.* Smith, 13 Id. 195; Lattimer *v.* Poteet, 14 Id. 4; United States v. Rillieux's Heirs, 14 How. 189; Sparkman *v.* Porter, 1 Paine 457. And see Smith *v.* Stevens, 10 Wall. 321; United States *v.* Cook, 19 Id. 591; Beecher *v.* Wetherby, 95 U. S. 517, 525.

3d. That at the time of granting these letters-patent, and of the discovery of the continent of *North America, by the Europeans, and during the whole intermediate time, the whole of the territory in the letters- [*545 patent described, except a small district on James river, where a settlement of Europeans had previously been made, was held, occupied and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever: and that in making settlements within this territory, and in all the other parts of North America, where settlements were made, under the authority of the English government, or by its subjects, the right of soil was previously obtained, by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured.

4th. That in the year 1624, this corporation was dissolved by due course of law, and all its powers, together with its rights of soil and jurisdiction, under the letters-patent in question, were re-vested in the crown of England; whereupon, the colony became a royal government, with the same territorial limits and extent which had been established by the letters-patent, and so continued, until it became a free and independent state; except so far as its limits and extent were altered and curtailed by the treaty of February 10th, 1763, between Great Britain and France, and by the letters-patent granted by the king of England, *for establishing the colonies of Carolina, Maryland and Pennsylvania. [*546

5th. That some time previous to the year 1756, the French government, laying a claim to the country west of the Allegheny or Appalachian mountains, on the Ohio and Mississippi rivers, and their branches, took possession of certain parts of it, with the consent of the several tribes or nations of Indians possessing and owning them; and with the like consent, established several military posts and settlements therein, particularly at Kaskaskias, on the river Kaskaskias, and at Vincennes, on the river Wabash, within the limits of the colony of Virginia, as described and established in and by the letters-patent of May 23d, 1609; and that the government of Great Britain, after complaining of these establishments as encroachments, and remonstrating against them, at length, in the year 1756, took up arms to resist and repel them; which produced a war between those two nations, wherein the Indian tribes inhabiting and holding the countries north-west of the Ohio, and on the Mississippi, above the mouth of the Ohio, were the allies of France, and the Indians known by the name of the Six Nations, or the Iroquois, and their tributaries and allies, were the allies of Great Britain; and that on the 10th of February 1763, this war was terminated by a definitive treaty of peace between Great Britain and France, and their allies, by which it was stipulated and agreed, that the river Mississippi, from its source to the Iberville, should for ever after form the boundary between the dominions of *Great Britain and those of France, in that part of North America, and between their respective allies there. [*547

6th. That the government of Virginia, at and before the commencement of this war, and at all times after it became a royal government, claimed and exercised jurisdiction, with the knowledge and assent of the govern-

ment of Great Britain, in and over the country north-west of the river Ohio, and east of the Mississippi, as being included within the bounds and limits described and established for that colony, by the letters-patent of May 23d, 1609; and that in the year 1749, a grant of 600,000 acres of land, within the country north-west of the Ohio, and as part of Virginia, was made by the government of Great Britain to some of its subjects, by the name and style of the Ohio Company.

7th. That at and before the commencement of the war in 1756, and during its whole continuance, and at the time of the treaty of February 10th, 1763, the Indian tribes or nations, inhabiting the country north and north-west of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami, were called and known by the name of the Western Confederacy of Indians, and were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each, *which
*548] they had ceded to France, and she held under them, and among which were the aforesaid posts of Kaskaskias and Vincennes; and that these Indians, after the treaty, became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property; the territories of the respective tribes being separated from each other, and distinguished by certain natural marks and boundaries, to the Indians well known; and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil.

8th. That among the tribes of Indians, thus holding and inhabiting the territory north and north-west of the Ohio, east of the Mississippi, and west of the Great Miami, within the limits of Virginia, as described in the letters-patent of May 23d, 1609, were certain independent tribes or nations, called the Illinois or Kaskaskias, and the Piankeshaw or Wabash Indians; the first of which consisted of three several tribes united into one, and called the Kaskaskias, the Pewarias and the Cahoquias; that the Illinois owned, held and inhabited, as their absolute and separate property, a large tract of country, within the last-mentioned limits, and situated on the Mississippi, Illinois and Kaskaskias rivers, and on the Ohio, below the mouth of the Wabash; and the Piankeshaws, another large tract of country, within the same
*549] *limits, and as their absolute and separate property, on the Wabash and Ohio rivers; and that these Indians remained in the sole and absolute ownership and possession of the country in question, until the sales made by them, in the manner hereinafter set forth.

9th. That on the termination of the war between Great Britain and France, the Illinois Indians, by the name of the Kaskaskias tribes of Indians, as fully representing all the Illinois tribes then remaining, made a treaty of peace with Great Britain, and a treaty of peace, limits and amity, under her mediation, with the Six Nations, or Iroquois, and their allies, then known and distinguished by the name of the Northern Confederacy of Indians; the Illinois being a part of the confederacy then known and distinguished by

the name of the Southern Confederacy, and sometimes by that of the Western Confederacy.

10th. That on the 7th of October 1763, the king of Great Britain made and published a proclamation, for the better regulation of the countries ceded to Great Britain by that treaty, which proclamation is referred to, and made part of the case.

11th. That from time immemorial, and always up to the present time, all the Indian tribes, or nations of North America, and especially the Illinois and Piankeshaws, and other tribes holding, possessing and inhabiting the said countries north and north-west of the Ohio, east of the Mississippi, and west of the Great Miami, held their respective lands and territories, each in common, the individuals *of each tribe or nation holding the lands and territories of such tribe, in common with each other, and there [*550 being among them no separate property in the soil; and that their sole method of selling, granting and conveying their lands, whether to governments or individuals, always has been, from time immemorial, and now is, for certain chiefs of the tribe selling, to represent the whole tribe, in every part of the transaction; to make the contract, and execute the deed, on behalf of the whole tribe; to receive for it the consideration, whether in money or commodities, or both; and finally, to divide such consideration among the individuals of the tribe: and that the authority of the chiefs, so acting for the whole tribe, is attested by the presence and assent of the individuals composing the tribe, or some of them, and by the receipt by the individuals composing the tribe, of their respective shares of the price, and in no other manner.

12th. That on the 5th of July 1773, certain chiefs of the Illinois Indians, then jointly representing, acting for, and being duly authorized by that tribe, in the manner explained above, did, by their deed-poll, duly executed and delivered, and bearing date on that day, at the post of Kaskaskias, then being a British military post, and at a public counsel there held by them, for and on behalf of the said Illinois nation of Indians, with William Murray, of the Illinois country, merchant, acting for himself and for Moses Franks and Jacob Franks, of London, in Great Britain, David Franks, John Inglis, Bernard Gratz, Michael *Gratz, Alexander Ross, David Sproat and James Milligan, all of Philadelphia, in the province of Pennsylva- [*551 nia; Moses Franks, Andrew Hamilton, William Hamilton and Edmund Milne, of the same place; Joseph Simons, otherwise called Joseph Simon, and Levi Andrew Levi, of the town of Lancaster, in Pennsylvania; Thomas Minshall, of York county, in the same province; Robert Callender and William Thompson, of Cumberland county, in the same province; John Campbell, of Pittsburgh, in the same province; and George Castles and James Ramsay, of the Illinois country; and for a good and valuable consideration in the said deed stated, grant, bargain, sell, alien, lease, enfeoff and confirm to the said William Murray, Moses Franks, Jacob Franks, David Franks, John Inglis, Bernard Gratz, Michael Gratz, Alexander Ross, David Sproat, James Milligan, Andrew Hamilton, William Hamilton, Edmund Milne, Joseph Simons, otherwise called Joseph Simon, Levi Andrew Levi, Thomas Minshall, Robert Callender, William Thompson, John Campbell, George Castles and James Ramsay, their heirs and assigns for ever, in severalty, or to George the Third, then King of Great Britain

and Ireland, his heirs and successors, for the use, benefit and behoof of the grantees, their heirs and assigns, in severalty, by whichever of those tenures they might most legally hold, all those two several tracts or parcels of land, situated, lying and being within the limits of Virginia, on the east of the Mississippi, north-west of the Ohio, and west of the Great Miami, and thus butted *and bounded :

*552] Beginning, for one of the said tracts, on the east side of the Mississippi, at the mouth of the Heron creek, called by the French the river of Mary, being about a league below the mouth of the Kaskaskias river, and running thence a northward of east course, in a direct line, back to the Hilly plains, about eight leagues more or less ; thence the same course, in a direct line to the Crab Tree plains, about seventeen leagues more or less ; thence the same course, in a direct line, to a remarkable place known by the name of the Big Buffalo Hoofs, about seventeen leagues more or less ; thence the same course, in a direct line to the Salt Lick creek, about seven leagues more or less ; then crossing the Salt Lick creek, about one league below the ancient Shawanese town, in an easterly, or a little to the north of east, course, in a direct line, to the river Ohio, about four leagues more or less ; then down the Ohio, by its several courses, until it empties into the Mississippi, about thirty-five leagues more or less ; and then up the Mississipi, by its several courses, to the place of the beginning, about thirty-three leagues more or less :

And beginning, for the other tract, on the Mississippi, at a point directly opposite to the mouth of Missouri, and running up the Mississippi, by its several courses, to the mouth of the Illinois, about six leagues more or less ; and thence up the Illinois, by its several courses, to Chicagou or Garlic creek, about ninety legues, more or less ; thence nearly a northerly course, in a direct line, to a certain remarkable place, being the ground on which a

*553] *battle was fought, about forty or fifty years before that time, between the Pewaria and Renard Indians, about fifty leagues more or less ; thence by the same course, in a direct line, to two remarkable hills, close together, in the middle of a large prairie or plain, about fourteen leagues more or less ; thence a north of east course, in a direct line, to a remarkable spring, known by the Indians by the name of "Foggy Spring," about fourteen leagues more or less ; thence the same course, in a direct line, to a great mountain, to the north-west of the White Buffalo plain, about fifteen leagues more or less ; and thence nearly a south-west course to the place of beginning, about forty leagues more or less :

To have and to hold the said two tracts of land, with all and singular their appurtenances, to the grantees, their heirs and assigns, for ever, in severalty, or to the king, his heirs and successors, to and for the use, benefit or behoof of the grantees, their heirs and assigns, for ever, in severalty : as will more fully appear by the said deed-poll, duly executed under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 2d of September 1773, in the office of Vicerault Lemerance, a notary-public, duly appointed and authorized. This deed, with the several certificates annexed to or indorsed on it, was set out at length in the case.

13th. That the consideration in this deed expressed, was of the value of $24,000, current money of the United States, and upwards, and was paid and delivered, at the time of the execution of the deed, by William Murray, one

*of the grantees, in behalf of himself and the other grantees, to the Illinois Indians, who freely accepted it, and divided it among themselves; that the conferences in which the sale of these lands was agreed on and made, and in which it was agreed that the deed should be executed, were publicly held, for the space of a month, at the post of Kaskaskias, and were attended by many individuals of all the tribes of Illinois Indians, besides the chiefs named as grantors in the deed; that the whole transaction was open, public and fair, and the deed fully explained to the grantors and other Indians, by the sworn interpreters of the government, and fully understood by the grantors and other Indians, before it was executed; that the several witnesses to the deed, and the grantees named in it, were such persons, and of such quality and stations, respectively, as they are described to be in the deed, the attestation, and the other indorsements on it; that the grantees did duly authorize William Murray to act for and represent them, in the purchase of the lands, and the acceptance of the deed; and that the two tracts or parcels of land which it describes, and purports to grant, were then parts of the lands held, possessed and inhabited by the Illinois Indians, from time immemorial, in the manner already stated.

14th. That all the persons named as grantees in this deed, were, at the time of its execution, and long before, subjects of the crown of Great Britain, and residents of the several places named in the deed as their places of residence; and that *they entered into the land, under and by virtue of [*555
the deed, and became seised as the law requires.

15th. That on the 18th of October 1775, Tabac, and certain other Indians, all being chiefs of the Piankeshaws, and jointly representing, acting for, and duly authorized by that nation, in the manner stated above, did, by their deed-poll, duly executed, and bearing date on the day last mentioned, at the post of Vincennes, otherwise called post St. Vincent, then being a British military post, and at a public council there held by them, for and on behalf of the Piankeshaw Indians, with Louis Viviat, of the Illinois country, acting for himself, and for the Right Honorable John, Earl of Dunmore, then governor of Virginia, the Honorable John Murray, son of the said Earl, Moses Franks and Jacob Franks, of London, in Great Britain, Thomas Johnson, jr., and John Davidson, both of Annapolis, in Maryland, William Russel, Matthew Ridley, Robert Christie, sen., and Robert Christie, jr., of Baltimore town, in the same province, Peter Campbell, of Piscataway, in the same province, William Geddes, of Newtown Chester, in the same province, collector of his majesty's customs, David Franks and Moses Franks, both of Philadelphia, in Pennsylvania, William Murray and Daniel Murray, of the Illinois country, Nicholas St. Martin and Joseph Page, of the same place, Francis Perthuis, late of Quebec, in Canada, but then of post St. Vincent, and for good and valuable considerations, in the deed-poll mentioned and enumerated, grant, bargain, sell, alien, enfeoff, release, ratify and *confirm to the said Louis Viviat, and the other persons last men- [*556
tioned, their heirs and assigns, equally to be divided, or to George III., then King of Great Britain and Ireland, his heirs and successors, for the use, benefit and behoof of all the above-mentioned grantees, their heirs and assigns, in severalty, by which ever of those tenures they might most legally hold, all those two several tracts of land, in the deed particularly described, situate, lying and being north-west of the Ohio, east of the Mis-

sissippi, and west of the Great Miami, within the limits of Virginia, and on both sides of the Ouabache, otherwise called the Wabash ; which two tracts of land are contained respectively within the following metes and bounds, courses and distances, that is to say :

Beginning, for one of the said tracts, at the mouth of a rivulet called Riviere du Chat, or Cat river, where it empties itself into the Ouabache or Wabash, by its several courses, to a place called Point Coupee, about twelve leagues above post St. Vincent, being forty leagues, or thereabouts, in length, on the said river Ouabache, from the place of beginning, with forty leagues in width or breadth, on the east side, and thirty leagues in breadth or width, on the west side of that river, to be continued along from the place of beginning to Point Coupee. And beginning, for the other tract, at the mouth of White river, where it empties into the Ouabache, about twelve leagues below post St. Vincent, and running thence down the Ouabache, by its several courses, until it empties into the Ohio ; being from White river to the Ohio, about fifty-three leagues in length, more or less, with forty
*557] *leagues in width or breadth on the east side, and thirty in width or breadth, on the west side of the Ouabache, to be continued along from the White river to the Ohio ; with all the rights, liberties, privileges, hereditaments and appurtenances, to the said tract belonging :

To have and to hold to the grantees, their heirs and assigns, for ever, in severalty, or to the king, his heirs and successors, for the use, benefit and behoof of the grantees, their heirs and assigns ; as will more fully appear by the deed itself, duly executed under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 5th of December 1775, in the office of Louis Bomer, a notary-public, duly appointed and authorized. This deed, with the several certificates annexed to or indorsed on it, was set out at length.

16th. That the consideration in this deed expressed, was of the value of $31,000, current money of the United States, and upwards, and was paid and delivered, at the time of the execution of the deed, by the grantee, Lewis Viviat, in behalf of himself and the other grantees, to the Piankeshaw Indians, who freely accepted it, and divided it among themselves ; that the conferences in which the sale of these two tracts of land was agreed on and made, and in which it was agreed, that the deed should be executed, were publicly held for the space of a month, at the post of Vincennes, or post St. Vincent, and were attended by many individuals of the Piankeshaw nation of Indians, besides the chiefs named as grantors in the deed ; that the whole
*558] *transaction was open, public and fair, and the deed fully explained to the grantors and other Indians, by skilful interpreters, and fully understood by them, before it was executed ; that it was executed in the presence of the several witnesses by whom it purports to have been attested, and was attested by them ; that the grantees were all subjects of the crown of Great Britain, and were of such quality, station and residence, respectively, as they are described in the deed to be ; that the grantees did duly authorize Lewis Viviat to act for, and representthem, in the purchase of these two tracts of land, and in the acceptance of the deed ; that these tracts of land were then part of the lands held, possessed and inhabited by the Piankeshaw Indians, from time immemorial, as is stated above ; and that the several grantees under this deed entered into the land which it purports to grant, and become seised as the law requires.

17th. That on the 6th of May 1776, the colony of Virginia threw off its dependence on the crown and government of Great Britain, and declared itself an independent state and government, with the limits prescribed and established by the letters-patent of May 23d, 1609, as curtailed and restricted by the letters-patent establishing the colonies of Pennsylvania, Maryland and Carolina, and by the treaty of February 10th, 1763, between Great Britain and France; which limits, so curtailed and restricted, the state of Virginia, by its constitution and form of government, declared should be and remain the limits of the state, and should bound its western and north-western extent.

*18th. That on the 5th of October 1778, the general assembly of Virginia, having taken by arms the posts of Kaskaskias and Vincennes, or St. Vincent, from the British forces, by whom they were then held, and driven those forces from the country north-west of the Ohio, east of the Mississippi, and west of the Great Miami, did, by an act of assembly of that date, entitled, "an act for establishing the county of Illinois, and for the more effectual protection and defence thereof," erect that country, with certain other portions of territory within the limits of the state, and north-west of the Ohio, into a county, by the name of the county of Illinois. [*559

19th. That on the 20th of December 1783, the state of Virginia, by an act of assembly of that date, authorized their delegates in the congress of the United States, or such of them, to the number of three at least, as should be assembled in congress, on behalf of the state, and by proper deeds or instruments in writing, under their hands and seals, to convey, transfer, assign and make over to the United States, in congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which Virginia had to the territory of tract of country within her limits, as defined and prescribed by the letters-patent of May 23d, 1609, and lying to the north-west of Ohio; subject to certain limitations and conditions in the act prescribed and specified; and that on the 1st of March 1784, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, then being four of the delegates *of Virginia to the congress of the United States, did, by their deed-poll, under their hands and seals, in pursuance and execution of the authority to them given by this act of assembly, convey, transfer, assign and make over to the United States, in congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which that state had to the territory north-west of the Ohio, with the reservations, limitations and conditions in the act of assembly prescribed; which cession the United States accepted. [*560

20th. That on the 20th day of July, in the year of our Lord 1818, the United States, by their officers duly authorized for that purpose, did sell, grant and convey to the defendant in this action, William McIntosh, all those several tracts or parcels of land, containing 11,560 acres, and butted, bounded and described, as will fully appear in and by the patent for the said lands, duly executed, which was set out at length.

21st. That the lands described and granted in and by this patent, are situated within the state of Illinois, and are contained within the lines of the last, or second, of the two tracts, described and purporting to be granted and conveyed to Louis Viviat and others, by the deed of October 18th, 1775 and that William McIntosh, the defendant, entered upon these lands,

under and by virtue of his patent, and became possessed thereof, before the institution of this suit.

*561] 22d. That Thomas Johnson, one of the grantees, *in and under the deed of October 18th, 1775, departed this life, on or about the 1st day of October 1819, seised of all his undivided part or share of and in the two several tracts of land, described and purporting to be granted and conveyed to him and others by that deed, having first duly made and published his last will and testament in writing, attested by three credible witnesses, which he left in full force, and by which he devised all his undivided share and part of those two tracts of land, to his son, Joshua Johnson, and his heirs, and his grandson, Thomas J. Graham, and his heirs, and the lessors of the plaintiff in this action, as tenants in common.

23d. That Joshua Johnson and Thomas J. Graham, the devisees, entered into the two tracts of land last above mentioned, under and by virtue of the will, and became thereof seised as the law requires. That Thomas Johnson, the grantee and devisor, during his whole life, and at the time of his death, was an inhabitant and citizen of the state of Maryland; that Joshua Johnson and Thomas J. Graham, the lessors of the plaintiff, now are, and always have been citizens of the same state; that the defendant, William McIntosh, now is, and at and before the time of bringing this action was, a citizen of the state of Illinois; and that the matter in dispute in this action is of the the value of $2000, current money of the United States, and upwards.

24th. And that neither William Murray, nor any other of the grantees under the deed of July the 5th, 1773, nor Louis Viviat, nor any other of the

*562] *grantees under the deed of October the 8th, 1775, nor any person for them, or any of them, ever obtained, or had the actual possession, under and by virtue of those deeds, or either of them, of any part of the lands in them, or either of them, described and purporting to be granted; but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles which preceded it, from obtaining such possession; and that since the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781, till the year 1816, petitioned the congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

February 17th–19th. The cause was argued by *Harper* and *Webster*, for the plaintiffs, and by *Winder* and *Murray*, for the defendants. But as the arguments are so fully stated in the opinion of the court, it is deemed unnecessary to give anything more than the following summary.

On the part of the *plaintiffs*, it was contended: 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem,

*563] therefore, to be unnecessary, and merely speculative, to discuss *the question respecting the sort of title or ownership, which may be

thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstance, that the members of the society held in common, did not affect the strength of their title by occupancy. Grotius, *de Jure Belli ac Pacis*, lib. 2, c. 2, § 4; lib. 2, c. 24, § 9; Puffend. lib. 4, c. 5, § 1, 3. In the memorial or manifesto of the British government, in 1755, a right of soil in the Indians is admitted. It is also admitted in the treaties of Utrecht and Aix-la-Chapelle. The same opinion has been expressed by this court, *Fletcher* v. *Peck*, 6 Cranch 87; and by the supreme court of New York, *Jackson* v. *Wood*, 7 Johns. 296. In short, all, or nearly all, the lands in the United States, is holden under purchases from the Indian nations; and the only question in this case must be, whether it be competent to individuals to make such purchases, or whether that be the exclusive prerogative of government.

2. That the British king's proclamation, of October 7th, 1763, could not affect this right of the Indians to sell; because they were not British subjects, nor in any manner bound by the authority of the British government, legislative or executive. And because, even admitting them to be British subjects, absolutely, or *sub modo*, they were still proprietors of the soil, and could not be divested of their rights of property, or any of its *incidents, by a mere act of the executive government, such as this proclamation. [*564

3. That the proclamation of 1763 could not restrain the purchasers under these deeds from purchasing; because the lands lay within the limits of the colony of Virginia, of which, or of some other British colony, the purchasers, all being British subjects, were inhabitants. And because the king had not, within the limits of that colonial government, or any other, any power of prerogative legislation; which is confined to countries newly conquered, and remaining in the military possession of the monarch, as supreme chief of the military forces of the nation. The present claim has long been known to the government of the United States, and is mentioned in the Collection of Land Laws, published under public authority. The compiler of those laws supposes this title void, by virtue of the proclamation of 1763. But we have the positive authority of a solemn determination of the court of king's bench, on this very proclamation, in the celebrated *Grenada Case*, for asserting that it could have no such effect. (*Campbell* v. *Hall*, Cowp. 204.) This country being a new conquest, and a military possession, the crown might exercise legislative powers, until a local legislature was established. But the establishment of a government, establishes a system of laws, and excludes the power of legislating by proclamation. The proclamation could not have the force of law, within the chartered limits of Virginia. A proclamation, *that no person should purchase land in England or Canada, would be clearly void. [*565

4. That the act of assembly of Virginia, passed in May 1779,(a) cannot

(a) This statute is as follows: "An act for declaring and asserting the rights of this commonwealth, concerning purchasing lands from Indian natives. To remove and prevent all doubt concerning purchases of lands from the Indian natives, be it declared by the general assembly, that this commonwealth hath the exclusive right of

affect the right of the plaintiffs, and others claiming under these deeds; because, on general principles, and by the constitution of Virginia, the legislature was not competent to take away private, vested rights, or appropriate private property to public use, under the circumstances of this case. *566] And because the act is not *contained in the revisal of 1794, and must, therefore, be considered as repealed; and the repeal re-instates all rights that might have been affected by the act, although the territory, in which the lands in question lie, was ceded to the United States, before the repeal. The act of 1779 was passed, after the sales were made, and it cannot affect titles previously obtained. At the time of the purchases, there was no law of Virginia rendering such purchases void. If, therefore, the purchases were not affected by the proclamation of 1763, nor by the act of 1779, the question of their validity comes to the general inquiry, whether individuals, in Virginia, at the time of this purchase, could legally obtain Indian titles. In New England, titles have certainly been obtained in this mode. But whatever may be said on the more general question, and in reference to other colonies or states, the fact being, that in Virginia, there was no statute existing at the time, against such purchases, mere general considerations would not apply. It may be true, that in almost all the colonies, individual purchases from the Indians were illegal; but they were rendered so by express provisions of the local law. In Virginia, also, it may be true, that such purchases have generally been prohibited; but at the time the purchases now in question were made, there was no prohibitory law in existence. The old colonial laws on the subject had all been repealed. The act of 1779 was a private act, so far as respects this case. It is the same as if it had enacted, that these particular deeds were void. Such acts *567] *bind only those who are parties to them, who submit their case to the legislature.

On the part of the *defendants*, it was insisted, that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remained in a state of nature, and have never been admitted into the general society of nations. *Penn* v. *Lord Baltimore*, 1 Ves. 445; 2 Ruth. Inst. 29; Locke, Govern-

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pre-emption from the Indians, of all the lands within the limits of its own chartered territory, as described by the act and constitution of government, in the year 1776. That no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchases on the public account, formerly for the use and benefit of the colony, and lately of the commonwealth, and that such exclusive right or pre-emption will and ought to be maintained by this commonwealth, to the utmost of its power. And be it further declared and enacted, that every purchase of lands heretofore made, by, or on behalf of, the crown of England or Great Britain, from any Indian nation or nations, within the before-mentioned limits, doth and ought to inure for ever, to and for the use and benefit of this commonwealth, and to or for no other use or purpose whatsoever; and that all sales and deeds which have been, or shall be, made by any Indian or Indians, or by any Indian nation or nations, for lands within the said limits, to or for the separate use of any person or persons whatsoever, shall be, and the same are, hereby declared utterly void and of no effect."

ment, B. 2, c. 7, § 87–9; c. 12, § 143; c. 9, § 123–30; Jefferson's Notes 126; Colden's Hist. Five Nations 2–16; Smith's Hist. New York 35–41; Montesquieu, *Esprit des Loix*, liv. 18, c. 11, 12, 13; Smith's Wealth of Nations, B. 5, c. 1. All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers. 5 Annual Reg. 56, 233; 7 Niles' Reg. 229. Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil, as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives. Marten's Law of Nations 67, 60; Vattel, *Droit des Gens*, lib. 2, c. 7, § 83; lib. 1, c. 18, § 204–5. The sovereignty and *eminent domain thus acquired, necessarily precludes the idea of any [*568 other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty, and the domain acquired with it. Even if it should be admitted, that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another, is no longer a sovereign state. Vattel, lib. 1, c. 1, § 11. The same treaties and negotiations, before referred to, showed their dependent condition. Or, if it be admitted, that they are now independent and foreign states, the title of the plaintiffs would still be invalid: as grantees from the Indians, they must take according to their laws of property, and as Indians subjects. The law of every dominion affects all persons and property situate within it (Cowp. 204); and the Indians never had any idea of individual property in lands. It cannot be said, that the lands conveyed were disjoined from their dominion; because the grantees could not take the sovereignty and eminent domain to themselves.

Such then, being the nature of the Indian title to lands, the extent of their right of alienation must depend upon the laws of the dominion under which they live. They are subject to the sovereignty of the United States. The subjection proceeds from their residence within our territory *and [*569 jurisdiction. It is unnecessary to show that they are not citizens, in the ordinary sense of that term, since they are destitute of the most essential rights which belong to that character. They are of that class who are said by jurists not to be citizens, but perpetual inhabitants, with diminutive rights. Vattel, lib. 1, c. 19, § 213. The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government. The act of Virginia of 1662, forbade purchases from the Indians, and it does not appear that it was ever repealed. The act of 1779 is rather to be regarded as a declaratory act, founded upon what has always been regarded as the settled law. These statutes seem to define sufficiently the nature of the Indian title to lands; a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property, capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of

nature, by the extent of men's wants, and their capacity of using it to supply them. Grotius, lib. 2, c. 11 ; Barbeyr. ; Puffend. lib. 4, c. 4, § 2, 4 ; 2 Bl. Com. 2 ; Puffend. lib. 4, c. 6, § 3 ; Locke on Government, B. 2, c. 5, § 26, 34–40. It is a violation of the rights of others, to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle, the North American Indians could have acquired no proprietary
*570] interest in the vast tracts *of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive. Locke, c. 5, § 36–48 ; Grotius, lib. 2, c. 11, § 2 ; Montesq. tom. 2, p. 63 ; Chalmers' Polit. Annals, 5 ; 6 Cranch 87. According to every theory of property, the Indians had no individual rights to land ; nor had they any, collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest can rest on other basis ; and all existing titles depend on the fundamental title of the crown by discovery. The title of the crown (as representing the nation) passed to the colonists by charters, which were absolute grants of the soil ; and it was a first principle in colonial law, that all titles must be derived from the crown. It is true, that, in some cases, purchases were made by the colonies from the Indians ; but this was merely a measure of policy to prevent hostilities ; and William Penn's purchase, which was the most remarkable transaction of this kind, was not deemed to add to the strength of his title. *Penn* v. *Lord Baltimore*, 1 Ves. 444 ; Chalmers' Polit. Annals 644 ; Sullivan's Land Tit. c. 2 ; Smith's Hist. N. Y. 145, 184. In most of
*571] the colonies, the *doctrine was received, that all titles to land must be derived exclusively from the crown, upon the principle that the settlers carried with them, not only all the rights, but all the duties of Englishmen ; and particularly the laws of property, so far as they are suitable to their new condition. 1 Bl. Com. 107 ; 2 P. Wms. 75 ; 1 Salk. 411, 616. In New England alone, some lands have been held under Indian deeds. But this was an anomaly arising from peculiar local and political causes. Sulliv. Land Tit. 45.

As to the effect of the proclamation of 1763 : if the Indians are to be regarded as independent sovereign states, then, by the treaty of peace, they became subject to the prerogative legislation of the crown, as a conquered people, in a territory acquired, *jure belli*, and ceded at the peace. Cowp. 204 ; 7 Co. 17 *b* ; 2 Meriv. 143. If, on the contrary, this country be regarded as a royal colony, then the crown had a direct power of legislation ; or, at least, the power of prescribing the limits within which grants of land and settlements should be made within the colony. The same practice always prevailed, under the proprietary governments, and has been followed by the government of the United States.

March 10th, 1823. MARSHALL, Ch. J., delivered the opinion of the court.—The plaintiffs in this cause claim the land in their declaration men-
*572] tioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain *Indian tribes, constituting

the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the courts of the United States? The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title, which can be sustained in the courts of this country.

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot, be drawn into question; as the title to lands, especially, is, and must be, admitted, to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not simply those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an *ample field to the ambition [*573
and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

*In the establishment of these relations, the rights of the original [*574
inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle,

that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France, also, founded her title to the
*575] vast territories she claimed in America on discovery. However *conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country, not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters-patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant-General, and the representative of the king, in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants, to give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out, and give title to lands, according to his own judgment. The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they claimed under the title acquired by this
*576] voyage. *Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States-General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands. The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia.

To this discovery, the English trace their title. In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people;" and of these countries, Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, *notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting [*577 the prior title of any Christian people who may have made a previous discovery. The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America, lying on the sea-coast, between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies, at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees. In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and *into the land throughout from sea to [*578 sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the court of king's bench, on a writ of *quo warranto;* but the whole effect allowed to this judgment was, to revest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude. Under this patent, New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers. Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves; and in 1635, surrendered their charter to the crown. A patent was granted to Gorges, for Maine, which was allotted to him in the division of property. All the grants made by the Plymouth Company, so far as we can learn, have been respected.

In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New England, as far south as the Del- [*579 aware *bay. His royal highness transferred New Jersey to Lord

Berkeley and Sir George Carteret. In 1663, the crown granted to Lord Clarendon and others, the country lying between the 36th degree of north latitude and the river St. Mathes; and in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America, which lies from 36 degrees 30 minutes north latitude to the 29th degree, and from the Atlantic ocean to the south sea.

Thus has our whole country been granted by the crown, while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government, at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown, unaccompanied by the powers of government, as in the case of the northern neck
*580] of Virginia. It has never *been objected to this, nor to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected. Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but
*581] retained his title to the soil. That *title was respected until the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations and treaties, which the different nations, claiming territory in America, have carried on, and held with each other. The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody; and continued, until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two

crowns, as to suspend or terminate them. Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began, as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris. Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the 12th article of the treaty of Utrecht, made in 1703, his most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred. The treaty of Aix-la-Chapelle, which was made *on the principle of the *status ante bellum*, did not remove this subject of [*582 controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful, arguments, in favor of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians. This river was comprehended in the chartered limits of Virginia; but though the right of England to a reasonable extent of country, in virtue of her discovery of the sea-coast, and of the settlements she made on it, was not to be questioned, her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognised by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She, therefore, sought to strengthen her original title to *the lands in controversy, by insisting that it had been acknowledged [*583 by France, in the 15th article of the treaty of Utrecht. The dispute respecting the construction of that article has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguised.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain, all Nova Scotia or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was

occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed, that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after-attempt to purchase it from the Indians, would have been considered *and treated as an invasion of the territories of France.
*584]

By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or south-east of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians. By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly, by the Indians. Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It *has never been doubted, that either
*585] the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase; formerly for the use and benefit of the colony, and lately for the commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers. Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government. In pursuance of the same idea, Virginia proceeded, at the same session, to open her *land-office, for the sale of that country
*586] which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The states, having within their chartered limits differe territory covered by Indians, ceded that territory, generally, States, on conditions expressed in their deeds of cession, whic the opinion, that they ceded the soil as well as jurisdiction, and so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bonâ fide* disposed of for that purpose, and for no other use or purpose whatsoever." The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

*After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians. The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war. Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America. [*587

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never *been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. [*588

We will not enter into the controversy, whether agriculturists, merchants

and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the titles which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title *to
*589] a vast portion of the lands we now hold, orignates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them. The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers. When the conquest is complete, and the conquered inhabitants can be
*590] blended with the conquerors, *or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them, without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence. What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred. Frequent and bloody wars, in which the whites were not always the aggressors, unavoida-

bly ensued. European policy, numbers and skill prevailed; as the white population advanced, that of the Indians necessarily receded; the country in the immediate neighborhood of agriculturists became unfit for them; the game fled *into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being [*591 no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty. However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be *adapted to the actual condition of the two people, it [*592 may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

This question is not entirely new in this court. The case of *Fletcher* v. *Peck*, grew out of a sale made by the state of Georgia, of a large tract of country within the limits of that state, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was, that the state of Georgia was, at the time of sale, seised in fee of the premises. The real question presented by the issue was, whether the seisin in fee was in the state of Georgia, or in the United States. After stating, that this controversy between the several states and the United States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts, until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the state. This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, *which deserves [*593 to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might

extinguish the Indian title, for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the court of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty. As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a court to say, that different consequences are attached to this purchase, because it was made by a
*594] stranger. By the treaties concluded *between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.

The proclamation issued by the king of Great Britain, in 1763, has been considered, and we think, with reason, as constituting an additional objection to the title of the plaintiffs. By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands. It has been contended, that, in this proclamation, the king transcended his constitutional powers; and the case of *Campbell* v. *Hall* (reported by Cowper), is relied on to support this posi-
*595] tion. *It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it. If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is sup-

posed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognised in America as in the islands of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as *impairing its right to grant lands within the chartered limits of such colony. In addition to the [*596 proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged. So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects, as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for *the preservation of peace; and that their friendship should be secured by quieting their alarms for their [*597 property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

In the case of *Campbell* v. *Hall*, that part of the proclamation was determined to be illegal, which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted. The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts.

In the argument of this cause, the counsel for the plaintiffs have relied

very much on the opinions expressed by men holding offices of trust, and on various proceedings in America, to sustain titles to land derived from the Indians. The collection of claims to lands lying in the western country, made in the 1st volume of the Laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most
*598] of the titles were derived *from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim, are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the royal proclamation of 1763. It is not unworthy of remark, that the usual mode adopted by the Indians for granting lands to individuals, has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding, that the validity even of such a grant depended on its receiving the royal sanction.

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognised by the legitimate authority; and on the violation by the colony of rights thus reserved and secured. We do not perceive, in that case, any assertion of the principle, that individuals might obtain a complete and valid title from the Indians.

It has been stated, that in the memorial transmitted from the Cabinet of London to that of Versailles, during the controversy between the two nations, respecting boundary, which took place in 1755, the Indian right to
*599] the soil is recognised. *But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of his Britannic majesty to dominion over them.

The opinion of the attorney and solicitor-general, Pratt and Yorke, have been adduced to prove, that, in the opinion of those great law-officers, the Indian grant could convey a title to the soil, without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law-officers, ought to be very explicit, and accompanied by the circumstances under which it was given, and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe, that the author of "Plain Facts" is, in this respect, correct. The opinion commences thus: "In respect to such places as have been, or shall be acquired,
*600] by treaty or grant, from any of the Indian princes or governments, *your majesty's letters patent are not necessary." The words

"princes or governments," are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefmen, their nations or tribes, not of their "princes or governments." The question on which the opinion was given, too, and to which it relates, was, whether the king's subjects carry with them the common law, wherever they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Much reliance is also placed on the fact, that many tracts are now held in the United States, under the Indian title, the validity of which is not questioned. Before the importance attached to this fact is conceded, the circumstances under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern states. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known, that Mason, to whom New Hampshire, and Gorges, to whom Maine was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their power. The disturbances in *England, and the civil [*601 war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their title. In the meantime, Massachusetts claimed the country and governed it. As her claim was adversary to that of the proprietors, she encouraged the settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men, who held under Massachusetts, and under the Indians. The title of the proprietors was resisted; and though, in some cases compromises were made, and in some, the opinion of a court was given ultimately in their favor, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians, were sanctioned by length of possession; but there is no case, so far as we are informed, of a judicial decision in their favor.

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies, by the king's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode Island recites, "that the said John Clark, and others, had transplanted *themselves into the midst of the Indian nations, and were seised and possessed, by purchase and consent of the said [*602 natives, to their full content, of such lands," &c. And the letter recites, that "Thomas Chifflinch and others, having, in the right of Major Asperton, a just propriety in the Narraghanset country, in New England, by grants from the native princes of that country, and being desirous to improve it into an English colony," &c., "are yet daily disturbed." The impression this language might make, if viewed apart from the circum-

stances under which it was employed, will be effaced, when considered in connection with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home, to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

*603] On the restoration of Charles II., this small society *hastened to acknowledge his authority, and to solicit his confirmation of their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them, containing the recital which has been mentioned. It is obvious, that this transaction can amount to no acknowledgment, that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was, to settle the sea-coast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious, to expel them from their habitations, because they had obtained the Indian title, otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted, is said to be "our island called Rhode Island;" and the charter contains an actual grant of the soil, as well as of the powers of government.

*604] *The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbors, who where disposed to claim some authority over them. The king, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession. This charter, and this letter, certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition, that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving, that, independent of such prohibitions, Indian deeds would be valid. But, we think, this fact, at most,

equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed, is strong evidence of the general opinion, that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion, that the plaintiffs do not exhibit a title which can *be sustained in the courts of the United States; and that there [*605
is no error in the judgment which was rendered against them in the district court of Illinois.

Judgment affirmed, with costs.

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ARCHIBALD GRACIE and others, Plaintiffs in error, *v.* JOHN PALMER and others, Defendants in error.

*Lien for freight.*

By a charter-party, the sum of $30,000 was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and, at the option of the charterer, to Calcutta, and back to Philadelphia (with an addition of $2000, if she should proceed to Calcutta), the whole payable on the return of the ship to Philadelphia, and before the discharge of the cargo there, in approved notes, not exceeding an average time of 90 days from the time at which she should be ready to discharge her cargo: the charterer proceeded in the ship to Calcutta, and with the consent of the master (who was appointed by the ship-owners), entered into an agreement with P. & Co., merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading, stipulating for the delivery of the goods purchased therewith, to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S., of Philadelphia, should be accepted, in which event, the agents of P. & Co. should deliver the goods to the charterer: the goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here:" the bills of exchange drawn by the charterer, were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver, without the payment of freight: *Held*, that the owners of the ship had a lien on these goods for the freight.[1]

Palmer *v.* Gracie, 4 W. C. C. 110, reversed.

*ERROR to the Circuit Court for the Eastern District of Pennsyl- [*606
vania. This was an action of *assumpsit*, brought by the defendants in error against the plaintiffs in error, to recover back the sum of $10,500, paid under the circumstances stated in the following case, to be considered as a special verdict:

On the 23d of October 1818, the defendants, being the owners of the ship America, chartered her to Hugh Chambers, by the following charter-party:

"This charter-party, indented, made and entered upon, this 23d day of October, in the year of our Lord 1818, between Archibald Gracie, William

[1] S. P. Leary *v.* United States, 14 Wall. 607; The Othello, 5 Bl. C. C. 342; Holmes *v.* Pavensted, 5 Sandf. 97; Mactaggert *v.* Henry, 3 E. D. Sm. 390; Hagar *v.* Clark, 78 N. Y. 45.

Gracie and Charles King, the persons constituting the copartnership or house of trade, under the firm and style of Archibald Gracie & Sons, of the city of New York, owners of the ship or vessel called the America, of New York, of the burden of 460 tons or thereabouts, register admeasurement, of the first part, and Hugh Chambers, of the city of Philadelphia, merchant, of the other part, witnesseth, that the said owners have let, and the said Hugh Chambers hath taken and hired, the said vessel, to freight for the voyage, upon the terms and conditions following: Whereupon, the said owners do covenant, promise and agree to and with the said charterer, by these presents, that the said vessel shall be tight, staunch and strong, well and sufficiently fitted, manned, provided and furnished with all things needful and necessary for such vessel, on her intended voyage, hereinafter mentioned,
*607] and provisioned for the term of eighteen months, and *fully and properly armed with large and small arms, and with sufficient ammunition for the same; and that she shall, on or before the 15th day of November next, be in readiness, at the port of Philadelphia, to receive and take on board, and shall there, when tendered within reach of her tackle, receive and take on board, all such lawful goods and merchandise, as the said charterer may think proper to ship, not exceeding what she can reasonably store and carry, over and above her tackle, apparel, provisions, armament and other necessaries, and the privileges hereinafter reserved for the master, and first and second officers, and the lading of the dollars to be shipped by the owners, as hereinafter mentioned; and that the said ship shall be in readiness to sail from Philadelphia aforesaid, and on being loaded and afterwards dispatched, shall and will (wind and weather permitting) set sail from the said port of Philadelphia, on or before the 30th day of November next, and proceed to the island of Madeira; and shall and will there make a right and true delivery of such quantities of goods and merchandise, as shall be there deliverable, loaded at Philadelphia aforesaid, to such persons as the same shall have been consigned to; and the same being so unloaded, the said ship shall and will receive and take on board all such legal goods, wares and merchandise whatsoever, as shall be offered and tendered, within reach of her tackle, by or for account of the said Hugh Chambers, not exceeding as aforesaid. And as soon as the said ship shall be thus loaded at Madeira
*608] aforesaid, *she shall and will set sail and depart from thence (wind and weather permitting), and directly proceed on her voyage, and put into the port of Bombay, in the East Indies; and that she shall, at the option of the said Hugh Chambers, his agent or agents, be allowed also to put into Calcutta, and deliver her cargo and take in returns there. And at the said ports of Bombay and Calcutta, respectively, unlade all such goods and merchandise as shall remain on board, and relade such lawful goods, wares and merchandise, as the said charterer, his agents, factors or assigns, shall think fit to charge and lade on board, over and above, and not exceeding as aforesaid, and the lading, for account of the said owners, in respect of the returns for the said funds, in dollars, to be shipped by them; and that the said ship shall and will, with her said return-loading (wind and weather permitting), sail and proceed back to the said port of Philadelphia; and there deliver unto the said charterer, his executors, administrators or assigns, the full and entire cargo laden and taken on board the said ship at Bombay and Calcutta aforesaid, for his account; upon the entire delivery whereof,

the said intended voyage shall end and be determined (the dangers of the seas, restraints of princes and rulers, and all other unavoidable casualties, always being excepted by these presents). And it is hereby agreed, that the said owners shall load and ship, on board the said vessel, for the said voyage, 15,000 Spanish milled dollars, to be invested in goods and merchandise in India, in like manner *as the residue of the cargo in general and that they shall be chargeable with freight on the returns thereof, [*609 at the rate of $50 per ton; or, if the said returns shall be in goods and merchandise, usually chargeable with, or taken on, freight, by weight, that the same shall be estimated at such rate as shall be equivalent to that sum by the ton; and also, that the commission to be allowed the supercargo of the said ship, shall be a clear commission of five *per centum* on the amount of the investment in India. And it is further agreed, that the said charterer shall furnish and supply the needful and sufficient cabin-stores to and for the supercargo, master and officers of the said ship, for the said voyage, and that the owners shall and will allow and pay to him therefor, the sum of $1500; and also, that the cabin shall belong to the said charterer (excepting the respective state-rooms in which the master and officers shall sleep). And it is hereby further agreed, and granted and reserved, that the master shall have a privilege of six cubic tons, freight free; the first officer a like free privilege of three cubic tons, and the second officer a like free privilege of two cubic tons, provided, that neither of the said privileges shall be used for the purpose of shipping flour out in the said ship. And the said charterer, for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said owners, that the said charterer will well and truly pay and satisfy all the port-charges and expenses of the said ship, as well abroad as at Philadelphia aforesaid, until she shall have discharged *her return-cargo, excepting always the sea-stores, the wages of the [*610 master, officers and crew, and the repairs and outfits of the said ship, with all which she is to be chargeable. And it is hereby further agreed, that there be allowed, and are granted, 120 working days in all, for the loading and unloading of the said ship at the ports and places of loading and delivery, and that the time not used and occupied at one port or place, may be taken or made up at the others, so that the whole do not exceed the number allowed as above mentioned; and that for every detention, over and above the said 120 days, the said charterers shall pay to the said owners the sum of $75 per day, to be paid in like manner as the freight. And the said charterer, for himself, his heirs, executors and administrators, doth hereby promise and agree, with the said owners, their executors, administrators and assigns, that he will cause the said ship or vessel to be loaded at the said port of Philadelphia, on her being in readiness to receive her funds and cargo there, and reloaded at the island of Madeira, and at Bombay and Calcutta, in the manner above expressed; and that he will pay to them, on the return of the said ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she shall be ready to discharge her cargo, the clear sum of $30,000; and if she shall have proceeded to Calcutta, the further sum of $2000, for the hire and freight of the said ship, for *the said [*611 voyage. In witness whereof, the said owners and charterer have to

these presents, in duplicate, set their hands and seals, the day and year first above written. ARCH. GRACIE & SONS. [L. S.]
HUGH CHAMBERS." [L. L.]

On the 28th of November 1818, the America sailed from Philadelphia, upon the voyage in the charter-party mentioned, laden with sundry goods, and also $15,000 in specie, the property of the defendants. The flour and other merchandise were delivered at Madeira, and the quantity of 207 pipes of wine, purchased with the proceeds, or part thereof, was there laden on board the America, and made deliverable in India. The America proceeded from Madeira to Calcutta, where the quantity of about 324 tons of her burden was filled up from the proceeds of the outward cargo, and with such parts of the wine, taken in at Madeira, as was not disposed of at Calcutta; and the merchandise so taken in was made deliverable to sundry consignees, in the port of Philadelphia. Hugh Chambers, the charterer, was on board the said ship, at Calcutta, and it was impracticable to obtain any freight for the said ship, at the said port, beyond the amount so laden as aforesaid; nor could any person be induced there to ship on board of her any other goods, deliverable in the United States, upon the condition of paying, or being liable for, any freight whatever. Whereupon, the said Chambers applied to the plaintiffs to make him an advance, for the purpose of purchasing merchandise to ship on board the *ship America, and did then and there, with the knowledge and consent of Edward Rosseter, the captain or master of the said ship America, enter into an agreement with the plaintiffs, that if they would make such an advance, he would leave the merchandise purchased threwith, in their hands, as a security for the said advance while in Calcutta, and would, when shipped on board the America, deliver to them a bill of lading, stipulating for the delivery thereof to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the payment of the said advance, unless the said Hugh Chambers's bills for the same, drawn upon Messrs. Grants & Stone, of Philadelphia, should be accepted, and the consignor should feel perfectly assured they would be paid at maturity; in which event, the said agents should deliver the said merchandise to him. That the said plaintiffs accordingly made the said advance, received the said goods as were purchased, and shipped them on board the said ship America; for which shipment, the said master signed and delivered the following bill of lading to the plaintiffs, which the said Chambers indorsed:

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"Shipped, in good order, and well conditioned, by Hugh Chambers, in and upon the good ship, called the America, whereof is master for this present voyage, Edward Rosseter, and now lying in the port of Calcutta, and bound for Philadelphia, to say, 746 bags and 65 boxes of sugar, 589 bags of saltpetre, 1060 *bags of ginger, 35 bags of aniseed, 32 boxes of borax, 32 of castor oil, 303 bundles of twine, 35 bales of goat-skins, 6160 horns and horn tips, 260 cow-hides, 1569 gunny-bags, two bales of seersuckers, two boxes of choppas, six bales of sannahs, five bales of checks, twenty-two bales of gurrahs, and one box of mull muslins. On account and risk of Hugh Chambers, of Philadelphia, being marked and numbered as in the margin; and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Philadelphia (the danger of

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the seas only excepted), unto Messrs. T. M. & R. Willing, or to their assigns. Freight for the said goods having been settled here. In witness whereof, the master or purser of the said ship, hath affirmed to five bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Dated, Calcutta, 7th of September, 1819.

"Contents unknown. EDWARD ROSSETER."

"Marks and numbers on the back of this bill, countersigned—Hugh Chambers."

That the said Chambers, at the same time, drew and delivered to the plaintiffs, the said bills of exchange upon Messrs. Grants & Stone, for the sum of 8042*l.* 8*s.* 4*d.* sterling, being the amount of the said advance; which said bills were afterwards duly presented to Grants & Stone for acceptance, who refused to accept the same, and they were afterwards duly protested for *non-payment, and now remain unpaid. That the said agreement to deliver the said goods, without paying freight, and the said bill of [*614 lading and indorsements, were made by the said Chambers, by Edward Rosseter, and by the plaintiffs, in good faith; and without them, the said plaintiffs would not have made the said advance, nor shipped the said goods; and the receipts of the said goods on board the America, by the said master, under the said agreement, and signing the bill of lading in the terms aforesaid, were, under the circumstances of the case at the time, the best he could do for the interest of the owners of the ship. That the said plaintiffs were informed by Hugh Chambers, that the America was chartered by the said Chambers, for a specific sum, and that the stock or merchandise originally placed on board of her, at the commencement of the voyage, and its proceeds, were solely and sufficiently a pledge for the payment of the same. That the America arrived in the port of Philadelphia, on or about the 29th of February 1820, when the defendants gave notice to the said Chambers, that they had entered the ship, and were ready to deliver the goods, after payment of the freight stipulated by the charter-party. On the 1st of March 1820, the said Chambers replied to the defendants, that he was unable to comply with the requisitions of the charter-party. On the 2d of March 1820, the defendants gave notice to all the consignees of the goods on board the America, as by letter of that date to T. M. & R. Willing. On the 3d of March 1820, Thomas M. & R. Willing, the consignees of the merchandise shipped by the plaintiffs, demanded *of the defendants, and of [*615 Edward Rosseter, the master, the delivery thereof, without paying freight, and protested against the payment of any freight. On the 6th of March 1820, the defendants refused to deliver the said merchandise, without paying freight. On the same day, the said T. M. & R. Willing, on behalf of the plaintiffs, replied to the defendants, and repeated the protest against paying any freight for the said merchandise, and their refusal to pay any freight, unless they should be compelled to do it, in order to obtain possession of the said goods. The said T. M. & R. Willing, being unable otherwise to obtain the said merchandises from on board the ship America, paid, as the agents of the plaintiffs, and in their behalf, to the defendants, the sum of $10,000; which payment was made in acceptances of the defendant's drafts, dated the 29th of March 1820, at ninety days, and duly paid the 30th of June 1820. The said payment was compelled by the defendants, under

their claim of freight, and in consequence of their having the custody of the said merchandises, and was made under protest, by the said T. M. & R. Willing. In consequence of the said payment, the said merchandises were delivered by the defendants to the said T. M. & R. Willing, as agents and consignees of the plaintiffs. There were other merchandises on board the said ship, exclusive of those consigned to the said T. M. & R. Willing, sufficient in value to pay the whole freight due by the said charter-party. If, upon the whole matter, the court shall be of opinion, that the defendants had
*616] no right to detain the said *goods for freight, judgment to be entered for the plaintiffs for the sum of $10,500, with costs of suit. If, upon the contrary, the court shall be of opinion that the defendants had such right, then judgment to be entered for the defendants.

Judgment being given upon this case for the plaintiffs below, the cause was brought by writ of error to this court.

March 5th. *D. B. Ogden*, for the plaintiffs in error, stated, that the general principle being, that the ship-owners have a lien for the freight, it must be shown, that they have parted with it in this case, either by the terms of the charter-party, or are deprived of it by the particular circumstances of the case.

1. As to the terms of the charter-party; the question is, whether the possession is fully parted with, so that the charterer has the complete control of the ship. *Hooe* v. *Groverman*, 1 Cranch 237; *Marcardier* v. *Chesapeake Ins. Co.*, 8 Ibid. 39, 49; *Christie* v. *Lewis*, 2 Brod. & Bing. 410; *The Nereide*, 9 Cranch 388, 424. The entire instrument must be taken together, and by that it will appear, that the ship-owners hired and paid the master and crew; and there is an express covenant, on the part of the owners, for the carriage and delivery of the goods, and on the part of the charterer for the payment of the freight, before the goods are delivered.

*617] 2. As to the particular circumstances of the *case, the question is, was any freight due? By the charter-party, the vessel was bound to receive all goods shipped by the charterer or his agent. This cargo was of that description. He borrowed money, and purchased the goods on his own account. They were to be delivered to the Messrs. Willings, as a security for the repayment of the money borrowed, and to be sold by them as the agents of the lender. Can the charterer, by any separate act of his, vary the right of the owner? Must not all the goods shipped by the charterer, be considered as under the charter-party? It is not within the scope of the master's authority, to dispense with the conditions of the charter-party. The moment the goods were put on board the ship, they were in possession of the owners, who had a lien on them for the freight. The bill of lading could not discharge this lien. The consignees alone were capable of indorsing the bill of lading, so as to operate a valid transfer. The charterer had no right to pay his own debt with the freight due to the owners, and the master had no right to bring goods free of freight.

But suppose, the goods were the property of the Messrs. Palmers; the right to freight must depend on the circumstances. The master has power to bind the owner as to the contract of affreightment, but not to transport without freight. The owner may limit his powers by the charter-party; and all that can be required, is, that the shippers of goods should know, or

have an opportunity of knowing, the restrictions upon the master's authority. The master was not on a general *voyage, seeking for freight, but was to perform his duty to the owners under that charter-party. [*618 The shippers knew this, and had an opportunity of inspecting the charter-party, and judging for themselves, whether the master was authorized to assent to such a contract. They knew that the cargo was pledged for the freight, both by the general law, and by the particular provisions of this charter-party. This case is precisely similar to the very recent case of *Faith* v. *East India Company*, 4 B. & Ald. 630, where the English court of K. B. held, that the ship-owner could not be divested of his lien for freight, by such a transaction between the charterer and shipper, who were cognisant of the terms of the charter-party.(*a*) The *case of *Hutton* v. *Bragg*, [*619 2 Marsh. 339, 7 Taunt. 14, which determined against the lien, in a case of a general letting of the ship, has been since overruled. *Christie* v. *Lewis*, 2 Brod. & Bing. 410.

*Sergeant*, contrà, contended: 1. That the goods of a third person, carried in a chartered ship, are not liable for the freight due by charter-party, but only for what is due for their own carriage, as stipulated by the bill of lading, at the time of shipment. It would follow, that if the freight be paid beforehand, *bonâ fide*, or it be stipulated, that they shall be carried free of freight, they are not liable at all. 2. That the goods in question were, both at law and in equity, the goods of a third person. It would follow, that having been fairly shipped under an agreement made with the charterer and the master, that they should pay no freight, the ship-owners had no lien upon them.

1. The first position is equally supported by authority, by principle, and

(*a*) The case of Faith *v.* East India Company, was as follows: The plaintiff, Faith, was the owner of the ship Eliza, of which Sivrac was master, and entered into a charter-party with Gooch, by which freight was agreed to be paid, for the use or hire of the ship, at a certain rate per ton, for a voyage to India, out and home, in the following manner, viz., a certain sum in advance, on the ship's clearing outwards, and the residue, half in cash, and half in approved bills, upon the delivery of the homeward cargo. The owner appointed Sivrac master, at the request of Gooch, the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner instructed the master to be careful to sign all bills of lading with the clause "freight payable as by charter-party." The ship was consigned to Colvins & Co., in Calcutta, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her—Colvins & Co. taking, for homeward freight, bills payable 60 days after delivery of the cargo; and a new master having been appointed by Colvins & Co., in conjunction with Sivrac, signed bills of lading with the clause "paying freight agreeable to freight bill." The freight bills were made payable in London, to Bazett & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as Colvins & Co., were cognisant of the terms of the charter-party. The court of king's bench held, that the owner of the ship had a lien on these goods, to the extent of the homeward freight. Colvins & Co. also put on board the ship, goods purchased by them on account of the charterer; but he being indebted to them, and Bazett & Co., their agents, those goods were, by the bill of lading, consigned to Bazett & Co. The court also held, that as between the owner of the ship and Bazett & Co., the goods were to be considered as the goods of the charterer, and liable to the owners' lien on them for the freight due by charter-party.

by the convenience *and necessities of trade. The case of *Paul* v. *Birch*, 2 Atk. 621, decided by Lord HARDWICKE, in 1743, seems less the introduction of a new doctrine, than an authoritative declaration of what had been before, and was then, understood to be the usage and law. It has since frequently been cited with approbation by elementary writers, and confirmed by judicial authority. Abbott on Ship. 192–3; 2 B. & Ald. 509; 2 Camp. 202; 2 Brod. & Bing. 410. The only question growing out of this undeniable position is, whether, in the case of a general letting and hiring of a ship, the goods of the charterer himself are liable for the freight. In *Hutton* v. *Bragg*, 2 Marsh. 339, 7 Taunt. 14, it was determined by the English court of C. B., that there was no lien in such a case. This authority has, however, been very much weakened by subsequent decisions (2 B. & Ald. 503), and at last solemnly overruled (Lord Ch. J. DALLAS dissenting) by the same court. *Christie* v. *Lewis*, 2 Brod. & Bing. 510. But in none of these cases, is it even intimated, that there is any lien upon other goods than those of the charterer, for the charter-freight. The word *freight* is used in two different senses. 1. To signify the price or consideration of the carriage of goods on board a ship. 2. To signify the price or hire of a ship for a given time, or for a given employment. The first, which is the appro-
*621] priate sense of the word, may be, by contract, express or implied; *but the form of the contract is not material. It may be by bill of lading, or it may be by agreement or charter-party; or without stipulating a price.

Now, to constitute a lien, it is necessary, 1. That there be a debt due, on account of the goods of the shipper, for the carriage of those goods. 2. That the goods be in the possession of the creditor, with the assent of the debtor, for the purpose of the carriage from which the debt arises. How is the lien acquired at all, or whence is the right of lien derived, for freight due by charter-party? If it be asked, how is it derived, in the case of a bill of lading, stipulating freight or not, or where there is no bill of lading, the answer is readily furnished. It is a particular lien for the carriage of the goods; the same which a common carrier has by the custom of the realm, and given by the common law, or by the law-merchant, which is a part of the common law. It is restricted to the very goods carried; for the common law knows of no such thing as a general lien. The utmost extension it has ever received, is to all the goods in the same bill of lading; and by a modern decision in England, to goods of the same shipper, on board the same ship, though in a different bill of lading. Abb. on Ship. 245; *Birley* v. *Gladstone*, 3 M. & S. 220. And that is upon the ground of an understanding to that effect, when the first goods are delivered.

*622] The lien for freight due by charter-party, stands *precisely on the same foundation. A general lien can only be by general usage, by a particular usage, or by contract. 2 Meriv. 401. The charter-party gives no lien in terms. The ship and goods are (commonly) mutually bound for the performance of the covenants, among which is the covenant for the payment of freight. But here, the goods are not so bound; and if they were, it would only extend to the goods of the charterer. But even the goods of the charterer are not bound for the performance of covenants; because, 1. There is no lien for port-dues, or demurrage, or any other charges of a similar nature. 2. There is no lien, till freight actually earned, and therefore, not if prevented by the freighter, or by a stranger; yet the owner can

recover on the covenant. 2 Holt on Ship. 178. 3. There is no lien upon the goods of the charterer, for what is termed dead freight, *i. e.*, of the unoccupied space. Holt on Ship. 178; *Philips* v. *Rodie*, 15 East 547; *Birley* v. *Gladstone*, 3 M. & S. 205. And this lien has no greater extent in equity, than at law. *Gladstone* v. *Birley*, 2 Meriv. 401. The cases cited, while they disaffirm the lien by contract, equally negative the existence of a general usage, operative either at law or in equity. How, then, can it be, that there is a lien upon the goods of a third person for the charter-freight? They do not owe it by contract. The shipper, or the consignee, is not liable for it. Equity first gave the owner a lien for the freight reserved by bill of *lading, and the law has followed equity. But neither law nor equity [*623 have ever gone further. It follows, that if the freight be paid beforehand, or the bill be freight free, and this be fairly done, there is no lien at all.

If it be competent to the master, with the assent of the charterer, to receive goods on board, on other terms than those of the charter-party, it will follow, that he must be the conclusive judge of the terms. The authority of the master, in this respect, in a foreign port, is the same in the case of a chartered ship, as in the case of a ship not chartered. The only difference is, that he must have the assent of the charterer. If it were not so, the ship must, in many cases, return home empty; which would be neither for the interest of the owner and charterer, nor would it promote the general interests of commerce and navigation.

The agreement between the charterer and shippers, in this case, was fairly made, with the assent of the master, and for the manifest benefit of the owners. Was it, then, competent for the master to bind the owners by his assent? The authority of the master of a chartered ship, in this respect, is no further restricted by the charter-party, than to require the assent of the charterer, and to receive the goods of the charterer himself, only on the terms of the charter-party. In the event, then, of the failure, in whole or in part, by the charterer, is it not competent for him to fill up the ship? The only limitation is, where goods are put on board, under or in pursuance of the charter-party; or where the conduct of the master *is collu- [*624 sive and fraudulent, and intended to injure his owner. The express contract, then, was, that the goods should be free of freight; and there can be no implied, where there is an express, contract.

If there was no freight due by contract, express or implied, for the carriage of these goods, it follows, from the principles already stated, that there could be no lien. It follows also, from another principle. There can be no lien created or continued, without a rightful possession. The possession acquired by the agreement, if held in violation of the agreement, would thereby become a tortious possession.

Could any action be maintained against the consignee, for the carriage of these goods? It is well settled, that where freight is due for the carriage of goods, the consignee to whom they are delivered, impliedly contracts to pay the freight, and *assumpsit* may be maintained against him. Abb. on Ship. 277; Holt 163. But here, no action could be maintained upon the charter-party, for he is no party to it; nor on the bill of lading, for it stipulates that no freight is to be paid; nor on the implied *assumpsit*, for there is none.

The case is thus reduced to a single point, and that is, whether the goods in question were the property of Chambers, so that they could not be carried in the ship on any other terms than that of paying the charter-freight. Wherever the interest of a third person intervenes, and is connected with the power of control, the master has a direction, *and may accept or *625] reject. If he accept, he is bound, and so is the owner, as against such third persons, by the terms he agrees to. Suppose, the charterer's goods to be pledged in a foreign port, and the pawnee (the charterer being unable to redeem) to refuse to ship under the charter-party, or unless he has priority; or suppose them to be attached, or arrested by a creditor; the master has an election, and the owner must abide by the decision.

But it is unnecessary to discuss this question further; for it is plain, that the property, before the shipment, at the time of the shipment, and upon the arrival of the vessel, was, and continued to be, the property of the plaintiffs below. Admit, that the surplus, in case of sale, would belong to Chambers, and the plaintiffs were only mortgagees; still, as mortgagees in possession, they are owners, and Chambers had only an equity of redemption. Nor does a mere interest in the profit and loss, make any difference (*Haille* v. *Smith*, 1 Bos. & Pul. 563; *Evans* v. *Maylett*, 1 Ld. Raym. 271); nor that they were shipped for account and risk of Chambers. *The St. Joze Indiano*, 1 Wheat. 289; *The Aurora*, 4 Rob. 218, cited in note; 1 Wheat. 214; 13 Mass. 76.

*Webster*, for the plaintiffs in error, in reply, stated, that it was not contended, that these particular goods were bound for all the freight of the ship; but considering them as the goods of Messrs. Palmer & Co., the claim was for a *pro rata* freight only. It is clear, by the charter-party, that the *ship-owners retained possession of the ship, so as to have a lien for *626] the freight; and that this lien was also expressly reserved by the terms of that instrument. It is equally clear, that this lien extends to all sub-shippers or strangers. There is no difference as to the validity and strength of this lien, whether it is on the goods of a charterer, or on those of other shippers, although there may be as to its extent; the goods of other shippers being liable for the freight stipulated by them, and the charterer's goods being liable for the whole amount of the charter-freight. Have the ship-owners, then, waived the lien which is thus secured to them by the general law, and by this particular contract? If they have done so, it is by some act subsequent to the charter-party. All that is relied on, is, what the master did at Calcutta. But supposing the goods to be Palmer's, could the master bind the owners by this agreement? We contend, he could not, because he was limited by the express terms of the charter-party, which provided, that freight should be paid at Philadelphia, before the delivery of the cargo. The contract was, that whatever goods were brought, should not be delivered, till freight was paid. The shippers, and the master, were cognisant of this contract. This provision was a direct limitation of the master's power. He was as much bound by it, as by any other part of the charter-party. It is said, that if the master may take goods for diminished freight, the same reason authorizes him to take goods for no freight. But it is very obvious, that a freight diminished by circumstances, *may still be just and *627] reasonable; whilst a contract to carry goods, without any freight,

cannot be so, under any circumstances whatever. It necessarily supposes, that freight is paid to the charterer in some other way, to the prejudice of the owner's rights; since it is absurd, to suppose an agreement to carry goods without any compensation. If the charterer might take part of a cargo in this way, he might take the whole, and then what becomes of the owner's rights? Of what use, in such a case, would be the covenant to load the ship? The shippers here assist the charterer in an attempt to break his contract with the owners, by which he had stipulated, that the goods should be holden for freight. The master cannot, where there is a charter-party, vary the rights and duties of the owner, by the bill of lading. If he cannot vary the contract, in favor of the charterer, neither can he in favor of anybody else. If goods be brought with the assent of the owner, though there be no contract, and not even a knowledge of the master, the lien attaches. Nobody was authorized, under the charter-party, to receive the owners' freight, before it was earned, nor elsewhere than in Philadelphia. *Hunter* v. *Prinsep*, 10 East 378.

We contend, then, that the owners' lien is not lost by the agreement made at Calcutta, with the assent of the master. 1. Because it is, in effect, an agreement made between the shippers and charterer, to violate the charter-party, to which the master was not competent to assent. 2. Because *the general authority of the master, as agent of the owners, was limited by the charter-party. The shippers knew of this limitation; and [*628 could not, consequently, derive any right under an agreement made with him, beyond the scope of his authority. 3. There is no ground here for saying, that the master was acting independent of the charter-party, as setting up a general ship; nor could he do this, under the circumstances of the case.

But the true view is, that these goods were the goods of Chambers, the charterer, as between him and the ship-owners. They were purchased and shipped by him, and for his account. They were at his risk *in transitu*. There is no document showing any interest whatever in Palmer & Co. But there was a parol agreement, that the goods should go consigned to the Messrs. Willings, and that the latter should hold them against the bills drawn by Chambers. The legal property was either in Chambers, or the Willings. The general residuary property was in Chambers; a pledge or lien only existed in favor of Palmer. If there was a loss, Chambers was to bear it; if a gain, it was to be his. If the goods have been sold for more than Palmer's debt, Chambers is entitled to the balance. Before the plaintiffs recover back this money, ought they not to show, that the goods, paying freight, do not leave them enough to pay their debt? The lien claimed by them may exist, and yet, in commercial law, the goods may be the property of Chambers. It is so in the contract of insurance; else no man *would ever insure goods liable to freight or commissions or duties, [*629 or any other species of lien.

No goods are brought across the seas, without being subject to liens of various sorts; some arising from express contracts, others from the operation of general principles. No one could own goods, if the ownership implied an absence of all liens. Therefore, in the commercial world, he is esteemed owner, for whose account, and at whose risk they come. Chambers had a clear insurable interest in those goods, to the whole amount of their

value, whatever that might be. Palmer had an insurable interest only to the amount of the bills of exchange. The plaintiffs' claim rests on the operation of the bill of lading; but that very bill of lading says, that the goods are shipped on account and risk of Chambers. This circumstance alone is conclusive. It would be so in the law of prize. The consignee would not be allowed to show an interest, by a lien for advances. *The Frances*, 8 Cranch 335, 418. But Palmer's interest was contingent; he was to have no proprietary interest in the goods, until failure of the acceptance of the bills of exchange, or equivalent security; *i. e.*, until after the arrival of the goods. Whatever the words are, that is the legal effect. Now, it has been repeatedly determined in this court, that where goods are sent to a vendee, to be received at his option, or conditionally, they are the goods of the ven-
*630] dor, until that option be expressed, or *that condition happen. *The Venus* (Magee's claim), 8 Cranch 253, 275; *The Merrimack* (claim of Kimmel & Alberts), Ibid. 328. So, if goods be shipped, to be sold on joint account of the shipper and consignee, or the latter alone, at his option, the property is not vested, until the election is made. *The Frances* (Dunham's claim), 8 Cranch 354; s. c. 9 Ibid. 183.

March 13th, 1823. JOHNSON, Justice, delivered the opinion of the court.—This is a writ of error from the circuit court of Pennsylvania, on a judgment, in which the defendants in this court were plaintiffs in the inferior court. The suit instituted in that court, was for the recovery of a sum of money paid under the following circumstances:

The Gracies, being owners of the ship America, chartered her to one Chambers, on a voyage to India. Chambers accompanied the vessel, and, at Calcutta, put her up as a general ship, with notice, however, of his being charterer, not owner. Finding it difficult there to obtain freight, he entered into an arrangement with Palmer, in pursuance of which, the latter supplied him with a quantity of goods, to the value of 8000*l.* upon the following stipulations: "That Chambers should draw bills in favor of Palmer & Co., upon his correspondent in Philadelphia, and that the goods should be consigned to the Willings, correspondents of Palmer, in the same place; to whom they should be delivered, freight free, in pledge for the due payment of Chambers's bills."

*631] When the goods were laden on board the America, *the ship-master signed bills of lading, stating them to be shipped on account and risk of Chambers, to be delivered to the Messrs. Willings, of Philadelphia. And in that part of the bill of lading, in which the freight is usually specified, are inserted these words, "freight for the said goods having been settled here." Indorsed on the bill of lading are the marks and numbers of the several packages, and on its face are written these words, "marks and numbers on the back of this bill, countersigned, Hugh Chambers." This is the indorsement noticed in the stated case. A charter-party, with all the usual covenants and formalities, was entered into by the parties, in which the owner undertakes to furnish and navigate the ship, and the charterer to pay the sum of $32,000 for the use of her, with certain specific reservations, not material to the decision of any of the questions raised in argument. The clause which stipulates for the payment of the compensation is in these words, "the said charterer covenants," &c., "that he will pay to the owners,

on the return of the said ship to Philadelphia, and before the discharge of her cargo there, in approved notes," &c., the sum stipulated for.

The case stated affirms, that the whole transaction in Calcutta was effected in good faith; that it was done with the knowledge and assent of the ship-master, and was, under all circumstances, "the best he could do for the interest of the owners of the ship." The bill of lading was inclosed to the Willings, *with information of the arrangement between Palmer and Chambers; and the drawees of Chambers's bills having refused [*632 to accept them, the Willings demanded the delivery of the goods, freight free. The Gracies refused to deliver the goods, insisting on their right to the freight usually paid on such goods from India, whether they were the property of Palmer or of Chambers. And in order to get possession of the goods, the freight was accordingly advanced by the Willings, and this action brought to recover it back. The cause was decided in the court below upon a case stated, in nature of a special verdict, which finds alternatively for the one or the other party, according to the law of the case. The judgment of the circuit court was in favor of the defendants.

Much of the argument below appears to have turned upon the general rights and liabilities of owner and charterer, under the contract of affreightment; but the learned and elaborate argument of the presiding judge in the court below, has relieved this court from much discussion on that part of the subject. The doctrine, as laid down there, and as stated by the counsel here, exhibits no material shades of distinction. It is, in fact, the common-law doctrine of bailment, and common carriers, applied to transportation on the ocean. The carrier may hire his vehicle, or his team, or his servant, for the purposes of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is *in the latter [*633 case only, that he assumes the liabilites, and acquires the rights of a common carrier. So, the ship-owner, who lets his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case, he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the character of a common carrier.

On examining the cases in which this subject has engaged the attention of courts of justice, it will be found, that the great difficulty generally has been, to decide in which of these two relations the ship-owner had placed himself, under the particular stipulations of the charter-party; and how far he has put it in the power of the charterer, to defeat his acknowledged right to a lien for the freight. The present case suggests the additional question, how far it lies in the power of the ship-master, to defeat this lien, or otherwise sanction a departure from the letter of the charter-party. The cause has been argued as one vitally important to the commercial world; and very strong views have been presented of the injuries that might be sustained by foreign shippers, on the one hand, and by ship-owners, on the other, as the one or the other alternative of the stated case *shall obtain the sanc- [*634 tion of this court. But it is obvious, that most, if not all of these

suggestions, have been the offspring of a zealous, rather than a calm, survey of possible consequences.

The contract of affreightment, like every other contract, is the creature of the will of the contracting parties. It may be varied to infinity, and easily adapted to the exigencies of either party, or of any trade. It is only where the express contract is silent, that the implied contract can arise. It is possible, that a master and a charterer might connive at a fraud, and pass a chartered vessel upon foreigners as an unchartered vessel; but it is not very probable, and would be extremely difficult. Yet it is not easy to conceive any other case, in which a foreign affreighter can be exposed to imposition, while it is always in his power to inspect the charter-party, and determine, from its stipulations, how far he may venture to ship his goods upon a special contract. The general liability of goods for freight, is known to all mercantile men; and a stipulation in a charter-party, "that no goods shall be landed from the vessel, until the freight is paid," will always alarm the fears of any prudent shipper.

But this case does not imperiously call for a decision upon the general question. The goods are expressly laden on board, as the property of Chambers, "on his account and risk." And the question is not, how far his contract may exempt the goods of another from freight, but how far he may incumber his own goods with a lien, which *shall ride over or supersede their general liability for the freight. We turn, in the first place, to the express contract of the parties, to afford a solution of the question. But there we find that the charterer cannot, without an express violation of his contract, deliver to the consignee a single article, not only until its own peculiar freight be paid, but until the payment of the sum of $32,000, the whole of the freight reserved to the owner.

*635]

On what principles rests the general lien of goods for freight? The master is the agent of the ship-owner, to receive and transport; the goods are improved in value, by the cost and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and ship-owner, and the law will not suffer that possession to be violated, until the laborer has received his hire. But this is literally the effect of that provision in the charter-party, which deprives the charterer of the right of landing the cargo, until the stipulated hire be paid; or rather, it would seem to go beyond it, and impose a liability beyond what the common law exacts. It may, therefore, be fairly construed into a stipulation, that the charterer should, under no circumstances, dispense with the legal lien of the ship-owner.

The question, then, is, who has trusted this charterer? for he that trusts must pay. That the ship-owner would not confide in the charterer to land his goods, without buying off his right to detain, is expressly proved by the contract. *That contract was accessible to the foreign shipper, and ought to have been looked into, to determine the extent of the power vested in the charterer. Whether he neglected this precaution, or contracted with the charterer, knowing of this restriction on his power to contract, he is the party that trusts. The charterer has contracted with the shipper to do an act, which he could not perform, without violating his own contract to the ship-owner, and must, therefore, be considered as having entered into a contract, subordinate in its nature to that previously existing

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between the owner and charterer. And as the undertaking of the charterer to Palmer, could only be performed, upon first complying with his undertakings to the owner, he must be considered as having rested on the personal responsibility of the charterer, for the removal of that obstacle.

That, in ordinary cases of the hypothecation of goods, the lien for freight would take precedence, cannot be questioned ; and in a late adjudication, on a case strikingly similar to the present, and in the courts of a nation which thoroughly understands the laws and interests of commerce (*Faith* v. *East India Company*, 4 B. & Ald. 630), it has been held, that goods so circumstanced, were bound to the whole extent of the liability of the charterer to the ship-owner for freight. In the present instance, a *pro rata* freight only is demanded. In the same case, it was further decided, that the ship-owner retained his lien for freight, on goods shipped by third *persons, even after the drawing of freight-bills, in favor of another, by previous agreement. [*637

But it is contended, that the case where goods are shipped freight free, or the freight has been actually paid, remains undecided ; that the lien for freight attaches only where freight was actually due, but in neither of those cases (that of payment or redemption), could it be predicated of freight, that it was due. Had the reasoning of the judges, in the case of *Faith* v. *East India Company*, been followed out to its unavoidable consequences, it would seem, that no doubt should have been expressed by them upon such a case. For, if the ground of that decision was, that the ship-owner was not bound to deliver the goods, until his freight was paid, it would seem to be immaterial, whether it had been previously paid to the charterer, or to any other, not authorized to receive it on account of the owner. But whatever might be the opinion of this court upon a cause so circumstanced, it is obvious, that this is not a case of that nature.

These goods were not shipped freight free, nor was the freight actually paid upon them. The words npon the bill of lading are, " freight settled here." And their ambiguity being explained by other parts of the case stated, there is made out a case, in which the freight was no further settled than by the arrangements made with Palmer, for the purpose of postponing the freight to the defendant's lien for advances of money, or the payment of bills. The compensation for carriage, *although disguised under the form of possible profits upon the sales of the goods shipped, still existed ; for freight is one of the charges which the consumer pays. It is, then, only an evasion of the rights of the owner, and presents a facility to evasion, which ought not to be encouraged. If it be said, that the payment of freight was, nevertheless, contingent and uncertain, the reply still is, that this is a subject for consideration between the charterer and the shipper, and could not be sanctioned, as the means of evading the express provision in the charter-party, against the right of delivery before the payment of freight. Although no freight had been due to the charterer, there was unquestionably a large sum due the owner ; and by the terms of his agreement, literally construed, he was not bound to open the hatches, until the whole sum was paid. This, however, is more than is contended for upon the plaintiffs' construction of the contract ; and more, unquestionably, than would have been sustained as against other shippers ; it is not, in this instance, insisted upon, as against the charterer himself. But, in fact, this [*638

memorandum of the master on the subject of freight, is altogether an immaterial circumstance, in a bill of lading made to the charterer himself. With whom was he at liberty to settle the freight upon his own shipments, to the prejudice of the ship-owner?

And this leads to the consideration of the last point made in argument for the defendants; to wit, that the acts of the master bound the ship-owner
*639] to a compliance with the stipulations made to the *defendants, Palmer & Co., to the prejudice of the lien insisted on by the present plaintiffs. That is, that either the master alone, or the master and charterer together, could divest the owner, both of his implied and express right to detain these goods. Whence is such a power to be deduced? Not from the charterer's rights in the ship, nor from the master's power over the ship; but it is supposed to result from the necessity of the case, the nature of the interest acquired by the charterer, and the general powers of a ship-master, as incident to the duties which he is called upon to perform.

But it is perfectly clear, that it is not in the power of the master to release the charterer from his contract to the owner. It is only when the contract is at an end by misfortune, or by the acts of the charterer, that he is called to the exercise of that latitude of power over the ship, which may lead to a resumption of the right to lade her for the benefit of all concerned. In the meantime, he has no power to modify the contract entered into with his owner; since all the power delegated to him, while the charter-party continues to operate, is to perform the undertakings of his employer in the fulfilment of the contract. When abandoned by his charterer, he is of necessity cast upon himself, to do the best he can for all concerned; and whether that be to return empty, or to take in such freight as may offer, he is still acting under his original relations with his owner; for, if not actually
*640] carrying into effect the *stipulations of the charter-party, his general duty is to do nothing that can release the charterer from his liability under it. This is altogether inconsistent with the idea of his being authorized to modify or dispense with the terms of the charter-party.

So far as the interests of the charterer may be affected by the want of power to modify contracts for freight, in any manner that exigencies may require, it has been before observed, that this should have been attended to, in making his contract with the owner. And as it is very certain, that a release from the ordinary security of the carrier, must have been purchased by an enhanced price, or personal security; so, it would be highly unjust, to subject the owners to a loss of their ordinary security, without compensation in price, or extraordinary security as the substitute. As to the interests of ship-owners themselves, it is enough, for the present case, to say, "let them judge for themselves."

But there is very great reason to think, that the acts of the master, in this case, have had views and effects attributed to them, directly the reverse of his intention and understanding in performing those acts. It is observed by one of the judges, in the decision before alluded to, "that had the captain done his duty, he never would have taken goods on board, on which the owner would have no lien." It is right, that a construction should be given to the con-
*641] duct of the master, which may comport both with a knowledge, and a due observance of his duty. And in this view of the case, *notwith-

standing his privity to the arrangement between the charterer and shipper, as he was himself called upon to do no act, that could deprive his owner of his lien, he might well have considered the stipulation between the charterer and shipper as a matter *inter alios;* in pursuance of which, his employer could sustain no loss, however the charterer might render himself liable to the shipper for consequences. Such was certainly not the understanding of the shipper, as to the effect of his contract with the charterer, but he might have been better informed, by studying the charter-party; and, *non constat*, if the master had been required to sign a bill of lading to the shipper, with an explicit stipulation, that the goods should be free from liability to his owner, that he would have been betrayed into such a breach of duty, or assumption of power. He might well have supposed, that in signing this bill of lading to Chambers, and not to Palmer, he was doing no act that could impair the rights and interests of his employer.

We are, therefore, of opinion, that there is error in the judgment of the circuit court; that it must be reversed, and a mandate issue to enter judgment for the defendants below, agreeable to the case stated.

Judgment reversed.

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*Anderson Childress, Executor of Joel Childress, Plaintiff in error, *v.* Emory and McCleur, Executors of John G. Comegys, surviving partner of William Cochran & Comegys, Defendants in error. [*642

*Jurisdiction.—Action against executors.—Profert.—Debt.—Wager of law.*

The courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different states, &c., although their testators or intestates might not have been entitled to sue, or liable to be sued in those courts.[1]

It is, in general, not necessary, in deriving title to a bill or note, through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm.

A declaration, averring that "J. C., by his agent, A. C., made" the note, &c., is good.

A general *profert* of letters-testamentary is sufficient; and if the defendant would object to their sufficiency, he must crave *oyer*, or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement.[2]

Debt, against an executor, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*.

An action of debt lies upon a promissory note, against executors.

The wager of law, if it ever had a legal existence in the United States, is now completely abolished.

Error to the Circuit Court of Tennessee. The defendants in error, citizens of the state of Maryland, and executors of John G. Comegys, the surviving partner of the late firm of "William Cochran & Comegys," brought an action of debt, in the *detinet*, on a promissory note, executed by *the said Anderson Childress, as the agent of said Joel Childress; both of whom were citizens of the state of Tennessee. [*643

The declaration stated the plaintiffs in said suit (now defendants in error)

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[1] Carter *v.* Treadwell, 3 Story 25. See Coal Co. *v.* Blatchford, 11 Wall. 172.

[2] Kane *v.* Paul, 14 Pet. 33.

to be the executors of the last will and testament of John G. Comegys, deceased, who was the surviving partner of the late firm of William Cochran & Comegys; that on the first of May 1817, the said Joel Childress, by his agent, A. Childress, made his promissory note to the firm of William Cochran & Comegys, and thereby promised to pay to William Cochran & Comegys, or order, the sum of $1897.28, for value received. That the said Joel, in his lifetime, did not pay the said firm of William Cochran & Comegys, nor did he pay the said John G. Comegys, surviving partner of said late firm of William Cochran & Comegys, the said sum of money, or any part thereof, nor has he paid the same, or any part thereof, to the said plaintiffs, executors as aforesaid, nor hath the said Anderson Childress's executors as aforesaid, paid the said sum, or any part thereof, to the late firm of William Cochran & Comegys, nor to John G. Comegys, surviving partner of the said firm, nor hath he paid the said sum, or any part thereof, unto the said plaintiffs, executors aforesaid, but so to do hath wholly refused, and still doth, to the damage of said plaintiffs $500; and therefore, they sue, and they bring here into court the letters-testamentary, by which it will appear they are qualified, &c.

*644] To this declaration, the defendant, now plaintiff *in error, demurred, and assigned for demurrer the following causes: 1st. That said declaration alleges, that said note was made to a late firm of William Cochran & Comegys, and that the plaintiffs are executors of the surviving partner of that firm; but whom said partner survived, or who comprised that firm, does not appear. 2d. That an action of debt cannot be maintained against the defendant (now plaintiff in error), as executor, upon a promissory note. 3d. That it is not alleged, that said pretended promissory note was signed by said Joel Childress, or the defendant. 4th. That the declaration omits to state any damages. 5th. There is no sufficient *profert* of any letters-testamentary, to show the right of said plaintiffs to maintain this suit. Joinder in demurrer.

After argument, the court overruled all the said causes of demurrer; and gave judgment, that the plaintiffs do recover the sum of $1897.28, debt, together with $360.47, for their damages, sustained by reason of the detention thereof, as also their costs, to be levied of the goods and chattels of Joel Childress, deceased, in the possession of said Anderson Childress; and on default thereof, the costs to be levied of the proper goods of said defendant.

March 8th. *Webster*, for the plaintiff in error, argued: 1. That the *645] action was misconceived, debt not *being an appropriate remedy against an executor or administrator, on a simple contract. He conceived it unnecessary to inquire into the origin of this rule, or the principle which sustained it, as it rested on the clearest authorities of the English law, and had become an established doctrine, from which this court would not be inclined to depart; as it was of more consequence, that the law should be certain and fixed, than that plaintiffs should be allowed a choice of remedies. Because the reason, on which a remedy may have been originally given or refused by the law, may have ceased, it does not, therefore, follow, that the established rules of practice and pleading are to be altered. The wager of law has ceased, but many rules of practice and pleading, founded

upon it, have survived, and have become rules of property, which cannot be now safely disturbed. The statute of limitations may, or may not, apply, according to the form of the action, and the party has a right to the benefit of the distinction. On the English law, it is clear, that debt cannot be maintained in this case, as the testator might have waged his law, which none can do, who defend in a representative character; hence it is, that in the case of simple contracts, debt has been superseded by the action of *assumpsit*, in which, as the testator could not have waged his law, his executor is not deprived of any defence which might have been used by the testator. *Barry* v. *Robinson*, 4 Bos. & Pul. 294; 1 Chit. Pl. 84, 93, 107.

*2. The next cause of demurrer, in this case, is the want of certainty in the declaration, which states the note have been made to a late firm of "William Cochran & Comegys," and that the plaintiffs are executors of the surviving partner of that firm; but of whom that firm was composed, or whom the said partner survived, do not appear. It cannot be inferred, that the firm of William Cochran & Comegys was composed of William Cochran and John G. Comegys, nor that the latter survived the former, and is the Comegys alluded to in the firm, and in the note in controversy. These are matters which should have been stated with sufficient certainty, and not have been left to mere conjecture. 1 Chit. Pl. 236, 256; 3 Caines 170. [*646

3. This declaration is defective also, in not stating that the note was either signed by Joel Childress, or by Anderson Childress, or by him as the lawfully authorized agent of Joel.

4. There is no sufficient *profert* of any letters-testamentary, evincing the right of the defendants in error to maintain this suit. The authority whence they emanated does not appear. An executor must show by whom his letters were granted; and here it does not appear whether they were granted in Maryland, or in the state of Tennessee. 3 Bac. Abr. 94.

5. The declaration states the defendants in error to be citizens of the state of Maryland, and the plaintiff in error to be a citizen of the state *of Tennessee; but it is not stated, that the testators of either party were citizens of different states: *non constat*, but they were all citizens of the state of Tennessee. 4 Cranch 46; 6 Ibid. 332. The case, therefore, may be considered as falling within the provisions of the judiciary act of 1789, c. 20. [*647

*D. Hoffman*, contrà, argued, that the action of debt was an appropriate remedy on a promissory note, against the personal representatives of the maker or indorser of such note. The reason assigned in England for denying this remedy against an executor or administrator, does not apply, even in that country, to the case of a promissory note, which is not that species of simple contract to which the books allude, when speaking of the trial by wager of law.

The question is altogether new, even in that country whence we are to derive our law on this obsolete subject; and has never received a judicial discussion or determination in this country. Some research, therefore, into this ancient subject, will be essential to its due determination. It is said, that debt will not lie against an executor, on the simple-contract debt of his testator; and in England, this, as a general proposition, is undoubtedly true.

Still, however, it can, with no propriety, be compared to a rule of property, which, though now, in many instances, arbitrary and unmeaning, must be maintained, as long possessions, valuable estates, and the firmest titles *648] *may be dependent on it. But whether a creditor by simple contract resorts to the one remedy or the other, is of no consequence to any one but himself. This election of remedy, then, will not be denied, unless for an adequate reason. This court is under no necessity to sanction an unmeaning *dictum* of English law, at all times absurd, and at no period, either approved by the lawyers of the times, or settled on any fixed principle, No reason has ever been assigned, for exempting executors from responsibility on this remedy, except the one, that as none, who defend *jure representationis*, can wage their law, and as the testator, in debt on simple contract, had this privilege, the executor shall not be thus sued. But it will be endeavored to be shown, that this was originally a gross preversion of reason; that the rule should have been either the reverse, or that, in order to preserve anything like consistency in the law, executors and administrators ought never to have been responsible, in any form of action, for the simple contracts of those whom they represent.

The inquiry then will be: 1. Whether the testator was ever permitted, even in England, to wage his law, in debt on a promissory note? 2. If he were allowed, whether this antiquated doctrine of the common law is proper to be adopted as a part of our jurisprudence? 3. Whether in law, or in practice, it ever has been recognised or used, in the state of Tennessee, or elsewhere in this country?

*649] 1. On examining the history and progress of *this singular species of trial, it will be found to have been uniformly applied to the evidence of the demand, and was in no case an incident to the nature of the action or remedy. Whenever the debt or demand was sufficiently evidenced, whenever it was notorious in its nature, or defined in its extent; or, finally, whenever it did not rest merely *in verbis*, there, wager of law did not obtain. We may, then, inquire, first, in what cases wager of law was not allowed by the common law? and secondly, in what description of cases, it was permitted? and from an examination of the reasons which sustained, or repudiated, wager of law in these cases, we shall find, that, in principle, it never could have been applied to the case of a promissory note, and that, in fact, it never has been so applied.

First, then, wager of law was not allowed in the following cases: 1. In an action of debt on any specialty: for here, as Plowden observes, a debt is contracted by three distinct acts of solemn consent, signing, sealing and delivery of the instrument; each act strengthens the evidence of consideration, and adds force and efficacy to the demand. It would not be proper, therefore, that a mere act *in pais*, as the oath of the party, should render that inoperative, which has been guarded by so many acts of deliberation. The maxim in such case being, *unumquodque dissolvitur eo modo quo colligatur*. 2. In debt on any record, there can be no wager of law, for similar reasons. The debt has become notorious and certain; the record brought *650] it into existence, and at law, the *record should ordinarily declare its annihilation. 3. In an action of debt for rent, even on a parol lease, the defendant is not permitted to wage his law, because, as it is said, the demand savors of the realty, which, in fact, means, that the claim arises

from the defendant's perception of the profits of the land; that his occupation is notorious, his entry into the land was, perhaps, *coram paribus curiæ*, and if not, that the notoriety of his occupation should, on the principle I have stated, oust the wager of law. 4. So, in an action of account, where the receipts have been by the hands of a third person, and not from the plaintiff himself, wager of law will not lie; and the reason assigned is, that this third person may well be supposed competent to prove the receipts, and this supposition, *per se*, is sufficient to exclude the wager of law. 5. In debt by a jailer against his prisoner, or by an innkeeper against his guest, for board, &c., the defendant cannot resort to this mode of trial; and the principle which excludes it in these cases, is essentially the same, viz., the presumed notoriety of the demand. Prisons and inns are *quasi publici juris*, the prisoner and the guest must be received, and their reception is not a matter of privacy, but is presumed to be provable: *aliter*, in the case of a victualler, who sues for matters furnished to his customers; his claim may be defeated by the defendant's oath. *Pinchon's Case*, 9 Co. 87 *b*; *City of London* v. *Wood*, 12 Mod. 684. 6. Wager of law is not permitted in debt for any *penalty given by statute, for this is a matter *in consimili casu* with debts by specialty or record. 7. Nor was it allowed against [*651 an account settled by auditors, for here, the debt becomes susceptible of proof, is rendered certain, and though still a simple-contract debt, yet, as it does not rest *in verbis* merely, it shall not be left to the conscience only of the defendant. 8. Where the claim or demand was in any degree connected with the realty, wager of law would not lie; for the *pares curiæ* were supposed to be cognisant of such matters. Hence, for example, where the plaintiff leased a room to the defendant, and then took him and his wife to board; in debt, for the boarding, it was held, that even this accidental connection of the matter with the realty, was sufficient to rescue it from the operation of the wager of law. 28 Hen. VI. 4; 9 Edw. IV. 1. 9. So, in debt for wages due for serving under the statute of laborers; as the service is compulsory and notorious, the defendant cannot wage his law. 10. Likewise, in debt by an attorney for his fees, though there be no writing, yet, as he is an officer of the court, his demand cannot be defeated by wager of law. 39 Hen. VI. pl. 34. 11. Wager of law is never permitted, in the case of contempt, trespass or deceit, for these, *per se*, charge the defendant with immoral conduct, which renders his oath suspicious. Co. Litt. 95 *a*. 12. Nor will it lie in a *quo minus*, for reasons similar to those already suggested. *Slade's Case*, 4 Co. 95 *b*. *13. Nor against any claim founded on prescription, for this is notorious, and susceptible of proof. 2 [*652 Vent. 261; 1 Mod. 121. 14. Lastly, in an action of debt by a merchant stranger, on any species of simple contract, the defendant was not permitted to wage his law. Even in those early times, the courts were strongly disposed to rescue commercial contracts and dealing from this species of trial, as may be seen by the intended operation of the statute *de mercatoribus*, and particularly, in the case of foreign creditors, who, it was presumed, could not so easily obtain the requisite evidence of their claims as resident merchants; and this may be seen in *Godfrey and Dixon's Case*, Palm. 14; Fleta 136.

From the cases enumerated, it appears, that wherever the plaintiff's demand is certain, and is so evidenced as to exclude the idea of a mere secret

or verbal contract between the parties, there, the defendant could neither deny the contract, nor maintain its discharge by his oath, and that of his compurgators.

If we examine the cases in which the defendant has been allowed this mode of trial, we shall find the same principle strongly manifested. The books furnish us with only six classes of cases in which a defendant is permitted to wage his law. 1. In debt, on simple contract; by which we are not to understand (as I shall presently show) every species of simple contract, but such only which, as the authorities express themselves, "are *dependent on the slippery memory of man, or the uncertainty of verbal agreements" 2. In debt on an award, under a parol submission. It has, indeed, been urged, that wager of law ought not, on principle, to be permitted in such a case, as the action is grounded on a notorious transaction, and by the interposition of third persons. But it was held, that the award is not the ground of action, but the submission, which may be private. Co. Litt. 295; 12 Mod. 681. 3. In an action of account against a receiver, on receipts from the plaintiff himself, the defendant may wage his law, for here the action itself shows that the matter is private between the parties; and this differs from the case already adverted to, where the receipts were by the hands of third persons. 4. In detinue, where the matter is no way connected with the reality, the defendant may wage his law. Here, the gist of the action is the detainer. But in detinue for a charter of feoffment, wager of law will not lie, as it concerns the freehold; everything regarding which, is presumed to be matter of notoriety. Cro. Eliz. 790; 2 Rol. Abr. 108; Year Book, 14 Hen. VI. pl. 1. 5. In debt for an *amerciament*, in a court not of record, it is said by some, that the defendant may wage his law. But, an enlightened baron of the exchequer says, that if this be law, it must be on the ground of the insignificancy of the debt, which seldom exceeds forty shillings, and which can be safely left to the consciences of men, and ought not *to trouble the country in the trial thereof. 12 Mod. 681. Holt, Ch. J., however, is decidedly of opinion, that the defendant cannot wage his law in this case: for, says he, "the plaintiff hath no sufficient proof to make out his cause; it hath ceased to be a matter of secrecy, and hence cannot be defeated by the oath of the defendant." 6. And lastly, in real actions, the defendant may wage his law of non-summons, this being often in secret, and not vouched by any writing. Bro. Ley Gager, pl. 27, 57, 103.

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From the cases enumerated, of the allowance or denial of this mode of trial, it is manifest, that it has only been tolerated in a few special cases; and these (to use the language of Holt) "are all grounded on a feeble foundation, or are of small consideration in the law." They abundantly prove, that wager of law originated in the "unstable evidence of the demand," in the "feebleness and exility of the plaintiff's cause of action," and that it had no connection whatever with the particular nature of the remedy by which the demand was sought to be enforced.

My position then is, that wager of law, in its origin, principle and practice, never did apply to written, though unsealed evidences of debt; and, *à multo fortiori*, not to promissory notes. It is conceded, however, that a different opinion has been entertained, and that it has supposed that the principle which regulates the admission or rejection of wager of law, is

the presence *or absence of a seal, or something equivalent thereto; and that all contracts, not of record, or not under seal, are parol or simple contracts, in reference to this mode of trial. That this opinion is erroneous, has already been partly shown; and, that it is altogether unsound, I shall now endeavor further to illustrate.

As to the origin of this "temper to corrupt perjury," Lord COKE confidently refers it to the law of God, which permitted the bailee of an ox, or other cattle, to discharge himself, by his own oath, from all responsibility for the death or loss of the animal. Others have regarded it as a mistaken application, by the early ecclesiastics of England, of the decisory oath of the civilians; and some have supposed that it was introduced by them with the oath *ex officio*, so often used in cases of ecclesiastical cognisance. But whether it be the offspring of Saxon rudeness, or finds its exemplar in the more refined code of imperial Rome, is not very material: certain it is, that the simple contracts alluded to in the books, mean nothing more than such an unsustained or unevidenced contract, as ought, in conscience, to be outweighed by the oath of the party sought to be charged. In the first Edward's reign, we find, that if a creditor sued on a verbal demand, he was required to make *rationabilem monstrationem* that a debt existed. For this purpose he produced his *secta;* the defendant might *vadiare legem*, that is, wage his law against the plaintiff's *secta*. We find, also, that no *secta* was ever required, where the plaintiff could produce any writing; *and as the wager of law was for the purpose of disproving the testimony [*656 of the *secta*, according to the then prevailing maxim, *lex vincit sectam*, it seems to follow, that no wager of law was ever allowed, where the plaintiff's claim was evidenced by any writing. The waging of law, therefore, may be considered as springing from the *secta*, and was a proof to silence the presumption raised by this preliminary evidence, adduced in support of mere verbal contracts. Bracton 409; Fleta 136, 138. The *secta*, and the defendant's oath, and compurgators, appear to have been requisite only "in respect of the weakness and inconsiderableness of the plaintiff's evidence of debt." This view of the subject is strongly shown in the well-known case on this antiquated learning, *City of London* v. *Wood*, 12 Mod. 670, 680, 682. In that case, HOLT, Ch. J., remarks, that wager of law is allowable, not because the debt may be discharged, or paid in private, but because the ground of action is itself secret; for, that if the privacy of payment, or the possibility thereof, were the occasion of wager of law, that might be a reason, in all cases where it is admitted, that this trial will not be allowed. The theory of this subject clearly evinces, that wager of law could, at no time, have been applicable to the species of simple contract now under consideration. Promissory notes surely are entitled to as much respect as a stated account by auditors, against which, we have seen, there could be no wager of *law; and they have all that certainty, notority and evidence in [*657 their nature, so often alluded to, and which constitute the only basis on which the admission or rejection of this summary proceeding can rest.

If we, for a moment, inquire into the nature of this species of simple contract, we cannot fail to perceive, that it has no one feature in common with those in which the defendant has been permitted to wage his law. Notes and bills are contracts *sui generis;* they are instruments of a peculiar character, neither specialties nor parol contracts. They cannot be

regarded as mere parol or simple contracts, either before, or since the statute 3 & 4 Anne, c. 9, and, consequently, ought not to be embraced within the principle which sustains the wager of law, allowing this to be even broader than has been stated. For, first, even prior to the statute of Anne, the plaintiff need not have averred nor proved any consideration: the mere statement of the promise, and the defendant's liability, constituted a sufficient *primâ facie* evidence of debt. Even between the original parties, they imported a consideration; and the *onus probandi* of the absence, or failure, of consideration, lies on the defendant. 2 Ld. Raym. 1481; 1 Chit. on Bills, 7, 12, 87, 452; 1 Chit. Pl. 295; 2 Phil. Ev. 6, 10; 3 M. & S. 352; 5 Cranch 332; 5 Wheat. 277; 9 Johns. 217. The doctrine, then, of *Rann* v. *Hughes*, 7 T. R. 350, which qualified the *obiter* opinion of Mr. Justice WILMOT, in *Pillans* v. *Van Meirop*, is itself too broad; *for, though the
*658] common law has not adopted the well-known distinction of the civilians, between contracts *ex literis* and *ex verbis*, yet notes and bills are exceptions, firmly ingrafted on the general rule. Secondly. If, then, these instruments, at all times imported a *primâ facie* consideration, the statute has clothed them with an additional property. They are no longer mere *choses in action;* their simple negotiability, though they remain in the hands of the original parties, imparts to them a further dignity, which distinguishes them from all other simple contracts; they are originally evidences of debt, and, after indorsement, the statute raises an irresistible presumption in favor of honest holders, a *presumptio juris et de jure*. May we not, then, assert, with confidence, that these instruments, which have sprung into life and utility, long after the wager of law had gone into almost desuetude, cannot be those "secret contracts, whose feebleness and exility" should subject them to avoidance by the defendant's oath?

Again, it will be borne in mind, that when wager of law was first practised, the principle which would not allow an action of debt on simple contract, against an executor, also deprived the creditor of every other remedy. The maxim then applied, was *actio personalis moritur cum personâ*. But after the introduction of the action of *assumpsit*, it was held by the courts, not only that the debt survived against the personal representatives of the
*659] deceased, but the debtor himself *was not permitted to wage his law in this form of action. It is manifest, however, that both of these opinions originated in the mistaken application of the principle which sustained wager of law, viz., to the form of the remedy, instead of the evidence of the debt; and that, in truth, there was no legal necessity to resort to such refinements, to get rid, either of the maxim, or of wager of law.

When case on *assumpsit* was introduced, promissory notes were scarcely known. Prior to Elizabeth's reign, debt was the only remedy on simple contract. The Year Books furnish no instance of the action of *assumpsit*, and *Slade's Case*, 4 Co. 92 (44 Eliz.), is the first judicial sanction of this form of action. This was shortly after followed by *Pinchon's Case*, 9 Co. 86, in which *assumpsit* was enforced against executors, and wager of law was denied to the testator. But in introducing the remedy by *assumpsit*, it was by no means the design of the courts to abolish the remedy by debt on simple contract. It was an additional remedy, intended to avoid an inconvenient maxim in one case, and a no less inconvenient mode of trial in another. The action of debt, however, remained a suitable remedy, in all

cases of simple contract, were wager of law would not lie. In the case now under consideration, *assumpsit* might, indeed, have been brought against the executors of Childress. If, in debt against Childress himself, he *could not have waged his law, why should this remedy be denied against his executors? If the testator had not this privilege, the [*660 plaintiff had his election to sue in debt or *assumpsit*. Of late, debt on simple contract has become a more favorite and practised remedy. In some respects, it is preferable to *assumpsit;* for, in debt, the judgment is final, and not interlocutory, as in *assumpsit*. The defendant, also, in some cases, is compellable to find bail in error, though the judgment be by *nil dicit*, or on demurrer. 1 H. Bl. 550; 3 East 359; 2 Saund. 216; 1 Chit. Pl. 107. Both in England and this country, debt is brought on notes and bills, wherever the responsibility is not merely collateral (*Bishop* v. *Young*, 2 Bos. & Pul. 78; *Raborg* v. *Peyton*, 2 Wheat. 385), and no reason can be assigned for refusing it in the present case, except the one I have endeavored to show was never applicable to this species of simple contract. It is material to be recollected, that wager of law was not, at any time, a well-fixed or established privilege. In the reign of Edward III., the courts very consistently held, that where a testator might wage his law, his executors might also. 29 Edw. III. 36 *b*, 37 *a*. The grounds of its application were always, in a degree, uncertain; and its admission or rejection, was under the sound discretion of the court. Wager of law, says Ch. Baron WARD, is a matter *ex gratiâ curiæ*. Judges are to use a sort of discretion in admitting people to it. 12 Mod. 676.

*As to the recent case of *Barry* v. *Robinson*, 4 Bos. & Pul. 293, [*661 it does, indeed, decide, that an action of debt cannot be maintained against an executor or administrator, on the simple-contract debt of his testator or intestate, such as a promissory note; and the reason assigned for denying the remedy, was the one I have endeavored to refute. But ought this case to outweigh those which have been advanced in support of a contrary opinion? It is a solitary case, standing amidst the accumulated decisions of centuries. From the days of Elizabeth, to the year 1805, and since, no case can be found, in which wager of law has been applied to the case of a promissory note, though debt has been frequently brought on notes and bills. The point now under consideration passed *sub silentio* in the case of *Barry* v. *Robinson;* it was not adverted to, either in the argument at the bar, or by the court. Had the question been made, and the mind of the court been expressly directed to the distinction between these evidences of debt, and other simple contracts, the decision must have been different. In that case, perhaps, there was no objection to resort to another form of action; but in the circumstances of the present case, if this action cannot be sustained, it will be of little avail to prosecute in another form. Sir JAMES MANSFIELD, in that case, rested his opinion, on the distinction between debt and *assumpsit*, as applicable to the case of executors; but no inquiry was made as to the nature of the proof to sustain *the action. He ad- [*662 mitted, that the distinction was not founded in good sense, but denied his power to alter the law. I have endeavored to show, that the law needed no alteration, as this summary mode of trial was not applicable, and never had been applied to such substantial evidences of debt as notes and bills.

2. But even supposing that, by the common law of England, the testator

could have waged his law, in this case, is it proper, that this antiquated doctrine should be adopted as a part of our jurisprudence? The wager of battle, and the various other barbarous modes of trial invented by a superstitious age, are equally portions of the common law; yet, all will allow, that they are wholly at variance with the genius and spirit of our institutions, and are not fit to be incorporated with our jurisprudence. At one time, the plaintiff was obliged to produce his *secta;* and, though our declarations still conclude with an *inde producit sectam*, in compliance with the fashion of former times, yet, an attempt at this day, practically to revive this preliminary proof, would, no doubt, be regarded as the result of a most adventurous and indiscriminate admiration of the common law.

3. The wager of law has never been adopted in this country. The reported adjudications of this country do not allude to the distinction between debt and *assumpsit* on simple contracts, nor is wager of law once mentioned in any
*663] of them. The statutes of the various states are equally *silent, with the exception of New Jersey (Rev. Laws of N. J. 1795), and South Carolina (Grimke's Laws of S. C.). In the former state, wager of law is abolished in all cases, except of non-summons in real actions; and in South Carolin, wager of law is abolished in the action of detinue. This provision, no doubt, was *ex abundanti cautelâ*. Detinue is there a practical remedy for the recovery of slaves, being preferable to replevin or trover. As slaves are not connected with the realty, so as to oust the wager of law, if it otherwise obtained, it might have been supposed, that this mode of trial would be attempted, in detinue for slaves, and to remove this possibility, the statute was enacted, for there is no instance of its adoption in this, or any other action; nor does the present record furnish any reason for supposing, that it is known to the law or practice of the courts of Tennessee. It is also proper to remark, that promissory notes, in the state of Tennessee, rest on precisely the same principles as in England; and the statute of Anne is there in force. Wager of law is a mode of trial, hostile to the liberal spirit of our laws. By this trial, the defendant becomes not only a witness in his own cause, but the only witness; and one, too, who cannot be contradicted either by proofs or circumstances. The judgment thereon is final; more conclusive than a verdict, for, when the defendant is sworn *de fidelitate*, and
*664] his eleven compurgators *de credulitate*, *all controversy is terminated. There could be no new trial, for any cause whatever. 2 Salk. 682; 2 Vent. 171; 12 Mod. 676. If ever so flagrantly abused by perjury, there can be no remedy; for it was a well-established maxim, "indictment for perjury lies not for false swearing in the trial by wager of law." 1 Vent. 296; Co. Litt. 295. The mock solemnity in the manner of waging law, would ill suit the simplicity of judicial proceedings in this enlightened age and country. Bracton 411; Fleta 137; 2 Lill. Abr. 824. Trial by jury is the only mode of trial known to our common-law jurisprudence. The judiciary act of 1789, c. 20, § 34, provides, that the laws of the several states shall be rules of decision on all trials at common law, except where the laws of the United States shall otherwise require. The constitution expressly guaranties trial by jury, in all common-law cases, where the amount exceeds $20. And though the phraseology of this article of the constitution seems to aim at the preservation of that which was before the admitted mode of trial, yet there can be no doubt, that it was a primary object to abolish all

summary trials, all barbarous and unsuitable modes of judicial investigation.

The other causes of demurrer may be more briefly examined. It is clear, from the declaration, that the firm of William Cochran & Comegys was composed of but two persons, viz., William Cochran and Comegys. The declaration alleges, that John G. Comegys was the surviving partner of this firm, and this is equivalent to an *express averment that the Comegys of the firm, and John G. Comegys, who survived, are the [*665 same persons; that the firm was composed of none else, and that John G. Comegys survived William Cochran. The forms of declaring or pleading do not require that every possible inference should be negatived. All that is required, is "certainty to a common intent," or, at most, "certainty to a certain intent in general;" by which is meant, what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear. 2 H. Bl. 530; Cowp. 682; 1 Saund. 276; 1 Chit. Pl. 237. This species of certainty is sufficient in all declarations, replications and even indictments. If there be sufficient certainty, to enable the defendant to answer, the jury to decide, and the court to render judgment, it is well, though the nicety of critics may not be gratified. It is said, that a more rigid certainty is sometimes required, but this is doubtful; and if not, it obtains only in two cases, viz., in pleas of estoppel, and alien enemy, which are not favored, and are, therefore, said to demand a certainty to "a certaint intent in every particular." 8 T. R. 167; 1 Doug. 159. On inspecting this declaration, could a reasonable doubt be entertained by the defendant below, the court or jury, that this firm was composed of any but the two persons mentioned, and that John G. Comegys is the person alluded to in the firm, and in the note, and that he survived William Cochran?

The next objection to the declaration regards *the mode in which [*666 Joel Childress is alleged to have made this note. But it would not have been proper to have stated, that the note was signed by Joel Childress, for this was not the fact; nor that it was made by A. Childress, for the debt was not his, but Joel's. The declaration might have stated, that the note was made by Joel, without noting the agency, for this is its legal operation. But the allegation in this case is according to the fact, viz., that "the said Joel Childress, by his agent, A. Childress, made," &c., and this is the safest and usual mode. Whether A. Childress were the lawfully-authorized agent of Joel, is matter of proof, not of pleading. 1 H. Bl. 313; 6 T. R. 659; 2 Phil. Ev. 4, 5, note *a*; Chit. on Bills 627, note *a*, note *b*.

It is also objected, that there is no sufficient *profert* of the letters testamentary; and that it does not appear, from what authority they emanated. The omission of *profert* is, no doubt, cause of special demurrer; but where *profert* is made, its sufficiency is matter of evidence only, and a demurrer to it, as evidence, would lie. But the demurrer in this case, is not for the omission, nor for defectively making the *profert*, nor does it appear in the shape of a demurrer to evidence, complaining of the insufficiency of the authority granting the letters. But were this the case, *non constat* from this record, by whom they were granted, which surely was the fault of the plaintiff in error, not of the defendant; how the court below was to have judged this matter, or how this court *can judge of the sufficiency of [*667 the letters, for they do not appear to have been legally before the

court below, and they are not before this in any form. This was the fault of the defendant below. After the *profert*, he should have craved *oyer*, and then demurred. 2 Wils. 413; 1 Chit. Pl. 416.

But this demurrer, I presume, cannot be sustained on any ground; for if the letters proffered were those of the state of Tennessee, the plaintiffs' right to sue will not be questioned: and if the letters were granted in Maryland, the statute of 1809, c. 121, § 1, 2, of Tennessee, expressly authorizes executors or administrators to sue in the courts of that state, under letters granted by any of the sister states.

The last objection which has been made, is to the jurisdiction of the court, viz., that the declaration only avers the parties to this suit to be citizens of different states, but has not stated their respective testators to be citizens of different states. But this is not a case embraced by the 11th section of the judiciary act of 1789, c. 20. Executors are not assignees, within the letter or spirit of that act: they are something more than assignees; they are representatives, who are not mere instruments, for they have the property of their testator, both legal and equitable, vested in them. They are the absolute owners of the property, as to all strangers: they are the lords of all the contracts made with their testator; they may release,
*668] sue or receive payment on them; *and until the estate is settled, not even the legatees or distributees can interfere with them. This is a case, then, under the constitution; and the controversy is between citizens of different states, not nominally merely, but substantially. It is, therefore, immaterial to inquire, whether their respective testators were citizens of the same, or of different states. *Chappedelaine* v. *Dechenaux*, 4 Cranch 306; Serg. Const. Law 113, 117.

March 14th, 1823. STORY, Justice, delivered the opinion of the court.—This is an action brought by the executors of John G. Comegys, who was surviving partner of the firm of William Cochran & Comegys, to recover the contents of a promissory note, made by Joel Childress, deceased (whose executor the plaintiff in error is), payable to the firm of William Cochran & Comegys. The cause came before the circuit court for the district of West Tennessee, upon a special demurrer to the declaration; and the court having overruled the demurrer, it has been brought here by writ of error.

The several causes assigned for special demurrer have been argued at the bar; but before we proceed to the consideration of them, we may as well dispose of the objection taken to the jurisdiction. The parties, executors, are, in the writ and declaration, averred to the citizens of different states; but it is not alleged, that their testators were citizens of different states; and
*669] the case *has, therefore, been supposed to be affected by the 11th section of the judiciary act of 1789, c. 20. But that section has never been construed to apply to executors and administrators. They are the real parties in interest before the court, and succeed to all the rights of their testators, by operation of law, and no other persons are the representatives of the personalty, capable of sueing and being sued. They are contradistinguished, therefore, from assignees, who claim by act of the parties. The point was expressly adjudged in *Chappedelaine* v. *Dechenaux* (4 Cranch 306), and, indeed, has not been seriously pressed on the present occasion.

The first cause of demurrer is, that the declaration states the note to

have been made to the firm of William Cochran & Comegys, but does not state who, in particular, the persons composing that firm were. Upon consideration, we do not think this objection ought to prevail. The firm are not parties to the suit; and if Comegys was, as the declaration asserts, the surviving partner of the firm, his executor is the sole party entitled to sue. It is not necessary, in general, in deriving a title through the indorsement of a firm, to allege, in particular, who the persons are, composing that firm; for, if the indorsement be made in the name of the firm, by a person duly authorized, it gives a complete title, whoever may compose the firm. (See 3 Chit. Pl. 2, 39.) If this be so, in respect to a derivative title, from the act of the parties, more particularity and certainty do not seem essential, in a derivative title by the *act of the law. A more technical averment might, indeed, have been framed upon the rules of good pleading; [*670 but the substance is preserved. And there is some convenience, in not imposing any unnecessary particularity, since it would add to the proofs; and it is not always easy to ascertain or prove the persons composing firms, whose names are on negotiable instruments, especially, where they reside at a distance; and every embarrassment in the proofs, would materially diminish the circulation of these valuable facilities of commerce.

Another cause of demurrer is, that the declaration does not aver that the note was signed by Joel Childress. To this, it is sufficient to answer, that the declaration does state, that "Joel Childress, by his agent, A. Childress, made" the note; and it is not necessary to state that he signed it; it is sufficient, if he made it. The note might have been declared on, as the note of the principal, according to its legal operation, without noticing the agency; and though it would have been technically more accurate to have averred, that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable; for, if he makes it by his agent, it is a necessary inference of law, that the agent is authorized, for, otherwise, the note would not be made by the principal; and that the demurrer itself admits. (See Chitty on Bills, app'x, p. 528, and notes; Bayley on Bills 103; 2 Phil. Ev. ch. 1, § 1, p. 4, 6.)

Another cause of demurrer is, that the declaration *omits to state any damages; but this, if in any respect material in an action of [*671 debt, is cured by the writ, which avers an *ad damnum* of $500.

Another cause of demurrer is, that the letters testamentary are not sufficiently set forth to show the right of the plaintiffs to sue. But *profert* is made of the letters testamentary, in the usual form; and if the defendant would have objected to them as insufficient, he should have craved *oyer*, so as to have brought them before the court. Unless *oyer* be craved and granted, they cannot be judicially examined. And if the plaintiffs were not executors, that objection should have been taken by way of abatement, and does not arise upon a demurrer in bar. It may be added, that, by the laws of Tennessee, executors and administrators, under grants of administration by other states of the Union, are entitled to sue in the courts of Tennessee, without such letters granted by the state. (Act of Tennessee, 1809, ch. 121, § 1, 2.)

It was also suggested at the bar, but not assigned as cause of demurrer, that the action ought not to have been in the *detinet* only; but in the *debet et detinet*. This is a mistake. Debt against an executor, in general, should

be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*. (Com. Dig., Pleader, 2 D, 2 ; 1 Chit. Pl. 292, 344 ; 2 Ibid. 141, note *f*; *Hope* v. *Bague*, 2 East 6 ; 1 Saund. 1, note 1 ; Ibid. 112, note
*672] 1.) And if it had been otherwise, *the objection could only have been taken advantage of on special demurrer, for it is but matter of form, and cured by our statute of jeofails. (*Burland* v. *Tyler*, 2 Ld. Raym. 1391 ; 2 Chit. Pl. 141, note *f*; Act of 1789, ch. 20, § 32.)

But the most important objection remains to be considered ; and that is, that an action of debt does not lie upon a promissory note, against executors. It is argued, that debt does not lie upon a simple contract, generally, against executors ; and the case of *Barry* v. *Robinson*, in 4 Bos. & Pul. 293, has been cited, as directly in point. Certainly, if this be the settled rule of the common law, we are not at liberty to disregard it, even though the reason of the rule may appear to be frivolous, or may have ceased to be felt as just, in its practical operation. But we do not admit, that the rule of the common law is as it has been stated at the bar. We understand, on the contrary, that the general rule is, that debt does lie against executors, upon a simple contract ; and that an exception is that it does not lie in the particular case, where the testator may wage his law. When, therefore, it is established, in any given case, that there can be no wager of law by the testator, debt is a proper remedy. Lord Chief Baron Comyn lays down the doctrine, that debt lies against executors, upon any debt or contract, without specialty, where the testator could not have waged his law ; and he puts the case of debt for rent, upon a parol lease, to exemplify it. (Com. Dig. Administration, B, 14. See also, Ibid. Pleader, 2 W, 45, tit. 2, D, 2.) The same
*673] *doctrine is laid down in elementary writers. (1 Chit. Pl. 106 ; Chit. on Bills, ch. 6, p. 426.) Upon this ground, the action of debt is admitted to lie against executors, in cases of simple contract, in courts where the wager of law is not admitted, as in the courts of London, by custom. So, in the court of exchequer, upon a more general principle, the wager of law is not allowed upon a *quo minus* (Com. Dig. Plead. 2 W, 45 ; Godbolt 291 ; 1 Chit. Pl. 106, 93 ; Bohun's Hist. of London, 86.) The reason is obvious ; the plaintiff shall not, by the form of his action, deprive the executor of any lawful plea, that might have been pleaded by his testator ; and as the executor can in no wise wage his law (Com. Dig. Pleader, 2 W, 45), he shall not be compelled to answer to an action, in which his testator might have used that defence. Even the doctrine, with these limitations, is so purely artificial, that the executor may waive the benefit of it ; and therefore, if he omits to demur, and pleads in bar to the action, and a verdict is found against him, he cannot take advantage of the objection, either in arrest of judgment, or upon a writ of error. (2 Saund. 74, note 2, by Williams, and the authorities there cited ; *Norwood* v. *Read*, Plowd. 182 ; Cro. Eliz. 557.) Style, in his Practical Register, lays down the rule with its exact limitations. "No action," says he, "shall ever lie against an executor or administrator, where the testator or intestate might have waged their law ; because they have lost the benefit of making
*674] that defence, which is a good defence in that action ; *and if their intestate or testator had been living, they might have taken advantage of it." Style's Pr. Reg. and Comp. Atty, in Courts of Common Law (1707), p. 666.

In the view, therefore, which we take of this case, we do not think it necessary to enter into the consideration, whether the case in 4 Bos. & Pul. 293, which denies that debt will lie against executors upon a promissory note of the testator is law. There is, indeed, some reason to question, at least, since the statute of Anne, which has put negotiable instruments upon a new and peculiar footing, whether, upon the authorities and general doctrines which regulate that defence, it ought to be applied to such instruments. The cases cited at the bar by the plaintiff's counsel, contain reasoning on this point, which would deserve very serious consideration. But waiving any discussion of this point, and assuming the case in 4 Bos. & Pul. 293, to have been rightly decided, it does not govern the case now before the court; for that case does not affect to assert or decide, that the action of debt will not lie, in cases where there can be no wager of law.

Now, whatever may be said upon the question, whether the wager of law was ever introduced into the common law of our country, by the emigration of our ancestors, it is perfectly clear, that it cannot, since the establishment of the state of Tennessee, have had a legal existence in its jurisprudence. The constitution of that state has expressly declared, that the trial by jury shall remain inviolate; and the constitution of the United *States has also declared, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law, would be utterly inconsistent with this acknowledged right. So that, the wager of law, if it ever had a legal existence in the United States, is now completely abolished. If, then, we apply the rule of the common law to the present case, we shall arrive, necessarily, at the conclusion, that the action of debt does lie against the executor, because the testator could nevery have waged his law in this case. [*675

Upon the whole, the judgment of the circuit court is affirmed, with six per cent. damages and costs.

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SIGLAR and NALL, Administrators of WILLIAM NALL, deceased, Plaintiffs in error, *v.* JOHN HAYWOOD, Public Treasurer of the State of North Carolinia, Defendant in error.

*Judgment against executors.*

An executor or administrator is not liable to a judgment, beyond the assets to be administered, unless he pleads a false plea.

If he fail to sustain his plea of *plene administravit*, it is not necessarily a false plea, within his own knowledge; and if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only.[1]

In such a case, the judgment is *de bonis testatoris*, and not *de bonis propriis*.

*ERROR to the Circuit Court of Tennessee. This was an action of debt, brought in the court below by Haywood, the defendant in error, against Siglar and Nall, the plaintiffs in error, upon a judgment obtained against the intestate, William Nall, in the superior court for the district of Hillsborough, in the state of North Carolina, for the sum of $2980.05. The defendants pleaded, 1. *Nil debet*, and 2. *Plene administravit*. The plaintiff [*676

[1] See Sergeant v. Ewing, 30 Penn. St. 75.

replied to the second plea, that the defendants have, and on the day of commencing this suit had, divers goods, &c., whereof they could have satisfied the plaintiff for the debt aforesaid.

On the trial, it appeared by the accounts exhibited by the defendants, that a part of the intestate's goods and chattels remained in their hands unadministered. On which, the plaintiff's counsel moved the court to instruct the jury, that the plea of *plene administravit* was, therefore, false, and that on that ground, the plaintiff was entitled to his verdict on the whole issue. The instruction was given by the court, to which the counsel for the defendants excepted. The jury returned a verdict for the plaintiff, for the sum of $2565.16 debt, and $4429.53 damages, for the detention thereof; and also found, "that the defendants have not fully administered all and singular the goods and chattels, rights and credits, which were of the decedent, and which came to their hands to be administered, previous to the issuing of the writ of *capias* in this cause, as the plaintiff in replying hath alleged."

*677] *Upon which, judgment was entered as follows: "Therefore, it is considered by the court, that the plaintiff recover against the defendants, $2565.16, the residue of the debt aforesaid, in form aforesaid assessed, and also his costs," &c. And the cause was brought by writ of error to this court.

February 4th. *Sergeant*, for the plaintiffs in error (no counsel appearing for the defendant in error), made the following points, together with several others which it is not thought necessary to state, because they are not noticed in the opinion of the court. 1. That the court erred in the above instruction given to the jury. 2. That the verdict was erroneous, because it did not find what goods and chattels, rights and credits of the intestate, or what amount thereof, remained in the defendant's hands unadministered. 3. The judgment was erroneous, because it is against the defendants generally, and *de bonis propriis*, when it ought to have been *de bonis testatoris*. Under the first point, he argued, that the law was well settled, that executors are no further chargeable than they have assets, unless they make themselves so by pleading a false plea, *i. e.*, such a plea as would be a perpetual bar to the plaintiff, and which they know to be false, as *ne unques executor*,

*678] or a release to themselves. But if they *plead a former judgment by another person, *et nil ultra*, and the plaintiff replies *per fraudem*, yet judgment shall be *de bonis testatoris*. 1 Rob. Abr. 931. The only plea that can involve the defendant in personal responsibility (except as above stated), and that only for costs, is a plea disputing the debt. 1 Chit. Pl. 485.(*a*) *Harrison* v. *Beecles* (cited 3 T. R. 685, 690), is in point. The plea there was *plene administravit*. It was proved, that the defendant had assets, but of less amount than the plaintiff's claim. It was contended, that the plaintiff was entitled to recover the whole amount. Lord MANSFIELD decided, after consultation with the other judges, that he could only recover the amount of assets proved, which has been the law ever since.

(*a*) See form of plea, and note on it, in 2 Chitty 499. It agrees with the form used in this action. Under this allegation, "hath not, nor on the day, &c., had," &c., the defendant may give in evidence any due administration of assets. 2 Saund. 220, note 8. Chitty, ut sup.

Siglar v. Haywood.

Upon the second point, if an executor plead *plene administravit*, and issue is joined thereon, and the jury find, that the defendant had goods in his hands, but do not find the value, the verdict is void for uncertainty. Co. Litt. 227 *a*; *Fairfax* v. *Fairfax*, 5 Cranch 19; *Booth* v. *Armstrong*, 2 Wash. 301; *Harrison* v. *Beecles*, 3 T. R. 688, 689, note. As to the mode of entering judgment against an executor or administrator, and afterwards proceeding thereon, he cited 2 Tidd's Pr. 842, 894, 929, 1017–20.

*February 5th, 1823. MARSHALL, Ch. J., delivered the opinion of the court.—This case presents several questions of some difficulty; [*679 but as the argument has been *ex parte*, and there are other points on which the judgment must necessarily be reversed, the court will confine its opinion to those on which no doubt can arise.

At the trial of the issue of fully administered, the plaintiff's counsel moved the court to instruct the jury, "that as it appeared, by the accounts exhibited by the defendants, that a part remained in their hands unadministered, that the plea was, therefore, false, and that on that ground he was entitled to their verdict on the whole issue." This instruction was given by the court, and to this opinion the counsel for the defendants excepted. It is now well settled, and the case cited from Cranch, in the argument, is founded on the principle, that if an administrator fails to sustain his plea of fully administered, he is not, on that account, liable to a judgment beyond the assets to be administered. The plea is not necessarily false, within his own knowledge; he may have failed to adduce proof of payments actually made. It is not required, that the plea should state with precision the assets remaining unadministered; and an executor or administrator would always incur great hazard, if he were required to state and prove the precise sum remaining in his hands, under the penalty of being exposed to a judgment for the whole amount claimed, whatever it might be. To state a full administration, without proving it, would be useless. The rule and usage, therefore, *is, that if the plea of fully administered be found against the defendant, the verdict ought to find the amount of assets unad- [*680 ministered, and the defendant is liable for that sum only. The instruction of the court, on this point, is erroneous, and, consequently, the verdict and judgment founded on it, must be set aside and reversed.

The same error is in the verdict. Instead of finding the amount of assets remaining unadministered, it finds the whole amount claimed, which, as was decided in the case already mentioned, is clearly erroneous. There is also additional error in the judgment which is rendered against the administrators, *de bonis propriis*, instead of being *de bonis testatoris*. For these errors, the judgment must be reversed, and the verdict set aside, and the cause remanded for further proceedings according to law.

Judgment reversed.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the court of the United States for the seventh circuit in the district of East Tennessee, and was argued by counsel on the part of the plaintiffs in error. On consideration whereof, this court is of opinion, that there is error in the record and proceedings of the said circuit court, in this, that the said court instructed the jury, on the trial of the issue, on the plea of

fully administered, that, as it appears, by the accounts exhibited by the
*681] defendants, a part remained in their hands unadministered, *the plea was, therefore, false, and that, on that ground, the plaintiff was entitled to their verdict on the whole issue; and also in this, that the jury have found a verdict, on the plea of fully administered, against the defendants, without finding the sum unadministered; and also in this, that the judgment on the said verdict is absolute against the administrators themselves, instead of being, to be levied of the goods and chattels of their intestate, in their hands to be administered. Whereupon, it is considered by the court, that the said judgment be reversed, and the verdict be set aside, and the cause remanded to the said circuit court, that further proceedings may be had therein, according to law.

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CORPORATION OF THE CITY OF WASHINGTON and others, Appellants, *v.* PRATT, FRANCIS and others, Respondents.

*Tax sales in Washington.*

Under the 8th section of the act of 1812, to amend the act for the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof.

The lien upon each lot, for the taxes, is several and distinct, and the purchaser of each holds his lot unincumbered with the taxes due on the other lots held by his vendor.

*682] *The advertisement must contain a particular statement of the amount of taxes due on each lot separately.

If the sale of one or more lots produce the amount of taxes actually due on the whole, by the same proprietor, the corporation cannot proceed to sell further.

APPEAL from the Circuit Court for the District of Columbia.

March 13th, 1823. This cause was argued by the *Attorney-General* and *Key*, for the appellants, and by *Jones*, for the respondents.

March 14th. JOHNSON, Justice, delivered the opinion of the court.—A number of lots in the city of Washington, the property of the respondents, having been sold for payment of taxes, assessed under authority of the appellants, to the use of the city, this bill was filed by the respondents, in the circuit court of the district, to enjoin the corporation from executing conveyances to the purchasers. The allegations on which the claim for relief was asserted, presented to the view of the court below a variety of irregularities, previous to, or accompanying the sale, which that court decided to be deviations from the provisions of the law of congress, authorizing the sale. A perpetual injunction was, therefore, decreed, and from that decree, the defendants below have appealed.

There have been various questions submitted to the consideration of this court, in the argument, which, with a view to precision, shall be stated in the parties' own language, in their order.

*683] *1. The first is, whether sales of unimproved squares or lots, in the city of Washington, to pay two years' taxes thereon, pursuant to the 8th section of the act of congress, passed in the year 1812, entitled, "an act, further to amend the act for the incorporation of the city," would be illegal, merely because such squares and lots had not been assessed to the true and lawful proprietors thereof, without any wilful mistake or neglect,

on the part of the persons who made the assessment, the assessors having used due diligence to ascertain the true proprietors? This question, as well as every other in the cause, must find a solution in the provisions of the law which vests the power to sell. Where these are explicit and consistent, there is no ground for adjudication but their literal meaning. That they must be construed strictly, follows, from their affecting private rights, and particularly rights of freehold; and that they must be pursued strictly, is the consequence of their being the sole foundation of the powers executed under them.

The 7th section of the act of incorporation of 1802, vests in the corporation a very general power to lay and collect taxes; but the next section of the same act limits their power in enforcing payment of taxes, to a distress and sale of goods, and contains an express prohibition against subjecting vacant lots to a sale for taxes. As no goods could be expected to be found on such lots, it became necessary to pass this act of 1812, the 8th section of which is in these words: "That unimproved lots in the city of Washington, on *which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold, at public [*684 sale for such taxes due thereon: provided, that public notice be given of the time and place of sale, by advertising, in some paper printed in the city of Washington, at least six months, where the property belongs to persons residing out of the United States; three months, where the property belongs to persons residing within the United States, and without the limits of the district of Columbia; and six weeks, where the property belongs to persons residing within the district of Columbia, or city of Washington: in which notice shall be stated, the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon." And then follows another proviso, securing to the proprietor, the right to redeem within two years after such sale. In legislating upon this subject, the corporation has sanctioned an assessment to the owners or supposed owners; and the real state of the question is, whether this is not going beyond the power of sale, as delegated to them by the act of congress. This again depends upon the question, whether the person "to whom," in the language of the clause cited, "the lots may have been assessed," can mean any other than the actual owner of such lot.

We think, it cannot. It was, undoubtedly, in the power of congress to have left what latitude they *pleased to the assessor, in designating the owner; but if they have confined him to the necessity of deter- [*685 mining the true owner, it is not in our power to enlarge his discretion. It may be a hardship upon the corporation, but the legislature only can decide, whether that hardship shall be perpetuated or not. It must be observed, that the alternative is one which would put it in the power of the assessor to designate a mere nominal owner, a kind of casual ejector, in every case. Had congress intended to lighten the labors of the corporation or their assessor, in this respect, there were very simple means of doing it; they might have sanctioned a designation with reference to the first or last vendee of record. But it is obvious, that congress were very jealous of the exercise of this power over the lots of absentees; and in the previous provisions of this eighth section, they make the right of selling, with reference to the time

of advertising, to depend expressly upon ownership; not reputed ownership or assessment: "to whom the property belongs," are the words of the law. When, therefore, they afterwards speak of publishing the name of the person to whom the lot was assessed, they must be held to mean, the name of him who was the owner, at the time of the assessment. This removes many of the inconveniences apprehended from subsequent or fraudulent transfers; and the inquiries remaining to be made by the assessor, will be greatly simplified, by the operation of the registering laws of the district. It will seldom happen, that the legal estate does not, in fact, exist in the last vendee of *record, or his heirs or devisees. The name of the real party in *686] interest must have been, in the eyes of congress, the most awakening circumstance of the advertisement required to warn him of his danger.

2. The second question is, whether, where several lots belonged, and were assessed to one person, and two years' taxes were due on every one of them, it would be lawful to sell one of the lots, to pay the taxes due upon all, or each lot would be liable only to be sold to pay the tax due on itself? This question, thus stated, does not admit of a general answer.

That each lot stands incumbered with no more than its own taxes, and the lien upon each is several and distinct, results, not less from the provisions of this eighth section, which gives the right of redeeming, severally, than from the consideration that, in case of a partial sale by the proprietor of many lots, the purchaser from him would not, by the act of transfer, hold his purchase disincumbered of its own particular taxes, either absolutely, or upon the contingency of the remaining lots of his vendor being adequate to the satisfaction of the taxes due on the whole. Nor would a purchaser of a single lot hold his purchase incumbered with the taxes due on the whole mass of lots held by the vendor: each would have the right to redeem, upon paying the taxes assessed on his own particular purchase, and would hold his purchase subject to such taxes.

The provisions of the act are clearly intended *to raise the tax of *687] each lot from itself. The words are, so *much* thereof, not so *many*; as they must have been, after speaking of "unimproved lots," had it been intended to authorize the sale of some, for the taxes of others; and not the sale of each one, or "so much" as is necessary of each one, for the payment of its own taxes. Apply the enacting words to the case of an owner of a single lot, and the effect of the word "much," can only be to authorize a sale of part of a lot, whenever circumstances will admit of such a sale, and the sum due will not require more. But if taxes be due by one and the same individual, in small sums, upon many lots, and one lot being set up for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and no excuse can then exist for making further sales. This exposition disposes of the second question.

3. The third question is, whether it be necessary that the advertisement should contain a particular statement of the amount of taxes due on each lot separately; or, where several lots belonged to the same person, whether it would be sufficient to state in the advertisement, the aggregate amount of taxes due on all the lots so belonging to the same person? This may be a very immaterial question practically, and it may not be very easy to assign a sufficient reason of policy for the one or other alternative. But what have we to do with such inquiries, in cases of positive enactment? The law must

be pursued, whatever be the previous *steps required. The difficulty here presented, is grounded on the use of the words in this eighth section, "amount of taxes." This, in its ordinary import, expresses an aggregate of taxes. But it is obvious, that we cannot here apply that aggregate idea to a sum made up from the taxes of many lots; since this would also support the sufficiency of a publication, exhibiting nothing more than the amount of taxes upon the whole list of lots advertised, whoever be the proprietors. Some more appropriate signification must, therefore, be sought for it; and this is easily found; for, when it is considered, that the taxes of each lot are made several liens upon each, it follows, that this aggregate idea can have reference only to the amount made up from the arrears of the two years, which must be due to authorize a sale. We, therefore, think, that the taxes of each lot ought to be severally exhibited. The operation of such a provision must be the test of its own policy. The duty is easily complied with, and the performance of it may not be destitute of practical utility.

4. The fourth point has not been pressed by the appellants' counsel, nor can there be a doubt entertained, that it is altogether against the appellants. The publication of the sum due, was as necessary under the eighth section, as any other act required by it; the circumstance of time in the advertisement, therefore, could not have been dispensed with as to that particular. An increase of the sum demanded, necessarily required the extension of the time of advertising. *Non constat*, *but that the smaller sum may [*689 have been provided and ready on the day of sale; or that the larger would not have been provided, within the legal time, had the advertisement been continued.

5. The fifth question is, whether, if unimproved lots, on which two years' taxes be due, be advertised for sale, and the amount stated be greater than that actually due, the sale of such lots will be void; and, if void, whether for the whole, or only for the amount of excess, when the amount is divisible, as it may be in the sale of several lots? This question may be disposed of thus: As it supposes that two years' taxes are actually due, there can be no doubt, that the lots may be severally sold; for the greater sum includes the less, and the owner had his remedy to prevent a sale, by tendering the amount actually due on any particular lot set up for sale. But if the corporation are suffered to go on to sell, and the sale of any one or more lots shall produce the amount actually due on the whole, by the same individual, it is clearly at their peril to proceed further. They must, in law, be held cognisant of the amount justly demandable, and have no power to sell, but for taxes actually due.

The sixth question we understand to be withdrawn; and the seventh, at least, in one view of it, we consider as disposed of in the answers to the first and fifth. If two years' taxes be actually due by the party whose property is advertised, and it be not tendered, the sale must be valid, *and the [*690 owner must be left to this remedy against the corporation for adjusting the correct amount. But if it be intended to obtain the decision of this court, whether one man's lots can be legally sold for another man's debts, we cannot perceive that it will admit of a question; nor can it ever occur, if the course be pursued which is marked out by this decision. The tenth point made in the cause, is one which goes to contest the correctness of the

decision below, on a general principle of equity; but, understanding this question, as well as that which arises upon the ground of the complainant's supposed remedy at law, to be withdrawn, we shall decline noticing them.

Decree affirmed, with costs.

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SNEED and others, Plaintiffs in error, *v.* WISTER and others, Defendants in error.

*Interest.—Oyer.—Pleading.*

The act of assembly of Kentucky, of the 7th of February 1812, "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the circuit courts of the Union, as to proceedings in similar cases in the state courts.

The party is as well entitled to interest, in an action on an appeal-bond, as if he were to proceed on the judgment, if the judgment be on a contract for the payment of money; he is entitled to interest from the rendition of the original judgment.

*691] *Oyer* is not demandable of a record;[1] nor in an action upon a bond for performance of covenants in another deed, can *oyer* of such deed be craved; for the defendant and not the plaintiff, must show it, with a *profert* of it, or an excuse for the omission.

If *oyer* be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea, where it is set down as a cause of demurrer.

*Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.[2]

ERROR to the Circuit Court of Kentucky. This was an action of debt, brought in the circuit court for the district of Kentucky, by the defendants in error, against the plaintiffs, upon a bond in the penalty of $4000, with condition, that the said A. Sneed should prosecute with effect his appeal from a judgment of the Franklin circuit court, pronounced in a suit wherein the said Wister and others were plaintiffs, and the said A. Sneed was defendant, and should well and truly pay to the said obligees, all such damages and costs as should be awarded against him, in case the said judgment should be affirmed in whole or in part, or the appeal should be dismissed or discontinued.

The averments in the declaration are, that the said A. Sneed did not prosecute his said appeal with effect, but that, afterwards, at a certain term of the court of appeals, the said judgment was affirmed, and judgment rendered in favor of the said plaintiffs, against the said defendant, A. Sneed, for damages at the rate of ten per cent. on the amount of the said judgment, to wit, on the sum of $1895.13½, as by the records of the said court of appeals *692] would *appear. And further, that the said judgment, rendered by the said Franklin circuit court, was for $1895.13½ damages, and —— dollars, costs, as would appear by the records of the said court. The declaration then avers, that the said A. Sneed hath not paid to the said plaintiffs the said damages and costs aforesaid, or either of them, whereby action accrued.

To this declaration, the defendants, after demanding *oyer* of the bond, and condition thereof, in the declaration mentioned, and also of the judgment of the court of appeals, therein proffered, pleads in bar of the action:

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[1] Noble *v.* Thompson Oil Co., 79 Penn. St. 354.

[2] Bullis *v.* Giddens, 8 Johns. 82; Niblo *v.* Clark, 3 Wend. 24; s. c. 6 Id. 236; White *v.* Converse, 20 Id. 266; Gates *v.* Wheeler, 2 Hill 232.

1. That by the judgment and mandate of the said court of appeals, the said cause was remanded to the circuit court of Franklin, where the judgment of the said court of appeals, according to the mandate, was entered up as the judgment of the said court of Franklin; and that after the said judgment was so entered, viz., on the 19th of August 1820, in the clerk's office of the said court, the said A. Sneed, according to the laws of Kentucky, did replevy the said sum in the declaration mentioned, by acknowledging recognisances, called replevin-bonds, before the said clerk, together with Landon Sneed, his surety in said recognisances, for the said sums of money, damages and costs, in the declaration mentioned, to be paid in one year from the date thereof; the said clerk having lawful authority to take said replevin-bonds, having by law the force of judgments, and then remaining in the said court in full force, not quashed, &c. 2. The second plea is *nil debet*. *To these pleas, the plaintiffs demurred, and assigned for cause of demurrer, to the first, that it contains a prayer of *oyer* of records, of which *profert* was not made, and of which the defendants had no right to *oyer;* and further, that the said plea is defective, in not setting forth where the replevin-bond pleaded was executed, that the court might judge whether there was any authority to take it. [*693

The demurrers being joined, the court below gave judgment in favor of the plaintiffs, and awarded a writ of inquiry to assess the damages to which they were entitled. On this inquiry, the defendants' counsel moved the court to instruct the jury, 1. That the damages of ten per cent. on affirmance, cannot be given, because not within the breaches assigned; and 2. That they ought not to allow interest on the damages in the original judgment, for any period before affirmance. These instructions the court refused to give; but did, upon the motion of the counsel for the plaintiffs, instruct the jury, that the act of assembly of Kentucky, of the 7th of February 1812, "giving interest on judgments for damages in certain cases," applies to cases depending in this court, in actions on appeal-bonds, as much as to proceedings in similar cases in the state courts. That the party is as well entitled to interest in an action on the appeal-bond, as if he were to proceed on the judgment as law; and that, by law, the plaintiff is entitled to interest on the amount of his judgment, from the time it was rendered in the Franklin circuit court.

*Judgment being rendered in favor of the plaintiffs below, for the damages assessed by the jury, a writ of error was sued out by the defendants, and the cause brought before this court for revision. [*694

March 7th, 1823. The cause was argued by *Talbot*, for the plaintiffs in error, and by *M. B. Hardin*, for the defendants in error, citing 1 Chit. Pl. 302.

March 14th. WASHINGTON, Justice, delivered the opinion of the court; and after stating the case, proceeded as follows:—Whether the replevin-bond entered into by A. Sneed, in the clerk's office of the Franklin circuit court, could be pleaded in bar of the action on the appeal-bond, is a question which this court would feel no hesitation in deciding, could we have succeeded in our efforts to obtain the act or acts of the Kentucky legislature which authorized the giving such bonds. The same reason prevents this court from giving an opinion as to the alleged insufficiency of the first

plea, in not setting forth where the replevin-bond, so pleaded, was executed, that the court might judge whether there was any authority for taking the same. If the cause turned exclusively upon those points, we should deem a continuance of it proper, until the counsel could have an opportunity of furnishing the court with those laws. This, we think, is not the case; being
*695] all of opinion, that, for the other cause of demurrer *assigned to the first plea, the judgment of the court below, upon that plea, was correct. In this case, no *profert* was made, in the declaration, of the records therein mentioned, nor would it have been proper to do so. And even if a *profert* be unnecessarily or improperly made, still, the defendant is not entitled to demand *oyer* of the instrument, but is bound to plead, without it. We take the law to be, that *oyer* is not demandable of a record; nor in an action upon a bond, for performance of covenants in another deed, can *oyer* of such deed be craved, but the defendant, and not the plaintiff, must show it, or the counterpart, with a *profert* of it, or an excuse for the omission. If *oyer* be improperly demanded, and the instrument be stated upon it, although the defect in the plea would be aided on a general demurrer, it is, nevertheless, fatal to the plea, where it is set forth as a cause of demurrer, The whole of this doctrine is laid down in 1 Chit. Pl. 302 (3d Am. ed.).

As to the plea of *nil debet*, to which there is a demurrer, it is clearly bad, no principle of law being better settled, than that this is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.

This brings the court to the consideration of the instructions given to the jury upon the application of the plaintiffs' counsel; and we are of opinion, that the act referred to was strictly applicable to this case, in like manner as it would have been had this action been brought in a state court; and
*696] that, according to the clear expressions *of that act, the plaintiffs were entitled to legal interest on the damages recovered in the Franklin circuit court, from the time of the rendition of that judgment, since it fully appeared, by the record of the court of appeals, that the judgment of the Franklin circuit court was rendered on a contract to pay money. The act declares, in substance, that every judgment rendered after the passage of the act, founded upon contract, sealed or unsealed, expressed or implied, for the payment of money, &c., which should be delayed in the execution, by proceedings on the part of the defendant, by injunction, writ of error, &c., with a *supersedeas*, or an appeal to the court of appeals, should, in the event of the judgment being affirmed, bear legal interest from the rendition of the judgment, &c. The last part of the section, which declares it to be the duty of the clerk of the court in which the judgment was rendered, to indorse on the execution, that the same is to bear legal interest until paid, is strictly applicable to the remedy, and not to the right. The latter is given by the preceding parts of the act; but it can only be enforced, where the plaintiff proceeds by execution, by virtue of the indorsement on that process, which it is the duty of the clerk to make.

The court is also of opinion, that the court below was right in refusing to give the first instruction asked for by the defendants' counsel, inasmuch as the breaches assigned do, in our apprehension, manifestly embrace the
*697] ten per cent. *damages given upon affirmance by the court of appeals. And if the above opinion, in respect to the interest to which the

plaintiff was entitled, be correct, it follows, that the court below was right in refusing to give the second instruction asked for by the defendant's counsel.

Judgment affirmed, with costs.

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HUGH, Plaintiff in error, *v.* HIGGS and wife, Defendants in error.

*Action on record.*

No action of law will lie on the decretal order of a court of equity.

ERROR to the Circuit Court for the District of Columbia.

March 6th, 1823. This cause was argued by *Key*, for the plaintiff in error, citing *Carpenter* v. *Thornton*, 3 B. & Ald. 52; and by *Jones*, for the defendants in error.

March 14th. MARSHALL, Ch. J., delivered the opinion of the court.—This is an action on the case, brought to recover the money which the plaintiff in error had been decreed by a court of chancery to pay to the defendants in error. The defendant in the court below contended, that an *action [*698
at common law did not lie on a decree in chancery, and excepted to the opinion of that court, overruling this objection. It is admitted by the opposite counsel, that, in general, the action does not lie to recover money claimed under the decree of a court of equity, but he supposed that, in this case, the money had been received by the defendant below, upon transactions, which took place after the decree. Upon examining the record, we perceive that the money was in his hands, as trustee, at the time the order to pay it over was made.

An objection was also made to an opinion of the circuit court, upon another part of the case. There was an agreement between the parties, under seal, and having some relation to the money, to which part of the claim relates, and the defendant below objected to the form of the action on that account. But we cannot discover, from the bill of exceptions, whether the money in contest was, or was not, received under that instrument. On that point, therefore, the court gives no opinion. The judgment is to be reversed for error in the opinion of the court below, which declares the action to be sustainable on the decretal order of the court of chancery, and the cause is remanded to the circuit court for further proceedings.

Judgment reversed.

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*GRACIE and others, Plaintiffs in error, *v.* PALMER and others, [*699
Defendants in error.

*Jurisdiction.*

It is not necessary to aver on the record, that the defendant in the circuit court was an inhabitant of the district, or was found therein at the time of serving the writ. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service.

March 5th, 1823. *Webster*, moved to dismiss the writ of error in this case, for want of jurisdiction. He stated, that the plaintiffs below, Palmer and others, were described to be aliens, and subjects of the

king of Great Britain, and the defendants, Gracie and others, to be citizens of the state of New York, and the suit was brought in the circuit court of Pennsylvania. It did not appear, that the defendants were inhabitants of, or found in the district of Pennsylvania, at the time of serving the writ: and he, therefore, contended, under the 11th section of the judiciary act of 1789, c. 20, that no civil suit could be brought against them by original process, in that district.

MARSHALL, Ch. J., stated, that the uniform construction, under the clause of the act referred to, had been, that it was not necessary to aver, on the record, that the defendant was an inhabitant of the district or found therein. That *it was sufficient, if the court appeared to have jurisdiction, by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found, at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance. That if process was returned by the marshal, as served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter.

*700]

**Motion denied.**

# APPENDIX.

## NOTE I.

### On the case of GREEN AND OTHERS *v.* BIDDLE, ante, p. 1–108.

The editor has supposed, that the learned reader would not be dissatisfied to see collected together the authorities from the civilians, and also from the common law, and the decisions of the courts of equity, bearing upon the principal question in the above case. The leading principles of the civil law on the subject, are stated by Justinian as follows:

"*De edificatione ex sua materia in solo alieno.*

"Lib. II., tit. 1, § xxx. Ex diverso, si quis in alieno solo ex sua materia domum ædificaverit, illius fit domus cujus solum est. Sed hoc casu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata; utique si non ignorabat, se in alieno solo ædificare: et ideo, licet diruta sit domus, materiam tamen vindicare non potest. Certe illud constat, si, in possessione constituto ædificatore, soli dominus petat, domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor fuerit, qui ædificavit. Nam scienti, solum alienum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse."

"*De fructibus bonâ fide perceptis.*

"§ xxxv. Si quis a non domino, quem dominum esse crediderit, bona fide fundum emerit, vel ex donatione, aliave qualibet justa causa, æque bona fide acceperit, naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura: et ideo, si postea dominus supervenerit, et fundum vindicet, de fructibus ab eo comsumptis agere non potest: ei vero, *qui alienum fundum sciens possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere." [ *4

"Lib. IV., tit. 17, § ii. Et si in rem actum sit coram judice, sive contra petitorem judicaverit, absolvere debet possessorem; sive contra possessorem, jubere ei debet, ut rem ipsam restituat cum fructibus. Sed, si possessor neget, in præsenti se restituere posse, et sine frustratione videbitur tempus restituendi causa petere, indulgendum est ei; ut tamen do litis æstimatione caveat cum fidejussore, si intra tempus, quod ei datum est, non restituerit. Et, si hæreditas petita sit, eadem circa fructus interveniunt, quæ diximus intervenire de singularum rerum petitione. Illorum autem fructuum, quos culpa sua possessor non perceperit, sive illorum quos perceperit, in utraque actione eadem ratio pene habeiur, si prædo fuerit. Si vero bonæ fidei possessor fuerit, non habetur ratio neque consumptorum, neque non perceptorum. Post inchoatam autem petitionem etiam illorum fructuum ratio habetur, qui culpa possessoris percepti non sunt, vel percepti consumpti sunt."

So also, the Napoleon code, which is in a great measure copied from the civil law, declares (liv. 2, tit. 2, art. 546) that, "the property of a thing, whether movable or immovable, gives a right to all which it produces, and to everything which is inseparably united with it, whether naturally or artificially. This right is termed the right of accession.

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547. The natural or artificial fruits of the earth, the civil fruits, and the increase of animals, belong to the owner by right of accession.

548. The fruits thus produced belong to the owner of the thing producing them provided he reimburses the expense of the labor bestowed upon it by third persons.

549. A mere occupant does not make these fruits his own, unless he is a *bonâ fide* possessor: in the contrary case, he is bound to restore the products, with the thing, to the owner who claims it.

550. He is considered as a *bonâ fide* possessor, when he possesses, as proprietor, in virture of a title to the property, of the defects of which he is ignorant. He ceases to be such, the moment these defects are known to him.

551. Every object which unites and incorporates itself with the thing, belongs to the owner, according to the rules hereinafter established."

555. Where plantations, buildings and other works, have been made or erected by a third person, with materials belonging to him, the owner of the land has a right either to retain them, or to compel such third person to remove them. If the owner insists upon the suppression of the plantations and *buildings, it must be done at the expense of the person who has made or erected them, without any indemnity to him; he may even be adjudged in damages, if there be ground for it, for the injury done to the owner of the land. If the owner chooses to preserve the plantations and buildings as his own, he must reimburse the value of the materials and labor bestowed on them, without regard to the more or less augmentation in value of the land. But if the plantations, buildings and other works, have been made or erected by a party who has been evicted from the possession, but who was not adjudged to restore the fruits, by reason of his being a *bonâ fide* possessor, the owner cannot insist upon the suppression of the said works, plantations and buildings, but shall have the election, either to reimburse the value of the materials and labor, or to pay a sum equal to the augmented value of the land.

*5 ]

So also, in the law of Scotland, which is mainly founded upon the Roman law—"A *bonâ fide* possessor is he who, though he is not really proprietor of the subject, yet believes himself proprietor, on probable grounds. A *malâ fide* possessor knows, or is presumed to know, that what he possessed is the property of another. A possessor *bonâ fide*, acquired right, by the Roman law, to the fruits of the subject possessed, that had been reaped and consumed by himself, while he believed the subject his own. § 35, Inst. de rer. div. By our customs, perception alone, without consumption, secures the possessor. Nay, if he has sown the ground while his *bona fides* continued, he is entitled to reap the crop, *propter curam et culturam*. But this doctrine does not, according to Bankton, I. 214, § 19, reach to civil fruits, *e. g.*, the interest of money, which the *bonâ fide* receiver must restore, together with the principal, to the owner.

"*Bonâ fide* necessarily ceases by the *concientia rei alienæ* in the possessor, whether such consciousness should proceed from legal interpellation, or private knowledge; for the essence of *bona fides* consists in the possessor's opinion that the subject is his own. Lib. 20, § 11, de her. pet. 20 Nov. 1662, *Children of Woolmet*. The decision, 14 March 1626, brought by Viscount Stair, in support of the contrary opinion, proves no more than that an assignation, without intimation, is an incomplete deed. *Mala fides* is sometimes induced by the true owner's bringing his action against the possessor, by which the lameness of his title may appear to him; sometimes not till *litis-contestation*, which was the general rule of the Roman law; and in cases uncommonly favorable, it is not induced, until sentence be pronounced against the possessor." (Erskine's Princ. of the Law of Scotland, B. 2, tit. 1, 13, 14.)

*Pothier has discussed this subject with his usual precision: and the following translation of a few passages from his treatise "*Du Droit de Propriété*," may not be unacceptable to the learned reader.

*6 ]

335. A *malâ fide* possessor is bound to account for all the fruits of the thing recovered, which he has received, not only those which he received after the judicial demand, but those which have come to his hands subsequent to his unlawful possession: *Certum est malâ fide possessorem omnes fructus solere præstare cum ipsa re.*

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L. 22 Cod. *de rei Vind.* He is held accountable, even for those proceeding from the crops which he has sown, and the labor he has bestowed on the land; but from these must be deducted the value of the seed and labor expended by him. The reason is, that all the fruits which the land produces are accessaries to the land, which, as soon as they are gathered, *jure accessionis*, become the property of the owner of the land, as we have seen *supra*, n. 151, instead of belonging to him whose labor has produced them; from whence this maxim: *Omnis fructus non jure semines, sed jure soli percipitur.* L. 25, D, *de usur.* He is held accountable, not only for the fruits which are the products of the thing itself, and which are termed natural fruits: he ought also to account for the civil fruits, as we have seen in the preceding paragraph.

336. A *malâ fide* possessor is not only held accountable for the fruits which he has received, but even for those which he has not received, but which the owner might have received, if the land had been restored to him: *Generaliter*, says Papinian, *quum de fructibus æstimandis quæritur, constat adverti debere, non an malâ fide possessor fruitus sit, sed an petitor frui potuerit, si ei possidere licuerit.* L. 62, § 1, D, *de rei Vind.* The reason is, that a *malâ fide* possessor contracts, by the knowledge which he has that the property does not belong to him, the implied obligation to restore it to the owner; on failure which, he is responsible for the damages and interest resulting from this obligation, in which are included the fruits which the owner has failed to receive. The heir, or other representative of the *malâ fide* possessor, even if he supposes in good faith that the property belongs to him, is held accountable for all the fruits received subsequent to the unlawful possession of the deceased to whom he succeeds, in the same manner as the deceased would be held accountable, if he were still living; because, in his character of heir he has succeeded to all his obligations, and his possession *is merely continuation of that of the ancestor, and is infected with all its vices, as we have observed in the preceding article. [ *7

337. According to the principles of the Roman Law, a *bonâ fide* possessor is not liable to restore the fruits received by him before the *litis-contestation*, except those which at that period specifically remain; but he is responsible for all the fruits subsequently received, in the same manner as a *malâ fide* possessor; *Certum est malâ fide possessores omnes fructus præstare; bonâ fide vero, extantes post litis-contestationem, universos.* L. 22, Cod. *de rei Vind.*

340. That which we have laid down, as to a *bonâ fide* possessor not being responsible for the fruits received and consumed by him before the suit, only applies in those cases where he has received and consumed them whilst his *bona fides* continued; but where he has had notice, although long before the judicial demand, that the property of which he is in possession belongs to another, he can no longer receive for his own profit the fruits proceeding from it, nor discharge himself from the obligation of restoring those which specifically remain, by afterwards consuming them.

341. The principles of our French law, in respect to the restitution of the fruits, in an action *in rem*, in the case of a *malâ fide* possessor, are the same with those of the Roman law, as they have already been explained. As to a *bonâ fide* possessor, he is not bound to restore any fruits received by him before the judicial demand. I do not find that in our practice (different in that respect from the Roman law), that the demandant can claim the fruits which specifically remain in the hands of the occupant at that period, where they have been previously received. But by the notice which is given to a *bonâ fide* possessor, in which the demandant exhibits to him a copy of his title deeds, and which has consequently, in this respect, in our law, the same effect as the *litis-contestation* in the Roman law, he ceases to be any longer a *bonâ fide* possessor; being considered as informed of the demandant's right by his notice; he cannot, therefore, be any longer considered as entitled to receive the fruits, and must be adjudged to restore all those which he has received subsequent to the notice.

343. Where, in the action *rei vindicationis*, the demandant has established his right, the possessor is adjudged to restore him the thing recovered; but in certain cases, where the possessor has disbursed a certain sum, or contracted an obligation for the removing an incumbrance, for the preservation or amelioration of the thing which

he is adjudged to restore, the judgment is rendered upon condition that the demandant *shall reimburse the possessor for the sums he has expended, and indemnify him in other respects. *8 ]

344. The second case is that to which Papinian refers in the latter part of the law *sumptuum in prædium factorum exemplo:* where the possessor has incurred any necessary expenses for the preservation of the thing (other than ordinary repairs), which the proprietor would have been obliged to incur, if the possessor had not, the owner cannot compel the possessor to restore the thing, unless he first reimburses to this possessor the amount thus expended by him, with the interest thereon, if it exceeds the fruits which the possessor has received, which are to be set off against it. We have excepted from the operation of our principle the expenses of ordinary repairs, because these are a charge upon the fruits, and for this reason, a *bonâ fide* possessor, who receives for his own account the fruits before the judicial demand, without being subject in this respect to make restitution to the owner, ought not to claim against the latter the expenses of ordinary repairs incurred by him during the same period, these expenses being a charge upon the usufruct which he has enjoyed.

345. There is a distinction between a *bonâ fide* and a *malâ fide* possessor, in respect to the expenses which they have laid out, which were not indispensably necessary, but only useful, and which have merely contributed to ameliorate the property. In respect to a *bonâ fide* possessor, the owner cannot compel him to restore the property, without first reimbursing the expenses, although they were not indispensably necessary to the preservation of the property, and have merely augmented its value. Justinian gives an example of this principle in the case of a *bonâ fide* possessor, who has erected a building upon the land; and he decides that the owner cannot recover the land unless he first offers to reimburse this expense to the occupant: *Si quis in alieno solo ex sua materia domum ædificaverit--illud constat, si in possessione constituto ædificatore soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonæ fidei possessor fuerit qui ædificavit.* Instit. tit. de rer. div. § 30.

346. This principle, that a *bonâ fide* possessor ought to be reimbursed the expenses of utility which he has laid out upon the property, is subject to several exceptions, which must be considered as implied in the text we have just cited from the Institutes, as Vinnius has remarked in his commentary. The first is, that the possessor ought not to be reimbursed precisely *and absolutely for the amount of the said expenses, but only for the amount which they have augmented the property in value. *9 ] This is what Paulus teaches us, in the case of a *bonâ fide* purchaser who has erected a building upon land which had been previously mortgaged; Paulus says, *Jus soli superficiem secutam videri—sed bona fide possessores non aliter cogendos ædificium restituere, quàm sumptus in extructione erogatos, quatenus res pretiosior facta est, reciperent.* Lib. 59, § 2, D. *de Pign.* This results from the principle on which is founded the obligation of the proprietor to reimburse the expenses of the *bonâ fide* possessor. This obligation arises only from that rule of equity, which forbids one person from enriching himself at the expense of another, without the fault of the latter. According to this rule, the owner ought not to profit, at the cost of the possessor, of the expenses which the latter has incurred; but he thus profits by it only so far as his property is augmented in value by these expenses; he ought not, therefore, to repay more than to that amount, even though the possessor has paid more. On the other hand, even if the value of the property is augmented to a greater amount than the expenditure laid out upon it, the owner is not obliged to repay more than the expenditures; because, although he has profited to a greater amount, he has only profited, at the expense of the possessor, to the amount of the sums actually laid out by him. The second exception to the principle, that a *bonâ fide* possessor is entitled to be reimbursed his expenditures of utility, at least, to the extent of the increased value of the property, is, that the rule is not so inflexible but that the judge may sometimes depart from it, according to circumstances. This is what Celsus teaches: *In fundo alieno quem imprudens ædificasti aut conservisti, deinde evincitur, bonus*

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*judex varie in personis causisque constituet: finge et dominum eadem facturum fuisse;*(a) *reddat impensam et fundum recipiat, usque*(b) *eò duntaxat quò pretiosior factus est; et si plus pretio fundi accessit, solum quod impensum est. Finge pauperem qui si id reddere cogatur, laribus, sepulchris avitis carendum habeat: sufficit tibi permitti tollere ex his rebus quæ poscis; dum ita ne deterior sit fundus quàm si initio non fuerit ædificatum.* Lib. 38, D. de rei Vind. In the case put by Celsus, if there be this equitable consideration in favor of the occupant, that the owner ought not to profit, at his expense, *by the augmentation in value which the land has received from the expenditures laid out on it; on the other hand, there is another equitable consideration, [*10 still more strong, in favor of the owner, to which the other must yield, which is, that equity still less permits the owner to be deprived of his inheritance, for which he may be supposed to have a just affection, because he is unable to reimburse expenditures which he did not wish to have laid out upon the property which he has no desire to sell, and which would answer all his purposes in its original condition. Where the expenditures of utility, laid out by the *bonâ fide* possessor, are so considerable that the owner is unable to repay them, before taking possession of his land, and these expenditures have, at the same time, produced a considerable augmentation in its rent, it seems to me, that the interests of the respective parties may be conciliated, by allowing the owner to take possession, upon condition that he should charge the land with the repayment of the amount of these expenditures by instalments. By these means, the just rights of both parties will be preserved; the owner is not deprived of his land, for want of the means of payment, and at the same time he does not profit, at the expense of the occupant, by its increased value."

Our author then proceeds (No. 348) to state, that there are expenditures which may augment the value of the thing, supposing the owner to wish to sell it, without increasing the rent or profit derived from it, supposing him to wish to retain it for his own use; in which case, the owner is not obliged to reimburse the *bonâ fide* possessor, unless the owner be himself a dealer in such articles, and has, therefore, derived a pecuniary benefit from the increased value of the thing. And he quotes, as an example of the application of this rule, a case put in the Digest, of a slave in the hands of a *bonâ fide* possessor, who has instructed him in painting, or some other elegant art, and the slave being reclaimed by his master, the latter is not responsible to the possessor for his increased value, unless the master be himself a dealer in slaves.

He then states (No. 349) a third exception to the rule, which obliges the owner to reimburse the *bonâ fide* possessor the expenses of utility laid out on the property, which is, that the rents and profits received by the occupant are to be first deducted.

350. As to a *malâ fide* possessor, the Roman law seems to have denied him the reimbursement of the expenses not absolutely necessary for the preservation of the property, although they may have augmented its value, and only to have allowed him the privilege of carrying off such articles as could be severed without injury to the property, and leaving it in its original state. *Malæ fidei possessores*, says the Emperor Gordian, **ejus quod in alienam rem impendunt, non eorum negotium gerentes quorum est, nullam habent repetitionem, nisi necessarios sumptus fecerint; sin autem [*11 utiles, licentia eis permittitur, sine læsione prioris status rei, eos auferre.* Lib. 5, Cod. h. t. The same also says elsewhere, *Vineas in alieno agro institutas solo cedere, et si à malæ fidei possessore id factum sit, sumptus eo nomine erogatos per retentionem servari non posse incognitum non est.* Lib. 1, *tit. de rei Vind., in fragm.* Cod. Gregor. Lastly, Justinian, in the Institutes, de rer. div. § 30, after having stated, that he who has built upon the land of another is entitled to a reimbursement of his expenditures by the owner, adds, *utique si bonæ fidei possessor sit; nam si scienti solum alienum esse, potest objici culpa, quod ædificaverit temere in eo solo quod intelligebat alienum esse.*" Pothier then states, that notwithstanding these positive texts, Cujas (Obs. x. cap. 1.)

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(a) *Id est, maximè hoc casu debet reddere impensam, sed etsi facturus non fuisset regulariter debet reddere.*

(b) This refers to *impensam reddat.*

supposes, that the *malâ fide* possessor is to be put on the same footing, in this respect, with the *bonâ fide* possessor, and is equally entitled to be reimbursed his expenditures, by which the land has been increased in value. Our author, after having refuted this notion, proceeds to observe, that in practice it is left to the discretion of the judge to decide, whether the owner ought to indemnify a *malâ fide* possessor for the expenses of utility, to the amount of the increased value of the land, according to the nature and extent of the *malâ fide* of the possessor, whether it is characterized by circumstances more or less criminal.

See also, Huber. Prælect. lib. 5, tit. 3, de Hered. Petit. § 12–19; Pothier, Pandect. Just. in Nov. Ord. Digest, tom. 1, p. 1861–91; Ib. p. 201–4; Argou, Instit. au Droit Français. tom. 2, liv. 4, ch. 17; Domat, Loix Civiles, liv. 3, tit. 5, § 3.

The subject under consideration has been treated somewhat at large by Lord Kames, in his Principles of Equity. The following citations will show that the author's notions of abstract justice, and his legal principles deduced from them, are in general accordance with the law of England, as well as with the doctrines of the civilians.

In his third book (the first chapter of which is entitled, "What equity rules with respect to rents levied upon an erroneous title of property"), he says: "With respect to land possessed upon an erroneous title of property, it is a rule established by the Roman law, and among modern nations, that the true proprietor, asserting his title to the land, has not a claim for the rents levied by the *bonâ fide* possessor, and consumed. But though this subject is handled at large, both by the Roman lawyers, and by their commentators, we are left in the dark as to the reason of the rule, and of the principle upon which it is founded." *If the common law afford to the proprietor a *12] claim for the value of his rents consumed, it must be equity correcting the rigor of the common law, that protects the possessor from this claim: but if the proprietor have not a claim at common law, the possessor has no occasion for equity. The matter, then, is resolvable into the following question: whether there be or be not a claim at common law? And to this question, which is subtle, we must lend attention." p. 270 (2d ed.).

Lord Kames then proceeds to an investigation of this point, and, at the close of the inquiry, observes: "And thus it comes out clear, that there is no action at common law against the *bonâ fide* possessor, for the value of the fruits he consumes; such an action must resolve itself into a claim of damages, to which the innocent cannot be subjected." p. 273. "But suppose the *bonâ fide* possessor to be *locupletior* by the rents he has levied:" .... at common law "there is no remedy, for the reason before given, that there is nothing upon which to found an action of reparation of damages in this case, more than where the rents are consumed upon living. But that equity affords an action, is clear; for the maxim, '*quod nemo debet locupletari aliená jacturâ*,' is applibable to this case in the strictest sense." p. 274.

By common law, Lord Kames evidently must mean the unwritten law of Scotland; since the common law of England has doubtless always afforded some remedy for the recovery of rents and profits, both where the fruits have been consumed, and where the tenant is *locupletior*. It would indeed strike one, that the famous maxim of the Roman law, of which Lord Kames has made so judicious a use, viz., "that no one ought to profit by another's loss," is applicable to the case of fruits consumed, not less than to the supposition. that the tenant is *locupletior*. The fruits consumed are certainly gain to the tenant, and loss to the proprietor, quite as much as fruits hoarded up are. But in ordinary cases, it is to be supposed, that the tenant is a gainer and *locupletior* (in Lord Kames' sense of the word) and hence the distinction may not be very important; since he allows that equity will grant relief even against a *bonâ fide* possessor, in case he be *locupletior*.

In another place (book 1, part 1, art. 1) Lord Kames considers the case of a *bonâ fide* possessor, and the melioration of real property in his possession. The title of land-property being intricate, and often uncertain, instances are frequent, where a man, in possession of land the property of another, is led, by unavoidable error, to consider it

as belonging to himself; his money is bestowed without hesitation in repairing and meliorating the subject." (p. 99.) "Every one, in that case, must be sensible of *a hardship, that requires a remedy; and it must be the wish of every disinterested person, that the *bonâ fide* possessor be relieved from this hardship. [*13 That the common law affords no relief, will be evident at first sight." (p. 98.) But "a court of equity interposes, to oblige the owner to make up the loss, as far as he is *locupletior*." (p. 99.)

The maxim of the law of England, on this subject, seems to have always been *quod caveat emptor*. This is the general spirit of the common-law doctrine as to the transfer both of personal chattels and of real property. Where there is an outstanding judgment or mortgage, concerning which the purchaser is ignorant, the maxim is applied, so far as the land itself, and the title to it, claimed by persons other than the vendor and vendee. If there be a remedy, then, for the *bonâ fide* possessor, it is, as Lord Kames observes, only to be found in a resort to a court of equity; and there, as we shall presently see (in the case of Dormer *v.* Fortescue), the relief will depend upon the evidence of *bona fides*.

The authorities in the common law of England are numerous and uniform, from the earliest times, in support of the doctrine laid down by the court in the case in the text, concerning rents and profits. "Est autem ista recognitio (says Bracton) sive assisa triplex et pœna multiplex ut infra de restitutione damnorum: Est enim personalis quia persequitur eum, qui fecit disseisinam propter factum quia ipse fecit; persequitur eum ad pœnam propter injuriam; persequitur etiam rem quoad restitutionem et in hoc est rei persecutoria." "Acquiritur vero per assisam istam non solum ipsa res spoliata corporalis, verum etiam omnes fructus medio tempore percepti cui competit querela. Item non solum ipsa res sed in ipsa re pax et quies. Item, non solum pax et quies in proprio, sed libertas et perturbationis evacuatio, de quibus mentio facta est in principio." (Lib. 4, De assisa novæ disseysinæ, cap. 6.)

Nearly the same thing is to be found in Fleta; take the following citations:— "Et quo casu, si talis intrusor teneat se in possessione ejici poterit impunè vel donatoi per assisam novæ disseisinæ seisinam suam recuperabit. Fleta, lib. 3, cap. 14. Domino vero proprietatis competit remedium versus ejectorem per assisam novæ disseisinæ et perinde recuperabit tenementum dampnâ vero minimè." (Id. lib. 4, c. 31.)

And Brooke also, in his abridgment, is equally explicit. "Nota (says he), per ascun justices et sergeants, si disseysor fait feoffment, le disseysie reenter, il recouvera son dammages per severals briefes de trespass, tam vers les feoffees come vers le disseysor, et in assyse de rent, le playntife recovera tout son damnages vers le tenaunt pour xx. ans, coment *que il nad estre tenaunt mes per un moys. 33 Hen VI. 46." [*14 (Bro. Abr. part 1, fo. 202, § 13, tit. Damages.)

The extent to which the principle is carried in this place, is warranted by the statute 6 Edw. I., commonly called the statute of Gloucester, which enacts (among other things,), "that the disseisee shall recover damages in a writ of entry upon novel disseisin, against him that is found tenant after the disseisin." (See Plowd. 204.) The statute of Marlbridge, 52 Hen. III., c. 16, had before given damages in a writ of mort d'auncester against the chief lord.

It is also laid down in Brooke's Abridgment, "that if a man disseise me and enfeoff persons unknown, and then retake an estate to himself and ten others, and only two of these ten take the profits, the disseisee shall have an assise against the disseisor, and not against the ten feoffees, for the profits; and it shall be no good plea for the disseisor in this case to say, that he received nothing of the rents with the ten others." (See also, folio 121 *b*, § 22, part 2, tit. Pernor de profits et rents; and titles Assise; Disseisor and Disseisin; Trespass.)

Lord Coke says, that "in actions where damages are to be recovered, and the land is the principal," (some hold the opinion,) that "the demandant never counteth to damages, and yet shall recover them." "Others doe hold the contrarie." (Co. Litt. 356 *a*.) And in Mr. Butler's note upon this passage, he says that "Sir Edward Coke,

in his commentary upon the statute of Gloucester, 2 Inst. 286, observes, that regularly, in personal and mixed actions, damages were to be recovered at common law, but that in real actions *no* damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages, either by writ or count. The assise was a mixed action, and, therefore, if upon the trial the demandant made out his title, his seisin, and his disseisin, by the tenant, he had judgment to recover his seisin, and his damages for the injury sustained." Co. Litt. 355 *b*, note (1).

It thus appears, that, by the old law, damages were formerly recovered by the demandant in a writ of assise. But by the modern law, "the action for mesne profits is consequential to the recovery in ejectment." (*Per* Lord MANSFIELD, 2 Burr. 668.) Undoubtedly, the substitution of the modern action of ejectment, for the assise and the ancient action of ejectment, has produced this change.

In the case of Goodtitle *v.* Tombs (3 Wils. 120) Lord Chief Justice WILMOT says, "Before the time of Henry VII., plaintiffs in ejectment did not recover the term, but, until about that time, the mesne profits were the measure of damages. I brush out of my mind all fiction *in an ejectment, the nominal plaintiff, and nominal defend-
15] ant, the casual ejector—the *dramatis personæ*, or *actores fabulæ*, and consider the recovery by default, or after verdict, as the same thing, viz., a recovery by the lessor of the plaintiff, of his term, against the tenant in the actual wrongful possession of the land. By the old law of practice, in an action of ejectment (as I said before), you recovered nothing but damages—the measure whereof was the mesne profits: no term was recovered. But when it became established, that the term should be recovered, the ejectment was licked into the form of a real action; the proceeding was *in rem*, and the thing itself—the term only, was recovered, and nominal damages, but not the mesne profits; whereupon, this other mode of recovering the mesne profits, in an action of trespass, was introduced, and granted upon the present fiction of ejectment; and I take it, that the present action is put in the place of the ejectment at common law, which was, indeed, a true and not a fictitious action, in which the mesne profits only, and not the term, were recovered; for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration; therefore, I desire to be paid the damages to the value of the mesne profits, which I lost thereby; this is just and reasonable." (3 Wils. 120. See also, 2 Dunlap's Practice, 973, 974, 1068, 1069.)

Both in the English practice, and that of the United States, the plaintiff who recovers jugdment in ejectment, is entitled to his action for the rents and profits received by the defendant anterior to the time of the demise laid in the ejectment. (3 Bl. Com. 205 ; Adams' Eject. 329; 2 Dunlap's Pract. 1070.) And the statute of limitations is a bar to a recovery of the rents and profits received beyond six years before the bringing the action. (Bull. N. P. 88; Hare *v.* Furey, 3 Yeates 13.) In Van Alen *v.* Rogers (1 Johns. Cas. 281), it was determined by the supreme court of New York, that if the tenant has made buildings and other improvements, antecedent to the time when the plaintiff's title accrued, under a contract with the then owner, he will not be allowed for them in an action for the mesne profits, brought by a devisee, but must seek his compensation from the personal representatives of the devisor. In the case of Murray *v.* Gouverneur (2 Johns. Cas. 441), it is said by Mr. Justice KENT, that the action for mesne profits is an equitable action, and will allow of every kind of equitable defence; and that a *bonâ fide* purchaser, without notice, may set off the value of repairs made upon a house, against the amount of the rents and profits.

It is observed by Mr. Adams, in his valuable treatise on the action of *eject-
*16] ment, that it has been said by some, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits, until he has made an actual entry, or, in other words, until the day of the demise in ejectment; for that none can have an action for mesne profits, unless in case of actual entry and possession. Others have held, that when once an entry has

been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled. The latter seems the better opinion; but these antecedent profits are now seldom the subject of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues." Adams, Eject. 334, 335.

Where a fine, with proclamations, has been levied, an entry to avoid it will not, in the action for mesne profits, entitle the plaintiff to the profits between the time of the fine levied, and the time of the entry, although they probably may be recovered in a court of equity. Compere *v.* Hicks, 7 T. R. 723; Dormer *v.* Fortescue, 3 Atk. 124.

And this conducts us from the decisions of the courts of law to those of equity. In the case of Dormer *v.* Fortescue, referred to in the text, it was decreed, that "the defendants should account with the lessor of the plaintiff, Dormer, for all the rents and profits of the eststes, from the time when his title first accrued." "I am well satisfied," says Lord Chancellor HARDWICKE, "in my opinion upon this case, and that the plaintiff is entitled to the rents from the accrual of his title, and that in this court he has a right to demand them." "There are several cases where this court will do it" (*i. e.* decree an account of rents and profits), "and several where they will not: but I can by no means admit the latitude in the anonymous case in 1 Vern. 105, or, rather, in that note of a case."(*a*) "For if a man brings an ejectment bill for possession, and an account of rents and profits, where there is no mixture of equity, the court will oblige the plaintiff to make his election to proceed here or at law, and if at law, he must proceed for the whole there." "But *as I said before, there are several cases where this court does decree an account of rents and profits, and [*17 that from the time the title accrued." In this case, it appears, that the settlement under which the plaintiff's title arose was in the hands of the defendants, and detained by them, though I do not say it was fraudulently obtained, but still the plaintiffs could not come at it, without the assistance of this court. The plaintiff, it is true, brought his ejectment, before he brought his bill here, and from hence the defendant's counsel have inferred, that he knew his title: but how did he know it? Why, only by guess; for it is plain, the plaintiff did not so much as know there was this two hundred years' term standing out, for the deed by which it was created, is not so much as mentioned in the bill, and he only knew it by its being read in the cause." (3 Atk. 124.)

This case affords us also some assistance upon the nature of a *bonâ fide* possession, which has been already discussed in the former part of this note. "It is objected," said Lord HARDWICKE, "that where a man is *bonâ fide* possessor, he shall not account according to the rule of the civil law: and the rule of this court, and the civil law, is stronger in this respect than the law of England. But where a man shall be said to be *bonâ fide* possessor, is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title." This last interpretation confines the case of *bonâ fide* possessor within very narrow limits; and wherever there be color of dispute as to one's title to land, even from the time the title accrues, the tenant must be considered, according to Lord HARDWICKE, as a *malâ fide* possessor.

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(*a*) "Where a man is put to his election, whether to proceed at law or in this court, if the bill be for the land, and to have an account of the mesne profits, he may elect to proceed in an ejectment at law, for the possession, and in equity, upon the account, because at law he can recover damages for mesne profits from the time only of the entry laid in the declaration." (1 Vern. 105.)

## NOTE II.

### To the case of HUGHES *v.* MARYLAND INSURANCE COMPANY, *ante*, p. 311.

WASHINGTON, J.—The question, in this case, is whether the action is maintainable The objection to the action of debt, where the penalty is uncertain, is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds, than you can a horse, on a demand *for a cow. Blackstone says (3 Bl. Com. 154), that debt, in its legal *18] acceptation, is a sum of money due, by certain and express agreement, where the quantity is fixed, and does not depend on any subsequent valuation to settle it; and for non-payment, the proper remedy is the action of debt, to recover the specific sum due. So, if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined, and which, if the proof varies from the claim, cannot be looked upon as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract which my action has alleged to be specific and determinate. But *indebitatus assumpsit* is not brought to compel a specific performance of the contract, but is to recover damages for its non-performance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

The doctrine laid down by this writer, appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential, that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid, more than he had received, and in a variety of other cases, where the law, by implication, raises a contract to pay. 2 Com. Dig. 365. The sum may not be fixed by the contract, but may depend upon something extrinsic, which may be averred, as a promise to pay so much money as plaintiff shall expend in reparing a ship, may be sued in this form of action, the plaintiff averring that he did expend a certain sum. 2 Bac. Abr. 20. So, on promise by defendant to pay his proportion of the expenses of defending a suit, in which defendant was interested, with an averment that plaintiff had expended so much, and that defendant's proportion amounted to so much. 3 Leon. 429. *So, an action of debt may be brought for goods sold to defendant, for so *19] much as they were worth. 2 Com. Dig. 365. So, debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon. 6 T. R. 63.

Wooddeson (3d vol. 95) states, that debt will lie for an indeterminate demand, which may readily be reduced to a certainty. In Emery *v.* Fell (2 T. R. 28), in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labor, money laid out and expended, and money had and received; the court, on a special demurrer, sustained the action, although it was objected, that it did not appear that the demand was certain, and because no contract of sale was

stated in the declaration. But the court took no notice of the first objection, and avoided the second, by implying a contract of sale, from the words which stated a sale. These cases prove, that debt may be maintained upon an implied as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord MANSFIELD, in the case of Walker *v.* Witter, 1 Doug. 6, is conclusive upon this point. He lays it down, that debt may be brought for a sum capable of being ascertained though not ascertained at the time the action was brought. ASHHURST and BULLER say, that whenever *indebitatus assumpsit* is maintainable, debt is also. In this case, two points were also made by the defendant's counsel; first, that on the plea of *nil debet* the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and secondly, that on the plea of *nul tiel record*, judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favor of the defendant on the second point, and against him in the first, by deciding, that debt could not be maintained on a foreign judgment, because *indebitatus assumpsit* might; and that the uncertainty of the debt demanded in the declaration, was no objection to the bringing of an action of debt. The decision, therefore, given upon that point, was upon the very point on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of BULLER, "that all the old cases show, that whenever *indebitatus assumpsit* is maintainable, debt also lies." The subject is very satisfactorily explained by Lord LOUGHBOROUGH, in the case of Rudder *v.* Price, 1 H. Bl. 550, which was an action of debt, brought on a promissory note, payable by instalments, before the last day of payment was part, in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided, that the action could not be supported, because, the contract being entire, would *admit of but one action, which could not be brought, until the last payment had become due, although *indebitatus assumpsit* might [*20 have been brought. But his lordship was led to inquire into the ancient forms of action on contracts, and he states, that in ancient times, debt was the common action for goods sold, and for work and labor done. Where *assumpsit* was brought, it was not a general *indebitatus assumpsit;* for it was not brought merely on a promise, but a special damage for a non-feasance, by which a special action arose to the plaintiff. The action of *assumpsit*, to recover general damages for the non-performance of a contract, was first introduced by Slade's Case, which course was afterwards followed. In the case of Walker *v.* Witter, BULLER also stated, that till Slade's Case (Trin. 44 Eliz., 4 Co. 92 *b*,) a notion prevailed, that on a simple contract for a certain sum, the action must be debt; but it was held, in that case, that the plaintiff might bring *assumpsit* or debt, at his election.

Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt, and that the action of *indebitatus assumpsit* succeeded, principally, I presume, to avoid the wager of law, which, in Slade's Case, was one of the main arguments urged by the defendant's counsel, against allowing the introduction of the action of *assumpsit*, as it thereby deprived the defendant of his privilege of waging his law. BULLER seems, therefore, to have been well warranted, in the case of Walker *v.* Witter, in saying, that all the old cases show, that where *indebitatus assumpsit* will lie, debt will lie. The same doctrine is supported by the case of Emery *v.* Fell, 2 T. R. 30, which was an action of debt, in which all the counts of *indebitatus assumpsit* are stated, where the objection to the doctrine was made and overruled. So, in the case of Harris *v.* Jameson, 5 T. R. 557, ASHHURST refers, with approbation, to the opinion delivered in the case of Walker *v.* Witter. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of Walker *v.* Witter, as appears by the case of Rands *v.* Peck (Cro. Jac. 618); and in Draper *v.* Rastal, the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyn, in his Digest, tit. Debt, p. 366, where he enumerates the cases in which debt will not lie, states no exception to the rule, that where *indebitatus assumpsit* will lie, debt will lie, but one, for the interest of money due upon a loan. But the reason

of that is explained by Lord LOUGHBOROUGH, in the case of Rudder *v.* Price, who states that until the case of Cook *v.* Whorwood, upon a covenant to pay a stipulated sum by instalments, *if the plaintiff brought *assumpsit*, after the first failure, he was *21] entitled to recover the whole sum in damages, because he could not, in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision, the only difference between debt and *assumpsit*, in such a case, was, that the former could not be brought, until after the last instalment was due; and, in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

I proceed with the doctrine of Judge Blackstone, before stated. After stating what constitutes debt, he observes, "that the remedy is an action of debt, to recover the special sum due." It is observable, that he does not say that the plaintiff is to recover the sum demanded by his declaration, and no person will deny but that he is to recover the special sum due. After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery, and says, "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds, "the action of *assumpsit* is most commonly brought; because, in that, it is sufficient, if the plaintiff prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say, that where a special contract is laid in the declaration, it must be proved as laid, the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence, must correspond, in all respects, with that stated in the declaration, and any variance will be fatal to the plaintiff's recovery. Such, too, is the law, in all special actions in the case; but if Judge Blackstone meant to say, that in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. The old cases, before mentioned, in which debt was brought and sustained, are all cases where it is impossible to suppose that the sum stated in the declaration was or could in every instance be proved, any more than it is or can be proved in actions of *indebitatus assumpsit*. They are, in fact, actions substantially like to actions of *indebitatus assumpsit*, in the form of action for debt. The action of debt for foreign money, is and can be for no determinate sum; because the value must be found by the jury, either upon the trial of the issue, or upon a writ of inquiry, where there is judgment by default. (Randall's Peake.)

*The case of Sanders *v.* Markes, is debt for an uncertain sum, in which the *22] debt claimed was for 15*l.* 18*s.* 6*d.* and the defendant's proportion of the whole sum was averred to be 15*l.* 18*s.* 8*d.* yet the action was supported. This is plainly a case, where the sum due could not be certainly averred; because the yearly value of the defendant's property might not be known to the plaintiff, and could only be ascertained, with certainty, by the jury. In the case of Walker *v.* Witter, Lord MANSFIELD is express upon this point. He says, that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of Rudder *v.* Price, Lord LOUGHBOROUGH, who has shed more light upon this subject than any other judge, says, "that long before Slade's Case, the demand in an action of debt must have been for a thing certain in its nature; yet, it was by no means necessary, that the amount should be set out so precisely, that less could not be recovered."

In short, if, before Slade's Case, debt was the common action for goods sold, and work done; it is more obvious, that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for, in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose,

that in an action of debt on a simple contract, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to Slade's Case; and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might, Lord LOUGHBOROUGH, in the above case, denominates it an erroneous opinion, and says, that it has been some time since corrected.

In the case of McQuillen *v.* Coxe, the sum demanded was 5000*l.*; which was 50*l.* more than appeared to be due by the different sums. The objection was made on a special demurrer, that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration, or the misrecital of the writ; but overruled the demurrer, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ. From this last expression, it might be supposed, that the court meant *to distinguish between the sum demanded by the writ, and that demanded by the declaration; but this could not have been the case, [*23 because the sum demanded by the writ, and that demand by the declaration, was the same, viz., 5000*l.* There was, in fact, no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ; and the objection stated in the special demurrer, was made to the variance between the sum demanded by the declaration, and the sum alleged to be due.

The distinction taken in the case of Ingledon *v.* Cripps (2 Ld. Raym. 815; 2 Salk. 659) runs through all the above cases, and appears to be perfectly rational; viz., that where debt is brought on a covenant, to pay a sum certain, any variance of the sum in the deed will vitiate. But, where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a *remitter* for the balance. This shows, that debt may be brought for more than is due, and that the jury may give less; or, if they give more than is due, the error may be corrected by a *remitter*.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract, where the sum demanded is uncertain, it would seem to follow, that it would lie for a penalty given by statute, which is uncertain, and dependent upon the amount to be assessed by a jury; for, when they have assesed it, the sum so fixed becomes the amount of the penalty given. This, however, stands upon stronger ground than mere analogy. The point is expresly decided in the case of Pemberton *v.* Shelton, Cro. Jac. 498. That was an action of debt, brought upon the first section of the statute 2 Edw. VI., ch. 13, which gives the treble value of the tithes due, for not setting them out. The declaration claimed 33*l.* as the treble value; and in setting forth the value of the tithes, the whole amount appeared to be more than one-third of the sum demanded; so that the plaintiff claimed less than the penalty given by the statute. Upon *nil debet* pleaded, the jury found for the plaintiff 20*l.* and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion, upon the ground afterwards laid down in the case of Ingledon *v.* Cripps. They held, that there was a difference when the action of debt is grounded on a specialty or contract, which is a sum uncertain: or upon a statute, which gives a certain sum for the penalty; and where it is grounded on a demand, when the sum is uncertain. being such *as shall be given by the jury. In the former, it was agreed, that the plaintiff cannot demand less than the sum [*24 agreed to be paid or given by the statute; but in the latter, it is said, that if the declaration varies from the real sum, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict and judgment, which may be given for the plaintiff. It cannot be said, that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought upon the common-law principle, that where a statute gives a penalty, debt may be brought to recover it.

Action of Debt.

In this case, the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying, that the demand of one sum does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.

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SHIPPING.

1. By a charter-party, the sum of $30,000 was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and, at the option of the charterer, to Calcutta, and back to Philadelphia (with an addition of $2000, if she should proceed to Calcutta), the whole payable on the return of the ship to Philadelphia and before the discharge of her cargo there in approved notes, not exceeding an average time of 90 days from the time at which she should be ready to discharge her cargo—the charterer proceeded in the ship to Calcutta, and, with the consent of the master (who was appointed by the ship-owners), entered into an agreement with P. & Co., merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading, stipulating for the delivery of the goods purchased therewith, to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S., of Philadelphia, should be accepted; in which event, the agents of P. & Co. should deliver the goods to the charterer: the goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here:" the bills of exchange, drawn by the charterer, were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver, without the payment of freight: *Held*, that the owners of the ship had a lien on these goods for the freight. *Gracie* v. *Palmer*.....*605

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