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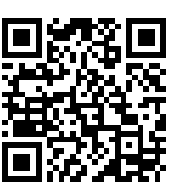

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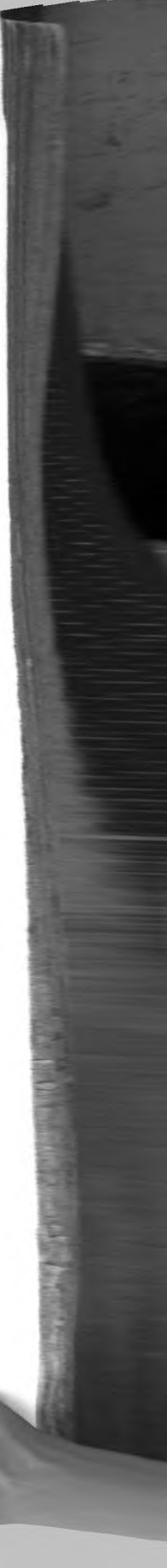

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

UNITED STATES SUPERIOR COURT

FOR THE TERRITORY OF ARKANSAS,

FROM 1820 TO 1836;

AND IN

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARKANSAS,

FROM 1836 TO 1849;

AND IN

THE UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF ARKANSAS,

IN THE NINTH CIRCUIT, FROM 1839 TO 1856.

WITH NOTES AND REFERENCES AND RULES OF COURT.

BY

SAMUEL H. HEMPSTEAD, ESQ.,

COUNSELLOR AT LAW, LITTLE ROCK, ARKANSAS.

BOSTON:

LITTLE, BROWN AND COMPANY.

1856.

UNIV. OF MICH. LAW LIBRARY

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INTRODUCTION.

By act of congress of March 26, 1804, (2 Stat. 283,) all that portion of country ceded by France to the United States, April 30, 1803, under the name of Louisiana, lying south of the Mississippi Territory, and of an east and west line to commence on the Mississippi River at the thirty-third degree of north latitude, and extending west to the boundary of the cession, was formed into a territory under the name of the Territory of Orleans. The residue of the cession, embracing Missouri and Arkansas, was called the District of Louisiana, and placed under the government of Indiana Territory. By act of congress of June 4, 1812, this district became the Territory of Missouri. 2 Stat. 743. On March 2, 1821, (3 Stat. 645,) congress provided by joint resolution for the admission of Missouri into the Union, and which admission became complete on the issuing of the president's proclamation, August 10, 1821. 3 Stat. 797.

By act of congress of March 2, 1819, (3 Stat. 493,) all that part of the Territory of Missouri lying south of a line beginning on the Mississippi River at thirty-six degrees north latitude, running thence west to the river St. Francois; thence up the same to thirty-six degrees thirty minutes north latitude, and thence west to the western territorial boundary line, was erected into a separate territory called Arkansas Territory, to take effect after July 4, 1819; and the seat of government was established at the post of Arkansas until otherwise directed by the territorial legislature. By act of congress, May 26, 1824, (4 Stat. 40,) the western boundary of Arkansas Territory was fixed at a point forty miles west of the south-west corner of the State of Missouri, and to run south to the right bank of Red River, and thence down that river, and with the Mexican boundary, to the line of the State of Louisiana.

The act of 1819 vested the judicial power of the Territory of Arkansas in a superior court, consisting of three judges, appointed for four years, but subject to removal by the president, and in such inferior

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courts as the legislative department of the territory should from time to time establish, and in justices of the peace. The superior court had jurisdiction of all criminal and penal cases; exclusive cognizance of all capital cases; original jurisdiction concurrently with the inferior courts; and exclusive appellate jurisdiction in all civil cases, in which the amount in controversy should be one hundred dollars or upwards. Two judges to constitute an appellate, and one judge a court of original jurisdiction.

By act of congress of April 17, 1828, the president was authorized, by and with the advice and consent of the senate, to appoint an additional judge of the superior court, to hold office for four years, and which was accordingly done. The legislature was authorized, and did divide the territory into four judicial districts, and assigned them to the four judges. In addition to circuit duty, the judges were required to hold two terms of the superior court annually, at the seat of government of the territory. And the legislature of the territory was authorized in all cases, except when the United States was a party, to fix the respective jurisdictions of the district and superior court, and it was declared that the United States cases shall be tried in the superior court in the manner said cases are now (1828) tried. A party aggrieved, except in criminal cases, was at liberty, by appeal, writ of error, or *certiorari*, to remove the suit into the superior court for further trial, and where it was to be tried and heard by not less than two of the judges other than the judge who made the decision in the district court. Writs of error and appeals from the final decisions of the superior court lay to the supreme court of the United States, in the same manner as from the circuit courts of the United States, when the amount in controversy exceeded one thousand dollars. 4 Stat. 261, 262.

The seat of government of the territory was fixed at Little Rock in 1821, where it has ever since remained. The first superior court was held there in that year by Benjamin Johnson and Andrew Scott, judges.

Arkansas was admitted into the Union by act of congress, June 15, 1836. A district court was created therein, and the State declared a judicial district of the United States to be called the Arkansas District. 5 Stat. 50, 51. The court was invested with the same powers and jurisdiction that were conferred on the district court of Kentucky by the Judiciary Act of 1789. Benjamin Johnson was appointed district judge.

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GOVERNORS OF MISSOURI TERRITORY.

From 1804 to 1805, WILLIAM HENRY HARRISON.
" 1805 to 1807, JAMES WILKINSON.
" 1807 to 1813, MERIWEATHER LEWIS.
" 1813 to 1819, WILLIAM CLARKE.

DELEGATES TO CONGRESS FROM MISSOURI TERRITORY.

From 1812 to 1814, EDWARD HEMPSTEAD.
" 1814 to 1816, RUFUS EASTON.
" 1816 to 1819, JOHN SCOTT.

GOVERNORS OF ARKANSAS TERRITORY.

From 1819 to 1825, JAMES MILLER.
" 1825 to 1829, GEORGE IZARD.
" 1829 to 1829, H. G. BURTON.
" 1829 to 1835, JOHN POPE.
" 1835 to 1836, WILLIAM S. FULTON.

GOVERNORS OF THE STATE OF ARKANSAS.

From 1836 to 1840, JAMES S. CONWAY.
" 1840 to 1844, ARCHIBALD YELL.
" 1844 to 1844, SAMUEL ADAMS.
" 1844 to 1849, THOMAS S. DREW.
" 1849 to 1849, RICHARD C. BYRD.
" 1849 to 1852, JOHN SELDEN ROANE.
" 1852 to 1856, ELIAS N. CONWAY.

DELEGATES TO CONGRESS FROM ARKANSAS TERRITORY.

From 1819 to 1823, JAMES WOODSON BATES.
" 1823 to 1829, HENRY W. CONWAY.
" 1829 to 1836, AMBROSE H. SEVIER.

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REPRESENTATIVES TO CONGRESS FROM THE STATE OF ARKANSAS.

From 1836 to 1839, Archibald Yell.
" 1839 to 1845, Edward Cross.
" 1845 to 1846, Archibald Yell.
" 1846 to 1847, Thomas W. Newton.
" 1847 to 1853, Robert W. Johnson.
" 1853 to 1856, Alfred B. Greenwood.
" 1853 to 1855, Edward A. Warren.
" 1855 to 1856, Albert Rust.

SENATORS TO CONGRESS FROM THE STATE OF ARKANSAS.

From 1836 to 1844, William S. Fulton.
" 1844 to 1848, Chester Ashley.
" 1848 to 1856, William K. Sebastian.
" 1836 to 1848, Ambrose H. Sevier.
" 1848 to 1853, Solon Borland.
" 1853 to 1856, Robert W. Johnson.

JUDGES OF THE SUPREME COURT OF THE STATE OF ARKANSAS FROM 1836 TO 1856.

CHIEF JUSTICES.

Daniel Ringo,
Thomas Johnson,
George C. Watkins,
Elbert H. English.

ASSOCIATE JUSTICES.

Thomas J. Lacy,
Townsend Dickinson,
George W. Paschal,
William K. Sebastian,
Williamson S. Oldham,
Edward Cross,
William Conway,
Christopher C. Scott,
David Walker,
Thomas B. Hanly.

SPECIAL JUDGES OF SAID COURT FROM 1836 TO 1856.

Gerard N. Causin.
Nathan Haggard.
Richard C. S. Brown.
Sam. C. Roane,
Sackfield Maclin,
Isaac Strain,
Edward Cross,
Samuel H. Hempstead,
Thomas Johnson.

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PREFACE.

THIS volume of reports is presented to the profession to preserve the decisions of the federal courts of Arkansas in a more enduring form than in tradition. Adjudged cases become precedents, and it is therefore important that they should be known. In fact, if we have to appeal to recollection, or neglected records, justice safely administered can hardly be expected. Those practising in these courts have felt the inconvenience arising from the want of a published report of their decisions. If this volume shall wholly or partially remove the evil, my labor will not have been lost. It can never be a source of profit to me, and certainly distinction is not won by performing the duties of reporter. It forms a sort of judicial history of Arkansas from its commencement as a Territory down to this time, and in that point of view will possess some interest there, if not elsewhere. The decisions of the superior court are embraced, because it is conceded on all hands that the court was always an able one; and although this book, no doubt, contains many cases of little or no value, yet in that respect it is not different from other reports. Whilst tautology has been omitted in the opinions, the substance, and generally the exact language of the court, has been preserved. Cases sustaining a principle decided have been added; and if time had permitted, I should have made full notes to the cases.

The late BENJAMIN JOHNSON, of Arkansas, who sat in those

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courts for nearly thirty years, and was their pride and ornament, generally wrote out his opinions, and before his death placed such as had been preserved in my hands. Of him I cannot speak without emotion; and when I remember that he died full of juridical honors, beloved by all, without an enemy in the world, admired for the purity of his public and private character and for his devotion as a Christian, respected for his unbending integrity and for a heart full of kindness to all, I cannot but say to myself we shall not see his like again. He was a safe, patient, and able judge; and the judicial distinction which he won extended far beyond the boundaries of his State, and we may well wish that the judiciary of our country was always represented by such men.

S. H. HEMPSTEAD.

February, 1856.

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OFFICERS OF COURT.

GEORGE BULLITT, Judge of the General Court from 1817 to 1820.
JOSHUA NORVELL, Prosecuting Attorney. JOHN DODGE, Clerk.

JUDGES OF THE SUPERIOR COURT.

BENJAMIN JOHNSON,	THOMAS P. ESKRIDGE,
ANDREW SCOTT,	EDWARD CROSS,
JOSEPH SELDEN,	ALEXANDER M. CLAYTON,
WILLIAM TRIMBLE,	THOMAS J. LACY,
JAMES WOODSON BATES,	ARCHIBALD YELL.

The only survivors of the above-named judges at this time [1856] are Edward Cross and Alexander M. Clayton.

DISTRICT ATTORNEYS AT DIFFERENT PERIODS.

SAMUEL C. ROANE,
THOMAS J. LACY,[1]
SAMUEL S. HALL,
WILLIAM C. SCOTT,
ABSALOM FOWLER,
GRANDISON D. ROYSTON,
SAMUEL H. HEMPSTEAD,
JOSEPH STILWELL, *Eastern District of Arkansas.*
J. W. MCCONAUGHEY, *Eastern District of Arkansas.*
JESSE TURNER, *Western District of Arkansas.*
ALFRED M. WILSON, *Western District of Arkansas.*

CLERKS.

DAVID E. MCKINNEY,
WILLIAM FIELD, *Eastern District of Arkansas.*
ALEXANDER MCLEAN, *Western District of Arkansas.*

[1] Did not accept.

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MARSHALS.

GEORGE W. SCOTT,
ELIAS RECTOR,
THOMAS W. NEWTON,
HENRY M. RECTOR,
LUTHER CHASE, *Eastern District of Arkansas.*
JOHN QUINDLEY, *Eastern District of Arkansas.*
GEORGE W. KNOX, *Western District of Arkansas.*
SAMUEL HAYS, *Western District of Arkansas.*

ATTORNEYS ENROLLED AT DIFFERENT TIMES.

JOSHUA NORVELL,
SAMUEL C. ROANE,
EPHRAIM DAVIDSON,
WILLIAM O. ALLEN,
JAMES WOODSON BATES,[1]
ELIZUR HUBBARD,
CHESTER ASHLEY,
ROBERT C. ODEN,
DAVID F. MADDOX,
SAMUEL DINSMORE,
ALEXANDER S. WALKER,
PERLY WALLIS,
JASIN CHAMBERLAIN,
ROBERT CRITTENDEN,
WILLIAM TRIMBLE,[1]
HENRY CASSADY,
THOMAS HUBBARD,
AMBROSE H. SEVIER,
THOMAS P. ESKRIDGE,[1]
WILLIAM QUARLES,
SAMUEL S. HALL,
JAMES H. LUCAS,
JOHN TRIMBLE,
J. P. HOUSTON,
WILLIAM CUMMINS,
ABSALOM FOWLER,
ALBERT PIKE,
DANIEL RINGO,[2]
PETER T. CRUTCHFIELD,
ORSON V. HOWELL,
WILLIAM KELLY,
WILLIAM S. FULTON,
JOHN TAYLOR,
SAMUEL H. HEMPSTEAD,
JOHN J. CLENDENEN,
GEORGE C. WATKINS,
FREDERICK W. TRAPNALL,
JOHN W. COCKE,
GRANDISON D. ROYSTON,
EUCLID L. JOHNSON,
ROBERT W. JOHNSON,
GEORGE B. HAYDEN,
ELBERT H. ENGLISH,
JAMES M. CURRAN,
GEORGE A. GALLAGHER,
PLEASANT JORDAN,
CHARLES P. BERTRAND,
JOSEPH STILWELL,
HENRY M. RECTOR,
PHILLIP TRAPNALL,
H. F. FAIRCHILD,
WILLIAM BYERS,
JOHN T. TRIGG,
J. W. MCCONAUGHEY,
S. W. WILLIAMS,
M. QUAIL,
W. L. D. WILLIAMS.

[1] Appointed judges superior court.
[2] Appointed judge district court.

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TABLE OF CASES

REPORTED IN THIS VOLUME.

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CASES

DECIDED IN THE

SUPERIOR COURT OF THE UNITED STATES

FOR THE

TERRITORY OF ARKANSAS,

FROM 1820 TO 1836.

The United States *vs.* Thomas Dickinson.

1. It is not a fatal defect in an indictment for rape that it also alleges that the woman was gotten with child.
2. Before a jury is made up, incompetent jurors who have been summoned, may be discharged, and others summoned in their places.

January, 1820. — Indictment for rape determined before Andrew Scott, judge of the Superior Court, held in Arkansas county.

This was an indictment for rape committed on the person of Sally Hall, to which the defendant plead not guilty, and there was a trial by jury composed of Richmond Peeler, Charles Roberts, Manuel Roderigue, John Jordolas, Jacques Gocio, Stephen Vasseau, Nathal Vasseau, Michael Petterson, John Pertua, Manuel Pertua, Pierre Mitchell, and Attica Nodall, who, after hearing evidence and arguments of counsel, retired to consult of their verdict, and, after deliberation, returned into court

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the following, namely, " We, the jury, find the defendant guilty of rape, in manner and form as in the indictment alleged." The counsel for the prisoner moved in arrest of judgment for the following reasons. " 1. It does not appear by the indictment that the same was found by the grand jurors of the United States. 2. No place is mentioned in the indictment where the offence was committed, nor is it mentioned in what year it was committed. 3. The assault and rape are not positively and directly charged in the indictment. 4. It is not stated to have been committed with 'force and arms.' 5. It is not stated to have been feloniously committed. 6. It is not alleged in the indictment that Sally Hall was in the peace of God and the United States when the offence is alleged to have been committed. 7. Two offences, which are inconsistent with each other, are alleged to have been committed at the same time, in the indictment, namely, rape on Sally Hall, and the getting her with child.[1] 8. The place of residence and occupation of the accused is not mentioned in the indictment. 9. It appears by the record that H. Armstrong was foreman of the grand jury who found the bill of indictment, and that H. Armstrong is not a competent juror, not having resided twelve months in this territory. 10. Three jurors were dismissed by the court after they were sworn, and before they found a verdict, as appears from the record."[2]

The Court overruled the motion, and said that some of the reasons urged in arrest of judgment were not sustained by the

[1] The old notion that if the woman conceived, it could not be a rape, because she must in such case have consented, is quite exploded. 1 Hale, 631 ; 1 Hawkins, ch. 41, sec. 8 ; 1 East, P. C. ch. 10, sec. 7, p. 445 ; 1 Russ. on Crimes, 677. Impregnation, it is well known, does not depend on the consciousness or volition of the female. If the uterine organs be in a condition favorable to impregnation, this may take place as readily as if the intercourse was voluntary. Taylor's Med. Jurisprudence.

[2] Before the jury was made up, three persons who had been sworn as jurors, namely, Wm. A. Luckie, John O'Regan, and Thomas Stephens, were discharged on the motion of the prosecuting attorney, on the ground that they had not resided twelve months in the territory, (Geyer's Digest, 34,) and others were ordered to be sworn in their places, and to this proceeding, the counsel of the accused objected.

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record; that others were not proper grounds in arrest of judgment, and that some had not been presented at the proper time nor in a proper manner, if good at all.

The prisoner being asked if he had any objection why sentence should not be pronounced against him on the verdict of the jury, said, that he objected to any sentence, because he was advised that the indictment did not properly charge the commission of a felony. The court disregarded his objection, and sentenced him to be castrated according to the law in that behalf provided, by a skilful physician, under the direction of the sheriff of Arkansas county, on the 15th February, 1820, between ten o'clock, A. M., and three o'clock, P. M., of that day.[1]

A motion was made by the prisoner for a writ of error, *coram nobis*, but the motion was overruled.

Joshua Norvell, prosecuting attorney, for the United States.

Jasin Chamberlain, *Henry Cassady*, *Alexander S. Walker*, and *Perly Wallis*, for the prisoner.

WILLIAM RUSSELL *vs.* AMOS WHEELER et al.

1. In forcible entry and detainer, the right of having the proceedings reviewed by a higher tribunal in the mode pointed out by law, is allowed to the defendant as well as the complainant.
2. In forcible entry and detainer, if the summons contains the substance of the complaint so as to apprise the defendant of the nature and extent of the claim, it is sufficient without reciting the complaint fully.
3. Where a limited jurisdiction is conferred by statute the construction ought to be *strict* as to the *extent* of jurisdiction; but liberal as to the *mode* of proceeding.
4. Although a verdict is informal, yet if the substance of the issue has been found, it is good, for a verdict is not to be taken strictly like pleading, and courts will mould a verdict into form according to the real justice of the case.

June, 1821. — Forcible Entry and Detainer. Error to the Pulaski Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

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[1] This sentence was not executed, the prisoner having been pardoned by James Miller, the governor of Arkansas Territory.

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JOHNSON, J., delivered the opinion of the Court. — Russell sued out from two justices of the peace, a warrant of forcible entry and detainer against Wheeler and others, and the jury having found a verdict against them, they obtained a *certiorari* and brought the case before the circuit court. On the trial in the circuit court, the proceedings of the justices' court were set aside and annulled. Many objections have been urged to the writ of *certiorari* granted by the court below, which, from the view we have taken, we do not deem it material to decide.

For the sake of the practice, however, we will consider the first.

It is contended that a writ of *certiorari* in a case of forcible entry and detainer, is, by the statute, allowed to the plaintiff only. If this construction be correct, it is believed that it would present a novelty in the history of judicial proceedings. What just reason can exist for permitting a plaintiff in a case of this kind to apply to a superior tribunal, to correct errors and annul proceedings by which he is prejudiced, and denying the same right to a defendant, we are wholly at a loss to discover. That a claim may be set up by a plaintiff which is neither supported by justice nor law, as well as that a defendant may have acted illegally, are abundantly manifest. We cannot suppose that because a complaint is made, and a suit instituted, that it therefore follows that the party has a just cause of action. Experience evinces that many claims are asserted which have no foundation in justice or in law.

It would seem, therefore, as reasonable to extend to the defendant the same means for the correction of errors which may have been committed against him, as to the plaintiff when similarly situated. But from an examination of the statute, it is clear that it does not warrant the construction contended for. The right of having the proceedings reviewed by a higher tribunal is reciprocal, and is alike demandable by either party. Geyer's Digest, 204.

We will now proceed to what we deem the main question in the cause, namely: Whether the court below acted correctly in setting aside and reversing the judgment of the justices. The first error in the proceedings before the justices' court relied on by

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the counsel of the defendants in error is, "that the summons is not issued according to the form prescribed by the statute; it omits one half of the plaint; it omits the time the forcible entry and detainer was alleged to have been done; it omits the quantity of land, and the description of the boundaries as given in the plaint, and misrecites that part of the plaint which it purports to recite."

It is true that the summons does not contain a literal copy of the complaint, nor do we apprehend that it is necessary. All that is essential is, that the summons shall contain the substance of the complaint, and so describe the land in contest that the defendant may be apprised of the extent of the claim set up against him, and thereby be enabled on the trial to make his defence. That the summons contains a proper and definite description of the land, so as fully to apprise the defendant of the subject-matter in dispute, we think admits of no doubt. The complaint is upon a forcible entry and detainer upon the fractional quarter of section two, in township one, north of the base line of range twelve, west of the fifth principal meridian, containing about forty acres of land, bounded on the north by the Arkansas river, on the east by the Quapaw Indian line, on the west by the north and south line, between sections two and three in township aforesaid, on the south by the southwardly boundary of the north-west fractional quarter of section two.

The summons describes the premises to be, "That part of the north-west fractional quarter of section two, in township one north of the base line, range twelve west of the fifth principal meridian that lies south of the Arkansas river, at a place called 'Little Rock Bluff,' in the county of Pulaski." It is easy to perceive that the summons describes the same fractional quarter section of land that is described in the complaint, and although the description is not made in the same words, yet they are substantially the same. It has been contended that the form of proceeding given by the act of assembly must be literally pursued. By adverting to the adjudications of other courts it will be seen, that a more liberal interpretation has been given to statutes analogous to the present. In the case of *Barret* v. *Chitwood*, 2 Bibb, 431, upon a statute in many re-

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spects similar to the one under which these proceedings were had, the court says: "Where a limited jurisdiction of this sort is given by act of assembly to be exercised *in pais*, the correct rule appears to be, that as to the extent of jurisdiction the act should be construed strictly, but with respect to the mode of proceeding, a liberality of construction ought to be indulged." Other cases might be cited to show that where a statute prescribes a form of proceeding, a substantial, and not a literal compliance is all that is required. We are therefore of opinion that the summons in this case contains the essential part of the complaint, and that it is sufficient under the act of assembly.

The point mainly relied on by the defendants' counsel is, "that the verdict of the jury was fatally defective, and insufficient for the justices to enter a judgment thereon." It is in the following words: "The jury upon their oaths do find, that the lands or tenements in the county of Pulaski, bounded and described as in the complaint, upon the first day of January, 1820, were in the lawful and rightful possession of said William Russell, and that the said Amos Wheeler and others did, upon the same day, unlawfully with force and strong hand expel and drive out the said William Russell; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay."

Several specific objections have been urged against the verdict, which we will proceed to examine: 1. It is insisted that the verdict does not pursue the form prescribed by the statute. This objection, as far as it regards form only, has been sufficiently remarked upon, and no further observations will be added. 2. "That it does not contain a description of the land in contest." By a reference to the verdict it will be seen, that although it does not itself describe the boundaries, yet it refers to a paper in the case, the complaint, for the boundaries, which renders it as certain and as definite as if those boundaries were again recapitulated in the verdict itself. The maxim of law, "*Id certum est quod certum reddi potest*," applies to cases like the present; we are therefore of opinion, that it is not defective on this account, but that it sufficiently describes the land in controversy. 3. "That it only finds a forcible entry into the premises,

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and does not find a forcible detainer by the defendants." Upon an examination of the verdict we are clearly of opinion, that it finds a forcible detainer as well as entry. What is the language of the verdict? It is, "That the jury find that the defendants did with force and strong hand expel and drive out the plaintiff; wherefore the jury find upon their oaths, that the said William Russell ought to have restitution thereof without delay."

What is the conclusion that a mind unshackled by technical rules would draw from the latter clause of the verdict? Is not the inference irresistible, that the jury find a detainer when they say that the plaintiff ought to have restitution without delay? Why should he have restitution, unless he was kept out of possession? Upon any other supposition the language is more than unmeaning; it is absurd.

If then the meaning of the jury is clear, and it is their intention to say, as it certainly is, that the defendants detain the premises, although it may not be expressed in technical language, or according to usual forms, yet the court are bound to work and mould the verdict into form according to the real justice of the case. The rule upon this subject has been long settled, and is supported by a uniform train of authorities. In the case of *Worley* v. *Isbel*, 1 Bibb, 251, it is laid down, "that though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve. Verdicts are not to be taken strictly like pleadings, but the court will collect the meaning of the jury, if they give such a verdict as the court can understand." The same principle will be found decided in the case of *Patterson* v. *The United States*, 2 Wheaton, 221.

The same doctrine is to be found, only in a stronger point of view, in *Crozier* v. *Gano and wife*, 1 Bibb, 257. And to the same effect are cases in 2 Bibb, 427; 3 Henning & Munford, 309; *Hawks* v. *Crofton*, 2 Burr. 698. In the case before the court, there can be no doubt as to the meaning of the jury. They have in substance found that the defendants detained the land in contest; we are therefore satisfied that this objection to

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the verdict ought not to be sustained. Upon a consideration of the whole case we are of opinion, that the circuit court erred in setting aside and reversing the proceedings of the justices, and the judgment, therefore, must be reversed and the cause remanded.

THOMPSON AND MATHEWS *vs.* CAMPBELL.

1. It is erroneous to order a plaintiff to be nonsuited against his consent. 1 Peters, 471, 497; 6 Peters, 609.
2. When nonsuit may be taken.[1]

June, 1821. — Appeal from Lawrence Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

OPINION OF THE COURT. — It is clear that the court erred in rejecting the evidence offered by the plaintiff as stated in the bill of exceptions, and also in ordering the plaintiff to be nonsuited against his consent.[1]

The evidence was clearly admissible to support the cause of action as laid in the declaration, and should have been received.

Reversed.

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[1] A plaintiff cannot be nonsuited against his consent, because he has a right by law to have his case submitted to a jury and the court. He may agree to a nonsuit; but if he does not choose so to do, the court cannot compel him to submit to it. *Elmore* v. *Grymes*, 1 Peters, S. C. R. 471; *D'Wolf* v. *Rabaud*, 1 Peters, 497; *Crane* v. *Morris*, 6 Peters, 609; *Mitchell* v. *New England Mar. Ins. Co.* 6 Pickering, 118; *Bove* v. *Davis*, 5 Blackford, 115; *Martin* v. *Webb*, 5 Ark. 74; *Wells* v. *Gaty*, 8 Mis. 681; *Hunt* v. *Stewart*, 7 Ala. 525; *Scruggs* v. *Brackin*, 4 Yerger, 528.

A plaintiff may take a nonsuit at any time before the court or jury have actually rendered a verdict. *Dove* v. *Hawks*, 3 McCord, 559; *M'Lughan* v. *Bovard*, 4 Watts, 308; *Wooster* v. *Burr*, 2 Wend. 295; *Haskell* v. *Whitney*, 12 Mass. 49, *note*.

In Arkansas it is provided by statute, that "no plaintiff shall be permitted to suffer a nonsuit on trial after the jury have retired from the bar, or the cause has been submitted to the court." Digest, § 111, p. 813.

A nonsuit cannot be ordered by the court without the acquiescence of the plaintiff. The correct practice is to instruct the jury, that if the evidence has

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Hewes Scull *vs.* Joseph Kuykendall.

A suit should not be dismissed because a *capias* not served was erroneous when an *alias capias* executed on the defendant is correct; as the court should not look beyond the last writ.

June, 1821. — Error to Arkansas Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

Opinion of the Court. — The court below dismissed this suit because there was an error in the original writ, although it was not served, but an *alias* had been regularly obtained and served on the defendant. We can see no reason for dismissing the suit for an error in a writ which was never served. It can only be considered as a clerical misprision, by which the defendant could not possibly be prejudiced. The *alias capias* which was served on the defendant is in every respect correct, and the court ought not to have looked beyond it. *Reversed.*

William Neely *vs.* Robinson et al.

An attorney in fact of an executor or administrator, cannot maintain suit in his own name for the benefit of the estate.

October, 1821. — Appeal from the Arkansas Circuit Court, determined before Andrew Scott and Joseph Selden, judges.

Opinion of the Court. — In this case it would be useless to give an opinion at length, as the law which governs it has been long and uniformly settled. We do not think that the attorney in fact of an executor or administrator can maintain an action for the benefit of the estate in his own name, in any instance, and therefore the demurrer, setting forth this ground to defeat the action, should have been sustained. *Reversed.*[1]

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not proven a matter necessary to be proven, the jury must find for the defendant. *Martin* v. *Webb*, 5 Ark. 74; *Ringo* v. *Field*, 1 Eng. 49; *Carr* v. *Crain*, 2 Eng. 249.

[1] An agent cannot sue in his own name, where the legal interest is in his

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In the matter of RADFORD ELLIS.

A grand juror may be fined and discharged for intemperance.

October, 1821. — On motion of the prosecuting attorney, the court imposed a fine of thirty dollars on Radford Ellis, foreman of the grand jury, for intemperance, discharged him from the jury, and ordered execution to issue for the fine, and the court appointed Samuel McCall foreman of the grand jury in his place, and administered the proper oath to him, in presence of the grand jury.

BENJAMIN MURPHY *vs.* THOMAS H. TINDALL.

It is not essential to the maintenance of the action of replevin that the defendant should unlawfully take the property out of the possession of the plaintiff; but the action lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law who have possession by virtue of legal process.

April, 1822. — Appeal determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

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principal. *Pigott* v. *Thompson*, 3 Bos. & Pull. 147; *Gunn* v. *Cantine*, 10 Johns. 388; *Devers* v. *Becknell*, 1 Mis. 333; *Brackney* v. *Shreve*, Coxe, 33; *Toland* v. *Murray*, 18 Johns. 24.

An action cannot be maintained in the name of a mere agent of a corporation. *Gilmore* v. *Pope*, 5 Mass. 491.

An agent of the United States cannot prosecute an action of assumpsit in his own name, where the interest is in the United States. *White* v. *Bennet*, 1 Mis. 102; *Bainbridge* v. *Downie*, 6 Mass. 253.

An agent who makes a contract in behalf of another, cannot maintain an action thereon in his own name either at law or in equity. *Whitehead* v. *Potter*, 4 Iredell, 257.

In general, a mere servant or agent with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon. 1 Chitty's Pl. 7; *Bogart* v. *De Bussy*, 6 Johns. 94; *Jones* v. *Hart's Executors*, 1 Hen. & Munf. 470.

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OPINION OF THE COURT. — This was an action of replevin brought by Murphy against Tindall, and upon the trial of the cause a verdict was rendered in favor of the defendant, from which the plaintiff appealed to this court. The only question presented for consideration is, whether the court below erred in the instruction given to the jury, on motion of the defendant, which was that, "unless it was proved that the defendant took the property out of the possession of the plaintiff unlawfully, and against the plaintiff's consent, the jury must find for the defendant." We are clearly of opinion that this instruction was erroneous. It is true, that it was necessary to establish an unlawful taking from the plaintiff in order to support the action; but it was not necessary to prove the unlawful taking by the defendant. It was sufficient to prove it by any other person. This, we apprehend, is the doctrine of the common law, (1 Chitty's Pl. 185,) and by reference to the statute of this territory, (Geyer's Digest, 333,) it is clear that the action of replevin is maintainable against any person in whose hands or possession the property may be found. We are of opinion, then, that the action of replevin lies against all persons in whose possession personal property unlawfully taken may be found, except officers of the law, who may have possession by virtue of legal process. In the opinion we have given we are supported by the authorities referred to in 1 Chitty on Pleading, 185, 186.

Reversed.

WILLIAM BLAKELY *vs.* DAVID FISH.

An appeal will not lie except from a final decision or judgment, and where none is given, the appellate court has not jurisdiction.

April, 1822. — Appeal determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — This is an action on the case brought by the appellee against the appellant. The appellant in the court below demurred to the declaration, which demurrer was overruled, and he excepted and prayed an appeal to this court,

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which seems to have been granted. It does not appear from the record that the court proceeded to give final judgment in favor of either party. We are clearly of opinion, that an appeal will not lie except from the final decision or judgment of the court; and here there being no final judgment, this court has no jurisdiction. Geyer's Digest, 261; 4 Dall. 22, 160; 6 Cranch, 51. *Dismissed.*

E. BYINGTON and BENJAMIN MURPHY *vs.* JAMES LEMMONS.

Where damages are assessed by a jury, the court, on rendering judgment therefor, cannot add interest from a time anterior to the verdict, as it is presumed that interest was embraced in the damages, if interest ought to have been given at all.

April, 1822. — Appeal determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — The only question we deem important is the variance between the verdict of the jury and the judgment of the court.

The verdict is for "eighty-nine dollars in damages," and the judgment is for damages assessed by the jury, and also for interest thereon from the rendition of the judgment before the justice of the peace. We are of opinion that the court erred in adding interest to the damages found by the jury.

It was the province of the jury to decide upon the question of interest, and it must be presumed, if any ought to have been awarded, that it was included in their assessment of damages. *Reversed.*

JESSE JEFFREY, appellant, *vs.* SCHLASINGER and GILLETT, appellees.

1. The books of a merchant, although correctly kept, are not admissible in evidence in his favor.
2. Payment may be given in evidence under non-assumpsit without notice.

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April, 1822. — Appeal determined before Benjamin Johnson Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — This is a case brought here by appeal, and the following errors are assigned: —

1. "The appellees offered in evidence their original book of entries, having previously proved they were regular merchants and kept a correct book of entries as such, and that the book was in their handwriting, and the court permitted the book to be read in evidence to the jury." We cannot but look upon a proceeding of this character as fraught with the most dangerous consequences, and as tending to encourage fraud and imposition, in the highest degree. 3 Bl. Com. 368; 1 Brock. 72. It is also unprecedented except in States where allowed by statute, and is then generally limited to small amounts. We are of opinion that it was error to admit such testimony. [1]

[1] By the common law of England, shop books are not allowed of themselves to be given in evidence for the owner. But a clerk or servant who made the original entries may have recourse to them to refresh his memory, as to other written memoranda made at the time of the transaction. If the clerk or servant who made the entries be dead, the books may be admitted in evidence to show delivery of the articles on producing proof of his handwriting. Bull. N. P. 282; 1 Salk. 285; Ld. Raym. 873; 2 Salk. 690. But if the clerk be living, though beyond the jurisdiction of the court, the entries are inadmissible. 1 Esp. R. 1.

Where there are regular dealings between the plaintiff and defendant, and it is proved that the plaintiff keeps fair and honest books of account, and keeps no clerk, his books of account, under the circumstances and from the necessity of the case, are admissible as evidence. *Vosburg* v. *Thayer*, 12 Johns. 462; *Potter* v. *Case*, 8 Johns. 211.

In other States, the suppletory oath of the plaintiff must be added. *Poultney* v. *Ross*, 1 Dall. 238; *Sterritt* v. *Bull*, 1 Binney, 234; *Cogswell* v. *Dolliver*, 2 Mass. 217; *Prime* v. *Smith*, 4 Mass. 455.

In Arkansas, "the regular and fairly kept books of original entries of a deceased merchant, or regular trader, or any person keeping running accounts for goods, wares, merchandise, or other property sold or labor done, accompanied by the affidavit of the executor or administrator of such deceased person, or some creditable person for him, setting forth that they are the books, or accounts of his testator or intestate, shall be evidence to charge the defendant for the sum therein specified, subject to be repelled by other competent testimony." — Digest, sec. 7, p. 499.

But this is subject to this qualification, that "to entitle the party to introduce

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2. "The court erred in not permitting the defendant under his plea of non-assumpsit to give evidence of payment."

We think the court did err in excluding this testimony, as payment may be given in evidence under the general issue without notice, as decided by this court, in the case of *John Smith, T.* v. *Edmund Hogan*, and as the authorities clearly establish. 1 Salk. 394; 6 Com. Dig., Pleader, (E. 14); Ld. Raym. 217, 566; 1 Chitty, Pl. 511; 12 Mod. 376.

Reversed.

ARCH HODGE *vs.* DANIEL PLOTT.

1. In an appeal from a justice under the act of 1818, the security in the appeal bond is equally subject to judgment with the appellant when the judgment is affirmed, or on a trial *de novo* a judgment is rendered against the appellant; but if the adverse party takes judgment against the principal only, it is irregular to sue out a *scire facias* against the security with a view to obtain an execution against him, for there must be a judgment for the *scire facias* to rest on.
2. The security is not bound to pay until it legally appears that the principal is unable to pay.

April, 1822. — Appeal determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — Daniel Plott recovered a judgment against William Harris, before a justice of the peace, for the sum of sixty-eight dollars and twelve cents debt, and one dollar and twelve cents costs, from which judgment Harris appealed to the court below, and entered into a bond with Arch Hodge, security, conditioned in substance that Harris should prosecute his appeal, and if Plott should recover more than the amount of the judgment of the justice, that said Harris, defendant, should pay the amount of such judgment and costs of suit. The court below rendered a judgment against Harris

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such evidence, he must first establish to the satisfaction of the court, that his testator or intestate had the reputation of keeping correct books." — Digest, sec. 8, p. 491.

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for sixty-six dollars and twelve cents debt, and seven dollars and thirty-seven cents damages, but no judgment was taken against Hodge as security. Upon this judgment, execution was issued against Harris, and at the same time a *scire facias* was sued out against Harris and Hodge to show cause why execution should not issue against them on the above-mentioned bond, and a judgment was rendered by the court below against Hodge for the above debt, and four dollars and ninety-five cents damages, with costs, from which Hodge appealed to this court. We are of opinion that the *scire facias* was improvidently issued as to Hodge, inasmuch as there was no judgment against him whereon it could rest, as by the statute there must have been, in order to entitle the plaintiff to execution. The law is, that in "all cases of appeals or *certiorari* from justices of the peace, by virtue of existing laws on those subjects, if the judgment of the justice be affirmed, or judgment given on a trial upon the merits *de novo* in the circuit court, judgment shall be given and execution issue, not only against the original defendant or defendants in the suit before such justice, but also against his or their security or securities in the appeal bond or bonds to prosecute such *certiorari*." Acts of 1818, p. 27. Now, although the law is that judgment shall be entered against the security as well as the principal, yet it is plain that this provision being for the benefit of the plaintiff, he may waive it, and may make his election and take judgment against the principal only. This was done in this case, and afterwards an execution could not be obtained against the security in a summary manner by *scire facias*. It is a different suit and between different parties, and does not come within the purview of the statute. Besides, if there had been a joint judgment in the first instance, still the security would not be bound to pay until it legally appeared that the principal was unable and could not pay, and nothing of this kind has been shown. *Reversed.*

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Edward Good *vs.* Samuel Davis.

1. Accord and satisfaction occurring after issue formed in a suit, must be pleaded *puis darrein continuance*, if the party would avail himself of it.
2. Pleading *puis darrein continuance* waives all previous defences.

April, 1822. — Per Curiam. After the commencement of a suit and issue formed, a party to avail himself of accord and satisfaction occurring afterwards, must specially plead *puis darrein continuance*, and establish it by evidence, if disputed, and pleading *puis darrein continuance* waives all previous defences. 1 Salk. 168; 2 Strange, 1105; 1 Chitty's Pl. 697; 5 Taunt. 333.

Reversed.

John Taylor *vs.* Edmund Hogan.

It is no ground for reversing the judgment of a justice rendered on a specialty, that neither the plaintiff nor his agent appeared at the trial, and the appellate court, instead of determining the cause on the transcript from the justice, should have tried it *de novo* on the merits.

August, 1822. — Error to Pulaski Circuit Court, determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

Opinion of the Court. — This was an appeal from a justice of the peace to the court below, where the judgment was reversed on the ground that the plaintiff did not appear before the justice in person, or by agent duly empowered by letter of attorney, on the day of trial. We are of opinion that the court erred in reversing the judgment of the justice on that ground, the suit having been brought on a specialty; and also erred in determining the case on the transcript from the justice alone, when it should have been tried on the merits as though the suit had originated in that court. Geyer's Digest, 390.

Reversed.

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JOHN WYATT, appellant, *vs.* JACOB HARDEN, appellee.

1. When a substantial amendment is made in a declaration, the defendant should be allowed until the next succeeding term to plead.
2. It is improper to allow evidence to go to the jury which would constitute the ground of a separate action.

August, 1822. — Appeal determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — The judgment in this case must be reversed upon two grounds: 1. The court erred in not allowing the appellant, the defendant in the court below, until the next term to plead, after a substantial amendment of the declaration had been made. 2. The court erred in permitting any evidence to go to the jury in relation to a ferry, as a disturbance of or injury done thereto would constitute the ground of a separate action. *Reversed.*

BENJAMIN MURPHY *vs.* ELI J. LEWIS and DANIEL MOONEY, executors of SAMUEL MOSELY, deceased.

1. An execution issued on a judgment which does not authorize it, may be quashed on motion, and the money made thereon ordered to be refunded; but where there is only a clerical mistake, this cannot be done, for the execution may be corrected by the court, so as to conform to the judgment.
2. The power of the court to correct errors and mistakes in executions is unquestionable, and necessarily belongs to every court of record.

August, 1822. — Motion to quash an execution determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — This is a motion by the defendants to quash the execution and have the money refunded, the amount having been collected by the sheriff and paid over to the plaintiff. We have no doubt the execution issued for a greater sum than the judgment authorized; for instead of six per centum as damages upon the dissolution of the injunction, the execution is for six per centum per annum, thereby making

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a material difference in the amount against the defendants For the defendants it has been contended, that, as the execution is erroneous, it ought to be quashed, and the money made thereon refunded. We are, however, of a different opinion. If the judgment had not authorized the emanation of an execution at all, or there had been no judgment, then it would be irregular to sue out one, and in such a case the doctrine contended for would be correct. But when there is only a clerical mistake in the execution, it may be corrected by the court, so as to make it conform to the judgment. Of the power to correct errors or mistakes in executions, there can be no doubt. In the case of *Smith* v. *Carr*, Hardin, R. 308, the court of appeals of Kentucky say: "The power of correcting the ministerial acts of its own officers necessarily and incidentally belongs to every court, and has always been exercised, as well before as since the formation of the present constitution." The case referred to was one of an erroneous execution. In the case before this court, to order the whole of the money to be refunded, would be more than law or justice require.

For what purpose should we require the whole of the money to be restored?

That another execution might issue, and the true amount again be made and paid over to the plaintiff? We can perceive no good reason for a course of this kind, and no authority has been found to warrant it. We are therefore of opinion, that the mistake in the execution should be corrected, and that Murphy refund to Lewis and Mooney the amount which he has received above the sum for which the execution ought to have issued. *Ordered accordingly.*

WILLIAM BLAKELY, administrator of MOSES GRAHAM, *vs.* ABRAHAM RUDDELL.

1. The fact that a party came lawfully into possession of property is not the criterion to determine whether a demand and refusal are necessary in an action of trover.

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2. If A. lends his horse to B., and B. sells him, the plaintiff need make no demand of B. to maintain an action of trover against him, because this is strong evidence of conversion.
3. Demand and refusal are not the only evidence of a conversion.
4. Instructions will be presumed to be correct where the evidence is not spread upon the record by exception or otherwise.

August, 1822. — On error before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — The only ground relied on for the reversal of the judgment in this action of trover is, that the court erred in instructions to the jury. Upon the trial, on the motion of the defendant, the court instructed the jury that "the plaintiff had not sustained his action by proving a demand and refusal before the commencement of the suit, the defendant having become lawfully possessed of the property." There are cases where the plaintiff cannot recover unless he proves a demand and refusal, and it is equally clear that there are cases where a demand and refusal are unnecessary, although the defendant may have come lawfully into possession; as where A. lends his horse to B., and B. sells him. This would be as strong evidence of conversion as could be adduced, and no demand would be necessary to enable the plaintiff to recover. 1 Chitty, Pl. 177, 178; 5 East, 407; 6 Ib. 538; 1 Johns. Cas. 407.

But in the case before the court, the evidence of the plaintiff, if he adduced any, is not contained in the bill of exceptions, nor spread upon the record in any other manner; and as the court might have been justified in giving the instruction, we are bound to presume in favor of the court in that respect. If, indeed, the plaintiff on the trial adduced evidence of a conversion other than that of a demand and refusal, the court no doubt committed an error in giving the opinion contained in the bill of exceptions; but as no such evidence is shown to have been introduced, we cannot presume it, and consequently the judgment must be affirmed. *Affirmed.*

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Edmund F. Hogan *vs.* Creed Taylor.

The judgment cannot exceed the amount claimed in the declaration.

August, 1822. — Per Curiam. The judgment in this case being rendered for fifty dollars more than the amount claimed in the declaration, is manifestly erroneous, and must be reversed; it being well established, that a greater amount cannot be given than claimed in the declaration. 1 Chitty, Pl. 372; Yelverton, 45; 10 Co. 117; 3 Com. Dig., Damages, E. 3.

Reversed.

Richard Searcy *vs.* Edmund Hogan.

1. Where it does not appear that exceptions were taken, the appellate court, which tries the case on the record alone, will presume the judgment to be correct.
2. The superior court can only entertain a writ of error issued to, or an appeal from, a court of record.
3. The court of a justice of the peace is not a court of record.

April, 1823. — Appeal determined before Benjamin Johnson and Andrew Scott, judges.

Opinion of the Court. — In this case, the court have to be governed exclusively by the record; and as nothing appears on the face of it to show that any exceptions were taken, it is to be presumed that the judgment is regular and correct.

The suggestion of counsel, "that this court has exclusive appellate jurisdiction in all cases where the sum in controversy shall amount to one hundred dollars, and that the circuit court cannot take cognizance of such cases," we cannot admit as correct. To adopt that doctrine, would render almost useless an intermediate court between justices of the peace and this tribunal, and would destroy the beneficial effects derivable from an appeal; since we only try upon the record, and the court below upon the merits. This court can only entertain an appeal or writ of error from a court of record, which a justice's court is not.

Affirmed.

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THOMAS H. TINDALL, appellant, *vs.* BENJAMIN MURPHY, appellee.

An execution is not admissible as evidence, unless the judgment on which it issued is produced.

December, 1823. — Appeal from the Pulaski Circuit Court, determined before Benjamin Johnson, Andrew Scott, and Joseph Selden, judges.

OPINION OF THE COURT. — The only question presented by the record is, whether the execution offered in evidence by the appellant was properly excluded. We are of opinion that it was incompetent evidence. To have authorized its introduction, the judgment upon which it issued should also have been produced. 3 Littell, 14; 1 Salk. 409; 2 Johns. 281; 12 Ib. 213; 2 Southard, 813; 20 Johns. 338; 5 Serg. & R. 332; 1 A. K. Marsh. 158; 1 B. Monr. 94; 1 Gilman, 136.

Affirmed.[1]

ELI J. LEWIS, Clerk, appellant, *vs.* JAMES HAMILTON, sheriff, appellee.

1. When a sheriff fails to make the costs when practicable, he becomes responsible, nor will the order of the client or attorney as to costs change or affect that liability.
2. He may be reached by motion.

[1] By a statute of Arkansas in force 20th March, 1839, it is provided, that when an officer shall sell any real estate or lease of lands for more than three years, he shall make the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars recited in the execution; also a description of the time, place, and manner of sale; which recital shall be received in evidence of the facts therein stated. Digest, sec. 60, p. 504. This was intended to supersede the necessity of producing the records from which the recitals are made, and to furnish evidence of the authority under which the officer acted, as well as the manner in which he had executed that authority. It is, however, only *primâ facie*, and not conclusive evidence, and may be rebutted by proof. *Newton* v. *State Bank*, 14 Ark. 10; *Hardy* v. *Sloan*, 15 Ark.

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April, 1824.— Appeal from the Arkansas Circuit Court, determined before Joseph Selden and Andrew Scott, judges.

Opinion of the Court.— In this case it appears that in the circuit court of Arkansas county, a motion was made by the appellant against the appellee to recover seven dollars and four cents, costs due him as clerk of that court, in the case of *John Taylor, assignee of Richard Montgomery*, v. *James Young*, and which costs the sheriff of Arkansas county failed to make on execution placed in his hands. The motion was overruled on the ground that it appeared that Taylor had transferred the judgment to Samuel C. Roane, and that the latter directed the appellee to stay the collection of the debt. In our opinion it was error to deny the motion, for when a sheriff receives an execution on which costs are due a clerk, and fails to make them when practicable, the sheriff becomes responsible, nor will the order of the plaintiff in execution vary the case as to the costs, whatever may be the effect on the debt. *Reversed.*

Reuben L. Rochell and Hunt M. Shiff *vs.* Sylvanus Phillips.

1. After a demurrer to a plea of set-off has been overruled, the plaintiff should have leave to reply.
2. The errors of a judge in matters of law, as well as the errors of a jury in matters of fact, alike constitute valid ground for a new trial.

October, 1824.— Motion for a new trial, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges of the Superior Court.

Opinion of the Court.— At the last term of this court, a trial was had between the parties to this action, and a judgment rendered in favor of the defendant for 1,377 dollars and 66 cents damages and costs. A motion was afterwards made by the plaintiffs for a new trial, which was not then acted on by the court, but was continued over to the present term, and the only question now is, whether a new trial ought to be granted.

The defendant interposed several pleas in bar of the action,

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and among them the plea of set-off. To this the plaintiffs demurred, but the court overruled the demurrer. The plaintiffs then asked leave to reply, but the court (judges Selden and Scott) being divided in opinion, leave to reply was refused, and judgment rendered against the plaintiffs on their demurrer to the plea of set-off.

That the court erred in refusing leave to reply to the plea of set-off, cannot be seriously denied. In England, for the last twenty years, this practice has prevailed, and in the United States, we hazard nothing in saying that nine tenths of the courts are governed by the same practice. The old rigid rules which the court in this instance enforced, have long since given way to more enlightened and liberal principles. To quote authority on such a question we deem unnecessary. Every day practice and the repeated decisions of this court prove beyond controversy, that this is now the settled doctrine of the law.

If, then, the court erred on this point, is it a good ground for a new trial? We are of opinion that it is. The errors of a judge in matters of law, as well as the errors of a jury in matters of fact, alike constitute valid grounds for a new trial. This position we think cannot be controverted, for in motions for new trials both grounds are generally relied on, and indeed nothing is more common than for an appellate court to award a new trial for a mistake or misdirection of the judge on a point of law. Now it cannot be denied, that the court below possesses the same powers to do every thing while the cause is before it, that the appellate tribunal would have to require to be done. It is true, that after the term has passed, a court has no power over its own judgments, except to correct clerical mistakes, unless those judgments are kept open or suspended by a motion in arrest of judgment, a petition for a rehearing or re-argument, a motion for a new trial, or some like motion, which leave the record open and in the power of a succeeding court.

New trial granted.

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JAMES BILLINGSLEY *vs.* ROBERT BELL.

If the appeal is prayed on the day of trial, notice is unnecessary, and the appeal bond may be given at any time within ten days.

October, 1824. — Appeal from the Crawford Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — This was a suit originally brought by Bell against Billingsley, before a justice of the peace, who rendered judgment for Bell, and from which Billingsley, on the day of trial, prayed an appeal to the Crawford circuit court, which was granted, and a transcript of the proceedings sent up to that court. Upon the calling of the cause, Bell moved to dismiss the appeal, and this motion was sustained.

From the bill of exceptions, it is apparent that the court acted under a misapprehension of the fact that an appeal had been prayed by Billingsley on the day of trial. Such being the fact, the court erred, for the law is express that notice to the opposite party need only be given where the appeal is not prayed on the day of trial. Geyer's Digest, 391.

It has been said, that as the appeal bond was not entered into on the day of trial, the appellant could give bond within ten days. This is true, and as the bond in this instance was executed in that time, it is sufficient. Geyer's Digest, 390.

Reversed.

JAMES PEYATTE et ux. *vs.* SIMEON ENGLISH, administrator of JOHN ENGLISH, deceased.

1. Every plea must contain an answer to the whole cause of action or some certain part of it.
2. A plea that an estate is insolvent, is not a good plea in bar.
3. If the administrator of an insolvent estate pursues the course pointed out by law, he cannot be held personally liable.

October, 1824. — Debt determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

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OPINION OF THE COURT. — This is an action of debt, brought by the plaintiff against the defendant, as administrator of John English, deceased, upon an obligation executed by the intestate to the plaintiff.

The defendant has pleaded in substance that the estate of which he is administrator is insolvent, and to this plea the plaintiff has demurred, and the only question presented to the court is, whether the plea is good as a bar to the action.

We are of opinion that it is not, because, according to the well-established rules of pleading, every plea must contain an answer to the whole cause of action set out in the declaration, or to some certain part of it. Stephen's Pl. 215; 6 Com. Dig., Pleader, 3 M. 40, 41. The plea in question is not an answer to the whole declaration, for the reason, that although the estate may be insolvent and unable to discharge the full amount of debts against it, yet it may be able to pay a portion of them. It is not an answer to any certain claim of the plaintiff; because the plea does not state what part of the debt the estate is able to pay, and even then it would not be good. On these grounds, we think the plea insufficient.

But it has been argued, that unless the defendant be allowed in this action to plead the insolvency of the estate, he must be subjected personally to liability in another action brought upon this judgment. The answer to this is, that if the defendant has taken the legal steps and pursued the course pointed out by the administration law in relation to insolvent estates, he cannot be injured in his individual character, in any action which may be brought against him on the judgment which may be rendered in this case. *Demurrer sustained.*

REUBEN L. ROSHELL and HUNT M. SHIFF *vs.* JOHN MAXWELL.

1. The circuit court cannot enjoin a judgment of the superior court and make the case triable in the circuit court, for this would make the inferior paramount to the superior tribunal.
2. One circuit court cannot interfere with or restrain the proceedings of another circuit court, for they are equal in authority.
3. The circuit judges have the power to grant injunctions in proper cases.

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October, 1824. — Motion determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — In this case, the plaintiffs obtained a judgment on the law side of this court against Maxwell, on which execution issued, directed to the sheriff of Arkansas county. The defendant applied to the circuit court of that county to stay proceedings, and obtained an injunction, as appears by the sheriff's return on the execution. The plaintiffs now ask the issuing of an *alias* execution, notwithstanding the injunction, which they contend is a nullity. The bill is made returnable to the circuit court of Arkansas county, and is there to be tried and heard; and the question is directly involved, whether the circuit court has the power to stay the process and proceedings of the superior court, and by interlocutory or final decree enjoin, restrain, or control our acts.

We believe there is no power so to do; nor do we think one circuit court has the right to restrain or control the proceedings of another, so as to draw to itself an investigation properly belonging to the court where the suit at law was tried, much less to enjoin the proceedings of this court and retain the bill there. A course of practice fraught with so much inconvenience to suitors, and embarrassment to this tribunal, cannot be submitted to nor supported. It is disrespectful to us, and badly calculated to attain the ends of justice and equity. It is due to the superior court to know whether its judgments and process are properly or improperly intercepted. If improperly, must this court await the tedious investigation of a suit in chancery in the circuit court before it can enforce its judgments, and before it can know in any legitimate way whether the restraint is in conformity with equity or not? Can it be insisted, that after having permitted a judgment to go against him in this court, a party may, by applying to an inferior, paralyze the arm of the superior court, and make the efficacy of our judgments and decrees dependent on an inferior tribunal? We think not.

Besides, this bill ought to have been addressed to and returned into this court, where the judgment was rendered, so as to have afforded an early opportunity of withdrawing or continuing the restraint on the judgment, as should seem most

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consistent with equity. The power of the circuit judges to grant injunctions in proper cases is not denied. Such a power may well be said to be an incident to every court of record that can exercise chancery jurisdiction. But the right to retain this bill, and to proceed to the determination of it, is quite a different thing, and cannot be admitted.

If the circuit court has a right to stay our proceedings during an investigation in a suit in chancery, and at last forbid our proceeding at all to execute our judgments, it has as good a right to interfere in the trial of every suit here, and thus enfeeble our powers, forbid the trial of any and every suit on the docket, and hold our judgments and decrees subject to its will; in fact, it would make the inferior paramount to the superior tribunal. It need only be proposed to insure the rejection of such a doctrine. We are, therefore, of opinion that an *alias* execution should issue, and that the plaintiff should recover the costs of this motion. *Ordered accordingly.*

THE UNITED STATES *vs.* CHA-TO-KAH-NA-PE-SHA and WA-NA-SHA-SHINGER, Osage Indians.

1. Congress has the constitutional power to pass laws punishing Indians for crimes and offences committed against the United States.
2. Indian tribes are not so far independent nations as to be exempt from this kind of legislation.

October, 1824. — Indictment for murder, before Benjamin Johnson, Andrew Scott, and William Trimble, judges of the Superior Court.

OPINION OF THE COURT. — This is a motion for a new trial, and the grounds relied on are, 1, that the verdict is contrary to law; and 2, that it is contrary to and without evidence. In support of the first ground, it has been contended that the Osage Indians are a sovereign and independent nation, possessing the right to declare war and commence hostilities against the United States, or any other nation, that the facts stated in the indictment constitute an act of war against the United States, and that the prisoners cannot be made amenable to the

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civil tribunals of this country. Even if this position was sound, which is not the fact, still the proof in the case shows that the Osage nation were in amity with the United States, and had no intention of going to war by the murder of which the prisoners are found guilty. It was an attack upon our citizens by a party of Osages, for the purpose of robbery and plunder, unauthorized by the Osage nation. The nation, in fact, has disavowed the act and surrendered the accused, together with others, to be tried. Does this court, then, possess the power? Congress has passed a law expressly giving this court jurisdiction of offences committed by Indians, such as the one charged against the prisoners. That the act alluded to is constitutional we have no doubt, and we are bound to carry its provisions into effect. With regard to the other ground, that the verdict is contrary to evidence, it is sufficient to remark, that the proof satisfied the jury of the guilt of the prisoners, and it was so strong no reasonable doubt exists in the minds of the court, of the justice and propriety of the verdict which the jury have rendered, and the motion for a new trial must be overruled. *Motion denied.*

The counsel for the prisoners then moved the court in arrest of judgment, on the following grounds: 1. It does not appear in the indictment that the offence was committed on lands belonging to the nation or tribe of Indians, as by law it ought to do; 2. The offence with which the prisoners are charged, is not set forth with sufficient certainty; 3. It does not appear from the indictment with sufficient certainty, that Curtis Wilborn was killed and murdered by the Indian chiefs and warriors.

But after the argument the court overruled the motion, and sentenced the prisoners to be executed by the marshal, by hanging, on the 21st of December, 1824, between the hours of 12 o'clock, M. and 4 o'clock, P. M. of that day, and they were executed accordingly.

ABRAHAM SINCLAIR *vs.* DAVID MCELMURRY.

Where an appeal is not taken on the day of trial, the opposite party is entitled to notice thereof, before a default can be taken against him.

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April, 1825. — Error to the Pulaski Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

Opinion of the Court. — Sinclair, the plaintiff in error, sued out a warrant from a justice of the peace against McElmurry, the defendant in error, on an account amounting to twenty-eight dollars, and judgment was rendered by the justice in favor of Sinclair for that amount. Nine days after the rendition of the judgment, McElmurry appealed to the circuit court, and it does not appear that notice of the appeal was ever served on Sinclair. At the succeeding term of the circuit court, Sinclair was called, and not appearing, judgment of nonsuit was entered against him, and to reverse which he prosecutes this writ of error.

We have no doubt that the court erred in entering judgment against Sinclair. The appeal was taken by McElmurry after the day of trial, and in such cases the law requires that the appealing party should notify the opposite party of the appeal at least ten days before the next court authorized to try the same. Geyer's Digest, 391. Here, notice of the appeal was not given to Sinclair, and without it he was not bound to appear. A judgment for a default can never be entered against a person who is not in default, and how could Sinclair be so considered until he was regularly and legally notified of the pendency of the appeal in the appellate court. As no notice was given, McElmurry, and not Sinclair, was in default. We are clearly of opinion that the judgment of the circuit court is erroneous, and must be reversed. *Reversed.*

Peyton R. Pitman *vs.* Abijah Davis et ux.

1. The landlord cannot maintain trespass for an injury to his tenant, and on the same principle the tenant only can have a writ of forcible entry and detainer against one who expels him from the tenement.
2. Actual possession is absolutely necessary to enable a plaintiff to maintain an action for forcible entry and detainer, and constructive possession is not sufficient.

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April, 1825.— Forcible entry and detainer, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

Opinion of the Court. — In this case the plaintiff sued out a writ of forcible entry and detainer against the defendants, wherein it is alleged that the defendant, Elizabeth Davis, on the second and third days of November, 1823, entered in and upon a certain plantation and the dwelling-houses thereon, where Archer Brown, his tenant, resided; and the question is, whether the landlord can maintain a proceeding of this kind for a forcible entry on his tenant.

It is well settled that the landlord cannot maintain trespass for an injury to his tenant, and on the same principle it has been decided in Kentucky that the tenant alone can have a writ of forcible entry and detainer against a person who forcibly enters and expels him from the tenement. *Van Horne* v. *Tilly*, 1 Monroe, 52. It is irresistible from the statute regulating forcible entry and detainer, (Geyer's Digest, 202,) that possession in fact and not a constructive possession, is absolutely necessary to enable the plaintiff to maintain the action. *Stewart* v. *Wilson*, 1 A. K. Marsh. 225; *Pogue* v. *McKee*, 3 A. K. Marsh. 127. *Reversed.*

The United States *vs.* William Flanakin.

1. In all cases of trespass on the person or property of an individual where the prosecution is carried on at the instance of the party aggrieved, he is liable for costs, and they may be adjudged against him.
2. The word "trespass," in the criminal code, has a technical and definite meaning, as is descriptive of offences of a lower grade only, such as misdemeanors, and does not mean crimes of a deeper dye, such as horsestealing or the like, in which no prosecutor is necessary.

October, 1825. Indictment for larceny, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

Opinion of the Court. — The defendant having been prosecuted for the crime of horsestealing, and upon trial acquitted

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by the jury, now makes by his counsel the following motion, namely, "That James Lemmons, the principal witness, and at whose instance the prosecution was instituted, should be subject to the payment of costs, as prosecutor." This question must be decided by the statute law. The only provisions upon the subject of which we are aware, are to be found in Geyer's Digest, p. 154, 155, and are as follows: "No bill of indictment for assault, battery, or any other trespass, shall be preferred to any grand jury unless a prosecutor be indorsed thereon, and if the grand jury do in any such case return the bill 'not a true bill,' it shall be the duty of the grand jury to decide, and cause the foreman to indorse thereon, whether the county or the prosecutor shall pay the costs; and where the indictment is returned by the jury 'a true bill,' and the defendant on trial is acquitted, the petit jury acquitting such defendant, shall return together with their verdict, whether the county or prosecutor shall pay the costs, and the court shall give judgment accordingly."

"In all cases of prosecutions for assault and battery, or other trespasses, where the indictment or presentment shall be made from the knowledge of two or more of the grand jury, or upon the information of any public officer in the necessary discharge of his duty, or on the information of any other person other than he, she, or they, against whom the trespass is alleged to have been committed, it should be so stated at the end of the indictment or presentment, and no prosecutor shall be required."

From the preceding sections, it is manifest that a prosecutor is required only in one class of cases. In all cases of trespass against the person or property of individuals, a prosecutor is required where the prosecution is carried on by the person or persons aggrieved by the trespass, but even in these cases a prosecutor is not necessary, where the information is offered by any person against whom the trespass has not been committed. What then is meant by the word trespass, as used in the statute? This is the only point upon which a doubt can arise. The word trespass, when used in the criminal code, has a technical and definite meaning; it is descriptive of offences of a lower grade only, and is included in the term misdemeanor. When the law defines the higher crimes, — crimes of deep

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atrocity, other words than those of trespass or misdemeanor are employed. Treason, murder, robbery, and burglary, cannot be committed without committing a trespass, but no lawyer would contend that a conviction for murder could be had upon an indictment for trespass. Indeed, it is too clear to admit of doubt that the term trespass is used only to denote offences of a lower grade, and cannot be extended to embrace crimes of a deeper dye, designated and defined by their technical and appropriate appellations. As the word trespass does not include the offence of horsestealing, it follows that in the prosecution of that offence the law requires no prosecutor, and consequently this motion must be overruled. *Motion denied.*

JAMES LEMMONS *vs.* WILLIAM FLANAKIN.

1. L. and F. agreed to run a horserace, and it was stipulated that if either failed to run the race, the obligation for six cows and calves should be in full force against the other; *held*, that this contract was absurd in its terms; that the court would not reform it according to the supposed intention of the parties, and that no action would lie upon it.
2. Where there is ambiguity in a contract, the court will search out if possible the intention of the parties, and enforce it accordingly; but a construction which would impose a liability on one party when the letter fixes it on the other, cannot be tolerated, and especially where the contract is without a valuable consideration, and immoral in its tendency.

October, 1825. — Action of covenant, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — This was an action of covenant, brought on a penal obligation for a failure on the part of Flanakin to run a horserace. The plaintiff has made profert of the obligation, and after setting out the terms of the race, states the condition substantially as expressed in the obligation. It is also alleged that Lemmons was ready and offered to perform the condition on his part, and that Flanakin failed and refused to run the race according to the condition of the obligation. The allegation as to the failure to run the race is as follows, namely: "And it was then and there by the aforesaid parties

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further agreed, that should either of them fail to run agreeable to the said obligation, that the same for six cows and calves was to be in full force and virtue against the other."

This allegation conforms to the condition of the obligation, and the defendant by his demurrer questions the right of the plaintiff to maintain this action. He urges that, agreeable to the literal reading of the obligation, the party who failed to comply with the condition would have the right of action against the other; in other words, that it is not in force against him who fails to run, but against him who complies with the condition. This unquestionably is the literal reading. For the plaintiff it is urged, that it was obviously a mistake in the scrivener, and that the court should disregard the words and construe the obligation according to what may be supposed to have been the intention of the parties; that is, that it should be in full force and virtue against him who failed to comply, contrary to the letter, that it "should be in full force and virtue against the other."

When there is ambiguity we will search out, if possible, the true intention and meaning of the parties, and enforce the contract in conformity with that intention and meaning. 11 Co. Rep. 34; 1 Term Rep. 313. But certainly we cannot adopt a construction in direct violation of the reading and letter of an obligation, nor can we say that, under certain circumstances, one party shall be liable to the penalty of an obligation when it is expressed that the other shall be. 1 Term Rep. 51, 52; 6 East, 518; 9 Ib. 101. The least that can be said of this contract is, that it is absurd in its terms, and however much the court, for the purpose of doing justice to both parties, might be disposed to rectify a mistake in a contract entered into in good faith and for a full and valuable consideration, yet we do not feel authorized or required to go the same length in support of one without a valuable consideration, absurd on its face, and immoral in its tendency. We think this action cannot be maintained, and therefore the demurrer must be sustained, and judgment entered for the defendant. *Judgment accordingly.*

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HENRY L. SMITH *vs.* BENJAMIN L. MILES.

1. If the subject-matter is within the jurisdiction of the magistrate, and the execution regular on its face, the officer executing the same cannot be held liable as a trespasser.
2. No person acting under a regular writ or warrant can be liable in trespass, however malicious his conduct; but case for the malicious motive, and want of probable cause for the proceeding, is the only sustainable form of action.
3. In such case, a motion is not the proper remedy to reach the officer executing the writ.

October, 1825. — Error to the Chicot Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — This was a motion made in the Chicot circuit court by Miles against Smith, as constable of Oden township, to compel him to refund money collected from Miles.

Andrew Latting obtained judgment against Miles before Thomas James, a justice of the peace of Oden township, which was taken to the Chicot circuit court by *certiorari;* and pending the writ of *certiorari*, the justice issued execution, delivered it to Smith to execute, which he did do, so far as to make the costs; and this is the money prayed to be refunded, and judgment was rendered for that purpose.

It is not shown that Smith, the officer, had any knowledge of the existence of the *certiorari;* and under this state of case, Smith's counsel contend that he is not liable at all, but if so, not by motion; and this we hold is a correct position.

If the subject-matter is within the jurisdiction of the magistrate, and the execution is regular on its face, the constable cannot be liable as a trespasser. 1 Chitty, Pl. 210; *Wise* v. *Withers*, 3 Cranch, 331; 8 Johns. 45. This case falls within that rule, as far as we can judge from the record.

If Smith had knowledge of the *certiorari*, and acted maliciously, he might be liable to an action on the case for such malicious conduct. In speaking of the action of trespass, it is said, that "no person who acts upon a regular writ or warrant

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can be liable in this action, however malicious his conduct; but case for the malicious motive, and want of probable cause for the proceeding, is the only sustainable form of action." 1 Chitty, Pl. 214; 1 Strange, 509; 2 Term Rep. 653; 6 Ib. 245; Willes, Rep. 32. There is no pretence that Smith acted with a malicious intention, and therefore could not be liable in case, (1 Chitty, Pl. 152,) and we have seen is not liable in trespass. Can it, then, be seriously contended, that if not liable in any form of action, he could be held responsible on motion? Supposing Smith, however, to have acted maliciously, it is a question of fact to be tried by a jury, and not by motion, the latter remedy being founded on the record alone, except in a few cases under the statute, and provided for by statute, to prevent the delay and costs of a regular suit, and which does not usually admit of a trial of disputed facts. *Judgment reversed.*

SIMEON ENGLISH, administrator of JOHN ENGLISH, deceased, complainant, *vs.* WILLIAM RUSSELL, defendant.

A vendor who has not parted with the legal title, has a lien on the land for the unpaid purchase-money, and may subject the land to the payment of it, either against the vendee, his representatives, or assigns.

October, 1825. — Bill in Chancery, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — On the 21st day of June, 1821, the intestate, John English, and the defendant, William Russell, entered into a contract in writing by which the former purchased a tract of land of the latter, containing three hundred and twenty-five acres, at the price of five dollars per acre. Five hundred dollars of the purchase-money was paid down, and for the remainder English executed two notes to Russell, one payable the 20th June, 1822, the other the 20th June, 1823, and bearing ten per cent. interest per annum from maturity until paid. Russell bound himself to convey the land with general warranty, as soon as the purchase-money should be paid. An

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action at law was brought by Russell on the first note, and judgment recovered against the present complainant, as administrator of John English, deceased, to enjoin which this bill has been filed, alleging that John English died insolvent, and praying for a sale of the above-named land, to pay debts.

To the sale of the land as prayed for in the bill, no objection has been made by Russell; but he claims that the proceeds must be applied to the payment of the purchase-money due him on the land. We have no doubt Russell has a right to the proceeds of such sale, as claimed by him. *Taylor* v. *Alloway's Heirs*, 3 Littell, 216. He never parted with the legal title, and according to well-settled principles, the vendor has a lien upon the land for the purchase-money. *Macreth* v. *Symmons*, 15 Vesey, Jr. 329, 349; *Hughes* v. *Kearney*, 1 Sch. & Lefroy, 132; *Garson* v. *Green*, 1 Johns. Ch. Rep. 308.

The proceeds of the sale, therefore, must first be applied to discharge the debt due Russell on account of the purchase-money, and the overplus, if any, will belong to the estate, and go to the administrator. *Decreed accordingly.*

JAMES M. GIBSON and JOHN P. BROWN, plaintiffs in error, *vs.* HEWES SCULL, defendant in error.

Defendants in attachment may appear and plead without entering special bail to the action, and then the property attached is considered as a substitute for bail.

April, 1826. — Error to Arkansas Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

OPINION OF THE COURT. — The only question which we have to consider is, whether Gibson and Brown, the defendants in the court below, had the right to appear there and plead to the attachment, without first filing special bail to the action. We have no doubt this right is given to defendants in all cases upon attachment. The act of 1823 (Acts 1823, p. 6) provides, "that in all cases upon attachment, the defendant may appear and

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plead the same as in other cases, provided that when such defendant does not enter into special bail as is now prescribed by law, the property shall be and remain in the hands of the sheriff until the final determination of the suit." From the provisions of the above act, we think it clear, that defendants in attachment may in all cases appear and plead without giving bail, and that the property attached by the sheriff is considered as a substitute for bail. We are, therefore, of opinion that the court erred in refusing to hear the defendants unless they filed special bail to the action. *Reversed.*

BENJAMIN L. MILES *vs.* ENOCH ROSE.

1. A judgment in assumpsit will be reversed if the cause is tried without replication to good pleas in bar, such as non-assumpsit and payment.
2. Until replication, the jury could not be sworn to try the issue, for in fact there is no issue between the parties to be tried.

April, 1826. — Appeal from Chicot Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

OPINION OF THE COURT. — This was an action of trespass on the case, on promises, brought by Rose against Miles, to which the latter pleaded non-assumpsit and payment. Without making an issue, or replying, or noticing these pleas, Rose proceeded, a jury was sworn, the cause tried, and a judgment rendered in his favor, from which Miles has appealed to this court.

The pleas of Miles were a good bar to the action until avoided, traversed, or denied by replications; and without which a jury could not be sworn to try the issue, for in fact there was no issue made up between the parties. This error is too manifest to require reasoning from the court, and was doubtless the result of inattention on the part of Rose.

Reversed.

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ISRAEL ROBINSON *vs.* ABRAHAM WILEY.

1. A party who does not bring forward and submit his claim for adjudication when he might do so, may nevertheless subsequently sue for and recover it, and the previous trial will be no obstacle.
2. The admissions or confessions of a party to the record are admissible in evidence.

April, 1826. — Appeal from Conway Circuit Court, determined before Benjamin Johnson and Andrew Scott, judges.

OPINION OF THE COURT. — This was a suit brought by Wiley against Robinson, before a justice of the peace, where Wiley obtained judgment for thirty-one dollars, from which Robinson appealed to the circuit court, and Wiley again obtained judgment for forty-five dollars, from which Robinson has appealed. The questions presented to this court grow out of the bill of exceptions taken on the trial. The counsel for Robinson moved the court to exclude all the evidence given for Wiley, previous to a trial in another suit, wherein judgment was obtained by Robinson against Wiley.

The account of Robinson upon which he obtained the judgment, is made a part of the bill of exceptions, and after carefully inspecting it, as well as the account of Wiley against Robinson, upon which he obtained the present judgment, we cannot perceive that they are for the same matters or embrace the same items, but are entirely different and distinct accounts. It is undoubtedly true, that if in the suit of Robinson against Wiley, the latter had brought his account forward, and had not withdrawn it during the trial, he could never afterwards have instituted a suit on it; but this does not appear to have been the case. 2 Strange, 1259; 1 Stark. Ev. 223; 6 Term Rep. 607; 2 Johns. R. 210, 227.

We have no doubt, however, that the court erred in refusing Robinson permission to prove the admissions or confessions of Wiley. 2 Stark. Ev. 22.

The question asked the witness was legal and proper, and the answer should have gone to the jury, and for this error the judgment must be reversed. *Reversed.*

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EDWARD SWANSON, appellant, *vs.* JAMES BALL, appellee.

1. Where a bond is conditioned to prosecute a *certiorari*, and if the judgment of the justice is affirmed or more recovered, on a trial *de novo* the obligors will pay such judgment; the bond is discharged if the judgment of the justice is set aside for irregularity, although there may be no trial on the merits *de novo*.
2. The law will not create a liability against securities, which they have not brought on themselves by their contract.
3. And where less is recovered in the appellate court than before the justice, this is not embraced in the condition of such bond, so as to render the securities liable.

October, 1826. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — By the record it appears that suit was brought by the plaintiff, Swanson, against Ball, and on October 22, 1825, a judgment was rendered against him by default. On January 18, 1826, Ball obtained a *certiorari*, and by that means brought the case before the circuit court of Pulaski county, having entered into bond with Nicholas Pray and Ambrose H. Sevier, as his securities. At the May term of the court, in 1826, the judgment of the justice was set aside for irregularity. A trial *de novo* was awarded at the next term, at which term judgment was rendered against Ball for the sum of forty-four dollars and eighty-one cents; but as appears by the bill of exceptions, the court refused to give judgment against the securities on the bond to prosecute the *certiorari*.

The question presented to the court is, whether the circuit court did right in refusing to give judgment against the securities. In support of this assignment of error, the plaintiff refers to the act of 1818, which provides, "That in all cases of appeals or *certiorari* from justices of the peace by virtue of existing laws on those subjects, if the judgment of the justice be affirmed, or judgment given on a trial upon the merits *de novo* in the circuit court, judgment shall be given and execution issue not only against the original defendant or defendants, in the suit before such justice, but also against his or their security or secu-

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rities, in the appeal bond or bond, to prosecute such *certiorari.*" Acts of 1818, p. 27. But to determine this question we must refer to the obligation contracted by the sureties in the bond, the conditions of which are substantially, that if Ball shall well and truly prosecute his *certiorari*, and if the judgment of the justice shall be affirmed, or if Swanson shall recover more than the judgment of the justice, that Ball shall pay such judgment. The defendant by his counsel insists, that the first condition has been complied with, namely, that he has prosecuted his *certiorari* and reversed the judgment of the justice, and the securities are therefore not liable under that condition; that the event which would make them responsible under the second condition, never has nor can happen; namely, if Swanson shall recover more than the judgment of the justice, that Ball shall pay the judgment.

Swanson having recovered less than the judgment of the justice, there is no provision in the bond which will make the securities answerable, provided the plaintiff shall recover less than the judgment of the justice, and without such an express condition, the law will not create a liability against the securities which they never intended to bring on themselves by entering into the bond. The statute referred to creates no such obligation, but only points out the remedy. It is contended by the counsel for the plaintiff, that Ball has not reversed the judgment of the justice. He has shown irregularity in the proceeding, and set it aside for the irregularity. He had a right to complain, and having succeeded in his complaint, he was not responsible under his bond, much less his securities. The proceedings were had at the peril of the plaintiff, and if he be injured by the delay, it is an injury proceeding from his own errors. The decision of the circuit court, setting aside the judgment of the justice, was to all intents and purposes a reversal of the judgment. Indeed, Ball might claim the judgment of the circuit court as a reversal of the judgment of the justice. But the fair way of testing the security bond would be to suppose a suit to be brought thereon, and after setting forth the conditions, the plaintiff should assign as a breach, that Swanson had recovered less than the judgment of the justice. This clearly

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would not be a sufficient breach. As to the costs, Swanson will be responsible for all costs in this court, and the costs before the justice, and up to the time of setting aside the judgment of the justice for irregularity, and Ball must pay the balance. *Affirmed.*

ABRAHAM WILEY, appellant, *vs.* ISRAEL ROBINSON, appellee.

Where objection is made to the admissibility of testimony, the bill of exceptions must set it out so that the court may judge of its admissibility, and if this is not done, the judgment will be presumed to be correct.

October, 1826. — Appeal from Conway Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — On the 19th August, 1824, the plaintiff filed his account against Israel Robinson, before Richard Manifee, justice, on which a summons issued against the defendant, Robinson, and on the first Saturday in November, 1824, Wiley obtained a judgment, from which judgment Robinson appealed. The cause was brought before the circuit court of Conway county, and at the July term, 1826, the plaintiff obtained a judgment against the defendant for sixty-two dollars and costs. The bill of exceptions filed on the trial states, that this case was an action of assumpsit for the value of certain sows and pigs; that the plaintiff offered evidence of a former judgment before a justice of the peace, and of money had and received by Robinson from Wiley, by virtue of that former judgment. To which evidence the defendant objected, but the court suffered it to go to the jury, and for this the defendant claims a reversal of the judgment. The bill of exceptions does not show what that evidence was, nor for what purpose it was offered. If it was record or parol testimony, it should have been shown, so that this court might have an opportunity of judging whether the evidence was admissible or not. At all events, it is not shown that the evidence was inadmissible. It might have been admitted to prove some collateral fact, or to

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prove what matter had been in controversy between the parties on the former trial, or as rebutting testimony, in all of which cases, and a variety of others, it would have been admissible. The bill of exceptions does not, therefore, contain a sufficient statement of facts to show that the judgment of the circuit court was erroneous. And in this we are supported by the decision of this court in the case of *Blakely, administrator of Graham*, v. *Ruddel*, ante. *Affirmed.*

JOSHUA HIGHTOWER, plaintiff in error, *vs.* THOMAS N. HAWTHORN, defendant in error.

1. A plea not calculated to surprise the plaintiff, should be received when tendered.
2. Every litigant has an unqualified right to appear by himself or counsel, and to deny this right is a gross wrong.
3. After judgment by default, counsel may appear and cross-examine witnesses, and introduce witnesses in mitigation of damages.

October, 1826. — Error to Independence Circuit Court, determined before Benjamin Johnson and William Trimble, judges.

OPINION OF THE COURT. — This was an action of trover and conversion brought by Hawthorn against Hightower, in the circuit court of Independence county, and came on to be tried at the July term of that court in 1826, before Justice Scott.

By the record it appears that a jury was impanelled and sworn to try the issue between the parties, and afterwards the jury were discharged, no plea having been filed and no issue made up, and judgment by default was entered against the defendant, Hightower, and a writ of inquiry awarded to the next term of the court. By a bill of exceptions signed by William Quarles, Caleb S. Manly, John Ruddle, and A. S. Walker, by-standers, it appears that Hightower, by his counsel, offered to file the plea of the general issue, which plea the court rejected, alleging that Hightower had no right to appear by counsel in the case.

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By another bill of exceptions signed by William Quarles, Thomas Moore, and John Reed, it appears that the court decided that Richard Searcy, counsel of the defendant, Hightower, had no right to appear, and ordered that the bills of exception tendered to the court should not be filed, noticed, or received by the clerk, and refused to sign either of them. The first point made by the plaintiff in error is, whether the court below ought to have admitted the plea of the general issue. We are of that opinion. It was not calculated to take the plaintiff by surprise, and he having omitted to take judgment by default at the previous term, the cause would stand over, as on an appearance, to the succeeding term. At each continuance, all the rights of both plaintiff and defendant were also continued, and the parties stood in precisely the same attitude that they did at each preceding term.

As to the second point, made in consequence of the court denying to the defendant the right of the counsel to appear in the case. By an act of the legislature of 1807, (Geyer's Digest, 250,) parties may appear in person or by attorney. With a knowledge of this statute and the well-known doctrine of the common law on this subject for centuries, we cannot conceive how a court could deny, not only the right of counsel, but the unqualified right of every litigant.

To deny the party the right to appear by attorney, is at once shutting out from him that source of information and that exercise of his legal rights which would enable him to make a just and fair defence to the suit brought against him. Even after judgment by default, the counsel for the defendant may contest the right to a recovery of more than nominal damages; may cross-examine the plaintiff's witnesses; may introduce witnesses in mitigation of damages; may make any motion in the progress of the case, and in fact do every thing as in other cases, except he is not permitted to deny the plaintiff's cause of action, and his right to recover nominal damages.

Reversed.

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ABIJAH DAVIS, appellant, *vs.* PEYTON R. PITMAN, appellee.

1. In actions of trespass, where the damages are uncertain, it is the province of the jury to ascertain them; and the court should not interfere, unless the damages are outrageously excessive, and disproportionate to the injury.
2. In suits originating before justices of the peace, no formal pleadings are necessary.

October, 1826. — Appeal from Independence Circuit Court, determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — This was an action originally brought by Pitman against Davis, before a justice of the peace, for an alleged trespass on a farm of Pitman in the county of Lawrence; and on trial of the cause before the justice, a verdict and judgment were rendered in favor of Pitman against Davis for twenty-two dollars and costs, from which judgment Davis appealed to the circuit court, where judgment was again rendered in favor of Pitman for the like sum. From this judgment Davis prosecuted his appeal to this court.

Although many errors have been assigned and argued, we shall confine ourselves to two or three of them, believing the others to be immaterial. It appears, that after judgment in the circuit court, the defendant moved the court for a new trial, on the ground that, "on the trial of the cause, there was not a particle of evidence to show the extent of damages, by which the jury could assess them."

This motion was overruled by the court, to which decision the defendant excepted.

This question we think the court could not have decided differently, for the measure of damages is the very gist of the action of trespass; and all the court will require to be shown is, that a trespass has been committed, and damages being uncertain, it is the peculiar province of the jury from all the facts to ascertain them. The court should not interfere unless where the damages are outrageously excessive, and disproportionate to the injury.

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The defendant then moved the court in arrest of judgment, on the ground that there was no issue joined in this case, stating that the defendant had filed a special plea alleging title to the premises upon which the trespass was stated to have been committed; to which special plea there was no replication. We do find such a plea tendered on the trial before the justice, but it was not urged on the trial before the circuit court, nor were any exceptions taken to the jurisdiction of the justice; the parties, therefore, by consent, proceeded regularly to trial, in the same manner they would or should have done before the justice; no pleadings or issue was necessary, and after judgment it was not competent for either party to avail himself of any defect in the proceedings had before the justice.

It would have been different with regard to an issue, provided the suit had originated in the circuit court. *Affirmed.*

G. K. and W. G. McGUNNEGLE, plaintiffs, *vs.* SAMUEL M. RUTHERFORD, sheriff of Pulaski county, defendant.

1. The act of 1825 concerning taxes, requiring the "inhabitants" of each township to attend at the place of holding elections, at such time as the sheriff shall designate, to pay their taxes to him, does not apply to non-residents of the State or the township, but only to taxable inhabitants of the township.
2. Penalties may be recovered for fees improperly received by a sheriff and collector.

October, 1826. — Debt determined before Benjamin Johnson, Andrew Scott, and William Trimble, judges.

OPINION OF THE COURT. — This is an action of debt brought by the plaintiffs, citizens and residents of the State of Missouri, against the defendant, as sheriff of Pulaski county, to recover the amount of certain penalties imposed by law for demanding and receiving certain fees alleged by the plaintiffs to have been illegally collected from them by the defendant.

The following are the facts, as they appear from the agreed case submitted to the court.

The plaintiffs own the north-east quarter of section twelve in

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township six north, and range eight west, lying in Pulaski county. The defendant, as sheriff of that county, on the 1st day of July, 1826, gave thirty days notice by advertisement, as prescribed by the first section of an act of the general assembly of this territory, entitled "An Act supplementary to the several laws regulating the collection of taxes," passed 26th October, 1825, that he would attend at the proper places to receive the taxes due from the "inhabitants." That the plaintiffs, as non-residents of this territory and citizens of Missouri, failed by themselves or agents to attend at the place and time designated in the defendant's advertisement, or to pay the taxes due on their tract of land. On the 1st day of September, 1826, the taxes not being paid, their tract of land was advertised in the Arkansas Gazette for sale, agreeable to the provision of the laws, to which the act passed the 26th of October, 1825, is a supplement. After the above quarter section had been so advertised, the plaintiffs paid to the defendant the taxes, together with 18¾ cents costs for advertising, and 2½ per cent. commission on the amount of the taxes, it being half commission for receiving and paying out money; also one dollar, for levying execution on their tract of land. The plaintiffs, by way of penalty, claim six dollars for the two and a half per cent. commissions, and six dollars for the one dollar charged and paid for levying the tax list as an execution.

The principal question presented to the court is, whether the provisions of the act of 1825, before recited, are applicable to or embrace the case of a non-resident of the territory, or a non-resident of the county where the land lies.

We are clearly of opinion that the law does not embrace either a non-resident of the territory, or of the county where the land lies, but has reference solely to the "inhabitants" of the county. The act provides that, for the purpose of collecting the taxes in the several counties of this territory, it shall be the duty of the several sheriffs to give notice, by advertisement in every township, that they will attend at the place where elections are held, on a named day, for the collection of taxes in such township. Whereupon it shall be the duty of such taxable inhabitants, or their agents, to attend and pay to the sheriff the

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taxes due from such inhabitants. The language here used is too clear and explicit to leave room for construction. The duty of attending at the place appointed by the sheriff is imposed only on the taxable inhabitants of the township where the land lies, by the very words of the act; and it is not the province of the court to extend it beyond the plain and obvious meaning of the legislature. The second section of the act relates only to those who were required by the first section to attend and pay the taxes due, and in the event of a failure on the part of any of the taxable inhabitants of the township to attend at the place designated in the advertisement of the sheriff, and pay their taxes, the tax list becomes an execution in the hands of the sheriff, who may proceed to make distress on the property of such defaulters. And if he does make an actual levy of the tax list, he is entitled to the same fees as if he had levied an execution, except the allowance of mileage, to which he is not entitled. It follows, therefore, that the plaintiffs are not liable to pay the half commissions, nor the one dollar charged for levying the tax list as an execution; and there must be

Judgment for plaintiffs.

JOHN MCLAIN, appellant, *vs.* SAMUEL M. RUTHERFORD, appellee.

1. The custom of merchants as to days of grace, does not apply as between the maker and payee.
2. A plaintiff may enter a *nolle prosequi* to any count in his declaration.
3. When the sum is certain, or may be reduced to a certainty by computation, the intervention of a jury to assess damages is unnecessary.

April, 1827. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — Among the numerous points relied upon by the counsel to reverse the judgment of the court below, we deem it necessary only to notice two. First, it is contended that according to the custom of merchants, the defendant was entitled to "days of grace," and consequently the

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action was brought before the instrument, upon which it was founded, became due.

We are of opinion that the custom of merchants is not applicable to this case. From an examination of the instrument upon which the action was brought, it will be seen that it is merely a simple due bill, payable to the plaintiff himself, and not to him "or order." It is not negotiable, nor can it be transferred unless by assignment, under the statute. But had the note in this case been, from its phraseology, negotiable, even then, unless it had been actually transferred, the custom of merchants allowing days of grace would not apply. The custom of merchants does not apply to the immediate parties to the transaction, or, in other words, to the maker and payee. While a promissory note continues in its original form of a promise from one man to pay another, it bears no similitude to a bill of exchange. The resemblance begins from the first indorsement, and when once indorsed, the law relative to bills of exchange applies. The second point we have thought worthy of notice is, that "the plaintiff had no right to enter a *nolle prosequi* on the second count, and take final judgment on the first." We are most clearly of opinion, that the plaintiff in discontinuing the second count, acted in strict conformity with the most approved practice; the plaintiff having the undoubted right to the control of his own case.

We are also of opinion that the judgment on the first count was correctly taken, the intervention of a jury being unnecessary. The rule, as established by the supreme court of the United States, (*Renner* v. *Marshall*, 1 Wheat. 215,) is this: whenever an action is brought for a sum certain, or any sum that may be reduced to a certainty by computation, the intervention of a jury may be dispensed with. *Judgment affirmed.*

RODNEY EARHART, assignee of MATHEW PATTERSON, plaintiff in error, *vs.* SARAH CAMPBELL, administratrix of J. Campbell, deceased, defendant in error.

1. If a declaration is fatally defective, the court will affirm a judgment nonsuiting a plaintiff, without considering whether nonsuit was proper.

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2. A person who sues as assignee is bound to allege an assignment, to show title in himself.

April, 1827. — Error, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is an action of debt, brought by Earhart, assignee of Mathew Patterson, against Sarah Campbell, administratrix of J. Campbell, deceased.

Upon the trial in the circuit court, upon motion of defendant, a judgment of nonsuit was rendered against the plaintiff. We deem it unnecessary to consider the question or point that influenced the court below in rendering a judgment of nonsuit against the plaintiff, as we are clearly of opinion that the declaration is fatally defective. On this ground the judgment of the circuit court must be affirmed. The plaintiff, Earhart, brings his suit as assignee of Mathew Patterson, and so styles himself in the declaration, but fails in any part to set out the assignment, or show any title in himself derived from Patterson. After declaring as assignee, he was bound to allege an assignment, that the defendant, if she thought proper, might deny, by plea, the assignment of the note.

This, we think, is a fatal defect in the declaration. It is further defective in not alleging the time when the note became due and payable, which it was necessary to aver in the declaration. It is also defective, substantially, in failing to allege or aver a promise to pay at any time, which is an indispensable requisite in the declaration. As the declaration is defective and sets out no good grounds of action, there is no error in the circuit court in nonsuiting the plaintiff. *Judgment affirmed.*

WILLIAM DROPE, complainant, *vs.* JOHN MILLER, defendant.

Issue directed out of chancery to ascertain whether a partnership, asserted by complainant and denied by defendant, was formed as alleged.

April, 1827. — Order to try disputed facts, determined before Benjamin Johnson and Thomas P. Eskridge, judges.

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OPINION OF THE COURT. — In this case it is alleged by the complainant that he formed a partnership in trade with the defendant, in April, 1819, which fact is denied by the defendant.

It is, therefore, ordered that a jury come at the next term on the law side of this court to ascertain by their verdict, whether there was or was not a partnership in trade, formed by said Drope and Miller, in April, 1819, and that the verdict of the jury be immediately certified to this court as a court in chancery.

J. G. DEADRICK *vs.* JOHN HARRINGTON.

1. Unless it appears that a jury was required, and refused by the justice, the judgment will not be reversed.
2. The expression, "I give judgment," includes the technical and formal words of a judgment, and is sufficient.

October, 1827. — *Certiorari* to Arkansas Circuit Court, determined before Benjamin Johnson and William Trimble, judges.

OPINION OF THE COURT. — This case was brought before the circuit court of Arkansas county, and certified to this court because the judge of that court had previously appeared as attorney for the plaintiff before the justice of the peace.

We think it necessary to notice only two points in this case. The first point was, that it does not appear that the parties dispensed with a trial by jury. To authorize this court to reverse the judgment of the justice, we think, under the statute, it ought to appear that the plaintiff required a jury, and that it was refused. Secondly, the court are satisfied that the judgment entered by the justice is substantially good. The parties are identified, the sum is certain; and the only objection is, that the justice has said, "I give judgment," instead of saying, "it is considered that the defendant have and recover of the plaintiff."

In using the word judgment, the justice has included the more technical and formal words. His language is sufficiently certain, at least, as much so, as if a jury should say, "we find for the defendant." *Judgment affirmed.*

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ALEXANDER S. MOORE, plaintiff, *vs.* JOSEPH PAXTON, defendant.

1. The statute of limitations is not pleadable to a judgment rendered in another State.
2. Where process is served on the defendant, or his appearance entered to the action, the judgment of another State is conclusive; and no pleas can be interposed thereto, nor can it be impeached in any other way than it could be in the State where rendered.

October, 1827. — Debt, determined before Benjamin Johnson and William Trimble, judges.

OPINION OF THE COURT. — This is an action of debt brought by the plaintiff against the defendant, upon a judgment obtained in the State of South Carolina. The defendant has plead the statute of limitations, to which plea the plaintiff has demurred. The statute is as follows: "All actions of debt grounded upon any lending or contract, without specialty, shall be brought within five years after the cause of action shall accrue." Geyer, Dig. 274. This has been considered a question of great importance, and has been ably argued at the bar. We are satisfied that the statute of limitations cannot be plead to an action of debt founded on a judgment from another State or territory, where the process was served upon the defendant in person, or his appearance entered to the action. The judgments of sister States do not stand upon the same footing as foreign judgments; but where the defendant has personal notice by the service of process, or enters his appearance, the judgment is conclusive, and cannot be inquired into in any other way than it could be in the State where the judgment was obtained, and no other pleas can be interposed thereto. This doctrine has been settled by the supreme court of the United States, in *Mills* v. *Duryee*, 7 Cranch, 481, and *Hampton* v. *Mc Connell*, 3 Wheaton, 234.

The demurrer to the plea of the statute of limitations must be sustained. *Judgment for plaintiff.*

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THOMAS MOORE, administrator of Thomas Curran, deceased, complainant, *vs.* RICHARD SEARCY, defendant.

1. S. having the legal title to land, but one half of it in equity belonging to C. deceased, cannot have a debt against C. satisfied out of the land, to the exclusion of other creditors, but must come in equally with them.
2. The land decreed to be sold for the benefit of all the creditors.

April, 1828. — Bill in chancery, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is a suit in chancery brought by Thomas Moore, administrator of the estate of Thomas Curran, deceased, to coerce the conveyance of certain real property, namely, one undivided half of the east half of the north-east quarter of section ten of township thirteen north, in range six west, containing eighty acres, more or less; also the one half of forty acres of ground, more or less, of section seventeen of township thirteen north, in range six west, lying below the town of Batesville, fronting White River, and joining the lands of Charles Kelly and Hartwell Boswell, lying and being in the county of Independence and territory of Arkansas. The bill charges, that the said Curran in his lifetime, and said Richard Searcy, with their joint funds and in partnership, entered the property in controversy at the United States land-office at Batesville; that, by agreement between the parties, the patents for said lands issued in the name of said Searcy; that Curran afterwards died insolvent, and prays the conveyance of one half of the above described lands. The defendant, in his answer, admits the several allegations as set forth in the complainant's bill, but alleges that Curran died indebted to him in the sum of five hundred and sixty-seven dollars and sixty-six cents, which is not denied by the complainant; and contends that he holds a lien in equity on the property in controversy for the full amount of his debt against the estate.

This is a controversy between the creditors of Curran, of whom the defendant is one, and a decree of conveyance will be for the benefit of all.

Searcy, as a creditor, has only the same equity that the others

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have; and the accidental circumstance of his being invested with the legal title, cannot avail him in a court of equity to the prejudice and exclusion of the other creditors.

Sale decreed accordingly.

ALBERT G. HARDING, plaintiff, *vs.* ALEXANDER S. WALKER, defendant.

1. Gaming contracts are contrary to good morals, and void.
2. All wagers are not void; but all gaming contracts are.

April, 1828. — Case, before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is an action on the case, brought by the plaintiff to recover of the defendant the sum of one hundred and fifty dollars, won at a game of cards, called "seven up." To the declaration, the defendant demurs, and insists that there is no cause of action set forth. He admits that the game mentioned is not one of those prohibited by statute, but claims that there is not a good consideration at common law set forth.

The demurrer must be sustained on two grounds; first, because the contract is without a good or valuable consideration. It is settled that the law will not raise an assumpsit without a consideration, or support an action on a *nudum pactum*. See 1 Bibb, 182; 6 Johnson, 194; Comyn, p. 9.

Second, because it is a gaming contract, and against good morals. In the case of *Bunn* v. *Ricker*, 4 Johns. 432, a distinction is taken between wagers and gaming contracts. Wagers against public policy or good morals are void as gaming contracts. It is clearly to be inferred from the opinion of the court and the cases referred to, that all wagers are not void, but that all gaming contracts are. In the case of *Good* v. *Elliot*, Grose, justice, says that wagers are not void as gaming contracts. Lord Mansfield, in the case, *Da Costa* v. *Jones*, says, whether it would not have been better policy to have treated all wagers as gam-

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ing contracts, and to have held them void, is too late to discuss. Thus all declare that some wagers are to be supported, but deny the validity of all gaming contracts. This is a gaming contract, and therefore void.

Demurrer sustained, and judgment for the defendant.

FREDERICK DENT, plaintiff, *vs.* CHESTER ASHLEY, administrator of William M. O'Hara, deceased, defendant.

Where administration of an estate is granted in two States, there is no privity between the administrators, and hence a judgment against one cannot be made the basis of an action against the other.

April, 1828. — Debt, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

ESKRIDGE, J. delivered the opinion of the Court. — This is an action of debt, brought by the plaintiff against Ashley, administrator of the estate of William M. O'Hara, deceased, upon a judgment recovered in the State of Missouri by the plaintiff Dent against Susan O'Hara, administratrix, and Paul Anderson and Robert Simpson, administrators of the estate of William M. O'Hara, in the State of Missouri.

The defendant filed five several pleas; to the second, fourth, and fifth of which, the plaintiff demurs generally, and takes issue upon the first and third. This state of pleading enables us to look back to the declaration, and ascertain whether a sufficient cause of action has been set forth in it, to authorize a judgment in favor of the plaintiff. *Beauchamp* v. *Mudd*, Hardin, 164.

The judgment upon which this action is founded, is against the administrators of O'Hara, in Missouri, and we are at a loss to see how it can be used as evidence of debt, or be the basis of a suit against the administrators of O'Hara here. There is, unquestionably, according to the well-known rules of law, no connection or privity between the administrators in Missouri and the administrator in Arkansas. 3 P. Wms. 369; 2 Rawle, 431; 5 Mass. Rep. 67.

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The principle is universally acknowledged, that no one can be bound by a verdict or judgment unless he be a party to the suit, or be in privity with the party, or possess the power of making himself a party. The reason is obvious. He has no power of cross-examining witnesses, or of adducing evidence in maintenance of his rights; in short, he is deprived of all means provided by law for ascertaining the truth, and consequently it would be repugnant to the first principles of justice, that he should be bound by the result of an inquiry to which he is altogether a stranger. *Wood* v. *Davis*, 7 Cranch, 271; *Davis* v. *Wood*, 1 Wheaton, 6; *Paynes* v. *Coles*, 1 Munf. 373; *Turpin* v. *Thomas*, 2 Hen. & Munf. 139; *Jackson* v. *Veddor*, 3 Johns. R. 8; *Case* v. *Reeves*, 14 Johns. R. 79, are in illustration of this rule.

In the case of *Grout* v. *Chamberlin*, 4 Mass. Rep. 613, it is decided that a judgment recovered by an executor is no bar to an action brought by the administrator *de bonis non, cum testamento annexo*, for the same cause, there being no privity. The first judgment cannot, at common law, be enforced by the administrator *de bonis non*, but becomes inoperative. We are, therefore, of opinion that the declaration is insufficient in not setting forth a ground of action.[1] *Judgment for defendant.*

FREDERICK DENT, plaintiff, *vs.* CHESTER ASHLEY, administrator of William M. O'Hara, deceased, defendant.

The assignee of a bond or note is bound to use due diligence, by prosecuting the maker to insolvency, before he can resort to the assignor; unless the maker is notoriously insolvent, or has removed from the State, so as to render suit unnecessary or impossible, or an useless act.

April, 1828. — Assumpsit, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is an action on the case brought upon the assignment of a promissory note, given by

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[1] *Stacy* v. *Thrasher*, 6 How. 44; *Pond* v. *Makepeace*, 2 Met. 114; (as to privity, Greenl. Ev. § 523); *Chapman* v. *Fish*, 6 Hill, 554; *Aspden* v. *Nixon*, 4 How. 467.

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W. S. Townsend to O'Hara, and assigned by him to the plaintiff, in the following words: "I transfer the within note to Frederick Dent, and guarantee the ultimate payment of the same. W. M. O'Hara." The plaintiff has demurred to two pleas in bar, filed by the defendant, and the only questions made at the bar, relate to the sufficiency of the declaration. The material averments in the declaration are, that the note was executed by the obligor to O'Hara, and by him assigned to the plaintiff in the words above recited, and at the time the note became due and payable, was duly presented to the obligor for payment; that the obligor failed and refused to pay the amount or any part thereof to the plaintiff; and that O'Hara in his lifetime, and since his death the defendant, have failed and refused to pay the amount due by the note. Are these averments sufficient to maintain the action? The assignment in this case is not in the usual form, but contains an express guarantee or promise by the assignor for the ultimate payment of the note. This does not change or vary his liability from that of an ordinary assignor where no such guarantee is expressed, and this position is clearly supported by the cases of *Goodall* v. *Stuart*, 2 Hen. & Munf. 105, and *Campbell* v. *Hopson*, 1 Marsh. Rep. 228; the assignment in these cases being virtually the same with the one in this case. What is the liability of the assignor of a bond or note? The statute of this country, which authorizes the assignment of bonds and promissory notes, is substantially the same with the statutes of Virginia and Kentucky upon that subject, and it has been long settled in those States, by a uniform current of decisions, that the assignee of a bond or note, not being negotiable as a mercantile instrument, must, to enable himself to recover of the assignor, prosecute the payor or obligor to insolvency. 2 Wash. Rep. 219; 2 Hen. & Munf. 105; 5 Ib. 456; 1 Bibb, 542; 2 Ib. 34; 5 Littell, 331.

The assignee of a bond or note is bound to use due diligence by suit to recover the debt from the maker of the note, before he can resort to the assignor; unless, indeed, there are special circumstances in the case, rendering it unnecessary or impossible to sue the obligor; such, for example, as notorious insolvency, or removal from the State.

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This doctrine having been settled by the highest courts of Virginia and Kentucky, and approved by the adjudications of the supreme court of the United States, we are not disposed to give a different construction to a statute precisely analogous to that upon which those decisions were based. We think the doctrine supported as well by reason as by authority.

Applying it to the case before the court, the declaration will be found to be defective, and insufficient to maintain the suit.

There is no averment of any diligence whatever to recover the money of the obligor of the note, except a bare demand. To entitle the plaintiff to recover in the present action, it is indispensable that he should have averred, that without delay he instituted suit against the obligor; had held him to bail, if bail was demandable; had pursued him to insolvency by taking a *ca. sa.* against his body; and after using due diligence, and all the means which the law provided to coerce the payment of the debt, he failed to obtain it. The declaration in this case, containing no allegation of due diligence by suit, to recover the money of the maker of the note, is, therefore, fatally defective, and insufficient to maintain the action. It has been argued, that by the statute authorizing the assignment of bonds and notes, they are placed upon the same footing with bills of exchange. It is true, that by the statute of Anne, bonds and notes, when assigned, are placed upon the same footing with bills of exchange; but it is by express provision that they are placed upon the same footing, and no such provision is to be found in the statute of this country. The legislature, with the statute of Anne before them, have made notes, etc., assignable without using the expressions, "In like manner with bills of exchange;" have enabled the assignee to maintain an action in his own name; and have declared that they shall be subject to the same obligations in the hands of the assignee, that they were subject to in the hands of the assignor. This proves that our legislature, patterning after Virginia, whose laws on the subject are the same in substance, did not intend to elevate them to the rank of mercantile paper, nor that they should be governed by the law of merchants. But if the doctrine appli-

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cable to bills of exchangewere applied to this case, still no cause of action is shown in the declaration.

To make the assignor of a bill of exchange liable, notice of the non-payment of the bill must be averred and proved. No such averment is to be found in the declaration.

There is another objection to the declaration, which renders it fatally defective. The assignment is not averred to have been made for any good or valuable consideration, which we deem a material averment.

The assignment itself is a *primâ facie* evidence of a valid consideration, but this does not dispense with the necessity of averring it in the declaration. The demurrer is overruled, and the declaration adjudged insufficient.

SAMUEL ALLEN, appellant, *vs.* ELIZABETH ALLEN, appellee.

1. A defendant cannot file a cross-bill until the original bill is answered.
2. Alimony will not be granted to a wife before she answers.

April, 1828. — Appeal from Independence Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is an appeal from a decree of the circuit court of Independence county, pronounced in a suit in chancery for a divorce, in which the appellant was plaintiff, and the appellee, defendant. Various reasons have been assigned by the appellant for reversing the decree of the court below. Conceiving, however, that the first point relied upon, is decisive in favor of the appellant, we shall confine our remarks to that point alone. The point is, that the circuit court erred in overruling the demurrer.

The plaintiff below filed his bill, praying for a divorce from bed and board, and the bonds of matrimony. The defendant instead of answering this bill, filed her cross-bill praying a divorce from bed and board, and for alimony. This was clearly irregular.

The bill should have been answered, and the allegations

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therein contained contested before the cross-bill could be properly filed. 1 Harrison's Chancery, 35; 3 Black. 444–448. In the case of *Lewis* v. *Lewis*, 3 Johnson's Chancery Rep. 519, the chancellor refused to grant alimony to the wife before she answered, because it did not appear whether she intended to defend herself against the charges in the bill. We feel no difficulty in reversing the decree of the court below.

Decree reversed.

THOMAS W. JOHNSON *vs.* THOMAS MCLAIN.

Where errors are committed, but the judgment on the whole record is right, it will not be disturbed.

May, 1828. — Motion, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is a motion for a writ of error, with a *supersedeas* to a judgment obtained by McLain against Johnson in the Pulaski circuit court. It appears from the record of the proceedings in the court below, that Johnson, to an action of debt brought against him by McLain, appeared at the May term of said circuit court, and filed three pleas of payment. In two of the pleas he avers that he paid the debt one day before it became due, and in the third plea he avers that he paid it on the day it became due.

An issue was made up and tried by a jury, who returned a verdict for the plaintiff. The defendant in the court below then moved the court to arrest the judgment on the following grounds: first, that the issue was immaterial; secondly, that the time from which the interest is to be paid, is not expressed in the verdict; thirdly, that the whole proceeding is irregular, informal, and illegal. The court sustained the motion and arrested the judgment.

We cannot see the ground upon which the court arrested the judgment. The issue was not immaterial, for there was at least one good plea filed, upon which issue was taken, namely, the plea of *solvit ad diem*. From an inspection of the record, it is

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manifest that this plea was filed at the May term, before the jury rendered their verdict, and no parol averment can be received to contradict the record.

The second ground is equally untenable, for we are clearly of opinion that the verdict of the jury is substantially good. They find for the plaintiff the debt in the declaration, with interest and costs.

It is evident that the jury intend to find interest from the time the note became due.

After arresting the judgment, the court awarded a repleader, and at the subsequent term of the court the following proceedings took place: "This day, appeared the parties by their attorneys, and the plaintiff's attorney moved the court for a judgment by default, which motion the court overruled, whereupon the plaintiff's attorney withdrew his demurrer filed to the defendant's plea, and moved the court to strike out the plea as for want of a plea, which motion the court sustained, and proceeded to render judgment for the plaintiff for the debt in the declaration, and the interest then due in damages and costs of the suit."

We are here again at a loss to perceive the ground on which the court rejected the plea of the defendant. But as the plea does not appear on the record, we are bound to presume that it was not such an one as the court should have received. But, admitting the court to have erred in the latter case in rejecting the defendant's plea, we are still of opinion it can have no influence in the decision of this case. The court at the previous term should have rendered judgment on the verdict of the jury, and not have arrested the judgment; by rendering judgment at the subsequent term, that only was done which ought to have been done at the previous term.

It is not material to the ends of justice whether the acts of the court proceed from good or bad reasons. The judgment, it is true, is erroneous in not allowing to McLain interest on the debt at the rate of ten per cent. per annum from the time the note became due until paid, but only giving interest up to the time of rendering the judgment. But this is an error of which the defendant in the court below has no right to complain.

Motion overruled.

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FIRE FIKES, appellant, *vs.* GEORGE BENTLEY, appellee.

On an application for a new trial, on the ground of newly discovered evidence, it should appear that it was unknown to the party at the trial, as well as his counsel.

May, 1828. — Appeal from Conway Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and William Trimble, judges.

OPINION OF THE COURT. — This is an appeal from the Conway circuit court. The appellant moved for a new trial, on an affidavit setting forth newly discovered evidence, and stating that the evidence was not known to his counsel on the trial of the cause. But it does not state that it was unknown to himself, which we think indispensable. *Judgment affirmed.*

THE UNITED STATES *vs.* ROBERT CRITTENDEN.

1. Indictment is quashable in which the time is alleged "on or about" such a day.
2. It is also quashable for failing to conclude "against the peace and dignity of the United States."

October, 1828. — Indictment for sending a challenge to fight a duel, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

OPINION OF THE COURT. — The defendant moved the court to quash the indictment, because the time therein stated was in the alternative "on or about," and because the indictment does not conclude "against the peace and dignity of the United States;" and the parties being heard, and full consideration thereof had, it is the opinion of the court that for either of the objections the indictment should be quashed.

Indictment quashed, and defendant discharged.

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THE UNITED STATES *vs.* JAMES LEMMONS.

An indictment must conclude "against the peace and dignity of the United States."

October, 1828. — Indictment for setting up and keeping a faro bank, determined before Benjamin Johnson, Thomas P. Eskridge, William Trimble, and James Woodson Bates, judges.

On motion of the defendant, by his attorney, the indictment was quashed, because it did not conclude "against the peace and dignity of the United States of America."

SYLVANUS PHILLIPS, plaintiff, *vs.* WILLIAM RUSSELL, defendant.

1. A writ of error *coram nobis* may be brought in the same court where the judgment was given, when the error assigned is not for any fault in the court, but for some defect in the execution of the process, or for some default of the ministerial officers.
2. It lies to set aside an erroneous execution.

October, 1828. — Error *coram nobis*, before Benjamin Johnson, Thomas P. Eskridge, and James Woodson Bates, judges.

JOHNSON, J., delivered the opinion of the Court. — This is a writ of error *coram nobis*, sued out by the plaintiff, to reverse a judgment and quash an execution thereon for error in fact, which judgment was obtained by the defendant against the plaintiff in this court. Upon application to one of the judges of this court in vacation, an order was made by the judge, commanding the clerk to issue a writ of error, with a *supersedeas* as to the execution. The clerk, upon the application of the plaintiff, issued a writ of error *coram nobis*, with a *supersedeas* to the judgment, as well as the execution. We have no doubt that the execution was erroneous and illegal, and that the order of the judge for a *supersedeas* to quash it was correct. This has not been controverted in the argument, and the only inquiry now is, whether the plaintiff or the defendant shall pay the costs

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of this proceeding. The plaintiff undoubtedly had a right to the writ of error, with a *supersedeas* to set aside and quash the erroneous execution. This is well settled by the most approved authorities. Serjeant Williams, in his notes to 2 Saunders, Rep. p. 101, says: "Error may be brought in the same court where judgment was given, when the error assigned is not for any fault in the court, but for some defect in the execution of the process, or through the default of the clerks." 2 Tidd, 1056. In 2 Sellon, Practice, 484, the doctrine is thus laid down: "Error lies either in the same court where judgment was obtained, or in a superior court. It lies in the same court where judgment was given, when the error was not for any fault in the court, but for some defect in the process of the cause, other than in the judgment, or for default in adjudging execution, or for misprision of the clerk, or for error in fact." *Dewitt* v. *Post*, 11 Johns. 460; 1 Bibb, 351; 2 Ib. 569; 3 Ib. 291; 2 Marshall, 319; 3 Ib. 561; 2 Littell, 163; 3 Ib. 1; 5 Ib. 56.[1] From these authorities, it is clear that a writ of error *coram nobis* lies in cases like the present; and if the plaintiff had not sued out a writ of error, with a *supersedeas* to the judgment, but had limited and restricted it to the execution, as ordered by the judge, he would unquestionably be entitled to recover the costs; but instead of conforming to the order of the judge, he has sued out a writ of error, with a *supersedeas* to the judgment, as well as the execution.

Here was manifest error, and the *supersedeas* to the judgment has, during the present term, been set aside and discharged. Upon a proceeding so manifestly erroneous, on the part of the plaintiff, we think it only reasonable that he should be subjected to the costs.

It has been attempted to separate and distinguish the *supersedeas* from the writ of error; but they cannot be so separated or distinguished, for in truth the latter was a mere nullity without the former, and at common law the writ of error, from the

[1] As to this subject, see also 2 Dunlap, Practice, 1125; 2 Paine & Duer, Practice, 446; 2 Tidd, 1191; 3 Bac. Ab. title Error (I.), 6, p. 366; 3 How. Prac. Rep. 259; 6 Wend. 50; Tidd, Appendix, 346.

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time of its allowance, operated as a *supersedeas.* 2 Tidd, 1071; 2 East, 439; 1 Salk. 321. Execution quashed, and defendant to recover his costs; but the clerk is directed to tax no costs in his own favor against either party, as all the errors complained of originated with himself. *Adjudged accordingly.*

BENJAMIN MOORES, and ANN MOORES, his wife, *vs.* LAWRENCE F. CARTER, FREDERICK THOMAS, and WILLIAM CLARK.

1. Although a wife may live separate from her husband, and acquire property by her personal labor and exertions, or by gift, yet it belongs to the husband, and he alone must sue for any injury to it. The wife cannot join in the action.
2. It is not error to refuse to allow an amendment, by striking out the name of one of the plaintiffs in a suit.

October, 1828. — Error to the Crawford Circuit Court, determined before Thomas P. Eskridge and James Woodson Bates, judges.

OPINION OF THE COURT. — The plaintiffs brought an action of trespass *vi et armis* against the defendants, and in their declaration aver, that the plaintiff, Benjamin Moores, is a private soldier in the United States army, and is stationed at Fort Gibson in this territory; and that he lived separate and apart from his wife, Ann Moores, who by her industry had become possessed of a small dwelling-house; and had furnished it at her own expense, and resided in it, separate and apart from her husband; that the defendants with force and arms, entered the dwelling-house, and threw her into great fear by their menacing manner, by breaking open her chests, searching all the private apartments, greatly disturbing her and injuring the property, and took and carried away various articles of property, of the proper goods and chattels of the plaintiffs.

At the appearance term, on the motion of the defendants, the proceedings and declaration were quashed; and after the above order was made, the plaintiffs' attorney asked leave to amend the declaration, but his motion was overruled, and the suit dismissed.

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Two questions are presented in this case: *First*, can the plaintiffs join in the action; and *second*, if they were improperly joined in bringing the suit, should the court have permitted the declaration to be amended. We have no doubt that the wife was improperly joined with the husband in bringing the action Although she lived separate and apart from him, the marriage was in full force, and he was legally entitled to all the marital rights. The dwelling-house, and all the goods and chattels purchased or owned by the wife, belonged to the husband, and for an injury done to that property the husband alone must sue. This doctrine is too well settled to be controverted; and it is not necessary to support it by reference to authority.

It has been argued, that she was the meritorious cause of action, and therefore had a right to join. If this was true, the consequence might follow; but she was not the meritorious cause of action in the sense contemplated by law. Every species of personal property which the wife may acquire by purchase, by her own personal labor, or by gift, during the coverture, belongs to the husband, and consequently an injury to that property, or the taking of it away, can only give a right of action to the husband, and not to the wife.

Upon the second question, as to the amendment, we have no doubt that the declaration could not be amended, by striking out one of the plaintiffs. It would have been more regular if the defendants had demurred, instead of moving to quash the declaration. But we are not inclined to regard an objection as to form only, since the motion was in the nature of a demurrer, and the judgment of the court was in substance the same.

It is true there is no judgment in favor of the defendants for costs in the court below; but of this the plaintiffs have no right to complain. *Judgment affirmed.*

JAMES S. DICKSON, appellant, *vs.* THOMAS MATHERS, appellee.

1. Where evidence is within the control of a party, who omits to use it at the trial, because he was not advised of its importance, a new trial will not be granted to enable him to bring it forward.

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2. Possession by the plaintiff, and an actual wrongful taking by the defendant, are necessary to support the action of replevin.
3. Property in the defendant must be specially pleaded, and cannot be given in evidence under *non cepit*.

October, 1828. — Appeal from Conway Circuit Court, determined before Thomas P. Eskridge and James Woodson Bates, judges.

Opinion of the Court. — This was an action of replevin, brought by the appellant against the appellee, in the Conway circuit court, for unlawfully taking and detaining a negro, and comes here by appeal.

Several points have been relied on for reversing the judgment. First, that the judgment was rendered upon an immaterial issue. From the record, it appears that the defendant plead the general issue *non cepit*, and property in himself. By the first plea, he says he has not taken the property in such a manner as to entitle the plaintiff to an action of replevin; and by the second, that the property is his own, in order to entitle himself to a return of it.

These were the only pleas which the defendant could plead; he could not avow, because it would be inconsistent with the general issue, and property must be pleaded in bar or abatement, and cannot be given in evidence under the general issue. 1 Chitty, Pl. 481; 5 Mass. 285; 1 Johns. Rep. 380; 2 Selwyn, N. P. title Replevin, 367; *Shearick* v. *Heuber*, 1 Binney, 3; *Hempstead* v. *Byrd*, 2 Day, Rep. 299; 1 Com. Dig., Action, M. 6. In *Pangburn* v. *Patridge*, 7 Johns. Rep. 140, the pleas of *non cepit* and property were plead together. The pleas, then, were not inconsistent.

The second question presented by the record arises out of an application for a new trial. In the affidavit upon which the application for a new trial is founded, it is stated that there is a written contract for the hire of the negro, from George Bentley to the plaintiff, the importance of which contract he did not know at the time he consented to go to trial. The contract referred to was within the control of the plaintiff Dickson, at the time of the trial, and that it was not used must be ascribed to his own negligence, of which he cannot avail himself as a ground for a new trial.

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The third point grows out of the bill of exceptions taken to the instructions of the court to the jury. These instructions were, that the jury ought not to find for the plaintiff unless there was an unlawful taking of the negro by the defendant from the possession of the plaintiff, or that he enticed the negro from the possession of the plaintiff into his own possession, in which latter case there would be an unlawful taking.

Possession by the plaintiff, and an actual wrongful taking by the defendant, are requisites to support the action of replevin. The taking must be from the actual possession of the plaintiff, and it must be tortious. *Pangburn* v. *Patridge*, 7 Johns. 140; *Clarke* v. *Skinner*, 20 Ib, 465; *Thompson* v. *Button*, 14 Ib. 84.

Judgment affirmed.

JOHN CAMPBELL, appellant, *vs.* BENJAMIN CLARK, appellee.

1. Where a note may be discharged in property at a certain time, no demand is necessary. It is only when property is payable on demand, or no time is fixed, that it becomes necessary to aver and prove a demand.
2. A note for the payment of money by a certain day, which may be discharged in property, is not a note for the payment of property, and the payee has no right to demand property, nor can the obligor discharge it in property after the day of payment has passed.

October, 1828. — Appeal from Hempstead Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and James Woodson Bates, judges.

OPINION OF THE COURT. — Clark brought an action on the case against Campbell, in the circuit court, and obtained a judgment, to reverse which, Campbell has appealed to this court.

The first question material to be decided relates to the continuance of the cause.

At the September term the parties appeared, and by consent, the defendant was allowed to plead on or before the first of December. On the 28th of November, the defendant filed his plea, and on the 27th of February the plaintiff filed a *similiter*,

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making up the issue. At the March term the cause was continued on the motion of the defendant; and at the July term the defendant moved for a continuance, on the ground that the plaintiff had not served him with a copy of his replication fifteen days before the term of the court; which motion was overruled. The defendant, in our judgment, was not entitled to a continuance. By referring to the Digest of Geyer, 249, it will be seen that it is only where the plaintiff continues his cause at the first term without filing his replication, that he is bound to file it and serve the defendant or his attorney with a copy fifteen days before court. In this case the plaintiff filed his replication before the second term, and at that term the cause was continued. We do not think it was necessary, under these circumstances, to serve the defendant with a copy of the replication, if indeed a *similiter* may come under that denomination. It was on file in the court, and the defendant was bound to take notice of it. The motion for a continuance was, therefore, properly overruled.

The only question which relates to the merits, is, whether it was necessary to aver and prove a demand.

The action was brought upon a note in the following words: "On or before the first of June, 1827, I promise to pay Benjamin Clark, or order, $200, which may be discharged in cotton at the market price in the fall of 1826."

It has been heretofore decided by this court, that in cases where the time is fixed for the payment of property, by the contract between the parties, no demand is necessary to entitle the plaintiff to maintain his action. This doctrine is clearly settled by the adjudication of the court of appeals of Kentucky, and we see no reason to depart from our former opinion, sustained as it is by authority so respectable. *M'Gee* v. *Beall*, 3 Lit. 191. It is only in cases where property is payable on demand, or where no time is fixed for its payment, that a demand must be averred and proved. But the note in question is not a note for the payment of property. It is a note for the payment of money at a certain day, with a provision that it may be discharged in property before the day on which the money became due. It is an election given to the obligor to pay it in property

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by a specified time, but he is not bound to pay it in property, and if he fails to avail himself of that stipulation, he is bound to pay the money according to the terms of the contract. In such a case no demand need be averred or proved; the plaintiff has no right to make the demand. It rests with the defendant whether he will avail himself of the stipulation in his favor, giving him the privilege of paying the debt in property. It is equally well settled, that the defendant's place of residence is the place for the payment of onerous property, unless a different place is specified in the contract.

We are therefore of opinion, that the court below did not err in refusing to instruct the jury, that a demand was necessary to entitle the plaintiff to maintain his action. With regard to the value of the cotton, we are also of opinion that it was wholly unnecessary to prove it. The note was given for two hundred dollars, which might be paid in cotton at the market price. Upon a failure to discharge the note by delivering, or tendering the cotton, the amount to be paid by the defendant was ascertained and fixed in the note itself, and the value of cotton could not increase or diminish it. *Judgment affirmed.*

JOHN PATTERSON *vs.* SYLVANUS PHILLIPS, executor of William Patterson, deceased.

1. An heir is entitled to prosecute a writ of error to reverse a judgment rendered by the circuit court against an estate, in favor of the executor.
2. It is no part of the duty of an executor or administrator to board and clothe infant heirs, and he can have no allowance for it in his administration accounts.
3. Notice must be given to heirs where their interests are to be affected by a proceeding.
4. Where the statute of limitations does not apply, lapse of time affords a presumption against the justice of a claim, entitled to weight by a court or jury.

April, 1829. — Error to the Phillips Circuit Court, determined before Benjamin Johnson and Thomas P. Eskridge, judges.

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OPINION OF THE COURT. — Phillips, executor of William Patterson, deceased, and defendant in error, presented an account against the estate of William Patterson, at the December term, 1825, of the circuit court of Phillips county, and obtained a judgment for seven hundred and fifty dollars. John Patterson, one of the heirs, and plaintiff in error, appeared and opposed the allowance of the account, and having failed in the court below, has brought this case up on a writ of error. A preliminary question has been made and argued, which it is first necessary to notice. The defendant, by his counsel, insists that a writ of error will not lie in the present case. In ordinary cases it is admitted that a writ of error lies from the circuit courts to this court, but it is contended that the proceeding was had under the thirtieth section of the administration law of 1825; and that by the provisions of that section an appeal is the only mode of bringing the case to this court. It is a sufficient answer to this objection, that the present case does not come under the provisions of that section. The provision is, "that if any person having any claim or demand against the estate of any deceased person, shall apply to the circuit court where administration was granted, to have the same allowed, first giving the executor or administrator ten days previous notice in writing."

The mode of proceeding is then pointed out, and a further provision made, that if either party feels aggrieved by the decision, he may appeal to the superior court, where the trial is to be had *de novo* upon the merits.

It is very obvious that the present case does not come within the provisions of this section. It provides a remedy for the creditor of the estate, other than the executor himself, who, as the representative of the estate, is to defend the claim. The creditor is to be one party and the executor the other. If Phillips is permitted to exhibit the claim, who is to oppose or defend it? Is he permitted to present it in his individual character, and to defend it in his fiduciary capacity? *Allen* v. *Gray*, 1 Monroe, 98. If this could be tolerated he has not done so; for he has presented the account as executor, and not in his personal character, or as guardian of the infant heirs. 3 Littell, 8. It

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is needless to attempt to illustrate that which is so obvious. If the preceding observations be correct, it follows that the plaintiff is entitled to a writ of error in this, as in ordinary cases.

The first error assigned questions the propriety of allowing any part of the account against the estate of William Patterson.

The claim presented by Phillips did not, in our judgment, constitute a proper subject of allowance against Patterson's estate. It was not a debt created by Patterson, nor was it due from or owing by him; it was, in truth, a claim, not against the estate, but against the heirs of Patterson in their individual character. It was no part of the duty of Phillips, as executor, to board and clothe the infant heirs, and he could have no allowance therefor in his administration accounts. Toller on Exec'rs, 134; *Brewster* v. *Brewster*, 8 Mass. 149; *Hart* v. *Hart*, 2 Bibb, 609; *Washburn* v. *Phillips*, 5 Smedes & Marsh. 600.

It is contended that Phillips was constituted guardian by the will, and maintained and educated the infant heirs of Patterson. He is undoubtedly entitled to remuneration; but in presenting his accounts against those heirs, the defendant, as guardian, should have made it out against them severally and not jointly. It would be manifestly unjust to charge one heir with necessaries furnished to another, and by presenting a joint account this would be the inevitable consequence.

In the present case the heirs had attained to full age, and they were entitled to notice by which their interest was to be affected. No such notice appears to have been given, and one only of the heirs appeared and opposed the proceedings. We do not think the statute of limitations applicable to this case as a positive bar, as the defendant stands in the attitude of a trustee; but the great lapse of time affords a presumption against the justice of the claim, which is entitled to due weight in the consideration of a court or jury.

Judgment reversed.

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THOMAS GRIFFIN, appellant, *vs.* JESSE NOKES, appellee.

A due bill not payable to order or bearer, is assignable, and may be assigned by an agent.

April, 1829. — Appeal from the Crawford Circuit Court, determined before Benjamin Johnson and Thomas P. Eskridge, judges.

JOHNSON, J., delivered the opinion of the Court. — The first question is, whether a due bill not payable to order or bearer is assignable. We have no doubt that a due bill is embraced by the words of the statute, "bonds, bills, and promissory notes." Geyer's Digest, 66. The second question is, whether a due bill can be assigned by an agent. Of this we have no doubt, and consider it too clear to require reasoning.[1] Kyd on Bills, 33; Chitty on Bills, 198; Pothier on Obligations, 74, 448.

ESKRIDGE, J., concurred.

Judgment affirmed.

PETER C. PARKER, plaintiff, *vs.* ELI J. LEWIS and PETER EDWARDS, defendants.

1. Courts have a legal right to grant new trials in actions for torts, on the ground of excessive damages, and may grant any number until the ends of justice are answered.
2. If a party, having leave to amend pleadings, files bad pleas, they may be stricken out on motion.
3. A plea which amounts to the general issue, or does not answer the whole charge or count, is bad.

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[1] Story on Bills, 76; Bayley on Bills, 69 to 74. But this must be done in the name of the principal, otherwise the agent will be held personally liable. To bind the principal and exonerate himself, he should regularly sign thus: "A. B. (principal) by C. D., his agent" or "attorney," as the case may be, or what is less exact, but would suffice, "C. D. for A. B." Story on Bills, 76, 77; Story on Agency, 153. In commercial and maritime contracts to promote public policy and encourage trade, if it can on the whole instrument be collected that the object is to bind the principal, and not the agent, courts of justice will adopt that construction of it, however loosely or informally expressed. Story on Agency, 154.

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October, 1829. — Trespass before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

TRIMBLE, J., delivered the opinion of the Court. — This is a suit brought by the plaintiff against the defendants, returnable to the October term of this court, 1828. The first count in the declaration is, for breaking and entering the close of the plaintiff; the second is for taking and carrying away the goods of the plaintiff. At the October term, 1828, Lewis, one of the defendants, put in his plea, to which a demurrer was sustained, and he had leave to amend his pleading, and time was given to file his amendment. On the 18th of April, 1829, Lewis amended, by filing three several pleas. The first is the general issue, to which no objection is made. The second is a justification under a judgment, confessed in vacation, under the statute and execution thereon, which judgment was afterwards confirmed in court. The third plea of Lewis is property in himself, as to the negroes in the second count mentioned; and says nothing as to the balance of the goods and chattels charged in that count to have been taken and carried away. At this term the plaintiff, by his attorney, moves the court to strike out the second and third pleas of Lewis. We think this motion must be sustained if the pleas are found to be bad. The second plea justifies under an execution issued on a judgment in vacation, before the same had been confirmed in court. We have heretofore declared, that judgments thus confessed before the clerk in vacation, are not complete until acted upon by the court, and confirmed. Under the statute, (Geyer's Digest, 248, sec. 17, tit. Judicial Proceedings,) clerks may sign all confessions of judgments taken in vacation, which in fact is but taking the acknowledgment of the defendant, of record, and it is reserved to the court to give judgment on such confession. No execution could issue until such judgment was rendered by the court, and therefore it appearing by the plea of Lewis, that the execution under which he justified, did issue before judgment was rendered by the court, his plea on that account is bad. The third plea is bad on two grounds: 1. If properly pleaded it would amount to the general issue; and 2, it does not profess,

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nor does it really answer the whole charge in the second count of the declaration. The defendant, by his attorney, insists that the plaintiff should be driven to take his exception to the pleas by demurrer. We think not. The defendant after having filed one plea, which was adjudged bad on demurrer, ought not to be permitted to amend by filing pleas no better than the first. The defendant asked leave to amend, and it was his duty to have tendered good pleas, and the indulgence as to the time granted by the court, cannot place him in any better condition than he was in at the time of obtaining leave to amend. If the court would not have received those pleas if tendered, *a fortiori* they ought to strike them out, when filed under the indulgence of the court, giving the defendant time to amend his pleading. The second and third pleas of defendant must, therefore, be stricken out. *Ordered accordingly.*

October 24, 1829.— Before Benjamin Johnson, William Trimble, James Woodson Bates, and Thomas P. Eskridge, judges.

Issue having been formed on the plea of not guilty, the cause was tried by a jury composed of Joseph McKnight, Asa G. Baker, Benjamin Clemens, G. W. McSweney, James C. Collins, William Flanakin, Bartley Harrington, William Lenox, Kirkwood Dickey, Emzey Wilson, Samuel Williams, and William Dugan, who rendered the following verdict: "We, the jury, find for the plaintiff ten thousand dollars damages."

October 27, 1829. — On this day Judge TRIMBLE, the only judge in court when the verdict of the jury was returned, handed into court a written statement of the finding of the jury, as follows: "We, the jury, find for the plaintiff ten thousand dollars damages," and being asked if that was their verdict, they said that "Parker's note to Lewis for three thousand two hundred and twenty-two dollars and sixty-nine cents with interest was to be deducted, and that the balance was found against Lewis, and that they found nothing against Edwards."

The plaintiff moved the court to render judgment for him on the verdict, which, after argument of counsel on both sides, was, on the next day, denied. On the 31st of October, 1829, a motion was made by the defendant Lewis for a new trial, and after

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due consideration a new trial was awarded, at the cost of the defendant.

The plaintiff then moved that a *venire facias de novo* issue returnable to the present term, and that the cause be tried at the present term, but this motion was overruled by an equal division in the court, and the case was continued, with leave to the parties to take depositions.

At the next term, July 22, 1830, the cause came on for trial before Benjamin Johnson, James W. Bates, Edward Cross, and Thomas P. Eskridge, judges, and a jury was formed of the following persons, namely: Edward Shurlds, Dudley D. Mason, Nathan W. Maynor, John McLain, Cornelius W. Ennis, Jordan Stewart, Christian Brumback, Lewis Young, Burk Johnson, David Davidson, Ransalear Munson, and John H. Lenox, who, after hearing the evidence and arguments of counsel, retired to consult of their verdict, and returned into court with the following, namely: "We, of the jury, find the defendant, Eli J. Lewis, guilty in manner and form as charged in the plaintiff's declaration, and aver the plaintiff's damages by reason of the premises set forth in said declaration, to the sum of seven thousand, seven hundred and thirteen dollars. Burk Johnson, foreman."

And judgment was rendered for the plaintiff for the damages so averred, and for costs.

Before the jury retired, the plaintiff asked and obtained leave to enter a *nolle prosequi* as to Peter Edwards, codefendant, which was done accordingly, and he was discharged.

On the next day, July 23d, 1830, the defendant Lewis moved for a new trial, for divers reasons set out in his motion, and on the 2d August, 1830, the same judges presiding, the motion was sustained, and a new trial awarded, on which occasion the unanimous opinion of the court was delivered as follows, namely: —

Eskridge, J. — This is an action of trespass. There was a verdict during the present term for the plaintiff, for seven thousand, seven hundred and thirteen dollars, and the case is now before the court on a motion for a new trial. The material grounds assigned for a new trial are: First, that the damages are exces-

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sive, and second, that the verdict is contrary to law and evidence. That the case may be understood, a short history of it seems to be necessary. Parker, the plaintiff, confessed a judgment to Lewis, the defendant, before the clerk of the circuit court of Phillips county, in vacation, in which shortly thereafter an execution issued, which was levied on the plantation and other property of Parker. This proceeding at the time it occurred was perfectly regular, and in strict conformity with the acknowledged and universal practice of the country. At a subsequent period, however, it was decided by this court, that the confession of a judgment thus taken by a clerk, was irregular and invalid, and required to give it legal effect, to be confirmed by the court in term time. In the absence, then, of the decision of this court just adverted to, Parker had no ground of action. It is by virtue of that decision alone that he has a right to be heard in the present action.

There has been no evidence adduced, going to show that Lewis did not act in good faith, that he did not believe he was pursuing the remedy guaranteed to him by the then laws of the country for the recovery of a just debt. The evidence does not show any act of oppression or unfairness on the part of Lewis in vindicating his legal rights. What, then, was the fair criterion of damages in the present action? There is certainly not a case made out of vindictive damages. Allowing the jury all possible latitude in their estimate of damages, they certainly could not exceed the fair value of the property sold under the execution. What was the value of the property thus sold? Let us advert to the plaintiff's declaration, and the evidence adduced in its support. There are two counts in the declaration. The first for entering his close, destroying fences and crop. There was not a particle of evidence to show that the farm or crop was in the slightest degree injured. The farm, though levied on, was not sold, the fences were not torn down, nor the crop injured. The first count in the declaration is wholly unsupported by evidence, except by the facts that the farm was levied on, and that the coroner was on it when he sold the personal property. The second count is trespass *de bonis asportatis*. What was the value of the personal property sold under the execution? It is a most difficult matter to estimate its value, for the evidence is very far from being conclu-

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sive and satisfactory. The evidence is clear as to seven bales of cotton, thirty-two head of hogs, thirteen head of cattle, one colt; and that the store goods sold under the execution for a little upwards of five hundred dollars; say that the goods were worth one thousand five hundred dollars, allowing two hundred per cent. more than they sold for at the sheriff's sale; putting the most extravagant estimate on the personal property sold under the execution, it could not have exceeded two thousand dollars in value. We have excluded the negroes from the estimate; it having been shown on the trial that the legal title to the negroes was in Lewis. He held a mortgage on them, and by virtue of it, had a right to their possession at any moment he chose to assert it. That the mortgage on this property vested the legal title in Lewis the mortgagee, and that he had a right to reduce the negroes to possession, whenever an opportunity presented, are propositions that cannot be controverted.[1] It is true, Lewis resorted to rather a singular mode to gain possession of the negroes. But the objection comes with ill grace from Parker. Lewis had his own negroes sold, allowed a credit for the amount for which they sold, and Parker complains of it! Parker's equity of redemption could not be sold under execution, for the legal estate was in Lewis. 3 Atk. 739; 8 East, 467; 2 Bos. & Pul. New Rep. 461 *b.* But Parker has at this time a right to redeem these negroes, for his rights under the mortgage have not been impaired by the sale under the execution. It appears from this view of the case, that nearly six thousand dollars in vindictive damages were given by the jury. Did the law and the evidence authorize vindictive damages at all? We think not. But it has been said that juries in cases sounding in damages, have an unlimited and arbitrary control, and that they are in fact irresponsible, and that a court cannot grant a new trial. This position is certainly incorrect. It is not true when applied to actions for libels, slander, assault and battery, and other personal torts, for the books afford many in-

[1] The suit was subsequently adjusted between the parties, and on January 11, 1831, on the motion of Chester Ashley, Esq., attorney for the defendants, was dismissed, the defendant paying the costs.

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stances of new trials granted for excessive damages in this description of actions. It was done in *Wood* v. *Gunston*, Styles, 462; in *Ash* v. *Ash*, Comb. 357; in *Chambers* v. *Robinson*, 1 Strange, 692; in *Clerk* v. *Udall*, 2 Salk. 649; in *Jones* v. *Sparrow*, 5 Term Rep. 257; and in *Mc Connell* v. *Hampton*, 12 Johns. Rep. 234. In the last case a verdict had been obtained in an action for assault and false imprisonment, for nine thousand dollars, and a new trial was promptly granted by the supreme court of New York, for excessiveness of damages. Although the defendant was one of the most wealthy men in the United States, Chief Justice Thompson says, in giving his opinion, "that courts have a legal right to grant new trials for excessive damages, in actions for torts, is nowhere denied; but on the contrary, has been universally admitted, whenever the question has been agitated."

It is said by the court in the case of *Payne* v. *Trezerant*, 2 Bibb, 33, that it was the duty of the court whenever the juries will take upon themselves to disregard the laws of the land, and clear and indubitable testimony, to set aside their verdicts *toties quoties*, until twelve men can be got firm enough to defend and support the legal institutions of the country. In *More's Administrator* v. *Chery*, 1 Bay, 369, a third new trial was granted on similar grounds. But it must be borne in mind that the case now before the court is not for a personal tort, but is for an injury done to property, and the jury in their assessment of damages should have been governed by the pecuniary loss, unless it had been established by evidence that the defendant Lewis had been guilty of acts of malice and oppression, in which case the damages might have been enlarged. It is true, the record of the judgment confessed before the clerk in vacation was not read to the jury; but it was among the papers introduced by the plaintiff, and referred to in the argument of the counsel for the defendant. But, even admitting that there was no evidence before the jury of the confessed judgment, and that they ought to have found vindictive damages, still we are clearly of opinion the damages found by the jury are outrageously and flagrantly excessive.

The jury in the case now before the court, though highly re-

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spectable and intelligent, and certainly above all imputation of improper motives, were unquestionably influenced by false and unfounded considerations in estimating the damages. The case had been long pending; was publicly investigated at a former term; had been much talked of; had given rise to much excitement, and the jury were doubtless influenced by public opinion, and unconsciously disregarded the evidence. We can alone account in this way for damages so outrageously excessive, so entirely disproportionate to the injury sustained.

On the ground of excessive damages, the verdict must be set aside.

It remains for us to answer another objection to the granting of a new trial. It has been said that this is the second application for a new trial. Admitting this, we are neither precluded by the plain language of our own statute, nor by the general principles of law, from granting a second new trial. Digest, 261; *More's Administrator* v. *Chery*, 1 Bay, 269; *Goodwin* v. *Gibbon*, 4 Barrow, 2188, or Morgan's Essays, 27, 28. In *Goodwin* v. *Gibbon*, Lord Mansfield said, "there was no ground to say that a new trial should not be granted after a former new trial. There is no such rule. A new trial must depend upon answering the ends of justice." Justices Yates and Astor concurred, saying, that a second new trial ought to be granted as well as the first, if the reasons were sufficient for granting it. But we deny, strictly speaking, that this is a second application for a new trial. In the former trial the finding of the jury was not received on the ground of its uncertainty and insufficiency, and a new trial was awarded as a matter of course, on that account, and without the slightest reference to the merits of the case. The second ground for a new trial is, "that the verdict is contrary to evidence and law." The first branch of this reason has been already discussed. As regards the second, we take it for granted, without reference to the affidavits of the two jurors, which were inadmissible, that the jury took into consideration, in estimating the damages, the value of the negroes; and if so it was contrary to law and against the instructions of the court. It has already been shown that Lewis, by virtue of the mortgage, was invested with a clear and indisputable

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legal title to the negroes, and to their possession, and that he had a right to take possession of them at any time. It has also been shown that Parker's rights under the mortgage remain unimpaired, as he still retains the power to redeem. The jury were distinctly instructed to exclude the value of the negroes from their estimate of damages. The verdict of the jury being contrary to law, and against the express instructions of the court, must be set aside. *A new trial awarded.*

JOHN NICKS and JOHN ROGERS, appellants, *vs.* JEREMIAH MATHERS, appellee.

In a case of forcible entry and detainer, judgment affirmed on an equal division in the appellate court.

October, 1829.— Appeal, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

TRIMBLE, J.— The appellants brought a suit for forcible entry and detainer before two justices of the peace. On the inquisition, the jury found for the defendant, and the plaintiffs sued out a writ of *certiorari;* and at the November term of the Crawford circuit court, in 1827, the proceedings were set aside for irregularity, and a trial *de novo* awarded on the merits. At the May term of the circuit court, in 1828, the defendant moved the court to dismiss the suit, because the court had no jurisdiction to try it. This motion was sustained, and to this decision the plaintiffs excepted, and filed their bill of exceptions. The question now before this court is, Ought the suit to have been dismissed? The court at the May term had no power to set aside the order for a trial *de novo* made at a previous term; for admitting such order to have been erroneous, yet it required the power of an appellate court to correct it, after the term had passed. But the case, having been brought before the circuit court, and the inquisition set aside, ought to have been tried on its merits, and finally disposed of there. It is therefore my opinion, that the cause ought to be remanded to that court to be tried on its merits.

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ESKRIDGE, J. — This is an appeal from the Crawford circuit court. The appellants brought a writ of forcible entry and detainer before two justices of the peace, and the finding of the jury upon the inquisition being for the defendant, the plaintiffs sued out from the Crawford circuit court, at the November term, 1827, their writ of *certiorari*, according to the statute. The proceedings before the justices were set aside for irregularity, and a trial *de novo* ordered. At the May term, 1828, the defendant moved to set aside the *certiorari*, on the ground that the court had not jurisdiction; which motion was sustained, and it is from this decision that the plaintiffs have appealed.

The only question to be determined is, whether the circuit court, having set aside the proceedings in a case of forcible entry and detainer, brought there by *certiorari*, could rightfully order a trial *de novo*. My opinion is, that it could not. The power of the circuit court ceases the moment it has set aside the proceedings for irregularity. The statute giving the remedy of a writ of forcible entry and detainer is in derogation of the common law, is special and peculiar in its nature, and must, according to well-known rules, be strictly pursued in all its provisions. The sixth section of the act regulating the proceedings in writs of forcible entry and detainer, (Geyer's Digest, 204,) does not give the circuit court the power to try the case *de novo*. It only empowers that court to set aside the proceedings for irregularity, and nothing more. To authorize the circuit court to try the case *de novo*, that power must be expressly delegated by the statute, and is not to be assumed by implication or construction. The fact that the circuit court set aside the proceedings for irregularity and ordered a trial on the merits at one term, and at a subsequent one dismissed the case, cannot be considered as irregular, because the court is always open to dismiss for want of jurisdiction.

This court being equally divided, however, in opinion, the judgment of the circuit court stands affirmed.

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CHARLES FISHER, appellant, *vs.* JACOB REIDER, appellee.

1. A party is not allowed to complain of a fault committed by him.
2. An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done.

November, 1829. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

OPINION OF THE COURT. — This is an action of debt brought by the appellee against the appellant in the circuit court of Pulaski county, and comes to this court by appeal.

It appears from the record, that the defendant in the court below filed his plea of payment, to which the plaintiff replied; and the defendant refusing to join issue by adding a *similiter*, a judgment on that account was rendered against him, and he now contends that this judgment should be reversed.

The judgment, although not strictly and formally correct, is certainly substantially good, and ought not to be reversed at the instance of the appellant, who was in fault in not completing the pleadings. Admitting the English practice, in a case like this, to be, to strike out the plea and enter judgment by default, it is not perceived what advantage it has over the practice heretofore adopted by this court in the case of *Russell* v. *Flanakin*, in which a judgment precisely similar was entered. The defendant in refusing to join issue abandoned his defence, and the plea, though not actually, was virtually stricken out. It is a mere matter of form, and when substantial justice has been done between the parties, this court would be unwilling to reverse the judgment of the inferior court on mere technical objections of a doubtful character. *Judgment affirmed.*

ALEXANDER REECE, appellant, *vs.* JAMES JOHNSON, appellee.

A witness who has a direct and positive interest in the event of a suit, is incompetent.

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November, 1829. — Appeal from Phillips Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

Opinion of the Court. — This is an action brought by Johnson against Reece, for taking and carrying away a negro woman slave. Johnson, on the trial, proved possession in himself, and the taking by Reece; and he further proved that the negro had been in the possession of John Dukes, now deceased, and that Dukes devised the negro to his wife and infant son Isham, and that he was the legal guardian of Isham Dukes; and that before the commencement of this suit he had intermarried with the widow of John Dukes.

To the evidence, so far as it related to the title of Johnson, the defendant objected; but his objection was overruled. We cannot see the ground upon which the objection was based. The plaintiff in the court below might safely have rested his case on the proof of actual possession, and the taking and carrying away by the defendant Reece; but it was not improper, illegal, or irrelevant, to go further, and show his title to the property, and it was merely unnecessary trouble. We think the court decided correctly in overruling the objection to the evidence.

The defendant relied upon two grounds of defence; first, he denied the taking by the general issue, and secondly, he justified as the rightful owner of the property.

In his plea of justification, he averred that the slave in contest was the property of the estate of Isham Dukes, deceased, and that he, Reece, is the legal administrator of the estate, and as such was entitled to take the property.

On the trial before the jury, the defendant in the court below offered as a witness Joseph Robbins, who was rejected by the court, on the motion of the plaintiff, on the ground of interest. It appeared in evidence that the witness had intermarried with the widow of Isham Dukes, deceased. The interest of the witness in the event of the cause, appears to us to be direct and positive, not remote, contingent, or uncertain. If the defence set up by Reece had been sustained by proof, the slave in contest was a part of the estate of Isham Dukes, deceased, and in that event the wife of the witness was entitled to dower in the

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negro woman. We think, therefore, the witness was properly excluded, and not permitted to give evidence. This case does not come within any of the exceptions to the general rule, that interest in the event of a cause disqualifies a witness.

We are also clearly satisfied, that the verdict rendered in this case is responsive to both the issues which the jury were sworn to try. *Judgment affirmed.*

JOHN COOK, appellant, *vs.* SAMPSON GRAY, appellee.

1. A note sued on is not part of the record, unless produced on oyer.
2. Days of grace are not allowed on promissory notes.
3. The case of *Reeder* v. *Fisher* cited and approved.
4. A note imports a consideration.

November, 1829. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, William Trimble, Thomas P. Eskridge, and James W. Bates, judges of the Superior Court.

OPINION OF THE COURT. — The first assignment of error is, that "the action of debt will not lie in this case." In answer to this it will be sufficient to say, that the statute gives to the assignee the same remedy that the original holder had. The second objection is, "the declaration is not sufficient." The declaration is sufficient. 3. "The whole sum is not due for which judgment was rendered." The averments in the declaration are sufficient to charge the defendant and warrant a judgment for the debt and interest. 4. "The instrument declared on is not a promissory note, as described in the declaration; and the court erred in rendering judgment on a different instrument than the one declared on." It does not appear that the court rendered judgment on any instrument in writing other than the one set forth in the declaration. The production of it did not make it a part of the record, unless it was produced on oyer. 5. "The computation of interest was from a wrong time; three days of grace ought to be allowed." This court has before decided that the days of grace allowed on mercantile paper do not attach to promissory notes. 6. "The judg-

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ment is not sufficient, or such as the law requires in such cases." This objection is answered by the opinion in the case of *Reider* v. *Fisher*, ante. 7. "The whole proceedings are erroneous, *prout patet per recordam.*" The whole proceedings, except the defendant's plea, are regular, *prout patet per recordam.* 8. "The contract is a *nudum pactum*, and shown to be so in the declaration, and therefore no judgment could be entered." The promissory note, as set out in the declaration, is not a *nudum pactum.* It is averred to be for "value received;" but even if it did not, our statute makes it unnecessary to show that a note is made on a good consideration. On its face it imports a consideration. *Judgment affirmed.*

JAMES LEMMONS, plaintiff, *vs.* AUGUSTUS CHOTEAU, defendant.

1. The assignee of a note must use due diligence, by prosecuting the maker to insolvency, or show some sufficient excuse for the failure, before he can hold the assignor liable.
2. That the maker is a transient and unsettled person, without averring insolvency, is not sufficient to excuse the holder from using due diligence.

November, 1829. — Debt, before Benjamin Johnson, James Woodson Bates, Thomas P. Eskridge, and William Trimble, judges.

JOHNSON, J., delivered the opinion of the Court. — This is an action brought by Lemmons to recover of Choteau, upon an assignment which the latter made to the former, of a note executed by William S. Williams.

The note of Williams bears date the 5th of October, 1824, was payable the 25th of December following, and was assigned by Choteau to Lemmons the 6th of October, 1824. The declaration of Lemmons nowhere suggests that he has exercised any diligence by prosecuting a suit against the maker of the note. It states that when the note became payable, he made diligent search after Williams, the maker of the note, and has continued to make diligent inquiry for said Williams up to the time of bringing this suit, but could not find him; and avers that

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Williams, at the time of the assignment, was not a citizen or resident of this territory, nor at this time resides in this territory; and that he never did reside in this territory, nor has he any property here whereon to make or collect the amount of the note, or any part of it.

The doctrine has been long settled by a uniform current of decisions in the States of Virginia and Kentucky, upon a statute in all respects analogous to ours, that the assignor of a bond or note is liable upon his assignment in the event of a failure to obtain payment of the bond or note, after due diligence has been used by the assignee to coerce payment. If the question were now presented for the first time, it might admit of great doubt, whether, according to common law principles, the assignor would be responsible where the debt assigned was just and fair, and the failure to obtain payment resulted alone from the insolvency of the maker of the bond or note. It cannot be asserted that there is a failure of the consideration because the right to a just debt is sold and transferred, and the inquiry arises, whether the assignor or the assignee takes upon himself the risk of the insolvency of the obligor or payor. I should incline to the opinion that where the parties were silent, the law would cast the risk upon the purchaser of the bond or note, and would not raise an implied contract on the part of the assignor, that he took upon himself and insured the solvency of the obligor or maker of the note. But this question I consider at rest, by the decisions referred to, as well as by the previous decisions of this court. We have repeatedly held that the assignor is liable to the extent of the sum received by him, upon a failure on the part of the assignee to obtain payment after the use of due diligence. The question in this case is, whether that diligence which the law requires has been used. In the case of *Brinker* v. *Perry*, 5 Littell, 194, the court says, "that, in general, due and proper diligence by suit against the maker of a note must be employed by the assignee to enable him to have recourse against the assignor, cannot at this day be doubted." The necessity of doing so has been repeatedly decided by this court, and as a general principle must now be considered as incontrovertibly settled. To this general princi-

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ple there are, no doubt, exceptions. Does the case at bar fall within any one of those exceptions? The allegations in the case just referred to, were, that when the note became payable, Moody, the maker, had left, and continued out of the State for many months, and is still out, so that the amount could not be recovered of him. The averments in this declaration are, that the plaintiff has made diligent search for Williams, the maker of the note, but has been unable to find him; that Williams at the time of the assignment, and ever since, has not resided within this territory. In the case of *Brinker* v. *Perry*, the maker of the note was out of the State when the note became payable, and was out at the commencement of the suit. In the case at bar, precisely the same facts are alleged. The only difference in the two cases is, that it is averred in the present case that the plaintiff has made diligent search for the maker of the note, from the time it became due until the institution of this suit.

The court of appeals of Kentucky, in the case referred to, say: "It is unimportant whether the declaration be understood to allege the fact of the maker of the note having removed from the State, or only absented himself on a temporary occasion. In either case the principle is the same, and in neither case can there be a recovery against the assignor, without due diligence, by suit, having been exercised against the maker of the note. If the absence was merely temporary, there was nothing to prevent Brinker from suing the maker of the note, and if there was a permanent removal, as it is alleged to have taken place before the note was assigned, he must be understood to have undertaken to pursue the maker of the note, by suit, in the country to which he had removed, before recourse could be had against the assignor." Apply this doctrine to the case now before us. If the maker of the note resided out of the limits of this territory, as is alleged in the declaration, at the time the note was assigned to the plaintiff, he must be understood to have undertaken to pursue the maker of the note, by suit, in the country where he did reside, before he could have recourse against the defendant. The two cases are exactly similar, and the only diversity that could be imagined, consists in the allegation of the diligent but unsuccessful search

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after Williams, the maker of the note, and that is an averment wholly immaterial, and can have no bearing in the case. The case of *Brinker* v. *Perry*, I consider as authority of high character, and precisely in point, without a shade of difference; and on that I am clear that the demurrer to the declaration should be sustained. *Demurrer sustained.*

The plaintiff amended his declaration, to which there was a demurrer, which was determined before Benjamin Johnson, James Woodson Bates, Thomas P. Eskridge, and Edward Cross, judges, July, 1830.

JOHNSON, J., delivered the opinion of the Court. — A demurrer having been sustained to the declaration in this case at a former term, an amended declaration has been filed by the plaintiff, to which the defendant has again demurred. The averments in the former declaration were, that the plaintiff had made diligent search for Williams, the maker of the note, and could not find him, and that he never did reside in this territory, nor has he any property whereon the said amount or any part of it could be made or collected. Upon these averments this court decided that the plaintiff failed to show the use of that diligence to recover the debt against Williams, which entitled him to recover upon the assignment made by the defendant. The ground of that opinion was, that as the plaintiff himself alleged that Williams was a non-resident at the time of the assignment of the note, he was bound to pursue him to the country where he did reside, or where he might be found, and there bring suit against him, and pursue him to insolvency, before he could have recourse against the assignor. In this opinion we were fully sustained by the case of *Brinker* v. *Perry*, 5 Littell, Rep. 194. Is the case materially varied by the amended declaration? What are the averments? That the plaintiff has made diligent search for Williams, and has not been able to find him, or any property upon which to levy an attachment; that he has not been able to find any fixed residence of Williams, but that before the note became due, Williams went beyond the limits of this territory into the Osage nation of Indians, and has lived there ever since, so that no legal process could be served on him, nor could he be compelled in the Osage country to pay any part of the note,

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and that Williams is a wanderer in that nation, and has no special place of residence.

The plaintiff in the preceding allegations does not inform the court that Williams resided in this country at the time the defendant assigned the note. If that averment was made, and also the averment of the subsequent removal of Williams from this territory, and that he had gone to parts unknown to the plaintiff, or that he was insolvent, these allegations might dispense with the averment of the use of due diligence by suit, and entitle the plaintiff to maintain the action. But the averments are, that Williams executed the note in this territory, and shortly after went beyond our limits into the country belonging to the Osage Indians, and has there wandered ever since. The fact that Williams is a transient person or wanderer, and cannot be found, if he was so at the time the note was assigned, does not excuse the use of diligence by suit, for if the plaintiff received the assignment of a note executed by a person thus transient and wandering, he must be understood to have undertaken to search for and find him and bring suit against him to coerce the payment of the note. Where a man receives a note by assignment upon a person residing in a different State or country, he is bound to sue the obligor of the note in the country where he resides, if he cannot be found elsewhere; and where a person takes a note by assignment upon a transient and unsettled person, having no fixed place of residence, he impliedly undertakes to find the obligor or maker of the note, and to bring suit against him before he can have recourse against the assignor. It is, however, contended that in the Osage nation of Indians, there is no mode of coercing the payment of a debt. The answer is, that the plaintiff has not averred that the payment of a debt cannot be coerced in the Osage nation, and if he had made the averment it could not avail him, unless he had also averred the insolvency of Williams; for the defendant is liable upon the assignment, only in the event of the maker of the note being unable to pay it. *Demurrer sustained.*[1]

[1] If the maker is notoriously insolvent, so that a suit would be fruitless, the assignee is not bound to sue him, before he can resort to the assignor, because the law never requires an useless act. *Saunders* v. *Marshall*, 4 H. & M. 455.

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HEWES SCULL, appellant, *vs.* JOSEPH HIGGINS, appellee.

1. In an action on the case for failure to perform a parol contract, the time of making it is not material, and hence, where it was alleged to be made on the 19th of September, 1828, to take effect in forty days, and the breach of it was assigned to have occurred the next day, it will be presumed after verdict, that it was proven that the breach occurred after the expiration of forty days; and it is error to arrest the judgment.
2. The contract shows a cause of action.

November, 1829. — Appeal from Hempstead Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and William Trimble, judges.

OPINION OF THE COURT. — This was an action on the case brought by Scull for the breach of a parol contract to deliver a keelboat. The declaration charged, that on the 19th day of September, 1828, the defendant, in consideration, etc., promised to deliver the said boat forty days from the date, and assigns for breach, that the defendant, on the 20th day of September, sold the said boat to Rafelle and Notrebe. The suit was brought on the 20th of September, 1828, the day after the contract is charged to have been made. A trial was had, and the jury found for Scull, and a motion to arrest the judgment was sustained, from which the plaintiff took an appeal. The errors assigned for arresting the judgment, were: 1. There was no cause of action; 2. The action was premature; 3. There is no sufficient breach. The second objection was mostly relied on in the argument, namely, that the action was premature. The contract was laid to be on the 19th of September, 1828, to take effect forty days thereafter, and were this an action on a specialty, the objection would be valid; but in this form of action the time is not material, and the plaintiff might, and we are bound to presume did, prove the contract to have been made at a prior date to the day laid, and that the time given to deliver the boat had expired. 1 Chitty, 288. This is equally applicable to the third objection, since we will presume that a sufficient breach had been proven on the trial. As to the first objection, that there was no cause of action, we think there was a cause

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of action, and the damages which the plaintiff sustained by reason of a breach, a proper subject of inquiry by the jury. *Reversed.*

WILLIAM RUSSELL, plaintiff, *vs.* JAMES H. LUCAS, defendant.

1. Payments should be applied to extinguish the interest, and then the principal.
2. Proper mode of computing interest stated.

July, 1830. — *Scire facias* to revive judgment, before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — The only question to be decided, is as to the mode of calculating interest.

We are of opinion that the correct mode of casting interest when partial payments have been made, is to apply the payment in the first place to the discharge of the interest then due, and if the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal unpaid. If the payment be less than the interest, the surplus interest must not be taken to augment the principal, but interest continues on the principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied towards discharging the principal, and the interest is to be computed on the balance of principal as above stated. 1 Dallas, 124; 1 Halsted, 408; 2 Wash. C. C. R. 168; 5 Cowen, 331. *Judgment for plaintiff.*

CHARLES S. RENO, plaintiff, *vs.* JAMES WILSON, Sheriff of Crawford County, defendant.

1. Money in the hands of a sheriff cannot be levied on, nor applied to an execution against the plaintiff.
2. It may be seized on execution in the hands of the party, and need not be sold; but may be placed as a payment on execution.

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3. Money in the hands of an officer, can only be reached by the interposition of the court.

July, 1830. — Motion before Benjamin Johnson, James Woodson Bates, and Thomas P. Eskridge, judges.

BATES, J., delivered the opinion of the Court. — This is a motion against a sheriff for refusing to pay over money received by him on execution. The defence set up is, that he applied the money to an execution in his hands against the plaintiff. The court cannot admit the validity of this defence. Money in the possession of a party is subject to levy.[1] 2 Show. 166; Dalton, 145; but the contrary is true where it is in the hands of an officer, for then it is *in custodia legis*.[2] This principle is fully

[1] Money in the possession of the defendant, may be seized on execution. This is now well settled, whatever doubts may have formerly existed to the contrary. *Handy* v. *Dobbin*, 12 Johns. 220; *Holmes* v. *Nuncaster*, 12 Johns. 395; *Doyle* v. *Sleeper*, 1 Dana, 535; *Dolby* v. *Mullins*, 3 Humph. 437; Gwynne on Sheriffs, 222; Dalton on Sheriffs, 145; *Rex* v. *Webb*, 2 Shower, 166; 2 Tidd, 917.

The money need not be sold, but may be placed as payment on the execution. *Sheldon* v. *Root*, 16 Pick. 567; *Brooks* v. *Thompson*, 1 Root, 216.

[2] Money in the hands of the sheriff, collected on execution, and not paid over to the creditor, cannot be attached or seized on execution against such creditor. Gwynne on Sheriffs, 224; 1 Cranch, 41; *Williams* v. *Rogers*, 5 Johns. R. 163; *Prentiss* v. *Bliss*, 4 Verm. 513; *Overton* v. *Hill*, 1 Murph. 47; *First* v. *Miller*, 4 Bibb, 311; *Dawson* v. *Holcomb*, 1 Ohio, 275; *Thompson* v. *Brown*, 17 Pick. 462; *Dubois* v. *Dubois*, 6 Cow. 497; Allen on Sheriffs, 162; *Wilder* v. *Bailey*, 3 Mass. 289; *Pollard* v. *Ross*, 5 Mass. 319.

But undoubtedly it would be competent for a court of chancery to appropriate the fund on the judgment of the creditor, upon showing that the debtor had no property subject to execution, or was insolvent, or was about to defraud the creditor. *Egberts* v. *Pemberton*, 7 Johns. Ch. R. 208; *Candler* v. *Pettit*, 1 Paige, 169. In the last case Chancellor Walworth said: "The cases of *Haddam* v. *Spader*, in the court of errors of this State, 20 Johns. Rep. 554; and *Taylor* v. *Jones*, 2 Atk. Rep. 600; and *Edgell* v. *Haywood*, 3 Atk. 352, in the English court of chancery, show that after a party has proceeded to judgment and execution at law, he may, by the aid of a court of equity, reach property in the hands of a third person, which was not in itself liable to execution." *Williams* v. *Rogers*, 5 Johns. R. 168. And this appropriation seems to have been made in many cases in a summary manner on motion, in the court where the execution was returnable. Thus in *Armistead* v. *Philpot*, 1 Dougl. 230, it appearing that the plaintiff could not find sufficient effects of the defendant to satisfy his judgment, the court on motion ordered the sheriff

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warranted by the decision of the supreme court of the United States in *Turner* v. *Fendall*, 1 Cranch, 117, a case parallel in all the material circumstances to that at bar. 3 Croke, 166, 176; 1 Dougl. 219; Barnes, Notes, 214; 4 Bibb, 312.

Judgment for plaintiff.

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to retain for the use of the plaintiff money which he had levied in another action at the suit of the defendant, having first discharged the bill of the attorney. *Turner* v. *Fendall*, 1 Cranch, 117; *Ball* v. *Ryers*, 3 Caines, Rep. 84; *Van Ness* v. *Yeomans*, 1 Wend. 87; *Ward* v. *Storey*, 18 Johns. R. 120; Allen on Sheriffs, 162. But the rights of the parties must be clear; because where conflicting claims on the fund exist, a court of chancery has more means and can procure more light in adjusting them, and can do full justice (*Williams* v. *Rogers*, 5 Johns. R. 167) between all parties in interest, while a court at law would fail to attain that desirable object in a complicated case. In two cases in the King's Bench, (*Fieldhouse* v. *Croft*, 4 East, 510, and *Knight* v. *Criddle*, 9 Ib. 48,) the court refused to interfere; but these decisions were based on the principle that money could not be taken on execution; and the assumption that it could, Lord Ellenborough declared, was "an innovation on the law which ought not to be admitted." The same doctrine seems to have been adopted by the court of common pleas in *Willows* v. *Ball*, 5 Bos. & Pull. 376. And the supreme court of New York, in *Williams* v. *Rogers*, above cited, refer to these cases with approbation, and seem inclined to adopt the rule therein stated; but it is added, "the court do not say that they will never interfere when the equity of the case can be accurately discerned." 3 Caines, Rep. 84, note (*a*); *Saunders* v. *Bridges*, 3 Barn. & Ald. Rep. 95.

The quaint reason given in the old cases, why the sheriff could not take money in execution, even though found in the defendant's *scrutoire*, was that it could not be sold. This reason is not a good one, and in *Turner* v. *Fendall*, above cited, Chief Justice Marshall laid down the true rule as follows: "The reason of a sale is that money only will satisfy the execution, and if any thing else be taken, it must be turned into money; but surely, that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article, to produce which is the sole object of the execution." 1 Dougl. 230.

And in *Handy* v. *Dobbin*, 12 Johns. R. 220, (which may be considered as overruling *Williams* v. *Rogers*, 5 Johns. R. 167, as far as that may question the right to levy on money,) it was said that there was no objection in principle, why money should not be taken in execution; that it was the goods and chattels of the party, and that it comported with good policy as well as justice, to subject every thing of a tangible nature to the satisfaction of a debtor's debts, except such things as the humanity of the law preserved to a debtor, and mere choses in action.

In Arkansas, and probably in other States, it is provided by statute, that any

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ADAM D. STEWART, appellant, *vs.* SAMPSON Gray, appellee.

1. Under the act of 1790, the certificate of a judge styling himself "one of the judges" of a court, is not a sufficient authentication; but it must appear that he is the chief justice, or presiding judge or magistrate.
2. A plaintiff may suffer a nonsuit at any time before the jury find a verdict; but it is too late after a court has decided on the plea of *nul tiel record.*

July, 1830. — Appeal from Pulaski Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and James Woodson Bates, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This is an action of debt, founded upon the record of the supreme court of the State of Tennessee, and comes to this court by appeal from the circuit court of Pulaski.

Issue was joined in the court below upon the plea of *nul tiel record*, and was decided in favor of the defendant; to which opinion the plaintiff excepted. The plaintiff's counsel then

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current gold and silver coin which may be seized on execution, shall be returned as so much money collected, without exposing the same to sale. Digest of Stat. of Ark. sec. 25, p. 498.

On principle and authority the following positions would seem to be clear: —

1. That money in the possession of the defendant, or a third person other than the officer, may be seized on execution and returned without sale as so much money collected.

2. That money collected by an officer on execution, cannot be levied on nor attached, while it remains in his hands, nor appropriated by him on an execution against the person for whom the money was collected.

3. That where there are conflicting claims, and the rights of parties are doubtful, a court of equity is the proper tribunal to enable a creditor, by a proceeding in the nature of a creditor's bill, to reach the money so collected and subject it to his claim, or otherwise adjust the equities of the respective parties.

4. That although a court of law will not generally interfere in a summary manner where the case is complicated and the right doubtful; yet when these obstacles do not intervene, and justice will be promoted thereby, such money may be appropriated at law under the direction of the court to which the execution is returnable, on a summary motion for that purpose, first giving reasonable notice to the party interested, to enable him to show cause against it, as that he has paid the debt, or that the appropriation ought not to be made.

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moved the circuit court to be permitted to suffer a nonsuit; which motion was overruled, and to this opinion the plaintiff likewise excepted.

The questions to be decided by this court are, first, whether the circuit court erred in sustaining the plea of *nul tiel record;* and second, whether the court erred in overruling the plaintiff's motion to be permitted to suffer a nonsuit. The first question depends upon the sufficiency of the authentication of the record of the supreme court of Tennessee.

By the constitution of the United States, congress has the power to prescribe the manner in which the public acts, records, and judicial proceedings in the several States shall be proved, in order to make them evidence in any other State; and by an act of May, 1790, has declared that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court in the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form.

The record of the supreme court of Tennessee is attested by the clerk, with the seal annexed, and the attestation is certified by one of the judges to be in due form. The judge states himself to be "one of the judges of the supreme court of Tennessee." Is this a sufficient authentication? It cannot be admitted that, under the act of congress, any judge can certify the record. It must, by the language of the act, be the judge, if there be only one, or if there be more, then the chief justice or presiding judge, or magistrate of the court from which the record comes; and he must possess the character at the time he gives the certificate.

If this be the correct construction of the act, and it is clearly susceptible of no other, it is manifest that the judge who certified the record in question has not given himself the character required by the act. The statement that he is one of the judges of the supreme court of Tennessee, certainly does not import that he was the sole judge, chief justice, or presiding judge of that court. Cases may occur in which no judge can with truth

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or propriety be denominated the judge, chief justice, or presiding judge of a particular court; for example, where several judges constitute a court, and the law is silent as to which of them shall be the presiding judge, as is the case with the superior court of this territory. In courts thus organized, at each term one of the judges must necessarily preside; but it does not follow that any judge of a court thus constituted may certify a record when he is not the presiding judge, because he has been, or may be thereafter, possessed of that character. The only inconvenience that results from cases of this kind is, the delay that in some instances must occur in waiting until some judge is qualified by his situation to give the requisite certificate. This is an inconvenience for which the act of congress has not provided; nor has the act provided for the cases of absence, death, resignation, or removal of the judge. *Stevanson* v. *Bannister*, 3 Bibb, 369, a case expressly in point.

The circuit court, therefore, did not err in not receiving as evidence the record of the supreme court of Tennessee, under the plea of *nul tiel record.*

The second question is, whether the circuit court erred in overruling the plaintiff's motion to be permitted to suffer a nonsuit. In issues of fact triable by a jury, the plaintiff will be permitted to suffer a nonsuit at any time before the jury actually find their verdict, but never afterwards. In the case now before the court, the issue joined upon the plea of *nul tiel record* was an issue of law properly triable by the court; and after the court had delivered its judgment upon the issue submitted to it, it was too late for the plaintiff to apply for permission to suffer a nonsuit. 1 Archbold, Practice, 211; 3 Blackstone, Com. 376.

Judgment affirmed.

ROBERT CRITTENDEN, plaintiff in error, *vs.* JOHN T. DAVIS, defendant in error.

Either a verdict or judgment cures a defective venue.

January, 1831. — Error to Pulaski Circuit Court, determined

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before Thomas P. Eskridge, Edward Cross, and James Woodson Bates, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This is a writ of error to the circuit court of Pulaski county, to reverse a judgment rendered in that court in an action of assumpsit, wherein John T. Davis, indorsee, was plaintiff, and Crittenden defendant.

Two points have been relied on by the counsel for the plaintiff in error to reverse the judgment of the court below: first, that there is not a sufficient venue laid in the declaration; and second, that there is not a sufficient breach alleged. Both of these grounds are wholly untenable, because they are contradicted by the declaration itself. The declaration seems to have been drawn according to the most approved forms. The notes declared on are alleged to have been made in the county of Pulaski, and within the jurisdiction of the court; and the expression "then and there" applied to the execution of the indorsements, must be taken in connection with, and relate to the venue as laid for the notes themselves. There is certainly a sufficient venue. There is a separate and distinct breach alleged to each count in the declaration, when in fact one general breach at the end of the declaration would have been sufficient. But, admitting the declaration to have been defective in not laying a sufficient venue, it was the duty of the defendant below to have availed himself of such defect, by demurring specially to it; and it is now too late, after a formal judgment by submission to the court below, to take advantage of it upon a writ of error. The modern practice, as well in England as in most of the States in the United States, is, that either a verdict or a judgment cures a defective venue. 5 Mass. T. R. 94, 96; also *State* v. *Post*, 9 Johns. Rep. 81. In the last case quoted, it is decided that where no venue is laid in the body of the declaration, the venue in the margin is sufficient. It is not material in this case to inquire what may have been the effect of a defective venue at common law; whether it was matter of substance or barely matter of form, because it is very obvious that our statute of *jeofail* is as comprehensive as both the statute of Charles II. and of 4 Anne taken together.

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Statutes of this description have correctly received from all courts a liberal construction. Their object is to repress any attempts of parties litigant to defeat the ends of justice, by resorting to technical and frivolous objections, which do not touch the merits of matters in controversy.

Judgment affirmed.

BENJAMIN L. MILES, plaintiff in error, *vs.* THOMAS JAMES, defendant in error.

If a jury is required, and denied by the justice, when the sum exceeds ten dollars, it is an error for which his judgment should be set aside.

January, 1831. — Error to Chicot Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

CROSS, J., delivered the opinion of the court. — This cause is brought here upon a writ of error to the Chicot circuit court. The record shows that a suit was commenced before a justice of the peace, by the defendant in error, against Miles, the plaintiff, for the sum of $17.95 cts. On the day of trial, Miles produced an account against James, of $15.37½ cts. Whereupon James asked the justice to discharge the jury, which, on the application of Miles, had been summoned without his consent, on the ground that the sum in controversy was not sufficient in amount to entitle the parties, or either of them, to a trial by jury. The justice went on to try the cause himself, and gave judgment against Miles for $9.52½ cts. Subsequently, and within the time prescribed by law, a writ of *certiorari* was sued out by Miles, and the proceedings certified up to the circuit court, and at the November term were there confirmed.

This confirmation of the proceedings of the justice, is the only error assigned. Our statutes point out the methods by which a judgment rendered before a justice of the peace may be brought up before the circuit court. One by appeal, the other by *certiorari*. The former it will be unnecessary to examine. When the *certiorari* is used, the statute provides, "that

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if the court shall set aside the proceedings of the justice for irregularity or informality appearing upon the face of them, the court shall examine into the merits of the case, and give judgment as in other cases." Geyer's Digest, sec. 18, p. 391. The power of the circuit court to set aside the proceedings of the justice, is made to depend upon the irregularity or informality appearing upon their face, as certified up under the command of the *certiorari*. If either exist, they are to be taken for naught, and an examination of the merits permitted. On the other hand, if they be regular and formal, their confirmation must follow.

Was it regular in the justice, to deprive Miles of the right of trial by jury? A quotation from the statute will afford a sufficient answer to the question. It declares that "if the sum demanded exceeds ten dollars, either party shall have a right, upon application therefor, to a trial by jury." Geyer's Digest, sec. 12, p. 387. Here the sum demanded exceeded ten dollars, application was made for trial by jury, and that mode of trial refused. This refusal of the justice, we think, was sufficiently irregular for setting aside his proceedings.

It was, consequently, error in the circuit court to confirm them. *Judgment reversed.*

ORSON V. HOWELL *vs.* PETER T. CRUTCHFIELD.

1. Under the act of 22d October, 1828, the superior court was made an appellate court only. Acts, 34.
2. The writ of mandamus is an original writ, and incident to original jurisdiction, and hence the superior court have no power to issue it.

January, 1831. — Motion for a rule, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This is a motion made by O. V. Howell, an attorney at law of this court, for a rule against Peter T. Crutchfield, the judge of the county court of Pulaski county, to show cause why a mandamus should not be granted by this court, commanding him to amend the

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record in a certain proceeding in the county court against O. V. Howell, for an alleged contempt offered by him to the county court.

The plaintiff in this motion states in his affidavit that the record of the proceedings in the case above stated is imperfect and incomplete, and entirely omits and fails to show several material parts of the proceedings, and mistakes others which were had in open court in the case, and that he believes it to be material to his rights and privileges as a man, as an attorney at law, and as a citizen, that a true and perfect record of all the proceedings in the case, upon two certain processes, purporting to be attachments against him, should be fully set forth in the records of the county court. He further states that he applied to the judge of the county court, by motion in open court, to have the records of the proceedings so amended as to have all the acts of the county court fully stated, but that the judge refused to hear his motion. The prayer is for a rule to show cause why a mandamus shall not issue to the judge of the Pulaski county court, commanding him at the next term of the court, to amend and alter the records of the last term, so as to set forth fully the proceedings before mentioned, or to signify something to the contrary to this court.

A preliminary question touching the jurisdiction of this court, to grant a mandamus in this case, has been made, and it is this question alone that we are called upon to decide at present. The act passed on the 22d of October, 1828, by the legislature of this territory, contains the following provisions: "That from and after the taking effect of this act, the superior court of this territory shall in all cases at law and equity be exclusively an appellate court, and shall not have original jurisdiction in any civil case, unless such as arise under the laws of the United States, or take cognizance of any criminal cases alleged to have been committed within this territory." Acts, 34.

To enable this court to issue, then, a mandamus, it must be shown to be an exercise of appellate jurisdiction. In the case of *Marbury* v. *Madison*, 1 Cranch, Rep. 137, the supreme court held that a mandamus to the secretary of State was an exercise of original jurisdiction, and discharged the rule. In the case of

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Daniel v. *The County Court of Warren*, 1 Bibb, Rep. 496, the court of appeals of Kentucky, held that a mandamus is an original writ, not an appellate process; that it is an emanation from and an incident to original jurisdiction only; that in its nature it is not necessary to the revision of a cause already adjudged or decreed, but does in itself create that cause, and on that ground overruled the motion. These cases are in point to show that the motion for the rule must be overruled.

JOHN JACOBS, appellant, *vs.* THOMAS JACOBS, administrator of Keziah Jacobs, deceased, appellee.

1. It is incompetent for a justice of the peace, after he has certified a transcript to the circuit court, to supply defects by certificate or otherwise; nor can they be supplied by the testimony of persons present at the trial.
2. The transcript, as certified, must be taken as true, and no extraneous matter can be received to add to or diminish it.
3. Where it does not appear that an appeal was prayed on the day of trial, and ten days notice is not given to the adverse party where the appeal is taken afterwards, it is proper to dismiss it.
4. But it can only be dismissed with costs, and it is erroneous to give judgment for the money in controversy.

January, 1831. — Appeal from Lafayette Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and James Woodson Bates, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This was an action for the recovery of money due upon an account brought by Thomas Jacobs against John Jacobs, before a justice of the peace for the county of Lafayette. There was a verdict and judgment before the justice, in favor of the plaintiff, for $78.00, from which the defendant appealed to the circuit court, which having dismissed the appeal, the cause has been brought by appeal to this court.

Two questions are presented by the record: first, whether the circuit court erred in dismissing the appeal; and second, whether the judgment rendered by that court, upon such dismissal, was

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correct and suitable. A justice of the peace is required by the statute to keep a docket, and to note in it every step taken in the progress of a cause pending before him, and a transcript from the docket thus kept is made evidence; and it is incompetent for the justice, after he shall have certified a transcript from his docket to the circuit court, to supply any defect that may exist in it, by certificate or otherwise; nor can such defect be supplied by the testimony of persons who were present at the trial before the justice. The transcript, as certified by the justice, must be taken as true, and no extraneous matter can be received by the court to add to or diminish it.

The circuit court decided correctly in refusing to receive both the certificate of the justice and the affidavits of witnesses, that an appeal was prayed for on the day of trial. The fact, whether an appeal was taken on the day of trial, was an important one in the progress of the cause, which ought to have been noted by the justice on his docket. The statute provides, that when an appeal is prayed for on the day of trial, it shall not be necessary to give notice to the adverse party; and, on the other hand, when an appeal is not prayed for on that day, a notice of ten days must be given to the opposite party.

It not appearing from the transcript of the justice's docket, as certified to the circuit court, that either an appeal was prayed for on the day of trial, or that ten days notice, as required, was given, the appeal was very properly dismissed by the circuit court. But, however correct the decision of the circuit court may have been in dismissing the appeal, the judgment of that court upon the dismission was erroneous, and must be reversed by this court. The circuit court, instead of dismissing the appeal, and rendering a judgment for costs only, gave a judgment for the money in controversy, as also for costs. This was error, and on this ground the judgment of the Lafayette circuit court must be reversed. *Judgment reversed accordingly.*

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HEWES SCULL, appellant, *vs.* SAMUEL C. ROANE, appellee.

1. Where there is a good and bad count in a declaration, and it appears that the evidence was applied solely to the bad count, the judgment must be reversed.
2. Where a note was payable when E. shall settle her accounts with S., *held* that S. was bound to coerce a settlement by suit or otherwise, and that the cause of action accrued to the payee, after the lapse of one year, that being a reasonable time.

January, 1831.— Appeal from Arkansas Circuit Court, determined before Benjamin Johnson, and Thomas P. Eskridge, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This is an action of assumpsit, brought by the appellee against the appellant.

The declaration contains three counts. The first, upon a note for the payment of money, in the following words: "Due Samuel C. Roane, $160.05, value received. N. B. This note to be paid when Mrs. Sarah Embree shall settle her accounts with H. Scull. March 7, 1828. (Signed) H. Scull." The second count is for money advanced and paid to the defendant; and the third count is for money assumed and paid at the request of defendant. The only breach contained in the declaration, is in the following words: "Yet the said plaintiff saith he has often requested the defendant to pay and discharge the above demanded sum of $160.05, namely, at the Port of Arkansas, on the 17th of January, 1829, before the issuing of this writ; but the said defendant has hitherto wholly refused to pay the said sum of $160.05 to the plaintiff." To each of these counts the defendant, in the court below, filed a general demurrer, which was overruled, and he then plead the general issue upon which the cause was tried, and judgment rendered in favor of the plaintiff; from which Scull has appealed to this court. The first point relied on for reversing the judgment is, that the breach assigned in the whole declaration is applicable by its terms to the last count only.

This, we think, must be conceded; it results, therefore, that

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the first two counts being without any breach, must be considered as totally defective.

But the last count, containing the requisite breach, is a good and valid count; and although at common law where the declaration contains a faulty and defective count, and a general verdict with entire damages is given, the judgment will be arrested or reversed on a writ of error or appeal. Yet this principle of the common law is changed. Geyer's Digest, p. 260, sec. 47. Our statute provides, "that where there are several counts in a declaration, one or more of which are faulty, and entire damages given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard such count or counts as are faulty."

But the counsel for the appellant contends, that as it appears by the bill of exceptions that the only evidence offered at the trial was the note declared upon in the first count, and as the first count is fatally defective, the judgment given in this case must be reversed, notwithstanding the declaration contains one good count. It is well settled, that the plaintiff in an action like the present may elect the count on which he will give the note in evidence. *Tuttle* v. *Mayo*, 7 Johns. 132; *Burdick* v. *Green*, 18 Johns. 14. Had the appellee in the case now under consideration, elected to give the note in evidence under the last count in the declaration, it was entirely competent for him to have done so, and the judgment in that event, as well by the decisions referred to as by our statute, would have been valid; but instead of this, the whole evidence was applied to a faulty and defective count, and the judgment, on that account, must be reversed.

Another question has been made and argued in this case, and as it may arise again in the court below, it may not be improper to express our opinion. It grows out of the instructions given to the jury. The judge of that court instructed the jury, "that from the face of the note declared upon, the defendant was bound to have coerced a settlement of his accounts against Mrs. Embree by suit or otherwise, and that from the lapse of time from the date of the note to the commencement of the suit, the defendant should be liable for the amount of the note." We

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think the instructions given were in accordance with the law. By a reference to the note, it will be seen, that it was made payable "when Mrs. Embree shall settle her accounts with H. Scull," the obligor in the note. It will hardly be contended that the note would never become due, upon the refusal of Mrs. Embree to make the settlement. This could not have been the intention of the parties, and contracts are to be so construed as to effectuate their intention. It was manifestly the intention of the parties, that Scull should be allowed a reasonable time to make a settlement of his accounts with the person named, and after that period his liability on the note would arise.

To permit Scull to take advantage of his own neglect in failing to coerce a settlement of his accounts in a reasonable time, would violate every principle of justice. This court accords in opinion with the court below, that after the lapse of one year a cause of action accrued to the appellee, upon the note described. *Judgment reversed.*

SALINE GRANDE et al., appellants, *vs.* CATHARINE JANE FOY, appellee.

1. The action of ejectment was authorized by our laws as far back as 1807, and continued to exist without the fiction of "lease, entry, and ouster," until 1816, when the common law was adopted by positive enactment, and the action of ejectment introduced according to the forms of the common law.
2. History of the action of ejectment reviewed, and our legislation on the subject referred to.

January, 1831. — Appeal from Crittenden Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

CROSS, J., delivered the opinion of the Court. — This was an action of ejectment, brought by the appellants against the appellee, in the circuit court of Crittenden county, for the recovery of a tract of land, containing five hundred and forty-four acres and forty-four hundredths of an acre.

At the last May term of the circuit court of that county, a

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motion was made on the part of the appellee to dismiss this cause upon the ground that there was no law in force in this territory by which the title to real estate could be tried, and the possession recovered by action of ejectment. This motion was sustained by the court, and the cause dismissed accordingly. To this decision, the appellants by their attorney excepted, and prayed an appeal to this court.

The record presents but a single question, namely, whether the court below erred in sustaining the motion to dismiss upon the ground, that by the laws of this territory the action of ejectment could not be maintained. The action of ejectment is peculiar to the common law, and was invented in England during the reign of Edward II., or in the early part of that of Edward III. Adams on Ejectment, ch. 1, p. 7, 8. On its first introduction, it was a remedy afforded a lessee for a term of years, when he had been ousted by the lessor for the recovery of his term, or the remainder of it, with damages. 3 Black. Com. 199. During the reign of Henry II. it was converted into a method of trying titles to the freeholds, but did not assume its fictitious form until the exile of Charles II. From the period of its first having been used in trying titles to land, up to the time last mentioned, an actual lease, entry, and ouster, which, according to its present modification, constitutes the fiction, was necessary, and without it the action could not be sustained.

By a recurrence to the history of our laws, and an inquiry, first, as to the period when the common law was adopted in this country; and secondly, whether as it now stands, the action of ejectment is authorized, we shall be enabled to arrive at a correct conclusion in regard to the question before us. In considering the first branch of the subject, it may be necessary to declare that by the treaty of cession in the year 1803, between France and the United States, the province, as it was then called, of Louisiana, was acquired; a portion of which now comprises Arkansas. At the first session of congress after the treaty, the president of the United States was authorized to take possession of the country, and a law was passed, entitled "An Act erecting Louisiana into two territories, and providing for the temporary government thereof." By this act all west of

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the Mississippi River, and south of latitude thirty-three north, was called the Territory of Orleans, and the residue the District of Louisiana. The same act vested in the governor and judges of the Territory of Indiana the power to make all laws which they might deem conducive to the good government of the inhabitants of the district, and declared that the laws then in force in the district, not inconsistent with its provisions, should continue in force until altered, modified, or repealed. Act of 1804, 3 Laws of United States, 608, 609.

The succeeding session of congress in 1805, passed a law further providing for the government of the District of Louisiana, by which the name was changed from that of district to that of the Territory of Louisiana, and a different legislative power created and vested in the governor and three, or a majority, of the judges of the territory. A provision was also inserted continuing all such laws and regulations as were in force at the time of its passage until altered, modified, or repealed. 3 Laws of United States, 659, 660.

That act continued in force until December, 1812, when the organic law of Missouri took effect. By that law the name of the Territory of Louisiana was changed to that of Missouri, and all laws and regulations in force at the time of its passage, and not inconsistent with its provisions, were declared to be in force until altered, modified, or repealed. In March, 1819, the law was passed creating the Territory of Arkansas, in the southern part of the Missouri Territory, which continues in like manner all such laws and regulations as were in force at the time of its passage until modified or repealed.

From this view it will be seen, that such laws and regulations as were in force at the time of the acquisition of Louisiana, were continued from time to time up to the date of our organic law in the year 1819, except such as were inconsistent with the constitution and laws of the United States, and until altered, modified, or repealed.

In 1816 the legislature of the Missouri Territory passed a law, by which it is enacted, "that the common law of England, which is of a general nature, and all statutes of the British parliament in aid of, or to supply the defects of the common law, and of a

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general nature and not local to that kingdom, which common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with, the constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the legislature." Geyer's Digest, 124.

By that act, which is still in force, the common law of England, of a general nature, is introduced, except where it conflicts with our statutes, or is repugnant to or inconsistent with the constitution and laws of the United States; and here, perhaps, the inquiry might be closed as to the period when the common law was adopted. To prosecute it further would be rather a matter of curiosity than necessity upon the present occasion. We are induced to believe, however, from the numerous common law phrases and terms used in our statutes anterior to the passage of the law of 1816, that it must have been adopted either by statutory provision or by common consent at an earlier day. As far back as the year 1807, we find most of the common law actions mentioned in the acts of the legislature of Louisiana, such as trespass *vi et armis*, ejectment, case, debt, covenant; also, the terms murder, presentment, and indictment. Demurrers, general and special, are spoken of, and pleas of various kinds known to be authorized by the common law. In using these terms, and recognizing such actions and pleas, did the legislature intend those only authorized by the laws and regulations in force at the time Louisiana was acquired? If so, it is doubtful whether the laws of France or Spain should have been resorted to, to find their definitions, and the manner of proceeding in them, inasmuch as the province of Louisiana had been acquired from the latter by virtue of the treaty of San Ildefonso, in October, 1800. It would certainly be conjectural altogether to say the laws of either of these governments were intended, and to say both would be absurd. To arrive at the conclusion, then, that the legislature intended actions, pleas, and terms defined by the laws of France or Spain or both, we have first to suppose their existence, and from this hypothetical existence the deduction must be made, that the legislature intended such actions, pleas, and terms, as were never known to their

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laws, or the laws of one of those governments. This would be a conclusion alike inconsistent with the rules of logic and law, and the legislature never so intended it. How then, it may be asked, are we to ascertain the meaning of the legislature in speaking of such actions, pleas, and terms, as are known to be sanctioned by the rules of the common law? Certainly, by referring to the common law itself, thereby avoiding the necessity of a hypothetical existence.

In corroboration of the opinion that the legislature alluded to the common law actions, pleas, and terms, is the fact, that all the proceedings had in the courts, immediately after the passage of the acts in which they are mentioned, were in accordance with the rules of the common law. The maxim, therefore, applies with great force, "*contemporanea expositio est fortissima in lege.*" The inquiry may be made, as to what has become of the laws and regulations declared to be in force by the act of Congress, passed in 1804. We would answer, that many have been abolished, or superseded by our statutes, and others have shared the fate of all ancient customs, when there no longer exists any necessity for their observance. The conclusion, therefore, is well founded, that the common law was, at least partially, adopted as far back as the year 1807, and indeed prior to that time, and it is not very material whether by common consent or by statute.

The second branch of the subject to be considered is, whether, by the common law as it now stands, the action of ejectment is authorized.

It has been contended that the act of 1816, adopting the common law, did not introduce it, because a statute was then in force, passed by the legislature of Louisiana in the year 1807, which is contrary to, and inconsistent with, that portion of the common law which relates to it. The statute alluded to is in the following words: "In all actions of ejectment, the plaintiff shall declare in his proper name, and instead of the fictitious suggestion of lease, entry, and ouster, shall state that he is legally entitled to the premises," &c. Geyer's Dig. p. 176. The legislature, by the act of 1816, have certainly introduced no part of the common law inconsistent with statutory provis-

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ions in force at the time of its passage, and hence it is clear, that the fiction, invented, as we have shown, during the exile of Charles II., pertaining to the action of ejectment, was excluded, the act of 1807 then being in force. But this does not prove that the legislature, by the qualifications inserted in the act of 1816, intended to exclude it according to its ancient form. The argument on the part of the appellee, appears to be based upon an assumption, that the action could not, at the time of the passage of the law of 1816, be maintained, by the rules of the common law, without the fictions. This is untrue. The lessee in England, may still prosecute ejectment for the recovery of his term, where he has been ousted, without the fictitious suggestions of lease, entry, and ouster, in the same way he could have done before its enaction, and so in this country after the time of 1807.

That the action of ejectment was authorized, at the time of the passage of that law, and afterwards, is as clearly indicated as it could be done without using express words for that purpose. It may be regarded as a negative statute, with an affirmative meaning. In 1823, the legislature of this territory passed an act, repealing the act of 1807, by which it evidently intended to revive the fiction.[1] But this does not change the matter in the slightest degree, according to the view we have taken, so far as the existence of the action itself is concerned. At the same session, and after the passage of the repealing act, just mentioned, an act was passed, regulating evidence in actions of ejectment; and if it should still be considered doubtful, as to the existence of the action under our laws, prior to 1816, and even afterwards, that act, we think, would settle the question. It is in these words: "*Be it enacted*, that the final certificate of any receiver of the United States land districts, in this territory, and certificates of confirmations of Spanish claims, shall be sufficient evidence of title, to commence and prosecute any action of ejectment," &c. This act clearly recognizes the

[1] NOTE BY THE JUDGE.—Judge Cross does not consider the question whether the fiction is authorized by the common law, as involved in the present case, and does not express an opinion on that subject.

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existence of the action, and were we to say that it could not be sustained, we should virtually nullify the act, because, without the existence of the action, the evidence it authorizes could not be received.

We are, therefore, of opinion that the action of ejectment was authorized by our laws, as far back as the year 1807; that it continued to exist without the fiction, until 1816, when the common law was adopted by positive enactment; that if it had not before existed, that act would have authorized it; that the act of 1823, repealing the act of 1807, did not affect its existence; and if we are deceived in all these positions, the act of 1823, regulating the evidence in ejectment, alone would introduce it. *Judgment reversed.*

WILLIAM E. WOODRUFF, appellant, *vs.* GEORGE BENTLEY, appellee.

1. Detinue lies against a person who has quitted the possession of property prior to the institution of suit.
2. If a defendant has been legally evicted, or returned the property before suit, this will bar the action.

January, 1831. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, Edward Cross, and James Woodson Bates, judges.

CROSS, J., delivered the opinion of the Court. — This was an action of detinue brought by the appellee against the appellant, in the Pulaski circuit court, for the recovery of a negro boy. The suit was commenced on the 22d February, 1830, and at the following June term, a verdict and judgment was recovered by the appellee. From the bill of exceptions taken by the appellant during the trial, it appears that the judge of the circuit court instructed the jury, that if they found from the evidence that the negro slave in contest was the property of the plaintiff, and that the defendant had possession of said slave in December or January last, although he might not have been in his possession at the date of the writ, they ought to find for the

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plaintiff, &c. In giving these instructions, it is contended that the court erred; first, because the appellant had restored the negro to the person from whom he had received him, in whose power it was to have effected a legal eviction before the commencement of the suit; and second, that the relation of bailor and bailee existed between the appellant and a certain Thomas Mathers, to whom the negro had been returned. The evidence, as collected from the bill of exceptions, is, that the appellee sent the negro in contest to a certain Thomas Mathers, his son-in-law, on the 23d December, 1827, where he remained in his employ and possession until October, 1829, when he (Mathers) hired him to the appellant. The negro remained in the possession of the appellant, under this contract of hirage, until the early part of January, 1830, when a man by the name of Harris came and demanded him, stating that he had purchased him from the appellee, upon condition that he could get peaceful possession of him. Appellant refused to deliver up said negro, declaring that he would deliver him to no person without an order from Mathers. A few days afterwards Mathers was seen in possession of the negro, on the way to his residence in Conway county. Two weeks thereafter he sent the negro to Little Rock, where appellant resides, with directions that the appellant would hire him, or that he should hire himself to some other person. The negro came to appellant's, and remained with him five or six days; when Chester Ashley put him in possession of the Messrs. Elliots, under a previous contract of hirage from said Mathers. In January preceding the commencement of the suit, the appellee called on Mathers, and told him to send home his negro, then in his possession. The question is, Are the instructions given to the jury by the judge of the circuit court correct, when applied to the facts above detailed?

It is certainly a well-settled principle, that detinue lies against a person who has quitted the possession of the property prior to the institution of the suit. Com. Dig. title Act, 364; *Bastie* v. *Lambert*, 1 Wash. Rep. 176. When, however, the defendant has been legally evicted before the institution of the suit, it would operate as a bar, and a recovery could not be had in detinue. Ib. 116. And so where the relation of bailor and

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bailee exists, a return of the property by the bailee would bar the action, and after a demand made by a person who had title. 1 Bac. Abr. title Bailment, 375; Roll. Abr. 607; 2 Bos. & P. 462.

This doctrine, as was justly remarked by the counsel for the appellant, is founded in the best policy. Were it otherwise, a door would be open placing it in the power of corrupt individuals, by combining, to practise incalculable frauds and impositions upon society. Besides, it would greatly impair the beneficial relations growing out of contracts of hirage, or any other species of bailment. But does the evidence in this case show that the appellant was legally evicted, or that he stood in the attitude of a bailee and returned the property to Mathers, the bailor? We think not. His contract for the hire of the negro took place in October, 1829, under which he remained in possession until some time in January following. A demand was then made by Harris, who alleged that he had purchased from appellee. Shortly afterwards appellant returned the negro to Mathers. With this return the relation of bailor and bailee ceased; and if nothing further had appeared from the evidence, we would be disposed to reverse the judgment. But it did not close at this stage of the transaction. After the return of the negro, the appellee called on Mathers for him, and immediately afterwards he was sent back to appellant, without any contract or obligation on the part of Mathers to do so. He remained in the possession of, or, to use the language in the bill of exceptions, stayed with the appellant five or six days. The appellee, it seems, ascertained in the mean time where his property was, and, intent upon requiring it in specie, brings suit against the appellant. But before the writ was sued out, the negro is taken by Ashley, and by him placed in the hands of Messrs. Elliots. The appellant, therefore, had not been legally evicted prior to the institution of the suit; nor can he be regarded, under the circumstances, as having stood in the attitude of a bailee. Mathers himself appears to have held the negro only in that character under Bentley, as his bailor. And the appellant was apprised of his (Bentley's) claim before the negro came to his possession the second time. It is questionable whether he was

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not, under this state of case, equally responsible with Mathers to Bentley. We are, therefore, of opinion that the instructions of the circuit court given to the jury, when applied to the facts of the case, are substantially correct. *Judgment affirmed.*

WILLIAM BLAKELEY, complainant, *vs.* HENRY L. BISCOE, defendant.

Where there is a plain and adequate remedy at law, a court of chancery has no jurisdiction.

January, 1831. — Bill in chancery, determined before Benjamin Johnson, Thomas P. Eskridge, Edward Cross, and James Woodson Bates, judges.

JOHNSON, J., delivered the opinion of the Court. — This is a bill in chancery, filed by Blakeley against Biscoe, to which the defendant has filed a general demurrer. Blakeley, in his bill, alleges that in the year one thousand eight hundred and twenty-one, administration of the estate of Moses Graham was duly granted to him in the county of Clark; that he proceeded to sell the personal estate of Graham according to law, taking notes or bonds of the purchasers amounting to six hundred and fifty-three dollars; that shortly after the sale he employed the defendant Biscoe, to act as his agent in all things pertaining to the administration of the estate, and that Biscoe undertook and faithfully promised to do and perform every duty required of the complainant in relation to his administration, and finally to settle the same as required by law, and to pay over the balance of the assets, if any, after the settlement, to the complainant, and as a consideration for his services, Biscoe was to retain six per centum out of the amount of the estate; that Biscoe agreed and bound himself to keep a just and true account of all money received by him, as agent, stating when it was received and how appropriated, and to exhibit the account to the complainant whenever requested; that the complainant, in pursuance of the agreement, delivered the notes taken at the

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sale before mentioned, amounting to $653, to the defendant Biscoe, who received and collected the amount of the notes. The bill further alleges, that the defendant Biscoe failed and still refuses to make the settlement of the administration, refuses to account for and pay over the money in his hands unexpended, and also refuses to exhibit a just and true account of all moneys received, of whom received, to whom paid, and for what purpose. The prayer of the bill is, that the defendant may be compelled to state and set forth a just and true account of his agency, pay over the money remaining in his hands, and for general relief.

Upon the case just stated the question arises, whether a court of chancery can entertain jurisdiction. Where there is a plain and adequate remedy at law, a court of chancery will not grant relief. This principle has become a maxim in the code of equity, and is sustained by innumerable authorities. 1 Bibb, Rep. 212; 2 Ib. 273. Is there a plain and adequate remedy at law for the case stated in the present bill? The case stated and set out in the bill is nothing more nor less than a contract between the plaintiff and defendant, by which the latter agrees to act as the agent of the former in collecting certain bonds or notes, and of attending to the settlement of an intestate's estate, and to pay the balance over. For the breach of this contract the law surely affords an adequate remedy without a resort to equity. An action on the case, either in contract or in tort, is the appropriate action in which the plaintiff may recover all the damages to which he is entitled. If he seeks a recovery only of the money remaining in the hands of the defendant as in the present bill, the action of assumpsit is the appropriate remedy. If he also claims damages, as he would seem to do in the present bill, a special count for the non-feasance or misfeasance, will afford redress. It is manifest, then, that there can be no necessity to resort to a court of equity to obtain relief. It is not a case for an account, as has been contended. A bill for an account will lie only when there are mutual demands forming the ground of a series of accounts, on one hand, and a series of payments on the other, and not merely one payment and one receipt. 1 Mad. Chan. 570; 6 Ves. 136; 9 Ves. 473. Nor

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does the bill allege the necessity of coming into chancery for a discovery. There is no allegation that the plaintiff is unable to prove the contract and the delivery of the notes to the defendant. Upon the whole we think it a clear case for an action at law, which is competent to afford ample redress, and consequently the chancellor will not take jurisdiction.

Demurrer sustained.

ADAM STROUD, appellant, *vs.* BARTLEY HARRINGTON, appellee.

1. At the common law, non-assumpsit put the plaintiff to the proof of all the material averments in the declaration, and where he relied on an indorsement, it was necessary for him to prove it.
2. By statute, the writing on which the suit is founded is receivable without proof of execution, unless the execution is denied on oath; but this does not embrace an indorsement where the suit is not founded on the indorsement, and in such case, without proof of execution, the plaintiff is not entitled to judgment.

January, 1831.— Appeal, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

JOHNSON, J., delivered the opinion of the Court.— This is an action of assumpsit, brought by Harrington, assignee of Benjamin Clarke, against Stroud, in the Clark circuit court. The declaration is founded upon a promissory note, executed by Stroud to Benjamin Clarke, with his name indorsed thereon by a blank indorsement. Stroud plead the general issue of non-assumpsit, and neither party requiring a jury, the cause was, by consent, submitted to the court. No evidence was adduced on the trial to prove the indorsement of the note by "B. Clarke," the payee thereof, and on that ground the defendant moved the court to enter a nonsuit against the plaintiff, which motion was overruled.

The defendant then offered to introduce evidence to impeach the assignment or indorsement of the note; which motion was also overruled. A judgment was thereupon rendered for the plaintiff in the court below, for the amount specified in the note. The defendant moved the court for a new trial, which

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motion was overruled. From this judgment Stroud has appealed to this court. The only point we deem material to decide is, whether the court below erred in rendering a judgment without requiring proof of the indorsement of the note declared on, and in rejecting evidence to impeach the assignment. By the rules of pleading at common law, it is admitted that the plea of non-assumpsit denies all the material averments in the declaration, and puts the plaintiff to the proof of them; and that without proof of the indorsement, a recovery could not be had. But it is contended, that by our statute, the common law in this respect is changed; and that an indorsement of a note can only be denied by a plea verified by the oath of the party putting in the plea. Our statute is in the following words: "Whenever any suit shall be commenced in any court in this territory, founded on any writing, whether the same be under seal or not, the court before whom the same is depending shall receive such writing in evidence of the debt or duty for which it was given, and it shall not be lawful for the defendant in any such suit to deny the execution of such writing, unless it be by plea, supported by the affidavit of the party putting in such plea, which affidavit shall accompany the plea and be filed therewith at the time such plea is filed." Geyer's Digest, 250.

It is manifest that the indorsement of a note, unless the action is founded upon the indorsement against the indorser, is not embraced by the letter of the above-recited statute. It requires that a plea denying the execution of the writing upon which the suit is founded shall be accompanied by the oath of the party putting in such plea. What is meant by the execution of the writing? Unquestionably, the making, signing, and delivery of the note or bond. The indorsement constitutes no part of the execution of the note. Its only operation is to transfer it from one person to another after it has been duly executed. We are equally clear in the opinion that the indorsement of a note is not embraced by the spirit and intention of our statute, unless the action is founded on the indorsement against the indorser. The indorsers may be, and frequently are, strangers to the maker of the note, who cannot be presumed to know their handwriting. Suspicious circum-

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stances may exist in relation to the assignment, and yet the maker is ignorant of the indorser's handwriting, and cannot safely deny it under oath. He is compelled to admit it, or swear to that of which he is ignorant. A doctrine from which such consequences result cannot be admitted to be correct. The case of *Mills* v. *The Bank of the United States*, 11 Wheat. 431, does not apply to the case before the court.

Mills was sued as an indorser by the bank, and under a rule of court, in substance analogous to our statute, he was not permitted to deny his assignment unless he did so under oath. And we should not hesitate to apply the same rule under our statute. It was then erroneous, we think, to render judgment for the plaintiff in the court below, without proof of the indorsement of the note by Clarke, and on that ground the judgment must be reversed. *Judgment reversed.*

THE UNITED STATES, complainants, *vs.* BERNARDO SAMPERYAC and JOSEPH STEWART, defendants.

1. It rests in the sound discretion of the chancellor, to award a feigned issue, or not; and it is done, to enable him to obtain additional facts, and to arrive at a satisfactory conclusion on the facts of the case.
2. The verdict of the jury, on a feigned issue, is not conclusive, for the chancellor may have it tried again and again, and may even decree against a verdict.
3. Where there is sufficient proof to enable the chancellor to decide, the parties should not be subjected to the delay and expense of a trial at law.
4. The act of May 26, 1824, (4 Stat. 52) confers on this court the powers of a court of chancery, for the purpose of trying the validity of claims mentioned in that act, and a bill of review may be maintained therein.
5. A bill of review lies either for error in law, appearing on the face of the decree, or for new material matter, that has come to light afterwards, and which could not have been used at the time the decree was made.
6. The bill must be founded on new matter to prove what was before in issue, for a party cannot be entitled to a bill of review on new matter, to prove a title which was not in issue.
7. Where a fraudulent claim was set up, and sustained by false testimony, the decree may be reversed and annulled, on a bill of review, and no rights can be acquired under such former decree.
8. When the allegations of a bill are distinct and positive, they are taken as

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true, without proof, after a decree *pro confesso;* which, in its effect, is like a judgment by *nil dicit* at law.

9. But where the allegations are so defective or vague, that a precise decree cannot be rendered upon them, proof must necessarily be adduced before a decree can be made.
10. A refusal to deny, where a party is legally bound to speak, is equivalent to an admission of the charges against him. What is admitted need not be proved.
11. The general denial of allegations, by one uninformed as to their truth, will not be sufficient to dissolve an injunction.
12. A bill of review will be barred by the lapse of a reasonable time, after discovery of the new matter; but what shall be considered reasonable time, depends upon the sound discretion of the chancellor, under all the circumstances of the case.
13. Fraud, deduced from circumstances, may be sufficient to outweigh positive proof to the contrary.
14. Startling frauds and forgeries proved and commented on.
15. Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee, and the latter takes only an equitable interest; which is subject to every equity and charge which attached to them in the hands of the assignor.
16. A purchaser for a valuable consideration without notice, must be clothed with the legal title, and not a mere equity, in order to protect himself.
17. No one can occupy the attitude of an innocent purchaser, under a forged claim and conveyance.
18. Construction of the act of Congress of the 8th May, 1830, 4 Stat. 399; and *held* not to require the observance of all the technical rules in the ordinary course of chancery practice on a bill of review, under that act.
19. Almost every law providing a new remedy, affects causes of action existing at the time the law is passed; but such a law is not for that reason invalid.
20. It is incontestable, that a grantee can convey no better title than he possesses, and hence, those who come in under a void grant acquire nothing.

February, 1831. — Bill of review in chancery, determined before Benjamin Johnson, Thomas P. Eskridge, James Woodson Bates, and Edward Cross, judges of the Superior Court of the United States for the Territory of Arkansas.

Bernardo Samperyac, under the act of Congress of the 26th of May, 1824, (7 Laws U. S. 300) entitled "An Act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," by R. C. Oden, his solicitor, filed his bill against the United States, in the office of the clerk of

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the superior court of the Territory of Arkansas, on the 21st of November, 1827; stating that he, an inhabitant of the Province of Louisiana, on the 6th of October, 1789, addressed a petition to the governor of the said province and its dependencies, asking a grant of land in full property, on Strawberry River in Arkansas district, containing ten arpens in front by the usual depth; that on the 11th of October, 1789, Miro, the governor of the Province of Louisiana, made the grant as requested, and at the same time issued an order of survey to the surveyor-general of the province, to the end that the boundaries of the grant might be defined for the purpose of making a title in form; that this grant was secured by the treaty between the United States and France of the 30th of April, 1803, and would have been perfected into a perfect title under the government under which it originated, had there been no change of sovereignty; and the bill prayed the court to confirm the said grant, according to the provisions of the act of Congress before mentioned, and that process be issued against the attorney of the United States for the Territory of Arkansas, to appear and answer the bill.

The petition of Samperyac, and the order of survey, in the Spanish language, attached to the bill as exhibits, translated by James H. Lucas, the sworn interpreter and translator of the court, were as follows, namely: —

PETITION.

To the Governor of the Province of Louisiana and its dependencies, &c. &c.

Bernardo Samperyac, wishing to establish himself on Strawberry River in the Arkansas district, prays that you will do him the favor to grant him ten arpens of land in front by the usual depth, being the lands of his Catholic Majesty, and not causing any prejudice; a favor your petitioner hopes to receive from your bounty; and he will ever pray to God for your health.

BERNARDO SAMPERYAC.

New Orleans, 6th Oct., 1789.

ORDER OF SURVEY.

New Orleans, 11th Oct., 1789.

The surveyor of this province, Don Charles Trudeau, will

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establish this tract, on the ten arpens of land requested, by the usual depth, and will mention the bounds, in order that they may appear at the time that the boundaries have to be defined, for the purpose of making a title in form. MIRO.

Process having been executed on Samuel C. Roane, district attorney, on the 24th of November, 1827, he filed an answer in behalf of the United States, denying the facts and allegations in the bill, and alleging that grants could only be made legally to persons actually residing in the Province of Louisiana; that Samperyac, in whose name the bill was filed, was a fictitious person without actual existence; or that if he ever existed he was a foreigner, or then dead, and made no transfer, or assignment, of the claim in his lifetime; that he had no legal representative in existence; that there was no one now living, who was authorized to file this bill or prosecute this suit, and prayed that the bill might be dismissed. On the 19th of December, 1827, the district attorney moved to continue the cause until the next term, principally on the ground that there were many cases pending in the court, similar in all respects, and involving the same principles, and with regard to which the United States desired to procure evidence if any existed. The court denied the motion, and the district attorney excepted, and the court signed and sealed his bill of exceptions.

The testimony in behalf of the complainants was the exhibits to the bill already referred to, and the deposition of John Hebrard, of the parish of Ouchita and State of Louisiana, taken in open court on the 19th of December, 1827. He testified that he was about seventy-one years old; that he was alcalde in the Province of Louisiana, under the Spanish government, from 1789 to 1791, under the appointment of Miro, governor of said province; that he was commandant in Catahoola from 1797, under the appointment of Manuel Gayoso de Lemos, governor of said province, until the country was transferred to the United States; that he was often in the executive offices of those governors during their administration; had often seen them write, and from his official situation had occasion for a continued correspondence with each of them during the times they were

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respectively governors of said province, and that he was well acquainted with their handwriting; that he had examined the signature to the grant in this case, and found it to be in the proper handwriting of Miro, governor of said province at that time. He further testified, that the grant in this case was in the most usual form and mode of granting lands by the said governors, and would have been perfected into a title in form under the Spanish government; that lands thus granted were considered and treated by the government and the grantee as established titles, and were to be surveyed or not as the grantee chose; that a concession or order of survey, calling for lands fronting on watercourses, were to be run off, when surveyed, as follows: commencing from forty to sixty feet back from the highest high land, after passing all overflowed land if any in front, and the grantees were authorized to locate the grant on entirely good, arable land, so as neither to include inundated nor barren land, unless they chose to do so. He further testified, that the command of Arkansas commenced on the Mississippi River, at a place called Little Prairie, about forty miles below New Madrid, and fronted on the Mississippi down to Grand Point Coupee, now called Lake Providence, in Ouchita parish, State of Louisiana, and extended back west so as to include all the waters which emptied into the Mississippi from the west, between those points. He stated, on cross-examination, that he knew Bernardo Samperyac; that he resided in the Province of Louisiana at the date of the order of survey, 11th October, 1789, and was then living on Red River in Natchitoches parish, Louisiana; that in granting lands to individuals, the consideration frequently was for services rendered the government, but more frequently to induce population; that any man from any quarter could and generally did obtain concessions and orders of survey; that the Spanish governors kept records of grants, but that the destruction of the offices at New Orleans by fire, in 1792 or 1793, destroyed the greater part of the records, and that a great many more were said to have been purloined and taken off, about the change of government, by officers who had been attached to the Spanish executive offices; that, as to granting lands, the governors-general of

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Louisiana were limited as to jurisdiction and quantity. They were authorized and empowered by the laws, usages, and customs of the Spanish government to grant lands not exceeding one league square, in the Province of Louisiana, which commenced at the mouth of the Mississippi River, and extended back so as to include all Upper and Lower Louisiana.

On the same day, the 19th December, 1827, the superior court, held by Benjamin Johnson and William Trimble, judges, on the foregoing testimony, decreed the confirmation of the said grant to Bernardo Samperyac, as for four hundred arpens of land, and the decree was recorded, and no appeal taken from it by the United States within one year.

One hundred and thirty other cases before the same court, against the United States, in the names of different claimants, were confirmed for four hundred arpens of land each, on the same testimony, and decrees entered and recorded, and from which no appeals were taken.

On the 14th of February, 1828, Samperyac transferred his claim by deed to John J. Borrie; and in December, 1828, Joseph Stewart, it was admitted on the part of the United States, purchased the claim from John J. Borrie by deed, for a valuable consideration, and in good faith; by virtue of which purchase, Stewart entered at the Little Rock land-office, on the 13th of December, 1828, the north-east quarter of seventeen, the east half of south-east quarter of seventeen, and the west half of north-east quarter of thirteen; all in township eleven, south of range twenty-six west, containing 320 acres, relinquishing the overplus of twenty acres; and obtained the certificate of entry of Bernard Smith, the register thereof.

On the 10th of April, 1830, the United States, by Samuel C. Roane, their attorney for the Territory of Arkansas, filed in the superior court, by leave thereof, their bill of review against Bernardo Samperyac, setting out the proceedings in the foregoing case, and alleging that the original decree was obtained by fraud and surprise; that the petition and order of survey were forged; that Hebrard, the witness in the cause, committed the crime of perjury; that the order of survey was never signed by Miro, governor of Louisiana, as it purported to have been, and

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that this fact had come to the knowledge of the said district attorney since the decree was entered; that Samperyac was a fictitious person, and never had existence; that the district attorney had discovered new and important record evidence, of the existence of which he was not aware, and which was not within his control at the hearing of the cause, and which could be procured, if a rehearing was allowed; and praying that said decree and proceedings might be reviewed and reversed and annulled.

Bills of review were filed in each of the other cases, at the same time setting forth the same facts.

On the 8th of May, 1830, congress passed an act entitled "An Act for further extending the powers of the judges of the superior court of the Territory of Arkansas, under the act of the 26th day of May, 1824, and for other purposes," continuing in force that act so far as it related to claims within the Territory of Arkansas until the 1st of July, 1831, "for the purpose of enabling the court in Arkansas having cognizance of claims under the said act to proceed by bills of review filed, or to be filed, in the said court on the part of the United States, for the purpose of revising all or any of the decrees of the said court in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed in any case on any forged warrant, concession, grant, order of survey, or other evidence of title; and in every case wherein it shall appear to the said court, on the prosecution of any such bill of review, that such warrant, concession, grant, order of survey, or other evidence of title, is a forgery, it shall be lawful, and the said court is hereby authorized to proceed, by further order and decree, to reverse and annul any prior decree or adjudication upon such claim; and thereupon such prior decree or adjudication shall be deemed and held in all places whatever to be null and void, to all intents and purposes. And the said court shall proceed on such bills of review by such rules of practice and regulations as they may adopt for the execution of the powers vested or confirmed in them by this act." 8 Laws U. S. 297, 298.

Samperyac was proceeded against as an absent defendant,

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after the return of the process that "he was not to be found in the Territory of Arkansas." On the 28th of October, 1830, Joseph Stewart was permitted to file his answer, and become a defendant, which was excepted to on the part of the United States, and a bill of exceptions signed and sealed by the court. On the same day, a decree *pro confesso* was entered against Bernardo Samperyac, he having failed to appear and answer the bill.

The answer of Stewart denied the frauds and forgeries alleged in the bill, and averred that if there was any fraud, corruption, or forgery, he was ignorant of it, and that he *bonâ fide* purchased the claim, for a valuable consideration, from John J. Borrie, by deed, and had entered the same at the Little Rock land-office, and ought not to be divested of the land so entered; and that the said decree, being for less than five hundred acres, and not having been appealed from within one year, was final and conclusive, and could not be annulled or set aside. The cause was set down for final hearing at the next term; and, on motion of the district attorney, it was ordered that he have leave to withdraw from the record files of the court the original Spanish paper in this case, for the purpose of taking depositions, the Hon. James Woodson Bates, one of the judges, dissenting. The clerk was required to retain a copy of the paper.

On the 26th of January, 1831, the cause came on for final hearing, on bill, answers, exhibits, and testimony; and was argued by counsel until the 1st of February, 1831, and was then submitted, and by the court taken under advisement.

On the 4th of February, 1831, the defendants filed their written motion that the court submit the question of forgery *vel non*, of the order of survey, to the decision of a jury; and this motion was taken under advisement.

The testimony adduced under the bill of review is sufficiently referred to in the opinion of the majority of the court, and need not here be recapitulated.

On the 7th of February, 1831, the above motion was overruled by the following opinion of the court: —

Per Curiam. — We are of opinion that the motion to award

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a feigned issue in this case should be overruled, for the following reasons: —

1. Because it rests in the sound discretion of the chancellor to award a feigned issue or not; and where the truth of the facts can be satisfactorily ascertained by the chancellor, without the aid of a jury, it is his duty to decide as to the facts, and not subject the parties to the expense and delay of a trial at law. *Dale* v. *Roosevelt*, 6 Johns. Ch. Rep. 255.

2. Because the chancellor, when he directs such issue, does it upon the ground that the evidence produced before him in the record is not sufficient to enable him to arrive at a satisfactory conclusion; he, therefore, directs the facts to be tried by a jury, for the purpose of collecting additional evidence; which additional evidence, when so collected, the chancellor considers in connection with that already existing in the records of the chancery court. *Bootle* v. *Blundell*, 19 Vesey, jr. 500; 1 Archbold's Practice, 347, 348, 349.

3. Because the verdict of the jury upon such feigned issue, is not conclusive upon the chancellor; he may have it tried again and again, if these verdicts are not agreeable to his sense of justice; or he may even decree contrary to a verdict, if he thinks proper. *Moris* v. *Davis*, 14 Sergt. & Lob. 380.

4. Because the bill in this case has been taken for confessed, and every distinct and positive allegation in it must be taken as true. *Williams* v. *Corwin*, 1 Hopkins, 471.

Motion overruled.

On the 7th of February, 1831, the court decreed that the former decree in favor of Bernardo Samperyac against the United States, for four hundred arpens of land, pronounced and recorded at the December term of this court in 1827, be reversed, annulled, and held for nought; and that Stewart pay his own costs. Decrees of reversal were pronounced in the other cases.

Samuel C. Roane, district attorney, and *William S. Fulton*, for the United States.

Chester Ashley, *Robert Crittenden*, *William Trimble*, and *William Kelly*, for defendants.

JOHNSON, J. — This is a bill of review, filed by Samuel C. Roane, attorney of the United States for the Territory of Arkan-

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sas, for and on behalf of the United States, to revise, reverse, and annul a former decree of this court, pronounced and recorded at the December term, 1827, in favor of Bernardo Samperyac, for four hundred arpens of land.

The substantial allegations in the bill of review are, that the decree is erroneous, and was obtained by fraud and surprise; that the original petition, or requite and order of survey exhibited in this case, are forged and corrupt; and that the order of survey was never signed by Miro, governor of Louisiana, as the same purports to have been; and that this fact has come to the knowledge of the said district attorney since said decree was entered of record; that Bernardo Samperyac is a fictitious person, and never had an actual existence; that if he ever did exist, he was dead at the time of exhibiting his bill; that John Hebrard, upon whose testimony the decree was made, committed the crime of perjury in giving his testimony; and that the statements sworn to by him upon the hearing of this cause, as set forth in his deposition, are false and corrupt; that the original petition and order of survey in this case, shows upon its face, that it was not made as early as the year 1789, but appears to have been made long since; and that the former decree of this court was obtained by fraud, covin, and misrepresentation, in violation of the principles of equity and of law.

The district attorney, for and on behalf of the United States, avers and says, that since the decree was made in this case, he has discovered new and important record evidence, which was not within his control, and the existence of which he did not know, and had not time to procure at the hearing of this cause; all which he believes he will be able to procure and exhibit upon the final hearing.

The first question made and argued at the bar, which will be considered, relates to the power conferred on this court by the act of congress of the 26th May, 1824, entitled "An Act enabling the claimants to land within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims."

It is contended by the counsel for the defendants that the act of 1824 constituted a special tribunal, with limited and restricted

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powers; that full chancery powers were not conferred; that this court possessed no greater powers than have been heretofore delegated to boards of commissioners, created by acts of congress, to decide upon claims similar to those now pending in this court; that this court cannot entertain a bill of review, because the authority to do so is not given by the act of 1824. That this court, sitting as a court for the adjudication of French and Spanish claims, possesses no power not delegated and conferred by the several acts of congress upon that subject, we are ready to admit.

To ascertain the extent of the power and jurisdiction of this court, let us examine the act of 1824. That act provides, that it shall be lawful for certain claimants to present a petition to the district court of the State of Missouri, setting forth their claims as pointed out in the act; praying in said petition, that the validity of such title or claim may be inquired into and decreed by said court; and the said court is authorized and required to hold and exercise jurisdiction of any petition presented in conformity with the provisions of the act, and to hear and determine the same on the petition, in case no answer be filed, after due notice, or on the petition and answer of any person interested; and the answer of the district attorney of the United States, where he may have filed an answer, according to the evidence which may be adduced by the parties, in conformity with the principles of justice, and according to the laws and ordinances of the government under which the claim originated; a copy of the petition to be served on any adverse claimant, and on the district attorney of the United States when the government is interested in the defence. The act further provides, that any petition which shall be presented, shall be conducted according to the rules of a court of equity, except that the answer of the district attorney of the United States shall not be required to be verified by his oath, and tried without any continuance, unless for cause shown; and said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimants, and, by a final decree, to settle and determine the validity thereof, according to the laws of nations, and all other ques-

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tions properly arising between the claimants and the United States; and the court may, at its discretion, order disputed facts to be found by a jury, according to the practice of said court, when directing issues in chancery before the same court; and in all cases, an appeal to the supreme court of the United States is allowed, within one year from the rendition of the judgment or decree, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the said district court shall, in like manner, be final and conclusive.

By the 14th section of the act of 1824, it is enacted, "That all the provisions of that act shall extend to and be applicable to the Territory of Arkansas, and for the purpose of finally settling and adjusting the title and claims to land derived from the French and Spanish governments; the superior court for the Territory of Arkansas, shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations, in all respects, as by this act is given to the district court for the State of Missouri."

The question arises under the foregoing act, Whether this court has been clothed with full and complete chancery jurisdiction and power, in adjudicating upon these claims; or whether it has been invested with a limited and restricted authority, capable of performing nothing which is not expressly delegated by the act, resembling rather a board of commissioners than a court of equity? Upon the best reflection which we have been able to bestow upon the subject, we entertain little doubt that the act of 1824, intended to confer, and does confer, upon this court, the full and ample power of a court of chancery.

Instead of creating a special tribunal, a board of commissioners to decide and report upon claims like these, congress has referred them to the decision of a court, possessed of common law and chancery jurisdiction; a court invested with a part of the judicial power of the United States.

The cases, when brought before this court, are to be conducted according to the rules of a court of equity. This court, then, possessing both chancery powers and common law jurisdiction, are required to try these cases on the chancery side of the court.

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The fact that the cognizance of these claims is given to a court possessed of full and ample equity jurisdiction, with the injunction to try the cases according to the rules of a court of equity, goes far to prove that congress intended to refer them to the judiciary, and allow the United States to be sued before her own courts, that a final termination might be put to these demands upon her justice. The provision for an appeal from the decision of this court to the supreme court of the United States, by either party, strongly evinces the intention of congress that these claims should receive their adjudication by the judiciary of the United States. If, then, congress intended to refer them to the judiciary, can it be reasonably inferred that they intended to limit the general powers of the court to which the reference is made? We think not.

The act, in terms, does not limit the jurisdiction of this court; and we are not to infer a limitation unless it be expressed, or arises from a necessary implication.

If we are correct in affirming the proposition that the act of 1824 authorizing certain claimants to bring suit against the United States, on the equity side, possessed of full chancery power and jurisdiction, it follows, that a bill of review will lie in this court, unless there be something in the act itself forbidding it.

It has been urged that that part of the act which says that the judgment or decree of this court, unless appealed from in one year, shall be final and conclusive, necessarily precludes the idea of a bill of review. We entertain a different opinion. The provision just referred to, relates to the time in which an appeal may be taken. It says nothing about a bill of review, or rehearing.

Each of these modes of revising the decrees of this court, according to the practice in chancery, is left untouched, and stands precisely as they existed had no time been limited for an appeal. The court entertains a bill of review, in virtue of the chancery jurisdiction conferred by the act of congress by which it was created, and possessing that power previous to the act of 1824, continued to possess it, with the authority to apply it to these cases, for the adjudication of which the latter act was

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passed. It is, however, further contended by the counsel for the defendants, that, as the bill of review in this case was filed upwards of two years subsequent to the final decree in the original cause, and more than one year after the time allowed for an appeal had elapsed, this remedy is barred by length of time. In the case of *Thomas* v. *Harvie*, 10 Wheat. 146, the supreme court of the United States held that a bill of review, for error apparent in the decree, is barred by length of time, unless it is filed before the time limited for an appeal; but, in the same case, the court expressly reserved the question, whether a bill of review, founded upon matter discovered since the decree, is in like manner barred by the lapse of the time limited for the appeal. That question is directly presented in this case, and calls for our decision. We have bestowed upon it all the reflection of which we are capable; and the conclusion to which we have arrived is, that a bill of review, founded on the discovery of new matter after the decree, ought not to be barred by the lapse of one year, the time limited in these cases; nor do we think it ought to be barred by the lapse of two years and four months, the time between the former decree and the filing of this bill. The reasons assigned by the supreme court, in the case cited, for applying as a bar to bills of review for error apparent on the face of the decree, the time limited for an appeal, do not, in our judgment, apply to the case of a bill of review, founded on new matter, discovered subsequent to the decree. Judge Washington, in delivering the opinion of the court, says, "that courts of equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands, its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts;" and the decision was, that, although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought.

In the case of a bill of review for new matter recently discovered, no laches or neglect can, we think, be properly imputed to the party filing the bill.

It is allowed only on the ground of his ignorance of the ex-

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istence of the new matter before the former decree; and it is incumbent on him to file his bill in a reasonable time after the discovery is made; all this is alleged in the present bill. The bill could not be filed within one year after the decree, because the new matter had not then come to light, but was subsequently discovered.

If, then, laches or neglect are not imputable, has so great a time intervened that it may justly be denominated a stale demand? Two years and four months can scarcely be considered in that light. It would not bar an action of assumpsit upon a parol contract, and cannot be considered an unreasonable delay in bringing a bill of review. In England, twenty years is allowed; and in the case decided in 10 Wheaton, before cited, five years was allowed.

We do not think that, to a bill of review for new matter, no lapse of time ought to bar the remedy. Upon the principle of repose, we think the lapse of a reasonable time ought to present a bar; what that reasonable time should be considered, and it is well settled to be in the sound discretion of the chancellor, it is unnecessary for us to decide, since we are clearly of opinion that two years and four months is not an unreasonable time for filing a bill of review. Whether the principle settled by the supreme court of the United States, in several cases, that laches are not imputable to the government, ought to apply in this case, we need not decide. The second inquiry which arises in this case, and which has been ably argued at the bar, is, whether a case is made out for a bill of review according to the established principles of equity.

The material allegations in the bill have already been stated, by which it appears that the main and principal ground relied upon for a review, is the discovery of new matter since the making the former decree.

The only allegation we deem material to notice is, that the original petition, or requite and order of survey on which the decree was based, is forged and corrupt, and was never signed by Miro, governor of Louisiana; and that this fact has come to the knowledge of the district attorney of the United States since the rendition of the decree, asked to be reviewed; and

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that he has, since the said decree, discovered new and important record evidence, which was not within his control, the existence of which he did not know, and had not time to procure, at the hearing of the cause.

The objections urged by the counsel for the defendants are, that this is a matter which was put in issue by the pleadings in this case before the former decree was pronounced and recorded; and having been once put in issue, a bill of review will not lie for the discovery of evidence relating to the matter put in issue previous to the decree; that a bill of review will lie only for error apparent in the decree, or for new matter subsequently discovered, which was not in issue between the parties. Let us examine this position. The ordinances of Lord Chancellor Bacon respecting bills of review, are generally referred to as good authority, and have never been departed from. 3 Atkyns, 26. The doctrine is there asserted that no bill of review shall be admitted except it contain either error in law, appearing in the body of the decree, or some new matter which has arisen after the decree, and not any new proof that has come to light after the decree was made; nevertheless, upon new proof that has come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be granted.

According to the doctrine of the above ordinance, the present bill makes out a good case for a bill of review.

New proof, important and material, none could be more so, is alleged to have come to light since the making and recording of the former decree, which could not possibly have been used at the hearing, because it was not known by the district attorney to have existence.

This new proof is, that the title papers of the defendant are fraudulent and forged. But this fact is said to have been before put in issue. Admit it, for the sake of argument. What is the doctrine asserted by the Chancellor Eldon in the case of *Young* v. *Keighly*, 16 Ves. 348. The ground of a bill of review, the chancellor says, is error apparent on the face of the decree, or of new evidence of a fact material pressing upon the decree, and discovered after publication in the cause.

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Again, he says, "as far as I can ascertain what the court permits with regard to bills of review upon facts newly discovered, the decisions appear to be on new evidence, which, if produced in time, would have supported the original case, and are not applicable where the original cause does not admit of the introduction of the evidence; as not being put in issue originally."

The doctrine is to be found in Cooper's Pleading, 91. The author asserts "that it must be on new matter to prove what was before in issue, for a party cannot be entitled to a bill of review on new matter to prove a title which was not in issue." For this position he cites Cary's Reports, 82, and Ambler's Reports, 293. If these authorities are to be relied upon, they prove conclusively, that in the present bill, a good cause is made out for a review.

We are ready to admit, that in the two cases decided by the court of appeals of Kentucky, reported in Hardin's Reports, 342 and 454, a different doctrine seems to be established. But the rule as laid down by Chancellor Eldon, accords better with our views of what the rule ought to be, and accordingly we adopt it as intrinsically correct. But, admitting that the new matter must relate to something not before put in issue by the parties, still we think a case is made out for a bill of review.

It is certainly true that the district attorney, in his answer, denied all the allegations in the petition, and required the petitioner to produce proof of them; but, at the same time that he denied them, he stated that he was wholly uninformed as to their truth. It is like the answer of a guardian, denying the allegations of a bill on the ground of ignorance, whether they are true or false; and such answer has been held insufficient to dissolve an injunction. *Apthrope* v. *Comstock*, 1 Hopkins, Ch. Rep. 143; *Roberts* v. *Anderson*, 2 Johns. Ch. Rep. 202.

By this general denial of the title of the petitioner, no special fact in relation to that title was put in issue. The district attorney made no allegation that the title papers of the petitioner were fraudulent or forged. He could not make such an averment at the time he filed his answer, because he was wholly uninformed as to the authenticity of those papers, and, on that ground, required that they might be proved.

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There was no controversy as to the fact whether those papers were genuine or forged; no conflicting testimony was introduced, and all the proof adduced before the court was by the petitioner. This surely cannot be such a putting in issue of the fact of forgery or not, as to preclude a reëxamination of that matter, when subsequently discovered. We suppose the judges of the court of appeals of Kentucky mean to say, that after certain material matters of fact have been put in issue, and evidence adduced by each party to that issue, and a decree rendered, a bill of review will not lie merely upon the discovery of additional testimony to the same point, unless that evidence consists of records. In which event they admit that a bill of review will lie. According, then, to the principles settled in Kentucky, a case is made out for a bill of review; for the present bill contains the allegations that important record evidence has been discovered conducing to prove that the title papers of the petitioner are false, fraudulent, and forged. The court of appeals of Kentucky, in the case of *Respass* v. *Mc Clahan*, Hardin's Rep. 346, say: "There is an important difference between the discovery of a matter or fact itself, which, though it existed at the former hearing, was not then known by the party to exist, or which was not alleged or put in issue by either party, and the discovery of new witnesses, or proof of a matter or fact which was then known or in issue. In the former cause, the party not knowing the fact, and it not being particularly in issue, there was nothing to put him on the search, either of the fact or the evidence of the fact, and therefore the presumption is in his favor, that, as the matter made for him, his failure to show the matter was not owing to his negligence or fault. They further say, after the most careful search, they cannot find one case reported in which a bill of review has been allowed on the discovery of new witnesses to prove a fact which had been before in issue, although there are many where bills of review have been sustained on the discovery of records or other writings relating to the title which was generally put in issue."

It cannot be affirmed that the forgery of the title papers of the petition was particularly put in issue by the former pleadings. The title only was generally put in issue, and, according to the authority just quoted, as record evidence in relation to

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that title is alleged to have been discovered, a clear case is made out for a bill of review.

If, then, this court possesses the jurisdiction to entertain a bill of review in the case now before the court, and a case is made out by the bill, according to the principles of equity, the next inquiry is, Does the evidence adduced call upon the court to pronounce a decree of reversal?

What is the evidence? First, the defendant, Samperyac, the original petitioner in whose favor the former decree was rendered, has failed to answer this bill, and, under a rule of this court, an order of publication was duly published in the Arkansas Gazette; and at the October term, 1830, of this court, the bill was taken for confessed as to the said defendant. The inquiry arises as to the effect of taking the bill for confessed. The doctrine is well settled, that when the allegations of a bill are distinct and positive, and the bill is taken for confessed, such allegations are taken as true without proof. That a decree *pro confesso* is like a judgment by *nil dicit* at common law. *Williams* v. *Corwin*, 1 Hop. Ch. Rep. 471; 3 Atkyns, Rep. 468. In the case of *Hawkins* v. *Crook*, 2 P. Wms. 556, the bill alleged a decree to have been obtained by fraud.

The decree assumes that the order to take a bill *pro confesso* admitted the facts charged as fraudulent, and the court plainly took them to amount to fraud, and without further proof, decreed the appropriate relief. The authorities clearly establish this principle, that if the allegations are of a nature so distinct and positive, that, taking them to be true, the court can make a decree upon them, it will, upon the order *pro confesso*, decree without proof. Where they are in their nature so defective or vague that a precise decree cannot be made upon them, proof must be adduced from the necessity of the case. No rule can be better founded in reason and propriety.

A refusal to deny where the party is legally bound to speak, is equal to an admission of the charges made against him. What is admitted, need not be proved.

The allegations are incontrovertibly established, when confessed by him against whom they are made. This is the doctrine applicable to original bills; and we have, in our researches,

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been able to find no case where the doctrine has been applied to bills of review. Perhaps it may be because no such case exists, and that this is the first where a bill of review has ever been taken *pro confesso*. But the principle applies with equal force and propriety to the latter as to the former. The allegations of this bill are, that the title papers are forged and spurious, and that the witness who proved them committed perjury. These allegations, when admitted, destroy the evidence upon which the former decree was based, are distinct and positive in their nature, and justify a decree without additional proof. But admitting that the doctrine applicable to original bills, in relation to the effect of taking a bill *pro confesso*, ought not to be applicable to bills of review, still we are of opinion that the evidence adduced in this case is full and conclusive to prove that the title papers upon which the former decree was based are forged, fraudulent, and spurious. Let us advert to the evidence: Hilary B. Cenas, register of the land-office at New Orleans, states, in his deposition, that he has instituted a careful search among the Spanish records under his charge, particularly in a book entitled *Register de los primeros decretos de concesion;* in which book it was customary to enter any order of survey, as it was first made, from the year 1786 up to 1799, inclusive, and could not find any order of survey of lands in favor of, or granted to, Celestine Armon in the District of Arkansas.

He further says that he has examined the form of orders of survey, as sworn to by Judge Tessier and Jean Mercier, the register of mortgages in New Orleans, and found it to correspond with the orders of survey of record in his office; that he has compared the signatures affixed to orders of survey, upon which Messrs. Tessier and Mercier have given their depositions in the cases of the United States against the persons named in said depositions, and that he verily believes that they are false and counterfeit. By consent of parties, this deposition was read in this case, to prove the same facts in relation to the order of survey in favor of Samperyac. Isaac T. Preston, late register of the land-office at New Orleans, asserts that he has examined the papers annexed to the depositions of Jean Mercier and Charles Tessier, in the cases in which they have

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given their depositions before the honorable Gillen Preval, purporting to be Spanish orders of survey. The signatures are not in the handwriting of governor Miro or Gayoso, as they purport to be. Deponent is well acquainted with the signatures of those governors, having seen their genuine signatures to many different records. Deponent further says, that said papers are not in the form in which Spanish orders of survey were given, but that the form annexed to the depositions of Mr. Tessier and Mr. Mercier, were adopted in all orders of survey, except when the nature of the place to be surveyed required a different form. He further states, that he has seen the deposition of Hilary B. Cenas, register of the land-office at New Orleans; and that deponent, when register of the same office, made a similar search with the same result. Charles Tessier deposes that he was a clerk in the office of the late Spanish government, from the commencement of the year 1790 to the end of the year 1802; that he was acquainted with the handwriting of governor Miro, and Manuel Gayoso de Lemos, from seeing them write frequently; and says, positively, that the signature of Miro presented to him, and appended to the order of survey in this case, and which has been signed by me, *nevariator* is not in the handwriting of said governor Miro; that the decree or order of survey is not in the form used and prescribed in such case, nor is it recorded, as was the usual practice, in granting lands by the governor; that the practice was to insert at the foot of the said order, the word "*reg'd*," with the flourish of the recording clerk; further, that the spelling of the said decree is not according to the rules of Spanish orthography, and that the clerks, whose duty it was to write such orders, were all good Spanish scholars, and would not have been permitted to use such spelling in any official business; that the handwriting of the aforesaid order of survey is not that of any of the clerks that were, at that time, employed in that department of the government, the deponent being well acquainted with the handwriting of all the clerks who wrote in the office during the time he was in the employ of the government, and he is also acquainted with the handwriting of those that preceded him for many years.

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This witness further states, that he has no recollection of John B. Hebrard, Harea Devere, and Lemuel Masters, and is positive that these men were not familiar in the office of the Spanish government, and never known or seen in that office; that he does not know the handwriting of the order of survey in this case; that it is not in the handwriting of any of the clerks that ever were employed in the office of the Spanish government then existing.

Jean Mercier, a clerk in the office of the late Spanish government in Louisiana, from 1792 to 1801, deposes to the same facts, in all respects, testified to by Charles Tessier, and which it is unnecessary to repeat.

Antoine Cruzat, sen., deposeth, that he was employed as an officer of the regiment of Louisiana, in the office of governor Manuel Gayoso de Lemos, all the time he was governor of Louisiana under the Spanish government. That he had frequent opportunities to see and examine the signature of governor Miro, and to see him also sign his name.

He further says that he is well acquainted with the handwriting and signature of all the clerks of the office of the said governors; and that he has no hesitation in saying, that the signatures of Miro and Gayoso, appended to the orders of survey in which Charles Tessier and Jean Mercier have given their depositions before Judge Preval, pursuant to several commissions from the superior court of the Territory of Arkansas, are not genuine, as well as the handwriting of the orders of survey. That the spelling of said orders of survey is incorrect, and that no clerk would have been permitted to use it; that the form of the orders of survey, as given by Mr. Mercier and Mr. Tessier, is the only true and correct one; that he has never known any men by the name of John B. Hebrard, David Devere, and Lemuel Masters; and that he is confident they have never been seen in the office of governors Miro and Manuel Gayoso de Lemos, at New Orleans.

The deposition of Martin Durald, late register of mortgages in New Orleans, taken in a similar case to the one now before the court, in which the United States is plaintiff, and Martin Durald defendant, has been read as evidence in this case, by

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consent of parties. He deposes that he was born in Louisiana, and has never had any grant nor any order of survey for any land in the Territory of Arkansas; that his father was of the same name with himself, and that, to the best of his knowledge, his father has never had any land in the Territory of Arkansas; that he is well acquainted with all the names of the French and Spanish inhabitants of Louisiana, as having kept a public office in New Orleans; and that he knows no person, except his father and himself, of the name of Martin Durald; that he had a brother by the name of Joseph V. Durald, and that, to the best of his knowledge, his said brother never had any land in the Territory of Arkansas.

From the testimony, it is manifest that the order of survey in this case is not to be found recorded in the record book at New Orleans, in which it was usual and customary to record any order of survey made from 1786 to 1799. The same fact is also proved in relation to every case amounting to upwards of one hundred, now pending before this court, upon bills of review.

Tessier, Mercier, Preston, and Cenas, all depose to this fact; Tessier, Mercier, Cruzat, all of them well acquainted with the handwriting of Governor Miro, and having frequently seen him write, swear that the name of Miro, signed to the order of survey in this case, is not in his handwriting, and therefore not genuine. Cenas, the present register, and Preston, the late register of the land-office at New Orleans, both swear that they have seen many genuine signatures of Governor Miro; and from the comparison with the present order of survey, the signature is not in the handwriting of Governor Miro. Tessier, Mercier, and Cruzat, depose that they are well acquainted with the handwriting of all the clerks who wrote in the Spanish governor's office, at New Orleans, and that the order of survey in this case, is not in the handwriting of any clerk who ever wrote in the said office, and that the form of the order of survey in this case, is not in the form used by the Spanish government; Cenas and Preston also swear to this latter fact; Tessier and Mercier swear that Hebrard was never seen in the governor's office, at New Orleans.

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The fact that the name of Samperyac, the original petitioner and defendant to this bill, is signed in a good handwriting to the petition to the governor for a grant, and that his mark is used in the deed of transfer to John J. Bowie, is also in proof.

It is further in proof, that the defendant, Samperyac, has never made his personal appearance in this court, nor has one of the original claimants, amounting to one hundred and seventeen, ever appeared here, except by John J. Bowie, their agent, and the counsel employed by him; and the counsel admit that they have never seen one of the original claimants in whose favor the former decrees of this court were made. The evidence upon which the former decree was made, is the deposition of John B. Hebrard. In deciding upon this testimony, we think there is no rational ground to doubt, we are entirely satisfied, and believe it to be abundantly manifest, that the order of survey, upon which the former decree was made, is fraudulent, forged, and counterfeit; and that Samperyac himself is an ideal, fictitious being, and never had an existence except in name. The fact that Samperyac, nor any of the other claimants have ever appeared here, or been seen by their counsel employed for them, that no one of them has filed an answer in these bills of review; that their title papers upon which the former decrees of this court rested, are not to be found of record where such papers were generally and usually recorded; that their title papers are not in the form used at the time, by the Spanish government, in making concessions of land; that they are misspelt, and above all, that they have been proven by the testimony of three or four witnesses, who stand above suspicion, having the best opportunity of being well informed, to be counterfeit, forged, and spurious, speak a language not to be misunderstood, and calculated to produce the strongest conviction, that the order of survey, on which the former decree is based, is a forged and spurious paper, and, consequently, that the former decree of this court ought to be reversed, unless there is some other circumstance in the case to prevent it. There is, however, another defendant in this case, besides the original petitioner. Joseph Stewart, at a former term, appeared, and, on his motion, was admitted a defendant to this bill of review, and has filed his answer. In

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it he alleges that he is an innocent purchaser, without notice, for a valuable consideration, of the land decreed by a former decree of this court; that he purchased from John J. Bowie, who, he alleges, purchased from Samperyac, the original petitioner, and exhibited the deeds of transfer or assignment. He denies all the allegations in this bill, of fraud, forgery, and perjury, but admits his entire ignorance of these matters, and prays that his interest may be protected by this court.

The question arises, What effect is this answer entitled to have in the decision of this cause? The defendant Stewart, in our judgment, does not occupy the attitude of an innocent purchaser without notice, so as to stand on any higher ground than the defendant Samperyac himself. The interest which he has purchased in the land decreed by this court, is an equitable and not a legal right.

It is well settled, that a judgment or decree is not assignable at law, so as to vest a legal title in the assignee. The act of congress of 1824 does not authorize the assignment or transfer of the decree of this court; and, under that act, the land decreed to the claimant could be entered or located only in his name, or in the name of his legal representatives, in case of his death, and the patent could issue only to the claimant or his legal representatives, not to his assignees. Stewart, then, can only be considered as the purchaser of an equity; and it is an established principle, that a purchaser for a valuable consideration without notice, in order to protect himself, must be clothed with the legal title, and not a mere equity. 2 Bro. Ch. Rep. 66; 2 Madd. Ch. 258; 1 Atkyns, 571; 3 Ib. 377. The defendant Stewart, having only an equitable title under the former decree of this court, takes it subject to all equity which attached to it in the hands of his assignor. It cannot be asserted that Stewart is a purchaser under the former decree of this court. This can be true only when there has been a judicial sale, in which case the purchaser is protected, though the judgment or decree is erroneous. Upon this ground, alone, we think it is obvious that the defendant Stewart stands on no other or different ground than the original petitioner, in whose favor the former decree was made. 2d. If, however, we are mistaken in this

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position, still we think the defendant Stewart is not entitled to be protected as an innocent purchaser without notice, on the ground that the transfer from Samperyac to John J. Bowie is a forgery. The evidence establishing this fact will be briefly detailed.

The transfer or deed from Samperyac to John J. Bowie, of the land decreed by the former decree of this court, now claimed by Stewart, bears date on the 14th day of February, 1828, and is attested by Henry Hobbs and John Cook, and proved by the said Cook before John Williams, as justice of the peace in Clark county in this territory. By consent of parties, about sixty-six deeds of transfer from the original claimants, in whose favor this court have made decrees, all of which are now pending in this court upon bills of review, and are similarly situated with the case now under consideration, have been filed as evidence in this cause.

Twenty-four of those transfers, from the original claimants, are made to John J. Bowie, attested by John Cook and another name. The first of these transfers bears date on the 29th day of December, 1827, in a few days after the decree was entered of record. The second bears date on the 18th January, 1829; the third on the 19th; the fourth on the 21st; the 5th on the 24th of the same month and year. The sixth bears date on the fourth February, 1828; the seventh on the 6th; the eighth on the 8th; the ninth and tenth on the 9th; the eleventh on the 10th; the twelfth and thirteenth on the 11th; the fourteenth on the 12th; the fifteenth on the 13th; the sixteenth on the 20th; the seventeenth, eighteenth, and nineteenth, on the 21st; the twentieth on the 22d; the twenty-first on the 23d; the twenty-second on the 28th; the twenty-third and twenty-fourth on the 29th February, 1828. These twenty-four transfers, one of which is the transfer in this case, purport to have been executed by the original claimants, in whose favor the decrees of this court were made to John J. Bowie, are all attested by John Cook and another, and certified by John Williams, a justice of the peace in this territory, to have been proved before him by John Cook, the subscribing witness.

How does it happen that this witness, John Cook, should

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have been present to witness the execution of twenty-four deeds from different persons to John J. Bowie, and most of them on different days? Could it have been necessary that Bowie should have employed this Mr. Cook to travel round with him to become a witness to their execution? Could Bowie have procured witnesses residing near these claimants to attest their deeds or transfer to himself? How does it happen Bowie is so fortunate as to find these original claimants so soon after the decree of the court was made? One of them he found in a few days after the decree, in a shorter time than would be required to travel beyond the limits of the territory. Having been fortunate in the commencement, his good fortune never seems to desert him until he obtains all the transfers. On the 4th February he finds one of them; one of them on the 6th; he is equally fortunate on the 8th; on the 9th he finds two, and on the 11th his efforts are still crowned with greater success, he finds three; on the 23d of the same month he finds three others; and by the 29th February, he discovers all of them. Thus it would seem that these original claimants, not one of whom can now be found to answer these bills of review, these men whom the counsel employed by John J. Bowie to advocate their rights, never saw; not one of whom are proven to be living, or that they ever did exist. These are the men whom John J. Bowie finds residing so near each other, that he could obtain the deeds of three of them in one day, and find all of them in little more than one month after the decrees. If, however, we could believe all this, is it not passing strange that Mr. Cook, whom nobody knows, should have happened to be present at all these various times and places ready to attest these transfers from the original claimants to John J. Bowie? Unless we indulge the presumption, that Bowie employed this Mr. Cook to go along with him to attest these deeds, for which we can see no reasonable motive, we are unable to account for his presence whenever wanted or called for by Bowie. Bowie must have had a talisman, possessed of the magical power of Aladdin's lamp, by which he calls up, at his bidding, this omnipresent witness. We have no doubt that this witness, like the genius

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in the Arabian tales, having performed the office for which he was invoked, has vanished into air, and disappeared for ever. In addition to these twenty-four deeds of transfer, thirty other deeds of transfer or assignment from the original claimants to John J. Bowie and other persons, are by consent exhibited as evidence in this cause; all these deeds are attested by Lemuel Masters and other names, and certified by J. Williams, a notary-public in Louisiana, to have been proved before him by Lemuel Masters on the 29th day of February, 1828. The two first bear date on the 10th January, 1828; the third and fourth bear date on the 20th; the fifth and sixth on the 21st; the seventh on the 24th; the eighth on the 25th; the ninth and tenth on the 26th; the eleventh on the 27th; the twelfth on the 28th; the thirteenth and fourteenth on the 29th January, 1828; the fifteenth and sixteenth bear date on the 2d day of February, 1828; the seventeenth on the 9th; four more on the 10th; one on the 11th; one on the 13th; one on the 21st; two on the 22d; one on the 25th; one on the 26th; one on the 27th, and the remaining three on the 28th February, 1828. Lemuel Masters, the witness who proves these deeds, is not an ideal being, but is one of the three witnesses who proves the original claims, and on whose evidence the former decrees of this court were made. This circumstance adds nothing to his credit. Why should one of these witnesses to the original claims, brought here by John J. Bowie, which fact is known to this court, he being the only person who appeared here as agent of the claimants, have been selected to travel round and attest the deeds of transfer from these claimants? All the remarks made in relation to the twenty-four transfers apply with equal force to the thirty just named. Can it be believed that Lemuel Masters could find eighteen of these original claimants in one month, and four of them in one day? If they resided so near each other, why have not one of them answered these bills? Why has no deposition been taken to prove that any one of them ever had an existence? Why, in short, has not John J. Bowie himself, answered these bills in the character of an innocent purchaser?

The defendant Stewart claims through him, and the answer of Bowie might be received upon the same ground. This cir-

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cumstance is pregnant with proof that these transfers are fraudulent and base forgeries, and that the original claimants never existed except in name. There is another peculiarity about these transfers calculated to throw discredit upon them. It is this: in thirteen of these deeds, it is manifest, from an inspection, that the name of one of the witnesses thereto is written in the same handwriting with the body of the deed, and in the same ink. It is not usual or common for a witness to a deed to be called on to write the deed itself; and as the witness is never after heard of, the presumption is very strong that he, too, lives only in name. There are also twelve other deeds of transfer filed by consent, as evidence in this cause. We will not waste our time in remarking upon them. To pursue the subject further, would be worse than useless. In investigating frauds like these, the mind sickens and the feelings revolt. From a review of all the evidence in this case, we entertain no doubt that the transfer in this case, which purports to have been made from Bernardo Samperyac to John J. Bowie, is false and forged; and, consequently, upon that ground also, the defendant Stewart cannot be permitted to occupy the attitude of an innocent purchaser, fairly and *bonâ fide*, from Bowie. But his recourse is upon Bowie, of whom he purchased; and he cannot stand upon other and different ground than Bowie himself. The act of congress of the 26th May, 1824, from which this court derives its authority to decide in these cases, has been continued in force by several subsequent acts, the last of which was passed on the 8th May, 1830. That act has expressly given the power to this court to entertain bills of review in these cases, and to reverse the former decrees of this court, if, upon a revision, it shall appear that these decrees were based upon forged title papers.

From the view we have taken of this case, it has not become necessary for us to consider the question made, and ably argued at the bar, whether congress have not, in the act of 1830, transcended the limits of sound legislation; and we withhold the expression of an opinion upon it, as we are satisfied that the act of 1824 referred the decision of these cases to this court, sitting as a court of chancery; and that, under the system of

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equity by which this court is governed, a power exists to entertain a bill of review in the present case.

BATES, J. — I dissent from the opinion of the Court, as delivered in this cause. I part with my associates on the threshold, on the point of jurisdiction; and, therefore, in the brief opinion which I shall give for the grounds of my disagreement, I shall not find it necessary, or even proper, to touch the other points which have been raised and so ingeniously and elaborately argued. *Obsta principiis*, is a maxim dear to the lovers of sound government. I shall endeavor on this, as on all other occasions, to manifest my appreciation of its value.

By the treaty negotiated by the United States, in 1803, with the French republic, for the acquisition of Louisiana, our government became bound, in good faith, to perfect certain obligations which the previous governments, Spanish and French, had contracted with their citizens or subjects. But this treaty guarantee had no stipulation as to mode, and the government does not recognize in the citizen a right to sue without its consent.

This consent was given by the act of congress of May, 1824. Tribunals were created in the State of Missouri and Territory of Arkansas to adjudicate claims to land founded on French and Spanish grants, of which tribunals this is one; a special and extraordinary tribunal, created by the law referred to. Under this law, and before this tribunal, the claimant instituted his suit, which, at its maturity, ripened to a decree in his favor.

The bill of review has been instituted to annul and reverse the decree, on the ground that the grant is a forgery, and the claimant a supposititious character. It is foreign to my purpose to inquire into the well-foundedness of these allegations, for, whatever the decision, in the view I take of the subject, it could lead to no practical result.

I assume it as a postulate not to be questioned, that the government going into the courts, is to be tried only by the same rules, and have the same measure of justice meted out to it, that the law secures to ordinary parties litigant.

The law of 1824 gave to the party against whom the final decree of this court should be given the right of appeal within one year from the time of its rendition. The appeal not ap-

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plied for, the decree became final and conclusive. More than a year had elapsed before the filing of the bill of review in this case. I will not moot the point, whether a bill of review would lie at all: it is rendered more than superfluous from the obvious fact, that no revision of the decree, of any kind, was sought for within the year. But it is said that the congressional legislation of May, 1830, puts this question at rest, cures all defects, gives jurisdiction, — gives it, too, to defeat rights and destroy vested interests growing out of, and based on, a former act of congress. Such, it is true, is the import of the language of the law; but is it so? Can it be that the federal legislature has the constitutional competency so to do? We could expect to find such a doctrine prevailing only in the worst days of the most tyrannical governments. It is a language that Sejanus may have whispered to Tiberius. It is a language that may hold at this day in the meridian of Constantinople and St. Petersburg, where the mandate of the sultan, or the ukase of the emperor, supersedes reason, subverts right, and abrogates law. It is a language repudiated even in constitutional monarchies; and it is a language which, if received here as orthodox, goes convincingly to prove that the liberty, of which we have so proudly boasted, has an existence rather in name than in essence.

Yet, highly objectionable as I deem this law, I couple with that objection no ascription of motives. It was probably a work of much haste, — the principles it involves not pushed to their conclusions, and not seen in their practical results. I think I heard in argument that the principles of this act might be inoperative when sought to be brought to bear on the property and rights of the citizens of the States, but that congress had unlimited and illimitable power over the territories. This proposition scarcely requires the show of refutation; it is incompatible with the genius of our government, and is, as it regards this territory, palpably in violation of treaty stipulations.

I cannot resist the conclusion that we have not cognizance of this case, and that the bill of review should be dismissed for want of jurisdiction. *Decree reversed and annulled.*

From the decree in the foregoing case, the defendants ap-

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pealed to the supreme court of the United States, and the case was argued at the January term, 1833, by Mr. Prentiss and Mr. White, for the appellants, and by Mr. Taney, attorney-general, and Mr. Fulton, for the United States, and will be found fully reported in 7 Peters, 222. At the same term, after stating the facts and pleadings, Mr. Justice Thompson delivered the opinion of the court as follows: —

The objections which have been taken at the bar to this decree, may be considered under the following points: —

1. Whether, under the act of 1824, the court had authority to entertain the bill of review; and if not, then,

2. Whether the act of 1830 is a constitutional law, and confers such authority.

3. Whether the proceedings on this bill of review can be sustained under the act of 1830.

4. Whether, admitting Stewart to be a *bonâ fide* purchaser of the claim of Samperyac, he is protected against the title set up by the United States.

1. We think it unnecessary to go into an examination of the questions which have been made under the first point. Although the act of 1824 directs, that every petition which shall be presented under its provisions, shall be conducted according to the rules of a court of equity, it may admit of doubt, whether all the powers of a court of chancery, in relation to bills of review, are vested in that court. And as the view taken by this court upon the other points renders a decision upon this unnecessary, we pass it over without expressing any opinion upon it.

2. The ground, upon which it has been argued that the act of 1830 is unconstitutional, is, that a right had become vested in Stewart before the act was passed; and that the effect and operation of the law is to deprive him of a vested right. To determine the force and application of this objection, it becomes necessary to look at the claim as it now appears before the court. It is found, by the decree of the court below, and is admitted at the bar, that Samperyac is a fictitious person. That the petition, purporting to have been presented by him to Miro, governor of the Province of Louisiana, and the order of survey, alleged to have been made thereupon, are forgeries. These are

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the only evidence of title upon which the original claim rests. And it is proved and admitted that the deed, purporting to have been given by Samperyac to Bowie, under whom Stewart claims, is also a forgery. The bill or petition filed in the original cause, alleges that the claim is secured by the treaty between the United States and the French Republic, of the 30th April, 1803. This, however, has not been insisted upon on the argument here; and there is certainly no color for pretending that a claim, founded in fraud and forgery, is sanctioned by the treaty. The title to the land in question, passed by the treaty, and became vested in the United States; and there has been no act, on the part of the United States, by which they have parted with the title. It is contended, however, that this right or title has been taken away by the original decree in this case, under the act of 1824. By the fourteenth section of that act, all its provisions are extended to the Territory of Arkansas; and it is declared that the superior court of that territory shall have, hold, and exercise jurisdiction in all cases, in the same manner, and under the same restrictions and regulations in all respects, as is given by the said act to the district court of the State of Missouri. And by the second section of the act, it is declared that in all cases the party, against whom the judgment or decree of the court may be finally given, shall be entitled to appeal within one year from its rendition, to the supreme court of the United States, the decision of which court shall be final and conclusive between the parties; and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive. No appeal was taken within the year; and the question is, whether the United States, by neglecting to appeal, have lost their right, and if not, whether the remedy provided by the act of 1830, to assert that right, is in violation of the constitution.

If Samperyac was a real person, and appeared here setting up this objection, it might present a different question, although it is not admitted, even in that case, that the United States would be concluded as to the right. But the original decree in this case was a mere nullity; it gave no right to any one. The title still remained in the United States, and the most that can

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be said, is, that by omitting to appeal within the time limited by the act, the remedy thereby provided was gone, and the decree became final and conclusive with respect to such remedy.

But the act of 1830 provides a new remedy; and it may be added that the act of 1804 declares the decree to be final and conclusive between the parties. And as Samperyac was a fictitious person, he was no party to the decree, and the act, in strictness, does not apply to the case. But, considering the act of 1830 as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers. It only organizes a tribunal with powers to entertain judicial proceedings. When the original decree was entered, there was no person in existence whose claim could be ripened into a right against the United States by omitting to appeal; Stewart was not only no party to the decree, but his purchase from Bowie was nearly a year after the decree was entered.

Had Samperyac been a real person, having a decree in his favor, and Stewart had afterwards purchased of Bowie the right which that decree established, it might have given him some equitable claim; but it would have been subject to all prior equitable, as well as legal rights. Nor would it be available in any respect in the present case, for Stewart, in no manner whatever, connects himself with Samperyac. As it is admitted that the deed purporting to have been given by Samperyac to Bowie is a forgery, Stewart is therefore a mere stranger to this decree, and can derive no benefit from it. It is said, that if this bill of review was filed under the act of 1830, the court had no jurisdiction, the bill having been filed in April, and the law not passed until the May following. But the act, in terms, applies to bills filed or to be filed, and of course cures this defect, if any existed. Such retrospective is no unusual course in laws providing new remedies.

The act of 1803, amending the judicial system of the United States, 3 Laws U. S. 560, declares, that from all final judg-

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ments or decrees, rendered or to be rendered, in any circuit court, &c., an appeal shall be allowed to the supreme court, &c. It therefore forms no objection to the law, that the cause of action existed antecedent to its passage; so far as it applies to the remedy, and does not affect the right.

3. But it is objected, in the next place, that this bill of review cannot be sustained under the act of 1830; that it was not filed and prosecuted under limitations and restrictions, and according to the course and practice of a court of chancery in such a proceeding. We think it unnecessary to examine, whether all the technical rules required in the ordinary course of chancery proceedings, on a bill of review, have been pursued in the present case. The act, clearly, does not require it. It authorizes bills of review to be filed on the part of the United States, for the purpose of revising all or any of the decrees of the said court, in cases wherein it shall appear to the said court, or be alleged in such bills of review, that the jurisdiction of the same was assumed, in any case, on any forged warrant, concession, grant, order of survey, or other evidence of title.

If congress had a right to provide a tribunal in which the remedy might be prosecuted, they clearly had a right to prescribe the manner in which it should be pursued. The great and leading object was, to provide for revising the original decree, or granting a new trial. The material allegation required is, that the original decree was founded upon some forged evidence of title; and this is very fully set out in the bill. That it was not the intention of the law, that the court should be confined to the technical rules of a court of chancery, on bills of review, is evident from the provision in the last clause of the first section of the act, which directs the court to proceed on such bills of review, by such rules of practice and regulations as they may adopt, for the execution of the powers vested or confirmed in them by the act.

4. The next inquiry is, whether the appellant, Stewart, has acquired a right to the land, by reason of his standing in the character of a *bonâ fide* purchaser. The record contains an admission on the part of the United States, that he purchased the claims of John J. Bowie, by deed, for a valuable considera-

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tion, in good faith, some time in November or December, 1828. But this gave him no right to be let in as a party in the bill of review; he was not a party to the original bill, nor could he connect himself with Samperyac, the only party to the bill, he being a fictitious person; and the interest of Stewart, whatever it might be, was acquired long after the original decree was entered. He was, therefore, a perfect stranger to that decree. The deed purporting to have been given by Samperyac to Bowie, is admitted to be a forgery. Bowie, of course, had no interest, legal or equitable, which he could convey to Stewart. But, admitting Stewart to have been properly let in, as a party in the bill of review, the only colorable equity which he showed was the certificate of entry given by the register of the land-office, December 13, 1828; and this certificate, founded on a decree in favor of Samperyac, a fictitious person, obtained by fraud, and upon forged evidence of title.

This certificate is entirely unavailable to Stewart. He can obtain no patent under it if the original decree should remain unreversed; for the act of 1830 forbids any patent thereafter to be issued, except in the name of the original party to the decree, and on proof to the satisfaction of the officers, that the party applying is such original party, or is duly authorized by such original party, or his heirs, to receive such patent.

The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States. But Stewart acquired no right whatever under the deed from Bowie; the latter having no interest that he could convey. In the case of *Polk's Lessee* v. *Wendall*, 5 Wheat. 308, it is said by this court, that on general principles, it is incontestable that a grantee can convey no more than he possesses. Hence, those who come in under the holder of a void grant can acquire nothing.

Upon the whole, we think Stewart was improperly admitted to become a party; but considering him a proper party, he has shown no ground upon which he can sustain a right to the land in question.

The decree of the court below is accordingly affirmed, with costs.

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ASA DEEN, plaintiff in error, *vs.* ANDREW HEMPHILL, defendant in error.

1. Where an appeal bond is defective, the party may file a new one at any time before the case is finally acted on, and the appeal should not be dismissed.
2. Although the statute uses the term "recognizance," a "bond" is just as effectual, and a sufficient compliance with it.

July, 1831. — Error to Lafayette Circuit Court, determined before Thomas P. Eskridge aud Edward Cross, judges.

ESKRIDGE, J., delivered the opinion of the Court. — This is an action of debt, brought by Asa Deen against Andrew Hemphill, before a justice of the peace of the county of Lafayette. There was a judgment in favor of the plaintiff in the justices' court, for the sum of $36 and costs, from which the defendant appealed to the circuit court of Lafayette county. There Deen moved to quash the appeal bond, and dismiss the appeal at the costs of the appellant. The circuit court sustained the motion so far as to quash the bond, but refused to dismiss the appeal, and thereupon on motion of the appellant, permitted him to file a new bond in lieu of that which had been quashed, to which latter opinion the appellee excepted, and to reverse which he has brought the cause to this court by writ of error.

Two grounds were relied upon in argument for reversing the judgment of the circuit court. First, that the circuit court erred in permitting a new bond to be filed after having sustained a motion to quash the old one; and, second, admitting the circuit court to have decided correctly in receiving the new bond, that the bond thus received is not in conformity with the statute. It is admitted that the decision of the circuit court upon the first question is contrary to the practice which has heretofore generally prevailed in this territory. It is, however, sanctioned by the practice of several of the States, especially by that of the State of Virginia, and seems to be founded on reason. *Brown* v. *Mathews*, 1 Rand. 462; 1 Munf. 397. The object in requiring a bond from the party appealing is to secure the rights of the adverse party; and it seems to us, if the bond be given at any time

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before the suit is finally acted upon by the circuit court, the rights of the party are as effectually protected, as if the bond taken by the justice had been valid and sufficient. The fact that the justice failed to take a good bond should not operate to the prejudice of the party. The party does all in his power to comply with the statute, and when the bond is ascertained by the circuit court to be defective, it would be highly unjust that the party should lose his appeal and be subjected to the payment of costs for an error in which he had no agency.

The second point is, that the bond permitted to be given in the circuit court is not in conformity with the statute. The statute, it is true, uses the term recognizance, not bond; but it is not perceived why the one should not be as effectual as the other. Without tracing the legal distinction between a recognizance and a bond, it will be sufficient to observe, that the rights of the appellee are as certainly secured by the one as the other. They are equally binding, and the remedy upon each is equally obvious and direct. There is no error in the judgment, and the same is affirmed. *Judgment affirmed.*

JEREMIAH PATE, administrator of John Johnson, deceased, plaintiff in error, *vs.* MATTHEW GRAY, defendant in error.

1. The statutes of set-off are to be liberally expounded, so as to advance justice and prevent circuity of action.
2. The expressions "mutual debts" and "dealing together," and "indebted to each other," convey the same meaning in these statutes.
3. The demands of plaintiff and defendant must be specific and mutual, and there must exist a simultaneous right of action at the institution of suit, to enable one to set off against the other.
4. Assignee of a chose in action may sue in his own name, and a release of the obligor by the assignor after assignment is a nullity.
5. Joint and several note may be set off.
6. A plea of set-off cannot be considered as an action, within the meaning of the 28th section of the administration law, (Ter. Dig. 58,) so as to deprive a party of costs.
7. On a note payable on demand, with ten per cent. interest until paid, the interest is to be computed from date, that being clearly the intention of the parties.

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July, 1831. — Error to Hempstead Circuit Court, determined before Thomas P. Eskridge and James Woodson Bates, judges.

Eskridge, J., delivered the opinion of the Court. — This was an action of debt, brought by the administrator of John Johnson against Matthew Gray, in the Hempstead circuit court, founded upon the following note: —

"In the month of January in the year 1829, I, for value received, promise to pay John Johnson or order five hundred and fifty dollars: witness my hand and seal 19th day of September, 1829. (Signed) Matthew Gray [seal]."

There were three several pleas pleaded by the defendant: first, payment on the day; secondly, payment subsequent to the day; and thirdly, a special plea of set-off in bar. Upon the two former the plaintiff joined issue, and to the latter interposed a general demurrer. The circuit court decided that the plea of set-off was a bar to the plaintiff's action, overruled the plaintiff's demurrer, and rendered a judgment in favor of the defendant for the sum of $127 and costs; to which opinion of the circuit court plaintiff excepted, and to reverse which he has brought the cause to this court by writ of error.

The evidence adduced by the defendant, in support of the plea of set-off, was a promissory note, in the following language: —

"508\frac{42}{100}$. New Orleans, 19th May, 1827.

"On demand, we jointly and severally promise to pay to the order of T. R. Hyde five hundred eight dollars and forty-two cents for value received, with interest at the rate of ten per cent. per annum until paid. (Signed) John Johnson,

"L. W. Maddox."

Upon which promissory note there was the following indorsement: —

"Transferred and assigned to Matthew Gray for value received, without recourse to me.

"March 30th, 1829. (Signed) T. R. Hyde."

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The questions presented for our consideration depend upon the statutes of set-off.

It is well to premise, that the statute of set-off ought to be, as it always has been, liberally expounded, to advance justice and prevent circuity of action.

The statute of 1804 provided, that if two or more dealing together be indebted to each other upon bill, bond, &c. &c., and the statute of 1818, supplementary to the former, provides that if two or more be mutually indebted to each other by judgments, &c., one debt may be set off against the other. Our statutes of 1804 and 1818 are to be construed in connection; and if so, they mean precisely the same thing.

The words "mutual debts" in the English statute of 2 Geo. II. c. 22, sec. 13, and "dealing together" and being "indebted to each other," in the statute of New York, are considered as expressions of the same import. *Gordon* v. *Bowne*, 2 Johns. Rep. 155. And so the expressions in our statutes should be considered as conveying the same meanings; and it was doubtless so intended by the legislature.

I do not deem it necessary to examine several points discussed at the bar. The general rule on the subject of set-off is, that the demand of the plaintiff, as well as that of the defendant, must be specific and certain; there must be mutuality, that is, on each side a debt, to authorize a set-off. There must exist in both plaintiff and defendant, at the time of the institution of the suit, a simultaneous right of action.

From the view which I take of the case, it will be only necessary to notice four of the points relied upon in argument for reversing the judgment. First, that Gray, holding the note relied on as a set-off as assignee, was not evidence under the plea of set-off; second, that the note ought not to have been received in evidence, because it was the joint and several note of John Johnson and L. W. Maddox; third, that interest was improperly allowed on the note from its date; and fourth, that a judgment for costs was improperly rendered against the plaintiff.

This court has repeatedly recognized the rights of an assignee

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of a chose in action, and our statute on the subject of assignment is explicit.

The supreme court of New York, in the case of *Andrews* v. *Beecher*, (1 Johns. Cas. 411,) went so far as to say that release by the obligee of a bond, after an assignment of it, was a nullity, and not to be regarded. The decision just quoted conforms to the English decisions (see *Leigh* v. *Leigh*, 1 Bos. & Pul. 448). The assignee is the real party in interest. Gray, after he acquired the note from Hyde by assignment, stood precisely in his place, and succeeded to all his rights. What was originally a debt due from Johnson to Hyde became, by virtue of the assignment, a debt due from Johnson to Gray, and created the mutual indebtedness contemplated by the statute of set-off; a debt existed on each side, and a simultaneous cause of action accrued to each party.

The right of the assignee to avail himself of a set-off in a case precisely like the present, has been recognized by the supreme court of South Carolina, (see *Comply's Administrator* v. *Ashen*, 2 Bay, 481,) and also by the supreme court of New York, in the case of *Tuttle* v. *Bebee*, 8 Johns. Rep. 152. If it, however, appeared from the record, that Gray acquired the note by assignment subject to the death of Johnson, he could not plead it as a set-off, according to the case of *Edwards' Administrator* v. *Taylor*, 20 Johns. Rep. 137.

But it was objected, secondly, that the note being joint and several, the liability of Johnson and Maddox could not, on that account, be received in evidence. I cannot perceive any force in this position. The note being the joint and several note of Johnson and Maddox, it was competent for Hyde, to whom it was originally executed, and for Gray, after its acquisition by assignment, to sue Johnson alone, or to sue Johnson and Maddox. It was entirely optional with the holder of the note to proceed jointly or severally against the makers. Gray has chosen to hold Johnson individually liable, and he had a right to do so.

Third; the propriety of the allowance of interest on the note offered as a set-off, from its date, is questioned.

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The question then occurs, What was the intention of the parties at the time of the execution of the note, upon a fair and sound interpretation of it? It is conceded, that upon a promissory note payable on demand, without any stipulation in relation to interest, interest does not accrue until demand made; and in such case, if no demand be made prior to the institution of the suit, interest will begin to run from that time, the institution of the suit being considered a demand. Why, it may be asked, if it had been the intention of the parties at the time of the execution of the note that interest should not accrue until a demand made, did they not so frame the note? They did not do so, but expressly stipulated for interest at the rate of ten per cent. per annum until paid. The parties could have meant nothing else, but that this note should bear interest from the day of its execution. To say that this note only bears interest from a demand, would be rejecting that portion of the note which stipulated for the payment of interest; and this is the rule of decision in the State of Kentucky. See *Whitton* v. *Snope's Administrator*, 1 Litt. 160, a case directly in point.

The fourth and last point that I shall notice calls in question the propriety of the judgment for costs in the circuit court.

The 28th section of the act concerning executions and administrations provides, that if any person shall bring an action against any executor or administrator within one year, such person, although he may obtain judgment, shall not recover any costs of suit. Ter. Dig. 28.

A plea of set-off in bar, it is true, is considered in the nature of a cross action, so far as it regards the proof; but it cannot in this, nor in any other case, be considered as the institution of an action, and is consequently not embraced by the provisions of the 28th section of the administration law. Gray was not a voluntary litigant of his claim. He was sued, and having succeeded in his defence, and recovered a judgment by virtue of a statute equally obligatory upon this court with that just referred to, he is entitled to costs, as a necessary consequence of the judgment.

BATES, J., concurred. *Judgment affirmed.*

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Ambrose H. Sevier *vs.* Peter Holliday.

1. On a receipt given by an attorney at law to A. B., for a note in favor of C. D., the legal interest is vested in the latter and he must sue; and A. B. cannot maintain suit against the attorney.
2. Being only a naked bailee, A. B. by voluntarily parting with the possession of the note, divested himself of all right to or interest in it, and could not hold the attorney responsible.
3. As to liability of an attorney for negligence, and for failing to pay over moneys collected, see notes.

July, 1831. — Writ of error to the Clark Circuit Court, before Thomas P. Eskridge and James Woodson Bates, judges of the Superior Court.

Eskridge, J., delivered the opinion of the Court. — This is an action of trespass on the case brought by Peter Holliday against Ambrose H. Sevier, in the Clark circuit court, and comes to this court by writ of error. The declaration contains three counts, the first two for negligence in the defendant as an attorney in failing to collect and account for a note placed in his hands for collection by the plaintiff, and a third in trover, for converting the note so placed in his hands. There was a judgment in favor of the plaintiff for one hundred and sixty-four dollars and four cents, to reverse which the defendant has brought this writ of error.

Several grounds are relied on in argument for reversing the judgment of the circuit court, only two of which will be noticed.

First, it is contended that the action was improperly brought in the name of Peter Holliday, instead of in the name of William English. There was a receipt given in evidence in the court below, signed by A. H. Sevier to Peter Holliday, in the following language: —

"Received of Peter Holliday, one note of $133, against Joshua J. Henness, drawn in favor of William English, this 14th November, 1825. A. H. Sevier."

The circuit court decided that the receipt was evidence conducing to prove a privity of contract between Sevier and Holliday, and admitted the receipt in evidence, to which opinion there was a bill of exceptions filed.

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The general doctrine that the action must be brought in the name of the person in whom the legal title resides cannot be controverted. 1 Chitty, 3; 1 Saund. 153 *n.* 1; 8 Term Rep. 332. I cannot perceive how the receipt given by Sevier to Holliday for a note payable to English, can operate as a recognition of title to the note in Holliday. There is nothing in the record of the court below going to show that Holliday had any interest in the note whatever, nor can I perceive how it tends to establish a privity of contract between Sevier and Holliday. The possession of the note by the latter might have established a privity of contract between himself as bearer, and Henness, the maker, but that question it is not necessary to decide. Holliday must be considered as the naked bailee of the note, or as the agent of English, and in either character he cannot recover on the receipt. If Holliday was a naked bailee, and voluntarily parted with the possession of the note to Sevier, he thereby ceased to have any control of it, and divested himself of all right to bring an action. Whilst holding the note as bailee, Holliday had a good title to it against all the world, except English, the rightful owner; but having voluntarily parted with the possession of it, he divested himself of all interest in it. But consider Holliday as the agent of English, and the result is precisely the same. Holliday certainly could not bring an action in his own name, as was settled in *Gunn* v. *Cantine*, 10 Johns. 387, a case strikingly analogous to the one under consideration, in which it was said by the court, that a mere agent or attorney not having any beneficial interest in a contract, cannot maintain an action in his own name.

The second point which I deem it necessary to mention, is the alleged defect in the count in trover, in which it is not stated that Holliday was possessed of the note in controversy, as of his own property. This, by reference to the authorities, will be seen to be a valid objection. 1 Chitty, 185. But the first question being decisive of the cause, it is not necessary to inquire whether the defect in the count in trover has been aided by verdict. The two first counts in the declaration are fatally defective in not setting out a title in the plaintiff to the note,

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and that is not cured by verdict. My opinion is that the judgment of the circuit court ought to be reversed.[1]

[1] This case came before the supreme court of Arkansas, and is fully reported in 2 Ark. Rep. 512; and the doctrine advanced in the above opinion was sustained, and the judgment reversed. The following is a synopsis of the decision of the supreme court.

1. An attorney is not liable in the discharge of his official duty for claims put into his hands to collect as such attorney, unless it be shown that he has been guilty of culpable negligence in the prosecution of the suit, or that thereby the plaintiff has lost his debts; nor can he be held liable for moneys collected by him as an attorney, unless a demand be made upon him, and he refuses to pay it over, or remit it, according to the instructions of his client.*

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* In *Sneed* v. *Hanlyport*, it was held, that an attorney was not subject to an action for moneys collected by him, until demand, directions to remit, or some equivalent act; and that the statute commenced running from that point of time. 5 Cowen, 376; 7 Wend. 320; 3 Barb. 584.

In *Cummins* v. *McLain*, 2 Ark. 412, it was decided that an attorney at law cannot be held liable as for money collected by him as attorney, unless it be first proved that by failure to prosecute claims put into his hands for collection with due and proper diligence, the plaintiff lost his debt; or that he had collected the money, and refused to pay it over on demand, or to remit it according to instructions. The liability of the attorney rests upon the principle of his agency for the plaintiff, and he holds the money for his principal in that capacity, and the court said the plaintiff must demand payment or request the money to be remitted before the attorney can be charged with being guilty of laches or culpable negligence; and it was observed that it would be in opposition to the nature of the trust created between the parties, as well as against good faith and justice, to hold the attorney liable before demand and refusal to pay, or remit the money. *Sevier* v. *Holliday*, 2 Ark. 570; *Palmer* v. *Ashley*, 3 Ark. 82.

The legitimate object, however, of a demand is to enable a party to discharge his liability agreeable to the nature of it, without suit. But if an attorney denies the liability, or the right of the other to call upon him, a demand, or directions to remit, it is conceived, would be as unnecessary as useless, and it was so held in *Walradt* v. *Maynard*, 3 Barb. 586. And in chancery the rule is, that if the defendant denies the right of the plaintiff, he cannot insist in his defence that there was no demand. *Ayer* v. *Ayer*, 16 Pick. 335.

The law dispenses with the necessity of a demand where the defendant has committed acts inconsistent with the title of the plaintiff, and conducted himself in such a way as to render a demand wholly unavailing. *Beebe* v. *De Baun*, 3 Eng. 565; *La Place* v. *Aupoix*, 1 Johns. Cas. 407.

Where there has been an actual conversion by the defendant, no demand is required. 9 Bac. Abr., Trover (B), 638.

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2. Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily requires on the trial, proof of the facts so defectively or improperly stated or omitted, and without which it is not to be presumed that either the judge would have directed the jury to give, or the jury would have given a verdict, such defect, imperfection, or omission, is by the common law cured by the verdict. 1 Saund. 228, notes; 1 Term Rep. 545; 3 Ib. 147; 4 Ib. 472; 7 Ib. 518; 10 Bac. Abr. Verdict, (X), 354.

After verdict, nothing is to be presumed except what is expressly stated in the declaration, or what is necessarily implied from the facts that are stated; that is, where the whole is stated to exist, the existence of the parts is implied; and where the claim is alleged to exist, the existence of the component links will be implied after verdict. But if the plaintiff wholly omits to state a good title or cause of action even by implication, matters which are neither stated nor implied need not be proved at the trial, and there is no room for intendment or presumption, as the intendment must arise from the verdict when considered in connection with the issue upon which it was given. 1 Term Rep. 141; 4 Ib. 472; 7 Ib. 519; 3 Ib. 481; H. Bl. Rep. 569. The cases of presumption are where the plaintiff has stated a case defective in form, not where he has shown a title defective in itself. 4 T. R. 472. If any thing essential to the plaintiff's action be not set forth, though the verdict be found for him, he cannot have judgment; because if the essential parts of the declaration be not put in issue, the verdict can have no relation to it, and if it had been put in issue it might have been found false. Therefore, in an action against an attorney for failing to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him a note made by a third person for so many dollars to bring suit on, recover, and collect of that third person for the use and benefit of the plaintiff for certain fee and reward to the defendant in that behalf, is so defective in stating the plaintiff's title to sue, that a verdict on it in favor of the plaintiff will not sustain the judgment. No title to the note in the plaintiff is stated by or implied in any of these allegations, and no facts are stated which could not be proven without at the same time establishing the plaintiff's title to the note or legal right to receive the proceeds; nor is it stated or implied that the note was due when so delivered, nor to whom payable, nor what sum was due upon it. Such a count shows a defective title, and not a title defectively stated, and no proof is admissible under it, which can make it good. Under such a count a receipt given by the defendant, stating that he had received of the plaintiff a note for so many dollars against A. B., in favor of C. D., so far from proving the title to the note to be in the plaintiff, proves it to be in C. D., who is the legal owner, and is held in law to have possession of it. Such a receipt is, therefore, inadmissible in evidence under such a count.

3. A party cannot be allowed to prove more than he has alleged in his declaration, and when he omits to allege a fact essential to his action and not

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JOHN M. BRADLEY, plaintiff, *vs.* NICHOLAS TRAMMEL, defendant.

1. Under the statute of assignments (Geyer's Digest, 66,) making all bonds, bills, and promissory notes for money or property assignable, to authorize an assignee to sue in his own name, a note must not only be assigned and made over, but must be indorsed. Delivery without indorsement is not sufficient.
2. An indorsement is a written assignment on the back of the note, in the absence of which the holder, neither by statute, nor the common law, can maintain an action against the promisor in his own name.
3. The statutes 3 and 4 Anne, placing notes on the footing of inland bills of exchange, cited, and various cases in connection with them commented on.
4. The maker of a note may set up the same defence against it in the hands of an assignee, that he might make if it were held by the payee.

January, 1832. — Debt, determined before Benjamin Johnson and Thomas P. Eskridge, judges.

JOHNSON, J., delivered the opinion of the Court. — This is an action of debt, brought by Bradley against Trammel, on the following promissory note: —

"For value received, I promise to pay John G. Jackson, or

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involved or implied in the pleadings, or inferable from the verdict, he can offer no proof of such a fact.

A party having no interest in a note cannot be injured by the failure of an attorney to collect it. If his declaration does not show such an interest, or such an interest is not legally implied from its allegations, he cannot prove his interest, nor does he show any right to recover.

4. To entitle a plaintiff to recover in trover two things are necessary to be stated and proved, first, property, either general or special, in the plaintiff, and second, a wrongful conversion. In trover for a note, the omission to state in the declaration that the plaintiff was possessed of the note as of his own property, or that it came to the possession of the defendant, would be fatal on general demurrer, but are probably cured by verdict. But the introduction of such a receipt as is mentioned above, disproves the plaintiff's title to the note, and establishes the interest to be in another, and consequently precluded a recovery.

The opinion of the supreme court was delivered by Dickinson, J., and the case was very elaborately discussed by counsel, as will be seen by reference to it.

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bearer, the sum of eight hundred and ninety dollars, six months after date. Witness my hand, this 17th of July, 1824.

"NICHOLAS TRAMMEL."

The assignment of the note is set out in the declaration in the following terms: "That the said John G. Jackson afterwards transferred and delivered the said note to the said plaintiff, Bradley, who thereby, then and there became, and still is, the lawful bearer thereof, and entitled to demand and receive the said sum of eight hundred and ninety dollars from the defendant, Trammel."

The defendant has filed a general demurrer to the declaration, and the question presented is, whether the plaintiff can maintain this action in his own name. If he can, it is in virtue of the assignment of the note to him by Jackson, to whom it was executed. And if the assignment set out in the declaration is such as is required by our statute, there can be no doubt that the plaintiff is entitled in his own name to maintain the action. Our statute is in the following words: "All bonds, bills, and promissory notes, for money or property, shall be assignable, and the assignee may sue for them in the same manner as the original holder thereof could do. And it shall and may be lawful for the persons to whom the said bonds, bills, or notes are assigned, made over, and indorsed in his name, to commence and prosecute his action at law, for the recovery of the money mentioned in such bonds, bills, or notes, or so much thereof as shall appear to be due at the time of such assignment, in like manner as the person to whom the same were made payable, might or could have done." Geyer's Digest, 66. It will be perceived that the statute makes all bonds, bills, and notes assignable, and authorizes the person to whom a bond, bill, or note is assigned, made over, and indorsed, to sue in his own name, in like manner as the payee or obligee might have done. Taking the whole of the acts together, it is manifest, that to enable the assignee to sue in his own name, the bond, bill, or note must be assigned, made over, and indorsed. A bare assignment and making over by delivery, without an indorsement, is not sufficient, because the statute requires the bond or

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note to be indorsed to enable the assignee to sue in his own name. To dispense with an indorsement, which is a written assignment on the back of the note, (*Gustone* v. *Williamson*, 2 Bibb, 83,) and permit the assignee, by delivery merely, to bring the action in his own name, would be to dispense with one of the plain and positive requisitions of the statute.

How is the assignment set out in the present declaration? "That the said Jackson transferred and delivered the said note to the plaintiff, who thereby became the lawful bearer thereof." This may be true, and still the note may not have been indorsed; and the action cannot be maintained under our statute in the name of the assignee unless he is also the indorsee.

The conclusion, then, to which we have arrived, is, that the plaintiff cannot maintain this action by virtue of our statute authorizing the assignment of bonds, bills, and promissory notes.

Can he maintain the action according to the principles of the common law? Stewart Kyd, in his treatise on bills of exchange and promissory notes, p. 18, makes the following remarks: "A promissory note may be defined to be an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer at large; and at first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsable over, within the custom of merchants, to any other person, by him to whom it was made payable; and that if, in fact, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action, within the custom, against the person who first drew and subscribed the note; and that, within the same custom, even the person to whom it was made payable could not maintain such action. But, at length, they were recognized by the legislature, and put on the same footing with inland bills of exchange, by the 3 and 4 Anne, chap. 9; made perpetual by 7 Anne, chap. 25.

In the case of *Walmsly* v. *Child*, 1 Ves. sen. 341, Lord Chancellor Hardwicke says, "Where a note is payable to him or bearer, the bearer of the bill or note has not such a property as

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that he can maintain an action at law in his own name, but it must be in the name of the payee or his representatives."

Chancellor Kent, in his Commentaries, 3 vol. 73, says, "It was a question much discussed before the statute of Anne, whether notes were not, by the principles of the law-merchant, to be held as bills, and Lord Holt rigorously and successfully resisted any such attempt." In the case of *Nicholson* v. *Sedgwick*, 1 Raym. 180, decided seven years before the statute of Anne, the plaintiff brought an action of assumpsit, and in his declaration averred that the defendant made a note in writing, by which he promised to pay one Mason, or to the bearer thereof, £100; that Mason delivered the note to the plaintiff for £100 in value received, and that for the non-payment of this £100 by the defendant, the plaintiff brought this action, and upon a motion in arrest of judgment, the court held that the action could not be brought in the name of the bearer, but that it ought to be brought in the name of him to whom the note was made payable. And the same point was resolved in the cases of *Horton* v. *Coggs*, 3 Lev. 299, and *Hodges* v. *Steward*, 1 Salk. 125; 12 Mod. 36.

These cases are directly in point, and if regarded as authority, are decisive of the present question. The case of *Clerke* v. *Martin*, 2 Ld. Raym. 757, decided in the first year of Queen Anne, was an action on the case, and one count in the declaration was upon the custom of merchants, as upon a bill of exchange, and showed that the defendant gave a note, by which he promised to pay to the plaintiff or his order. Upon a motion in arrest of judgment, Lord Holt decided against the action, and said: "This note could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law, and invented in Lombard street, which attempted in these matters of bills of exchange, to give laws to Westminster Hall." Justice Gould concurred with him in arresting judgment.

In the subsequent cases of *Burton* v. *Souter*, 2 Ld. Raym. 774, and *Williams* v. *Cutting*, 2 Ld. Raym. 825, it was held by the same court, that promissory notes were not negotiable, within the custom of merchants. These adjudications are clear

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and explicit in affirming the doctrine, that according to the principles of the common law before the statute of Anne, promissory notes, whether payable to certain persons or order, or to a certain person or bearer, were not negotiable, so as to enable the assignee to sue upon them in his own name.

Ashurst, judge, in *Carlos* v. *Faucourt*, 5 Term Rep. 485, says: "Before the statute of Anne, promissory notes were not assignable as choses in action, nor could actions have been brought on them, because the considerations do not appear on them; and it was to answer the purposes of commerce that those notes were put by the statute, on the same footing with bills of exchange." In *Norton* v. *Rose*, 2 Wash. Rep. 248, Judge Roane says: "It is admitted that, on the principles of the common law, a chose in action is not assignable; that is, the assignment does not give to the assignee a right to maintain an action in his own name."

Judge Carrington, in the same case, observes: "That in England, notes of hand were not assignable until the 3 and 4 of Anne, so as to enable the assignee to bring a suit at law in his own name. Courts of equity were, of course, resorted to, when the maker of the note was not precluded from setting up any equitable defence which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them on the same footing of negotiability with bills of exchange. But the judges still considered them merely as the evidence of debt. At length the statute of Anne was procured, conformably with the wishes of the trading part of the community, making them assignable in like manner as bills of exchange. The likeness thus strongly sanctioned by legislative authority, produced similar decisions in cases where their negotiability was concerned."

If, however, promissory notes were negotiable and assignable, and stood upon the footing of inland bills of exchange, according to the principles of the common law, adopting in this respect the *lex mercatoria*, why was it deemed necessary on the part of the merchants, to apply to parliament for the enactment of a statute raising them to the dignity of mercantile instruments?

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If the repeated adjudications of the king's bench, enlightened and adorned, as it then was, by the transcendent genius of Chief Justice Holt, were known to be erroneous, and contrary to former precedents, why did not the merchants, always a wealthy class of the community, make a different appeal, and before the lords in parliament, reverse and annul the erroneous judgment of the king's bench? They, however, acquiesced in these decisions. They were well aware that as they were attempting to innovate upon the rules of the common law, which forbid the assignment of a chose in action, they never could obtain the reversal and annulment of judgments pronounced in accordance with principles which had been settled for ages. They made a different appeal, and obtained an act of parliament of the 3 and 4 of Anne, chap. 25, "giving like remedy on promissory notes as used on bills of exchange," and for the better payment of inland bills of exchange, to the following effect:

"Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same. Therefore, to the intent to encourage trade and commerce, which will be very much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, that from the first day of May, 1705, all notes in writing made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, usually intrusted by him or them to sign such notes by him, her, or them, whereby such person or persons doth or shall promise to pay to any other person or persons, his, her, or their order, or to bearer, any sum of

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money mentioned in such note, shall be taken and construed to be by virtue thereof due and payable to any such person or persons to whom the same is made payable; and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange, and that the person to whom such sum is by such note made payable, may maintain an action for the same in the same manner as they might do on an inland bill of exchange, made or drawn according to the custom of merchants, against the person who signed the same; and that any person to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the person who signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange."

The recital in this act of parliament is almost conclusive evidence of the settled doctrine, that at common law promissory notes were not negotiable, nor assignable, so as to authorize the assignee to bring the action in his name.

To maintain the doctrine that a promissory note, payable to a person named or bearer, was negotiable and assignable before the statute of Anne, the counsel for the plaintiff has mainly relied on two cases; one of them decided by the king's bench, in England, the other by the supreme court of New York. The first is the case of *Grant* v. *Vaughan*, 3 Burr. 1518, and was an action on the case, brought by Grant, who inserted two counts in his declaration; one upon an inland bill of exchange, the other upon *indebitatus assumpsit* for money had and received to his use.

The writing relied upon by the plaintiff is thus described by the reporter: "The defendant, Vaughan, gave a cash note on his banker, to one Bicknell, or husband of a ship of his, which note was directed to Sir Charles Asgell, who was Vaughan's banker, and was worded thus: 'Pay to ship Fortune, or bearer, so much.'" Bicknell lost this note, which came into the hands of the plaintiff, for a full consideration by him paid without notice of its loss by the original owner. The court gave judgment for the plaintiff, who brought the action as bearer, and no

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doubt correctly. In the first place, the writing was in fact an inland bill of exchange; and secondly, if it was not a bill of exchange, but a promissory note, the statute of Anne had been long previously enacted, which placed it on the same footing with an inland bill of exchange. This decision cannot, then, be regarded as authority upon the present question, and all that fell from the court bearing upon it, is to be received as extrajudicial.

It is true, that Lord Mansfield and Mr. Justice Wilmot, in discussing the case, clearly intimate an opinion that promissory notes, payable to J. S. or bearer, were negotiable before the statute of Anne, and controverts the decisions made by Lord Holt. But these doctrines of Lord Mansfield and Justice Wilmot, who are justly ranked among England's most talented and distinguished judges, are not to outweigh the numerous authorities directly upon the present question, which have already been cited. The case of *Pierce* v. *Crafts*, 12 Johns. Rep. 90, decided by the supreme court of New York, was an action of assumpsit on two promissory notes, payable to William Douglass, or bearer, and the bearer, Crafts, was allowed to maintain the action in his own name. But in New York, the statute of Anne had been reënacted. So that this case also is no authority upon the question presented by the case at bar. Judge Platt there seems to indicate an opinion, that these notes were negotiable, independent of the statute of Anne. This opinion is, however, extrajudicial, not called for by the case before him, and is not entitled to consideration as authority.

Our legislature has not deemed it expedient, like the parliament of England, to make any other interest bend to that of commerce. Our condition is essentially different, and a different policy has been wisely pursued. There are other interests which equally deserve the protection of the laws. Agriculture may be justly regarded as the great interest upon which the prosperity and happiness of this community mainly depends.

With the statute of Anne before them, our legislature have not thought proper to make promissory notes assignable in like manner with inland bills of exchange. It has thought it consistent with the principles of justice as well as with the dictates

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of enlightened policy, to permit the maker of a bond or note to set up the same defence against it in the hands of the assignee, that he could make against it in the hands of the obligee or person to whom he gave it. In other words, that the assignment of the note is not to operate to the prejudice of its maker, unless he, by his own consent, destroyed his equity or waived his rights.

And why should the assignment of a note affect the rights of the obligor or maker of the note? If it is tainted with fraud, or the consideration has failed, or a right of offset existed, why should the assignment or transfer of it to another have the effect of precluding these just defences to an action brought to recover the amount of the note?

Is it not consistent with the principles of natural justice, that the assignee should stand in the shoes of the assignor and take the note, subject to all the equities and legal defences which existed against it in the hands of the assignor? This is the principle upon which courts of chancery have uniformly acted in permitting the assignment of a chose in action.

For these reasons, we are clearly of opinion that the demurrer ought to be sustained. *Demurrer sustained.*

JOHN MAXWELL, appellant, *vs.* ARDEN WILLIAMS, appellee.

1. After the dismissal of an appeal, the appellate court has nothing further to do with the case.
2. Delay in suing out execution releases bail under the statute.

January, 1832. — Appeal from Arkansas Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — The record in this case shows the following state of facts: Williams, the appellee, obtained a judgment before a justice of the peace, against Walter Tucker and James Bennett, on the 13th March, 1830; and on the same day, Maxwell, the appellant, became bound as special bail for the stay of execution, which expired on the 13th of July,

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1830. On the 17th of August, upwards of a month after the expiration of the stay, an execution was issued on the judgment, and returned the 7th of September, indorsed "no property found." A *scire facias* was sued out on the 9th of December following, requiring Maxwell to show cause why an execution should not issue against him, jointly with Tucker and Bennett, and upon the same day an execution was awarded by the justice. Maxwell appealed to the circuit court, and at the first term thereafter, on the motion of Williams, by his attorney, the appeal was dismissed, and the judgment of the justice confirmed. From this decision Maxwell prayed an appeal to this court.

Two points are relied on to reverse the judgment: first, it is contended that the circuit court erred in confirming the judgment of the justice, after dismissing the appeal; and second, that Williams, by failing to issue execution on his judgment for upwards of thirty days after the expiration of the stay, released the special bail.

It will be necessary only to notice the first objection. After dismissing the appeal, it is very clear that the circuit court had nothing further to do with the case. It then stood before the justice of the peace in the same situation it did before the appeal was prayed. If the appeal had been entertained, Maxwell undoubtedly had the right to show cause why an execution should not issue against him in the same manner he could have done upon the return of the *scire facias* before the justice. Upon the second point, were it necessary to decide, there would be a unanimity of opinion, that the delay to sue out execution released the bail. Execution must be issued against the principal immediately on the expiration of the stay. Ter. Dig. 392. *Judgment reversed.*

JOHN HILL, plaintiff, *vs.* WILLIAM PATTERSON, defendant.

In actions for slander, or trespass *vi et armis*, the plaintiff recovering less than ten dollars, can recover only two thirds of the costs of suit. Geyer's Digest, 260.

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January, 1832. — Error to St. Francis Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

JOHNSON, J., delivered the opinion of the Court. — This was an action of trespass on the case for slander, brought by Patterson against Hill. On the trial in the court below, Patterson obtained a verdict against Hill for one cent damages; upon which the court rendered judgment in favor of Patterson for the sum of one cent for his damages, together with his costs in and about the suit in that behalf expended.

The only ground relied upon in the assignment of error is, that the court gave judgment in favor of the plaintiff below for all the costs by him expended about his suit in that behalf, when, according to the law, he was entitled to judgment for two thirds of those costs only. The 48th section of the act regulating judicial proceedings (Geyer's Digest, 260) provides, that "if in any action of trespass on the case for slander, or action of trespass *vi et armis*, that may hereafter be instituted in any court of record within this territory, the plaintiff shall recover less than ten dollars, such plaintiff shall be allowed to recover two thirds of the costs given by law in such suit, and no more." In accordance with the above provision, the judgment should have been rendered for two thirds of the costs of the suit, and having been given for all the costs, is consequently erroneous, and must be reversed. *Judgment reversed.*

TAPLEY A. CAMP, plaintiff, *vs.* CHRISTOPHER H. PRICE, defendant.

Where a justice renders no judgment, his proceedings are a nullity, and may be set aside on *certiorari*.

January, 1832. — Error to Monroe Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

JOHNSON, J., delivered the opinion of the Court. — The proceedings in this case appear to have had their origin before John

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R. Dye, a justice of the peace for Phillips county. The transcript of his record is in the following words: —

"Territory of Arkansas, county of Phillips, Cache township, October 29, 1828. T. Camp ordered summons against C. H. Price, for twenty bushels of corn; summons issued against Christopher H. Price, to appear before me on the 8th day of November, 1828. The constable of Cache township returned the within-named summons, executed by leaving a copy of the original at the house of Benjamin Pyburn. This being the 8th day of November, 1828. The plaintiff, T. Camp, acting agent of Ashburn Early, and judgment entered against C. H. Price for $11.07½ cents by default. Given under my hand and seal this eighth day of November, 1828.

"J. R. DYE, a Justice of the Peace."

The money not having been collected, subsequent proceedings were had in the following words: —

"Territory of Arkansas, county of Monroe. A transcript of judgment being placed in my hands from the docket of John R. Dye for collection, and it appearing that said judgment was not satisfied, T. A. Camp ordered a summons for C. H. Price, to appear before me, a justice of the peace, to show cause, if any he had, why execution should not be issued against him, ordering him to appear before me on the 29th day of May, 1830. The parties appeared on said 29th day of May, 1830. No cause being shown why execution should not issue against him, execution issued 29th day of May, 1830, for $10.11 cents and $7.77 cents costs on the revival of the judgment.

"JOHN C. MONTGOMERY, J. P."

To reverse these proceedings, the defendant Price, on the 16th of June, 1830, sued out a writ of *certiorari* from the circuit court of Monroe, and on the trial of the *certiorari* at the May term, 1831, the proceedings of the justice were set aside and the case dismissed with costs; and to reverse the judgment of the circuit court, this writ of error is prosecuted.

The only error assigned is, that the court below erred in not quashing and dismissing the writ of *certiorari* on the motion of Camp, for the reasons stated in the bill of exceptions.

In looking into the transcript of Mr. Justice Dye, it is mani-

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fest that it contains nothing in the shape or form of a judgment. It contains the assertion or affirmation that he gave a judgment against the defendant by default for a specific sum, but does not give a copy of that judgment. He fails also to give a copy of the process by which the defendant was summoned to appear before him, or a copy of the return of the officer serving the process, and from the statement which he does give, it does not appear that the summons was legally served. This record, when placed in the hands of Mr. Justice Montgomery, was not sufficient to authorize him to award execution against the defendant Price, and in making that award, and in issuing execution, he unquestionably erred. The *certiorari* from the circuit court issued within thirty days from the trial before Justice Montgomery, and as we regard the previous proceedings as a nullity, there never having been a judgment rendered, we think the defendant had a right to sue out a *certiorari* to reverse the revival of the judgment and the award of execution made by Justice Montgomery. *Judgment affirmed.*

Ex parte ROBERT CRITTENDEN.

1. The attorney for the government has a right to be present during the sitting of the grand jury, to conduct the evidence and confer with them.
2. But he has no right to give an opinion, as to whether there shall be a bill or not, unless his opinion is requested on a matter of law by the grand jury.

July, 1832. — Motion, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

Robert Crittenden, an attorney of the court, moved that *Samuel C. Roane*, the United States attorney for Arkansas Territory, be prohibited from being and conferring with the grand jury, during the deliberations of that body; but the court denied the motion, giving it as their opinion, that it was legal and proper for him to do so, whenever he might deem it necessary.

Motion overruled.[1]

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[1] See disquisition on the "office and duty of grand jurors," in Davis's Precedents of Indictment, from p. 18 to 23, where the existence and the reason for the exercise of this right are fully shown. Chitty says it is usual to permit the

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prosecutor to be present during the sitting of the grand jury, to conduct the evidence on the part of the crown. 1 Chitty, C. L. 317; Kelyng's Rep. 8.

A grand jury must consist of twelve at least, and may contain any greater number, not exceeding twenty-three, in order that twelve may form a majority of the jurors. There must be twelve at least, because the concurrence of that number is absolutely necessary to put a defendant on trial; and there must not be more than twenty-three, because otherwise there might be an equal division, or two full juries might differ in opinion. 2 Burr. 1088; 2 Hale, 151; 1 Chitty, C. L. 306.

The usual practice is to summon twenty-three; and there is a propriety in it, resulting from the known fact that there is more safety in large than small bodies of men, and less probability of hatred and ill-will infusing their pernicious influences into public prosecutions. A few men may feel a disposition to hunt down a victim, when a greater number would not engage in the disreputable business.

Impartial, intelligent, discreet, respectable men, good and upright citizens, and "gentlemen of the best figure in the county," (4 Bl. Com. 302,) should always be returned as jurors, because the vast authority which attaches to them in that capacity ought not, and indeed cannot, be intrusted to those who are ignorant, corrupt, or incompetent, without the utmost danger to life, liberty, and property. Upon juries depend life, liberty, and reputation, in criminal, and the dearest rights of property, in civil cases; and hence they should possess the intelligence to discern justice, and the integrity to maintain it.

The legislation of congress indicates that jurors should be summoned from such parts of the district as shall be most favorable to an impartial trial, but so as not to incur unnecessary expense, nor unduly burden the citizens of any part of the district with such services. 1 Stat. 88.

The Act of 1789 also provides as follows:—"Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom shall be administered an oath or affirmation that he will truly and impartially serve and return such writ. And when, from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court, where such defect of jurors shall happen, return jurymen *de talibus circumstantibus*, sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint." 1 Stat. 88.

Persons exempted from serving on juries by the laws of the United States.

All artificers and workmen employed in the arsenals and armories of the United States. 2 Stat. 62. Assistant postmasters and clerks regularly employed and engaged in post-offices. 5 Stat. 88.

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By the laws of Arkansas, the following persons are exempted: — Persons exercising the functions of a clergyman; practitioners of physic, practising attorneys at law, clerks, all officers of courts, ferry keepers, overseers of roads, constables, keepers of grist-mills whose names are recorded as such; patrols, during the time they may continue to perform their duties as such; persons over the age of sixty years; members of the Little Rock Fire Company. Digest, 631, 744, 770; Act of December 5, 1846, p. 141.

When the duty of summoning jurors is devolved on the marshal, or any one appointed for that purpose, he ought to return "good and lawful men," avoiding persons of ill fame, or under the influence of parties, (Digest, 631,) or persons convicted of any infamous crime, (1 Chitty, C. L. 307,) idiots, lunatics, persons exempted from serving on juries, relatives of parties, and those who have formed or expressed decided opinions as to the matter in hand (1 Burr's Trial, 367; *Armstead* v. *Commonwealth*, 11 Leigh, 657); those who are actuated by hostile feelings towards, or have a strong bias for or against the parties (2 Hawk. P. C. ch. 43, sec. 28; Wharton's C. L. 612, 613); and, in a capital case, those who have conscientious scruples as to punishing the accused under any proof, however strong. *United States* v. *Cornell*, 2 Mason, 91; *Commonwealth* v. *Lesher*, 17 Serg. & R. 155.

By the laws of Arkansas, every grand juror must be a free white male citizen of the State over the age of twenty-one years, resident of the county, a householder or freeholder, and otherwise qualified according to law (Digest, 629); by which is meant, I take it, that idiots, lunatics, and like persons, would not be competent jurors.

Petit jurors must have the same qualifications, except they need not be householders nor freeholders; but no person can serve as a petit juror who is related to either party to a suit within the fourth degree of consanguinity or affinity. Digest, 630.

Qualifications of jurors in the courts of the United States, and mode of summoning the same.

The act of Congress of July 20, 1840, provides as follows: — "That jurors, to serve in the courts of the United States in each State respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest court of law of such State now have and are entitled to, and shall hereafter from time to time have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised and hereafter to be practised therein, in so far as such mode may be practicable by the courts of the United States or the officers thereof; and for this purpose, the said courts shall have the designation and impanelling of juries, in substance, to the laws and usages now in force in such State; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective States for the State courts." 5 Stat. 394.

The provisions of the Judiciary Act of 1789 (1 Stat. 88) on this subject were

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EPHRAIM MIRICK, appellant, *vs.* ANDREW HEMPHILL, appellee.

1. Although the court may err in instructions to the jury, yet if it is apparent that justice has been done, a new trial should not be granted.
2. In detinue, the value of the article sued for is a secondary object, and even if excessive, as assessed by the jury, it is doubtful if a party can complain of it, as he may discharge the judgment by the restoration of the property.
3. Affidavits of jurors cannot be received, to show how the instructions of the court were understood.

July, 1832. — Appeal from Hempstead Circuit Court, determined before Thomas P. Eskridge and Edward Cross, judges.

OPINION OF THE COURT. — This case comes up, by appeal, from the Hempstead circuit court. The plaintiff brought an action of detinue to recover an obligation on Soher, Goodman & Co., for the proceeds of fourteen bales of cotton, to be received of John Bradley, and obtained a judgment for the same, if to be had, if not, the value thereof, estimated by the jury at four hundred and eighteen dollars and six cents, together with the costs of suit. The defendant afterwards moved the court for a new trial, which motion was overruled, and he excepted, setting out the evidence on the part of the plaintiff, and the instructions given to the jury.

Three grounds are relied upon for the reversal of the judgment. 1st, that the court instructed the jury contrary to law; 2d, that the defendant held the obligation as bailee, and no demand was proven to have been made previous to the institution of the suit; and 3d, that the court refused to hear, on the motion for a new trial, the affidavits of several of the jurors, setting forth their understanding of the instructions which influenced their verdict.

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substantially the same, except it was not prospective, but confined the selection of jurors to the mode practised in the several States at the time of its passage. It will be perceived that the act of 1840 is prospective, and supersedes that of 1789, and constitutes the rule by which the United States courts are governed in the selection of jurors; and this act, too, for the first time, expressly recognizes the exemptions allowed by the State laws. This act applies to grand and petit jurors, and to petit jurors in criminal cases. Conckling's Practice, 270.

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The instructions, to which the first objection relates, were in substance, that if the jury found for the plaintiff, they ought to find for him the obligation, if to be had; if not the value thereof, and the criterion in ascertaining it, would be the value of fourteen bales of cotton in New Orleans, at the time specified in the sale bill of Soher, Goodman & Co., set out in the bill of exceptions, and that in estimating the fourteen bales of cotton, all the evidence ought to be taken into consideration. The sale bill referred to, is an account of the sale of fourteen bales of cotton, for A. Hemphill, received of John Bradley, by Soher, Goodman & Co., in New Orleans, in May, 1830, amounting to the sum of four hundred and eighteen dollars and six cents, after deducting all charges for freight, storage, and expenses. If these instructions are objectionable, it is only in that portion which relates to the criterion by which the jury was directed to be governed, in finding the value of the obligation. It was, doubtless, going too far, on the part of the court, to instruct that the criterion in estimating the value of the obligation, would be the value of fourteen bales, sold in New Orleans, by Soher, Goodman & Co., there being no evidence showing that the cotton mentioned in the obligation was required to be sold there, or that it was actually sold at that place. It is very apparent that no injustice was done the defendant in consequence of it, as the testimony set out in the bill of exceptions, shows conclusively that the jury was fully warranted in assuming the criterion to which they were referred by the court. The defendant, therefore, having sustained no injury on account of the instructions objected to, the court rightfully overruled the motion for a new trial, so far as predicated upon misdirection to the jury. There is another view of the first ground relied upon by the defendant for the reversal of the judgment, that we think deserves consideration. The action is detinue, and although it was the duty of the jury to assess the value of the obligation, that value is a secondary object, and not recoverable, but upon the contingency of the obligation not being restored. Whatever, then, may have been the value of the obligation, assessed by the jury, the defendant can discharge it by its restoration. See the case of *Thompson* v. *Porter*, 4 Bibb, p. 72.

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He is not, by the finding of an improper or excessive value, inevitably subjected to injury. He might restore the obligation. The second ground, namely, that a special request was necessary before the institution of the suit, if tenable at all, is fully met by the testimony, as a demand is proven to have been made.

The third, and last, which relates to the refusal of the court to hear the affidavits of several of the jurors as to their understanding of the instructions, is not tenable. 2 Tidd, 817; 5 Burrow, 2667. We are of opinion, therefore, that the circuit court properly refused a new trial. *Judgment affirmed.*

ARTHUR DILLINGHAM, plaintiff in error, *vs.* JACOB SKEIN, defendant in error.

1. Debt will lie upon an open account for goods sold and delivered, as well as assumpsit.
2. Debt will lie on a contract, express or implied, for a sum certain, or capable of being ascertained.
3. The expressions, "account," "open account," and "book account," convey the same idea, and express an amount due otherwise than by written contract.
4. Where a party appears and does not object for want of an appeal bond, he thereby waives it, and the want of it does not affect the jurisdiction of the court. Jurisdiction is acquired by the appeal, not by giving the bond.
5. Where the record states that the jury were sworn, it will be presumed that the proper oath was administered, to try the case before the court.

July, 1832. — Error to Washington Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — This suit was commenced on the following writ, before a justice of the peace: —

"Territory of Arkansas, county of Washington. To the constable of Prairie township, county of Washington, greeting: Summons Arthur Dillingham to appear before me, a justice of the peace, on the 3d day of June, 1831, at my dwelling-house, between the hours of ten in the forenoon, and three o'clock in

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the afternoon of said day, to answer Jacob Skein in an action of debt on an open account under one hundred dollars. Given under my hand, this 26th of May, 1831.

(Signed) "HENRY TOLLETT, J. P."

On the 3d day of June, 1831, the parties appeared, and after hearing the evidence, the justice rendered judgment against the defendant Dillingham, in favor of the plaintiff Skein, for seventy dollars and costs of suit. From this judgment Dillingham prayed an appeal, and at the December term of Washington circuit court, the parties appeared by their attorneys, and the case was tried by a jury, who found for the plaintiff Skein, now defendant in error, seventy-one dollars and seventy-five cents, for which the court rendered judgment, to which judgment this writ of error is prosecuted.

Among the numerous assignments of error relied upon by the counsel for the plaintiff, three of them only will be considered by the court; the remainder being frivolous and untenable. It is assigned for error, "that there is no cause for action set forth, or mentioned in the summons." We think a sufficient cause of action is set out in the summons of the justice. It is stated to be "an action of debt on an open account under one hundred dollars." Our statute (Digest, 283) requires the writ of summons to state that the defendant is "to answer the plaintiff in action on bill, bond, note, book account, or promise, as the case may be." It is true, the summons does not literally pursue the forms set out in the statute; but this, we do not apprehend, is necessary. A substantial compliance is all that is requisite.

It is objected that debt will not lie upon an open account, and that therefore the writ of summons is erroneous and void. Admitting that a mistake in naming the appropriate form of action in the writ of summons would be a fatal error, on which we give no opinion, still we think there is nothing in the objection. Debt will lie upon an open account for goods sold and delivered, as well as an action of assumpsit. In the case of *Hughes* v. *Maryland Insurance Company*, 8 Wheaton, Rep. 311, Appendix note (2) 17, Judge Washington says: "Debt is

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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 recovered, and in a variety of other cases, where the law, by implication, raises a contract to pay. So an action of debt may be brought for goods sold to defendant, for so much as they were worth. In *Emery* v. *Fell*, 2 Term Rep. 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. This case proves 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*, Douglass, 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. Ashurst and Buller say, that wherever *indebitatus assumpsit* is maintainable, debt is also." *United States* v. *Colt*, 1 Peters, C. C. Rep. 145.

The action, then, as described in the writ of summons, was not, in our judgment, misconceived, but was just as appropriate as *indebitatus assumpsit.* The omission to insert the word *book* before the word *account*, we do not deem material. We know no distinction between an open account and a book account; and each expression conveys the same idea.

Another ground of error relied on is, that the circuit court had no jurisdiction of the case. It appeared from the justice's record, that an appeal was prayed, and a bond executed; which, however, does not appear in the record. It is sufficient to remark, that, one of the parties having appealed, the circuit court thereby acquired jurisdiction. The parties having appeared

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before that court, and the appellee making no objection that an appeal bond had not been given, thereby waived it; and the absence of an appeal bond in no manner affected the jurisdiction of the court.

The remaining objection we shall notice is, that it does not appear for what the jury were sworn.

It appears from the record, that the jury were sworn, and, having heard the evidence, rendered their verdict. Although the entry is not in the regular technical form, we think it substantially good. If the jury were sworn, this court is bound to presume that the proper oath was administered to them. No pleadings were filed by the parties, and the court will presume the jury were sworn to try the cause then before the court.

Judgment affirmed.

GEORGE W. ARCHER, plaintiff in error, *vs.* ALANSON MOREHOUSE, defendant in error.

1. Where a case is submitted to the court, all questions of law and fact involved, are necessarily passed on, and the result is embodied in the judgment.
2. In such case no formal and technical finding of the issue is necessary.
3. A general finding for the plaintiff or defendant by a jury is good, and disposes of all the issues.
4. A plea of payment admits all the allegations in the plaintiff's declaration, essential to support the action, and it is unnecessary for the plaintiff to prove them.
5. Judgment may be given for interest from the maturity of the note, or in damages. Either mode is regular.

July, 1832. — Error to Chicot Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — This was an action of debt, brought by Alanson Morehouse against George W. Archer, in the circuit court of Chicot county, and comes to this court by writ of error.

Issues were joined on the pleas of payment at the day, and payment after the day, and neither party requiring a jury, the

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cause was submitted to the court, and a judgment was rendered in favor of Morehouse, for the sum of eight hundred dollars, to bear ten per cent. interest from the 17th day of November, 1831.

Seven grounds are assigned for reversing the judgment of the circuit court, most of which were very properly abandoned in argument, and it will only be necessary to give an opinion on three, relied on in the assignment of errors.

The first ground, and that on which most stress was laid by counsel in argument is, that the circuit court did not, in the judgment which it rendered, make any disposition of the issues of fact joined in the cause; but proceeded to render judgment without saying any thing of such issues.

The practice of submitting a cause to the decision of the court, is peculiar to the laws of this territory, and was altogether unknown to the common law. The court, when a cause is thus submitted to its decision, performs the office of the jury, in addition to its ordinary duty of deciding the law. The whole cause, whether of law or fact, is before the court; and it passes upon it accordingly.

Why is it that the jury, when a cause is tried by them, find a verdict upon the issues joined? It is to enable the court to pronounce a judgment of law upon the facts as ascertained by the jury in their verdict. But even in a cause tried by a jury, a general finding for plaintiff or defendant, according to the practice of this court, is considered good. In this case, the court acting in the double capacity of jury and court, it would seem to be an act of supererogation to spread upon the record a formal finding of the issues. It appears from the judgment of the circuit court, that "issues being joined upon the pleas of payment at the day, and payment after the day, and neither party requiring a jury, the matters and things were submitted to the court. It was adjudged by the court, that the plaintiff have, and recover, etc." Can any doubt exist as to the intention of the court? Is there any uncertainty in the judgment? Why, then, incumber the record with a formal and technical finding of the issues? The judgment, as rendered, relates not only to the issues, but to all the matters and things in the cause.

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The second point which we deem it material to give an opinion upon, calls in question the correctness of the decision, on the subject of the testimony in the cause.

The court, it appears from the bill of exceptions, decided, that when the plea of payment is relied on by the defendant, it devolves upon him to support such plea by evidence, before the plaintiff will be required to adduce any evidence on his part. There can be no doubt, but that this decision was correct. The plea of payment is an affirmative plea, and the burden of proof is imposed on the defendant. The plea of payment admits all the allegations in the plaintiff's declaration. What do the pleas of payment admit in the case before the court? Why, that the notes declared upon were executed by the defendant, and that the amount of money named in the notes was due from the defendant to the plaintiff at the time of the execution of the notes. All the allegations, therefore, contained in the plaintiff's declaration, essential to the support of his action, being admitted by the defendant in his pleas of payment, it was wholly unnecessary for the plaintiff to produce any evidence on his part.

The third and last point on which we propose to give an opinion, calls in question that part of the judgment of the circuit court which relates to the interest.

The judgment is for eight hundred dollars, to bear ten per cent. interest from the 17th day of November, 1831. It is contended that the interest should have been ascertained by the court, and a judgment rendered for it in damages. It is admitted that this is a very common way of giving judgment; but on the other hand, the mode adopted by the circuit court, is sanctioned by the practice of several of the States, especially by the practice in Kentucky, and we cannot conceive that one mode has any particular advantage over the other, each being equally calculated to promote the ends of justice.

Judgment affirmed.

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JOHN H. COCKE, assignee of Charles Fisher, plaintiff, *vs.* JAMES W. HENSON, BENJAMIN JOHNSON, and AMBROSE H. SEVIER, defendants.

1. It is within the discretionary power of a court to stay proceedings in a second suit until the costs of the first are paid.
2. The rule, if granted at all, is always on the ground of vexation.

July, 1832. — Motion to stay proceedings, determined before Thomas P. Eskridge and Edward Cross, judges.

CROSS, J., delivered the opinion of the Court. — In this case a motion is made for a rule to stay proceedings until the costs of a former suit for the same cause of action be paid. It appears that some two or three years ago, the plaintiff brought suit on the instrument which forms the basis of the present action, and prosecuted the same against the defendants until the last term of this court, when he applied for and obtained leave to suffer a nonsuit. Judgment was thereupon rendered against him in favor of the defendants for their costs. At the time of this proceeding, the pleadings had been made up, and the defendants had taken depositions to be used on the trial. The writ in the present suit has been sued out since the last term of this court. The motion involves a question of practice in which there has been no former adjudication in the courts of this territory, of which we have any knowledge, and we have therefore taken something more than ordinary pains to investigate the subject.

Although questions of this kind have never, heretofore, been raised in the courts of this country, they have been of frequent recurrence in the courts of many of the States. There they have been regarded as an appeal to the discretion of the court; and such we consider the present motion. The exercise of discretionary power by judicial tribunals is not only essential to the ends of justice, but to their existence. Without it, the very object of their creation would in some degree be thwarted. When resorted to, however, it should be exercised with great caution, and in such a manner as is best calculated to promote the object of its existence. It has been urged that, although

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courts necessarily possess discretionary power in many cases, the rule asked for in the present motion is not embraced, and that in the absence of statutory provision and the sanction of common law, the motion must fail. If the state of facts presented in the case before the court be such as to justify the exercise of the power, we can perceive no objection to its exercise. We have been unable to find any positive prohibitory enactment on the subject; nor have we found any thing in our statutes restrictive by inference. In the court of king's bench, in England, the power is constantly exercised. In New York, the supreme court has recognized its existence in a case similar in principle to the one before us. So in Pennsylvania, Massachusetts, and, as is believed, in Tennessee. Such rules have, however, always been refused in the English courts, when the body is in custody for the costs for the prior suit. No delay in suing out execution, that we can find, has ever been allowed to have any influence in granting such rules. The rule, if granted at all, is always allowed upon the ground of vexation. 1 Tidd, 480. In the case before the court, the plaintiff prosecuted a former suit for the same cause of action for upwards of two years, and when the defendants had prepared their pleadings, and had been at the trouble of summoning witnesses and taking depositions to be used on the trial, and preparing themselves fully for trial, the plaintiff voluntarily, and without any apparent reason for doing so, asked for and obtained a dismissal of his suit, and a few weeks thereafter brought suit in the same court for the same cause of action against the same individuals. Whatever may have been the reasons by which he was influenced to pursue this course, we cannot but presume that justice might have been as well obtained in the first as the present action. The defendants are now driven to the alternative of submitting to his claim, or travelling over the same ground again, in defending against the second suit. Should the plaintiff choose to do so at any subsequent stage of the present suit, he may again suffer a nonsuit and proceed anew against the defendants, and they again be compelled to submit to the claim or defend against it.

In the mean time heavy bills of costs might, and would,

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doubtless, accumulate, if he were allowed to progress without their payment, and in this state of things, insolvency or elopement might close the scene of vexation. Although such, we apprehend, would not be the case in the present instance, as the plaintiff is said to be abundantly able to meet any demands against him, yet in others it might be so. The principle is the same, regardless of the condition of parties, and we are therefore conclusively of the opinion that the question embraced by the defendants' motion is within the scope of the discretionary power of this court, and that the facts of this case fully justify its exercise. *Rule ordered accordingly.*

THOMAS JAMES, plaintiff in error, *vs.* SAMUEL JENKINS, defendant in error.

1. The affidavits in attachment cases may be made before the clerks of the circuit courts.
2. The proceeding by attachment is in derogation of the common law, and when the service of the writ does not conform to the statute, the judgment is erroneous.

July, 1832. — Error to Chicot Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — Jenkins, the defendant in error, sued out an attachment from the office of the clerk of the circuit court of Chicot county, against James, and prosecuted the same to judgment. The object of the plaintiff in error is to reverse this judgment. Various grounds are relied on for that purpose.

First, it is contended that the affidavit upon which the attachment issued, is insufficient, the clerk having no power in such cases to administer oaths in vacation. Secondly, there was no service of the writ, and of consequence, that every subsequent step taken in the cause was erroneous. These are the only grounds we deem it material to notice. The first has been urged with some plausibility, but the practice has uniformly

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been, in making the affidavit required, to take the oath before the clerk; and although we have found no express provision in our statute delegating the power, yet we think it is impliedly given, and that the legislature obviously so intended it.

The second objection is of a more serious character. The only return made by the sheriff is in these words: "Served the within writ of garnishee on the within-named Squires' Ward, Wm. B. Patton, and John S. Been, by reading the same within their hearing, in the presence of James Estill and William Springer, on the 17th day of November, in the township of ———, and county of Chicot. Nov. 17, 1828."

The manner of serving the writ of attachment is pointed out in the third section of the act of 1818, entitled, "An Act to provide a method of proceeding against absent and absconding debtors;" and requires that the officer should go to the place where, or the person in whose hands or possession the lands, tenements, goods, chattels, and effects are supposed to be, or the person supposed to be indebted to the defendant, and then and there declare in the presence of one or more creditable persons of the neighborhood that he attaches the same. The return of the sheriff does not even purport to be a service of the writ of attachment, and if it did, there has been no compliance with the provisions of the statute. The proceeding by attachment is derogatory of the common law, and there should at least be a substantial observance of the provisions of the statute authorizing it. *Judgment reversed.*

BENJAMIN CLARK, complainant, *vs.* JESSE SHELTON, defendant.

The superior court, since the act of 22d October, 1828, has appellate jurisdiction only, and cannot entertain jurisdiction in a case certified to it from the circuit court.

July, 1832. — Motion to dismiss, determined before Benjamin Johnson and Thomas P. Eskridge, judges.

OPINION OF THE COURT. — This suit was originally commenced in the circuit court of Hempstead county, on the ——

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day of March or April, in the year 1832. At the April term, 1832, the judge of that court having been personally concerned as counsel for one of the parties, certified the cause up to this court, that it might be here tried. The counsel for the defendant have moved the court to dismiss the suit for want of jurisdiction, and to remand the same to Hempstead circuit court.

The only question presented by the motion is, whether the court can entertain jurisdiction of the cause. The decision of this question must depend upon the acts of congress and the legislature of this territory. By an act of congress passed on the 17th April, 1828, sec. 3d, " The legislature of the Territory of Arkansas shall be authorized in all cases, except where the United States is a party, to fix the respective jurisdictions of the district and superior courts." In the acts of the legislature of this territory, on the 22d of October, 1828, we find the following provisions: " That from and after taking effect of this act, the superior court of this territory shall, in all cases of law and equity, be exclusively an appellate court, and shall not have original jurisdiction, in any civil case, unless such as may arise under the laws of the United States, or take cognizance of any criminal cases, alleged to have been committed within this territory, provided that nothing in this section shall be so construed as to prevent said superior court from deciding all cases, civil or criminal, at law or in equity, that are now pending in said court, or returnable thereto."

Section 13th. " Be it further enacted, that in all cases where a judge of the superior court is concerned or interested in any suit or action now pending, in any of the circuit courts, the parties in such suits may cause the same to be certified to the superior court to be there tried and determined; and all suits or actions that may hereafter be brought by any of said judges against others, or to which either of the said judges is a party, shall be returnable to, and tried in the superior court; *provided*, that no judge shall be compelled to hear and determine any criminal case wherein the defendant or defendants are related to him; but shall cause the same to be certified to the superior court, to be there tried and determined." These are all the provisions of the act of 1828, relative to the jurisdiction of the

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superior court. It is material to observe, that the judges of the superior court are also judges of the circuit courts. From the foregoing provisions just recited, it is manifest, that all original jurisdiction which the superior court had theretofore possessed, is taken away, excepting such as may arise under the laws of the United States, and a few other specified cases. It is admitted this case does not arise under a law of the United States, nor does it fall within any of the cases specified in the act of 1828. How, then, can this court entertain jurisdiction? The only ground relied on by the counsel for the complainant is, that an act of our legislature, of 1821, and an act of 1823, confers the jurisdiction upon the court. The conclusive answer to this argument is, that the provisions of these acts of 1821 and 1823, are inconsistent with the provisions of the statute of 1828, and consequently the latter repeals the former. By the act of 1828, the previous original jurisdiction of this court is abrogated, annulled, and taken away, with the exception of a few cases provided for in the act. No statute, anterior to 1828, can have any operation upon the subject of the jurisdiction of this court.

By the act of congress, and of the legislature of this territory, both enacted in 1828, the question of jurisdiction must be decided. According to the provisions of these acts, it is placed beyond doubt, that this court cannot entertain jurisdiction of the present suit. *Suit dismissed.*

ABSALOM MADDING, appellant, *vs.* JOHN PEYTON, appellee.

Where the summons of the justice of the peace describes the cause of action as a "note of hand," a "bond" or "writing obligatory" cannot be received in evidence, for it is variant from the summons.

July, 1832. — Appeal from Hot Springs Circuit Court, determined before Thomas P. Eskridge and Edward Cross, judges.

OPINION OF THE COURT. — This suit was commenced before a justice of the peace for Hot Spring county, upon the following writ: —

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"Territory of Arkansas, county of Hot Spring, Hunter township, United States of America, to the constable of Hunter township, greeting: Summons John Peyton to appear before me, justice of the peace, on the thirty-first day of the present month, at my dwelling-house in said township, between the hours of ten in the forenoon and three o'clock in the afternoon of the said day, to answer unto Absalom Madding in an action on a note of hand. Given under my hand and seal this 23d day of August, 1831.

(Signed) JOHN WILLIAMS, J. P." [seal.]

On the 31st of August, the parties appeared, and after hearing the evidence, the justice rendered a judgment against the defendant Peyton, in favor of the plaintiff Madding, for $14.75; from which the defendant prayed an appeal. At the July term of the Hot Spring circuit court, the parties appeared by their attorneys, and neither party requiring a jury, the cause was submitted to the court. On the trial in the circuit court, the plaintiff having offered in evidence, in support of his action, the following writing obligatory, to wit:—

"Washington, Nov. 1831.

"On or before the first day of December next, I promise to pay A. Madding fourteen dollars and seventy-five cents, which may be discharged in good merchantable seed cotton, delivered in Barkman's or Collins' gin, for value received. Witness my hand and seal. (Signed) JOHN PEYTON." [seal.]

The defendant, by his counsel, moved the court to exclude the said writing obligatory from being given in evidence, which motion the court sustained, and thereupon rendered a judgment for the defendant; to which opinion the plaintiff excepted, and filed his bill of exceptions.

The only question for the consideration of this court is, whether the circuit court erred in excluding the writing obligatory from being given in evidence. This will depend upon a fair construction of the statute regulating the collection of "small debts."

The first section of the small debt law provides, that the summons shall set forth the true cause of action, whether

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founded on bond, bill, note, book account, or promise. The summons, in the case before the court, describes the cause of action to be a note. A note is the evidence of debt in writing, not under seal. The instrument of writing excluded from being given in evidence by the circuit court, is a bond, or writing obligatory, — an evidence of debt in writing under seal.

The object of requiring the true cause of action to be set forth in the summons is, to apprise the defendant of the charge which he is called upon to answer, in order that he may be prepared to make his defence. The writing offered in evidence, in the circuit court, being in legal acceptation and operation totally different from that described in the summons, and constituting an altogether different ground of action, was very properly excluded from being given in evidence. This court is disposed to sustain, whenever it is possible, proceedings had before a justice of the peace, knowing the great inconvenience which would result to the country from requiring formal correctness in their proceedings. *Judgment affirmed.*

JOHN H. COELLE, plaintiff in error, *vs.* THOMAS D. LOEKHEAD and JAMES MCFARLAND, defendants in error.

Amendment made by adding the name of another person, four years after the rendition of judgment.

July, 1832. — Motion to amend a judgment, before Benjamin Johnson and Edward Cross, judges.

This day, the court being sufficiently advised of the motion of the defendants in error to correct and amend the judgment rendered in this case at the April term of this court, 1828; it appearing that the said judgment should have been affirmed in the names of Thomas D. Loekhead and James McFarland, partners, under the name of Thomas D. Loekhead & Co., instead of in the name of Thomas D. Loekhead alone, sustained the motion, and ordered this amendment to be made *nunc pro tunc.*

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SAMUEL CAMPBELL, administrator, and LIZA CAMPBELL, his wife, administratrix, plaintiffs in error, *vs.* WILLIAM STRONG, assignee of Wade Hampton, deceased, defendant in error.

1. A writ of error does not lie on an allowance against an executor or administrator.
2. Where a new jurisdiction, unknown to the common law, is created, a writ of error will not, and a *certiorari* will lie to it. 2 Tidd, 1051.

July, 1832. — Writ of error to Phillips Circuit Court, determined before Thomas P. Eskridge and Edward Cross, judges.

OPINION OF THE COURT. — The defendant Strong presented a claim for allowance against the plaintiffs as administrator and administratrix, to the circuit court of Phillips county, which was finally acted upon and allowed on the 17th day of November, 1826. The object of the writ of error is to reverse this allowance. Two preliminary questions have been raised by a motion to dismiss the writ of error, first, whether it is authorized in such cases? and if so, secondly, whether it is not barred in the present case by the statute of limitations?

By the 30th section of the act of 1825, entitled, "An Act concerning executors and administrators," any person having a claim or demand against the estate of a deceased person, may apply to the circuit court of the county in which the letters testamentary, etc., of administration were granted, to have the same proved and allowed, first giving ten days previous notice of the nature and amount of such claim or demand, and in such cases the circuit court or, if either desired it, where the amount exceeds twenty dollars, a jury shall decide on the validity of the claim or demand without the formality of pleading.

Where the sum in controversy does not exceed one hundred dollars, the decision is final. For a greater amount the right of appeal is given to either party to the superior court upon paying the costs of proceeding in the circuit court, and making affidavit, he does not appeal for the purpose of delay. In the superior court, where the appeal has been regularly obtained and transmitted, the case is to be tried on its merits *de novo*.

The object of the legislature in authorizing this summary

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mode of proceeding, was doubtless not only to facilitate and simplify the adjustment of claims against the estates of deceased persons, but to render it less expensive. The common law method, however, by suit against the executor or administrator, may still be resorted to. But if the action be brought within a year after the grant of letters testamentary or of administration, the costs are to be paid by the plaintiff in the suit notwithstanding he may obtain judgment for the amount of his claim. Where the common law remedy is adopted, there can be no doubt but that a writ of error would lie as in other cases. The issuance of a writ of error from the final decision or judgment of any circuit court, is declared by our statute, to be a matter of right. Geyer's Digest, 263. Apart from this statutory provision, the common law allows the writ on all judgments rendered according to its rules by any court of record. 2 Tidd, 1051; 9 Petersdorf, tit. Error, 10.

The proceedings in the case before the court is dependent for its validity alone upon the thirtieth section of the act of 1825, and is altogether contrary to the course of the common law. Upon an allowance in the proceedings authorized, a subsequent act is necessary on the part of the court before payment of the claim allowed can be coerced by execution.

The executor or administrator is required to settle his accounts annually with the court, and upon these settlements, an order is made for the payment of claims previously allowed in whole or in part according to the situation of the estate, upon which, if not complied with in ten days after the end of the term, the claimant may sue out an execution. See section thirty-four of same act. The allowance, therefore, is neither a final decision, nor is it a judgment according to the course of the common law. The doctrine is, where a new jurisdiction is created by statutory provision authorizing a proceeding not known to the common law, the writ of error will not lie, but a *certiorari* will. 2 Tidd, 1051. It has been repeatedly decided in the circuit courts, that a writ of error does not lie on an allowance against an executor or administrator in the county courts where such allowances are now cognizable by act of the legislature.

We are clearly of the opinion, that if the plaintiffs have been

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injured by the decision of the circuit court, their remedy is not by writ of error, the legislature not having given it by the act authorizing the allowance. The second ground relied upon, it will not be necessary to notice. The motion is therefore sustained, and the writ dismissed.

JOHN TILFORD & Co., appellants, *vs.* ALLEN M. OAKLEY, appellee.

A bill in chancery is not the proper remedy to enforce a decree in chancery for the payment of money, the remedy at law being adequate and complete.

July, 1832. — Appeal from Hempstead Circuit Court, determined before Thomas P. Eskridge and Edward Cross, judges.

OPINION OF THE COURT. — This is an appeal from the decree of the circuit court of Hempstead county, pronounced in a cause wherein John Tilford & Co. were complainants, and Allen M. Oakley, defendant, dismissing the complainants' bill. The complainants filed their bill to enforce a decree of the Bath circuit court of the State of Kentucky, decreeing the defendant Oakley to pay a specific sum of money. The only question for the consideration of this court is, whether a bill in chancery is the appropriate remedy to enforce a decree in chancery for the payment of a specific sum of money. We think it is not the proper remedy. The complaint had a clear and complete remedy at law, by an action of debt founded on the decree. *Thompson* v. *Jameson*, 1 Cranch, 282; *Post & La Rue* v. *Neafie*, 3 Caines' Rep. 22; *Sadler* v. *Robins*, 1 Camp. 253.

Decree affirmed.

MOSES BURNETT, appellant, *vs.* EDWARD WYLIE, appellee.

1. In an action on a penal bond, the plaintiff must assign, or suggest on the record breaches of the condition, and judgment rendered without doing so is erroneous.

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2. Breaches may be assigned either in the declaration or replication, when performance is pleaded or suggested on the record.

July, 1832. — Appeal from Chicot Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — This is an action of debt, brought by Wylie against Burnett, in the Chicot circuit court, upon the following obligation, and condition annexed: — "Know all men by these presents, that we, John J. Bowie, as principal, and Wm. B. Patton and Moses Burnett, as securities, are held and firmly bound unto Edward Wylie in the sum of seven hundred dollars lawful money of the United States, to be collected of, as on the following conditions, namely: whereas the said Bowie has this day bargained and sold unto the said Wylie seven hundred acres of Spanish confirmed land claims; now, if the said Bowie should make good and sufficient title to him, the said Wylie, to the aforesaid land, then in that case the above obligation is to be void, otherwise to remain in full force." Which writing is by oyer made part of the record.

The defendant in the court below, having by consent withdrawn his pleas of payment, waived oyer of the writing declared on, and filed a general demurrer to the declaration, which was by the court overruled, and judgment rendered against him for seven hundred dollars and costs, has appealed to this court.

The principal ground of error relied upon by the counsel for the appellant is, that the plaintiff in the court below failed to assign breaches of the condition of the writing obligatory on which the action is founded, and that judgment was rendered without a writ of inquiry, or the intervention of a jury.

Our legislature, at its last session, adopted and reënacted the statute of William 3, c. 11, sec. 8, under the title of "An Act concerning suits on penal bonds and other writings under seal." This statute has also been long since reënacted in the States of New York, Virginia, and Kentucky. The adjudications, then, in England and in those States, upon this statute, will be regarded by this court as high authority.

In the case of *Van Benthuysen* v. *De Witt*, 4 Johns. Rep. 213,

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the supreme court of New York say: "In suits on bonds for the performance of covenants, it is compulsory on the part of the plaintiff to assign breaches, and have his damages assessed; and when breaches are assigned, the jury at the trial must assess damages for such breaches as the plaintiff shall prove; otherwise the verdict is erroneous, and a *venire facias de novo* will be awarded. 5 Term Rep. 636; 2 Caines' Rep. 329; 2 Wils. Rep. 377. It is now settled in England, New York, Virginia, and Kentucky, that in debt on bonds, with a condition for doing any thing else, except the payment of a gross sum of money, or the appearance of a defendant in a bail bond, the plaintiff is bound to suggest breaches, either in his declaration, replication, or on the roll or record." 1 Saund. Rep. 58, n. 1, by Williams, 2; Ib. 187; *Collins* v. *Collins*, 2 Burr. 820; 5 Term Rep. 538; 8 Ib. 126; 2 Hen. & Munf. Rep. 446; 1 Bibb, Rep. 242.

The learned editor of Johnson's Reports, in a note to the case before mentioned of *Van Benthuysen* v. *De Witt* (2d ed.), lays down the law on this subject, which entirely accords with our own views. He says: "The plaintiff may assign breaches (either one or more) in his declaration, or he may leave the assignment to be made afterwards in consequence of the plea; as if the defendant pleads performance of the covenant, the plaintiff may set forth his breaches in his replication; or where the defendant pleads *non est factum*, or judgment be given against him on demurrer, *nil dicit*, or confession, and the plaintiff has not assigned breaches in his declaration, he may, notwithstanding, suggest breaches on the record; and the suggestion may be made as well before as after the entry of the judgment. The judgment to be entered is to recover the penalty of the bond, nominal damages, and costs; and if judgment be entered for the damages assessed by the jury, it is so far erroneous, and will be reversed as to the damages, and the execution is of course to levy the amount of the judgment, but is indorsed to levy only the damages assessed for the breaches of covenant, together with the costs." In support of these positions, numerous authorities are cited.

If, then, the present action is founded on a penal bond for

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the performance of any thing else than the payment of a gross sum of money, or the appearance of the defendant in a bail bond (and it is clearly not for either of these), it was incumbent on the plaintiff, after the demurrer to his declaration had been overruled, to assign or suggest a breach or breaches of the covenant contained in the condition of the obligation declared on, and have the damages assessed by a jury upon a writ of inquiry; and for his failure to proceed in this manner, we are clearly of opinion that the judgment is erroneous, and must be reversed.

It has been argued by the counsel for the plaintiff with great earnestness and zeal, that this is not an action brought upon a penalty for non-performance of an agreement or covenant contained in any indenture, deed, or writing. By inspecting the writing obligatory, as set out upon oyer, it is manifest that it is a penal bond for the conveyance, by a good, sufficient title, of seven hundred acres of Spanish confirmed land claims. To illustrate this proposition by reasoning would seem to be difficult, since it appears to us to be self-evident. The language used is clear, plain, and unambiguous. The obligors bind themselves to pay to the plaintiff seven hundred dollars, conditioned to be void if one of them should make to the plaintiff a good and sufficient title to seven hundred acres of Spanish confirmed land claims which he had that day bargained and sold to the plaintiff, otherwise to remain in force. The plain intention of the parties to this contract is to secure by a penalty, namely, seven hundred dollars, the conveyance, by a good title, of seven hundred acres of Spanish confirmed land claims.

Let us advert to the condition of the bond on which the action was brought in the case of *Ramsey* v. *Matthews*, 1 Bibb, 242. It is in these words: "the condition of the above obligation is such, that whereas the above-named Ramsey has hired two negroes of the said Matthews for one year, and for one hundred dollars each, to be paid at the end of the year, and to find said negroes in clothing, &c., pay their taxes, and return said negroes at the end of the year to the said Matthews; now, if the said Ramsey does and shall well and truly pay, do, and perform, &c., then this obligation to be void." How or in what

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particular does the condition differ from the condition of the bond before the court? The condition of the present bond is, "now, if the said Bowie should make a good and sufficient title to him, the said Wylie, to the aforesaid land, namely, seven hundred acres of Spanish confirmed land claims, then the above obligation to be void." There is no substantial difference in these two bonds; and Judge Trimble and the whole court held that the obligation in the case of *Ramsey* v. *Matthews* was to be regarded as a bond with collateral conditions, in which the law requires breaches to be assigned.

We abstain from further remarks on a question which to us appears so free from doubt. The other objection taken to the declaration, we deem untenable. *Judgment reversed.*

Ex parte John Smith.

1. The act incorporating the city of Little Rock, delegates no power to punish for offences provided for by the general laws of the country.
2. An ordinance, imposing a fine for an assault, committed in the limits of the city, is void.
3. The mayor may exercise the same powers as to criminal matters as a justice of the peace.

July, 1832. — *Habeas corpus*, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

Opinion of the Court. — The body of John Smith is brought before this court, on a writ of *habeas corpus*, the return of which shows that he is held in custody by the town constable under a warrant issued by the mayor of the town of Little Rock, reciting that "Whereas John Smith, on the day of July, inst., before me, Mathew Cunningham, mayor of the town of Little Rock, was convicted of having committed an assault on the body of John H. Walker, within the limits of said town, in violation of the ordinances, and fined by me in the sum of thirty dollars, for said offence, and also the costs of prosecution, and commanding the said constable to take the said John Smith, if to be found within the town of Little Rock, and unless he shall pay the

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aforesaid fine and costs, to deliver him to the keeper of the common jail of the county of Pulaski, who is commanded to receive into his custody the said John Smith, and him safely keep until he shall pay said fine of thirty dollars and the costs aforesaid." The motion to discharge involves two questions: first, as to the power delegated to the mayor and town council by the act of incorporation; and second, as to the powers of the mayor unconnected with the council.

By an act, passed at the last session of the legislature, entitled, "An Act for the incorporation of the town of Little Rock, and for other purposes," various powers are delegated to the mayor and town council, when organized according to its provisions. They are constituted a legislative body for the town, and may enact ordinances to preserve its health, to remove nuisances, provide night-watches, erect market houses, make such by-laws as they may deem proper for the suppression of vice and immorality, and enforce the same, and do all such matters and things for the well-being and good police of said town, as are not inconsistent with existing laws. These are the principal powers given to the mayor and town council in their legislative capacity, none of which expressly authorize the making of ordinances or by-laws on the subject of assaults. If such a power be given at all, it is by implication. The power to make by-laws for the suppression of vice and immorality, as well as that to do all things necessary for the well-being and good police of the town, would seem to embrace almost every species of crime; but no one would contend that the mayor and town council could, under these general grants of power, make ordinances and by-laws on the subject of murder, or other felonies. The most rational construction, then, to be given to terms so indefinite and apparently comprehensive is, that the legislature intended to confer no power to make ordinances and by-laws in relation to matters already provided for by the general laws of the country. It may be said, that if the mayor and town be thus restricted in their sphere of action as a legislative body, the object of incorporation will never be attained. This, however, would be an unjust conclusion, as ample power is given, although not to the mayor and town council, in the

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exercise of which, offences of every grade may receive their appropriate punishments.

Is it to be found in the enumeration of powers delegated to the mayor, unconnected with the council, which will now be considered, and forms the second question involved in the motion to disharge?

The moment the mayor is regularly installed into office, he is declared, by the act of incorporation, to be a conservator of the peace, and not only empowered, but actually required to do and execute all such matters and things within the limits of the town, as justices of the peace for the territory may and can lawfully do. In an examination, therefore, of his powers and duties, it would be necessary to ascertain those of a justice of the peace, as regulated and defined by the laws of the territory. Acting in that character, he might issue a warrant, upon proper information, for the arrest of any person charged with felony, and upon examination bind over for further trial, or commit to prison. In case of assault and battery, or breach of the peace in his presence, or upon the oath of a creditable person, he can cause the offender to be brought before him, and upon confession or the verdict of guilty, by a jury of twelve men, impose a fine of not less than five nor more than twenty dollars. He may cause recognizances to be entered into in certain cases for keeping the peace, and issue warrants for the apprehension of vagrants. The duty is likewise imposed upon him to execute the laws and ordinances of the council, and see that they be faithfully observed.

Entertaining the opinion, that no power has been delegated to the mayor and town council in their legislative capacity to make ordinances and by-laws on the subject of offences, for the punishment of which the general laws of the country provide, it follows that the ordinance imposing a fine of thirty dollars for an assault is void, and that Smith, who has been fined and committed for its violation, is improperly in custody. The imprisonment would have been equally unauthorized, if the mayor had acted in the matter as a justice of the peace, there being no power given in such cases to impose a fine of thirty dollars. The prisoner, therefore, must be discharged.

Discharged accordingly.

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ROBERT W. FRENCH, assignee of Joseph Henderson, appellant, *vs.* THOMAS T. TUNSTALL, appellee.

1. On a general demurrer, unless for misjoinder of actions, judgment must be given for the plaintiff, if there is one good count in the declaration.
2. Debt or covenant is the appropriate remedy on a writing obligatory.

July, 1832. — Appeal from Chicot Circuit Court, determined before Benjamin Johnson and Edward Cross, judges.

OPINION OF THE COURT. — The declaration contains two counts. The first is the common count in an action of assumpsit for money lent and advanced by the plaintiff to the defendant. The second is also in the form of a count in assumpsit, upon a promissory note under seal. The defendant filed a general demurrer to the declaration, which was sustained by the court, and judgment rendered in his favor, from which the plaintiff has appealed to this court.

If the declaration contains one good count, a demurrer to the whole declaration will not be sustained, unless there is a misjoinder of actions. The first count is in assumpsit, and is clearly a good and valid count. It is equally clear that the second count is also in the form of a count in the action of assumpsit. It is true that the cause of action set out in the second count will not support an action of assumpsit; debt or covenant being the appropriate action upon a writing obligatory. But because the second count is faulty and defective, and might have been reached by a general demurrer, it does not follow that it is a count in debt, although it states a cause of action for which debt is the appropriate remedy.

We are of opinion, then, that there is no misjoinder of actions, notwithstanding the second count is palpably defective, and sets out no cause of action for which assumpsit will lie.

The first count being good, the demurrer to the declaration should have been overruled. The case of *Judin* v. *Samuel*, 4 Bos. & Pul. Rep. 43, is, in principle, analogous to the present case. The declaration contained three counts. The first was in trover for bills of exchange, and the second and third counts, after stating the delivery of the bills to the defendant, in order that he might get them discounted for a certain commission,

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and his having got them discounted, stated that he converted and disposed of the money to his own use.

The defendant demurred generally, on the ground of a misjoinder of tort and contract; the subject of the two last counts being matter of contract; but the court held that, on a general demurrer, as all the counts were in the form of tort, judgment must be for the plaintiff if any one count was good. We think the principle decided in the above case is decisive of the case now before the court. *Judgment reversed.*

BENJAMIN MURPHY, appellant, *vs.* BENJAMIN F. HOWARD, appellee.

In actions sounding in damages, those claimed in the declaration, and not those awarded by the jury, constitute the cause of action and give the court jurisdiction.

January, 1833. — Appeal from Conway Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — Howard declared in an action of assumpsit against Murphy, for the value of a certain keelboat, charged to be of the value of one hundred and fifty dollars, and laid his damages at that amount.

Upon the trial of the issue joined, the jury by their verdict assessed the damages to twenty-five dollars, for which the court rendered judgment for Howard, from which Murphy has appealed to this court.

The only ground relied upon by the counsel for the appellant for reversing the judgment is, that the circuit court did not possess jurisdiction of the case. By referring to the statute of 1828, (Acts, p. 34,) it will be seen that the circuit courts are clothed with "original jurisdiction in all cases of one hundred dollars and upwards." Is this a case of one hundred dollars, or is it a case where the amount in controversy is less? To decide this question we must look either to the declaration or the verdict of the jury. By referring to the former, it will be seen

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that the amount in controversy is one hundred and fifty dollars, the damages claimed for a breach of the contract. According to the latter, the amount in controversy was twenty-five dollars, the damages assessed by the jury in their verdict. To which of these shall we refer in deciding the question now presented to the court?

The doctrine is well settled that in actions sounding in damages, those laid in the declaration, and not those found by the jury, are the cause of action, and give to the court jurisdiction. 2 Dallas, 328; 3 Ib. 441; 1 Bibb, 345. In these cases the doctrine is expressly laid down that the damages in the declaration furnish the rule to ascertain the jurisdiction of the court. "The absurd and inconvenient consequences that would result from a contrary doctrine, afford a strong argument against its propriety. If a verdict for less than one hundred dollars would oust the court of its jurisdiction, then it would seem to follow, that a verdict for the defendant would equally deprive the court of its jurisdiction, and that no judgment could be given that would bar a future action for the same cause, or that would award to the defendant his costs. In actions sounding in damages, if the verdict is to be the criterion of jurisdiction, in many cases it will be impossible for a plaintiff to know to what tribunal to apply for relief. If he estimates his cause of action either too high or too low, it will be equally fatal. But further, taking the verdict as the rule to ascertain the jurisdiction, and it may be easily conceived that cases may occur in which from a difference of opinion in the amount of damages between the jury and the justice of the peace, neither tribunal will exercise jurisdiction, and the party will be without a remedy. A doctrine resulting in such consequences cannot be correct." *Singleton* v. *Madison*, 1 Bibb, 342. *Judgment affirmed.*[1]

[1] Debt will not lie for a debt under forty shillings, (2 Inst. 311, 112,) yet the smallness of the sum must appear on the face of the declaration. 3 Burr. 1592; Barnes, 497. And though reduced by a set-off, it will not affect the jurisdiction of the court. 3 Wils. 48.

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BENJAMIN CLARK, appellant, *vs.* JESSE SHELTON, appellee.

1. Appeals only lie from final decrees. An appeal from an interlocutory decree dissolving an injunction, will not be entertained. *Young* v. *Grundy*, 6 Cranch, 51.
2. Appeals and writs of error at common law adverted to. Act of 1807, (Geyer's Digest, 261,) and 5th section of act of congress of 17th April, 1828, (Acts, p. 46,) construed.

January, 1833. — Appeal from the Hempstead Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — The object of the motion submitted to the court is, to dismiss the appeal in this cause, upon the ground that no appeal lies from an interlocutory order dissolving an injunction. In England, appeals are allowed from interlocutory orders, as well as from final decrees. 1 Harrison's Chancery, 454. But such appeals do not stay the execution of the order appealed from, nor suspend the proceedings in the court from which the appeal is taken, without a special order granted to that effect. This is the rule in regard to appeals from the rolls to the lord chancellor, as well as to appeals from the chancellor to the house of lords. *Warden of St. Paul's* v. *Morris*, 9 Ves. 316; *Gwynn* v. *Lethbridge*, 14 Ves. 585; *Willan* v. *Willan*, 16 Ves. 215; *Macraughton* v. *Borhen*, 1 Jac. & Walk. 48. The analogy is thus preserved to the doctrine at law that a writ of error does not operate as a *supersedeas* without a special direction for that purpose. *Entwistle* v. *Shepherd*, 2 T. R. 78; *Kempland* v. *Macauley*, 4 T. R. 436. The only check ever imposed to prevent the party from proceeding to enforce the decree is, to require bond and security to repay, in the event of a reversal of the decree.

In the United States a different course of practice has prevailed very extensively, to prevent the inconvenience of having a cause pending in the original and appellate court at the same time. The rule has been adopted that appeals should only be allowed from final decrees, and then the whole cause is considered to be open, and every order subject to revision and correc-

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tion. In the case of *Young* v. *Grundy*, 5 Cranch, 51, the supreme court of the United States decided that, "no appeal or writ of error will lie to an interlocutory decree dissolving an injunction." A similar decision has been made by the court of appeals of Virginia, and the same doctrine is settled in the courts of Kentucky and Tennessee. In New York it was regarded, so late as the year 1823, as an open question, whether an appeal would lie from an order dissolving an injunction. But it was deemed to be settled that the order must be carried into execution, and could not be suspended by an appeal. *Wood* v. *Dwight*, 7 Johns. Ch. 295. By a statute passed at a subsequent period, the right to appeal from an interlocutory decree, under special circumstances, was granted. This statute may be seen 7 Johns. Ch. R. 316, note (*a*). With this view of the law, let us proceed to the consideration of the statutes in force here bearing upon the subject.

The first is the act of 1807, (Geyer's Digest, p. 251, sec. 54,) which provides in substance, that if any person shall feel himself aggrieved by any final decision or judgment given in any of the courts in any cause wherein the amount in controversy exceeds one hundred dollars, he may appeal to the superior court, and after such appeal the court below shall not proceed any further in such case. If this provision stood alone, there could be no ground to dispute that no appeal will lie from any other than a final decision. But it is contended in argument, that the 5th section of the act of congress, passed the 17th day of April, 1828, (Acts, p. 46,) repealed the clause above referred to. It is our opinion that it does not have such effect. The two laws form part of the same system. They are in *pari materia*. They do not of necessity conflict with each other, but may and will stand together. The first act is not inconsistent with the last, and, in our opinion, they are both in force. Yet, if the former were repealed by the latter, the consequence to the appellant would be the same, because, but for the provision in the act of 1807, that after an appeal no further proceedings shall be had in the court below, the appellee in this case might have gone on to enforce his judgment at law, notwithstanding the appeal. *Warden of St. Paul's* v. *Morris*, 9 Ves. 316; *Hoyt* v. *Gelston*, 13 Johns. 139.

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If this were not the case, the evil so forcibly depicted by Lord Eldon would ensue. If a petition to stay proceedings were refused, the party would only have to appeal from that order, thus carry his point, and produce interminable delay. The only protection which the court can extend to the complainant in a bill for injunction when the injunction is dissolved, is to require bond and security from the defendant in equity, to refund the amount, in the event of a different decision upon final hearing. This is consistent with the practice of the English courts. *Monkhouse* v. *Bedford*, 17 Ves. 380; *Way* v. *Foy*, 18 Ves. 452. And it is in accordance, entirely, with the course pursued in some of the State courts of the Union.

In conclusion, we believe that no greater latitude in regard to appeals was intended to be given, by the act of congress referred to, than had previously been given by the act of 1807, and that no repeal of the act of 1807 was intended. We are, therefore, of opinion that no appeal lies from an interlocutory decree dissolving an injunction, and that this appeal was improvidently granted, and must be dismissed.

Dismissed accordingly.

ABRAHAM STANDEFER, appellant, *vs.* THOMAS DOWLIN, for the use of John M'Phail, appellee.

1. The authority of an attorney in a suit may be questioned by affidavit, or the production of sufficient proof, and he be required to show such authority.
2. An affidavit, stating that the party was informed and believed, and had good reason to apprehend that an attorney had no authority, is not a sufficient foundation for a rule against the attorney to show his authority.
3. In such a case, the grounds of the belief, and the reasons inducing the apprehension, should be stated, so as to enable the court to judge whether a rule ought to be granted.

January, 1833. — Appeal from Washington Circuit Court, determined before Benjamin Johnson, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — During the process of the cause, and previous to the rendition of judgment, the defendant filed

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his affidavit and moved the court to rule McPhail, or the counsel for the plaintiff to file a warrant of attorney to authorize them or some of them to collect the debt. In his affidavit, the defendant states, "that he is informed and believes, that the above suit has been instituted against him by John McPhail, and the counsel of said plaintiff, without any lawful authority from said plaintiff, and that he has good reason to apprehend that if the debt in this declaration should be paid to the said McPhail, or to said attorney or counsel, that the said McPhail or said attorneys could not execute any legal acquittance for the same."

The motion of defendant for the rule to file the warrant of attorney, or to show the authority for commencing the action was overruled, to which the defendant excepted, and after judgment was rendered against him, he appealed to this court. The correctness of the decision of the court below, overruling the defendant's motion, is the only point to which our attention has been drawn.

The uniform and settled practice here, in accordance with the practice in most, if not all of the States of the Union, is to proceed in the cause, upon the appearance of an attorney of the court for either of the parties, without requiring him to file his warrant, or to show the authority for prosecuting or defending the suit. Chief Justice Kent observes, in the case of *Denton* v. *Noyes*, 6 Johns. Rep. 308, that "by licensing attorneys the court recommended them to the public confidence, and if the opposite party, who has concerns with an attorney in the business of a suit, must always, at his peril, look beyond the attorney to his authority, it would be productive of great public inconvenience. It is not usual for an attorney to require a written warrant from his client. He is generally employed by means of some secret confidential communication. The mere fact of his appearance is always deemed enough for the opposite party and for the court."

But it cannot be doubted that a defendant may, by a sufficient affidavit, or the production of sufficient proof, question the authority for bringing and prosecuting the action. This is expressly asserted by the same eminent judge, in the case to which reference has just been made. Did the affidavit of the

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defendant, in the present case, lay a sufficient foundation to call upon the court to grant the rule? We think not. It is true he stated he was informed, and believed, and had good reason to apprehend, that the suit had been instituted without any authority from the plaintiff in the action. But this, in our judgment, was not sufficient. He should have stated to the court the ground upon which his belief was founded, and the reasons which induced him to apprehend that no authority existed for prosecuting the suit. He would then have enabled the court to form a correct judgment whether the rule ought or not to be granted. To permit defendants to question the authority to bring the suit on affidavit, merely stating their belief that the authority did not exist, without showing the ground and reason of that belief, would be productive of great public inconvenience, and hold out strong temptations to perjury for the sake of delay. We think the court correctly overruled the motion of the defendant, on the ground of the insufficiency of the affidavit upon which the motion was based.

Judgment affirmed.

BENJAMIN MURPHY, appellant, *vs.* RICHARD C. BYRD, appellee.

An appeal does not lie to the superior court in cases where the sum in controversy is less than one hundred dollars.

January, 1833. — Appeal from Conway Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This is an appeal from the Conway circuit court, and a motion has been made by the appellee to dismiss it on the ground that the sum in controversy between the parties being under one hundred dollars, the appeal was improperly granted, and this court has not jurisdiction. Whether this court has jurisdiction in cases in which the sum in controversy in the court below is under one hundred dollars, depends upon a proper construction of the several acts on the subject. The act of 1807, (Geyer's Dig. sec. 54, p. 261,) the act of congress

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of 1812, (Geyer's Dig. p. 34,) and the Organic Law of Arkansas, (Acts of 1818,) all in substantially the same language, provide that the superior court shall have appellate jurisdiction in all civil cases in which the amount in controversy shall be one hundred dollars or upwards. The language of the several acts cited are too plain to admit of a doubt. It is manifest that this court has not jurisdiction by appeal when the sum in controversy is under one hundred dollars. But it is contended that the act of congress of the 17th of April, 1828, gives an appeal to this court in all cases without regard to the amount in controversy. The language of the act is, that "the party aggrieved shall be at liberty, by appeal, writ of error, or *certiorari*, to remove his suit to the superior court for further trial." This language, it is true, is very broad, but it is not incompatable with the provisions of the several acts before cited, and cannot be understood as having repealed them.

The object of the act of 1828 was to legalize certain acts of the legislature of Arkansas, and to provide for the appointment of a fourth judge for this territory; and though the appellate jurisdiction of this court is provided for, it could not have been the intention of congress to repeal the act of 1807 regulating appeals, nor could it have been designed to repeal the provisions of the acts of 1812 and 1818 fixing the jurisdiction of this court in cases of appeal.

This appeal must be dismissed. This court is governed in its proceedings by the rules of the common law and the act of 1807. The act of 1807 expressly allows a writ of error, as a matter of right. Cases in which the sum in controversy is less than one hundred dollars, may be brought to this court by writ of error, but not by appeal. Geyer's Digest, 263.

JOHNSON, J., dissented. *Appeal dismissed.*

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JOHN CLARK and ALLEN M. OAKLEY, plaintiffs in error, *vs.* LEVIN CROPPER, defendant in error.

1. The assignment of a note must be proved on the trial to entitle the assignee to judgment.
2. The case of *Stroud* v. *Harrington*, ante, cited and approved.

July, 1833. — Error to Hempstead Circuit Court, determined before Thomas P. Eskridge and Alexander M. Clayton, judges.

OPINION OF THE COURT. — There is an error in the judgment of the circuit court in rendering judgment against the defendant without the production of any evidence to prove the assignment of the note on which the action was brought. The case of *Stroud* v. *Harrington*, decided at the January term, 1831,[1] is in point, and contains the reasons upon which this opinion is based. The time at which the assignment was filed up at the trial, we do not regard as erroneous. *Judgment reversed.*

ABSALOM FOWLER, appellant, *vs.* RICHARD C. BYRD, appellee.

1. *Lis pendens* in chancery is created by filing a bill and actual service of subpœna.
2. At law, suing out a writ constitutes the pendency of a suit, without service of the same.
3. A plea of another action pending is an affirmative plea, and casts the *onus probandi* on the party pleading it, and the proof to sustain it must be record evidence.
4. When the defendant has shown the issuing of a writ for the same cause of action, he has proved, *primâ facie*, the pendency of a suit; and it then devolves on the plaintiff to show, by record evidence, the disposition of it, parol evidence being inadmissible.
5. It would be competent to dismiss the previous writ at the time, by leave of the court, or have an order of dismissal *nunc pro tunc* entered of record, and thus destroy the effect of the plea in abatement; but the omission cannot be supplied by parol testimony.

February, 1833. — Appeal from Pulaski Circuit Court, determined before Edward Cross and Alexander M. Clayton, judges.

CLAYTON, J., delivered the opinion of the Court. — This was

[1] Ante p. 116.

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an action of debt, brought by R. C. Byrd against A. Fowler, in the circuit court of Pulaski county, in which the defence set up was a plea of the pending of a former suit for the same cause of action.

The circuit court permitted the clerk to prove by parol that the writ in the former suit had been dismissed, overruled the plea, and gave judgment for the plaintiff; from which judgment an appeal was taken to this court. In chancery it is settled, that a *lis pendens* is created by filing a bill and actual service of the subpœna. 2 Madd. 256; 1 Johns. Ch. R. 566.

At law, suing out a writ constitutes the pendency of a suit, without any further step, and neither service of process, nor any other proceeding, is required to form the ground of a plea of another action pending for the same cause. 1 Bac. Abr. 23; 5 Coke, 48, 51. The plea of another action pending is an affirmative plea, and casts the *onus probandi* upon the defendant pleading it, and the proof to sustain it must be record evidence. 1 Saund. Pl. & Ev. 19. A record is a memorial of a proceeding or act of a court of record, entered in a roll for the preservation of it. 7 Com. Dig. tit. Record (A). When, in this case, the defendant in the court below showed the issuing of a writ for the same cause of action, he proved, *primâ facie* at least, the pendency of a suit; and it then devolved on the plaintiff to prove, by competent testimony, that the suit had been disposed of, and was no longer pending. The parol evidence introduced for the purpose was not, in our opinion, legal. *Brush* v. *Taggart*, 7 Johns. 20; *Hasbrouck* v. *Baker*, 10 Ib. 248; *Jenner* v. *Joliffe*, 6 Ib. 9. Had he moved for leave to enter at that time a dismission of the first writ, or an order directing the clerk to make out upon the record a statement of the facts and dismission, as they had actually occurred, *nunc pro tunc*, we think upon that state of the case the plaintiff would have been entitled to succeed. But the failure to do so, and the attempt to supply the omission by parol testimony, constitutes such an error as to warrant the reversal of the judgment.

It is probable that even now, the plaintiff, by entering of record a dismissal of the first suit in the circuit court, will be entitled to have judgment in that court. *Judgment reversed.*

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ANONYMOUS.

1. Pleas in abatement, not being received with favor, require the greatest accuracy and precision in their form, and must be certain to every intent, and are not amendable; they must not be double.
2. If bad, the plaintiff need not demur, but may treat them as nullities and sign judgment.
3. If on the whole record the judgment of the inferior court is correct, it will not be reversed because improper evidence was admitted.

February, 1833. — PER CURIAM. Pleas in abatement require the greatest accuracy and precision in their form; they must be certain to every intent; they must not be double; they are never received with favor (1 Chitty's Pl. 491); they are dilatory, not reaching the merits of the action, and are not amendable; the plaintiff need not demur thereto when bad, but may treat them as nullities and sign judgment. 1 Tidd, 588. Tested by these rules, a plea in abatement which avers the suing out a former writ for the same cause, that it is still remaining in the clerk's office, that the defendant was arrested on such writ and surrendered to a person who represented himself to be deputy sheriff, that the suit is still pending, as defendant believes, and concluding with a verification, is destitute of requisite precision and formal accuracy, and does not tender a certain issue. What issue is tendered? Is it the suing out of the writ; its existence in the clerk's office; the arrest or surrender of the defendant, or the fact that T. was deputy sheriff, or that he represented himself to be such; that the suit is still pending, or that the defendant believes it to be pending? Such a plea is clearly insufficient, and may be treated as a nullity.

Where it appears to the appellate court that improper evidence has been admitted on the trial of an issue in the inferior court, yet if upon the whole record the judgment is right, it will be affirmed.

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SILAS MCCOY, as administrator of William Carlisle, deceased, *vs.* JAMES LEMONS, as administrator of John McElmurry, deceased.

1. The want of ten days' notice to an administrator, of the presentation of a claim to the probate court, cannot be made a ground of objection where the administrator voluntarily appears.
2. Appearance cures all defects and irregularities in process and the want of service, and dispenses with the necessity of process.

January, 1833.— Appeal from Conway Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT.— McCoy, as administrator of Carlisle, made his motion before the county court of Conway county, for an allowance against Lemons, administrator of McElmurry. After a hearing of the parties, the county court sustained his motion, and allowed him five hundred dollars, with interest at the rate of six per cent. per annum, from the 29th day of October, 1825, from which Lemons appealed to the circuit court; but the appeal was dismissed on the motion of Lemons, on the ground that ten days' notice had not been given to him, according to the directions of the statute of 1825, and from which latter decision McCoy has appealed to this court.

It appears from an examination of the proceedings before the county court, that the defendant was present at the trial in that court, which, in our opinion, superseded the necessity of notice. The notice prescribed by the act of 1825, can only be considered in the light of process to bring the party into court, and of course his voluntary appearance supersedes the necessity of it. Acts, 1825, p. 66. There is no principle of law better established than that the appearance of the defendant cures all defects and irregularities in process. It cures the want of service. *Caldwell* v. *Martin*, 2 Stra. 1072; *Wood* v. *Lide*, 4 Cranch, 180; *Knox* v. *Summers*, 3 Cranch, 498. *Judgment reversed.*

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CHESTER ASHLEY and BRUCE PERCIFULL, plaintiffs in error, *vs.* EASTHER MADDOX, administratrix of Thomas Maddox, deceased.

1. Garnishments could not issue on judgments rendered prior to November 7, 1831, as the garnishment act was prospective and not retrospective. Ter. Dig. 346.
2. A double judgment cannot be rendered for a single debt.

January, 1833. — Error to Phillips Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — The defendant in error, in the year 1827, obtained several judgments against Samuel K. Green, and in February, 1832, issued a summons from the circuit court of Phillips county against the plaintiffs, under the act passed in November, 1831, entitled "An Act to enable judgment creditors to collect their debts with more facility," (Ter. Dig. 346,) calling upon the plaintiffs, as garnishees, to state whether they were indebted to Green, or had any effects of his in their hands. Percifull and Ashley did not enter their appearance to the summons, and a jury being impanelled, to ascertain if any thing was due to Green from Percifull and Ashley, or either of them, returned a verdict that Percifull was indebted to Green in a sum sufficient to pay the amount due from Green to the defendants, and that the claims were in the hands of Ashley, as an attorney, for collection. Upon this verdict the court rendered a joint judgment against Ashley and Percifull, for two hundred and ninety-six dollars, and ninety-three cents. It is contended that the judgment is erroneous for several reasons, and of this opinion is the court. The act of 1831, under which the proceeding purports to be had, gives this remedy, "in all cases where any plaintiff shall obtain judgment." Its words only comprehend judgments obtained after its passage, and this court cannot, by construction, give it a retrospective effect, and make it embrace judgments previously rendered. It is not for us to speculate on the supposed meaning and intention of the legislature. Where there is no doubt or ambiguity in the

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words used, there is no room for construction. Upon the finding of the jury, a judgment is rendered which is manifestly wrong.

Percifull was indebted to Green, and the claim was in Ashley's hands for collection. It was error to give a double judgment for a single debt. The statute places the judgment creditor, the defendant in this case, in the same situation which Green occupied. If the case were otherwise within the purview of the statute, she might go against Percifull, or might go against Ashley, if he were in default, but could not go against both for a debt due from one only. *Judgment reversed.*

GEORGE BENTLEY, appellant, *vs.* SAMUEL B. JOSLIN, DAVID VANN, and JESSE SMITH, appellees.

Where an injunction has been dissolved, and afterwards reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it.

January, 1833. — Appeal from Conway Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This was an action of debt brought in the Conway circuit court by the appellant against the appellees, upon an injunction bond. The defendants craved oyer of the bond, set out the condition, and pleaded that after injunction for which the bond was given had been dissolved, and before the institution of the suit, they paid the damages decreed against them by the order dissolving the injunction, and that upon an amended bill filed, the injunction had been reinstated, was still pending, and a new bond given. To this plea a general demurrer was filed by the plaintiff. The court overruled the demurrer, and gave judgment against the plaintiff for the costs, from which an appeal was taken to this court.

The reinstating of the injunction placed the cause in the

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court of chancery, in the same situation in which it stood previous to the dissolution of the injunction. It is a matter of daily occurrence, to reinstate an injunction upon the filing of an amended bill. It does not thereby become a new cause, but in our opinion is the continuation of the same cause. The injunction bond is not broken so long as the injunction remains in force. The demurrer admits the injunction in this cause to be still in existence. To permit the party to go on and collect the amount of the bond, before it is ascertained whether the injunction will be dissolved or perpetuated, is too obviously contrary to justice to be consistent with law.

Judgment affirmed.

JOSEPH ROBINS and ALEXANDER REECE, plaintiffs in error, *vs.* JOHN POPE, governor, for the use of William B. K. Homer, administrator of William H. Smith, deceased.

1. A declaration against two of three obligors is defective, which does not aver that all three have failed to pay the debt.
2. It is erroneous to execute a writ of inquiry at the same term at which judgment was rendered.
3. Breaches of a penal bond must be assigned before judgment. *Wiley* v. *Bennett*, (ante, p. 197,) cited and approved.

January, 1833. — Error to Phillips Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This is an action of debt, brought in the Phillips circuit court by the governor, for the use of Homer, as administrator *de bonis non* of Wm. H. Smith, deceased, upon the administration bond given by Sylvanus Phillips, the prior administrator of Smith, with Robins and Reece as his securities.

The defendants, Robins and Reece, who were alone sued, failed to enter their appearance, and a judgment by default was taken against them at the January term, 1832, of said court, and a writ of inquiry and final judgment at the same

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term given for the plaintiff for the sum of $663.81. From this judgment a writ of error is prosecuted into this court. Several errors have been assigned as causes for the reversal of the judgment; some of which only will be noticed.

The first objection taken is as to the sufficiency of the declaration. Two only of three obligors are sued, the breach is that the defendants have not paid the sum demanded. It is insisted that the breach, as laid, should be as broad as the obligation, and that as all are bound to pay, it should be averred that all have failed to pay. This objection seems to us to be valid; it may be true that the defendants in this suit may not have discharged the obligation, and that Phillips, who is not sued, may have discharged it or obtained a release from it. The declaration, then, should aver that neither Phillips nor the defendants have paid it. 1 Chitty, 327, 328; Com. Dig. tit. Pleader, 647. The want of such allegation might be cured by a plea of the defendants to the merits, and verdict founded upon a regular issue. But we deem the objection fatal when judgment by default has been rendered.

A second objection taken is, that the writ of inquiry was improperly executed at the term of the court at which the judgment by default was had. The law contained in Geyer's Digest, p. 251, sec. 7, directs that writs of inquiry should be executed at the next succeeding term after an interlocutory judgment is given. The act of November 21, 1829, (Acts, p. 23,) seems to be confined exclusively to cases in which pleadings are made up by the parties. We are of opinion that it does not repeal the provisions of the prior act; and that there is error also in the proceedings of the court below.

A third error assigned is, that the breaches of the bond were not assigned till after the judgment by default. This no doubt would be error if the fact were so, and this court has so decided at a former term, in the case of *Wiley* v. *Burnett*. But the record in this case is made out so imperfectly that we cannot say with certainty whether the assignment of breaches was filed before or after the judgment by default. If filed afterwards, it will be incumbent on the plaintiff to amend his proceedings in this particular likewise.

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For the reasons above stated, we think the judgment should be reversed, and the cause remanded for further proceedings, not inconsistent with the opinion here expressed.

Judgment reversed.

BENJAMIN MURPHY, appellant, *vs.* RICHARD C. BYRD, appellee.

1. A plea of payment referring to the instrument sued on, as a "supposed writing obligatory," is nevertheless good, and those words may be rejected as surplusage.
2. General plea of fraud is not admissible.

January, 1833. — Appeal from Conway Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This case comes up by appeal from Conway circuit court. It is contended that the court below improperly sustained the demurrer to the defendant's two pleas of payment and fraud.

The action is founded on a writing obligatory due the 11th of March, 1832, for the sum of one hundred and thirty-five dollars and twenty-two cents. By the defendant's plea it is alleged that "on the 11th day of March, 1832, in the county aforesaid, he paid to said plaintiff the said sum of one hundred and thirty-five dollars and twenty-two cents, according to the form and effect of said supposed writing obligatory." It is said that this plea is repugnant and inconsistent with itself, because it admits the writing by necessary implication, and afterwards denies it by referring to it as having only a hypothetical existence, and consequently the demurrer was properly sustained. Repugnancy will, in many instances, vitiate a plea, but not when the matter is nonsense, by being contradictory and repugnant to something precedent. In such cases the inconsistent matter will be rejected as surplusage. 1 Chitty, 211; 1 Salk. 324. In the case before us, the allegation of payment in the plea, is a clear admission of the instrument upon which the action is founded, and the statement afterwards allowing it

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a supposed existence only, is contradictory and should be rejected as surplusage. It certainly could not be taken advantage of on a general demurrer, and special demurrers are not allowed under the provision of our statute. We think, therefore, that the circuit court erred in sustaining the demurrer to the plea of payment. A general plea of fraud has heretofore been decided by this court to be inadmissible, and clearly is so.

ESKRIDGE, J., dissented. *Judgment reversed.*

SARAH CHANDLER, plaintiff in error, *vs.* RICHARD C. BYRD and JOHN H. COCKE, defendants in error.

1. On a joint and several bond, the plaintiff may sue one or all of the obligors, but not an intermediate number.
2. But an error of this kind is waived unless taken advantage of by plea in abatement.
3. Defects in pleading only reachable by special demurrer at common law, must be disregarded, special demurrers having been abolished by statute.

January, 1833. — Error to Pulaski Circuit Court, determined before Thomas P. Eskridge, Edward Cross, and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This is a writ of error to the circuit court of Pulaski, to reverse a judgment in an action of debt, wherein Sarah Chandler was plaintiff, and Richard C. Byrd and John H. Cocke, defendants.

The declaration alleges "that Richard C. Byrd, John H. Cocke, and A. W. Cotton, (now deceased,) by their certain writing obligatory, signed with their own proper hands, and sealed with seals, a certified copy of which writing obligatory is now here shown to this court, the original on file among and belonging to the records of the superior court for the Territory of Arkansas, and cannot be produced to this court," etc. The defendants filed a general demurrer to the plaintiff's declaration, which was sustained, and final judgment rendered against the plaintiff for costs.

Two questions present themselves for the consideration of

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this court; first, whether the action was correctly brought against R. C. Byrd and John H. Cocke, there having been a third obligor to the instrument upon which the suit is founded.

The supreme court of the United States in the case of *Minor* v. *The Mechanics Bank of Alexandria*, 1 Peters, 46, has settled this point. That court says, that on a joint and several bond the plaintiff may sue one or all of the obligors, but in strictness of law no intermediate number; he must sue all or one. But if an error of this kind is not taken advantage of by plea in abatement, it is waived by pleading to the merits. "The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed, and therefore it is no variance in point of law between the deed declared on and that proved."

The same doctrine is clearly illustrated in the case of *Cabell* v. *Vaughan*, 1 Saund. Rep. 291, note 4. The act of 1816, (Geyer's Digest, 241,) it is conceived, does not change the common law in this particular. The object of that act was chiefly to establish the liability of the representatives of deceased joint obligors.

The second question is, whether there is a proper profert of the instrument upon which the action is founded. Admitting the declaration in this respect to be defective according to the rules of the common law, it is an objection of which the party could only avail himself by special demurrer, and special demurrer having been abolished by act of the last legislature, the objection taken to this declaration in this respect is no longer tenable. *Judgment reversed.*

WILLIAM PELHAM, appellant, *vs.* ALFRED E. PACE, appellee.

1. Where a person sent notes to an agent for collection, with directions to remit the money by mail, or some responsible person, and the money was sent by a trustworthy youth eighteen years old, who had transacted business for himself for two years, and his pocketbook, containing this and other moneys, was stolen from him — *held*, that the agent was not responsible, and that he had substantially complied with the duties which the bailment devolved upon him.

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2. The mail is in legal contemplation a safe, though not a responsible, mode of conveyance; but a person, notwithstanding infancy, is considered responsible.

February, 1833. — Appeal from Pope Circuit Court, determined before Edward Cross and Alexander M. Clayton, judges.

OPINION OF THE COURT. — This case comes up by appeal from the Pope circuit court. The appellant brought an action of assumpsit to recover money had and received by the appellee to his use. At the trial, neither party required a jury, and the matter was submitted to the court, and a judgment rendered for the defendant. From a bill of exceptions taken by the appellant, the evidence appears to have been, that the attorney of the appellant forwarded to the appellee, through the mail, two notes on a man by the name of Logan, with directions to place the same in the hands of a justice for collection, and when collected to receive the money and transmit it to him by mail or some safe, responsible person; that the appellee received one hundred and thirteen dollars on the notes before the suit was commenced, and handed the same to a youth of seventeen or eighteen years of age, who promised to deliver it to appellant's attorney at Little Rock; that this youth had transacted business for himself, by the consent of his father, for one or two years, was intelligent, honest, and trustworthy, as any of his age; that before he had an opportunity of paying it over, his pocketbook was stolen, containing that, as well as other moneys; that said attorney had been heard to say that he would have had no hesitancy in sending money by this same youth in his own case; and finally, that appellee received compensation for his trouble.

The only question it will be material to consider is, whether the appellee discharged himself from liability by transmitting the money in the manner shown by the evidence.

In the absence of any express agreement between the parties, or terms imposed at the time of making the bailment, the law steps in and settles the questions of duty and liability. The case before us, however, depends upon the terms imposed at the time of transmitting the notes, and acceded to by the appellee in undertaking the collection. He was bound to transmit either

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by mail, or by a safe, responsible person. The mail, in legal contemplation, is a safe mode of conveyance, but not a responsible one. That mode was not adopted, but the money was forwarded by a youth of seventeen or eighteen years of age, who is shown by testimony to have been intelligent, prudent, and trustworthy, and to which the law adds responsibility, notwithstanding his age. On the subject of the liability of minors in such cases, see 11 Petersdorff, Abr. tit. Infant, 558. The appellee, we think, in transmitting the money, complied with the terms imposed at the time of receiving the notes for collection.

Judgment affirmed.

JOHN LENOX and HEWES SCULL, as administrators of William Lenox, deceased, complainants, *vs.* FREDERICK NOTREBE, MARY ANN HAMILTON, and MARGARET HAMILTON, infants, &c., defendants on original bill; and MARY ANN HAMILTON and MARGARET HAMILTON, infants, &c., by their guardian *ad litem*, complainants, *vs.* JOHN LENOX and HEWES SCULL, as administrators of William Lenox, deceased, and FREDERICK NOTREBE, defendants, on cross-bill.

1. The application for a receiver pending a litigation is regulated by legal principles, and addressed to the sound discretion of the court, and one will generally be appointed when there is danger that the subject-matter of controversy may be wasted and destroyed, impaired, injured, or removed, during the progress of the suit.
2. Where several persons reside together, and have a joint possession of property, the law casts the actual possession upon the legal owner.
3. A court of equity converts any one who intermeddles with the property of an infant into a trustee for such infant; and a trustee cannot buy an outstanding legal title to the prejudice of his *cestui que trust.*
4. A bond in a chancery cause to prevent the removal of the property in litigation beyond the jurisdiction of the court, and to have the same forthcoming to abide the final order and decree, creates a personal obligation against the obligor merely, and his sureties are not bound for the acts of any other person, or acts committed after his death.

February, 1833. — Motion for a receiver, determined before Edward Cross and Alexander M. Clayton, judges.

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CLAYTON, J., delivered the opinion of the Court. — The original bill in this case was filed by William Lenox and wife, both now deceased, to divest the legal title of certain property therein mentioned out of the defendants, the Hamiltons, then four in number, to have the bill of sale under which they claimed declared void, and to have the title vested in, and the property decreed to, the complainants. The defendants, the Hamiltons, being still infants, filed a cross-bill by their guardian *ad litem* for the discovery of certain facts necessary to their defence of the original bill, and prayed that Lenox may be compelled to give bond not to remove the property, and to have the same forthcoming to abide the decree. The answer to the cross-bill states the death of Mrs. Lenox and of two of the heirs of Hamilton, and sets up a title to the property in question upon two grounds distinct from those stated in the original bill. To determine upon this motion for the appointment of a receiver, it is not necessary to consider the title to the property, or to discuss the merits of the cause. The material affidavit upon which this motion is made, states the administrators of William Lenox, deceased, have failed to inventory the estate and personal property, including the negroes mentioned in the original and cross-bill, in this case, as the property of William Lenox, deceased, and that as the representatives of said William Lenox, deceased, they do not hold themselves responsible for the property mentioned in said bills. The application for a receiver is addressed to the sound discretion of the court, regulated by legal principles, and is exercised by the courts upon many occasions with great benefit to the parties. It is particularly serviceable when there is danger that the subject-matter of controversy may be wasted and destroyed, impaired, injured, or removed during the progress of the suit. The object is to secure the fund for the party found upon final hearing to be entitled, and to produce as little prejudice as possible to any of those concerned. When one party has a clear right to the possession of property, and when the dispute is as to the title only, the court would very reluctantly disturb that possession. But when the property is exposed to danger and to loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interpose

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and to have it secured. Who is legally entitled to the possession of the property in this case? It will be borne in mind at the time of filing the original bill, it appears from the papers in this cause, that the complainants, Lenox and wife and the infant children of Hamilton, the defendants here, resided together, the possession was joint, and the law would cast the actual possession upon the legal owners of the property. Who were at that time the legal owners? The infant children of Hamilton claiming under Notrebe's deed of conveyance. The very object of the original bill was to divest them of the legal title, to have the deed of Notrebe rescinded, and the property decreed to the complainants. The bill was filed in right of Mrs. Lenox, who had been the wife of Hamilton, and who was the mother of the defendants. In December, 1828, Mrs. Lenox and two of the defendants died, and the suit since has been prosecuted against the remaining defendants without any administration upon her estate. After the death of the mother, the two surviving defendants in February, 1829, ceased to reside with William Lenox, and he kept possession of the property. He had not the legal right to do so. The law cast the right of possession with the legal and apparent right of property, and it was his duty to have given up the possession to them. Having failed to do so, he became a trustee as to the legal estate for them, for a court of equity converts any one who intermeddles with an infant's property into a trustee for such infant. The answer to the cross-bill states that in January, 1831, the complainant Lenox purchased an outstanding legal title to the same property, and claims to hold it by virtue of this purchase. It is believed that upon well-settled principles this was a breach of trust upon his part, and that an implied trustee cannot purchase an outstanding legal title and claim the trust property under it, at least until he restores possession to the party for whose use as trustee he holds. At the time of the death of Lenox, he held possession in this manner, and so confident were his administrators that he had not either the right of property, or the right of possession, that they refused to return the property in their inventory as his, and state expressly, according to the affidavit, that they do not hold themselves

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responsible for it, as his administrators. If they are not responsible for it as his administrators, they are not, in the present aspect of the cause, responsible for it at all. They are only before the court in their representative character, and if it should ever become necessary to proceed against them individually, they must be before the court in their individual character. If they do not hold the property as administrators, they have no right to the possession, so far as this court can see from the facts before it. They may waste and destroy it, and at the end of this suit the party declared entitled may have to institute new proceedings against new parties, and travel the weary round of a chancery cause a second time. The appointment of a receiver will prevent this, and will have no other effect than to secure property which seems to be cast upon the world without any legal protector. The only circumstance which has interposed the slightest obstacle to our coming to the conclusion to appoint a receiver in this cause, grows out of the bond executed by William Lenox, in his lifetime, to have the property in question forthcoming to abide the final decree in this cause. The words in the condition of the bond are these: "now if the above bound William Lenox, shall keep said negroes and property safe, and not remove them beyond the jurisdiction of this territory, until the final hearing of this cause, and to abide the final order and decree of the court in this suit, then this obligation to be void." This obligation is merely personal. It rests upon and binds William Lenox alone. His securities in the bond are not bound for the acts of any other person. If he committed no breach, they would not be bound in our opinion for a breach committed by any third person after his death. But if we are mistaken in this opinion, enough doubt hangs over the matter to authorize the court to interpose and place the property beyond doubt, to render the parties safe instead of leaving them to uncertain controversy in a court of law. We think, therefore, the motion ought to be allowed, and a receiver appointed.

Order.— It is hereby directed and ordered that Benjamin Desha be appointed receiver in this cause, upon his entering into bond with Frederick Notrebe, William Cummins, Samuel

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J. Hall, and Emzy Wilson, as his securities in the penal sum of $10,000, payable to William Field, the clerk of this court, and his successors in the office of clerk of this court, for the use and benefit of such person or persons as this court may finally decree to be entitled to this property, and upon his so giving bond and security within sixty days from this time, his power and authority and duty as receiver in this cause shall be full and complete; and it shall be the duty of said Lenox and Scull to deliver up all the property in the proceedings mentioned, together with the issue and increase of the slaves and stock or such part thereof as is in their possession, to the said Desha, upon his producing to them a certified copy of the order.

THOMAS T. TUNSTALL, plaintiff in error, *vs.* WILLIAM P. ROBINSON, defendant in error.

1. For the small excess of $1.90 *de minimis non curat lex* applies, and judgment will not be reversed.
2. Payment on a judgment cannot be proved under *nul tiel record*, and if a party could avail himself of it, he must plead it.

July, 1833. — Error to Chicot Circuit Court, determined before the Superior Court.

OPINION OF THE COURT. — On the 16th day of December, 1830, Robinson, in an action of debt against Tunstall, recovered a judgment against him in the Chicot circuit court, for the sum of five hundred and seventy dollars and seventy-nine cents debt, and one hundred and seventy-eight dollars and thirty-six cents damages and costs of suit, to reverse which this writ of error is prosecuted.

This action is founded on a judgment which Robinson in his declaration avers he obtained against Tunstall in the circuit court of Jefferson county, in the State of Illinois, on the 3d of October, 1825, for five hundred and sixty-five dollars, forty-eight cents debt, and the costs of suit, amounting to five dollars, thirty-one cents. To this declaration, Tunstall pleaded *nul tiel re-*

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cord, upon the trial of which the court rendered the judgment now under review. The first error assigned is, " that the judgment rendered by the circuit court against Tunstall in favor of Robinson is for a greater sum of money than was due to Robinson at the time of rendering the judgment." By inspecting the copy of the judgment rendered in Illinois, it appears that it was for five hundred and sixty-five dollars, forty-eight cents debt, and also the costs of the suit, which appear from the certificate of the clerk to have been at least five dollars, thirty-one cents. The interest upon five hundred and sixty-five dollars, forty-eight cents, from the 3d day of October, 1825, to the 16th day of December, 1830, at the rate of six per cent. per annum, amounts to one hundred and seventy-six dollars, forty-eight cents; one dollar and ninety cents less than the damages given by the court. For the sum of one dollar and ninety cents, it may be admitted that the judgment exceeded the amount legally due. But for an error so trivial, we think the judgment ought not to be reversed. The maxim *de minimis non curat lex* is strictly applicable.

The second assignment of error is, " That the court erred in deciding the issue on the plea of *nul tiel record*, in favor of Robinson."

We can perceive no material variance between the judgment set out in the declaration and the copy of the judgment duly authenticated, adduced as evidence upon the trial.

The third assignment of error is, " That the judgment rendered by the circuit court is for a greater amount of debt than was shown by the supposed record evidence, adduced on the trial, to be due to Robinson."

The only question raised by the pleading for the decision of the court was, whether there was such a judgment as the plaintiff had set out in his declaration, in full force and unsatisfied.

This was the issue, and only issue to be tried upon the plea of *nul tiel record*. The judgment of the court upon it was unquestionably correct, for it is not true that the judgment had been either reversed or satisfied or paid.

If it had been in part paid or satisfied, it was competent for the defendant, by an appropriate plea, to have availed himself

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of it; but not having pleaded payment or satisfaction of the judgment either in full or in part, he was precluded from insisting upon a payment under the plea of *nul tiel record.* The court, therefore, correctly disregarded the return of the sheriff upon the execution issued upon the judgment rendered in Illinois.

The same remarks are applicable to the costs of the suit in Illinois, which it seems were paid by the plaintiff in error, but who failed to plead it.

It has been argued that there was no legal evidence before the court, of the amount of the costs adjudged by the circuit court, in the State of Illinois, and that if the execution from that court is to be relied upon to prove the amount of costs, it proves a payment to the plaintiff of eighty dollars of the judgment. We do not assent to this proposition. The execution, which appears in the transcript of the record, is good and legal testimony to show the amount of costs of suit; but the payment of eighty dollars, which also appears by the same execution, was inadmissible, under the plea of *nul tiel record*, and was properly disregarded. *Judgment affirmed.*

JOSEPH HENDERSON and RICHARD C. BYRD, appellants, *vs.* BENJAMIN DESHA, appellee.

Judgment may be rendered for ten per cent. interest until paid, where that rate is expressed in the contract.

February, 1834. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson, Edward Cross, and Thomas P. Eskridge, judges.

OPINION OF THE COURT. — This is an action of debt, brought by the appellee against the appellants, upon the following obligation: —

"Six months after date, we, or either of us, promise to pay to Benjamin Desha, or order, twenty-one hundred and eighty-one dollars and eighty-six cents, for value received; to bear interest

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from the date, at the rate of ten per cent. per annum. Witness our hands and seals this twenty-first day of May, 1832.

(Signed) "Jos. Henderson [seal].
R. C. Byrd [seal]."

The judgment of the circuit court was rendered in favor of the appellee for the sum of two thousand and ninety-five dollars and seventy-nine cents debt; two hundred dollars thereof having been previously paid, and thirteen dollars and thirty-eight cents interest, and thirty-four dollars and twelve cents damages, together with interest on two thousand ninety-five dollars and seventy-nine cents, at the rate of ten per cent. per annum till paid, and the costs of the suit, which has been brought up to this court by appeal.

Numerous objections have been taken by the appellants to the proceedings in the court below, some of which we will proceed to notice.

First, it is contended that it is not averred in the declaration that the defendants affixed their scrolls to the writing declared on. By inspecting the declaration, it will be seen that the averment is sufficiently made.

Another ground relied upon for reversing the judgment is, that it is rendered for interest at the rate of ten per cent. per annum till paid. By the terms of the contract in this case, ten per cent. per annum was agreed to be paid, and, by referring to our statute on the subject of interest, it will be seen that ten per centum may be lawfully reserved. Geyer's Digest, 240.

Judgment affirmed.[1]

Paschal Buford, executor of Henry Buford, deceased, plaintiff in error, *vs.* William Hickman, defendant in error.

1. The act of Congress of 1790, regulating the mode of authenticating records and judicial proceedings, applies in terms to the records of State courts; but a judgment of a court of the United States is admissible when authenticated in the same manner as provided in that act.

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[1] This case was overruled by *Byrd* v. *Gasquet*, post.

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2. Courts of the United States are bound to take notice of the officers of the respective courts of the United States.
3. A record which does not contain a writ, or show a service, nor an appearance of the party, nor any issue nor any act done by attorney, is not admissible, although it states that "the parties appeared by their attorneys."

February, 1834. — Error to Hempstead Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

Opinion of the Court. — An action of debt was brought by Paschal Buford, executor of Henry Buford, deceased, against William Hickman, founded upon a record of the United States district court of West Tennessee. The defendant filed a special demurrer to the plaintiff's declaration, but the demurrer was overruled. Issue was then taken on the plea of *nul tiel record*, upon which issue the court rendered judgment for the defendant; and the assignment of error calls in question the propriety of this judgment.

The whole case, we apprehend, turns upon the question of the sufficiency of the record offered in evidence. If that was full and complete, and properly authenticated, the decision of the court, in refusing to receive it as evidence, was erroneous. But, on the other hand, if it was not full and complete, and properly authenticated, the decision of the court was correct.

The first objection taken in argument to the admissibility of the record was, that it being a record of a district court of the United States, the act of congress of 1790, regulating the mode of authenticating records in order to make them evidence, does not apply. Admitting the act of congress of 1790 to apply alone to the records of the State courts, and this is clearly the case, still it has been decided, by some of the most respectable courts in the Union, that the records of the United States courts are admissible in evidence in the State courts, if authenticated by the seal of the court, attestation of the clerk, and certificate of the judge; and we can perceive no substantial objection to their admission as evidence in the courts of this territory. The United States exercise jurisdiction and sovereignty over Arkansas, and we conceive that we are bound to know the officers of

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In the case before the court, there were two subscribing witnesses to the bill of sale offered in evidence, one of whom stated upon his examination that his name as subscribed as a witness, was in his handwriting; that the name of the other subscribing witness, James Cummins, was the handwriting of Cummins, and that Cummins was in Texas, beyond the jurisdiction of the court. The non-production of the witness who was beyond the jurisdiction being satisfactorily accounted for, proof of his handwriting was properly received, and such proof, taken in connection with the testimony of Morgan Cryer the other subscribing witness to the instrument, afforded, in our opinion, *primâ facie* evidence of the due execution of the bill of sale offered in evidence, and the same ought to have been read to the jury.

Morgan Cryer stating that he had no recollection of the bill of sale, except the identity of his handwriting, presents, it is true, some difficulty; but still we think there was *primâ facie* evidence of the due execution of the bill of sale, so far, at least, as to authorize it to be given in evidence to the jury.

Judgment reversed.

JOHN H. COCKE, plaintiff in error, *vs.* JAMES B. KENDALL, assignee of John Brown, defendant in error.

1. A venue is technically necessary to every material traversable fact; and where one is laid in the count, all matters following refer to it.
2. Venue in the margin sufficient; and the want of one only reachable by special demurrer.
3. "Lawful money" of any State is equivalent to federal money.

February, 1834. — Error to Pulaski Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — This case comes up on a writ of error to the Pulaski circuit court. The principal grounds relied upon for the reversal of the judgment in the court below, are: 1. That there is no place or venue stated in the declaration

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where the assignment of the writing declared upon was made. 2. That the judgment is rendered for federal money, when it should have been for lawful money of Virginia. 3. That the judgment is for more than was due. 4. That the court erred in sustaining the demurrer to the defendant's first plea, of payment.

These objections will be considered in the order they are stated. And first, as to the want of a sufficient venue. The plaintiff in his declaration states a venue in the margin, and alleges "that on the 6th day of April in the year 1824, in the State of Virginia, to wit: in the county of Pulaski and Territory of Arkansas aforesaid, and within the jurisdiction of this court; the defendant John H. Cocke, by this certain writing obligatory, acknowledged himself to be held and firmly bound unto one John Brown in the sum of 157 dollars and 75 cents, lawful money of Virginia, &c., to be paid to said Brown six months after the date of said writing obligatory, and that the said Brown in the day and year last aforesaid, assigned his interest in the aforesaid writing obligatory to the said plaintiff by writing on the back of said writing obligatory in the words following, to wit: 'I assign,' of which the defendant had notice."

The authorities are abundant to prove the necessity of a venue to every material traversable fact. 6 Com. Digest, tit. Pleader, C. 20; 10 East, 364; 1 Chitty, 307. But when there are several facts, the venue stated as to the first, will apply to all the sentences connected by the conjunction "and." 1 Chitty, Pl. 307. In the case of *Skinner* v. *Gunton*, 1 Saund. 229, it is decided that when the venue is laid for the first matter in the count, all the matter which follows refers to it. In the State of New York it has been decided that where no venue is laid in the body of the declaration, (if the action be transitory,) the venue in the margin is sufficient. 9 Johns. Rep. 81. The courts of Massachusetts have said that the want of venue can only be reached by special demurrer. *Briggs* v. *Nantucket Bank*, 5 Mass. 96. These authorities, we think, apply with great force to the case before us. The venue stated in the margin of the declaration alone, would be considered sufficient, according to the rule that prevails in most of the States. It is

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also stated in the body of the count as to the execution of the writing and assignment alleged on the day of its date. The venue therefore, as to assignment, must be considered the same with that stated for the execution of the writing declared on. We think, without considering the effect of a verdict, that the objection as to venue cannot prevail.

The second objection relates to the judgment, which is rendered for money, in the usual form. It is insisted, that it should have been rendered for lawful money of Virginia, according to the expression used in the writing. This, we think, in substance has been done, as lawful money of the United States would be lawful money of Virginia, or any other State or territory. At all events, the attitude in which the question is now presented would preclude us from reversing the judgment for that cause. The third and fourth errors assigned have not been urged with much seriousness, and, indeed, they both present questions that have been heretofore settled by this court. Upon the whole, we see no cause for reversing the judgment of the circuit court. *Judgment affirmed.*

JOHN HART, appellant, *vs.* ISAIAH D. ROSE, appellee.

1. Where R. covenanted to build H. a flat-boat by a certain time, the latter to furnish the plank, and to be delivered at either of two places, this is a condition precedent, to be performed by H., before any liability arises against R.; and the averment as to the delivery of the plank must be certain and positive, as to place, otherwise the declaration will be demurrable.
2. A demurrer puts in issue the sufficiency of all previous pleadings, and judgment will be given against him who committed the first fault.

February, 1834. — Appeal from Pope Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Edward Cross, judges.

OPINION OF THE COURT. — This case comes up by appeal from the circuit court of Pope county, and the only ground relied upon for reversing the judgment is, that the court below erred in sustaining the demurrer to a replication filed by the plaintiff.

The pleadings in this cause show that Hart, the plaintiff,

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brought an action of covenant on a writing obligatory, by which, in his declaration, he alleges that Rose, the defendant, covenanted and bound himself, on his part, to build a flat-boat, of a certain description, and have the same completed on, or before the 5th of October, 1832, and that he, the said plaintiff, on his part, was bound to find and furnish to said Rose the plank for the building said boat, to be delivered at the lower plank landing on Shoal creek, or near the river above James Patterson's field.

He then avers, that within a convenient and proper time after making said agreement, mentioned in said writing obligatory, he did, according to the tenor and effect thereof, furnish to the said Rose the plank necessary for the building of said boat, at the place or places aforesaid, mentioned in said writing obligatory, according to the tenor and effect thereof. The declaration concludes by protesting that the said Rose did not perform fully and keep any thing in said writing obligatory contained, &c. The defendant plead performance, to which there was a demurrer filed and overruled by the court. The replication to the plea of performance was also demurred to by the defendant, which demurrer was sustained, upon the ground that the declaration was defective. It has been urged in argument that the court cannot go back to the declaration on a demurrer to the replication. This position, we think, cannot be sustained. The rule is, that on a demurrer the court will consider the whole record, and give judgment for the party who appears to be entitled to it. 4 East, 502. In the course of the pleadings every demurrer puts the sufficiency of all the previous pleadings in issue. Steph. Plead. 162; 1 Saund. Plea. 432. It was not necessary, therefore, in the case before us, that the replication should have been bad, as a defect in the declaration was sufficient to justify the court in sustaining the demurrer.

The stipulation on the part of the plaintiff to furnish the plank necessary for building the boat, at one or the other of two landings, must be regarded as a condition precedent, without the performance of which, no liability would be incurred by Rose on the agreement. The averments, therefore, ought to have been certain and positive as to the place where the plank

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was furnished, as it constituted a material and traversable fact. In the averment, as made, no issue could have been safely taken by the defendant. The subsequent pleadings in the cause did not cure this defect in the declaration, and the circuit court very properly, in our opinion, sustained the demurrer to the replication, if there had been no other cause.

It may be proper to state, that the replication itself is bad in several respects. First, on the ground that it is double; second, that the obligation as to the sufficiency of plank furnished, is not positive and certain; and lastly, that the conclusion is to the country, where it should have been with a verification. We are not prepared to say that the plea of performance is good. We do not deem it necessary, however, to express any opinion on that subject. *Judgment affirmed.*

MASSACK H. JANES, plaintiff in error, *vs.* JACOB BUZZARD, defendant in error.

1. The record of a suit between the same parties is admissible in evidence.
2. A person who obtains the possession of the slave of another is responsible for hire, although the negro may run away before the expiration of the time.
3. Nor can the fact that the possessor may be responsible for the value of the slave, in the event of running away, at all diminish the claim to hire.
4. A purchase of negroes by parol agreement is as valid as by bill of sale, whether a full consideration is given or not.
5. Where one gets possession of chattels tortiously, the real owner may waive the tort, and sue in assumpsit for the value or the proceeds.
6. And where they have been returned by the trespasser, the real owner may waive the trespass, and recover in assumpsit for the time of their detention.

July, 1834. — Error to Lafayette Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

JOHNSON, J., delivered the opinion of the Court. — This is an action of *indebitatus assumpsit*, brought by Buzzard against Jones, in the Lafayette circuit court, for the work and labor of six negroes, slaves, the servants of the plaintiff. The cause was

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tried on the general issue, and a judgment and verdict rendered for the plaintiff below for the sum of one hundred and eight dollars and costs of suit, to reverse which this writ of error is prosecuted.

The first assignment of error questions the sufficiency of the declaration, in not setting out any consideration for the promises therein mentioned, and in not averring that the plaintiff performed the work and labor either by himself or his servants. The plaintiff, in his declaration, avers, that "the defendant was indebted to the plaintiff in the sum of three hundred dollars, for work and labor of certain negro slaves, servants of the plaintiff, namely, one negro named Jacob, and before that time done and performed for the defendant, and at his special instance and request." The plaintiff in the court below alleges that the work and labor was done and performed by his servants at the request of the defendant, and there can surely be no doubt that he has a right to recover for the work and labor of his servants, as though they were his slaves for life.

The next error assigned is, that the court permitted improper testimony to go to the jury. From a bill of exceptions filed in this cause, it appears that the plaintiff in the court below produced the record of a suit in the Lafayette circuit court by the plaintiff in error, against the defendant in error and others, and offered to read as evidence a part of it, from which it appeared that Janes had, by a decretal order of the Lafayette circuit court, caused the negroes in this suit to be taken from the possession of Buzzard and delivered to him, and at a subsequent term of the court, the negroes were again ordered by the court to be restored to Buzzard. To this evidence, Janes, by his counsel, objected; but the court overruled his objection, and permitted the evidence to go to the jury.

We can see no error in the decision of the court in permitting the evidence to go to the jury. The plaintiff and defendant were parties to the suit, the record of which was adduced as evidence, and if it conduced to prove any fact material to the issue then before the court, either party had a right to use it. That it conduced to prove, and did establish beyond controversy, the length of time Janes had possession of the negroes,

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cannot admit of a doubt. This was a material inquiry, and on that ground the record was properly received as evidence.

The next assignment of error is, "that the court rejected proper testimony when offered by the defendant."

The first evidence offered by Janes, and rejected by the court, is as follows: Janes, by his counsel, asked a witness, "if the negro Jacob was taken subject to the condition that if he ran away and could not be returned at the expiration of three or six months, the person taking him should be liable to pay the value of him, what would be the value of his services per month?" The court, in our judgment, correctly rejected the testimony. If Janes by obtaining, as he did, the possession of the negro of Buzzard, incurred the responsibility of paying his value in the event of his running away, it was a liability voluntarily assumed, and cannot diminish the claim of Buzzard for the value of his services, especially when it does not appear that the negro did in fact run away. The remaining evidence rejected by the court is the following: The plaintiff in the court below introduced Morris May as a witness, and proved by him that he (May) sold and delivered the negro to the plaintiff, and that he (the witness) purchased the negro of one Samuel Farney. The defendant then asked the witness by what title he held the negroes, and what consideration he gave for them; to which the plaintiff objected, and the court sustained the objection. We think the evidence was inadmissible. The witness had already answered that he held them by the title of purchase from Farney, and it was equally valid whether it was made by a parol agreement or by a bill of sale, and it was not material whether he gave the full value for them or not.

The counsel for the plaintiff in error has insisted that the present action is misconceived, and that from the facts disclosed by the defendant in error on the trial of the cause, he was not entitled to recover in this form of action. A conclusive answer to the argument is, that all the facts of this case, as they were detailed in evidence to the court below, are not presented to this court. The bills of exception do not state that all the evidence given in the case is contained in them. Admitting, however, that it does appear from the evidence spread upon the record,

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that Janes obtained possession of Buzzard's negroes by an unjust proceeding in a suit in chancery, still we think that the present action is maintainable by Buzzard.

It is no doubt true that Buzzard might have brought an action founded upon the tortious acts of Janes, and recovered damages for the wrongful taking, as well as the illegal detention of his servants. But it was competent for him, and he had the election to waive the tort and to bring an action *ex quasi contractu.* There is abundant authority to sustain this position. In the case of *Stockett* v. *Watkins*, 2 Gill & Johns. Rep. 320, it was held that where one gets possession of chattels tortiously, and converts them into money, the real owner may waive the tort and sue in assumpsit for the proceeds; and that action has been sustained in some instances where the trespasser has not parted with the chattels. Where they have been returned to the owner, he may still waive the tort, and then recover their value for the time of their detention in assumpsit. 1 Saund. Pl. & Ev. 133; 1 Chitty, Pl. 94; 1 Mo. Rep. 643.

Judgment affirmed.

POLLY WILLIAMSON, appellant, *vs.* JACOB BUZZARD, appellee.

1. A bond for costs which omits the name of the non-resident plaintiff about to institute suit, is defective, and the suit should be dismissed.
2. Nor can bond be given after the institution of suit, so as to prevent dismissal.

July, 1834. — Appeal from Hempstead Circuit Court, determined before Benjamin Johnson, Thomas P. Eskridge, and Thomas J. Lacy, judges.

OPINION OF THE COURT. — This is an action of detinue brought by the appellant, a non-resident, against the appellee, which was dismissed at the cost of the appellant, on the motion of the appellee, on the ground that the bond for costs filed by the plaintiff in the court below was defective and insufficient. The condition of the bond, which is alleged to be defective, is in the following words: "The condition of the above obligation is such, that whereas a non-resident of the Territory of Arkansas is about to commence an action of detinue in the circuit

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court, &c., and omitting to insert the appellant's name as the non-resident about to bring the suit. After the judgment dismissing the suit was rendered by the circuit court, the appellant by her attorney presented to the court a new bond for costs, and moved the court for permission to file the same and to reinstate the cause upon the docket, which motion was overruled by the court.

The counsel for the appellant contends that the court below erred, first, in dismissing this suit for want of a sufficient bond for costs, and secondly, in refusing to receive a new bond when tendered, and reinstate the cause on the docket.

The statute (Geyer's Digest, 244) provides, that "any person who shall not be a resident within this territory shall, before he institutes any suit in the courts of this territory, file or cause to be filed, a bond with sufficient security, with the clerk of the court wherein his suit is instituted, for the payment of all costs which may accrue in said suit." It has been repeatedly held by this court, that unless a bond for costs is filed by a non-resident before he commences his suit, he shall not be permitted, after the suit is brought, to file the bond, but the court, on motion, will dismiss the action at the plaintiff's costs. We are still satisfied that this is the sound and correct construction of the statute, and feel no inclination to disturb the long and well settled practice. The counsel for the appellant, however, maintains the propositions, that the bond for costs filed by the appellant before the institution of the suit is a good and valid bond. He admits that there is a latent ambiguity in the bond, but contends that this ambiguity can be explained by averment and proved by parol evidence. Admitting the correctness of this position, which we are not disposed to controvert, still we are of opinion that the bond in question was not such a bond as was required by the statute. The plaintiff, before he institutes his suit, is required to file his bond with sufficient security for the payment of all the costs which may accrue in the suit. What description of bond is here required? Will a bond containing a latent ambiguity upon its face, which may be enforced by averments and parol proof, be sufficient? We think not. It should be a bond in which there is neither a latent nor patent ambiguity; one requiring neither averment nor parol evidence for its explanation

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and support; a bond clear and explicit in its terms, and free from any substantial defect.

We are, then, clearly of opinion that the bond originally filed by the plaintiff in the court below, was not such a bond as is contemplated by our statute, and that the judgment of dismission was properly rendered on that ground.

The second point presented in this case is, whether a non-resident plaintiff, having filed a defective bond for the costs, shall be permitted after the commencement of the suit to file a good and valid bond. We have reflected much upon this question, and the conclusion at which we have arrived is, that the best and soundest construction on the statute is to require a good, sufficient, and valid bond anterior to the institution of the writ, and permit no amendment after the suit is brought. The statute requires the bond before the suit is instituted, and a defective and imperfect bond cannot be said to be a strict compliance with the law. Neither justice nor sound policy, in our judgment, calls upon the court to relax the requisitions of the statute. There is no difficulty in preparing and filing a valid and legal bond, and to permit any other kind to be available might lead to consequences highly pernicious. *Judgment affirmed.*

TENNESSEE ROUNDTREE, administratrix of Jesse Roundtree, deceased, appellant, *vs.* JOHN MCLAIN, appellee.

1. Equity will not enforce the performance of a contract, which is uncertain, unfair, or unreasonable, nor where adequate compensation can be had at law.
2. Nor will equity compel the specific performance of a contract respecting a chattel, unless in peculiar cases, where there is no adequate remedy at law.
3. Equity will never aid one creditor to obtain an undue advantage over another.
4. R., being indebted to M., in consideration of forbearance, agreed to procure the obligation of a third person, and assign it to M., or so much as would satisfy the debt; *held*, that a specific performance would not be enforced.

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July, 1834. — Appeal from Pulaski Circuit Court, determined before Benjamin Johnson and Thomas J. Lacy, judges.

LACY, J., delivered the opinion of the Court. — This is an appeal from the Pulaski circuit court. The bill was filed by McLain, the appellee, for the specific performance of a parol agreement in the case of a chattel. It charges that Jesse Roundtree, in his lifetime, was considerably indebted by note and account to the complainant, and in consideration of his forbearance to sue, and give day, Roundtree, on his part, stipulated to procure an obligation of Allen Martin, as soon as he completed the building of a cotton-gin for Martin, and to assign the same to the complainant, or so much thereof as would satisfy and discharge his, Roundtree's, debt to McLain. It was further stated, as agreed between the parties, if Martin's note exceeded the amount due McLain, he was to pay the difference or excess to Roundtree. The answer denies the allegations of the bill, and puts the complainant to the proof.

It has been so repeatedly and constantly ruled, that equity will not enforce the specific performance of a contract where either the contract or the proof is uncertain, that reference to the decisions is deemed almost unnecessary and superfluous. *Colson* v. *Thompson*, 2 Wheat. 336; 1 Fonb. Eq. 172; 4 Johns. Ch. R. 559; 11 Ves. 522.

The agreement is substantially proved by one witness, and very imperfectly by any other testimony. Under all the circumstances of the case, it is questionable whether the proof would be sufficient to sustain the bill; but waiving that objection, and considering the agreement as fully established, the court will proceed to examine what equity the complainant has to ask for the extraordinary interposition of the chancellor. The jurisdiction to decree the specific performance of the agreement of parties, is founded on a legal title to damage, and will not be enforced, where adequate compensation can be recovered by an action at law. *Flint* v. *Brandon*, 8 Ves. 159; *Halsey* v. *Grant*, 13 Ib. 73; 1 Peters, 305; *Holly* v. *Edwards*, Burr. 159; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 282; 1 Bibb, 212; 2 Ib. 273.

If McLain has actually sustained an injury, his redress is ample, by an action on the case for damages. It is no answer

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to say that Roundtree's estate is insolvent. The question is not, whether it is insolvent or solvent; but has the party as full and complete a remedy at law as in equity? If so, he cannot come into this court for relief. What legal or equitable right has McLain to the note, or obligation which Roundtree promised to procure from Martin, and in what way or by what means can he set up his claim? At the time the agreement was entered into, it had no legal existence, for nothing certain was then due Roundtree from Martin, and his indebtedness, which afterwards accrued, depended upon a contingency which might never happen. Could McLain, by bill, or otherwise, have prevented Martin from discharging his own note, after its execution, or Roundtree from assigning it to an innocent purchaser for a valuable consideration? Surely not. If he had exhibited his bill in the lifetime of the intestate, could a court of chancery have decreed the specific performance of the agreement, when it possessed no means by which Martin could be compelled to give the note, or Roundtree to assign it? What sort of legal right had the complainant to the note, which could be enforced? None at all.

He does not claim it by delivery, for it never was in his custody or possession; nor by assignment, for this bill is to effect that object. It is contended, however, that this agreement constitutes an equitable charge upon a particular fund in the hands of Martin, and that equity will consider that done which ought to be done, and consequently enforce the agreement. This doctrine is unquestionably true, when a proper case arrives for its application; but the present case is not embraced by this principle, nor does it fall within the reason of the rule. It is, however, but justice to add, that the position was maintained with much learning and skill, and in a manner highly creditable to the ability of the counsel. The case of *Row* v. *Dawson*, 1 Ves. sen. 331, was cited and relied on by the counsel for the complainant; but that case and this are widely different, and the principle there settled by Lord Chancellor Hardwicke, so far from sustaining this bill, shows that it should be dismissed for want of equity. There, money was advanced on a draft drawn by the borrower, on certain moneys

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then due and to become due to him at Michaelmas, and the draft was also placed in the hands of the proper officer of the exchequer, which the court declared amounted to an assignment, and that the officer could not have paid the money to the drawer without making himself liable, because he had actual notice of the assignment for a valuable consideration. It could not be contended, that Martin could not have discharged his note to Roundtree, without making himself liable to McLain. Besides, in that case there was both assignment and delivery of the draft, and a prior lien for the money advanced, which immediately attached. Here none of these requisites existed, which cannot indeed be dispensed with; there was neither assignment nor delivery, nor was any thing due or certain, at the time of the contract, nor does the bill allege that advancements were made on the faith of the agreement, or of any particular fund.

An application to a court of chancery for the specific performance of a contract, is always addressed to their sound discretion. 1 Ves. jr. 565. Lord Somers, in the celebrated case of *The Marquis of Normandy* v. *Lord Berkley*, 5 Viner, Abr. 539, said that a specific performance ought never to be decreed, though the contract might be good in law, and damages recoverable for its breach, unless it was fair and reasonable in every particular. If an executory agreement is hard or oppressive, it is the constant practice to refuse a specific performance. *Barnardiston* v. *Lingood*, 2 Atk. 133; *Howell* v. *George*, 1 Mad. Ch. R. 15–17; 2 Sch. & Lefr. 554; Cases Temp. Talbot, 234. This bill is to compel the specific performance of a contract respecting a chattel, which is never decreed, except in cases of extreme and peculiar hardship, and when there is no adequate remedy at law. *Mason* v. *Armitage*, 13 Ves. 37; 1 P. Williams, 570; 3 Atk. 383; Hardin, 553; 3 Atk. 389; 2 Ves. sen. 238. And to grant relief would violate the rule that a court of equity will never allow one creditor to gain an inequitable or undue advantage or preference over others. *Riggs* v. *Murray*, 2 Johns. Ch. R. 576; *St. John* v. *Benedict*, 6 Johns. Ch. R. 112. This contract is certainly executory, and if enforced, it would prefer one creditor to another, without any lien, assign-

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ment, or legal right in his favor. It is neither fair, reasonable, nor just, for one to appropriate all the estate to his own benefit, without any advancement made in favor of the debtor, on the faith of the particular or expected fund. The bill does not allege, that at the time the contract was made, Roundtree was solvent and afterwards became insolvent, whereby the complainant lost his debt. This contract is deemed hard and oppressive, on the part of Roundtree, for it could easily have been, and probably was, extorted from his fears and necessities. If agreements of this kind should be specifically enforced, then great injustice and oppression might be exercised by creditors adjusting and settling their claims with their debtors, which ought not to be allowed.

The decree of the circuit court, in favor of McLain, must be reversed, and the bill dismissed for want of equity, at his cost.

Decreed accordingly.

ELI BENTLEY, executor of George Bentley, deceased, plaintiff, *vs.* AMBROSE H. SEVIER and BENJAMIN JOHNSON, defendants.

A *scire facias* is an action to which a party may plead, and it may be executed in the same manner as a summons.

July, 1834. — *Scire facias*, determined before Edward Cross and Thomas J. Lacy, judges.

OPINION OF THE COURT. — This is a motion by the defendants to quash the return of a *scire facias* executed in the same manner as a summons. It is contended that the statute does not embrace this writ, and that it cannot be executed as an ordinary summons, but must be served agreeably to the common law. Geyer's Digest, 245, sec. 10, declares that "the original process in all actions of slander, trespass, assault and battery, actions on the case for trover or other wrongs, and personal actions," shall be a writ of summons. It further provides that service of a summons shall be by reading the writ, declaration, petition, or statement, to the defendant, or by delivering him a

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copy thereof, or leaving such copy at his usual place of abode, with some person of the family above the age of fifteen years, and informing such person of the contents thereof; such service to be at least fifteen days before the return day of the writ. There is also a statute among the territorial acts (Acts of 1818, p. 35) which, without naming any particular action, provides generally that notice on all suits then pending, or thereafter to be commenced, might be served by leaving a copy as above indicated. The service of the *scire facias* under consideration is agreeable to the direction of this statute, and the question is whether it is sufficient.

There can be no doubt it was the object and intention of the legislature, by using general language respecting suits, to include this writ, and treat it as an action. A *scire facias* is declared to be a judicial writ founded on some matter of record, such as a recognizance or judgment. 2 Tidd, 982. It is said by Lord Coke (3 Co. Lit. 290 b, 524), "Although it be a judicial writ, yet in law it has ever been held to be an action to which a party could plead, and a release of all actions includes a *scire facias*." Skin. 682; 10 Mod. 258; 2 Tenn. Rep. 48; 1 Ib. 267; 4 Bac. Abr. tit. Scire Facias, 409; 2 Ld. Raym. 1048; 2 Wilson, 251. It will be perceived, upon examination, that many of these cases are somewhat conflicting, and most of them apply to suits brought upon recognizances, or to repeal letters patent, or on like subjects, when it is declared to be either an original, or in the nature of an original writ. 2 Tidd, 983–1035. And the courts appear to have frequently determined that it was a judicial, or in the nature of an original writ, as best suited their rules of practice, and consequently no satisfactory test is given whereby the distinction can always be exactly ascertained. And without attempting to reconcile these differences, we say that in this instance, if it can be considered as process intended to notify a party of an action pending, agreeable to the statute cited, as we think it may, the service is good, and we overrule the motion. *Motion overruled.*

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JOHN H. LENOX, surviving administrator of William Lenox, deceased, complainant, *vs.* FREDERICK NOTREBE and others, defendants on original bill; and MARY ANN HAMILTON and MARGARET HAMILTON by guardian, complainants, *vs.* FREDERICK NOTREBE and others, defendants on cross-bill.

1. In the absence of fraud or mistake, distinctly alleged and clearly proved, a court of equity will not set aside a deed regularly executed.
2. A deed, or judgment, or decree, of twenty years standing, may be set aside for fraud; but the fraud must be clearly alleged, and satisfactorily proved, either by positive or circumstantial testimony.
3. An equity is not subject to execution, unless by statute.
4. A trustee cannot become the purchaser of the estate or property of which he is trustee; nor can he buy an outstanding claim or title for his own benefit, and it will enure to the benefit of the *cestui que trust.*
5. A fraudulent conveyance is good as between the grantor and grantee, and their heirs and representatives, but is void as to creditors and purchasers.
6. Infants cannot be prejudiced by misstatements or omissions of their guardian in his answer, and equity will decree according to the facts of the case.
7. The answer of one defendant is not evidence for or against a codefendant.
8. An answer responsive to the bill, is evidence against the complainant.
9. A widow is not dowable of a trust estate.
10. A promise by a purchaser after a sheriff's sale to reconvey property purchased by him, is without consideration, and he cannot be required to perform the agreement.
11. Persons not parties or privies to a judgment are not bound by it.

July, 1834. — Bills in Chancery, determined before Benjamin Johnson, Edward Cross, and Thomas J. Lacy, judges.

LACY, J., delivered the opinion of the Court. — The complainants filed their original bill to set aside and cancel a mortgage which they allege was executed by James Hamilton in his lifetime to Frederick Notrebe, and also to set aside and cancel a deed of sale made by said Notrebe to the legal representatives of said Hamilton; they pray all the title and interest of the property contained in said deed be vested in themselves. The bill states that Hamilton became indebted to Notrebe in the sum of about $500, for which he executed a mortgage on two slaves, Phillis and Caroline, which they have fully satisfied. It charges that all the property belonging to Hamilton was ex-

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posed to sheriff's sale in 1825, and that Notrebe became the purchaser for the sum of $220, and that he agreed that Hamilton might redeem the property one year thereafter, by his paying to Notrebe the purchase-money and interest, and also whatever else was owing by Hamilton to Notrebe. It alleges that Drusilla Hamilton during her widowhood, and Lenox since his intermarriage with her, have fully paid off and discharged Notrebe's debt.

Notrebe and the heirs of Hamilton are made defendants to the original bill. Notrebe answered, and admitted generally the allegations set forth. The fund by which the payment was made, is alleged to have been a gift from Sarah Blanton to Drusilla Hamilton, for her sole benefit and use, and the remainder out of individual means of Lenox. The heirs answered by their guardian, and denied the allegations generally and specifically. It is stated by them, after the purchase by Notrebe of Hamilton's personal estate at sheriff's sale, it was agreed between Hamilton and Notrebe that the latter was to reconvey the property to them by Hamilton's paying whatever might be owing to Notrebe; that Hamilton in his lifetime never did pay off the debt and take a conveyance to himself, nor did he redeem the property for their benefit; that in 1826 their relative, Sarah Blanton, furnished to their mother, Drusilla Hamilton, now Drusilla Lenox, eleven hundred dollars for their sole use and benefit, and upon express conditions that Notrebe's bill of sale was to be paid off with it, and all the property therein contained conveyed to them. Accordingly the said Drusilla did pay the $1,100 to Notrebe for their use, and took a deed of conveyance, which was regularly acknowledged and recorded in 1826, conveying all the right, title, and interest to the legal representatives of James Hamilton, deceased. They afterwards filed a cross-bill against Lenox and Notrebe, (his wife Drusilla having previously departed this life,) setting forth the same material facts as contained in their answer, and prayed that the slaves be surrendered to their guardian for them, and that a decree be rendered in their favor, for the rents and profits accruing upon the estate.

Lenox answered, and set forth in addition to his original bill,

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that the money advanced for the redemption of the mortgage and bill of sale was furnished by his wife and himself individually, and that a judgment had been rendered in the State of Mississippi against him, in favor of Sarah Blanton's administratrix, for the $1,100 furnished his wife Drusilla, to pay off Notrebe's debt, and on that judgment suit had been instituted against him in the Arkansas circuit court, and judgment obtained, for which he was then liable. He also claimed title to the same property, by a bill of sale executed by James Hamilton to Pugh, in 1825, and prior to the sale by the sheriff to Notrebe. Pugh conveyed to William Rainey in 1825, and Rainey to the complainant in 1831. It was admitted that Mrs. Lenox and her two infant children, Sarah E. and Isaac Francis, departed this life in December, 1828.

Notrebe answered, and admitted the conveyance to Hamilton's heirs and representatives, and the full satisfaction of his debt. He stated the $1,100 was paid by Mrs. Blanton, for the benefit of the heirs of Hamilton, and that he made the conveyance to Hamilton's legal representatives. The proof in the cause clearly demonstrated that the $1,100 was the consideration of the deed from Notrebe to Hamilton's representatives, and was furnished by Sarah Blanton, for the sole use and benefit of the children and representatives of James Hamilton, deceased, and also that Mrs. Hamilton herself manifested some displeasure at the conveyance not having been made to the children. The object of the advancement, as shown by the testimony, was to vest in the children all right and title to the property.

The pleadings in this cause present considerable confusion and some contradiction. The parties seem to have changed their ground in their complaint and defence, and herein the court have found no little embarrassment in examining the record. The questions presented are numerous and highly important, and we have given to them a careful consideration. In their investigation, the court have derived much assistance from the highly satisfactory arguments of all the counsel concerned.

The complainants' bill is mainly a claim to set aside a deed.

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or bill of sale, regularly executed and recorded, and to vest title in themselves, without charging expressly that the conveyance was made through mistake or fraud. It is difficult for the court to conceive by what means they propose to effect their object. It is not pretended that Notrebe, in conveying the property to Hamilton's representatives, acted fraudulently. The proof shows that he was governed by the most scrupulous honor, that his object was to protect the rights of the children, without prejudicing the interest of creditors. And hence, though he knew that was the wish and intention of Mrs. Blanton and Mrs. Hamilton to convey the property to the children by name, he chose to employ descriptive terms in the conveyance, for fear they might by possibility be injured. Was it by mistake that the term "legal representatives" was used in the conveyance? Certainly not; for he had a full knowledge of all the facts, and even incurred the expense and trouble of consulting counsel upon the subject. It is contended that the conveyance was improperly made. In what way? The court is not aware that a deed or bill of sale can be impeached, except for mistake or fraud.

The defendants claim the property as the legal representatives of Hamilton, and they show a deed or bill of sale, regularly executed and recorded, to protect their title. Even where fraud is alleged to set aside a deed, it must be satisfactorily proven, either by positive or circumstantial testimony. This doctrine is so fully and ably examined in the leading case of *Hildreth* v. *Sands* (2 Johns. Ch. Rep. 36 to 56) by Chancellor Kent, and the authorities there cited are so numerous and conclusive, that it is deemed unnecessary to refer to others.

A deed, or even a judgment, or a decree of a court of chancery of twenty years standing, can all be set aside on the ground of fraud; but then it must be clearly alleged in the bill, and supported by proof. In this case there is no charge of fraud, nor is there any attempt to prove it. The defendants are clothed with the legal title, and until that title is destroyed by a superior equity, they are the rightful owners of the estate. It is not denied but what they are the legal representatives of Hamilton, and if so, all the right, title, and interest of the estate

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attached immediately to them, on the execution of Notrebe's bill of sale. It is contended that the purchase by Notrebe, at the sheriff's sale, conveyed no more than an equitable interest, and that the mortgagee held the property subject to redemption. An equity is not subject to execution, unless by some particular statute. This principle is too familiar and salutary to require argument or authority to sustain it. Hamilton's legal estate was sold by the sheriff, and Notrebe became the purchaser; and that estate, whatever it may be, the defendants are in law and equity entitled to.

It is difficult to conceive how it can be considered a mortgage, when the complainant does not charge in his bill that it was one, though the defendants treat it in the character of a mortgage in their answer. It was, to all intents and purposes, a legal sale, and a legal title was conveyed. And if there was a latent equity, constituting it a mortgage, even a court of chancery would never consider it so, unless for beneficial purposes. This sale was good against Hamilton and his heirs, and the agreement of Notrebe afterwards to reconvey did not change its character, though it might have incumbered it with conditions. Both the complainant and the defendants claim through the purchase of Notrebe, and it is good against them both and all the world. It can be impeached only on the ground of fraud or mistake by creditors or purchasers. Is the present complainant a creditor or purchaser? Can a court of equity view him in that light? When did Hamilton's estate become indebted to him, or at what time did he constitute himself creditor or purchaser? The property remaining in Hamilton's possession, or coming to him, could not make him the one or the other. It might and did constitute him a trustee. 1 Atk. 489. A trustee cannot acquire any advantage by possession of property, but holds it for the benefit of his *cestui que trust.* 2 Johns. Ch. Rep. 30; 1 Dow. 269; 1 Ch. Cas. 191; 1 Ball & Beatty, 46, 47; 2 Johns. Ch. Rep. 269. It is a settled principle, that a trustee can gain no benefit by any acts done by him as trustee, but that it shall accrue to him for whom he holds. He is not permitted to become a purchaser of part or the whole of the estate, for which he is trustee for a valuable consideration. Lord

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Hardwicke determined that a trustee could not buy at a sale by auction, and Lord Eldon has followed that decision. The reason is apparent. So jealous is the court of a trustee's taking advantage of his situation to benefit himself, that he could not even purchase property which the owner refused to sell to the *cestui que trust.* So a trustee who purchases a mortgage or judgment which was a lien upon the trust estate, is not allowed to turn such purchase to his own advantage. 1 Maddox, 90–93; 1 Johns. Ch. Rep. 27; 2 Ib. 252. In 2 Caines' Cases in Error, 183, it is decided that a trustee cannot purchase an outstanding claim or title for his own benefit. If this doctrine be true, and of that there can be no doubt, then what sort of title did Lenox acquire, when holding the property for Hamilton's children, by this purchase from Rainey? If the purchase from Rainey was fair and for a valuable consideration, it could not avail the complainant any thing, for he was holding as trustee for the defendants, and hence he could take nothing by his purchase, and it would enure to their benefit. How much stronger is the case against him when he comes into equity and sets up a title which, by his own showing, is fraudulent on its face, and that, too, to defeat the rights of infants, acquired for a valuable consideration. Besides, this fraudulent deed or bill of sale was executed long after the suit was commenced, and even after the filing of the cross-bill, and for the avowed and express purpose of defeating a legal and equitable title.

The defendants claim as purchasers for a valuable consideration, which is proved to have been advanced and paid to Notrebe in discharge of his demand against their ancestor, and this title is attempted to be disturbed and overthrown by a voluntary conveyance, fraudulently entered into, to defeat the rights of innocent purchasers or creditors. The rule of law, that a fraudulent conveyance between the grantor and grantee is obligatory upon himself and his heirs, so far from prejudicing the right of the infants before the court, will shield and protect them. They are purchasers, and claim the estate as such, and do not derive title by descent. The conveyance of Rainey to Lenox, as to them, is fraudulent and void. But it is said that Notrebe and the defendants treated the sheriff's sale as a mort-

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gage in their cross-bill and answer, and it being such will enable the complainant, in right of himself and his wife, to take the estate. The bill nowhere charges the sheriff's sale, in express terms, to be a mortgage. It is true it often has reference to a mortgage, but when that is the case, it is confined to the mortgage of the two slaves, Phillis and Caroline. Infants cannot be prejudiced by the misstatements or omissions of their guardian in his answer. Hence a court of chancery will decree according to the facts of the case. 3 Johns. Ch. Rep. 367. The answer of one defendant cannot be evidence for or against a codefendant. 9 Cranch, 153; 2 Wheat. 380. In this instance, the original answer of Notrebe responds in general terms affirmatively to the complainant's bill. The defendants, not deeming it satisfactory and complete, asked in their cross-bill for a full disclosure of all the facts, and hence his answer may be considered an amended answer to the complainant's original bill, and although it is not evidence against his codefendant, is nevertheless evidence against the complainant. *Field* v. *Holland*, 6 Cranch, 8; 2 P. Wms. 453. Notrebe's answer confirms the other testimony in the cause, which is abundant without it, and therefore there can be no doubt that the fund that redeemed the property sold at the sheriff's sale was advanced upon the express condition that it was to be conveyed to the children of Hamilton, and the deed shows upon its face by whom and for what purposes it was so advanced. If the property was held as collateral security subject to redemption, before Lenox and wife could ask a conveyance, they would have to show that they had actually paid the incumbrance. The solvency or insolvency of the estate can make no difference, for the view here presented considers the infants as purchasers, and the complainant and wife claiming as representatives of the estate. Besides, the deed from Notrebe to the children was procured through the agency of Mrs. Hamilton, and she entirely approved of its contents. Whatever right she had or possessed before that time was, by that conveyance, relinquished and given up to her children, and her husband, who claims through her, can in no possible event derive title. A widow cannot be endowed of a trust estate. 1 Har. Ch. 7, 22. The prop-

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erty remaining with Hamilton during his lifetime, and with her afterwards, and coming finally into the possession of Lenox, did not at all change the nature of Notrebe's purchase. He was the legal owner, and no one could possibly have any title to it, except in equity. As the case stands, Notrebe could not have probably been compelled by any one to have reconveyed, for his promise was made after the sale and without consideration; and above all, there can be no pretence that he could be compelled to convey to Lenox and wife. If creditors have lain dormant and lost their rights, or can even yet assert them, that cannot be any reason why those should be preferred who have no shadow or pretext of right in their favor. The estate vested in the defendants is both a legal and an equitable one, so far as the complainants are concerned; and they will not be permitted to disturb it without showing right or title in themselves. It is no answer to say that a judgment is rendered against Lenox by the administratrix of Sarah Blanton, deceased, which remains yet unsatisfied and enjoined by the complainants. That record could not be evidence in any point of view against the defendants, for they were neither privy nor parties to it (1 Stark. Ev. 217); but if it even could be, still it would weigh nothing against the mass of testimony in the cause. Though the judgment and the purchase by Lenox of Rainey, after the filing of the cross-bill, throw a dark and dishonoring shade over the whole of this transaction, and demonstrates its true nature and complexion, yet the court will forbear, and not indulge in expressions of harshness and severity which might be called for, and would be justified on this occasion, — *requiescat mortuum manes in pace.*

Every aspect in which the court is capable of viewing or considering this subject, constrains them to believe that both the law and equity of the case are with the defendants. It will, therefore, be decreed, that the original bill be dismissed with costs, and the prayer of the cross-bill granted.

Decreed accordingly.

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WILLIAM MARTIN, appellant, *vs.* JOSIAH CLARK, appellee.

1. In trespass, any matter done by virtue of a warrant, must be specially pleaded.
2. A new trial will not be granted, because witnesses did not state facts which the party expected they would state.

July, 1834. — Appeal from the Crawford Circuit Court, determined before Edward Cross and Thomas J. Lacy, judges.

CROSS, J., delivered the opinion of the Court. — The record in this case presents two questions for consideration: first, whether the court erred in excluding an execution offered in evidence by the defendant; and second, in refusing to grant a new trial.

1. Clark brought an action of trespass against Martin, and the cause was tried on the plea of not guilty. In trespass the rule is, that any matter done by virtue of a warrant or authority, must in general be specially pleaded. Co. Lit. 282 *b*; 283 *a*; 6 Com. Dig. Pleader (E. 17); 1 Salk. 107, 108; Dougl. 611; 1 Saund. 298, note 1; 1 Chitty's Pl. 538; 13 Johns. 443. The evidence was not admissible under the general issue.

2. The ground stated in the application for a new trial is, that two witnesses summoned by Clark did know, and were fully informed, that the property in controversy had been taken out of the possession of Clark and sold to Martin, and probably delivered to him; and that he, Martin, believed those witnesses would swear the truth in relation thereto; but that on the trial they either forgot the facts, or corruptly and wilfully refused to state them, and therefore that he did not have the benefit of a fair trial. This did not entitle Martin to a new trial, and his motion was rightfully overruled. Say. Rep. 27; 2 Caines, Rep. 129; 3 Johns. 256; 4 Ib. 425; 5 Ib. 259.

Judgment affirmed.

MASSACK H. JANES, appellant, *vs.* JACOB BUZZARD, appellee.

1. An appeal taken without the affidavit prescribed by law, must be dismissed.
2. The legislature of the territory had power to prescribe the conditions upon which an appeal might be taken.

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Appeal from the Lafayette Circuit Court.

July, 1834. — Motion to dismiss appeal, determined before Benjamin Johnson, Thomas P. Eskridge, and Thomas J. Lacy, judges.

JOHNSON, J., delivered the opinion of the Court. — This is a motion to dismiss the appeal made by the appellee, the plaintiff in the court below, on the ground that the appellant, the defendant in the court below, failed by himself or agent to make the affidavit required by law at the time of taking the appeal. The fifty-fourth section of the statute under the title "Judicial Proceedings," in Geyer's Digest, 261, provides that, "if any person shall feel himself aggrieved by the final decree or judgment given in any of the circuit courts in any cause wherein the matter in dispute exceeds, exclusive of costs, the sum or value of one hundred dollars, it shall and may be lawful for such person at the term in which judgment is given, to enter his or her appeal to the superior court; provided that no appeal shall be granted to any defendant in actions of debt or in actions upon the case, for note, bill, book account, or assumpsit, unless the defendant or his agent shall make affidavit or affirmation stating that he does not appeal for the purpose of delay or vexation, but that he believes himself aggrieved by the judgment of the inferior court."

If the proviso just recited be in force, the motion to dismiss this appeal must prevail, as the appellant made no affidavit or affirmation in the circuit court at the time he prayed the appeal. But it is contended that the proviso requiring the affidavit is repealed by subsequent legislation. Mr. Geyer, the compiler of the Digest, has marked it as repealed by the fifty-fifth section of the same title, and in this he was no doubt correct. But the fifty-fifth section has been subsequently repealed by the fifth section of an act supplementary to the several acts establishing courts of justice, and regulating judicial proceedings, passed December 23, 1818. Pamp. Acts, 36.

By the repeal of the fifty-fifth section, all the fifty-fourth section was thereby revived. By the repeal of a repealing statute, the original statute is revived. This principle of the common law is to be found in its earliest records, and is undisputed. *The Bishop's case*, 11 Co. Rep. 7; 1 Blackstone, Com. 90.

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The organic laws of Missouri and this territory have been referred to for the purpose of showing that an appeal is given by these laws, and that it is not competent to the local legislature to restrict the right of appeal. We think it is within the power of the legislature of the territory to prescribe the conditions upon which an appeal may be taken, provided they are not manifestly unreasonable. The condition required in the proviso of the fifty-fourth section, is far from being unreasonable or improper; but, on the contrary, is consistent with the soundest policy.

It is further contended by the counsel for the appellant, that an appeal without affidavit is given by the second section of an act in addition to an act, entitled "An Act to amend an act regulating the mode of judicial proceedings in certain cases, and extending certain powers to the General Court, passed 21st December, 1818." We are clearly of opinion, after attentive consideration of this act, that it is applicable to chancery suits alone, and not to actions or suits at law.

It is the opinion of the court that this appeal must be dismissed, on the grounds of a failure of the appellant to make by himself or his agent the affidavit required by law at the time of praying the appeal. *Appeal dismissed.*

RICHARD C. BYRD, plaintiff in error, *vs.* WILLIAM A. GASQUET, defendant in error.

1. Interest on a judgment, according to statute, (Geyer's Digest, 239,) cannot exceed six per cent., although the contract may bear a greater rate; and a judgment giving eight per cent. prospectively, is reversible.
2. The case of *Henderson and Byrd* v. *Deska*, (ante, p. 231,) overruled.

January, 1835. — Error to Pulaski Circuit Court, determined before Thomas J. Lacy and Edward Cross, judges.

OPINION OF THE COURT. — In this case, two questions only are presented. First, whether the court below erred in rejecting the plea that the plaintiffs were not partners, on the ground that it was not sworn to; and second, whether the judgment is regular in giving eight per cent. interest after its rendition.

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The first question presents no difficulty. The plea offered, was in abatement, and should have been verified by the oath of the party offering it. Geyer's Dig. p. 250, sec. 23. The second is of a more serious character, principally on account of the discrepancy in the decisions heretofore made in similar cases.

If this court were now called upon for the first time, to express an opinion on the subject, there would be no hesitancy in saying, that in this country, no judicial tribunal in ordinary cases, has the power to render judgment for prospective interest, at a higher rate than six per cent. per annum.

When a note or obligation is put in suit by action of assumpsit, debt, or covenant, interest may be calculated at a rate exceeding six per cent., and not more than ten, according to the agreement of the parties, and the judgment given for the amount due at the time of its rendition; but certainly for nothing more. The statute in force here on the subject of interest, it is said, authorizes and requires judgments like the one under consideration, otherwise the obligation of contracts for a higher rate of interest than six per cent., would be impaired.

It is true that the statute does provide, that when the parties agree expressly, that any obligation shall bear interest, not exceeding the rate of ten per cent., the same shall be deemed legal, and the several courts are required to give judgment accordingly. Geyer's Dig. 240. But this provision does not change the matter in the slightest degree, as any thing secured by it would be fully accorded, by calculating the interest at the rate agreed upon, and incorporating it in the judgment at the time of its rendition. After that time all accruing interest is on the judgment and not on the obligation. A judgment, giving six per cent. interest until paid, would doubtless be sustained; but when so expressed, would be no better than if nothing had been said upon the subject. The words giving it would be surplusage, merely expressive of the general rate, to which the party would have been entitled without their insertion. Accruing interest being on the judgment, the first section of the statute referred to, (p. 239,) fixing the general rate, steps in and relieves the question of all difficulty, by providing that creditors shall be allowed to receive at the rate of six per cent. per annum

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for all moneys after they become due, on bond, bill, promissory note, or other instrument in writing; or on any judgment recovered in a court of record, then or thereafter to be established. Six per cent., and no more, is given by the statute, on a judgment, and no distinction is made between judgments rendered on an obligation, or any other writing or description of evidence.

In the case before us, the action was founded on an obligation, by which the plaintiff in error bound himself to pay a sum of money, at a given time, with eight per cent. interest from maturity, if not punctually paid. The judgment is for principal and interest at that rate, up to the time it was given, and also interest at the same rate until paid.

The judgment, we know, is in accordance with the decision in the case of *Henderson and Byrd* v. *Desha*, (ante, p. 231,) at the January term of this court, 1834. At the July term, 1834, however, in two cases, the same question arose and was decided otherwise.

It may, therefore, be fairly regarded as remaining unsettled. But suppose there had been other cases decided in consonance with the case of *Henderson and Byrd* v. *Desha*, would it be, if obviously erroneous, conclusive upon this court in the present case? We think not; for although uniformity in judicial proceedings is desirable and necessary, yet when precedents are unauthorized and oppressive, they ought not to be tolerated.

Upon what, it might be asked in the case before us, is prospective interest at the rate of eight per cent. given? It cannot be answered, that it is upon the obligation, for that ceased to exist simultaneously with the rendition of judgment; nor can it be said that it is on the judgment, for interest on judgments is, by express statutory provision, limited to six per cent.

In all cases where interest at a higher rate than six per cent. is allowed, it is a consequence growing out of the act of the debtor, sanctioned by the provision in the statute on the subject of interest.

We therefore think, that the judgment of the circuit court, in this case, is defective, in giving accruing interest at a higher rate than six per cent. *Judgment reversed.*

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JAMES BOSWELL, administrator of Hartwell Boswell, deceased, appellant, *vs.* MYRIC D. NEWTON, appellee.

1. If the legislature changes the time of holding the courts, it does not affect the business therein, although no provision is made as to the decision of causes.
2. It does not produce a discontinuance of any cause or matter.
3. If a new jurisdiction had been created, a provision continuing the business might be necessary; but otherwise not.

January, 1835. — Appeal from Independence Circuit Court, determined before Thomas J. Lacy and Edward Cross, judges.

OPINION OF THE COURT. — The only question made in this cause is, whether the court below erred in dismissing it on the defendant's motion. The suit was commenced in the circuit court of Independence county in December, 1833, and the process made returnable to the ensuing May term, at which time the defendant appeared by his attorney and plead to the action, and whereupon the cause was continued until the November term, 1834, when the judgment of dismissal was given. At the time the suit was commenced, the circuit court of Independence county was required to be held on the second Mondays of May and November. Acts of 1829, p. 22. By an act of the legislature approved November 5, 1833, the time was changed to the third Mondays of May and November, but this act did not take effect until the first of November, 1834. In changing the time of holding the circuit courts, it seems that the legislature omitted to insert a provision, that all causes then pending should be returnable, have day, and be decided, as though the change had not been made.

The omission, upon principles of either law or reason, could not, as we think, amount to a discontinuance of any matter pending in the court, the time of holding which was changed. If the court had ceased to exist by the act of the legislature, and a new jurisdiction had been created, then such a provision would doubtless have been necessary. But this is not the case, and it will be found upon examination that no such clause has ever been inserted in any act of the legislature, where the time only of holding the court has been changed.

Judgment reversed.

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SAMUEL CAMPBELL and NISA CAMPBELL, his wife, late Nisa Hampton, administratrix of Wade Hampton, deceased, William Patterson, administrator of William Dunn, deceased, and William B. R. Horner, administrator of Ichabod Dunn, deceased, plaintiffs in error, *vs.* WILLIAM STRONG, defendant in error.

1. Questions as to the trial or continuance of a cause rest so much in the sound discretion of the inferior court, that this court will not interpose unless in a flagrant case.
2. The appointment of an elisor to summon a jury, will be presumed to be correct, and to have been done for reasons satisfactory to the court.
3. Where profert is not made, oyer cannot be demanded.
4. A judgment of allowance of a competent court, cannot be inquired into, reinvestigated, or impeached in a collateral proceeding, and can only be reinvestigated in the manner pointed out by law.
5. If fraudulent, a party is not without redress.
6. A party can take no exception to a verdict in the appellate court where none was made below.
7. The breach of the conditions of a penal bond, constitutes, in fact, the basis of the plaintiffs' action, and it should be assigned with certainty and particularity, so as to show the injury.
8. Except in a few particular cases, the rule is universal that no execution can be received in evidence, without the judgment on which it was issued.

January, 1835. — Error to Phillips Circuit Court, determined before Thomas J. Lacy and Edward Cross, judges.

LACY, J., delivered the opinion of the Court. — This is a writ of error, prosecuted by the defendants below to a judgment of the Phillips circuit court. The suit is in the name of the governor, for the use of William Strong, against Nisa Campbell and Samuel Campbell, as principals, on an administration bond, and William Dunn and Ichabod Dunn, as their sureties. The pleadings present no little perplexity, but the court will, however, without noticing the extraneous matter with which the record is incumbered, proceed to the examination of all the questions they deem important to the decision of the cause.

The breaches are properly assigned, for the declaration avers that neither Nisa Campbell, before her intermarriage, nor Samuel Campbell, since that time, nor William Dunn, nor Ichabod

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Dunn, nor either of them, have paid or discharged the bond. Nisa Campbell had no right to pay, but by the consent and as agent of her husband after her intermarriage, and hence it was not necessary to aver, as it is not contended that she did pay after that time. The demurrer to the declaration was properly overruled.

The suit ought not to have abated upon the suggestion of the death of James Miller, who was then acting governor of the territory, for he was only a nominal party upon the record, and his name might have been stricken out without injury, and that of the governor alone retained, who, in legal contemplation, is always in being. If the party was even improperly ruled to trial at the same term at which the suit was revived in the name of his successor, it could only have operated as a continuance, and questions of that character are always left to the sound discretion of the court that tries the cause, and it must be a very flagrant case of injustice that this court would interpose to correct.

The appointment of an elisor to summon a jury stands upon the same principle, and will be presumed to be correct, either by agreement of the parties concerned, or for reasons satisfactorily appearing to the court below.

Oyer was rightfully refused as profert was not made.

The testimony offered by the defendant to show that the judgment of allowance was wrongfully or fraudulently obtained, was properly rejected. If there was a judgment of allowance entered up by a competent court, that matter cannot again be inquired into or be reinvestigated in the way that the defendants proposed to do. The proper time was when that subject was under adjudication, and if the court which made the allowance would not permit the parties to appear, or refused to have competent proof to defeat the claim set up by the plaintiff, an exception ought then to have been filed, and this court could have corrected the error. Besides, if it was a fraudulent judgment, the party injured is not without adequate redress. Wherever a judgment in a court having cognizance or jurisdiction of the matter, is rendered against parties or privies, the matter is at an end, unless again reëxamined in the manner pointed out by law.

If the court is right in this position, it follows necessarily that

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the demurrer to the defendant's rejoinder was properly sustained.

The verdict of the jury is considered substantially correct; and even if it was not, as no exception was taken to it in the court below, it is now too late for the party to avail himself of such an advantage.

The only remaining questions for the court to determine, are the demurrer to the plaintiff's replication and the objection to the execution that was received as evidence in the cause. These points present something more of difficulty than those that have been disposed of, and are much more important in their bearing upon this cause.

The declaration is upon the penalty of the bond, without setting forth the conditions. A plea of general performance is a response to the issue, and the plaintiff then rejoins and avers the special breach upon which he has a right to recover. This breach constitutes in reality the basis of his action, and the bond is the means alone by which that injury can be redressed. The replication should have been as certain and as particular as the declaration, and as if the suit was for the breach. It should have averred that the defendants were indebted by reason of a judgment of allowance in a given court and at a certain term, and in an exact sum or amount, which judgment remained unpaid, and in full force and effect. Does the replication contain such matter? For aught that appears from the record, the judgment may have been paid off and fully discharged, or have been reversed, or a new trial granted, or the parties by our statutes may have been only entitled on the final settlement of the estate, to a certain portion of allowance, which may have been received. Had issue been taken on it, the only question that could have been submitted to the jury, would have been, was there such a judgment, and the defendants would have been precluded from proving they had discharged it, or complied with all the conditions of their bond. The replication nowhere states that the judgment is now in full force and unreversed, nor that the defendants have failed to settle, as they were bound to do, or pay off the debts according to their dignity or grade. Besides, it should have concluded with a verification,

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for the assignment of a particular breach surely contains new matter. 1 Chitty, Pl. 325, 330; 2 Starkie, 54, 92; Bacon, Abr. tit. Plea and Pleading, J. C. D.; *Robins* v. *Reese*, 1 Saund. 59; 9 J. R. 335; 2 Tidd, 826.

The objection that was taken as to excluding from the jury the reading of the execution, is not answered by saying that it was previously given in as testimony, and that after it was once admitted, it could not be rejected. The defendant's counsel had no right to object to the reading of the execution. Their right to have it excluded, only attached upon the plaintiff not producing a judgment on which it was founded. Besides, the motion to exclude is in the nature of a demurrer to evidence, which never can be made until the proof is heard. This court cannot presume there was a judgment when the record shows none was produced, nor does it alter the case, that both judgments were rendered in the same court. There might have been a fatal variance between the judgment and execution. The judgment might have been absolutely void on its face, or it might have been a forgery. That no execution can be received as evidence without a judgment, (except in a few particular cases,) is a rule of law so universal and important, that it requires neither authority nor argument to sustain it. It follows that the court on this point, as well as overruling the demurrer of the defendants to the plaintiffs' replication, erred, and the judgment must therefore be reversed, and the case remanded for a new trial, with leave to the parties to amend their pleadings. *Judgment reversed.*

ASA HARTFIELD, plaintiff in error, *vs.* BENJAMIN PATTON and JOHN CLARK, defendants in error.

1. By an agreement H. was to deliver salt at any place on the banks of Red River, below the mouth of Little River and above Long Prairie, which might be designated by B. and P.: *held*, that the omission of the latter to do so did not prevent H. from delivering the salt at any convenient place he might select, between the two points, in discharge of his agreement.
2. In an action of covenant brought by B. and P. for the failure of H. to de-

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liver the salt, the declaration need not aver that a place was designated, nor that notice of a place for the delivery of the salt was given, as the place was designated by the agreement itself; and an issue formed as to such notice is immaterial.

3. A repleader is never awarded in favor of him who commits the first fault in pleading, nor where there is one material issue in the cause.

July, 1835. — Error to Sevier Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

JOHNSON, J., delivered the opinion of the Court. — This is an action of covenant, brought by Clark and Patton against Hartfield, on the following covenant: —

"Arkansas Territory, Sevier county. Articles of agreement made and entered into between John Clark and Benjamin Patton, of the first part, and Asa Hartfield, of the second part, witnesseth: that the party of the first part hath this day bargained, sold, and delivered to the party of the second part all their right, claim, interest, and possession of the salt on Little River, known by the Little River Saline, together with the salt kettles, also the farm attached to said premises; and it is understood that if the party of the second part should be dispossessed of the aforesaid premises by any law of congress passed at the last session thereof previous to the time any one of the payments which are to be made in manner hereinafter described, then and in that case the party of the first part doth declare all such payments to be null and void. In consideration of which, the said party of the second part is to pay the party of the first part the sum of $4,500, as follows: $1,350, which is paid in advance; $1,500 in salt, as follows, namely, $1,200 to be paid at any place or places on the bank of Red River, below the mouth of Little River and not below the Long Prairie, which may be designated by the party of the first part, at the rate of 1\frac{50}{100}$ per bushel, and required to pay $300 at the aforesaid Saline at one dollar per bushel, and if not required there, to pay at the same time and places of the aforesaid, $1,200 in salt, at 1\frac{50}{100}$ per bushel, on the first day of December, 1831, if the water will admit of its being taken at that time, if not, at the first sufficient rise thereafter; the other payment of $1,500 to be made on the 1st December, 1832, on the same

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conditions and at the same places as the foregoing payments; also 150 bushels of salt, at the aforesaid salt-works, in the course of next winter, spring, and summer, as required, when he may have salt on hand."

The above agreement was signed and sealed by the parties on the 16th of September, 1830.

The plaintiffs, Clark and Patton, in their declaration averred the failure of the defendant Hartfield to deliver the salt at the times and places specified in the articles of agreement aforesaid, and claim damages therefor. The defendant demurred to the declaration, which demurrer was overruled by the court, and afterwards he filed two pleas; the first a plea of set-off, and the second that the plaintiffs did not give notice to the defendant of the place for the payment and delivery of the salt, on which issues were joined. On the trial before the court below, a jury having been dispensed with by consent, a judgment was rendered in favor of the plaintiffs, from which this writ of error is prosecuted.

The first point relied upon for the plaintiff in error is, that the declaration is fatally defective in not averring notice of the place for the delivery of the salt. By the terms of the contract, the salt was to be delivered at any place or places on the banks of Red River, below the mouth of Little River and not below Long Prairie, which might be designated by Clark and Patton. There can be no doubt that Hartfield might have performed his contract by delivering the salt at any place on the banks of Red River, below the mouth of Little River and above Long Prairie, in the event of the failure or omission of Clark and Patton to designate a place between those points. Clark and Patton might or might not designate a particular place, and their omission to do so did not prevent Hartfield from delivering the salt at any convenient point he might select between the places specified. There was then no necessity for the averment of notice of a place for the payment and delivery of the salt, as a place was designated by the contract itself. The declaration, in our opinion, is not defective in omitting to aver notice before the times specified for the delivery of the salt. The other objection to the declaration in relation to the dispossession

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of Hartfield by any law of congress passed at the last session thereof before the date of the writing obligatory, is so clearly untenable, that it is unnecessary to remark upon it.

The cause was tried upon the pleas of set-off and the failure of Clark and Patton to give notice of a place for the payment and delivery of the several quantities of salt in the agreement specified. The issue formed upon this latter plea was clearly immaterial, and a question arises whether a repleader ought not to have been awarded. The doctrine is well settled, that a repleader is never awarded in favor of him who commits the first fault in pleading. 3 Bibb, 84, 226. Nor is it ever awarded where one issue is material, though other issues are immaterial; and (3 Bibb, 168), on both of these grounds, a repleader should not have been awarded. 2 Tidd, 830; Willes, Rep. 532; 1 Ld. Raym. 170; 1 Dougl. 396. *Judgment affirmed.*

JOHN CAMPBELL, SMITH WALKER, HEWET BURT, and JAMES W. JUDKINS, plaintiffs in error, *vs.* JOHN POPE, governor, for the use of Francis A. McWilliams, defendant in error.

1. On a penal bond with conditions, judgment should be rendered for the penalty, to be discharged by the payment of the damages assessed, and if not so rendered must be reversed.
2. If a delivery bond is not taken, property levied on is at the risk of the officer; it is his own so far that he may bring an action to recover it, or for any injury to it, and he is responsible for its forthcoming to answer the execution.
3. A levy on personal property, shown by the officer's return to be of sufficient value to pay the debt, discharges the defendant, and the plaintiff must look to the officer for his money.
4. The value of goods levied on may be shown by parol evidence, as a means of arriving at the amount of damages which the plaintiff has sustained, where the return does not show the value.

July, 1835. — Error to Hempstead Circuit Court, before Benjamin Johnson and Archibald Yell, judges.

YELL, J., delivered the opinion of the Court. — This was an action of debt, brought in the name of the governor, for the

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use of McWilliams, against John Campbell and others, upon a constable's bond. An execution had been placed in the hands of Campbell, as constable of Ozan township, in favor of McWilliams against James W. Judkins, for the sum of sixty-one dollars and fifty cents. Upon the execution the constable made a levy on the property of Judkins, on the 8th day of April, 1833; but took no bond for its delivery, on the day of the sale; and returned on the execution, that he had levied on a quantity of household and kitchen furniture, bedding, medicines, and drugs, but not enough to satisfy the execution. He advertised the property to be sold on the 4th of May, 1833, and proceeded to offer the same publicly, and in separate parcels, at which time no person bid or gave any thing for the property. The plaintiff then sued out a *venditioni exponas*, and placed it in the hands of the constable, upon which he made the following return, namely: "This *ven. ex.* is returned not satisfied; the property levied on, by virtue of an execution, bearing date the 8th of April, 1833, is not to be found in my bailiwick, and I have not found any other goods or chattels of the defendant whereon to levy the *ven. ex.*; returned this 27th of June, 1833." Whereupon suit was commenced against Campbell, as constable, and his securities on his official bond, for the amount of the debt. At the May term, 1834, of the Hempstead circuit court, the jury found the following verdict: "We find the assignment of breaches in the plaintiff's declaration mentioned, to be true, and assess his damage by reason thereof, to the sum of sixty-one dollars and fifty cents."

In the investigation of this subject, it may be necessary to advert to several points in the cause, for the purpose of settling some questions that may hereafter arise. The material question is, Was there error in the verdict and rendition of the judgment in the court below? It has been properly contended by the counsel for the plaintiff in error, that the judgment for the plaintiff ought to have been for the full amount of the penalty of the bond, to be discharged by the payment of such damages as the plaintiff had sustained by reason of the breaches assigned; and in support of that position, 1 Saund. 58, n. 1, and Ter. Dig. 348, have been cited. By reference to the statute it will be

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found, that upon any bond "for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond, to be discharged by the payment of principal and interest due thereon, and costs of suit and execution shall issue accordingly." Then if this was a bond for money, no possible doubt could exist. But it is a bond with conditions to perform the duties of an office. Will that change the judgment? We believe not: the statute says, "the plaintiff may assign as many breaches as he may think fit, and the jury may assess damages on each of the breaches, and on each verdict the like judgment shall be entered, as heretofore has been usually done in such cases." From the statute and the English authorities, we are satisfied, that in this judgment there is error in form, sufficient to require us to remand the cause for a more perfect judgment.

The court is asked to decide the question, as to the liability of the constable, in not taking a delivery bond for the property on the first execution, and in failing to obtain the property on the return of the *venditioni exponas*. The statute requires the officer to take bond from the defendant; but if the defendant fails, or refuses to give it, he can only take the property and keep it until the day of sale. It becomes to a certain extent his own; he could, if it was taken out of his possession, bring an action to recover it, or for any injury to it. And further, if an officer levies on property sufficient to pay the debt, and his return shows the fact, it is a payment of the debt by the defendant, and the plaintiff must look to the officer for his money.

The officer may take a delivery bond (Ter. Dig. 345); but if he does not, the property is at his own risk; and if it is not forthcoming on the day of sale, he becomes liable, in the nature of special bail, to the plaintiff. If the above principles are true, then the officer would still be responsible for the delivery of the property on the return of the *venditioni exponas*.

The court refused to permit the defendant, on the inquiry of damages, to give parol evidence of the value of the goods levied on under the execution, and instructed the jury, that the officer, failing to state the value of the goods levied on, was conclusive evidence that there were goods enough to pay and

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satisfy the debt, although the officer had returned that they were not sufficient. We believe the court erred in rejecting the evidence to prove the value of the property. That was one means to arrive at the true amount of damages that ought to have been recovered against the officer. Consequently the court erred in instructing the jury, that the officer not returning the value of the property levied on, was conclusive evidence against him, of sufficient value, and that they ought to find accordingly.

Judgment reversed.

GEORGE MCDANIEL, appellant, *vs.* BENJAMIN R. MILAM, appellee.

Statute of limitations, lapse of time, and evidence of residence.

July, 1835. — Appeal from Hempstead Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

YELL, J., delivered the opinion of the Court. — On the 24th day of December, 1819, the defendant executed his note to plaintiff for the sum of one hundred dollars, due and payable in all the month of April next after the date of said note, at Natchitoches, in Louisiana, and on the 20th of August, 1833, a summons was sued out on said obligation, and at the October term, 1833, it was returned not executed, and an alias summons was ordered and returned executed on the third day of January, 1834. The defendant, among other things, relied on the statute of limitation of five years, which was plead. The plaintiff replied that the defendant, by his removal out of the United States to parts unknown, defeated the bringing of the action in five years after the cause of action accrued; to which the defendant replied that he did not defeat the bringing of the action aforesaid, in five years, as the plaintiff has alleged, upon which the plaintiff joined issue.

Neither party requiring a jury, the cause was submitted to the court upon the testimony as appeared in the bill of exceptions.

E. S. Williams, a witness, stated in substance, that he be-

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came acquainted with defendant Milam in June, 1820, in New Orleans; defendant remained there until January, 1821, and then went to Mexico, remained there about two years, and returned again to New Orleans and remained a few days, and then went to Kentucky on a visit and remained there about two months, and again returned to New Orleans, where he remained a few days, and went again to Mexico and remained there several months and again returned to the United States, and has since then been in Louisiana, frequently passing back and forth from there to Arkansas and Texas; he stated that the defendant could not have been esteemed a citizen particularly of any place. At the time the witness first knew him, he stayed most of his time in New Orleans, and lived at a boarding-house; he believed defendant did not reside at Natchitoches; had heard him, Milam, say he went to New Orleans in 1819, and traded from thence to the West Indies. The defendant first settled in Arkansas eight years ago last fall. Witness further stated that Milam was in Natchitoches every year after his return from Mexico, as often as once or twice a year.

Upon this evidence the court rendered a judgment in favor of the defendant, from which the plaintiff appealed to this court.

Without going at large into the grounds upon which this judgment was rendered for the defendant, which admits of ample vindication, we are of opinion that the lapse of time, in the present case, is a bar to the plaintiff's recovery. We therefore affirm the judgment of the court below.

Judgment affirmed.

THOMAS W. SCOTT, appellant, *vs.* JOHN DOE, on the demise of Peter T. Hickman, appellee.

1. The statute (Ter. Dig. 134) requires conveyances affecting lands, to be recorded in the county where the lands lie, within three months from the date thereof, otherwise to be void as against subsequent purchasers, who shall record their deeds in that time.
2. The requisition is that a deed shall be recorded; and mere *filing for record*

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is not equivalent to it, nor a compliance with the law. The deed must be *actually* recorded in a record book within three months.

3. A deed recorded is constructive notice, only from the time it was actually recorded, by being transcribed into the record book.

July, 1835.— Appeal from Hempstead Circuit Court, before Benjamin Johnson and Archibald Yell, judges.

JOHNSON, J., delivered the opinion of the Court.— This is an appeal by the defendant in an action of ejectment, from a judgment in favor of the plaintiff. On the trial, the plaintiff, to prove his title, produced in evidence a patent from the United States to William Hickman, a deed from Hickman to Hardin Wilson, and the record of a judgment and execution against him, together with a deed from the sheriff to the plaintiff Peter T. Hickman, bearing date on the 12th of April, 1832, and acknowledged and recorded on the 14th of the same month, for the land in controversy, purporting to be made to him as the purchaser at the sale under the execution; to the admission of which, as evidence, no objection was made.

The defendant, Scott, then produced in court a deed from the said Hardin Wilson to his daughter Artemisia Wilson, for the land in controversy, bearing date on the 7th of October, 1830, with the following indorsements thereon:—

"Arkansas Territory, Hempstead county, sct. Be it remembered, that on the 7th day of October, A. D. 1830, Hardin Wilson personally appeared before me, Allen M. Oakley, an acting justice of the peace, and acknowledged the foregoing deed to be his act and hand and seal, for the purposes and uses therein mentioned and contained. Given under my hand and seal this 23d day of April, 1832. ALLEN M. OAKLEY, J. P." [seal.]

"Territory of Arkansas, county of Hempstead, sct. I, Allen M. Oakley, clerk of the circuit court, and *ex officio* recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record, in my office, on the 23d day of April, A. D. 1832, and the same is now duly recorded in record book B, pages 439–440. In testimony whereof I have hereunto set my hand and affixed the seal of

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my office, at Washington, the 23d day of April, 1832, and of the independence of the United States the 56th year.

ALLEN M. OAKLEY, clerk and ex officio recorder.

"Filed 7th October, 1830. A. M. OAKLEY, clerk."

"F. W. Scott this day appeared and requested this deed to be recorded, filed 23d April, 1832. A. M. OAKLEY, clerk."

And the defendant also adduced the said Allen M. Oakley as a witness, who being sworn, stated that the deed from Hardin Wilson to Artemisia Wilson, was produced to him in his office, by Hardin Wilson, to be recorded, on the 7th day of October, 1830, which then and there he marked "filed," with his official signature, and that some short time afterwards Hardin Wilson asked him if the deed had been recorded, to which he replied in the negative, and that Hardin Wilson then said, he, the witness, need not record the deed, and that by reason of this direction he did not record the deed at that time, and he believed the deed remained in his office on file until the 23d of April, 1832, when the defendant, Scott, requested the deed to be recorded; and thereupon he recorded the deed; and that he drew his pen in manner and form as certified by him on the deed, and that he drew his pen across the indorsement "Filed 7 October, 1830. A. M. Oakley, clerk." But whether it was when requested by Scott to record the deed, or when told by Hardin Wilson that he need not record it, he did not recollect; and thereupon the defendant offered the deed in evidence to the jury; to the reading of which the plaintiff objected, which objection was sustained by the court, and the deed rejected.

The only question presented for the consideration of the court is, whether the court below erred in rejecting the deed adduced as evidence on the part of the defendant. Our statute requiring deeds to be recorded, provides that all deeds, conveyances, bonds, and other obligations for lands, tenements, or hereditaments hereafter made and proven or acknowledged before any competent authority shall be recorded in the county in which the lands are situate, within three months from the date thereof, or the same shall be void against subsequent purchasers, so recording the said deeds within the time prescribed by this sec-

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tion. Geyer's Digest, 129. The plaintiff occupied the attitude of both creditor and purchaser, and the deed under which he claimed was duly recorded within three months from its date. The deed offered by the defendant was not recorded within three months from its date, and not until the plaintiff's deed was recorded. According to the plain and express provision of the statute, the deed offered by the defendant was void against a subsequent purchaser duly recording his deed, not having been recorded within three months from its date, and the plaintiff being a subsequent purchaser, and having recorded his deed in due time, it was null and void against him. It is insisted, however, that it was filed with the proper officer for record on the day of its date, and although not in fact recorded until more than twelve months had elapsed, it was equally valid to all intents and purposes as if it had been recorded within the time prescribed by law. It is a sufficient answer to this argument, that the statute requires the deed to be recorded, or the same shall be void against subsequent purchasers. The filing it for record and transcribing it into the record book, are different and distinct acts. The reason and object of the law in requiring a deed to be recorded, is to afford notice to creditors, and subsequent purchasers, to enable them to guard against fraud. The filing of a deed for record is not as well calculated to give that notice as if it were recorded in the record book. The purchaser is not referred by the law to the clerk, but to the records made by him, in order to ascertain whether a sale or conveyance has been made. We have no hesitation in declaring that the bare filing of a deed for record, is not a substantial compliance with the statute, unless it is actually recorded within three months from its date. It has been further contended that the filing of the deed for record was sufficient evidence to authorize a jury to presume that subsequent purchasers had notice of the deed. We cannot yield our assent to this proposition. Notice is of two kinds, actual and constructive. It cannot be contended that the filing of the deed for record with Oakley was actual notice to Hickman of the existence of the deed, or that it conduced in the slightest degree to prove notice to him unless he was required by law to inquire of the clerk for deeds filed with him for

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record. Hickman was required to make no such inquiry, neither can the filing the deed for record operate as constructive notice. Nothing less than the actual recording of the deed, can make it operate as notice by construction of law. We think the court below correctly excluded the deed from being read as evidence.

Judgment affirmed.

MOSES COLLINS, plaintiff in error, *vs.* BALDA C. JOHNSON, defendant in error.

1. An action of debt will lie on an account, as well as assumpsit.
2. A party may waive a tort, and sue in debt or assumpsit; when *indebitatus assumpsit* is maintainable, debt is also.
3. Testimony rejected; witness called to explain testimony, and instructions to jury — all proper.
4. The case of *Janes* v. *Buzzard*, (ante, p. 259,) cited and approved.

July, 1835. — Error to Clark Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

YELL, J., delivered the opinion of the Court. — This was an action of debt, brought to recover the value of 4,007 pounds of seed cotton, delivered by Johnson to Collins to be ginned. A demand was made for the cotton, and a refusal by Collins, and upon that refusal Johnson, the plaintiff in the court below, commenced this suit before Isaac Ward, a justice of the peace, in an action of debt on account. There was a judgment before the justice of the peace in favor of the defendant Collins, from which judgment Johnson prayed an appeal to the Clark circuit court; and at the October term of that court, 1833, Johnson recovered a judgment against Collins for the sum of fifty-two dollars and fifty-nine cents and costs, to which judgment this writ of error is prosecuted.

The plaintiff in error set up various grounds to reverse the judgment of the court below.

1. Because an action of debt will not lie to recover the price of cotton delivered at a gin, and a refusal to pay or redeliver, unless the cotton had been converted to cash, when the tort

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might be waived, and assumpsit sustained for money had and received to plaintiff's use.

2. The court refused to suffer a witness to state what the defendant Collins said or answered, when the demand for the cotton was made.

3. The court refused the witness permission to answer as to the solvency of Allen H. Johnson about the date of this transaction.

4. The court permitted a witness to be recalled and examined after he had been fully examined and discharged.

5. Exception to the instructions of the court.

The first objection taken by the counsel for the plaintiff in error presents a comparatively new question in this court for determination. But one adjudication in this court is to be found, to aid us in coming to a correct decision. A similar point has been settled this term, in the case of *Janes* v. *Buzzard*, (ante, p. 259.) By reference to the English authorities (1 Saund. 133; 1 Chitty, 94; 1 Torenton, 112), it will be found that assumpsit would lie. The plaintiff Johnson might have his election to waive the tort and sue in assumpsit, and a judgment in assumpsit would be a bar to any other action, and *vice versâ* if he elected to bring tort or trover. That the action of assumpsit would have been good, this court does not feel any doubt. Debt may be due by contract, either express or implied, but it is not essential that the contract should be specific, or that any particular amount be expressed. It may arise on an implied contract. The action of debt will lie where the sum to be recovered can be ascertained; as upon an account stated, or for goods sold to the defendant for as much as they are worth. Douglass, 6. This doctrine is sanctioned by Washington, J., in 8 Wheaton, R. Ap. 19, namely, that when *indebitatus assumpsit* is maintainable, debt is also. 3 Com. Dig. 365. The principles settled by such high authority, this court is unwilling to disturb.

The second exception is for the rejection of testimony. In looking into the bill of exceptions, we find that the defendant in error introduced Adam Stroud to prove the demand for the cotton. The witness related a partial settlement between

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plaintiff and defendant. In that connection, plaintiff in error asked defendant in error if he had any other demands against him; he was answered that he had a cotton receipt for 4,007 pounds of cotton, drawn in favor of Allen Johnson, and which the plaintiff in error then refused to pay. The witness was then asked by the counsel for Collins to state all the conversation that took place at the time of the demand of the cotton by Collins, which was objected to by defendant's counsel, and the objection sustained. This court has not been able to see any error in the rejection of the testimony. Collins could not make himself a witness in his own cause, as was here attempted, unless some confessions of his had been introduced, which we are unable to find. The whole conversation was not evidence. The witness Stroud had mainly testified as to the demand and refusal. The refusal to pay the cotton when demanded, would not make the whole conversation evidence, unless a part of the statement or confessions of Collins had been related, which made it important that all his statements in that conversation should be taken together. The bill of exceptions does not present such a state of facts as to authorize this court to reverse the decision of the court below on this point.

The third error assigned is for the rejection of testimony as to the solvency of Allen H. Johnson about the date of this transaction. We are unable to see the relevancy of the question. It could not affect the judgment between the parties litigant, and this court is not prepared to say there was error in rejecting such testimony.

The fourth assignment was for reëxamining a witness after he had been fully examined and discharged. The general principle of law would exclude a witness, except as to some new matters, and to some point not before examined. By reference, however, to the bill of exceptions, it will be found that the witness A. H. Johnson was called to explain some matter in relation to the cotton receipt referred to in Stroud's testimony, which made it important and perhaps material to be explained. It was drawn out in answer to some statement made by Stroud on his examination, and which was not ex-

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amined to in the first examination. Under this state of facts, we believe there was no error in the examination.

The fifth error assigned is to the instructions of the court. The jury were told, that "if they believed from the evidence that the cotton in controversy was the same embraced in the receipt of defendant to Allen H. Johnson, for 4,007 pounds, they should find for the defendant, unless the receipt was given and obtained by fraud or mistake; and in that event, unless the plaintiff by some act of his recognized it, it would be their duty to consider the case as if the receipt had never been executed." Under that instruction and the evidence, the jury found a verdict for the defendant in error for the sum of fifty-two dollars and fifty-nine cents. Nothing is more clear, than that the defendant in error ought not to recover in this action, if he held the receipt *bonâ fide* of Allen H. Johnson for the same cotton in controversy. In that event, he should have commenced his action on the receipt in the name of Allen H. Johnson for his use. The other proposition is also true, that if they believed the receipt was obtained by fraud or mistake, then they were bound to view it as a nullity, and find for the plaintiff. There were several other errors assigned, which we deem not important to notice. We are unable to find in any of the assignments of error enough to reverse the judgment of the court below. *Judgment affirmed.*

EDWARD L. COMPTON, plaintiff in error, *vs.* THOMAS S. PALMER, defendant in error.

A case improperly dismissed by the circuit court; and *Boswell, administrator*, v. *Newton*, (ante, p. 264,) cited and approved.

July, 1835. — Error to Independence Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

OPINION OF THE COURT. — This is a writ of error to the Independence circuit court, to reverse a decision made at the November term of that court, dismissing the cause, on the ground that it had been discontinued by operation of law.

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Upon examination of the record, it is found, the same question is presented for consideration, as that determined at the last term of this court, in the case of *James Boswell, administrator*, v. *M. D. Newton*, (ante, p. 264,) which opinion the court has examined and fully approved.

The dismission of the cause for the reason set forth, was erroneous. *Judgment reversed.*

WILLIAM KIRK, plaintiff in error, *vs.* ANDREW J. ARMSTRONG, defendant in error.

Appeal from a justice not taken on the day of trial, ten days' notice before the sitting of the next court authorized to try the same, must be given to the opposite party.

July, 1835. — Error to Hempstead Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

OPINION OF THE COURT. — On the 5th of April, 1834, William Kirk obtained a judgment before a justice of the peace against Andrew J. Armstrong, for twenty dollars damages and costs of suit, from which judgment Armstrong prayed an appeal to the Hempstead circuit court, on the 3d day of May, 1834. Armstrong failed to notify Kirk that he had taken an appeal. At the next term of the Hempstead circuit court, Kirk failed to appear, and his suit, on the motion of Armstrong, was dismissed with costs. To this judgment this writ of error is prosecuted.

When an appeal is not prayed for on the day of trial, the party appealing is required by law to notify the opposite party, at least ten days before the next sitting of the court authorized to try the same. This not having been done, it was clearly erroneous to dismiss the suit. Geyer's Dig. 391.

Judgment reversed.

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BERRY A. WILSON, plaintiff in error, *vs.* THOMAS EADS, defendant in error.

1. Special bail for the stay of execution before a justice of the peace, become liable to pay the debt, in case it is not paid by the principal, or made out of his property, on the issuing of execution at the expiration of the stay, and nothing can discharge the bail except payment of the judgment.
2. Bail cannot complain of what is for his benefit, or by which he is not injured.

July, 1835. — Error to Hempstead Circuit Court, before Benjamin Johnson and Archibald Yell, judges.

JOHNSON, J., delivered the opinion of the Court. — On the 24th day of January, 1829, Wilson, the plaintiff in error, recovered a judgment against Robert B. Musick, for the sum of eighty-three dollars debt, and five dollars and sixty cents damages, and the costs of the suit, and on the same day, Eads, the defendant in error, appeared before the justice and acknowledged himself jointly bound with Musick for the stay of execution. On the 24th of July, the stay of execution having expired, Wilson caused execution to be issued against Musick and delivered it to the proper officer, who made return thereon, on the 19th day of August, 1829, in the following words: "No goods or chattels are found in my township to levy on, nor is the body of the defendant Robert B. Musick."

A second execution issued on the 19th of August, on which a part of the debt was made, and returned on the 18th of September, and a third execution issued on the last-mentioned day, and was returned on the 1st of October, on which nothing was made.

On the 26th of August, 1829, Wilson sued out from the justice who rendered the judgment, a *scire facias* against Eads as special bail, which was duly served upon him. On the 30th of September, 1829, the justice rendered judgment that execution issue in favor of Wilson against Eads and Musick jointly. To this judgment Eads sued out a writ of *certiorari* from the Hempstead circuit court, where the judgment of the justice awarding a joint execution against Eads and Musick was

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reversed, and judgment for costs given in favor of Eads; and to this judgment this writ of error is prosecuted.

It is admitted that the judgment obtained by Wilson against Musick, is regular and free from error. The only inquiry now before the court, relates to the judgment against Eads, the defendant in error.

The counsel for the defendant in error contend that the judgment is erroneous upon two grounds. First, because the execution against Musick was not returned in twenty days from its date, and a *scire facias* issued forthwith against Eads. And secondly, because the plaintiff Wilson caused two other executions to be issued against Musick, and thereby released the defendant Eads.

It is material to inquire into the nature and extent of the obligation entered into by the special bail for the stay of execution, upon a judgment rendered by a justice of the peace.

The act of the legislature, passed the 26th day of October, 1825, p. 20, provides, "That any person who shall hereafter become special bail for any defendant against whom judgment may be rendered, so as to entitle such defendant to stay of execution, such bail shall, before the justice of the peace, acknowledge himself jointly bound with such defendant in the full amount of such judgment and costs, which judgment the justice shall enter upon his docket, and at the time limited for the stay of execution shall issue execution against the principal, and if the principal shall not satisfy the execution, and if the bail shall not show property, and the constable cannot find property of the principal to satisfy said execution, then, and in either case, it shall be the duty of the constable to return said execution to the justice within twenty days of the date thereof, whose duty it shall be to issue *scire facias* against such bail, requiring him to show cause why execution should not forthwith issue against him for the judgment and costs aforesaid; and if he fails to show sufficient cause the justice shall issue execution against both principal and bail." Ter. Dig. 364.

From the provisions of this act it is manifest that the obligation into which the special bail for the stay of execution enters, is, that he will pay the judgment, provided an execution shall

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be issued against the principal at the time limited for the stay, and the amount of the judgment cannot be made out of the principal. There is no provision in the act that the special bail may discharge himself by the delivery of the body of the principal. He becomes jointly bound for the amount of the judgment in consideration of the time given for the principal, and if it cannot be made on execution against the principal, his liability is fixed, and from which nothing can discharge him except the payment of the judgment.

The execution against Musick was not returned within twenty days, and this is relied upon as a ground for discharging the special bail from his responsibility. The provision of the statute requiring the return of the execution within twenty days was introduced solely for the benefit of the plaintiff in the execution, and the failure of the officer to return it within that time cannot possibly operate to the prejudice of the special bail.

The alias executions taken out against Musick might and did operate for the benefit of Eads, but could not possibly prejudice his rights. *Judgment reversed.*

CHARLES MCARTHUR, appellant, *vs.* YOUNG HOGAN, appellee.

1. Where an affidavit in replevin omits to state that the plaintiff was lawfully possessed of the property, and that it was unlawfully taken from his possession and without his consent, it is fatally defective, and it is proper to dismiss the suit.
2. Judgment of *retorno*, not technically correct, but substantially good.

July, 1835. — Appeal, determined before Benjamin Johnson and Archibald Yell, judges.

OPINION OF THE COURT. — In this action of replevin, two questions are presented for the consideration of the court. First, the sufficiency of the affidavit of the plaintiff; and second, the legality of the judgment rendered by the court.

The affidavit made by the plaintiff in the court below, is manifestly defective and insufficient.

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It contains no averment that the plaintiff ever was possessed of the property, or that it was unlawfully taken from his possession and without his consent. These averments are required by the statute, (Ter. Dig. 457,) and the affidavit being thus fatally defective, the suit was properly dismissed by the court.

Our statute provides, that if any plaintiff in replevin shall fail to prosecute his suit with effect, the judgment shall be, that he return the property taken. Ter. Dig. 458. Has the circuit court rendered such a judgment? Although the judgment is not in the technical language of the usual forms, yet we think it substantially corresponds with approved precedents. The judgment is as follows: "Therefore, it is considered that the said plaintiff take nothing by the said writ, and that the said defendant have a return of the property so replevied as aforesaid." The judgment rendered in the case is, in our opinion, substantially for a return of the property, and although not formally, is substantially correct. *Judgment affirmed.*

JAMES CARR et al., plaintiffs, *vs.* SEARS TWEEDY, defendant.

A writ of *certiorari* cannot issue from the superior court, for the purpose of bringing up a case from the county court for adjudication, and such case should be determined in the circuit court.

July, 1835. — *Certiorari*, before Benjamin Johnson and Archibald Yell, judges.

OPINION OF THE COURT. — This cause is brought here by *certiorari*, directing the clerk of the county court of Conway to certify to the superior court at the July term, 1835, the record and proceedings in the above cause. At the April term, 1835, of the circuit court, judgment was obtained against James Carr and others, to the amount of $2,458, for failing to settle with the court as executors of the last will and testament of John Tucker, deceased, from which judgment no appeal was prayed, and this *certiorari* was brought to set aside the judgment and proceedings in the county court.

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The defendant moves to dismiss this *certiorari*, because this court has no jurisdiction in the cause.

If the act of 1829 (Ter. Dig. 157) organizing the county courts, gives the privilege of appeal, it still must be brought up in the way pointed out by the statute; it would be error to bring an appeal directly from the county court to this court, the circuit courts alone having jurisdiction of appeal from justices of the peace. Ter. Dig. 122, 157. Prior to the act of 1828, (Ter. Dig. 537,) this court had concurrent original jurisdiction with the circuit courts in all civil matters. Since the passage of that act, the superior court is made an appellate court alone, with some few exceptions, and this is a case believed not to be within this rule. The act declares, "That the superior court of this territory, in all cases at law and equity, shall be exclusively an appellate court, and shall not have original jurisdiction in any civil cause, unless such as may arise under the laws of the United States."

The writ of *certiorari* is an original writ, and cannot therefore be returned to this court. There is an intermediate jurisdiction clothed with the power to hear and determine all original pro ceedings, and also vested with appellate power to hear and determine all matters of litigation arising in the inferior courts.

That court, then, being vested with both original and appellate jurisdiction, would in any event be the proper tribunal to hear and determine this cause.

If an appeal is allowed, then, it should have been returned to the circuit court, and if it be an original writ, that court alone has jurisdiction. It was error to bring it up to this court.

Certiorari dismissed.

MASSACK H. JANES, plaintiff in error, *vs.* MORRIS MAY, defendant in error.

If a term intervenes between the issuing of the writ of error and filing the record and writ, the plaintiff in error will be non-prossed.

July, 1835. — Error to Lafayette Circuit Court, before Benjamin Johnson and Archibald Yell, judges.

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YELL, J., delivered the opinion of the Court. — This was an action of assumpsit upon promises by May against Janes, in the Lafayette circuit court. At the October term of that court, 1832, the plaintiff recovered a judgment against Janes for the sum of eighty-four dollars, besides costs. Upon this judgment, execution issued, and a *supersedeas* was granted, and on the 4th November, 1833, a writ of error was sued out returnable to the January term of the superior court, and on the 15th of July is indorsed filed by the clerk.

The only question in the cause which the court is now disposed to consider is, did the writ of error abate, by one term of the superior court intervening between the issuing of the writ of error and the filing of the record.

This court is clearly of opinion that the cause should have been returned to the January term of the superior court, 1834; that it is in the nature of an original writ, and must be returned to the next term after it has been issued. The failure to return to the proper term cannot be cured by an amendment, there being no clerical error or error in fact to amend, as the writ bears date when issued, and when filed in the office. According to the decision of the supreme court of the United States in the case of *Hamilton* v. *Moore*, 1 Peters, Cond. Rep. 168; 3 Dallas, 371, the plaintiff in the writ of error must be non-prossed.

Ordered accordingly.

HIRAM SMITH, appellant, *vs.* ALEXANDER S. WALKER and JAMES GIBSON, appellees.

1. Appeal bond which does not set out the nature of the action, nor the court to which the appeal is prayed, is informal, but not void, and should not be adjudged invalid.
2. It is sufficiently certain to prevent a second recovery against either principal or security.

July, 1835. — Appeal from Hempstead Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

OPINION OF THE COURT. — This was an appeal from the

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Hempstead circuit court, and was submitted to the court upon a reargued case, as to whether the bond upon which this suit is instituted, is void or not.

The first part of the bond is in the usual form, binding themselves to the plaintiff Smith in the penal sum of one hundred and twenty dollars, and then follows the conditions, namely, "That whereas the said A. S. Walker has this day prayed an appeal, wherein Hiram Smith is plaintiff, and the said Walker is defendant, now if the said A. S. Walker, etc." This bond neither sets out the nature of the action, nor the court to which the appeal is prayed, and is certainly informal. There is enough, however, in the bond to authorize a court to enter a judgment. It is sufficiently certain to prevent a second recovery against either the principal, or Gibson the security, and the object of the bond being clearly legal, and nothing appearing on the face of it to show it to be void, it is to be taken as valid. Chitty on Contracts, p. 73.

This court is of opinion there was error in the court below, in sustaining the demurrer on account of the supposed invalidity of the bond. *Judgment reversed.*

THOMAS DOWLIN, for the use of John McPhail, plaintiff, *vs.* ABRAHAM STANDIFER, SEABORN G. SNEED, and REUBEN W. REYNOLDS, defendants.

1. Where an appeal bond is conditioned to prosecute the appeal with effect, or on failure to do so to pay the debt, damages, and costs adjudged, the failure of the appellant to prosecute the appeal with effect, renders the parties liable on the bond; and, as bail in error, they become fixed, without *ca. sa.*, or any step against the principal.
2. Bail in error are not discharged, nor is the judgment satisfied by taking the body of the principal on a *ca. sa.*, and a plea to that effect is bad.
3. When bail become fixed, they cannot be discharged from liability, either by the surrender, bankruptcy, or arrest of the principal on a *ca. sa.*
4. The difference between bail to the action and bail in error is, that in the former the sureties are not fixed until *ca. sa.* is sued out and returned; but in the latter, no *ca. sa.* is necessary at all for that purpose, and they become fixed from the judgment of affirmance by the superior court.

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5. Debt is the proper action on an appeal bond or recognizance; but by the common law rule, the plaintiff must sue all, if living, or one, and not an intermediate number, otherwise the defendants may plead it in abatement.
6. Although upon an appeal or writ of error, the statute requires a recognizance; yet entering into bond with security, is a substantial compliance with the statute, and the parties are liable on a bond so given.

January, 1836. — Appeal from the Washington Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges of the Superior Court.

YELL, J., delivered the opinion of the Court. — This was an action of debt, instituted by Dowlin for the use of McPhail, against the defendants, upon a bond for the prosecution of an appeal from the circuit court of Washington county to this court, in which Abraham Standifer was the principal, and Sneed and Reynolds, securities. The condition of the bond as set forth in the declaration is, to prosecute the appeal with effect, or on failure to do so to pay the debt, damages, and costs adjudged against Standifer. The present defendant Standifer failed to prosecute that appeal with effect, and the superior court gave judgment for the present plaintiff in error. This suit has been instituted upon the bond, after a failure to collect the money upon execution against Abraham Standifer.

The defendants filed a special plea, in which they alleged that the taking of the body of the defendant Standifer in execution, was a full and complete satisfaction of the judgment and a discharge of the debt, to which plea the plaintiff demurred, and issue being joined thereon, the court overruled the demurrer, and gave judgment for the defendants, from which judgment the plaintiff prayed an appeal to this court, which was granted.

Two questions are presented for the consideration of this court, in aid and support of the judgment below. 1. Was the taking of the body of Abraham Standifer in execution a release and satisfaction of the debt? 2. Was the bond sued on such an one as authorized by the statute? This cause involves questions of great importance to the country, and deserves a careful investigation by the court.

The obligation sued on is called a recognizance, but is in fact a bond for the prosecution of an appeal, the condition of

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which is, that they will pay the debt, damages, and costs, in case the judgment of the circuit court shall be affirmed by the superior court.

The present defendants are considered by the court as bail in error, and the condition of the bond pursues substantially the condition of a bond on a writ of error, namely, to pay the debt, damages, and costs awarded by the former judgments. Arch. Prac. 223, 245. In error, if the judgment be affirmed, or the writ of error be discontinued, or the plaintiff be non-prossed, the bail are liable.

The issuance of the execution against Standifer, the principal, and taking him in execution, did not discharge the bail in error. When once the bail becomes fixed, their responsibility is as irrevocable and certain as that of the principal, and their liability is fixed from the affirmance of the judgment by the superior court. Bail, when once fixed, cannot be discharged from their responsibility by surrendering the principal, nor by his bankruptcy, nor even if the principal be taken on a *ca. sa.* Archb. Prac. 323; 2 Bos. & Pull. 440; 1 Term Rep. 624. Bail to the action, or bail alone, are not liable until a judgment and *ca. sa.* against the principal; and if any proceedings be had against them before the return of the *ca. sa.*, it is error, for they may surrender the principal, in discharge of their liability, at any time before final judgment, but not after their liability becomes fixed. Archb. Prac. 103, 311, 319; 8 Term Rep. 456.

The difference in liability between bail to the action and bail in error is simply this: there is no necessity to sue out a *ca. sa.* against the principal, in order to proceed against bail in error; but it is not allowable to proceed against bail to the action until you sue out a *ca. sa.* against the principal. The liability is not fixed until the return of a *ca. sa.* Archb. Prac. 319.

Debt is the proper action on this bond, and debt may be brought on a recognizance. When the principal and securities all enter into the recognizance, or into the bond, as in this case, the action must be brought against all, if living, or against each separately. If brought against two, without joining the rest, the defendants may plead it in abatement. Archb. Prac. 324; 2 Saund. 72; 1 Ib. 291.

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The doctrine contended for, that the taking of the defendant Standifer in execution is a discharge of the debt and a release of the securities, does not apply to the facts of this case. That doctrine rests on the ground that the taking of the body in execution is upon the same debt or contract, and before the bail is fixed. Here, the execution sued out against Standifer, the principal, was upon the judgment from the circuit court, from which an appeal had been prayed to the superior court. In that appeal, Standifer entered into the bond mentioned and set forth in the declaration with Sneed and Reynolds, his securities, for the prosecution of the appeal with effect. This action is instituted on that bond, and is a new and distinct contract and cause of action from the judgment in the circuit court upon which the execution issued, and therefore that principle of law does not apply. The issuance of the *capias ad satisfaciendum*, and taking the body of the defendant, is not such a satisfaction as to bar the plaintiff from a recovery against the securities. Tidd, 958; Archb. Prac. 323. The case in 2 Bos. & Pul. 440, expressly decides that in error, if the plaintiff in the action have his judgment affirmed, and take in execution the body of the defendant, for the debt, damages, and costs, he does not thereby discharge the bail in error.

The second point made by the defendants relates to the legality of the bond, and they contend that a recognizance is the only security allowed by the statute to be taken on an appeal or writ of error. It is true that the statute requires the appellant, who was plaintiff below, to enter into a recognizance, with one or more securities, in a sum sufficient to cover the costs in the inferior and superior court, conditioned to prosecute his appeal, and, where the appellant was defendant below, to enter into a recognizance, with one or more securities, in a sum sufficient to cover the amount for which judgment has been given, together with the costs that have accrued, or that may accrue, by reason of such appeal. Ter. Dig. 334. The court have no doubt that a recognizance is the mode pointed out by the statute; but it does not preclude the mode here adopted, nor does it avoid the appeal or discharge the securities in the appeal bond. Though it is not a strict compliance with the statute,

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yet the securities having bound themselves in a bond substantially good, cannot take advantage of their own act to defeat a recovery upon it. Having subscribed the bond, in lieu of a recognizance, we are disposed to enforce its collection, especially as the statute requiring a recognizance does not preclude the party from entering into bond with security, as was done in this case. No possible evil can result from sustaining the bond, as the suit is not more expensive, nor the defence less ample, than upon *sci. fa.* upon recognizance. We cannot, therefore, enforce the strict rule, as contended for by defendants' counsel; and, as we consider the bond valid, the action well brought upon it, and the plea bad, we hold that the demurrer should have been sustained. *Judgment reversed.*

JOSIAH CLARK, plaintiff in error, *vs.* THOMAS PHILLIPS, defendant in error.

1. A trivial variation in describing a deed, or written contract, is fatal, and the variance may be taken advantage of on demurrer in arrest of judgment, or on error.
2. The term "writing obligatory" imports a sealed instrument.
3. To enable a person, by assignment of a bond, to vest the legal title in the assignee, it must appear that he has the right to make the assignment.

January, 1836. — Error to Pope Circuit Court, before Archibald Yell and Edward Cross, judges.

CROSS, J., delivered the opinion of the Court. — This cause comes up on a writ of error to the Pope circuit court, and has been submitted without argument. At the return term in the court below, Clark, the plaintiff in error, appeared by his attorney and craved oyer of the writing declared upon, which was given in the words and figures following, namely: —

"The first day of October next, we or either of us promise to pay to John Rossman & Co., or order, eight hundred and fifteen dollars and fifty cents, for value received of them, this 29th day of October, 1830. (Signed) JOSIAH CLARK,
B. D. JOHNSON."

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On the back of which was the following indorsement, namely:—

"I assign the within note to Thomas Phillips for value received, this 22d day of October, 1832.

(Signed) "A. DILERAC."

Whereupon he filed a general demurrer to the plaintiff's declaration, to which there was a joinder, and on submitting it, the circuit court gave judgment for the plaintiff, overruling the demurrer.

Phillips alleges in his declaration, "that Josiah Clark and one B. D. Johnson, otherwise Bolus D. Johnson, who is not sued in this case, by their certain writing obligatory signed with their own proper hands, and sealed with their seals, promised to pay," and then goes on to state "that John Rossman & Co., to whom, or to whose order, the payment was to be made, indorsed, and assigned, the said writing obligatory, by which said indorsement and assignment they the said John Rossman & Co. then and there ordered and appointed the sum of money specified in said writing obligatory to be paid to Thomas Phillips, and then and there delivered the same to Phillips." There being an obvious variance between the writing described in the declaration as well as the assignment, and that exhibited on oyer, we shall consider the question only as to whether this variance ought to have been regarded in deciding upon the demurrer. The rule of law is, that a trivial variation in setting out a deed or written contract, is fatal. 1 Chitty, Pl. 304. And such variation may be taken advantage of after craving oyer, and setting out the writing by demurrer. 2 Saund. 366, note 1; 1 Chitty, 416. The same authorities also show that the variance will be available on the trial, in arrest of judgment or on a writ of error.

In the case before us, the declaration alleges in describing the written contract, that it was sealed with the seals of Clark and Johnson, when the instrument shown on oyer is without seals. There is also a discrepancy in the assignment, as the declaration states it to have been made by John Rossman & Co., when it appears from the oyer given, to have been made by A. Dilerac. To designate a written contract in a declaration, or

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plea, as a writing obligatory, would doubtless be equivalent to an allegation that it was sealed, as the words "writing obligatory" are technical, and imply a sealing. 4 Com. Dig. tit. Fact; 1 Saund. 290; 1 Chitty, 348. It follows, therefore, that if the allegation as to sealing had been entirely omitted, the misdescription would have been in legal contemplation and effect the same, by describing the instrument as a writing obligatory. It may be proper to remark in relation to the assignment, that, from any thing on the record, it does not appear that Phillips, the plaintiff below, had any transfer of the written contract vesting the title in him, so as to authorize a suit in his name. Certainly "A. Dilerac" could not assign it, because he had, to all appearances, no legal interest in it. As well might Richard Roe or John Doe have assigned it, so far as we can perceive.

Believing that a misdescription of a writing declared on after oyer may be taken advantage of on demurrer, and the misdescription being obvious in the case before us, we are unanimous in the opinion, that the demurrer was improperly overruled by the circuit court, and that the judgment rendered thereon ought to be reversed. *Judgment reversed.*

ELIZABETH EVANS, as administratrix of Thomas Evans, deceased, plaintiff in error, *vs.* JAMES WHITE and JOHN REED, defendants in error.

1. Judgments, under the statute, (Ter. Dig. 310,) bear six per cent. interest per annum from rendition, and can bear no greater rates, whatever may be the rate in the original contract, and a judgment for prospective and accruing interest at a greater rate is erroneous and reversible.
2. The judgment merges the contract, and accruing interest flows from the judgment, under the sanction of the statute.
3. The *lex loci contractus* must prevail, in the computation of interest, up to the time of judgment.
4. A judgment of nonsuit never operates as a bar to a subsequent action for the same cause.
5. The case of *Byrd* v. *Gasquet*, (ante, p. 261,) cited and approved.

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February, 1833. — Error to Conway Circuit Court, determined before Archibald Yell and Edward Cross, judges.

Cross, J., delivered the opinion of the Court. — This case comes up on a writ of error to the Conway circuit court. An inspection of the record shows that the defendants in error commenced an action of debt against the plaintiff for the amount of a judgment rendered by the superior court of Limestone county, in the State of Alabama. The defendant below, at the proper time, interposed the pleas, first, *nul tiel record;* second, former recovery; third, that plaintiff's intestate had no notice, and was never served with process in the original suit; and fourth, *nil debet;* the three last of which were demurred to, and the demurrer sustained. Issue was taken on the first, and the cause submitted for trial. To the reading in evidence of the transcript of the record from Alabama, the plaintiff in error objected, which objection was overruled, and the same permitted to be read. A bill of exceptions was thereupon filed to the decision of the court allowing the transcript to be read, and judgment was given in favor of the defendant in error, for the sum of one hundred sixty-four dollars and seventy-eight cents, with interest on the same, at the rate of eight per cent. per annum until paid. It also appears that by the laws of Alabama the legal rate of interest is fixed at eight per cent. per annum, and was at the time of the rendition of the original judgment by the superior court of Limestone county.

Various errors have been assigned, the first of which is, that the transcript read in evidence was not authenticated in accordance with the laws of the United States on that subject; second, that the judgment gives prospective interest at a higher rate than is authorized by the laws of Arkansas; and third, that the demurrer to the plea of former recovery was improperly overruled. These are the only errors urged in argument, and although there are others assigned, we deem it unnecessary to notice them.

In examining the authentication of the record from Alabama we concur in believing that the circuit court very properly allowed it to be read in evidence on the trial, as it is substantially in compliance with the provisions of the act of congress.

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The second error assigned, involves a question that has been more than once decided by this court. In the case of *Byrd* v. *Gasquet*, (ante, p. 261,) after a careful and tedious investigation of the subject, the court held, that notwithstanding parties in controversy might stipulate for the payment of interest at the rate of ten per cent. per annum, yet on rendering judgment upon such contract, it would be error to allow prospective and accruing interest at the same rate after its rendition, and that by our statutory provisions on the subject, no greater or other rate of interest could be allowed on any judgment, than six per cent. per annum, whatever might have been the rate agreed upon in the original contract. This court, in the case alluded to, expressed the opinion that the judgment merges the contract so far as the question of interest is concerned, and that whatever accrues afterwards flows from it, under the sanction of the statute which fixes the rate on all judgments at six per cent. On the subject of interest, see Ter. Dig. 310.

In the case before us, a judgment having been obtained in the State of Alabama, where the rate of interest, in all cases, is fixed at eight per cent., the *lex loci* ought to prevail in computing interest up to the time of rendering judgment here; after which the character of the claim being changed, our own statute applies. The allowance of interest, therefore, at the rate of eight per cent. after the rendition of judgment was, we think, unauthorized and obviously at variance with the statute referred to.

The third and last error we shall notice, depends on the consequence given to the proceedings in the county court. We think it amounts to nothing more than a judgment of nonsuit, which never operates as a bar to a subsequent action for the same cause.

On the ground that the court below has allowed interest at the rate of eight per cent. per annum prospectively, the judgment must be reversed and the cause remanded.

Judgment reversed.

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THE UNITED STATES *vs.* TOWN-MAKER, an Indian.

Indictment adjudged bad; but prisoner remanded to custody on proof before the court of the commission of homicide.

February, 1836. — Indictment for murder, determined before Benjamin Johnson, Edward Cross, and Archibald Yell, judges.

OPINION OF THE COURT. — It is considered by the court that the indictment in this case, and the matters and things therein contained, are not sufficient in law for the plaintiffs to have and maintain this prosecution against the defendant, nor is he bound by the laws of the land to answer thereto; and therefore said defendant by his counsel moved for his discharge from custody, which motion was opposed by Samuel C. Roane, district attorney of the United States, on the ground that he was ready to produce evidence before the court, that the defendant had committed the crime of murder. And thereupon the court overruled the motion of the defendant for his discharge from custody, and the district attorney introduced a witness, who proved that the defendant had been guilty of the homicide of a citizen of the United States, in the district of country occupied by the Osage nation of Indians, and therefore upon motion of the district attorney, it was ordered by the court that the defendant be remanded to the custody of the marshal, to be imprisoned until he shall be discharged according to law.

YELL, J., dissented from this order.

WILLIAM B. MARSHALL, plaintiff in error, *vs.* JESSE JEFFRIES, defendant in error.

"Jeffery" and "Jeffries" are not *idem sonans*.

February, 1836. — Error to Lawrence Circuit Court, determined before Benjamin Johnson and Archibald Yell, judges.

JOHNSON, J., delivered the opinion of the Court. — This is an action of trespass for an assault and battery, brought by Jeffries

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against Marshall. Marshall pleaded a misnomer of the plaintiff named, alleging that he was called and known by the name of Jesse Jeffery, and not by the name of Jesse Jeffries. To this plea Jeffries demurred, and the demurrer was sustained.

The only question for the consideration of this court, relates to the decision on the demurrer to the plea in abatement.

We think the court erred in sustaining the demurrer to that plea. We do not think that Jeffery and Jeffries are the same name. They are differently spelt, and clearly cannot be said to be *idem sonans.*

The judgment must be reversed, and the cause remanded, with directions to permit the defendant in error to reply to the plea of misnomer, if he shall apply for leave to do so, and on his failure, then to give judgment in accordance with the plea in abatement. *Reversed.*

FREDERICK FLETCHER, plaintiff in error, *vs.* WILLIAM ELLIS, defendant in error.

1. An action will lie for maintenance in this country.
2. In the declaration it is necessary to allege the pendency of a suit, in what court pending, together with time, place, and circumstances, so as to show the maintenance.

February, 1836. — Error to Conway Circuit Court, determined before Edward Cross and Archibald Yell, judges.

CROSS, J., delivered the opinion of the Court. — The record in this case shows that the plaintiff in error brought an action of trespass on the case against the defendant, in the Conway circuit court, and in his declaration alleged "that the said plaintiff and one Alexander Rogers, were indebted to Daniel Gilmore in a large sum of money, namely, in the amount of fifty-five dollars, upon which said Gilmore had brought suit and obtained judgment, and sued out execution against the plaintiff and the said Rogers, and the plaintiff avers that he and Rogers had, in the county of Conway, sufficient goods and chattels to have satisfied the execution, and the plaintiff avers that the de-

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fendant being an evil disposed person, fond of encouraging litigation and fomenting strife, and wishing to harass, impoverish, and distress the plaintiff, did, on the first day of October, 1834, at the county of Conway, and within the jurisdiction of this court, maliciously persuade and procure the said Daniel Gilmore, by offering him to pay all costs and charges, and to see his debt made secure, to have the plaintiff's body taken in execution; and by reason of the defendant's procurements by his several offers and promises as aforesaid made, the plaintiff's body was taken in execution." It also appears that the defendant filed a demurrer to the declaration, which was sustained by the court. The writ of error is prosecuted to reverse the judgment sustaining the demurrer.

A mere glance at the declaration will show that it has been drawn by an extremely careless pleader. The object of the action doubtless was, to charge the defendant for a maintenance, which is defined to be an officious intermeddling in a suit depending in a court, with which the person so intermeddling has nothing to do, by assisting the plaintiff or defendant in the prosecution of such suit. Coke, Lit. 358; 2 Inst. 213. The court is not designated in which the suit was pending, nor is the time or place alleged when and where the execution issued or into whose hands it came. The allegation is in relation to the maintenance, that the defendant offered Gilmore to pay costs and charges, and to see that his debt was secured. Between a mere offer to assist and assistance, there is certainly a material difference, for without the latter, the maintenance is not committed at all.

So far as any thing can be collected on the subject from the declaration, it seems that at the time the offer was made to pay costs and see the debt secured, an execution was rightfully in the hands of an officer of some kind, and the plaintiff and Rogers had a sufficiency of property in the county to satisfy it. If so, the defendant's offers were made in relation to a matter over which neither he nor Gilmore had any control, as the officer was legally bound in the first place, to levy on and dispose of the property in satisfaction of the writ, notwithstanding the plain-

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tiff in execution might have instructed him to arrest the body of the defendant.

That an action lies in this country for maintenance, we entertain but little doubt. Yet it certainly would be necessary, in order to sustain such an action, to allege not only the pendency of a suit, but designate the particular court in which it was depending, together with time and circumstances, none of which requisites exist in the case before us. Indeed, there is scarcely a single requisite stated necessary to constitute a maintenance, and we have seldom had occasion to examine a declaration in which there was so frail a cause of action set forth.

Judgment affirmed.

BENJAMIN M. LEADBETTER, plaintiff in error, *vs.* EPHISDITUS T. KENDALL, defendant in error.

A justice of the peace cannot issue process beyond the limits of his township, except in two cases indicated by statute; and process so issued, not falling within the exceptions, is utterly void, and an officer cannot justify under it.

February, 1836. — Error to Pulaski Circuit Court, determined before Edward Cross and Archibald Yell, judges.

CROSS, J., delivered the opinion of the Court. — The plaintiff in error brought suit in trespass against the defendant, for forcibly seizing and taking his goods. In justification, the defendant in error alleges that Jesse Brown, an acting justice of the peace in and for Big Rock township, issued a writ of execution, directed to the constable of Saline township, and that as such constable, in virtue of said writ, he seized and took the goods. Both townships are within the county of Pulaski, and the only question we deem it material to decide grows out of the construction to be given to the act of 1829 in relation to the jurisdiction of justices of the peace. The act referred to is in these words: "Hereafter, all justices of the peace in this territory shall be commissioned for their respective counties; and the township in which they severally reside shall confine or be the extent of their jurisdiction, except in criminal cases, and in

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cases under the statutes of this territory where it may require two justices of the peace to form a court; and in that case, where there shall be only one justice of the peace in such township, or the justices of the peace are concerned or interested in the suit, any justices of the peace, of the next adjoining township, are at liberty, and shall have power, to issue process and try said cause, the same as though they were resident in said township, any law to the contrary notwithstanding." Ter. Dig. 355.

Anterior to the passage of this law, under the provisions of an act passed in 1814, a judgment creditor was allowed to suggest that the defendant resided out of the township where the judgment was rendered, and that no goods or chattels could be found in the township where the justice resided to satisfy the same, whereupon it became the duty of the justice to issue execution, directed to the constable of the township where the defendant did reside, or where his goods and chattels could be found, and the constable was authorized and required to execute the same. Ter. Dig. 378. The act of 1829 expressly limits the jurisdiction of a justice of the peace to the township in which he resides, except in criminal cases and cases where, by statutory provisions then in force, two justices were necessary to form a court. In this it conflicts obviously with the prior act of 1814, and, by a well-settled rule, repeals it to the extent of the confliction. A justice, therefore, cannot now issue process beyond the confines of his township, except in the two cases indicated by the statute. When he does, the act is wholly unauthorized and absolutely void. As well might he issue process to a constable residing in a different county, as to one residing in a different township in the same county. In either case, there would be an entire want of jurisdiction. The law restricting the jurisdiction of justices of the peace being a general one, the defendant in error was bound to have noticed it. We think, therefore, that the demurrer to the plea of justification was improperly overruled. *Judgment reversed.*

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CASES

DETERMINED IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF ARKANSAS,

FROM 1836 TO 1849.

BEFORE THE

HON. BENJAMIN JOHNSON, District Judge.

THE UNITED STATES *vs.* TA-WAN-GA-CA, or TOWN-MAKER, an Osage Indian.

1. Congress specifically defined the boundaries of the State of Arkansas, and by giving the district court thereof such powers only as were conferred on the district court of Kentucky by the judicial act of 1789, necessarily excluded jurisdiction beyond the boundaries of the State of Arkansas; and, therefore, a crime committed in the Indian country west of Arkansas, is not triable in the district court.
2. A person indicted for murder in the late superior court, and not tried, cannot be committed nor tried in the district court on that charge, the latter not being the successor of the former, and the business of the superior court not having been continued over to the district court by act of congress.
3. The courts of the United States are of limited, though not inferior jurisdiction, and cannot exercise any jurisdiction which is not expressly or by necessary implication conferred by law.

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November, 1836. — Indictment for murder, in the District Court, before Hon. Benjamin Johnson, district judge.

Chester Ashley, district attorney *pro tem.*, for United States.

William Cummins and *Samuel S. Hall*, for the prisoner.

Opinion of the Court. — The prisoner was indicted for murder at a term of the superior court of the late Territory of Arkansas. That court was competent to try him for the crime, as a law of the United States had conferred upon it jurisdiction of capital crimes committed in that part of the Indian country west of Arkansas. The superior court of the territory ceased to exist, and no trial in this case was had. The district attorney *pro tempore* now moves the court to commit the prisoner to jail, and produces, as evidence of the commission of the crime sufficient to authorize the committal asked for, the original indictment found against the prisoner in the superior court of the territory. The first question which arises is, whether this court has jurisdiction of the offence.

The act of congress, establishing the Arkansas district court, gives it "the same powers that by law are given to the Kentucky district court by an act establishing the judicial courts of the United States." The act referred to was passed in 1789 (1 Story, Laws U. S. 53), and gave to the Kentucky district court no power to hear, try, or determine any matter arising beyond the limits of the State of Kentucky. All the laws giving to the circuit and district courts of the United States jurisdiction of crimes committed in the Indian country, have been passed subsequent to 1789. The courts of the United States are courts of limited, though not of inferior jurisdiction (10 Wheat. 192), and they can take no jurisdiction and possess no powers, except such as are expressly given by acts of congress, or are necessarily implied therefrom. The law establishing this court refers expressly to the law of 1789, and gives to this court all the powers which by that law were given the Kentucky court. This court, in defining its own powers and limiting its own jurisdiction, has no other guide than the law of 1789. Congress has conferred upon it no other powers, and a jurisdiction no more extended, than by that act were given to the Kentucky court. The special grant of particular powers in this

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case excludes the possibility of assuming any powers not expressly granted. This court cannot assume to itself any of the powers, or clothe itself with any of the jurisdiction, granted to the Kentucky court by law subsequent to the act of 1789.

Congress has specifically defined the boundaries of the State of Arkansas, and by giving to this court only the powers given to the Kentucky district court by the act of 1789, it has given this court no jurisdiction beyond those boundaries. Several laws were passed subsequent to 1789, giving the different United States courts jurisdiction over crimes committed in the Indian country. The provisions of none of these laws are declared by congress to apply to this court. It is referred solely to the law of 1789, and the possibility of taking jurisdiction by virtue of any subsequent law is absolutely excluded.

Nor is this court the successor of the superior court of the territory. That court has ceased to exist. This is a new court, established by a special law, and having specific and limited powers. Congress has neglected even to continue over to this court the business of the United States pending in the late superior court. They have not day, nor are they triable here. This court neither succeeds to the business nor to the powers of that. The powers of that court were far more extensive than of this; and much as this court may regret that it has not the power, still it is clear in the opinion that it can claim no jurisdiction beyond the limits of the State. Upon this ground, the prisoner will be discharged. *Ordered accordingly.*

In the Matter of GEORGE B. KEELER.

1. By the judicial act of 1789, the courts and judges of the United States are expressly authorized to issue writs of *habeas corpus*, and reference must be made to the common law to ascertain the nature of that writ. 3 Peters, 201.
2. The writ of *habeas corpus* is a great prerogative writ known to the common law, the great object of which is, the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment.

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3. The power of State courts and judges to issue this writ under the laws of the United States doubted.
4. The writ of *habeas corpus* does not issue, as a matter of course, on application, and if the defect or illegality does not appear, an affidavit should be made, stating the circumstances under which the person imprisoned is entitled to the benefit of the writ.
5. The writ will not be issued when it appears on the showing of the applicant that he is not entitled to its benefit. Examples given of the writ being denied.
6. The power to issue the writ and enforce obedience to it, being vested in the courts and judges of the United States, they should promptly interfere in behalf of an injured party, when a proper case is presented.
7. The military is subordinate to the civil authority, and the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion the public safety may require it.
8. As interfences with the military authority are regarded with jealousy, a strong case should be made out, and all the requisites of the law substantially complied with, before the writ is awarded against a military officer.
9. The enlistment of a minor under twenty-one years of age, without the consent of his parent or guardian, in the army, is illegal, and such minor will be discharged at the instance of his parent, guardian, or next friend, on proof being made thereof before any court or judge of the United States.
10. Applications of this nature must be supported by oath, taken before some competent officer of whom judicial notice will be taken, or who is shown to be such by proper evidence.
11. The writ will not be granted where the application is sworn to before a justice of the peace of another State, and there is no evidence of the official character of such justice.
12. The courts and judges of the United States cannot take judicial notice of the justices of the peace of another State.

April, 1843. — Before the Honorable Benjamin Johnson, district judge at chambers.

Habeas Corpus. The application of Lewis Keeler, representing himself to be the father of George B. Keeler, was presented to the Honorable Benjamin Johnson, district judge at chambers, in vacation, stating that George B. Keeler was his son, and had, without his permission or consent, enlisted as a soldier in the 2d Regiment of United States Dragoons, and was then in Company A. of that regiment, at Fort Washita, in service; and after stating the time and place of enlistment, it was alleged that the said George B. Keeler was a minor, under twenty-one years of age, and that his enlistment was contrary

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to the laws of the United States, and on this ground a writ of *habeas corpus* was prayed to be directed to the commanding officer at Fort Washita, requiring the body of George B. Keeler to be produced, together with the cause of his detention, to undergo and receive what the judge should consider concerning him, in the premises.

The application was verified by the affidavit of the applicant, purporting to be sworn to before a justice of the peace of the State of New York, but was not otherwise authenticated, nor his official character otherwise proved.

S. H. Hempstead, for the applicant.

OPINION OF THE COURT.—The judicial act of 1789 (1 Story, L. U. S. sec. 14, p. 59) authorizes all the courts of the United States to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law. And it is expressly provided by the same act, that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment, with the restriction only that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

In the case of *Tobias Watkins*, 3 Peters, 201, it was said by Chief Justice Marshall, in delivering the opinion of the court, that "no law of the United States prescribes the cases in which the writ shall be issued, nor the power of the court over the party brought up by it." The term is used in the constitution as one which was well understood, and the judicial act authorizes this court and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise without any precise definition of it, imposes on us the necessity of making some inquiries into its use according to that law which is in a considerable degree incorporated into our own.

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The writ of *habeas corpus* is a great prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine the legality of the commitment. 1 Chitty, C. L. 180. No doubt exists respecting the power, and the question is, whether such a case is presented as ought to call for its exercise.

The act of congress fixing the military peace establishment of the United States of March 16, 1802, provides "that no person under the age of twenty-one years, shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent or guardian or master, first had and obtained, if any he have," and the act then imposes a pecuniary penalty on the enlisting officer. 2 Story, Laws U. S. sec. 11, p. 832.

Such an enlistment being illegal, a minor is entitled to be discharged on the application of his father or guardian or next friend, on a showing satisfactory to the court or judge. It is an illegal confinement of his person, and he may be released on *habeas corpus* without any application having been first made to the war, or any other, department of the government for his discharge. *United States* v. *Anderson*, Cooke, Rep. 143; *Matter of Ferguson*, 9 Johns. 239; *Matter of Carlton*, 9 Cowen, 471; *Commonwealth* v. *Cushing*, 11 Mass. 67; *Commonwealth* v. *Harrison*, 11 Ib. 63; *Matter of Roberts*, 2 Hall's Law Journal, 192; *Husted's case*, 1 Johns. Cas. 136.

In some of these cases the power of State courts and judges over the subject is denied, but in all of them the jurisdiction of the courts and judges of the United States to interfere in a case like this, is held to be complete and unquestionable, and I express no decided opinion as to whether the State courts have or have not jurisdiction, although the inclination of my mind would lead me to adopt the negative of that proposition, for the reasons so strongly urged by Chief Justice Kent in *Ferguson's case*, 9 Johns. 239, backed by considerations peculiar to the jurisprudence of the courts of the United States, and which would prevent their interference with State authority on the one hand, and should prevent a like interference on the part of

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the State tribunals with the authority of the United States on the other.

Whenever a case is presented embraced within the provision alluded to, no difficulty would be felt by me in issuing the writ, since the power to do it is clear, and there is nothing in the subject to prevent it or render it improper. The military is subordinate to the civil authority, and the privilege of the writ of *habeas corpus* cannot be suspended unless when, in cases of rebellion or invasion, the public safety may require it. Const. art. 2, sec. 9. It is only in that event the writ cannot be issued. There is no other restriction. In the *Matter of Stacy*, 10 Johns. 333, Kent, Ch. J., said: "It is the indispensable duty of this court, and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security. Nor can we hesitate in promptly enforcing a due return to the writ when we recollect that in this country, the law knows no superior; and that in England their courts have taught us, by a series of instructive examples, to exact the strictest obedience to whatever extent the persons to whom the writ is directed may be clothed with power or exalted in rank." And accordingly in that case the court did not hesitate to award an attachment for contempt against Morgan Lewis, a general of division in the army of the United States, (August, 1813,) commanding at Sackett's Harbor, for a refusal to obey the writ.

In the sentiments expressed by the chief justice on that occasion, I fully concur, and will add that there is no officer, civil or military, so exalted, except the president of the United States, as not to be subject to this writ, and none so low as to escape its operation. The officer and the citizen must alike yield to its mandate. The president himself would not be exempt because he is above the law or because he can do no wrong, but because he cannot be held responsible except through the medium of impeachment, and to allow the writ to go to him, would involve the necessity of punishing him for a refusal to obey it, and such a power does not belong to the judiciary. The power to issue the writ in this case and compel obedience to it, is clear;

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but it is to be observed that the writ of *habeas corpus* does not issue as a matter of course on application, although it is frequently called a writ of right, and is so in the enlarged sense of that term. But where the defect or illegality complained of does not appear, an affidavit should be made stating the circumstances under which the person imprisoned or detained is entitled to the benefit of the writ. 1 Chitty, C. L. 124; Hand, Prac. 519; *Ex parte Bruce*, 8 East, 27; *Hottentot Venus*, 13 East, 195. In the English courts affidavits have been uniformly required, as an examination of the cases will show. And it may not be improper to remark, that as interferences with the military authority for any cause whatever are regarded with jealousy, a strong case ought to be made out, before a court or judge of the United States would send the writ to a military officer. Reasonable grounds must exist for awarding the writ, because if it should issue upon a mere unsupported application, a felon, under sentence of death, or undergoing imprisonment in a prison, or a person confined for insanity, or other prudential reasons, might obtain a temporary enlargement, although certain to be remanded. And therefore, Sir Edward Coke, when chief justice, did not scruple to deny a *habeas corpus* to one confined by the court of admiralty for piracy, there appearing on his own showing, sufficient grounds to confine him. 3 Bulstrode, 27; 2 Roll. Rep. 138; 3 Bl. Com. 132. And so the court of King's Bench in the case of *Schiever*, 2 Burr. 766, denied the writ, saying, that upon his own showing he was clearly a prisoner of war and lawfully detained as such. It must sufficiently appear that the party is imprisoned or detained against his will, without authority of law, and is consequently entitled to be relieved by the efficacy of this writ. It is the imperative duty of every district judge of the United States, when a proper case is presented either in court or at chambers, to promptly interfere in behalf of the injured party, and for one it will always be my pleasure to do so, because by the constitution itself it is plainly enjoined upon every officer of the government, civil and military, judicial, executive, and legislative, to guard and protect the personal liberty of the citizen, and not sanction any invasion of it without due process of law.

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What would be sufficient grounds to issue a writ of *habeas corpus*, must, to a great extent, depend on each particular case; and while the court or judge, so far from throwing obstacles in the way, would undoubtedly afford every reasonable facility to an injured person to obtain the benefit of this great and salutary remedy, yet too willing an ear should not be lent to these applications, backed as they generally are by our sympathies, lest a doubtful wrong or fanciful injury should be redressed at the expense of public justice. And moreover as these applications are hurtful to the military service, productive of serious inconvenience, not unfrequently attended with great expense, besides encouraging an idea among soldiers, ignorant of law, that a discharge may easily be obtained by appealing to the judicial authorities of the United States; it would seem to follow as a necessary consequence, that a strong case should be made out, and all the requisites of the law at least substantially complied with, before this extraordinary power can be successfully invoked. The proof of the facts alleged in this application, before a court or judge of the United States, would certainly entitle George B. Keeler to be discharged. But in the exercise of a sound discretion it would not be proper, as it seems to me, to award a writ of *habeas corpus* in the case at present, because the application must be treated as unsupported by affidavit or oath, since judicial notice cannot be taken of a justice of the peace of a sister State, and there is no proof of any kind to show that the person before whom this application purports to have been verified, was in fact a justice of the peace, and as such authorized to administer oaths, for the false swearing of which a person could be prosecuted for perjury. The certificate of the justice simply, cannot be received as evidence of his authority, because he is not an officer of such grade and rank as to make his official acts prove themselves. He is not like a notary-public, whose acts prove themselves in all commercial countries, when verified by his notarial seal. 3 Wend. 178.

These applications should be supported by oath, taken before some competent person authorized to administer the same, and of whom judicial notice will be taken, or who is shown to be so by proper evidence; and this application failing to show that, must be denied, but without prejudice to another application.

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UNITED STATES *vs.* JAMES S. CONWAY.

1. The "Act to regulate the sale of property on execution," approved 23d December, 1840, commonly called the valuation law, is constitutional, according to the doctrine in *Bronson* v. *Kinzie*, 1 How. 311, and its provisions must be followed in executing the final process of the court.
2. The obligation of a contract and the remedy to enforce it are distinct things, and whatever belongs to the remedy may be altered according to the will of the State, as to both past and future contracts, provided the alteration does not impair the obligation of the contract.
3. The obligation of a contract may be destroyed by denying a remedy altogether, or impaired by burdening the proceedings with new restrictions and conditions so as to make the remedy hardly worth pursuing; but a law which reserves property from sale one year, if two thirds of the appraised value shall not be offered, is not of that character.
4. A writ of *venditioni exponas* issued before the expiration of the year is irregular, and will be quashed on motion, and a *supersedeas* thereto ordered.

July, 1843. — Motion to quash a *venditioni exponas*, determined before Benjamin Johnson, district judge.

A. Fowler, district attorney, for the plaintiff.

Chester Ashley, for the defendant.

OPINION OF THE COURT. — This is a motion made by the defendant, Conway, to have stayed, set aside, and quashed an execution issued in this case against him, on the 9th day of June, 1843, now in the hands of Thomas W. Newton, the late marshal of this district, on the ground that the same has been irregularly and illegally issued. The only question I deem it material to determine is, whether the execution law of this State, entitled "An Act to regulate the sale of property on execution," approved 23d December, 1840, (Acts, p. 58,) providing for the valuation of property taken on execution, and that it shall not be sold unless it brings two thirds of its appraised value, be a valid and constitutional law. If it be a valid law, having been adopted under acts of congress as the law of this court, (4 Story, Laws U. S. 2121; 8 L. U. S. 62; 10 Ib. 244; 17th Rule of 6th October, 1842; *Wayman* v. *Southard*, 10 Wheat. 20; *U. S. Bank* v. *Halstead*, Ib. 51,) it follows that the *venditioni exponas* has irregularly and erroneously issued, one

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year not having elapsed since the property was offered for sale under the first execution.

I have looked into the opinion of the supreme court of the United States, in the case of *Bronson* v. *Kinzie*, 1 How. 311, and from an attentive and deliberate examination of the doctrine there settled, I can perceive nothing which can justly authorize the inference that that court would declare our State valuation law inoperative and void, as being in conflict with the constitution of the United States. The distinction between the obligation of a contract, and the remedy to enforce it, is clearly stated by the chief justice who delivered the opinion. In their nature they are different and distinct things. The obligation of a contract arises at the time the contract is made, and continues until it be performed or discharged. The remedy to enforce the obligation of the contract does not arise until there is a failure to perform the obligation. They are, then, not identical, but different and distinct things. The constitution prohibits laws impairing the obligation of contracts, and is silent with regard to laws relating to the remedies by which contracts are to be enforced.

In the opinion referred to, the chief justice states the doctrine in the following terms: "If the laws of the State, passed afterwards, had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts, in relation to past contracts as well as future. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution." The chief justice further says: "It is difficult perhaps to draw a line that would be applicable in all cases, between legitimate alterations of the remedy, and

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provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered them with conditions that rendered it useless or impracticable to pursue it."

Now, the question here presented is, Does the valuation law of this State come within the rule here laid down by the supreme court of the United States? Does it, in the language of the court, so seriously impair and burden the proceedings with new conditions and restrictions, as to make the remedy hardly worth pursuing? I think not. The valuation law, in the event that the property will not bring two thirds of its appraised value, postpones the collection of the debt for twelve months. This can scarcely be said to make the remedy hardly worth pursuing.

My opinion is, that the valuation law is a valid and constitutional law, and its provisions are to be followed in executing the final process of this court.

The *venditioni exponas* must, therefore, be quashed, and the clerk, on the application of the defendant, is directed to issue a *supersedeas* thereto. *Ordered accordingly.*

THE UNITED STATES, plaintiffs, *vs.* LORENZO N. CLARKE, JAMES PITCHER, and CHARLES P. BERTRAND, defendants.

1. Different defences which may be made in an action of covenant.
2. An accord must be executed before it can amount to satisfaction. An unperformed agreement is not sufficient, and cannot be pleaded in bar.

December, 1844. — Demurrer to pleas, determined in the District Court, before the Hon. Benjamin Johnson, district judge.

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S. H. Hempstead, district attorney, for the United States.

F. W. Trapmall and *John W. Cocke*, for defendants.

Opinion of the Court. — This action of debt is founded on a contract in writing, under a penalty of twenty thousand dollars, conditioned to perform certain articles of agreement entered into at the same time, namely, the 8th of December, 1837, between Lorenzo N. Clarke and the government, to furnish rations to the Chickasaw Indians. The penal bond, with the conditions thereunder written, and the articles of agreement, constitute but one agreement, upon which the United States have brought their action.

The defence disclosed by the defendants, — seventh, eighth, and ninth pleas, to which the district attorney has demurred, — is a subsequent agreement by the defendant Clarke with the plaintiffs, obligating himself to deliver to the United States rations of beef, corn, and salt, at a specified price, for all the Seminole Indians who should emigrate west during one year after the date of the contract, and stipulating that he should be entitled to a credit of five and a half cents for every ration of subsistence so delivered upon his indebtedness under the contract upon which the present suit is based.

The defendants fail to aver in their pleas that any rations were in fact delivered under the latter contract; but they do allege that this latter agreement was received by the plaintiffs in full satisfaction and discharge of the covenants and stipulations contained in the contract referred to in the declaration.

By adverting to the terms and provisions of the latter, it appears manifest that it was not the intention of the parties that it should operate by way of discharge and satisfaction of the obligations incurred by the first agreement, for it provides expressly that for each and every ration delivered by Clarke, he should be entitled to a credit of five and a half cents on the first contract, so that he might liquidate and pay his debt due to the plaintiffs under the same.

The contract set out in the pleas affords intrinsic evidence not to be mistaken, that the parties to it never intended it as a discharge and satisfaction of the previous contract, but, on the contrary, they manifestly intended that the first contract should

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remain in full force, and only provided that it might be satisfied, paid, and discharged by the delivery of a sufficient number of rations of subsistence. When delivered, they should operate to liquidate and discharge it. That was the object, and nothing beyond it.

The averment in the pleas, that the latter contract was received by the plaintiffs in full discharge and satisfaction of the former contract, cannot be regarded, because it is inconsistent with the terms and provisions of the contract itself, as well as the clear intention of the parties.

It may be further remarked, that the amount of rations to be furnished by the defendant Clarke is left wholly uncertain and entirely dependent upon the number of Seminole Indians that might emigrate during the year. It rested on that contingency.

It seems to me that it can admit of no serious doubt, that a contract thus uncertain and unperformed in any part, cannot be legally pleaded as an accord and satisfaction of a previous liability. 1 Com. Dig., Accord (b. 3), 201. The pleas are not sufficient in law to bar the action, and the demurrer to them must be sustained. *Demurrer sustained.*

The seventh and eighth pleas having been amended by leave of the court, the district attorney again demurred, for this, among other causes, that "the pleas did not show that the accord had been executed, without which it could not be a bar to the action."

Opinion of the Court. — This action is in substance for the recovery of damages for a breach of covenant, and is governed by the rules applicable to that action.

To an action of covenant, the defendant may set up various defences in bar of the action. He may deny that he ever made the covenant, by putting in the plea of *non est factum;* or he may plead a fraud practised upon him in its execution, and so avoid it. He may plead that he has performed the covenant stipulated on his part to be performed, or that he is discharged from performance by the failure of the plaintiff to perform a condition precedent. He may plead an accord, which Black-

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stone defines to be "a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15; 1 Bac. Abr. Accord, 54.

The question arises in this case, To which of these classes of pleas do the seventh and eighth amended pleas belong? Are they pleas of accord and satisfaction, or of covenants performed? It seems to me that they are not pleas of the latter class, because they fail to aver performance. It is true that they aver part performance, and a readiness and an offer to perform fully, which was refused by the plaintiffs. The defence then is, part performance and a legal excuse assigned for failure to perform fully.

A part performance, and a readiness and offer to perform the residue, is not in all cases equivalent to an actual, full, and complete performance. For example; if A. covenants with B. to do any specific act, as to deliver certain property upon the demand of A. at a certain place, and B. is sued by A. for a failure to deliver the property, B. may show that he could not deliver it, because A. never made the demand, and so bar the recovery of damages, on the ground that he was prevented from performing the contract by the fault of A., and not by any fault of his own.

But suppose the action should be brought by B., can he recover the same amount of A. that he would be entitled to, in case he had actually delivered the property and fully performed his contract? Clearly he could not. He could recover no more than the damages he had sustained by reason of the failure of A. to make the demand, so as to enable B. to comply with his contract. B. never having in fact delivered the property, would not be entitled to recover its value. The property is still his own, and he could only legally recover of A. the damages occasioned by the breach of the contract on the part of A. Thus it appears that part performance and readiness to perform in full does not give a party the same rights.

These, then, are not pleas of covenants performed. To what class do they belong? It appears to me that they can only be considered as pleas of accord, and are they, in the form

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pleaded, valid? I think not; for it is not averred that the accord was received and accepted in satisfaction of the contract sued on; but it is averred that performance of the new agreement was to operate as satisfaction. Full performance, as already remarked, is not alleged; and according to the best authorities, an executory agreement unperformed cannot be set up as a valid accord and satisfaction. 1 Bac. Abr. Accord and Satisfaction, A. 55; 1 Ld. Raym. 122; 6 Wend. 390; 16 Johns. 86; 2 H. Bl. Rep. 317; 5 T. R. 141.

The demurrer to the seventh and eighth amended pleas is sustained. *Demurrer sustained.*[1]

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[1] Performance of part and tender of performance of the residue is not a good plea. *Lewis* v. *Shepherd*, Ser. T. Jones, 6; 1 Bac. Abr. Accord (A) 59. If an accord be to do two things, and the defendant do one, and not the other, this is no bar to the action, because the plaintiff has no remedy for that which is not performed. 1 Bac. Abr. Accord (A.) 58; Roll. Abr. 129.

The accord must be executed. 9 Co. 79, b; 1 Salk. 76; T. Raym. 450; 2 Keb. 332; 2 Jones, 158, 168; 7 Blackf. 582.

Part payment and an agreement to take the residue at a future day cannot be pleaded as satisfaction in bar. Cro. Eliz. 304–306.

To constitute a bar to the action, the accord must be full, complete, and executed. 6 Wend. 390; 16 Johns. 86; 3 Ib. Cas. 243; 5 N. H. Rep. 136, 410; 1 Com. Dig. (B. 4,) 201, title Accord.

Bacon says: "Accord is an agreement between two persons, to give and accept something in satisfaction of a trespass, etc., done by one to the other. This agreement, when executed, may be pleaded in bar to an action for the trespass; for in all personal injuries, the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cause of complaint, and therefore present satisfaction is a good plea; but if the wrong-doer only promise a future satisfaction, the injury continues till satisfaction is actually made, and consequently there is a cause of complaint in being; and if the trespass were barred by this plea, the plaintiff could have no remedy for he future satisfaction, for that supposes the injury to have continuance." 1 Bac. Abr. title Accord and Satisfaction, 54.

If the defendant pleads a concord between himself and the plaintiff, that he should pay the plaintiff 3*l.* in hand, and should undertake to pay the plaintiff's attorney's bill, and avers that he had paid 3*l.*, and was always ready to pay the attorney's bill, but he never showed him any; this is no good plea, because the accord is not shown to be fully executed. 1 Bac. Abr. 59; 3 Keb. 690; 1 Com. Dig. Accord, (B. 4). To make a plea good, both accord and satisfaction must be shown. 1 Wash. C. C. Rep. 328.

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THE UNITED STATES *vs.* JOHN DRENNEN and ELIAS RECTOR, administrators of Wharton Rector, deceased.

1. Suits may be brought in the courts of the United States against executors and administrators, and judgments rendered against them in their representative capacity, and executions issued against the property of the estate unadministered, and a sale thereof, whether it be lands, slaves, or goods and chattels, will pass a valid title to the purchaser.
2. Every court must necessarily possess the power of executing its judgments and decrees.
3. The judicial act of 1789 expressly provides for rendering judgments against the estates of deceased persons, and also for issuing executions on all judgments rendered in the courts of the United States.
4. The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by State laws or regulations. 3 Wheat. 221; 11 Peters, 175.
5. By the laws of Arkansas, goods and chattels, credits and effects, lands, tenements, and slaves are assets in the hands of an administrator for the payment of debts.
6. Judgments may be rendered *de bonis testatoris* under these laws, and executions issued against the estate of the intestate, and the same sold to satisfy the execution.
7. Where property will be sacrificed, the officer should not sell, but wait for a *venditioni exponas*.
8. See notes, as to sale of property of deceased persons on judgments and execution.

March, 1845. — Petition to quash execution, determined before the Hon. Benjamin Johnson, district judge of the United States for the district of Arkansas, at chambers.

"*District of Arkansas, sct.*

"To the Hon. Benjamin Johnson, Judge of the District Court of the United States in and for the District of Arkansas.

"Your petitioners, John Drennen and Elias Rector, as administrators of all and singular the goods and chattels, rights and credits of Wharton Rector, deceased, respectfully represent,

"That heretofore, namely, on the 12th day of October, A. D. 1844, the United States, by the consideration and judgment of the district court of the United States for the district of Ar-

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kansas, recovered against your petitioners, as and in their capacities of administrators as aforesaid, the sum of seven thousand five hundred and twenty-five dollars and ninety-one cents, which were adjudged to them for their damages, with interest on said damages at the rate of six per cent. per annum from said 22d day of October, 1844, till paid, together with the sum of fifty-five dollars and fifty-one cents for costs sustained in said suit, which by the record thereof remaining in said court more fully appears.

"Your petitioners further represent, that afterwards, namely, on the fourth day of March, A. D. 1845, said United States, for having execution of said judgment, sued out of the office of the clerk of said court a certain writ of *fieri facias*, directed to the marshal of said district, by which said writ said marshal was commanded that of the goods and chattels and slaves, lands and tenements of the said intestate Wharton Rector, at the time of his death, he should cause to be made the damages and interest aforesaid, together with the costs aforesaid, so that he should have the same before the clerk of said court at his office in the city of Little Rock on the first Monday of April next, to be paid over to said plaintiffs; which said writ afterwards came to and is now in the hands of said marshal, who has, by virtue thereof, levied upon and advertised that the following described lands and tenements, situated in Rector town, Pulaski county, in the district aforesaid, namely, lots 4, 5, 6, 7, 8, 9, 10, 11, and 12, in block or square No. 6; fractional block No. 5, consisting of lots 1, 2, 3, 4, 5, and 6; fractional blocks 12 and 13; blocks No. 8 and 9; fractional blocks 3 and 4, and block No. 16, will be sold on the 29th day of March, 1845, to satisfy said writ of *fieri facias;* all which by a copy of said writ, with the marshal's certificate thereon, herewith exhibited, marked A., and to be taken as part hereof, will more fully appear.

"And your petitioners submit and insist, that by the law of the land, no writ of execution could issue against them, as such administrators, upon said judgment.

"Your petitioners therefore pray your honors to supersede,

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quash, and set aside said writ of *fieri facias*, together with all the proceedings had under and by virtue thereof.

"And your petitioners will ever pray, &c.,

"JOHN DRENNEN and ELIAS RECTOR,

"As administrators of Wharton Rector, deceased."

EXHIBIT A.

"*United States of America,* } sct.
District of Arkansas. }

"The United States, to the Marshal of the Arkansas District, Greeting:

"Whereas, the United States, on the 12th day of October, A. D. 1844, in our district court of the United States for the district of Arkansas, hath recovered against John Drennen and Elias Rector, administrators of the estate of Wharton Rector, deceased, the sum of seven thousand five hundred and twenty-five dollars and ninety-one cents (say $7,525.91), which were adjudged to them for their damages, with interest on said damages at six per centum per annum from the said 22d day of October, A. D. 1844, till paid, together with the sum of fifty-five dollars and forty-one cents for costs sustained in the suit. You are therefore commanded, that of the goods and chattels and slaves, lands and tenements of the said intestate Wharton Rector, at the time of his death, you cause to be made the damages and interest aforesaid, together with the costs aforesaid, so that you have the same before the clerk of our said court at his office in the city of Little Rock on the first Monday of April next, to be paid over to said plaintiff, and then and there certify how you have executed this writ.

"In testimony whereof, Benjamin Johnson, Esq., judge of our said court, hath caused the seal of said court to be hereto affixed this fourth day of March, A. D. 1845, and the sixty-ninth year of American independence.

"WM. FIELD, clerk.

(Attest) "By A. H. RUTHERFORD, deputy clerk."

"I, Henry M. Rector, United States marshal in and for the

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district of Arkansas, do hereby certify that the foregoing is a true copy of the execution now in my hands in the cause therein mentioned, and that I have levied said execution upon lots 4, 5, 6, 7, 8, 9, 10, 11, and 12, in block or square No. 6; fractional block No. 5, consisting of lots 1, 2, 3, 4, 5, and 6; fractional blocks 12 and 13; blocks No. 8 and 9, fractional blocks 3 and 4, and block No. 16, — all in Rector town, Pulaski county, Arkansas.

"And I do further certify, that I have advertised that said parcels of land would be sold, to satisfy said execution, on the 29th day of March, 1845.

"Given under my hand this 13th day of March, 1845.

"HENRY M. RECTOR,
"U. S. Marshal, District of Arkansas."

Written notice was served on *S. H. Hempstead*, attorney for the United States for the district of Arkansas, on the 13th of March, 1845, that the above petition would be heard before the Hon. Benjamin Johnson, district judge, at chambers, on the 14th of March, 1845; at which time the matter of the petition was argued by *George C. Watkins* for the petitioners, and *S. H. Hempstead*, district attorney, for the United States, who admitted the facts stated in the petition to be true. The application was denied on the merits, but no written opinion was delivered at the time. Subsequently the following was written.

OPINION OF THE COURT. — This was an application to quash an execution issued on a judgment obtained by the United States against John Drennen and Elias Rector, administrators of Wharton Rector, deceased, in the district court of Arkansas, on the 22d of October, 1844, and also to quash and set aside all the proceedings under the execution. The judgment substantially pursues the English form, and is against the petitioners in their representative capacity, and its language is that the moneys therein adjudged be "levied of the goods, chattels, slaves, lands, and tenements which were of Wharton Rector at the time of his death, and remaining in their hands to be administered." The execution pursues the judgment, and both are correct as to form and substance. The marshal levied,

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among other real property, on blocks eight and nine in Rector town, on which there are costly and valuable improvements, as the property of Wharton Rector, deceased, and, it is alleged, has advertised and will proceed to sell the same, unless prevented from doing so.

The application was overruled, on the principal ground that this court had a right to execute its judgments; but no reasons were given at length. As it was a question of interest and considerable difficulty, and time was not then afforded to examine it as fully as it deserved, I have since done so, and am confirmed in the correctness of my decision, and will now proceed to give briefly my reasons for it.

The ground upon which the execution was sought to be quashed was, that in view of the law of the State, none could be issued against administrators; and it was insisted by the counsel for the petitioners, that a judgment against an administrator must be filed in the probate court, according to the laws of Arkansas, classed and satisfied out of the assets of the estate in the regular course of administration, in full if the estate was solvent, and *pro rata* if insolvent, and that to allow an execution to be issued and levied on the assets of the deceased, and have them sold, would disturb the course of administration, and enable one creditor to obtain an advantage over another, when they should all be on an equal footing.

This is a question of delicacy and difficulty, and may in many instances in its practical results produce conflicts of authority between the federal and State tribunals, always to be avoided if practicable. But the jurisdiction of this court is clear, and cannot be surrendered. By the judiciary act of 1789, the district courts have cognizance of all suits at common law, where the United States sue, and the matter in dispute exclusive of costs, amounts to the sum or value of two hundred dollars. And by the act of 3d March, 1815, the jurisdiction of the district and circuit courts is extended to all suits at common law in which the United States, or any officer thereof, under the authority of an act of congress, shall sue, irrespective of the amount in controversy. 1 Story, Laws U. S. sec. 9, p. 56.

There is no defect in jurisdiction, unless it springs from in-

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ability to sue executors and administrators at all. Now that power is clearly vested in the courts of the United States, because the act of 1789 adverted to, expressly provides for rendering judgments against the estates of deceased persons. Gordon's Digest, 687. And the same act provides for the issuing of executions on all judgments rendered in those courts. 13 Peters, 60. Besides, the reports of the courts of the United States furnish ample evidence of the constant practice of bringing suits against executors and administrators, and to cite these cases would be a work of supererogation, because it would be to demonstrate what cannot be denied. Nor does it seem to have been thought, in any instance, that judgments thus rendered could not be executed; and certainly an execution is necessary to the beneficial exercise of the jurisdiction. An execution is said to be the end of the law, and it gives to the successful party the fruits of his judgment. 9 Peters, 8. If a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction. 8 Wheat. 106. A court without the means of executing its judgments and decrees, would be an anomaly in jurisprudence, not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed; and the power to pronounce necessarily implies the power of executing. Congress has the constitutional power to carry into effect all judgments which the judicial department has power to pronounce. *Wayman* v. *Southard*, 10 Wheat. 1; *Bank U. S.* v. *Halstead*, 10 Wheat. 51. And as we have already seen, that power has been exercised in the act of 1789, by expressly authorizing writs of execution to issue on all judgments which the courts of the United States may render.

The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by State laws or regulations. 1 Wash. C. C. Rep. 232; 1 Brock. C. C. Rep. 203; 10 Wheat. 1, 51, 61. Nor can the local laws of a State confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties and thus assist in the administration of the proper remedies, where the

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jurisdiction is vested by the laws of the United States. 11 Peters, 175.

To allow State laws to affect or impair the jurisdiction of the federal courts, or to arrest the remedies in those courts, would be to virtually abolish them at pleasure.

Even then, if it were true, that by the laws of Arkansas a judgment against an administrator cannot be executed or enforced otherwise than by an application to the probate court, it could have no effect in this forum, because, as we have seen, the right of rendering judgments and issuing executions thereon, against the representatives of deceased persons, is clearly conferred on the courts of the United States by acts of congress, and must necessarily supersede any State regulations in conflict with them. The laws of the several States only become rules of decision in trials at common law in the federal courts, in cases where they apply, and where the constitution, treaties, or statutes of the United States do not provide a different rule. 1 Stat. 92; 11 Wheat. 361; 6 Peters, 291; 4 McLean, 607. But the position is not sound; because there is nothing, as I can perceive, in the laws of Arkansas forbidding the execution of a judgment against an administrator in his representative capacity. On the contrary, it would appear to be allowable, because the right of the circuit courts to pronounce judgments *de bonis testatoris* is clearly inferable from the provisions of the statute authorizing actions pending against the deceased to be revived against his representative; and also actions generally to be instituted against executors and administrators, in the circuit courts, after the death of the intestate or testator. Rev. Stat. 81. And then steps in the eighth section of the execution law, which provides, in substance, that when an execution shall be issued against any person as heir, devisee, executor, or administrator, the officer to whom the same shall be directed shall be commanded, that of the goods and chattels which were of the ancestor, testator, or intestate at the time of his death, he cause to be made the debt, damages, and costs; for want of goods and chattels, then, real estate which was of the deceased at the time of his death, must be seized to satisfy the execution. Rev. Stat. 375. It is very clear from this section, that an exe-

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cution may be issued *de bonis testatoris*, and of course the property of the deceased levied on and sold. And lands and slaves of the deceased may be sold as well as personal property.

There does not appear to me to be any conflict in the provisions of the administration law and the last quoted provision. Such a construction should be given as that the whole may stand and be effectual. The administration law should doubtless be construed as giving two remedies; one cheap, simple, and expeditious; that is to say, by applying to the administrator or probate court, for the allowance and classification of the claim, and having an order for its payment, either partly or entirely, according to the condition of the estate; the other, more expensive and less expeditious, namely, by bringing an ordinary suit at law in the common law courts, obtaining judgment and execution *de bonis testatoris*,[1] and which are not affected by the insolvency of the estate, provided there are goods and chattels, lands and tenements, or slaves sufficient to satisfy such debt, remaining unadministered. Whichever remedy a party adopts, he must of course take it subject to all the conditions and limitations peculiar to the particular forum he seeks.

But it is insisted that death has the effect of withdrawing the assets and property of the deceased, of every description, from the influence of an execution, and placing all within the exclusive control of the probate courts. I do not so read the statutes of Arkansas. If that were true, the provisions above quoted authorizing suits against executors and administrators, and executions to issue against the property of the deceased would be nugatory, and would stand a dead letter on the statute-

[1] In *Ryan* v. *Lemon*, 2 Eng. 79, decided by the supreme court of Arkansas in 1846, the same distinction is substantially enunciated. It was there held that in the collection of claims against the estates of deceased persons, claimants may proceed by action according to the forms of the common law, or before the probate court, in the summary manner prescribed by the administration law; and that if the former is adopted, it must be subject to the qualifications imposed by legislative enactment. And the different provisions with regard to bringing suits against executors and administrators and presenting claims, were discussed and construed.

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book. Besides, it is well settled that if land be levied on in the lifetime of the judgment debtor, the sale may proceed after his death. The levy upon the property places it from that time forward in the custody of the law, for the payment of the judgment, and although the judgment creditor does not thereby become the owner, yet the levy may be said to vest in him an interest, or give him a lien not affected by the death of the judgment debtor. Certainly death does not withdraw it from the custody of the law. *Massie* v. *Long*, 2 Ohio Rep. 290; *Buckner* v. *Terrill*, Lit. Sel. Cas. 29; *Sumner* v. *Moore*, 2 McLean's Rep. 67.[1] Putting the statutes aside, then, here is a case where the property would not be withdrawn from the influence of an execution; and, indeed, the fallacy of the argument is

[1] A *fieri facias* being issued upon a judgment, was levied on land, and the judgment debtor died. Without reviving the judgment by *scire facias* a *venditioni exponas* was issued after his death, and the officer under it sold the land thus levied on; and it was held that the sale was valid, and conferred a good title on the purchaser. *Taylor* v. *Doe*, 13 How. S. C. Rep. 287.

The court said, "We regard the *venditioni exponas* merely as a continuation and completion of the previous execution, by which the property had been appropriated, and was still in the custody of the law." A sale under execution without revival of the judgment is not absolutely void, but voidable only, and cannot be avoided collaterally. 2 How. 602; 5 Ib. 253; 9 S. & M. 216. A sale made under execution, tested and issued after the death of the defendant therein, and without a revival of the judgment, is voidable, but not void. The sale is good until set aside by a direct proceeding, and cannot be attacked collaterally. *Shelton* v. *Hamilton*, 23 Miss.; (1 Cushm.) 496.

A sale of lands under a judgment against an executor *de bonis testatoris* conveys a good title to the purchaser, and the title of the heirs is thereby divested. *Worthy* v. *Hawes*, 8 Georgia Rep. 234.

The acts of congress, 3d March, 1797, sec. 5, and 2d March, 1799, sec. 65, giving priority to debts due the United States, control all State laws for the distribution of estates of deceased persons. 1 Stat. 515, 676. The law makes no exception in favor of a particular class of creditors, and the priority of the United States does not yield to the claims of any creditors, however high may be the dignity of their debts. *United States* v. *Duncan*, 4 McLean, 607.

Almost every State or sovereignty makes itself, by its own legislation, a preferred creditor, as to debts that may be due to it. Such was the Roman law, and such is the law of England. Statutes giving the government a priority are presumed to be for the public good, and are for that reason to be liberally construed in favor of the sovereign. 6 Peters, 29; 12 Ib. 134.

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too obvious to need further criticism, and is not sustained by authority.

The law, in allowing judgments and executions against the estates of deceased persons, established no new and unheard of doctrine; but rather carried out an ancient rule; because the common law of England enforced claims against estates, by means of judgments and executions *de bonis testatoris*. Real estate was not subject to sale under execution in any case, against the living or the dead, because it was held to be against the policy of their peculiar system of government. Nor were land there, as here, assets in the hands of the administrator for the payment of debts. Slaves were neither subject to execution, nor assets in the hands of an administrator, because slavery did not and does not exist in England. But goods and chattels which were assets, were subject to execution, seizure, and sale for the debts of the intestate as long as they remained in the hands of the administrator in specie unadministered; and they were so considered until actually sold and applied to the payment of debts. And this, notwithstanding the general subject of administration, was under the authority and jurisdiction of the ecclesiastical courts; and notwithstanding, too, a scale of priority was established and fixed by law among creditors. Toller's Ex'rs, 258. The case of *Mara* v. *Quin*, 6 Term Rep. 5, shows that a debt may be levied of the assets of the deceased in the hands of the executor to be administered. 2 Saund. 219 (a), note 2. And several cases in State courts are to the same effect. *Mitchell* v. *Lunt*, 4 Mass. 654; *McCormick* v. *Meason*, 1 Serg. & R. 92; *Prescott* v. *Tarbell*, 1 Mass. 204; *Weeks* v. *Gibbs*, 9 Mass. 73; *Clark* v. *May*, 11 Mass. 233.

It is only necessary to ascertain what are assets, because if by the common law goods and chattels might be taken on execution on account of their being assets and unadministered, so here lands and slaves may be taken and sold, if assets by our laws, which they certainly are.

Now the law of Arkansas destines the property of the deceased, real, personal, and mixed, to the payment of debts. Real estate, slaves, personal chattels, rights and credits, and property of every nature and description, are declared to be as-

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sets for that pupose.[1] Every thing is surrendered, nothing withheld. The administrator represents the intestate; and although it is true that by means of an action and judgment *de bonis testatoris*, the issuing of execution thereon, and levying on and selling specific property of the deceased, unadministered, subject to execution, one creditor may obtain an advantage over another, yet this results from the favor which the law extends to the vigilant creditor. One creditor may obtain priority over another and have his debt satisfied, to the exclusion of others, who, owing to the exhaustion of property, may get nothing, or only partial satisfaction. But this is no greater hardship than may and in fact constantly does occur between the living, because one creditor, by his activity and vigilance, may clothe himself with the right of judicially appropriating sufficient property of the defendant to satisfy the debt, and which may be his entire property, thus shutting out all other claims and debts, and leaving them unpaid. It is difficult to perceive, on principle, why vigilance should not reap its appropriate and accustomed reward, as well after as before the death of the debtor.

It is insisted, that to allow the property of a deceased person to be sold on execution, would be likely to produce a sacrifice of it. But I am not able to perceive why there would be any greater sacrifice than in any ordinary judicial sale. The sale must be public, and every one would have equal opportunities of purchasing; and if the marshal was satisfied that combinations existed to produce a sacrifice, or, owing to other causes, that it would fall so far below its real value as to warrant him, in the exercise of a sound discretion, to return the property unsold for want of bidders, he might, although possibly not absolutely bound so to do, take that course, as in ordinary cases, and wait for a *venditioni exponas*, and under which he must sell. 3 Campbell, 521; 2 Cowen, 185; 1 Freem. Ch. R. 470. Allowing, however, the objection in its fullest force, it could not affect the question of power, and would only be a circumstance connected with its expediency, and therefore to have no controlling weight.

[1] *Menefee* v. *Menefee*, 3 Eng. 47, 48, decided in 1847, holds that lands and slaves are assets in the hands of the administrator for the payment of debts, and he entitled to the rents and profits and the possession thereof.

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In this case it appears that the marshal has levied on the lands of the intestate, and as every officer is presumed to do his duty, it must be taken as at least *primâ facie* evidence that sufficient goods and chattels could not be found whereon to levy the execution, and therefore that it was necessary to seize and sell the lands. But even if there was in fact sufficient personal property, still the sale would not be invalid, nor would the title of the purchaser be affected, as the command to take personalty first is merely directory to the officer (7 Eng. 272, 273), and for any omission of duty in that respect, he would be responsible for whatever damage might accrue to the estate; but the sale would be good. 3 Bibb, 219; 3 A. K. Marsh. 281; 4 Monroe, 474; 5 Blackf. 590; 6 Wend. 523.

On the whole, I am clearly of opinion that this application ought to be refused, and that the plaintiffs have a right to proceed to a sale of the property. *Petition refused.*[1]

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[1] In *Adamson* v. *Cummins*, 5 Eng. 541, decided by the supreme court of Arkansas in 1850, it was said that our statutes certainly recognize the right of the circuit court to render judgments *de bonis testatoris*, else why permit any action pending against the deceased at the time of his death to survive and be revived against his executor, or why the recognition of the right to commence actions generally against executors and administrators after the death of the testator or intestate, or why make provisions touching the conduct of such suits, and the character and effect of judgments in such cases? And it was also said that the 8th section of the statute of executions was an express recognition of the right of the circuit court to issue executions *de bonis testatoris;* and moreover, that the right of the circuit courts to execute their own judgments was, upon general principles, clearly maintainable, and that all the analogies of the law were in favor of it.

But the court held that an execution which was levied on the slaves of the intestate was irregular merely, not void, and was quashable by the administrator after sale; but that the purchaser, without notice of the irregularity, would hold the property purchased, and that the sale would not be set aside.

The lands of a deceased debtor may be seized on execution and sold, under a judgment rendered against the executors of such deceased debtor for a debt due from him. *Landes* v. *Perkins*, 12 Mis. 260; *Landes* v. *Brant*, 10 How. S C. Rep. 376. See also note, ante, p. 328.

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A. WALDO PUTNAM et al., petitioners, *vs.* THE UNITED STATES, defendant.

Under the act of 26th May, 1824, (4 Stat. 52,) the district court has no jurisdiction to divide and partition a claim among claimants. They must go into other courts for that purpose.

September 8, 1846. — Petition for the confirmation and division of a Spanish claim, under the act of 26th May, 1824, (4 Stat. 52,) in the District Court of Arkansas, before the Hon. Benjamin Johnson, district judge.

L. Janin, *S. L. Johnson*, and *A. Fowler*, for petitioners.

S. H. Hempstead, district attorney, for the United States.

JOHNSON, J., said, this petition is filed by persons claiming undivided interests, by mesne conveyances from the grantee, in the grant of Elisha Winter, alleged to have been made in 1797, and for the confirmation of which grant, a petition has been filed in this court by his legal representatives, and is still pending. The petitioners in this case pray for the confirmation of their respective interests, derived through such mesne conveyances, or to receive scrip proportionate to such undivided interests. The petition really is for a confirmation and division by this court of the grant made to Winter, according to the alleged rights of these petitioners, as shown by the mesne conveyances set out in the petition. The district attorney has pleaded the pendency of the suit by the heirs of Elisha Winter, as to part of the petition, and demurred to so much of it as prays a division, because he avers that the act of congress of 26th May, 1823, does not give this court any authority to divide or partition claims, but merely to confirm or reject them.

And that is undoubtedly a correct position. It was not intended by that act to bring into this court the determination of controversies between intermediate claimants, or the ascertainment of the validity of conveyances, and the numerous and difficult questions frequently, and indeed generally, incident to divisions of property. This is a special tribunal for particular purposes, and armed with no such authority.

The government has afforded grantees and heirs and legal

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representatives an opportunity to test the validity of their claims, and if found good such claims are confirmed, and this may be considered as a judicial renunciation on the part of the government of all title. All other questions are left to be determined in other tribunals of the country. It is no concern of the government as to who is the particular owner. The real inquiry in these cases is, whether the government is the owner; and when that is decided against herself, she has no further concern in the controversy, and certainly cannot allow the owners to divide and parcel out their property, and settle their rights as against each other in this tribunal. This court has no such jurisdiction.

The plea and demurrer are both well taken, and the petition must be dismissed. *Petition dismissed.*

On the 31st October, 1846, a motion was made to reconsider, but it was overruled by the court.

THE HEIRS OF WILLIAM BULLITT et al., petitioners, *vs.* UNITED STATES, defendants.

Division of Spanish claim not allowed in the district court.

September, 8, 1846. — Petition to confirm and divide a Spanish claim, under the act of 26th May, 1824, (4 Stat. 52,) in the District Court of Arkansas, before the Hon. Benjamin Johnson, district judge.

L. Janin, *S. L. Johnson*, and *A. Fowler*, for petitioners.

S. H. Hempstead, district attorney, for the United States.

JOHNSON, J., said, this case was like the one of *A. Waldo Putnam*, just decided, except that the grant asked to be divided was made to William Winter, whose heirs are seeking a confirmation thereof in this court; and that the same principles applying, the petition in this case should be dismissed.

Petition dismissed.

On the 31st October, 1846, a motion was made for reconsideration, but was denied.

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ANN M. CALLENDER et al., petitioners, *vs.* THE UNITED STATES, defendants.

Petition to confirm a grant lying mostly in another State dismissed, for want of jurisdiction.

September 8, 1846. — Petition to confirm a Spanish grant under the act of 1824 (4 Stat. 52), determined in the District Court of Arkansas, before the Hon. Benjamin Johnson, district judge.

S. Janin and *S. L. Johnson*, for petitioners.

S. H. Hempstead, district attorney, for the United States.

JOHNSON, J., held, that as this petition was to confirm the grant to the Baron de Bastrop, lying principally, as it appeared from the record, in the State of Louisiana, the court there was the proper tribunal to entertain jurisdiction over the claim, and that this court should not do so; and that the objection to the jurisdiction of this court urged by the district attorney was well taken, and that the petition ought to be dismissed.

Petition dismissed.[1]

[1] HISTORY OF THE CLAIM. — The petitioners claimed under the Baron de Bastrop, to whom it was represented that the Baron de Carondelet, on the 20th June, 1797, had granted twelve leagues square, or more than a million of arpens of land, and situated, according to the figurative plan of Don Carlos Trudeau, royal surveyor, in the port of Ouchita, eighty leagues above the mouth of that river, adjoining on the part of the south-west the eastern shore of the river and bayous Ouchita, Bartholomew, and Siard, and giving a further description.

The grant is principally situated in Louisiana, the smaller portion being situated in Chicot county, Arkansas, on the bayou Bartholomew.

The history of the claim will be found in full in the case of *The United States, Appellants*, v. *Philadelphia and New Orleans*, 11 Howard's S. C. Rep. 610, in the supreme court, on appeal from the district court of Louisiana, which was argued by Mr. *Crittenden*, attorney-general, for appellants, and Mr. *Strawbridge*, Mr. *Soulé*, and Mr. *Sergeant*, for the appellees.

The Supreme Court, by Judges Taney, Catron, Daniel, Nelson, and Woodbury, decided the claim to be invalid, and rejected the same; Judges McLean, Wayne, McKinley, and Grier, dissenting.

Ann M. Callender et al. brought their petition in the district court of Louisiana for the confirmation of the de Bastrop grant, which was declared invalid by the supreme court. 11 Howard's S. C. Rep. 662.

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FRANCOIS VALLIERE and others, heirs at law and legal representatives of Don Joseph Vallieré, deceased, petitioners, *vs.* THE UNITED STATES.

HISTORY OF THE CLAIM. — The heirs of Don Joseph Vallieré, formerly captain in the 6th regiment of the Spanish army serving in Louisiana, claimed title to a large tract of land situated partly in the State of Arkansas and partly in Missouri, on the following facts and documents: —

1. The register of the land-office at New Orleans certifies that among the Spanish records under his custody, and forming part of the archives of his office, is a book bearing this title: No. 4, subdivided into volumes or sections, under the title of a "*Register de los Primeros Decretos de concession de tierra;*" which book exhibits at volume 6, page 31, an entry in Spanish, of which the following is a translation: —

"11th June, 1793. To Captain Don Joseph Vallieré, in the District of Arkansas, a tract of land situated on the White River, extending from the Rivers Norte Grande and Cibolos to the source of the said White River, ten leagues in depth."

2. The surveyor-general of Louisiana certifies that amongst the records of the surveyor-general's office under his charge, in bundle N, No. 37, he finds a plat of survey and *proces verbal*, in the Spanish language, of which the following is a translation: —

"Don Carlos Trudeau, royal and private surveyor of the Province of Louisiana.

"I certify having measured in favor and in presence of Don Joseph Vallieré, captain of the stationary regiment of Louisiana, a portion of land situated in the jurisdiction of Arkansas, on the north and south banks of Rio Blanco, Rio Cibolos, on the west or superior limit, by the fountainhead or origin of the most western branch of the said Rio Blanco, and by vacant lands of his Majesty, separated from said vacant lands by a line beginning at the same fountainhead of the north-western branch

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of Rio Blanco, running south-west ten leagues in depth, on the north by lands of his Majesty, separated from these by a drawn line beginning at the Rio Norte Grande, commencing at a point distant ten leagues in a direct line from its mouth or confluence with the said Rio Blanco, running in a course nearly west until it meets the fountainhead or origin of the most western branch of the Rio Blanco, and on the south side by vacant lands of his Majesty, separated from these by a line drawn apart, beginning at a point where ends the south-west limit, ten leagues from the fountainhead or origin of the most western branch of the Rio Blanco, running on a parallel line with the said Rio Blanco, descending ten leagues in depth, until it meets Rio Cibolos, at the distance of ten leagues in a direct line from Rio Blanco. All of which is fully demonstrated in the figurative plan which precedes, in which is marked the dimensions, courses, limits, trees, and posts, serving as artificial or natural boundaries.

"The line and limits have been made at the request of the grantee, and in compliance with the order from the governor-general, El Baron de Carondelet.

"18th June, 1793. I certify to all which precedes, in order that it may be verified.

"I delivered the present with the figurative plan 24th October, 1793.

(Signed) "Don Carlos Trudeau, Surveyor-general."

3. That in the regular record books kept in New Orleans by the Spanish authorities before 1803, but removed by them to Cuba, where the same, as it is said, now are, is recorded a grant of the foregoing land, in the Spanish language, of which the following is a translation:—

"Don Francisco Baron de Carondelet, &c. &c.

"For the benefit of the public, and for the greater encouragement of agriculture and industry of the country, I have judged it expedient to take steps for surveying and granting the royal lands in this province. Therefore, I grant to Don Joseph Vallieré, captain of the regiment stationed in Louisiana, a portion

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of land in the jurisdiction of Arkansas, situated on both banks of the Rio Blanco, ten leagues on both banks, beginning, &c. [describing it as in the above *procés verbal*, and then proceeds] which will be better seen on the figurative plan made by my order by the surveyor-general, Don Carlos Trudeau, of this province, the 24th October last (it being impossible for the royal surveyor to make an actual survey at the time). And, in virtue of my order of June of the current year, by which I made him a grant, and ordered the surveyor-general to put him in possession according to the usual form, in consequence of the power which has been conferred on me by the king, whom God preserve, I grant in his royal name to the said Don Joseph Vallieré, captain of the regiment of infantry of Louisiana, the said portion described above, in order that he and his legitimate successors may dispose of it as property belonging to him.

"Done in New Orleans, 22d December, 1793.

(Signed) "EL BARON DE CARONDELET."

Don Joseph Vallieré died in 1799. Whether he ever took possession of the land, or any part of it, or made any settlement thereon, does not appear; but as it was in the heart of the Indian country, and they hostile, it is probable no settlement of any consequence was made under the grant. No claim of title was presented by his heirs to the commissioners appointed by the act of congress of March 2, 1805, or the subsequent laws on the subject of French and Spanish grants in the province of Louisiana; nor is the grant mentioned in any of the reports made by any of these commissioners to the treasury department; nor does it appear to have been set up or brought to the notice of any tribunal, or to the notice of the government in any way until now. The first time it appears to have been brought to notice in any form was, that in 1844 a pamphlet was published in New York by "Jared W. Bell, printer, corner of Ann and Nassau streets," containing copies of what purported to be the original title papers and translations, as above set forth, and legal opinions by Daniel Webster, Rufus Choate, A. P. Upshur, David B. Ogden, Thomas Addis Emmett, James

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Kent, J. Blunt, John Sergeant, and B. F. Butler, pronouncing the claim valid and the title complete.

But the fact that a claim of such magnitude, and thus apparently formal and regular as to muniments of title, should be allowed to sleep more than half a century, is a strong circumstance against its validity, and, on the familiar principle of lapse of time, ought to be almost conclusive against it.

The United States, by *S. H. Hempstead*, district attorney, answered the petition, denying its allegations and the validity of the claim, and demanded strict proof thereof.

On the 22d of June, 1847, the petition was dismissed for want of prosecution, and a motion to reinstate it, made subsequently, was overruled.

Daniel Ringo and *F. W. Trapnall*, for petitioners.

S. H. Hempstead, district attorney, for the United States.

JACQUES ALEXANDRE BERNARD LAW, Marquis of Lauriston, citizen and resident of France, petitioner, *vs.* THE UNITED STATES, defendant.

HISTORY OF THE CLAIM, by James H. Piper, acting Commissioner of the general land-office. — This was a French claim for four leagues square of land, Paris measure, lying on the Arkansas River, in the present State of Arkansas.

The petitioner represents himself as a subject of the king of the French, resident in the city of Paris, France, and as grandson and heir of John Law, "formerly director-general of the Company of the Indies, and controller-general of the finances of the king of France;" that in A. D. 1718, the Company of the Indies, "to whom the former colony of Louisiana, including that which is now the State of Arkansas, belonged, in full property conceded and granted, to the ancestor of the petitioner, the aforesaid John Law, a tract of land of four leagues square, Paris measure, lying on the river Arkansas, in the now State of Arkansas," &c.; that it was granted allodially, "upon certain

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terms and conditions therein expressed, the whole of which terms and conditions," the petitioner avers were performed by said Law, "in good faith; and if any part of the same were not by him so performed and observed," which is not admitted by petitioner, he avers that the said Law "was prevented from performing the same by the acts, orders, and interference of the king of France, or regent of the said kingdom, or his or their officers or agents," and relieved, etc., "from any further performance of the same;" that from various accidents, &c., "many of the records and documents of the said company of the Indies have been lost and destroyed, so that the original of the grant or concession aforesaid cannot now be found or produced;" that the papers of Law "have also been dispersed and destroyed;" that "petitioner has caused diligent search to be made for the record of the said grant or concession to the said John Law, in various places, namely, in the archives of the Marine, in France, where the records of the colony of Louisiana were kept, and in the land-offices of the States and of the United States, at New Orleans, and in divers other places where it was natural to expect the same might possibly be found, but without success."

The petitioner further avers that, "there was such a grant or concession, that the same was duly and lawfully made," &c., and that he will "prove the nature, contents, and effect of the same, whereof mention is made in the histories of Charlevoix" and others; that Law, in 1719 and 1720, "took possession of the said tract of land by his agents, and settled thereon, fifteen hundred settlers, or other large number, and sent out from France and Germany numbers of others, who died on their passage, and was preparing to send out from L'Orient or some other port or ports in France, a large number of German families, when the same were countermanded and sent back, by order of the Regent of France or his officers and agents acting under his authority."

The petitioner further avers that the claim, right, and title to which he has succeeded, "is protected and secured by the treaty between the United States and the French Republic for the cession of Louisiana; and might have been perfected, and com-

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pleted, and held good and valid, had the said province of Louisiana continued under the government of France;" that the United States "have sold or otherwise disposed of the whole, or a large part of the said land to various persons," unknown to petitioner, against whom he seeks no relief, "being content to take scrip for the land so disposed of," &c.; that "his claim for the said land has not been submitted to and reported by any of the tribunals constituted by the laws of the United States to decide or report upon land claims, and he prays that the validity of his claim may be inquired into and decided," &c.

In glancing at the history of the events immediately preceding, and about the period of the alleged origin of this claim, we find, that by royal letters patent, dated 14th September, 1712, Louis XIV. granted to Crozat the exclusive commerce of Louisiana with mining privileges; (see extract from grant to Crozat, appendix to Clarke's compilation of Land Laws, p. 944); that in 1717, Crozat's grant was surrendered to the crown, (see note to said extract, and Marbois' Louisiana, p. 110); that in August, 1717, during the regency of the Duke of Orleans, in the minority of Louis XV., (Louis XIV. having died in 1715,) the Company of the West was created by royal letters patent, in the form of an edict or proclamation, a translation of which is to be found in White's Recep. Vol. I. p. 641 to 652 inclusive; that by the 5th art. of that edict there were granted to said company, "all the lands, coasts, ports, havens, and islands, which compose the Province of Louisiana, in the same way and extent as we have granted them to M. Crozat, by our letters patent of 14th September, 1712," &c. It will be observed, that by the 3d art. of the said grant to Crozat, mines abandoned three years reverted to the crown; although the 8th art. of the edict of 1717, appears to have conferred on the Company of the West the power also to grant land in freehold. It appears further, that the private bank which John Law had established in Paris, in 1716, under the auspices of the regent, was supplanted in 1718, by the establishment of the Royal Bank, (Chambers' General Biog. Dict. Vol. 20, p. 88; Encycl. Amer. Vol. 7, p. 453); at the head of the affairs of which, Martin states that the "original projector continued," and "availing himself of the thirst for

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speculation, which its success excited, formed the scheme of a large commercial company, to which it was intended to transfer all the privileges, possessions, and effects of the foreign trading companies that had been incorporated in France."

"The Royal Bank was to be attached to it. The regent gave it letters patent, under the style of the Western Company. From the mighty stream that traverses Louisiana, Law's undertaking was called the Mississippi Scheme. The exclusive trade to China and all the East Indies was afterwards granted to the company now called the India Company." Martin's Louisiana, Vol. I. p. 234.

By a royal edict, in May, 1719, the privileges of the East India and China Company were merged in the Company of the West, and the latter thereafter required to be designated as the Company of the Indies. "Compagnie des Indes." See Receuil des Edicts, &c., Paris, 1720; also White's Recep. Vol. I. p. 655, 657.

It appears, then, that the "Compagnie D'Occident," in 1717, succeeded to the rights of Crozat, with extended privileges; that it was connected with the Royal Bank; that in 1719 the India China Company was blended with the Compagnie D'Occident, and the latter took the name, in virtue of the royal edict, of Company of the Indies, and that during its existence this claim is alleged to have had its origin.

We find it mentioned by Dupratz, who came on to Louisiana with the colony sent in 1718 by the Western Company. In the History of Louisiana (translation published in London, 1774), after referring to the scarcity produced from "the arrival of several grantees all at once," it is stated as follows: —

"The grants were those of M. Law, who was to have fifteen hundred men, consisting of Germans, provençals, &c., to form the settlement. His land being marked out at the Arkansas, consisted of four leagues square, and was erected into a duchy, with accoutrements for a company of dragoons, and merchandise for more than a million of livres. M. Levans, who was trustee of it, had his chaise to visit the different posts of the grant. But M. Law soon after becoming bankrupt, the com-

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pany seized on all the effects and merchandise, and but a few of those who engaged in the service of that grant remained at the Arkansas; they were afterwards all dispersed and set at liberty. The Germans, almost to a man, settled eight leagues above, and to the west of the capital. This grant ruined near a thousand persons at L'Orient, before their embarkation, and above two hundred at Biloxi, not to mention those who came out at the same time with me in 1718," &c.

Charlevoix the Jesuit, in his "Journal Historique d'un voyage de l'Amerique," 3d vol. 4to. p. 411, published in Paris in 1744, after referring to the "*Kappas*," says, in 1721: "Vis-à-vis de leur village on voit les tristes débris de la concession de M. Law, dont la compagnie est restée Proprietaire."

Law's scheme had failed, and the grant had been entirely neglected. Martin's La. p. 248, also pp. 205, 230, 234, 250, 253.

The melancholy wreck of the settlement on Law's grant was seen, according to Charlevoix, in 1721, and he then referred to the company as the proprietor of it.

Marbois, in his Louisiana, p. 112, expressly informs us, that "the grant was transferred to the company;" and again, in a note on p. 120, it is stated that "on the 11th August, 1728, the company surrendered to the king all its rights against John and William Law," that "this proceeding was founded on a judgment in its favor for twenty millions, the value of which had only been furnished in part," and that "the king accepted the surrender the 3d of September following."

More than one hundred and twenty-six years have elapsed since the grant had its origin, and no evidence is found that it was ever before officially brought to the notice of our government through any of its tribunals. Indeed the petition declares that the "claim for the said land has not been submitted to and reported upon by any of the tribunals constituted by the laws of the United States to decide or report upon land claims."

It is averred, however, that the claim, right, and title to which the petitioner succeeded "might have been perfected and completed, and held good and valid, had the said province of Louisiana continued under the government of France." But it

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will be recollected that France ceded the colony of Louisiana to Spain by a special act, at Fontainebleau, on the 3d November, 1762, the order for delivery given by the king on the 21st of April, 1764 (Appendix to L. L. p. 976), the administration remaining in the hands of the French for some time afterwards (Marbois, 137). It may be suggested, then, that if ever it was designed to revive or perfect the claim in question under the French government, there was ample time for it, when it is considered that the sovereignty of the colony continued in the French government between forty and fifty years after the date of the claim.

We hear nothing of this claim during the long continuance in Louisiana of the sovereignty of Spain, who parted with her title to the colony by the St. Ildefonso treaty of 1800, ceding it to the French republic, from whom we acquired it by the treaty of 1803.

History, then, which tells us of the origin of the grant, informs us also of the failure of the enterprise of the grantee; of the disastrous events connected with it; of the transfer of the property to the company, whose rights in the premises, and also its privileges, it seems, were surrendered eventually to the king, whose title to Louisiana, in virtue of successive treaties, finally passed to the United States.

The United States, by *S. H. Hempstead*, district attorney, answered, denying the matters and things alleged in the petition, and demanding full proof; and the petition was dismissed by the court on the 8th day of May, 1848, for want of prosecution.

Richard Henry Wilde, for petitioners.

S. H. Hempstead, district attorney, for the United States.

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GABRIEL WINTER, WALTER H. OVERTON and HARRIET F. his wife, PETER PETERICK and HARRIET his wife, BLOUNT B. BRAZEALE and MARIETTE his wife, JOHN VIGNAUD and CAROLINE his wife, heirs and legal representatives of Elisha Winter, deceased, petitioners, *vs.* THE UNITED STATES, defendant.

1. Hearsay and reputation are not admissible to prove particular facts in a contest as to private rights, and hence proof that a stone monument was reputed to have been put down to designate a private grant, cannot be received.
2. By the laws and ordinances of Spain, and the regulations and usages of the province of Louisiana, the survey of an open concession or grant was necessary to give it locality and to perfect the title in the grantee, and without which private was not separated from public property, nor was the grant valid as against the government which made it, and hence not valid against the United States.
3. The regulations of Count O'Reilly, of 1770; those of Gayoso, of 1797; those of Morales, of 1797; the regulations existing in Florida as to the survey of lands, and decisions of the supreme court of the United States on that subject, referred to and commented on at large.
4. A survey of lands under the Spanish government, as with us, meant and consisted in the actual measurement of land, ascertaining the contents by running lines and angles, with compass and chain; establishing corners and boundaries, and designating the same by marking trees, fixing monuments, or referring to existing objects of notoriety on the ground, giving bearings and distances, and making descriptive field notes and plots of the work. 10 Peters, 441; 16 Ib. 198.
5. A warrant or order of survey could be executed by the surveyor-general of the province of Louisiana or by any deputy appointed by him, or by the district surveyor, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant; but Spain never permitted individuals to locate their grants by mere private survey.
6. The supreme court of the United States has decided in various cases, that an actual survey of an open concession was a necessary ingredient to its validity, and that it must also have been an authorized survey to sever any land from the royal domain. These cases cited.
7. A party is bound to abide by his own pleadings, and cannot therefore be permitted to prove any thing in opposition thereto.
8. Therefore a petition which prays for the confirmation of an indefinite grant, and shows on its face by express averment, that the same was not surveyed, presents a case in which the claim must be rejected.
9. Fixing a stone post or monument at any particular spot, with however much

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solemnity, was not equivalent to a survey, nor could it in the very nature of things designate any particular or specific land, and it was, therefore, an unauthorized act, not recognized by the Spanish government.

10. No usage or custom can prevail against an express law of the lawmaking power.
11. Under the government of Spain, as well as by the civil law, conditions in grants were required to be performed, and were not inserted as mere matters of form.
12. A grant of one million of arpens of land, at the port of Arkansas, made by the Baron de Carondelet, governor-general of Louisiana, to Elisha Winter, on the 27th of June, 1797, rejected, because the grant did not designate any particular land, and was not designated and ascertained by an authorized survey.

October, 1848. — Petition for the confirmation of a Spanish grant, determined in the District Court of the United States for the District of Arkansas, under the act of congress of the 26th of May, 1824, (4 Stat. 52,) before Benjamin Johnson, district judge. The facts of the case are sufficiently stated in the opinion of the court. A translation of the concession referred to in the petition and thereto attached, was as follows:

"The Baron de Carondelet, Knight of the Religious order of St. John, Field Marshal of the Royal Armies, Governor-General and Vice Patron of the Province of Louisiana and West Florida, Inspector of the troops of the same, &c.

"Being desirous to promote the population and agriculture by all the means adapted to the political circumstances of the times, and adverting to the proposals made to the government by Elisha Winter, to the end of forming a settlement in the post of Arkansas, for the cultivation of flax, wheat, and hemp; therefore, in order to realize said object, I presently concede to said Elisha Winter one thousand arpens of land square, to William Winter five hundred arpens square, to Gabriel Winter five hundred square, and to Samuel Price, Richard Price, William Hubble, John Price, William Russell, Joseph Stetwell, and Walter Karr, fifteen arpens of land in front by forty in depth, to each of them respectively, in consideration of the good information given to me of their excellent deportment and good principles, under the express conditions, that as soon as they shall have settled themselves on their respective surveys,

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which the commandant of the post will cause to be executed, there shall be delivered to each one his title deed in due form; that the settlement is to be made as united and as closely connected as possible, nor are any other American families to be admitted than those above named, and such as the government may permit to settle, which permission may be given in the mean time by the commandant to the good colonists, such as Spanish, French, German, and Irish, who shall make application; but no manner of admission shall be granted to vagabonds, and for any contravention of this clause the commandant will be held responsible. Provided, that if in the term of one year the lands appropriated in this document to the families above named, respectively, are not occupied, this concession shall be void, which shall be attended to in all its parts by the commandant of the district, who is charged with the strict execution of the whole, consistent with the beneficence and humanity of the Spanish government.

"The present given at New Orleans, the 27th of June, 1797.

[L. S.] "THE BARON DE CARONDELET.

"ANDREZ LOPEZ ARMISTO."

Among various exceptions to testimony adduced by the petitioners, was one to the deposition of William Russell. The material parts of the deposition were as follows:—

William Russell being duly sworn, says, the first time he was at the post of Arkansas, was either in 1812 or 1813; that he then heard the grants to the Winters frequently spoken of, and that it was the general understanding of the community at the post of Arkansas, that three grants, one to Elisha Winter, one to William Winter, and one to Gabriel Winter, had been made by the Spanish government; that William Winter had settled on the lands granted to him, very soon after the grant was made, and that he continued to reside on it until his death, and was buried on it. It was generally understood and reported at the post, that Elisha Winter, soon after the date of the grant, brought from Lexington, Kentucky, a hewn stone or monument, three or more feet long, and of large size, which was established under the superintendence of Don Carlos de

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Villemont, the then Spanish commandant of the post, in 1798, as the south-east corner of the tract granted to Elisha Winter, and as the south-west corner of the tract granted to William Winter. The place pointed out to me, as that where William Winter settled and lived and died, was north of east of the corner-stone, and one mile and a half from it.

The grant to William Winter was generally understood, and reputed at the post of Arkansas, in 1812 or 1813, to lie east of that granted to Elisha Winter; that the lines of these tracts were to be run to the cardinal points, and that the line dividing them was to be run north from this corner-stone.

He has heard the said Don Carlos de Villemont say, that the stone was planted with a good deal of public ceremony for the purpose of putting the grantees in possession of their lands.

As to these matters he has no personal knowledge, and what he does know and states is derived from hearsay and reputation.

In 1816 or 1817, he was at the said corner-stone, which had then fallen down and was lying on the ground; but it was generally said to be at the same spot where it was first set, in 1798.

To this deposition the United States, by *S. H. Hempstead*, district attorney, excepted on the ground that it was formed of "matters of hearsay and reputation as to particular facts, and therefore inadmissible."

An exception was also taken to the statement of Don Carlos de Villemont, made before Frederick Bates in 1813, on the ground that the latter had no authority to take it.

These exceptions having been argued by *Daniel Ringo*, for the petitioners, and *S. H. Hempstead*, district attorney, for the United States, the court, on the 7th of September, 1846, delivered the following opinion: —

Opinion of the Court. — The first exception is to the second deposition of William Russell.

It is not deemed necessary to notice any other ground of exception to this deposition than the one which relates to hearsay and reputation.

The court heretofore ruled in this case, that hearsay and reputation was not admissible to prove particular facts in a

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contest as to private rights; and it may not be improper briefly to state the reasons on which the rule is based.

It is certainly a general and long established principle of the law of evidence, that hearsay and reputation is not competent to prove any fact in a court of justice. The reason is that evidence ought to be given under the sanction of an oath, and an opportunity afforded of cross-examination. It is also unquestionable, that there are some exceptions, which are probably as ancient as the rule itself, and which are allowed, either because the danger attending such evidence is not likely to occur in the excepted cases, or because greater inconvenience would result from its exclusion than its admission; and among these exceptions are questions relating to public rights. In these cases common reputation is admitted, because such rights being matters of public notoriety, and of great local importance, become a continual subject of discussion in the neighborhood, where all have the same means of information, and the same interest to ascertain the claim. 1 Phil. Ev. 248; *Weeks* v. *Sparke*, 1 Maule & Selwyn, 679; *Morewood* v. *Wood*, 14 East, 329.

The boundaries of parishes or manors may be thus proved, because they are more or less of public concern; and it is not to be doubted that if a contest should arise between two States or two countries, as to boundary, general reputation would be admissible. Gris. Eq. Ev. 220. The tradition, however, of a particular fact, as that a post or stone was put down, or turf dug in a particular spot, is not competent evidence to establish a private right, because it is not a matter of public concern in which the community are interested.

This rule is undoubtedly sustained by the English cases, and by the weight of authority in the American courts. 1 Phil. Ev. 250; 3 Term Rep. 709; 5 Ib. 123; 14 East, 330; 1 Price, 253; 1 Anstr. 298; *Cherry* v. *Boyd*, Littell's Sel. Cas. 7; *Lee* v. *Tapscot*, 2 Wash. 276; *United States* v. *Kingsley*, 12 Peters, Rep. 483; *Elecott* v. *Pearl*, 10 Ib. 412.

The whole object and scope of Russell's deposition is to prove matters of reputation, or the voice of common rumor, which relate to no public, but to a strictly private right. The petitioners are prosecuting a private claim in this court, in

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which the public are not interested in the sense contemplated by the rule as to public matters. The deposition of Russell is, in the opinion of the court, incompetent and inadmissible as evidence, and must be rejected.

The third exception is to the testimony of Don Carlos de Villemont, purporting to have been taken before Frederick Bates, as commissioner, in 1813.

The main ground relied on by the district attorney to exclude this testimony is, that "the recorder of land titles, acting as commissioner, had no jurisdiction over the case, and had therefore no authority to take the testimony."

By an act of congress of the 13th of June, 1812 (2 Stat. 748), power was vested in the recorder of land titles to investigate and report on certain Spanish and French claims in the State of Missouri. His authority appears to have been confined to two classes of cases; first, to the claims of persons who were then actual settlers on the land they claimed, and whose claims had not been before that time filed with the recorder of land titles. Such persons were allowed to file a notice in writing, stating the nature and extent of their claims, and the written evidences thereof, which were directed to be recorded. Second, to claims which had been presented to the board of commissioners of Missouri, but had not been decided on by that board.

The recorder has authority to take testimony in these two classes of cases. 1 Land Laws, 622. Now this case could not belong to the first class; because the claimant was not then an actual settler on the land; nor did he file any notice of claim with the recorder. Nor could it belong to the second class, because, although it had been before the board of commissioners, it had been rejected by that board. It had therefore "been decided on," and whether rightfully or wrongfully, it was not his province to determine. It was certainly not the intention of congress, either by that or any subsequent law, to give him authority to reinvestigate either confirmations or rejections of claims made by the board of commissioners. *Strother* v. *Lucas*, 12 Peters, 454.

This case, then, was not regularly before him; he had no ju-

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risdiction over it for any purpose whatever, and it must therefore follow that he had no authority to take the testimony, and that it is of no more force or validity than a mere *ex parte* statement. It must, therefore, be excluded.

The second deposition of William Russell, and the testimony of Don Carlos de Villemont, must be rejected and suppressed.

The remaining exceptions of the district attorney to the evidence adduced by the petitioners, will be reserved for decision till the final hearing of the cause. *Depositions suppressed.*

Samuel C. Roane and *Frederick W. Trapnall* appeared as counsel for the petitioners. *Daniel Ringo* was also of counsel for the petitioners, who argued the law and facts of the case at great length. The following is a synopsis of his argument, and the points and authorities referred to by him: —

The grant is indisputably proven.

The lands granted are at the post of Arkansas. Is not this definite? Cannot a survey be made from it?

The lands were granted for settlement and agriculture, as is particularly shown on face of the grant. They were granted June 27, 1797, to be settled in one year.

In the winter or spring following, all the grantees removed to the post and settled there as agricultural farmers, embarked in a business not previously followed by them, and remained there engaged in such business until at and after the United States took possession of the country, a period of seven years at least. This is proven by Stilwell and Many.

Their settlement was upon the nearest vacant land to the post; the land between their settlement and the post was occupied by and granted to others. This is proven by Stilwell and Pelham.

They removed there with the avowed design of settling on lands granted them by the Spanish government, and induced Stilwell to remove with them to occupy lands granted to him by the same instrument. This is proven by Stilwell.

Winter procured in Kentucky, and brought with him to Arkansas, a stone two feet long, avowedly for a corner monument to the lands granted him, which, shortly after their arrival at the

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post, was taken to his dwelling, and thence to a place some two miles distant, and planted in the ground upright, just outside the lands granted to and occupied by others, where it has ever since remained. This is proven by Stilwell.

Winter, thenceforward, claimed there the quantity of land given by said grant; his claim was notorious, and must have been known to the commandant, and he exercised acts of ownership by occupancy, and by bartering some of it with Stilwell's father. The settlement at the post consisted then of some forty or fifty families, confined within the compass of four or five miles from the post. Proven by Stilwell.

Stilwell's father was put into possession of his land by the commandant; and in the same manner was every one who settled at the post invested with the land occupied by him.

The grant contained an order to the commandant to put the grantees in possession of the granted lands; establish the boundaries of their lands respectively; whereupon a title deed in form should be given to each, and provided that if the lands granted were not occupied by the families named in the grant within one year, the concession should be void. Settlement on the granted lands within one year, was the only condition prescribed to the grantees; the commandant was charged with the duty of establishing the boundary, or making the surveys, and forbid to admit other Americans, not named, as settlers.

This proves, incontestably, that the commandant possessed and exercised the control of the settlements made at the post, or within his jurisdiction, allowing only such persons to settle there as he was ordered by his superior, or himself judged proper to admit, and excluded such as he was directed, or chose, from settling.

Also that he prescribed to each the place of his settlement, which was to be as united and contiguous as possible; and he is commanded expressly to attend to the strict execution thereof in all its parts.

What was it that the commandant was thus enjoined to attend to, and do or see done?

1. To survey, cause to be surveyed, or establish the boundaries of the lands granted.

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2. To see that each family to whom the lands were granted was established on the same within one year from the date of the grant.

3. To see that no more or other American families than those named were admitted to settle on said lands.

Did he perform these orders? The Winter families and Stilwell removed to the post, and were settled and established there as early as the spring of 1798; Stilwell was formally put into possession by the commandant; the Winters at once made extensive improvements, erected permanent buildings, cleared lands, cultivated wheat, flax, hemp, and cotton; brought to the country sheep and other stock, the first that were ever there, and slaves and hired men; brought a stone to be planted as a monument on corner to the land granted, which was planted within two weeks after their arrival at a place contiguous to, but outside of the lands then occupied by others, so that a line extended west and east from it would embrace their settlement north of such line, in the quantity of lands granted to them; continued their settlement at the same place for seven years under the Spanish government, claiming the land as their private property under said grant, and that said stone had been planted by the commandant as the south-east corner of E. Winter's tract. These facts were notorious; were much talked of; were known to the various commandants, who never molested them, or denied their right, as claimed; nor did they ever complain that the commandant had not done what was required of him, nor did the governor ever complain that his orders had not been executed. The commandant was a public officer, and the law presumes that he discharged his duty, and the presumption is therefore irresistible that he established the boundary of the lands granted to Winter and his sons; that he caused said stone to be planted as a monument of such boundary; that it indicated the south-east corner of the tract of Elisha Winter; and that he saw the Winter family established on the lands so granted to them, according to his orders and the usages and customs then observed at said post. As to presumption, *Hartwell* v. *Root*, 19 Johns. 345; *Ross* v. *Reed*, 1 Wheat. 482; *Frost* v. *Brown*, 2 Bay, 133.

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With this conclusion every act of the parties accords; while no one fact has been or can be adduced to militate against this presumption; let us see.

The grant was made June 27, 1797. By it the commandant was required to set apart to each family the lands granted; and they were to establish themselves on the lands so granted and set apart for them respectively within one year: these facts are incontestably proven. Winter procured in Kentucky and brought to Arkansas a hewn stone of large size, two feet long, — there was no other such at or near the post, — removed to and settled at the post. The stone was set up conspicuously in the prairie immediately after. Winter claimed the land to the extent of the grant northwardly, claimed the stone as his south-east corner. All these facts were notorious at the post in 1798, and thenceforward; no one then controverted his rights as claimed.

But it has been said in argument that the stone may have been planted without the authority or direction of the commandant. For what purpose? Can a rational man suppose that Winter would have procured, transported, and planted it, without any object? or that he would have planted it with the design of making title to lands not granted to him? or that the commandant would have suffered him to establish himself on the land, of which he publicly claimed this was a corner monument, and quietly occupy it for seven years under such claim, and to exercise all the acts of ownership over it? Such a supposition is directly opposed to the ordinary conduct of men, to the usages of the Spanish authorities, to the express orders to the commandant, and utterly irreconcilable with the acts and conduct of the parties, and the legal presumptions based on them.

Nor could any of the parties at that period have anticipated a change of government, or acted in reference to such event; nor can it be presumed that Winter, by such conduct, could have expected to make title to or hold the lands claimed by means other than those warranted by the laws, usages, and customs then prevailing in said district; so that no possible motive

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for planting said stone without the direction and authority of the commandant can be conceived.

But it has been also urged that this is a general grant, which could only be so located as to sever the granted lands from the domain, and make them the property of the grantees, by an actual survey thereof, made by or under the authority of the Spanish surveyor-general. To this we reply, that the governor-general, as viceroy, possessed, in regard to the disposal of the public lands, all the powers of the king. White's New Recopilacion, vol. 1, p. 367–372; vol. 2, p. 31, sect. 23; p. 38, sect. 45; p. 41, sect. 50; fee-simple right acquired in four years, Ib. p. 49, sect. 75; grants not revoked without fault of grantee, Ib. 99; as to mode of grants, surveys, &c., Ib. 474. Morales's letter of Oct. 16, 1797; custom, vol. 1, p. 360, tit. 7; as to dominion, Ib. p. 85, c. 1–4; mode of acquiring, Ib. 91, c. 9, 10, 11; p. 154, sect. 1–3; p. 300, c. 7; p. 341–344; *John Smith T.* v. *United States*, 10 Pet. 326. He was neither restrained by any law or order of the king, nor could he be by any regulations of his predecessors, for his powers were equal to theirs, and he could limit or abrogate them in whole or in any particular.

In the present grant he expressly orders the commandant of the post to establish the boundaries, or cause the surveys to be made, as he had an unquestionable right to do. It is in proof that no surveyor was then in the district of Arkansas, nor any actual surveys made for years thereafter. That post was a frontier, remote from the capital and exposed to Indian depredations, and no actual survey of these lands could safely have been made; which facts were doubtless known to the governor, and fully account for the orders given by him to the commandant to establish the boundaries of the lands, or cause them to be surveyed, thus dispensing with a survey by the surveyor-general of these lands.

That no survey by actual admeasurement and running and marking the lines was then made, is admitted; but that a boundary was fixed by the commandant, we insist is established,

1. By proof of the occupancy by the grantees.

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2. By the planting of the stone as a monument of the boundary, and the marking of trees to indicate the boundary.

3. By the figurative plots of said tracts returned to and found in the land archives of said province and district.

The lands at the post were then in Lower Louisiana (proven by Stoddard), and the archives belonged to the office at New Orleans, the capital; and these plots were found in said archives in 1805, indorsed by Trudeau, the surveyor of said province; that they were received by him October 8, 1798, as appears by the certificate of Armesta; the same remained in the archives at New Orleans on the 1st March, 1808, as appears by the certified copies made on that day by Trudeau, the same person who had custody of the originals in 1798, and also in 1808; also in the records relating to said province taken to Florida on the surrender of Louisiana; the same evidence is found in 1808, and Trudeau, in April, 1808, again certifies that he took a copy of the original plot, and deposited the same among the archives; and the same remains in said office in 1848, as appears by the testimony and certificate of Bringier, the present depository thereof, under the authority of the State of Louisiana.

In 1808, June 18, the copies of said plats, of 1st and 2d of March, were produced to the board of commissioners for Louisiana and recorded in the recorder's office established by the United States at St. Louis.

At that time the whole was within the same jurisdiction; and copies from the office at New Orleans, where the originals then were, without additional authentication, were as conclusive as the originals or protocols which by law must remain among the archives, and unless shown to be antedated or fraudulent, were conclusive. White's New Recopilacion, vol. 1, tit. Proofs.

Such copy, therefore, imported such verity as by law clearly entitled it to be used as evidence, and to be admitted to record by the United States recorder. Trudeau had been intrusted with the custody of these archives by the Spanish government, and they continued in his custody afterwards under the authority of the United States government; he was their lawful cus-

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todian, and he had a right, under the unaltered laws and usages in force in the province, to authenticate copies of them, as he did; nor was there then or now any authorized imputation that such survey or plot was made at a different time, or received at a different time from that stated by Trudeau, namely, October 8, 1798, or that such plots have not been in his office as public archives ever since. And can it now be presumed, without evidence, that they were not made and deposited in 1798, or that the plots of survey were not made by proper authority? If not made by such authority, would they have been received and kept on record as archives by the proper depository of the surveys as authentic evidence of title? Such presumption is contrary to reason, and not warranted by any principle or rule of law; but on the contrary, the presumption from the facts is irresistible, that it was a plot or survey authorized in such case, constituting an authentic evidence of title in the grantees to the lands therein indicated. Otherwise it would not have been so officially filed and preserved by the lawful and proper depositary of such evidences of title; nor can he be presumed to have acted fraudulently in the matter.

The evidence of genuineness of these plots is, therefore, at least *primâ facie*, established; and there is no testimony contraventing this fact.

The presumption that the commandant executed the order of the governor, established the boundary of said lands, or caused said plots thereof to be made, is corroborated by these facts; and the stone being mentioned thereon, as a point in the boundary, corroborates the evidence and presumption that said stone was planted by the commandant, or his authority, as a monument or evidence of the boundary of said lands.

These copies of said plots, as stated above, were recorded by the board of commissioners June 18, 1808.

By acts of congress claimants were required, within a limited time, to produce for record the written evidence of their right, under penalty that if not so recorded they should never be received in evidence in any court; which requirement Winters complied with June 18, 1808, and his grant and these plots were then recorded by the recorder of the United States.

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But it has been said that the recording gives them no character or validity as evidence; that the recorder should record papers produced without regard to their genuineness or otherwise, and that before a copy of such record can be read, the genuineness of the original must be proven by extraneous evidence.

Can such be a fair exposition of the acts of congress requiring such documentary testimony? If so, the effect would be simply to impose burdens on the claimants, and seduce them into a fatal but delusive security as to the evidences of their titles, by requiring them, under the penalty of losing the benefit of such documents as evidences of their rights if they should fail to have them so recorded, and subjecting them to the expenses incident to such recording. Such we cannot conceive to have been the design of the government, or the effect of the law; and we insist, that by recording them they were intended to be made evidence without further proof, as without such recording they are forbidden to be received as evidence in any court. 1 Land Laws, 519; Ib. 528; Ib. 548; Ib. 620, 636, 640.

If such be not the fact, no advantage whatever could result to the claimants, but only advantages to the government, and burdens and prejudice to the claimants; a result not warranted by the spirit of the acts of congress, but directly opposed to it. See *Mackay et al.* v. *Dillon*, 4 How. 445. Copies admitted by court in Missouri, and admission not disapproved.

But from lapse of time, if from no other principles, the transcripts of these plots ought to be received as evidence, being from the proper office and made by the proper depositary of the original papers, in which office they are in this instance shown to have been since 1798, a period of fifty years, within which time witnesses to the transaction are presumed to have died or departed the vicinity, and especially such may be presumed to be the case in the circumstances of the present case, the act having taken place under a foreign government, and seven years before the present government acquired jurisdiction; the smallness and sparseness of the settlements, and the removal of many of the inhabitants on the change of government, as well as the death of all the parties to the transaction,—the grantees,

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the commandant, and the surveyor-general. See *Duncan* v. *Beard*, 2 Nott & McCord, 406; Phillips' Ev. 477, 479, and notes; 3 Ib. 1310; *Lewis* v. *Laroway*, 3 Johns. Cases, 283; *Hewlett* v. *Cock*, 7 Wend. 371; *Barr* v. *Gratz*, 4 Wheat. R. 213; *Winn* v. *Patterson*, 9 Pet. R. 674; *Patterson* v. *Winn et al.* 5 Pet. 240; 1 Starkie, Ev. 343; 1 Dallas, 14; *Thomas's Lessee* v. *Hornlocker*, also *Jackson* v. *Blanshan*, 3 Johns. 292; 10 Ib. 495; 3 Har. & McHen. 581; Ib. 196; 1 Bay, 364; 2 Nott & McCord, 55; 2 Munf. 129; 2 Wash. 276; 6 Binney, 435; 2 Day, 280.

It has been asked, also, who are the Marquis de Casa Calvo, and Andres Lopez Armesta? We prove the signature of the latter, and that he was secretary of the province, which may also be seen by the documents published by authority of congress; and by the same it is shown who the Marquis of Casa Calvo was, and his official character. 2 Land Laws, Appendix, 165, 166. These documents show the change of sovereignty on the 30th November, 1803; they were deposited in the provincial archives, then under the dominion of the United States, December 28, 1803, and certified by Spanish officers, and now published as well authenticated.

Spanish proclamation of May 18, 1803, by Salcedo and Casa Calvo, supposes and requests the continuance in office of the existing judicial and ministerial authorities. The dominion, as before stated, was delivered November 30, 1803; October 31, 1803, congress authorized the president to vest in such person or persons as he might elect; the military, civil, and judicial powers, &c.; and on the 26th March, 1804, passed acts for establishing territorial governments, to take effect October 1, 1804, in which provision is made for continuing the existing laws, &c. By what laws and what officers was the country governed in its municipal affairs after the change of dominion, and before the existing laws and officers were reënacted or reappointed by the United States? Surely there can be no doubt as to this; the existing laws and officers remained until superseded by others appointed by the United States. The dominion only was changed, and every thing else remained as before. If this were not so, what was the situation of the province after

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the cession to France in 1800, and before the cession to the United States in 1803? The sovereignty or right of sovereignty was in France, but the actual government was administered by the existing authorities, and their acts of an administrative character, indeed all their acts, have been recognized by the United States and by France.

The official character of Don Vincent Folch is shown by document No. 29. 2 Land Laws, Appendix, 227. He was governor of Florida from November, 1796, to 1809, and from May, 1809, to October, 1809, and we present his official authentication, as such, of the documents and plots of these lands, showing that they exist in the archives of Louisiana, removed to Florida by Casa Calvo; and his authentication under his seal, as viceroy of Florida, is as authoritative as the great seal of Spain, for as to the province, he stands in place of the king. *Lincoln* v. *Battle*, 6 Wend. 484; *Vandervoort* v. *Smith*, 2 Caines, R. 155; *Packard et al.* v. *Hill*, 7 Cow. 434.

In addition to these evidences (which apply to all the cases), the testimony of Gabriel Winter establishes the position of the lands of Wm. Winter, the establishment of the corner of his tract by De Villemont, and his investiture of the land granted him by the commandant. He speaks from personal knowledge, is a competent witness, and is in every particular fully corroborated by other testimony; his interest, if any, is in the question only, which does not disqualify him. 3 Starkie, 781; 1 Ib. 84, 85.

Gabriel Winter never occupied his land, nor was it occupied for him by any tenant of his. But if the proof establishes the grant, and the fact that his land was set apart to him according to the usages of the Spanish government or orders of the governor, and can be identified, it is his. Now if the survey offered be evidence, although the plot is figurative only, it is sufficient; the place of beginning is easily identified, the geography of the country shows where the lake on which it commences is situated, and this the court will judicially notice; and if there is any difficulty about the identity (if the other facts requisite are established), the court should direct a survey, as was done in Florida in sundry cases.

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By establishing the Winter family on any portion of the lands granted, the condition of the grant as to occupancy was fulfilled, according to the usages then in force; but occupancy was not indispensable, if the lands were set apart for him after being granted to him; they were severed from the domain and became his private property, and we prove that performance of specified conditions was not usual nor required.

Customs established control the general laws on subjects to which they relate, and which they embrace.

It is proved that there was no surveyor in Arkansas to 1802, which fact must have been known to the governor, and therefore his order required only the establishment of boundaries or beginning points for the surveys; and for the like reason, the custom, as proven, that lands were in that mode assigned to individuals, and they put in possession under and by such designation or establishment of boundary, is not only shown to have existed, but it existed of necessity.

Where lands are occupied under a grant, a survey may be presumed. 15 Pet. 283.

A copy of a deed required to be enrolled is as good evidence as the original. *Dick et al.* v. *Balch et al.* 8 Pet. 33; *Jackson* v. *Cole*, 4 Cowen, 587; *Jackson* v. *King*, 5 Ib. 237; *Peck* v. *Farrington*, 9 Wend. 44.

Entries of surveys made in his office by registers of land-office in Kentucky or Virginia are evidence of the facts, are public records, and it is not to be presumed that he would place on his records any thing not authorized; and facts proved by such records must be received as *primâ facie* evidence. *Galt et al.* v. *Galloway et al.* 4 Pet. 342, 343. So, we insist, the rule is as to matters recorded by the recorder of land titles, who is a sworn officer, and those received and deposited as records or archives by the Spanish surveyor-general, from both of which officers we have authenticated copies of the figurative plots of Winter's survey or grant of lands, as also a sworn copy from the present depositary and keeper of the latter. *Williams* v. *Sheldon*, 10 Wend. 654; *The People* v. *Dennison*, 17 Ib. 312.

A copy of an award recorded in a county, which is afterwards divided, of lands situated in the new county, is properly

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authenticated by the clerk of the old county. *Jackson* v. *Tibbetts*, 2 Wend. 592. And so, we insist, is now the rule as to records made in Louisiana, before the division, respecting lands now in Arkansas.

Hearsay and general reputation competent testimony as to boundaries. 1 Phillips' Ev. 249, 251.

The acts and declarations of Winter, from the date of the grant to the date of his settlement at the post, in regard to his removal there, its object, the transportation of the stone and its object, as well as the declaration of Winter, extracted from Stilwell by the examination of the United States, and in answer to interrogatories propounded by them, are competent proofs; the former are *res gestæ* as to the matter, and the latter being proof elicited by the United States, they can neither impeach the witnesses or object to its competency.

What a deceased witness has sworn to at a former trial between the same parties, in relation to the same issue, is proper evidence. *Jackson* v. *Crissey*, 3 Wend. 251; *Crary* v. *Sprague*, 12 Ib. 41.

We insist that the parties and issue were the same when these cases were before the commissioners that they are now; and what witnesses then said, who are now dead, is good evidence, which embraces all the witnesses examined by said commissioners. See also 4th sect. Act of Congress, 1824.

S. H. Hempstead, district attorney, argued the case fully in behalf of the United States, on all the points presented; but to defeat the claim relied mainly on the position, that as the concession was indefinite in itself, a survey was necessary to give it locality, and as no survey was ever pretended to have been made, the concession was void.

As to the necessity of a survey, which was the turning point in the case, the following is a synopsis of his argument.

The survey of lands was always a matter of the first importance in the province of Louisiana. It was generally expressed and always implied, in all grants not capable of complete identification by natural boundaries. They were made upon conditions that they were not to interfere with previous grants, or in the very phraseology of the grants themselves, "without

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prejudice to third persons," which most strongly implied the necessity of a survey as the only practicable mode of conforming to this requisition. Actual survey and the actual demarcation of boundaries, by persons properly authorized, were the only means by which authentic official evidence could be furnished of the location of grants, and the separation of private from public property.

Without going further back than 1754, the royal regulations and orders, the regulations of the several governors and those of the intendants from that time to the acquisition of Louisiana, affords ample evidence of the truth of the proposition, to say nothing of the uniform usage of the provincial government upon that subject.

It is prescribed in the royal regulations, of October 15, 1754. The sixth clause was based on the fact that many grants, sales, and compositions of lands, made after the year 1700, were held by the grantees, without having been surveyed or valued, and directs that confirmations should be withheld until such surveys and valuations should be executed. The seventh clause also speaks of survey and valuation. 2 Land Laws, 52.

Count O'Reilly, invested with unlimited civil and military powers, was sent by the king of Spain, in 1769, to the province of Louisiana, for the purpose of establishing there a permanent civil and military government. He states that the king had been pleased by his patent, issued at Arauguez, the 16th April, 1769, to delegate to him powers to establish in the military, the police, the administration of justice, and in the finances, such regulations as should be conducive to the service and the happiness of his majesty's subjects in the colony. On the 18th February, 1770, O'Reilly established general regulations with regard to granting the royal domains. The 12th is as follows:

"All grants shall be made in the name of the king by the governor-general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge and of two adjoining settlers, who shall be present at the survey; the above-mentioned five persons shall sign the process verbal which shall be made thereof, and the surveyor shall make three copies of the same, one of

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which shall be deposited in the office of the scrivener of the government and cabildo; another shall be delivered to the governor-general, and the third to the proprietor to be annexed to the titles of his grant." 2 Land Laws, App. 206.

The regulations of O'Reilly were not only expressly sanctioned by the king, on the 24th August, of the same year, but Don Louis de Unzaga, then the governor-general of Louisiana and his successors, were specially required to conform to them in all points, until they should be changed by his majesty. 2 Land Laws, App. 530.

From the 18th February, 1770, this regulation requiring a formal and particular survey of concessions, was the law of the whole province of Louisiana, and from the 24th August following, possessed the force of a royal cedula, which no representative or tribunal of the Spanish monarch was at liberty to modify or disregard. It does not appear that it was ever abrogated, or changed by the king, and indeed the uniform practice of the provincial government conforming to it, is the highest evidence of its having become firmly ingrafted upon the civil system of government which existed in the province of Louisiana. But this is not the only evidence.

Governor Gayoso, in his instructions, of the 9th September, 1797, declares that the forms established by his predecessors, in which to petition for lands, should be followed, and it is apparent that they carry out the general policy contained in those of O'Reilly. In a letter of Gayoso to Morales, the intendant-general, dated March 5, 1799, he says: "I also send you the form of the first decree which it has been the custom to issue before the survey was made. Of the registers which will soon be sent you, you will see the form in these used by all my predecessors."

The intendant-general of the province of Louisiana, Morales, in a letter to Don Pedro Varela Ulloa, the king's minister, dated October 16, 1797, respecting grants of land, says: "In order to obtain lands from the exchequer (fisco) the custom is still pursued which prevailed when the French were masters of the country, except in so far as the government and the intendancy acted in concert; and no other form is or has been observed

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than the presentation of a memorial by the petitioner praying for a certain number of arpens and designating their location. In virtue of this the surveyor or commandant of the post, with the assistance of the neighbors, makes the survey, and if no objection be offered puts the party in possession and gives him the papers necessary for having his title drawn out; this title is issued upon the strength of these papers, a minute of it being preserved in the office, in order that it may be noted in the book of grants; the sum which is to be paid to the surveyor or commandant for his trouble, is then delivered or put aside; and the duty of five per cent. for office fees being retained, the petitioner remains in full and quiet possession of the quantity of land which it may please the governor to grant. What I have said in the last paragraph must be understood as regarding inhabitants or planters who solicit grants of land; with respect to new settlers, although the commandant of the district in which they wish to fix themselves, may have surveyed and assigned to them the quantity of land which they and their families are considered capable of cultivating, there are yet but few who have obtained the titles which should have been furnished to them." 2 Land Laws, App. 542.

The power of granting lands was exclusively vested in the intendancy, in 1798, it having been previously exercised by the governor-general; this appears from the royal order of October 22d, 1798. 2 Land Laws, Appendix 208, 542–545, et seq.

Morales, intendant-general of Louisiana, published his general regulations, July 17, 1779, consisting of thirty-eight articles relative to granting lands. The 15th article is in almost the same language as the 12th clause of the regulations of Count O'Reilly; it is as follows:—

"Article 15th. All concessions shall be given in the name of the king, by the general intendant of the province, who shall order the surveyor-general, or one particularly named by him, to make the survey and mark the land by fixing the bounds not only in front but also in the rear; this survey ought to be done in the presence of the commandant or syndic of the district, and of two of the neighbors, and these five shall sign the process verbal which shall be drawn up by the surveyor."

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The 16th article requires the process verbal with a certified copy to be sent by the surveyor to the intendant; to the end that on the original process verbal, the necessary title paper, with the certified copy attached, be issued and delivered to the grantee. The original was required to be deposited in the office of the secretary and recorded, "to the end that at all times and against all accidents the documents which shall be wanted can be found."

The 17th article requires the titles of concessions to be recorded in books to be kept for that purpose.

The 18th article is as follows: —

"Experience proves that a great number of those who have asked for land think themselves the owners of it; those who have obtained the first decree by which the surveyor is ordered to measure it and put them in possession; others, after the survey has been made, have neglected to ask for the title to the property; we declare that any one of these who have obtained the said decrees, notwithstanding in virtue of them the survey has taken place, and that they have been put in possession, cannot be regarded as owners of land until their real titles are delivered completed with all the formalities before cited."

The 25th and 38th articles show that the grantees were obliged to pay the surveyor for his services, and to have the surveys executed at their own expense; and the more particularly was this the case in gratuitous concessions. "The fees of the surveyor in every case comprehended in the present regulation, shall be proportionate to the labor and that which has been customary until this time to pay," is the language of the 30th article. 2 Land Laws, App. 208, et seq.

It is true that these regulations were promulgated after this particular concession was made; but it is obvious that they merely embodied general principles contained in antecedent royal orders, and regulations of previous governor-generals, and enunciated with greater particularity, rules, regulations, and usages then existing in the Province of Louisiana, and which had existed long anterior to the year 1797. This is not left to doubtful inference, for the intendant Morales expressly informs us that he prepared his regulations "after having examined with

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the greatest attention the regulation made by the Count O'Reilly, of the 18th February, 1770, as well as that circulated by governor Gayoso, of January 1st, 1798, and after he had taken counsel of the assessor of the intendancy and of other persons skilled in those matters." The regulations of Morales, then, did not profess to establish any new system, but merely to give publicity to an old one, and point out with more precision those things which were esteemed essential to obtain a complete right of property in granted lands. No substantial alterations were made, and indeed their similitude to those of the Count O'Reilly in their main parts cannot escape observation, and, in a word, a close scrutiny will prove that. It was no idle assertion of the intendant that he had examined the regulations of the Count O'Reilly with the greatest attention. 2 Land Laws, App. 209.

It cannot admit of doubt, that even long before O'Reilly was sent to Louisiana, there were surveyors in each of the districts of the province, who were salaried officers, and whose duty it was to survey grants of land when called on by grantees for that purpose, and to make an official report of such surveys to the governor-general or granting power, which then became an official record.

It appears from the letter of the king's minister, the Marquis de Grimaldi, that O'Reilly had appointed surveyors for districts in the province at half their former salary, which appointment the king approved. 2 Land Laws, App. 530.

Indeed, it is a matter of public history, that surveyors were always "part and parcel" of the government of the Province of Louisiana.

If we look to the official records of the Spanish government in Florida, we shall find, that at least as early as 1791, instructions, emanating from the provincial government, were given to surveyors, as to the manner of measuring and establishing the boundary lines of granted lands. 1 Land Laws, App. 1004.

In that year, Quesadee, governor of Florida, appointed Pedro Marrot to the office of surveyor-general, and prescribed several standing rules for the direction of that officer.

The 9th rule is, "When lands are to be surveyed bounding

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those of individuals having them of their own, they will be cited to appear for the purpose of exhibiting their titles permitting them to remain in possession, running the lines without injuring them; and the government reserving the right of examining at a proper time the validity of their titles, and the defects of their petitions."

Again, in the 1st rule he is directed to "take care that the measurements be made adhering to the title."

These instructions or rules were dated and issued October 24, 1791. 1 Land Laws, App. 997, 998. On the 29th October, 1790, it had been communicated to governor Quesada as the order of the king of Spain, that foreigners who would freely present themselves and swear allegiance to his majesty, should have lands granted and measured to them, in proportion to the working hands each family might have. 1 Land Laws, App. 996.

The 9th clause of the regulations of Governor White, of October 12th, 1803, declares that all persons who abandoned or ceased to cultivate lands, which at any period shall have been measured to them by the surveyor-general, although they had obtained the corresponding title of property, should nevertheless lose and forfeit their right thereto. 1 Land Laws, App. 1001.

Governor Estrada, who succeeded governor White, commissioned George J. F. Clarke as surveyor-general of the Province of Florida, on the 2d of May, 1811. The commission recites, that whereas, the appointment of public surveyor being vacant on account of the absence of Don John Porcel, who exercised the same, and therefore being in the want of one for the measurement by the government in the laying off of lands, &c. 1 Land Laws, App. 1003. Certain instructions were promulgated by Estrada, on the 11th June, 1811, for the government of the surveyor-general in the discharge of his official duties; some of them will be referred to.

"2d. The surveyor having been called on by any person to measure and bound lands to him, he will require his title of property or grant from government, that on sight thereof he may proceed to its measurement and demarcation."

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"5th. To each person whose lands have been measured, a plot will be given, constructed in running lines of ink, marking in the perimeter the corners by a small circle of a line in diameter, and on the longitude of each line note its magnetic direction and length in chains and links. . . . . In the centre of plot he will place in numbers the acres of land which he has measured. The plot being made, he will deliver it with the following description: 'Plot of the number of acres of land of A. B., in such a place, measured and bounded by the public surveyor of this province. Don George Clarke, East Florida, the day of the year and month on the same tract.

"GEORGE CLARKE.'

"6th. The surveyor will keep a book of large paper, and copy therein the plots he gives out according to the foregoing article. . . . .

"7th. The book mentioned in the foregoing article will serve to show government what lands are vacant or not measured; he should form in legal surveys a journal of his operations, to satisfy the persons having lands adjoining.

"8th. That the boundaries shall be permanent, he will cause to be drove down at the corners stakes of three feet long and three inches thick at their heads, leaving them three inches above ground.

"9th. Those who employ the surveyor will pay him four dollars per day for his personal services, calculating from his departure from the mansion where he is found until he concludes the work performed for them." 1 Land Laws, App. 1004.

The commissioners for ascertaining Spanish claims in West Florida, namely, Samuel R. Overton, Joseph M. White, and Craven P. Luckett, in their report, in 1824, state that "the first step in obtaining a gratuitous concession, was the presentment of a petition to the sub-delegate, or authority vested with the power of disposing of lands. This petition was referred to the surveyor, who was required to report whether the tract solicited was vacant and royal domain."

"The subject was next submitted to the fiscal or king's attorney, whose province it was to state whether or not there were any objections to a compliance with the petition. When these

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reports were found to be favorable, the sub-delegate made the concession, fixed the terms, and passed the decretal order of survey. After all which had been fulfilled and executed, it was forwarded to the office of intendancy for confirmation. Where any doubts existed as to the land being vacant and royal domain, the order of survey preceded the concession." 1 Land Laws, App. 1043.

Such a mass of evidence, running through a period of more than fifty years, and harmonizing in all its parts, must certainly be regarded as establishing the necessity of surveys. No exceptions are provided for, and if there were any, it is the duty of the claimant to prove them by the strongest testimony, inasmuch since the law and the uniform usage under it are against him.

It is evident that a warrant or order of survey could be executed by the surveyor-general or any of his deputies, or the surveyor of any district, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant.

It appears to have been at one period a common practice in Florida for private persons to execute warrants or orders of survey by the direction of the governor, and upon which surveys formal and perfect titles were issued. 1 Land Laws, App. 1014, et seq.; *United States* v. *Harrison*, 16 Pet. 198, et seq.

In *Smith* v. *The United States*, 10 Pet. 334, it is said that "Spain never permitted individuals to locate their grants by mere private survey. The grants were an authority to the public surveyor or his deputy to make the survey as a public trust to protect the royal domain from being cut up at the pleasure of the grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it would not be a legal execution of the power."

Again. "But neither in this, nor the record of any of the cases which have been before us, have we seen any evidence of any law of Spain, local regulation, law, or usage, which makes a private survey operate to sever any land from the royal domain; on the contrary, all the surveys which have been exhibited in the cases decided were made by the surveyor-general of

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the province, his deputies, the special order of the governor or intendant, or those who represented them. No government gives any validity to private surveys of its warrants or orders of survey; and we have no reason to think that Spain was a solitary exception, even as to the general domain, by grants in the ordinary mode for a specific quantity to be located in one place."

Between a survey by the public surveyor and an authorized survey by a private person, there was a wide difference. A survey made by a public surveyor, in the discharge of his public duties, is admitted in evidence in suits between other parties, because the act is done under oath, and in the discharge of his duties to the government and the public. These duties are to measure the land by compass and chain, to establish corners, mark lines, and to preserve accurate field notes of the survey, with such explanations as may be required to give it certainty.

A plot is then made, which embodies, in a condensed form, the whole survey, and shows the lines, corners, trees, rivers, creeks, and other natural and artificial objects on the ground, with such remarks as may explain them. The statement, however, of collateral facts not within the scope of his proper official functions, are not admissible as evidence. *Ellicott* v. *Pearl*, 10 Pet. 441; *United States* v. *Hanson*, 16 Ib. 198.

It is upon this principle that it has been frequently held in the Florida cases, that because of the official character of the surveyor-general, the plots and certificates made by him, in the discharge of his official duty, have accorded to them the force and character of a deposition; but as to a survey by a private person, nothing is presumed, and every thing must be proved. 16 Pet. 200, 201; 10 Ib. 334; 16 Ib. 162.

The Spanish regulations attended to most clearly evince that when a concession was made, the duty was imposed on the grantee of having the order of survey executed, and the survey returned to the proper officer at his own expense, and without any cost to the royal treasury. In other words, the concession being an authority to the surveyor-general and his deputies to make the survey as a public trust, it was the duty of the grantee to call upon him for that purpose, or to procure authority for a private person to do it.

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The government contented itself, in the first instance, with giving the authority to survey, and then leaving it to the party to procure the execution of that authority. If he failed, he could not claim any right of private property in the grant, nor could he obtain any title without complying with this necessary condition.

There was no law, order, cedula regulation, usage, or custom of the province of Louisiana or Florida which authorized this condition to be dispensed with in any case, or under any circumstances.

It is also evident that a survey meant in these provinces what it means with us, the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries. 6 Jac. Law Dict. 157; Webster's Dict.

When the phrase is applied to land, no other meaning is attached to it by lexicographers; nor is it used in a different sense in the jurisprudence of any country with which I am acquainted.

This is no idle inquiry, because these kind of cases are not to be tried by common law rules, but by the laws, customs, and usages of the province of Louisiana; and hence the judges of the supreme court, in all the cases brought before them, have referred to these as guides.

In doing this it would have been impossible to overlook the fact that actual surveys were a necessary ingredient to the validity of grants under the Spanish dominion, and it has consequently been directly or indirectly arrested in numerous cases decided by that tribunal to be equally necessary under the government. *Wherry* v. *The United States*, 15 Pet. 327; *United States* v. *Forbes*, Ib. 180; *Buyck* v. *The United States*, Ib. 220; *O'Hara* v. *The United States*, Ib. 297; *United States* v. *Delespine*, Ib. 328; *The United States* v. *Miranda*, 16 Ib. 155; *United States* v. *Low*, Ib. 162; *The United States* v. *Harrison*, Ib. 198; *United States* v. *Clarke*, Ib. 228; *United States* v. *King*, 3 Howard, 784.

The Spanish document adduced as the foundation of this claim is an open order of survey, and might have been located

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in any part of the then district of Arkansas. It had no locality, no definite description of any particular land. There are two substantial conditions in it: 1st, that the lands conceded should be surveyed in one year, which the commandant of the post should cause to be executed; and 2d, that the grantees should settle upon and occupy their respective surveys within that period.

These two conditions are fairly deducible from this paper, which, for the sake of convenience, will be called a grant; and it may be observed that it was undoubtedly competent for the governor-general to order the commandant to cause the survey to be executed. *Smith* v. *The United States*, 10 Pet. 327.

It is not pretended that the lands mentioned in the grant were ever surveyed under the Spanish government; indeed that they were not, is shown in the petition itself. But it is said that as to the lands granted to Elisha and Wm. Winter, a stone or stones were planted, and that this gave locality and identity to the tracts, and severed them from the royal domain.

The bare statement of the proposition is its refutation. Fixing a stone or post is no survey, nor is it equivalent to a survey. It does not of itself indicate whether it is the corner of a north, east, south, or west line; nor does it indicate that the lines are to run from it to the cardinal points of the compass. But to go further: planting a stone to designate any particular corner, with a contemporaneous assertion that a parallel line is to be run a certain distance and direction, and thence in other directions, so as to form a square, is no identification of the land by any mode known to the Spanish government; nor is it so in fact. There are no visible lines, no visible boundaries, nothing to apprise our neighbor how far he may go without trespassing upon our soil, and nothing to indicate the lines of separation between public and private property.

The idea of giving identity to a million and a half of arpens of land without measurement, and without actually running and marking a single line, is really too absurd to merit consideration.

If it were not gravely insisted on, it might well be thought to be an experiment on human credulity.

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Now supposing, for the sake of argument, that all the testimony taken or adduced in this cause, as to planting a corner-stone, is competent, and that none of it ought to be excluded, what does it amount to? Certainly to nothing more than that in 1798 Elisha Winter, the father, planted a large stone, intending thereby to designate the tract granted to him; and that this was done in the presence of the commandant of the post of Arkansas, Don Carlos de Villemont. It is a singular and important fact, that the statement of this person, made more than thirty years ago, when the matter must have been fresh in his recollection, is entirely silent as to what course the stone was to designate, or to what points of the compass the lines were to run from it. This omission could not have proceeded from defect in memory, and it can only be accounted for on the supposition that the act of planting the stone was esteemed to be of so little consequence, that nothing was said on the subject.

As if to admonish us of the intrinsic infirmity of hearsay evidence, and the propriety of excluding it, it is stated by persons examined since the pending of this suit that they understood, principally however from the family of Winters, that this stone was actually intended to designate the south-east corner of this tract, and that the lines were to run to the cardinal points of the compass; a statement condemned by the silence of Don Carlos de Villemont, the very person who would have known it if such had been the fact. Could the stone, in the very nature of things, designate or identify any land? Could it not be the corner of four separate tracts? Could not lines from it be run north as well as south, and east as well as west, or north-east, north-west, south-west, or south-east? It was, therefore, an idle and nugatory act, and could not, in the very nature of things, separate any land from the royal domain.

It cannot be doubted that a survey was contemplated and required by the grant itself, a requisition indeed enforced by a general law sanctioned by the monarch himself.

The petitioners, satisfied as they must be that nothing was done equivalent to a survey, or to identify the land, are driven to the flimsy excuse that there was no public surveyor within the district of Arkansas, and thus indirectly admitting a survey

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to be essential. The commandant alluded to says:—"There was no public surveyor in the district of Arkansas at that time (1798), nor afterwards, during my command, down to the year 1802; on which account these tracts were not surveyed nor platted in the ordinary manner."

This is insufficient to excuse the non-performance of the conditions, because the fact must have been as well known in 1797 as it was the year after. *United States* v. *Kingsley*, 12 Pet. 484.

The condition was not impossible, but on the contrary was reasonable and proper, and one of two things must be established by the claimants, either that it was complied with, or that the performance of it was excused by the governor-general, and also that he was competent to excuse its performance, because, as plenary as his authority might have been, he was a subordinate officer, bound to execute the will of the king, whether expressed in royal orders, regulations, or in other modes which might have been adopted. The Baron Carondelet had no dispensing power; he could not say that a survey need not be made, or that a right of private property should vest without identity to the land. But it is fruitless to inquire what he might or might not have done, since it is not pretended that the performance of the conditions were ever excused.

To say that there was no public surveyor in the district of Arkansas in 1798, amounts to nothing. There was a surveyor-general at New Orleans, who could constitute deputies and send them to any part of the province to execute surveys at the request of a grantee, and upon the payment of the usual compensation.

If Elisha Winter did not choose to invoke his aid, the governor-general could have authorized a private person to make and return the survey, which it is reasonable to infer would have been done upon application, especially as we are informed that Winter was on terms of intimacy with that functionary, and was, according to the proof, in New Orleans a greater portion of the time between 1797 and 1800.

The commandant of Arkansas post could doubtless have authorized a competent person to make and return the survey, by

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virtue of the direction in the grant to cause the surveys to be executed.

The means to enable Winter to comply with this part of the grant were ample, sufficiently convenient, and at his command. Surely judicial tribunals will not undertake to relieve him from the consequences of his own neglect. The time allowed, one year, was abundant; and certainly it was not too much to expect, that as he had obtained from the bounty of the government a grant of enormous size, larger than many of the German principalities, he would not only willingly bear the inconvenience and expense of its separation from the royal domain, but would hasten the consummation of that event with all the forms and solemnities known to the law.

Under the Spanish government, the mode of designating grants, and investing individuals with the right of property therein, was attended with solemnity and publicity. The practice in such cases was in many respects analogous to livery of seizin, as used under the feudal system at an early period of English jurisprudence.

A grant delivered out for survey meant, not as in our country, a perfect title, but an incipient right, which, when surveyed, required confirmation by the governor. 16 Pet. 200. And hence in this concession a survey is enjoined, to the end that each grantee may receive a title in due form.

In the Province of Louisiana, not only were actual boundary lines to be marked and established, and corners planted by an authorized surveyor, but the party was then formally put into possession, either by the surveyor or commandant, in the presence of his neighbors, provided there was no objection, and it did not interfere with the rights of third persons.

The grant required a survey of the land, not planting a stone, which without survey could be nothing but an idle ceremony. But it is insisted that no lands were surveyed at the post of Arkansas, and that it was a custom there for the commandant to put persons in possession without it.

To that I reply that the assertion is not proved, but if it was, such a custom, — if a thing rarely practised and confined to a few interested persons can be so called, — was in positive vio-

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lation of the law existing in the province on that subject. No usage nor custom can ever prevail against an act of parliament, — a principle which must utterly destroy the usage of the post of Arkansas.

But it is said that it was the policy of the Baron de Carondelet to encourage settlements, and to dispense with surveys, if necessary to attain that end; and we are entertained with a sort of review of the acts of himself as governor-general. But will it advance us a single step in the cause to inquire into the policy of the baron during the five years he was governor-general, or to contrast his administration with that of Estevan Miro, his predecessor, or Gayoso, his successor? It would be quite as pertinent to investigate the Spanish intrigue set on foot as early as 1790 to separate the territory west of the Alleghany mountains from the Union, and its total failure; or to show that the Baron de Carondelet commenced his administration in 1792 with a scheme to sever Kentucky from the confederacy and bring her under Spanish dominion, and failed in it; or that he set it on foot a second time in 1795, sent an emissary into Kentucky in the person of Gayoso, then lieutenant-governor of Natchez, and again failed; or that the baron made a third attempt in 1796, and again signally failed. It would be a waste of time to wade through the rubbish of Spanish rule, to find out the policy of Spanish officials. We should discover enough at every step to demonstrate hostility to American citizens and American interests; corruption in office, and breaches of public and private faith. Whether the policy of the Baron de Carondelet was good or bad, is of no importance to the present question. He had not the right, and did not, in point of fact, dispense with a survey.

But it is said that figurative plots of the Winter grants were found in the offices in New Orleans. And of what avail is it to produce figurative plots or plans — mere creatures of the brain — office sketches, that can be made at any time? These sketches only present the supposed outlines of a tract of land, which could be made at a distance from the land, and without ever seeing it, by one having a general knowledge of the face of the country. They show no bearings and distances, no field

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marks or boundaries, no latitude or longitude, and no natural or artificial objects on the ground. Constructive journeys, constructive corners, constructive lines, make up these constructive surveys. They are destitute of reality, and carry deception on their face.

Two conditions arise from a fair construction of the concession: first, that each grantee would cause his grant to be surveyed; second, that he would establish himself on it within one year; and it was upon the performance of these conditions that each grantee could receive his "title deed in form." Non-performance within the time limited amounted to a forfeiture, or, to use the express language of the concession, the grant "became void." To speak with legal exactness, the lands granted could not vest in the grantees until a compliance with those conditions. No specific lands were appropriated in the document itself, and as none were severed from the royal domain by authentic survey, it was impossible for the grantees to occupy the lands granted. Occupancy is equivalent to seizin or possession, and it is certainly too clear to be controverted, that identity of the premises is essential to a seizin in law, as it is necessarily implied in a seizin in fact. *The United States* v. *Miranda*, 16 Pet. 159; *Arredondo's case*, 6 Ib. 741.

JOHNSON, J. — This is a petition filed by the heirs of Elisha Winter, under the act of congress of the 26th May, 1824, entitled "An Act enabling the claimants of lands within the limits of the State of Missouri and Territory of Arkansas to institute proceeding to try the validity of their claims," revived for five years by the act of 17th July, 1844; and the claim mentioned in the petition is for one million of arpens of land, in the State of Arkansas, based upon a Spanish concession, made by the Baron de Carondelet, governor-general of the Province of Louisiana, the 27th day of June, 1797, to Elisha Winter, the ancestor of the petitioners. 4 Stat. 52; 5 Ib. 676.

The answer of the district attorney denies all the statements and allegations in the petition, and full proof is demanded thereof.

From the commencement of the case, every reasonable indul-

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gence has been extended to the claimants, to enable them to procure all the proof within their reach, and doubtless we now have all that could be found, material to their rights.

The case has been thoroughly investigated by the counsel on both sides, and it gives me pleasure to add, that it has been argued by them with great zeal and uncommon ability, and which will the better enable me to form a correct opinion upon the questions which it is now my duty to decide.

Most of the testimony offered by the claimants has been excepted to by the district attorney; and these exceptions are on file in the case, as a part of the record. Some of them were decided by the court before the hearing; but finding that course of proceeding calculated to produce inconvenience and delay, and in a collateral manner bring about a decision upon the merits of the cause, the rule requiring exceptions to be filed was rescinded. But I will add, that as far as decisions have been made on exceptions, they are entirely satisfactory to my mind, and will be adhered to, and the principles therein contained, applied upon the present occasion.

As to the exceptions filed by the district attorney, not yet expressly decided, I will merely remark, that it is not deemed necessary to the rights of either party that this court should decide specifically upon each exception, because it would be useless as far as it could have any effect here; and in case of appeal to the supreme court, all the testimony and the exceptions to it will appear of record, and thus each party there will derive the same advantage and benefit, as if there was a specific decision upon each exception; for the inquiry then will be, not how this court has decided, but whether the decision is sustained by the principles of law, and warranted by legal and competent evidence. Without taking upon myself, therefore, the unnecessary labor of deciding collateral questions, I will now proceed to the main and prominent points in the case.

The paper in the Spanish language, which is produced as the foundation of this claim, is really nothing more than an order or warrant of survey, and strictly speaking is not a concession; but for the sake of convenience I shall call it the latter. Several translations of it have been brought to the notice of the court,

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but I shall not undertake to determine how nearly these translations assimilate to each other, because, should this case be taken to the supreme court, that tribunal will have no difficulty in ascertaining the true meaning of the paper.

Without descending to particulars on this point, I will only observe that I regard this concession as authorizing Elisha Winter to select, within the then district of Arkansas, one million of arpens of land, which was to be severed from the royal domain, and occupied within one year from the date of the concession, or else the concession to be void; in other words, that he was to establish himself upon it in one year.

The genuineness of the signature of the Baron de Carondelet to the concession, has been, in my opinion, sufficiently proved by competent witnesses, — those who are acquainted with his handwriting, — so as to entitle it to be used as evidence in any court of justice.

The district attorney in his argument, insists that the Baron de Carondelet had no authority to make so extensive a grant, and that if he could rightfully do so, he might with the same propriety have conceded to any private individual, as a mere gratuity, a whole parish or district of the royal domain. Certainly no one can doubt that a concession so immense ought to be closely scrutinized; but at the same time I do not feel it incumbent upon me to inquire into the precise extent and nature of the powers vested in the governor-generals of Louisiana as it respects the quantity of land which could be granted. The supreme court of the United States has frequently decided in this kind of cases, that a grant or concession made by an officer who has by law authority to make it, carries with it *primâ facie* evidence that it is within his power, unless the contrary is shown; and it is, therefore, no longer a debatable question. *United States* v. *Arredondo*, 6 Peters, 691; 7 Ib. 51; 8 Ib. 436; 9 Ib. 134.

Without further inquiry, therefore, I shall assume that the Baron de Carondelet possessed the power to make this concession; that the extraordinary extent of it is no objection to its validity; and then comes the main question in the case, namely, whether the land mentioned in the concession, was separated

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from the royal domain, so as to vest a right of property in the grantee, and thus bring it within the purview of the treaty of Paris of the 30th April, 1803. It is almost superfluous to add, that the whole case must turn upon this solitary point, for however meritorious the claim may be, and however strong the considerations which may favorably recommend it to the political departments of the government, it is not competent for the judiciary, either to grant land, give an equivalent, or confirm a claim that is destitute of identity. Indeed, the act of the 26th May, 1824, confers the special and limited authority under which this court must act in these cases; and by reference to that law it will be seen that the locality of a claim must be ascertained to give the court jurisdiction. 4 Stat. 52.

Now this concession on the face of it is utterly indefinite, and does not appropriate any specific lands to the grantees; and hence it is material to inquire whether an actual survey of such a concession as this was necessary to vest a right to the property in the grantee? The district attorney maintains the affirmative; and in my opinion he has successfully sustained that position, by referring to royal orders; to regulations of different governor-generals of the province of Louisiana, running through a period of nearly fifty years; to regulations in Florida, on the same subject; and lastly, to various adjudications of the supreme court of the United States.

It is perfectly obvious, that among civilized nations, where individual ownership of the soil is recognized as a right, some mode of designating every man's land must necessarily be adopted. Indeed, without any regulations at all upon that subject in Louisiana and Florida, the survey of lands would have followed as a natural consequence upon making grants; for without surveys, the confusion in land titles, and the disputes and litigation that must have ensued, would have been intolerable evils which no government would allow. In point of fact the survey of grants of land was common in the Province of Louisiana as early as 1754, because the sixth and seventh clauses of the royal order of that year, of date the 15th October, expressly require surveys to be made. 2 Land Laws, 52.

The most solemn and imposing regulations, however, upon

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the subject of surveying lands, are found in the twelfth clause of the general regulations of Count O'Reilly, civil and military governor of the Province of Louisiana, promulgated on the 18th of February, 1770. That clause is as follows: "12. All grants shall be made in the name of the king, by the governor-general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge ordinary of the district, and of the adjoining settlers who shall be present at the survey; the above-named four persons shall sign the process verbal which shall be made thereof, and the surveyor shall make three copies of the same; one of which shall be deposited in the office of the scrivener of the government and cabeldo, another shall be delivered to the governor-general, and the third to the proprietor to be annexed to the title of his grant." 2 Land Laws, App. 206.

The regulations of O'Reilly probably stand upon higher ground than those of any of his successors, because they were expressly sanctioned by the king himself, on the 24th August, 1770, the same year they were promulgated; and the governor-generals of Louisiana were specially required by the monarch to conform thereto, until it was his royal pleasure to change them. 2 Land Laws, App. 530.

There is no evidence that they were changed or modified at any subsequent period as far as surveys of grants were concerned. On the contrary, the instructions of Gayoso, dated the 9th September, 1797, and the regulations of Morales, intendant general of Louisiana, published 17th July, 1799, very clearly indicate that surveys were essential. In fact the fifteenth article of the regulations of Morales, is almost literally copied from the twelfth clause of O'Reilly's regulations already referred to. The general practice of the government conformed to these regulations; and it is known that there was a surveyor-general in upper, and another in lower Louisiana, each of whom had authority to constitute as many deputies as they pleased, with a view to execute surveys. Undoubtedly the Spanish regulations show, that when a concession was made, the duty was imposed on the grantee of having the order of survey executed at his own expense; and a return of the survey was to be made to

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the proper officer; and all this without cost to the royal treasury. In other words the concession was an authority to the surveyor-general and his deputies, to make the survey as a public trust; and it was the duty of the grantee to call upon him for that purpose, or procure authority for a private person to do it.

The government contented itself in the first instance with giving the authority to survey, and then leaving it to the party interested to procure the execution of that authority. No law or regulation existing in the Province of Louisiana, has been brought to the notice of the court, which dispensed with a survey in the case of an open floating concession, and it is presumed there was none.

It is also quite evident that a survey under the Spanish government meant, as with us, the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries. 1 Land Laws, App. 996–998, 1001, 1003, 1004, 1014, 1043; *The United States* v. *Hanson*, 16 Peters, 198; 6 Jac. Law Dictionary, 157.

"The survey," say the supreme court, in *Ellicott* v. *Pearl*, 10 Peters, 441, "made by a surveyor being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plot the lines, corners, trees, and other objects on the ground; and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts he stands like any other witness, to be examined on oath, in the presence of the parties, and subject to cross-examination." This case is cited, because in pointing out the duty of a surveyor of land, it clearly shows the nature of a survey, and what must be understood by it; namely, running lines with compass and chain, establishing corners, marking trees and other objects on the ground, giving bearings and distances, and making descriptive field notes and plots of the works. These are the ingredients of an actual survey, as well as the evidences of it; for it is not the mere assertion of the surveyor that he had surveyed land that makes it so. *The United States* v. *Hanson*, 16 Peters, 200.

A return by the surveyor-general, embracing a description of a survey of land in legal form, was *primâ facie* competent

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evidence without further proof on which the granting power could act. Plots and certificates, on account of the official character of the surveyor-general, had accorded to them the force and character of a deposition. 16 Peters, 200, 201; 14 Ib. 346.

It is evident also, that a warrant or order of survey could be executed by the surveyor-general, or any deputy appointed by him; or the surveyor of the district, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant. It appears to have been at one period a common practice in Florida, for private persons to execute warrants or orders of survey by the direction of the governor, and upon these surveys formal and perfect titles were issued to the interested parties. 1 Land Laws, App. 1014, et seq.; 16 Peters, 198. In *Smith* v. *The United States*, (10 Peters, 334,) it is said that "Spain never permitted individuals to locate their grants by mere private survey. The grants were an authority to the public surveyor, or his deputy, to make the survey as a public trust, to protect the royal domain from being cut up at the pleasure of grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it could not be a legal execution of the power." And in the same case it is further said, that, "neither in this nor the record of any of the cases which have been before us, have we seen any evidence of any law of Spain, local regulation, or usage, which makes a private survey operate to sever any land from the royal domain. On the contrary, all surveys which have been exhibited in the cases decided were made by the surveyor-general of the province, or his deputies, or under the special order of the governor or intendant, or those who represent them.

"No government gives any validity to private surveys of its warrants or orders of surveys, and we have no reason to think that Spain was a solitary exception even as to the general domain, by grants in the ordinary mode, for a specific quantity to be located in one place."

The supreme court of the United States, in various cases, has either directly or indirectly decided, that an actual survey of

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an open floating concession is a necessary ingredient to its validity; and that it must also be an authorized survey to sever any land from the royal domain. I shall make no comment on these cases, but merely refer to them. *Wherry* v. *The United States*, 10 Peters, 338; *Smith* v. *The United States*, Ib. 327; *United States* v. *Forbes*, 15 Ib. 180; *Buyck* v. *The United States*, Ib. 230; *O'Hara* v. *The United States*, Ib. 297; *The United States* v. *Delespine*, Ib. 328; *The United States* v. *Miranda*, 16 Ib. 155, 162; *The United States* v. *Hanson*, Ib. 198; *The United States* v. *Clarke*, Ib. 228; *The United States* v. *King*, 3 How. 784; *The United States* v. *Lawton*, 5 Ib. 26.

But upon this point I need not multiply authorities. Ordinances and regulations expressly sanctioned by the king, practice conforming to these regulations, the decisions of our courts of justice, all combine to establish it as a proposition beyond dispute, that a concession indefinite in itself, is void, without the aid of an official survey.

In most grants, even those of a descriptive character, which designated the place where the lands were to be located, a survey was required to be made and returned before a party could obtain a formal and perfect title. Non-interference with the rights of others was a condition which attached to all grants, and was generally expressed; but if not expressed, always implied. This, of itself, demanded an actual survey on the ground, as the only certain mode of observing that condition.

The actual demarcation of boundary lines by authorized persons, and the formal return of the proceeding were the only means of affording authentic official evidence of the location of grants and the separation of public from private property.

It is not pretended that the lands mentioned in this concession were surveyed within one year, nor before the 10th day of March, 1804. On the contrary, the fact is distinctly alleged in the petition, that there was no actual survey; and an excuse is offered for the omission, which, when scrutinized, will be found to be insufficient. According to a well-established rule, this averment cannot be controverted by proof on the part of the petitioners; they being bound to abide by their own pleadings. To obviate the want of a survey, it is said that a corner-

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stone was planted, under the direction of Don Carlos de Villemont, to designate the grant made to Elisha Winter, and that it was a proceeding of great solemnity. There is, in my judgment, no competent evidence adduced to show the planting of this stone by the authority, or under the direction and superintendence of Don Carlos de Villemont, as commandant of the post of Arkansas. But if there was, it has been shown to be a clear departure from the Spanish regulations respecting the location of grants; and hence a nugatory and idle act. Fixing a stone post or monument at any particular spot is no survey, nor equivalent to it; nor is it the slightest indication whether it is a northern, eastern, southern, or western corner; nor does it indicate how the boundary lines are to run. But to go further still,—planting or erecting a stone to designate any particular corner with a contemporaneous assertion, as to how the lines are to run from it, is no identification of land, nor can these acts, in the very nature of things, give it any known or certain locality. I repeat, that if there was full proof of the act of planting a stone, or erecting a monument, it was an illegal act, and severed no land from the royal domain.

The concession required a survey, a process verbal of it and its return, not the planting of a stone; and therefore the proceedings of the commandant, said to have been adopted to designate the lands granted, were not only in violation of the plain requisitions of the concession itself, but were not sanctioned by any of the ordinances, orders, or regulations of the Spanish government.

If a survey could have been dispensed with, it is reasonable to infer that it would have been done in the concession itself, and that planting a stone, or some such act, would have been substituted in its place. But this is not the case, and indeed so far from it, a survey and the return of it is clearly contemplated, and upon that the proper title was to be furnished to the grantees in form.

The Baron de Carondelet, plenary as his powers may have been, was subordinate to the king, and was obliged to observe his royal ordinances and orders. As governor-general, he had no dispensing power; and to say nothing of the insuperable

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difficulty of locating a tract of land of a million of arpens by the mere erection of a monument as a corner, it is sufficient to observe that he had not authority to dispense with a survey of the land in a case like this, and that it would have been illegal to do so; and there is perhaps no better proof of it than the fact that this proceeding, said to have been officially reported to the Baron de Carondelet, must, if so reported, have been regarded by him as illegal, and as a departure from the concession; for otherwise the presumption is almost irresistible, that the title in form promised in the concession would have been furnished to the grantees, and more especially as Elisha Winter was said to have been on terms of intimacy with the baron, and to have been in New Orleans much of his time between 1798 and 1800.

In my judgment, it was a condition that the grant should be surveyed, and without it the grantee could not be said to be established on any specific land; he could not be said to have the legal seizin or possession of any specific land, (*The United States* v. *Lawson*, 5 Howard, 29,) and therefore I disregard all the proof respecting the occupation by the Winters of a tract of land near the post of Arkansas, which they claimed as a grant from the Spanish government, as being entirely irrelevant.

But it is urged upon me that conditions were inserted in Spanish grants as a mere matter of form; that a compliance with them was not required; that there are no instances where grants have been declared forfeited for a non-compliance with conditions; that the hostility of the Indians would have prevented an actual survey, and that there was no surveyor at the post of Arkansas. As to danger from Indians, it may be replied, in the spirit of the decision of the supreme court in the case of *The United States* v. *Kingsley*, 12 Pet. 484, on a similar occasion, that a grantee cannot be permitted to urge as an excuse in fact or in law, for not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention in asking for the grant, as it does to his inability from such danger to execute it afterwards. And as to there being no surveyor at the post in the district of Arkansas at the time, it was a fact which he

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must be presumed to have known at the date of the concession, and cannot therefore be permitted to derive any advantage from that circumstance; nor was he confined to the district of Arkansas in obtaining a surveyor. It was imposing no extraordinary hardship, and was indeed asking but little at his hands, to require a survey of this enormous gratuity.

Now as to conditions being inserted in Spanish concessions as matters of form only, it seems to me to be a singular position to assume before a judicial tribunal, and not less singular that proof of it should be adduced. If I am at liberty to disregard certain parts of this concession as being formal and not requiring observance, may I not with the same propriety reject the whole? And is this to be a rule in this kind of cases, and to form a landmark in their adjudication? Judicial decisions would then depend upon the integrity and intelligence of witnesses, not on the written law, and would vary as often as the opinions of men. Such proof can have no weight with me, because of its uncertainty, and because it contravenes known regulations and laws which existed in the Province of Louisiana, and which I prefer as guides to the loose declarations of witnesses of whom we know nothing.

While upon this point, I will also add, that if it was the usage at the post of Arkansas to designate lands by merely fixing some corner thereto, it was a usage repugnant and contrary to express written law, and therefore void. 1 Bl. Com. 77; 3 Term Rep. 271. No usage or custom can prevail against an express act of the lawmaking power.

If the performance of conditions was not required, they would hardly have been inserted; and the fact that surveys and occupation were required by the terms of almost every concession, are conclusive proof that so far from being matters of form, they were really matters of the first consequence, and indicated the permanent establishment of the only certain system of separating private grants from the public domain. According to my recollection, the civil law used in Spain, and introduced into the Province of Louisiana, was equally as strict as the common law with regard to exacting a compliance with conditions, and as rigidly excluded parol proof, either to change, vary, modify,

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or annul, or in any manner affect such conditions. Code Napoleon, b. 3, c. 4, sect. 1. But what perhaps is more to the purpose, the supreme court has held that conditions could not be dispensed with, but must be performed. *The United States* v. *Kingsley*, 12 Pet. 486.

There are other points that might be noticed, but it is not necessary; and in closing this opinion, I will adopt the language of the supreme court in *Lawton's case* (5 Howard, 28), as applicable on the present occasion.

This concession, in its leading features, cannot be distinguished from various others, where no specific land was granted, or intended to be granted; but it was left to the grantee to have a survey made of the land in the district referred to by the concession by some person properly authorized, by which additional act the land granted would have been severed from the king's domain, and have become private property.

Let the claim be rejected, and the petition be dismissed, at the costs of the petitioners. *Ordered accordingly.*

NOTE. — The cases of *The Heirs of William Winter, deceased*, v. *The United States*, and *Gabriel Winter* v. *The United States*, for 250,000 arpens each, depending upon the same facts and principles, were severally argued by *Daniel Ringo*, for the petitioners, and *S. H. Hempstead*, district attorney, for the United States, in conjunction with the preceding case; and, under the foregoing opinion, the claims were severally rejected, and the petitions dismissed. In each of the three cases appeals to the supreme court were prayed and granted, but never prosecuted any further, and were abandoned.

The case of *A. W. Putnam and others* v. *The United States*, claiming under Elisha Winter by conveyances, was dismissed.

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CATHARINE DE VILLEMONT, CARLOS DE VILLEMONT, URSINE DE VILLEMONT, PEDRO DE VILLEMONT, JAMES BLAINE and YOE, his wife, DON CARLOS GIBSON, CECILIA GIBSON, ADELIA GIBSON, LOUIS DE VILLEMONT, PIERRE SOULE and ARMANTINE, his wife, LOUIS T. CAINE and ADELE, his wife, ARMAND MERCIER, ALFRED MERCIER, DIDER PREUX and LEONTINE, his wife, AUGUSTE MERCIER, and CHARLES TESSIER, heirs and legal representatives of Don Carlos de Villemont, deceased, petitioners, *vs.* THE UNITED STATES, HORACE F. WALWORTH, MARY B. MILES, and JAMES B. MILES, defendants.

In district court.

1. Where precise locality is not given to a concession, a survey is necessary to sever the land from the royal domain.
2. Surveys were necessary under the Spanish government.
3. Case of *Heirs of Elisha Winter* v. *United States*, ante, p. 344, cited and approved.

In supreme court.

1. In 1795, Baron de Carondelet, the governor-general of Louisiana, made a grant of land on the Mississippi River, upon condition that a road and clearing should be made within one year, and an establishment made on the land within three years; neither of which was complied with, nor was possession taken under the grant until after the cession of the country to the United States.
2. The excuses for these omissions, namely, that the grantee was commandant at the post of Arkansas, and that the Indians were hostile, are insufficient; as he must have known these conditions when he obtained the grant.
3. According to the principles established in *Glenn & Thurston* v. *United States*, 13 How. 250, the Spanish authorities would not have confirmed this grant; neither can this court do it.
4. The grant is void, because the land cannot be located by a survey.

October, 1848. — Petition for the confirmation of a Spanish land claim, determined in the District Court, before the Hon. Benjamin Johnson, district judge, under the act of congress of June 17, 1844 (5 Stat. 676), reviving act of May 26, 1824 (4 Stat. 52).

A. Fowler, for the petitioners.

S. H. Hempstead, district attorney, for the United States.

Albert Pike and *D. J. Baldwin*, for Horace F. Walworth.

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Daniel Ringo and *F. W. Trapnall*, for Mary B. Miles and James B. Miles.

Opinion of the Court. — The claim of the petitioners, as heirs and legal representatives of Don Carlos De Villemont, civil and military commandant of the post of Arkansas and its districts, is based on the request or petition of De Villemont, dated the 10th May, 1795, addressed to the Baron de Carondelet, governor-general of Louisiana, to grant to him a tract of land having a front of two leagues by a depth of one league, with parallel boundaries, situated in the place called the "Island del Chicot," distant twenty-five leagues below the mouth of the Arkansas River; the Cypress swamp of the Island del Chicot to be the upper boundary of the tract of land solicited. Upon which request, the Baron de Carondelet made a concession or order of survey, of which the following is a substantial translation, namely :—

"The surveyor-general of this province, or the private person appointed for that purpose, will locate and establish this tract of land which is petitioned for, upon the two leagues of land in front by one in depth in the place indicated in the preceding memorial; the said land being vacant, and the said location not operating to any one's prejudice; under the express conditions that a road and regular clearing be made in the peremptory space of one year; and this concession to become null at the precise expiration of three years' time, if the said land shall not be settled upon, and during which time it cannot be alienated; under which conditions a complete survey of the land must be made, which must be remitted to me, in order that a corresponding formal title may be supplied to the party interested. El Baron de Carondelet."

The tract of land is to be situated twenty-five leagues below the mouth of the Arkansas River, and the Cypress swamp of the Island of Chicot is to be its upper boundary.

There is no proof in the case as to the existence of the "Island del Chicot;" but there is evidence proving the existence of a place on the Mississippi River known and called by the name of "Point Chicot," and it may be admitted that this

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is the place called for in the request and order or warrant of survey.

But the petitioners have wholly failed to show by testimony that there existed a Cypress swamp above the place called Island of, or Point, Chicot, which was to constitute the upper boundary of the tract of land intended to be granted. In the absence of this proof, it is manifest that no precise locality is given to the tract of land claimed by the petitioners. To give identity and locality to the tract of land intended to be granted, it is evident that an actual official survey, made by the surveyor-general of the province, one of his deputies, or a private person appointed for that purpose, was essential. This, however, was never done. The tract of land claimed by the petitioners has never been identified and severed from the royal domain, and upon this ground alone the claim is null and void.

For the reasons upon which this opinion is founded, I refer to the decision at the present term in the case of *The Heirs of Elisha Winter* v. *The United States*, [ante, p. 344,] and the authorities there cited.

The petition must be dismissed, and the petitioners pay all costs. *Decreed accordingly.*

From this decree the petitioners appealed to the supreme court, where, at the December term, 1851, the case was argued by Mr. *Taylor* for the appellants, and Mr. *Lawrence* and Mr. *Crittenden*, attorney-general, for the United States, and Mr. *Pike* for Horace F. Walworth. It is reported in 13 Howard's S. C. Rep. 261; and there was delivered the following opinion of the supreme court: —

By CATRON, J. — The heirs of Don Carlos de Villemont filed their petition in the district court of Arkansas to have a confirmation of a grant for two leagues of land front by one league in depth, lying on the right descending bank of the Mississippi at a place called the Island del Chicot, distant twenty-five leagues below the mouth of the Arkansas River; the Cypress swamp of the island being called for as the upper boundary of said tract.

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The governor-general granted the land on the express conditions "that a road and regular clearing be made in the peremptory space of one year; and this concession to be null, if, at the expiration of three years' time, the said land shall not be established, and during which time it cannot be alienated; under which conditions the plot and certificate of survey shall be made out and remitted to me, in order to provide the interested party with the corresponding title in form."

The concession was made June 17, 1795. No possession was taken of the land by De Villemont, nor any survey made or demanded, during the existence of the Spanish government. The petition alleges that possession was first taken in 1807, and as an excuse for the delay, it is stated that the grantee was commandant at the post of Arkansas up to the end of the year 1802, and confined by his official duties there; and second, that so hostile were the Indians in the neighborhood of the land that no settlement could be made on it. The proof shows that De Villemont first took possession in 1822 or 1823.

The second regulation of O'Reilly of 1770 required that roads should be made and kept in repair in case of grants fronting on the Mississippi River, and that grantees should be bound within the term of three years to clear the whole front of their lands, to the depth of two arpens; and in default of fulfilling these conditions, the land claimed should revert to the king's domain; nor should proprietors alienate until after three years' possession was held, and until the conditions were entirely fulfilled.

In this instance, the time was restricted to one year for making the improvements required by the regulations, and three years were allowed for making an establishment on the premises. In this case, where a front of six miles was granted, a clearing to the whole extent was of course not contemplated, yet to a reasonable extent it certainly was; but it was undoubtedly necessary that an establishment should be made within three years; such being the requirement of the concession, in concurrence with the regulations.

The act of March 26, 1804, prohibited any subsequent entry on the land, and declared void all future acts done to the end

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of obtaining a perfect title, even by an actual settler, if the settlement was not made before the 20th of December, 1803. De Villemont's title must, therefore, abide by its condition when the act of 1804 was passed. For further views on this subject, we refer to our opinion expressed on Clamorgan's title, at the present term, in the case of *Glenn and Thurston* v. *The United States*, 13 Howard, 250.

We are asked to decree a title and award a patent on the same grounds that the governor-general of Louisiana, or the intendant, would have been bound to do, had application for a perfect title been made during the existence of the Spanish colonial government. The only consideration on which such title could have been founded, was inhabitation and cultivation either by De Villemont himself, or his tenants; and having done nothing of the kind, he had no right to a title. Nor can an excuse be heard that hostility from Indians prevented a compliance with the conditions imposed, as De Villemont took his concession subject to this risk. The alleged excuse that he was commandant of the post of Arkansas, and bound to be constantly there in the performance of his official duties, is still more idle, as he held this office when the concession was made, and knew what its duties were.

The petition was dismissed by the district court because the land claimed could not be located by survey. The concession is for two leagues front by one in depth, with parallel boundaries, situated at Chicot Island, the Cypress swamp on the island being the upper boundary. Chicot Island is represented in the concession as being twenty-five leagues below the mouth of the Arkansas River. The land now claimed by the petition is represented to lie five leagues below the mouth of that river, at a place known as Chicot Point, being a peninsula included in a sudden bend, and surrounded on three sides by the Mississippi River.

It is difficult to conceive that Chicot Point, lying in fact nearly twenty-five leagues below the mouth of the Arkansas, is the Chicot Island to which the concession refers. But admitting that the point was meant (which we believe to be the fact), still no Cypress swamp is found there to locate the upper boun-

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dary; nor is it possible to make a decree fixing any one side line, or any place of beginning for a specific tract of land.

Our opinion is, that on either of the grounds stated, the petition should be dismissed, and the decree below affirmed.

Ordered accordingly.

JOHN GLENN and CHARLES M. THURSTON, claiming under Jacques Clamorgan, petitioners, *vs.* THE UNITED STATES, defendant.

In district court.

Spanish claim rejected, (1) because conditions not complied with, and (2) because there was no survey of the grant.

In supreme court.

1. In 1796, when Delassus was commandant of the post of New Madrid, he exercised the powers of sub-delegate, and had authority, under the instructions of the governor-general of Louisiana, to make conditional grants of land.
2. He made a grant to Clamorgan, who stipulated on his part to introduce a colony from Canada to cultivate hemp and make cordage for the use of the king's vessels; but these conditions the grantee failed to perform.
3. By the Spanish laws and ordinances, these conditions had to be performed before the grantee could obtain a perfect title. If the Spanish governor would have refused to complete the title, this court, acting under the laws of congress, must likewise refuse.
4. After the cession of Louisiana to the United States in 1803, Clamorgan could not legally take any step to fulfil the conditions; and the case must be judged of as it stood the 3d March, 1804.
5. The difference between this and *Arredondo's case*, 6 Peters, 706, explained.
6. The cases of *Arredondo*, 6 Peters, 691; *Soulard*, 10 Ib. 100; *Wiggins*, 14 Ib. 334; *Menard* v. *Massey*, 8 How. 293; and *Boisdoré*, 11 How. 63, cited and approved.

April, 1849. — Petition in District Court, under act of 17th June, 1844, for the confirmation of a Spanish claim, determined before Hon. Benjamin Johnson, district judge.

Albert Pike and *D. J. Baldwin*, for petitioners.

S. H. Hempstead, district attorney, for the United States.

OPINION OF THE COURT. — In this case, I do not deem it necessary to give reasons at length for the decree I shall render,

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because the decision must depend mainly on principles already decided in the *Winter cases*, and in the *De Villemont case*. It is true that this is in some respects different; but that difference is rather formal than substantial.

I deem the claim invalid upon two grounds: first, that the conditions of the grant were not complied with; and I will merely remark that I cannot subscribe to the argument that it was a grant without conditions; second, that there was no authoritative survey of the grant, which was undoubtedly required by the Spanish regulations. For my reasons on this point, I refer to the opinion in the case of the *Heirs of Elisha Winter*.[1] Nor do I deem the calls of the grant sufficiently certain to separate any land from the royal domain without a survey.[2]

On these two grounds, the claim must be rejected.

Decreed accordingly.

From this decree the petitioners appealed to the supreme court; and at the December term, 1851, the case was argued there by Mr. *Webster* and Mr. *Johnson* for the appellants, and Mr. *Crittenden*, attorney-general, for the United States. It is reported in 13 Howard's S. C. Rep. 250.

CATRON, J., delivered the following opinion: — In August, 1796, James Clamorgan petitioned Colonel Delassus, then acting as commandant of the post and dependency of New Madrid, for a grant of land fronting on the Mississippi River for many miles, and running back to the western branches of White River, including a section of country equal in area to 536,904 arpens, as was afterwards ascertained by measurement.

To obtain title and possession of this large quantity of land, Clamorgan represented that he was a merchant residing in St. Louis; that he had been strongly encouraged by the governor-general of the Province of Louisiana to establish a manufactory of cordage, fit and proper for the use of his Spanish

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[1] Ante, p. 344.

[2] The supreme court, it will be seen, overruled this point, holding that the grant was sufficiently described to fix its locality.

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Majesty's vessels, and especially for the necessities of the Havana, to which place his excellency desired the petitioner to export the cordage, under his (the governor-general's) protection; of which facts the commandant was advised, so that he might exercise his power to favor an enterprise likely to become very important to the prosperity of the dependency, and very lucrative to all the inhabitants of Upper Louisiana. Furthermore, that the petitioner (Clamorgan) was then connected in correspondence and interest with a powerful house in Canada, which might procure for him a sufficient number of cultivators to teach in that region the manner of cultivating hemp, and fabricating it into various kinds of cordage, in the most perfect manner, so as thereby to respond to the views of the general government, which desired the prosecution of this enterprise by all proper and honest means that possibly could be used to exempt his Majesty from drawing in future from foreigners this article, so important in the equipment of his vessels.

Clamorgan further stated that "it is with this hope that the petitioner has actively made the most pressing demands to obtain from his correspondents in Montreal a considerable number of people proper for this culture, who must of necessity by inducement be attracted hither, although at this moment the political circumstances of Canada appear to oppose it, but in more favorable times hereafter, this object may undoubtedly be obtained. Notwithstanding which, the petitioner is obliged to assure himself in advance from you, Monsieur, a title which may guarantee to him the proprietorship of a quantity of arable land proportioned to his views, in order to form an extensive establishment as soon as the time shall appear favorable to his enterprise, and as soon as his correspondents shall be able, without compromitting their sense of duty, to cause to emigrate to this country the number of people necessary to give birth to this culture, so much desired by the government.

"Considering, Monsieur, this expectation of the petitioner, and the particular recommendations of his excellency, the governor-general of the province, the petitioner hopes that you will be pleased to grant him the quantity of land which he desires to obtain, as well in order to favor him, the execution of all

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which may contribute to the future success of his project, as to furnish him the means of attracting hereafter from a foreign country an emigration of cultivators, which may not perhaps be obtained until after a considerable lapse of time, and upon promises of rewards which the petitioner will be obliged to fulfil in their favor."

The land solicited is then described; the petitioner proceeds to set forth the title he desires: "To the end that as soon as it may be in the power of the petitioner he may be able to establish and select, in the tract of land so demanded, those portions which shall be best fitted to improve for the culture of hemp; because, inasmuch as a great tract of said lands is now drowned in swamps and unimprovable lowland, making it impossible to fix establishments in the whole extent; all to be done that the petitioner may enjoy the land, and dispose of it always, as a property belonging to him, his heirs, or assigns; and also may distribute them, or part of them, if he think fit, in favor of such person or persons as he may judge proper, to attain, as far as on him depends, the accomplishment of his project; and the petitioner will never cease to return thanks for your favors."

To this demand of Clamorgan, the commandant responded, and proceeded to grant as follows: "Since, by the exposition contained in this petition, the means of the petitioner are apparent to me, and his new connection with the house of Todd, which will be able to facilitate to him the accomplishment of the enterprise proposed, the profit whereof, if it succeed, will redound in part to the advantage of this remote country, miserable on account of its small population; and I giving particular attention to the recommendations which Senor El Baron de Carondelet, governor-general of these provinces, has communicated to me when he thought fit to appoint me commandant of this post and its dependencies, 'to seek by all means the mode of increasing the population and of encouraging agriculture in all its branches, and particularly the cultivation of hemp,' it appearing to me that the propositions which the petitioner makes are conducive to the attainment of this last recommendation. In virtue of this I concede to him and his heirs the tract of land which he solicits, in the place and with the boundaries that he

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prays for, provided there is injury to no one; and so that the same may be established, he shall cause a survey to be made, not obliging him to accomplish this immediately, as from the excessive extent of space it would cause him great expense if it were done before the arrival of the families which he is bound to cause to come from Canada, but so that, on their arrival and being put in possession, it shall be his duty to secure his property by means of exercising the power of survey, in order afterwards that he may make application to the governor-general to obtain his approval, with the title in form of this his concession."

By various conveyances the foregoing claim was vested in Glenn and Thurston, who filed their petition in the district court of Arkansas, seeking to have it confirmed according to the act of 1844. They set forth Clamorgan's application, the commandant's decree thereon, and the mesne conveyances.

The attorney of the United States answered, and among other grounds of defence set up, alleged that he was totally uninformed as to the several statements and allegations contained in the petition; that he denied said statements and allegations, and required full proof thereof, as well as of all other matters and things necessary or material to establish the validity of the claim of said James Clamorgan. On these issues the parties went to trial.

The petitioners established by proof that Clamorgan's application and the governor's decree thereon were genuine, and also proved a due execution of the several conveyances vesting title in Glenn and Thurston. No other evidence was introduced by either side. The district court dismissed the petition; and from that decree an appeal was prosecuted to this court.

No controversy has been raised drawing in question the validity of the mesne conveyances; nor do we suppose there is any difficulty in locating the land demanded in Clamorgan's petition. *Primâ facie*, its locality is sufficiently described to authorize a survey thereof, according to the Spanish usages.

As regards the commandant's power to make the concession to Clamorgan, there is more difficulty. In 1796, when Delassus was commandant at the post of New Madrid, he also acted as sub-delegate, and exercised the faculty of granting conces-

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sions for, and ordering surveys of, land. In the exercise of his functions, he was directly subordinate to the governor-general at New Orleans, and acted according to his instructions. Nor was he in any degree dependent on the lieutenant-governor of Upper Louisiana, residing at St. Louis, as appears by letter of August 26, 1799, from Morales to Delassus, reciting the facts. The letter is found in document 12 of senate documents, 2d session, 21st congress, p. 29, and filed as evidence by Judge Peck, preparatory to his trial before the senate of the United States. In a deposition of Delassus, forming part of the documents filed before the board of commissioners for Missouri in 1833, and afterwards returned by them for the consideration of congress, Delassus states the fact that he, as commandant at New Madrid, exercised the powers of sub-delegate. Document No. 59, p. 17, House Reports, 1st session, 24th congress.

This commandant's powers were therefore coextensive with those of the lieutenant-governor at St. Louis, in distributing the public domain. Having acted under the governor-general, to whose orders and instructions the commandant was bound to conform, it becomes necessary to ascertain what these instructions were in the present instance; and taking the facts stated in Clamorgan's memorial and in Delassus's decree thereon to be true, as we are compelled to do, it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan, in accordance with the governor-general's instructions. That the governor-general had power thus to contract, was held by this court when the agreements of Maison Rouge and Bastrop were before it for adjudication; and having done the same through his deputy in this instance, the acts of that deputy cannot be called in question on the assumption that he exceeded his powers.

In the document No. 59, above referred to, Delassus states what his practice was in giving out concessions. He kept no books in which the fact was recorded. All he did was to indorse his decree on the petition and return it to the party demanding the land, and the party might hand it to the surveyor or retain it at his option. That he (Delassus) believed the surveyor made a note of the concession of record, but whether be-

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fore or after the survey was made, he knew not, as that matter did not concern the deponent. That no time was limited within which the party was bound to survey.

Thus it appears that Clamorgan got the paper title relied on in the ordinary form, and which he retained in his own hands until after Upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it; nor was it surveyed during the time Spain governed the country; nor has any claimant under Clamorgan ever had possession, so far as this record shows.

The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to the consideration of the mere title paper, standing alone. On its true meaning this controversy depends.

1. The petition of Clamorgan, and Delassus's decree on it, must be construed together, there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions. 2. What is stated in either paper, as to facts or intent, must be taken as true. Such are the rules laid down in *Boisdoré's case*, 11 How. 87, and which apply here.

The country was vacant, and greatly needed population, which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land. That he would introduce cultivators of hemp, and artisans skilled in the manufacture of cordage, and would grow hemp and make cordage to an extent so large as to be of national consequence.

On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract; all that he did was a presentation of his petition, and the obtaining of Delassus's approval and decree on it. This paper he retained about thirteen years, when it was assigned to Pierre Choteau May 2d, 1809, by a deed of conveyance for the land claimed. In view of these facts, several legal considerations arise.

It was held in *Arredondo's case*, 6 Peters, 711, that by consenting to be sued, the United States had submitted to judicial

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action, and considered the suit as of a purely judicial character, which the courts were bound to decide as between man and man litigating the same subject-matter; and that, in thus deciding, the courts were restricted within the limits and governed by the rules congress had prescribed.

The principal rules applicable here are, that in settling the question of validity of title, we are required by the act of 1824 to proceed in conformity with the principles of justice, according to the law of nations, the stipulations of the treaty by which the country was acquired, and the proceedings under the same; the several acts of congress in relation thereto, and the laws and ordinances of the government from which the claim is alleged to have been derived.

When deciding according to the law of nations, and the stipulations of the treaty, we are bound to hold that such title as Clamorgan had by this concession or first decree stood secured to him as private property; and that the claim being assignable, the complainants represent Clamorgan. And this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the Spanish colonial government existing and in force when the grant was made. By these the commandant, Delassus, had authority to contract and give concessions, and make orders of survey, by first decrees, either with or without conditions, as this court held in the case of *Soulard* v. *The United States*, 10 Peters, 144, provided the concession was founded on a consideration *primâ facie* good; either past when the concession was made, or to follow in future. Here the consideration was to arise by future performance on the part of the grantee. But it is insisted, forasmuch as a title vested in Clamorgan by the grant to him, even admitting it was encumbered with conditions, still as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose; nor could want of performance be set up as a defence in this suit.

If the premises assumed were true, the conclusion would necessarily follow; and *Arredondo's case* is relied on in support

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of this position, and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida.

The subsequent condition there relied on to annul the grant was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held, and the grantee discharged from its performance. But in Clamorgan's case, the conditions to occupy and cultivate were precedent conditions; they addressed themselves to the governor-general, and their performance was required in advance. Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land, and furthermore to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land in the name of the United States, it necessarily follows the same duty is imposed on us that would have devolved on the governor-general, had the Spanish government continued in Louisiana.

By the Spanish regulations, Clamorgan was not recognized as owner of a legal title without the further act of the king's deputy, the governor-general, or the intendant-general, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the crown; and the same rule has been applied in this country. No standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals until confirmed either by congress directly, or by a special tribunal constituted by congress for that purpose. For our opinion more at large on this subject, we refer to the case of *Menard* v. *Massey*, 8 How. 305, 306, 307.

As we are asked to decree the final title, and bound to do so, in like manner as the Spanish governor-general or intendant was bound, it follows we may refuse for the same legal reasons

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that they may refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity to our previous decisions in other cases depending on similar principles?

Very many applications made for perfect titles to the district courts, under the act of 1824, have been resisted, because subsequent conditions had not been complied with; first, such as mill grants in Florida, where the usual quantity of 16,000 acres was given by concession, with a condition that the mill should be built within a specified time; second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the *case of Wiggins* (14 Pet. 334) and *Boisdoré* (11 How. 63); third, where by concession parties were required by special regulations to levee and ditch on the river's front in Lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp-growers, and the manufacture of cordage by Clamorgan; and yet no one has ever successfully maintained that a party having such concession could hold the land and obtain a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary. In all these cases it was held that performance was a condition precedent, and the real equity on which a favorable decree for a patent could be founded under the act of 1824.

If Clamorgan's concession carries with it conditions similar in principle, it must abide by this settled rule of decision. This depends on the true meaning of his contract with the Spanish authorities. He agreed to establish a colony, by introducing a foreign population, and to grow hemp and manufacture cordage, to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million of arpens of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue.

So far from complying, Clamorgan never took a single step after the agreement was made, and in 1809 sold out his claim on speculation for the paltry sum of $1,500. Under these

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circumstances, we are called on to decide in his favor, according to the principles of justice, this being the rule prescribed to us by the act of 1824 and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason than that he had the ingenuity to induce a Spanish commandant to grant the concession founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such conclusion would be equally contrary to the policy pursued by Spain, which was to make grants for the purposes of settlement and inhabitation, and not to the end of mere speculation. We so held in *Boisdoré's case* (11 How. 96), and the principle applies even more strongly in this case than it did in that; as there something was done towards compliance, and here nothing has been attempted.

The remaining ground on which the complainants demand a confirmation is the following: "Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the grantee, the estate vested without such performance, because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession."

That Clamorgan could take no step after the change of government, is not open to controversy. By the 14th section of the act of March 28, 1804, which establishes the Territories of Orleans and Louisiana, Clamorgan was prevented from doing any further act in support of his title, had he been disposed to do so. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants, whose concessions carried with them conditions that had not then been complied with. The 1st section of the act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts as to the validity of title and standing of the various claims, to the condition they held before the 10th of March, 1804.

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By the 3d article of the treaty of cession by which Louisiana was acquired, it was stipulated that the inhabitants of the ceded territory should be admitted as soon as possible and become citizens of the United States, and be maintained in the free enjoyment of their property in the mean time. But no time was provided by the treaty within which conditions appertaining to imperfect grants of land might be performed; this was left to the justice and discretion of our government; and in a due exercise of that discretion, the acts of 1804 and 1824 were passed, and to these acts of congress the 2d section of the act of 1824 commands us to conform.

The treaty addressed itself to the political department; and up to the passing of the act of 1824, that department alone had power to perfect titles and administer equities to claimants. And when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, namely, that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title, but that its validity should be determined according to its condition at that date.

All claims lying within the territory acquired by the treaty of 1803, which have been brought before the courts according to the acts of 1824 and 1844, have been compelled to abide by this test. Great numbers have been rejected because the conditions of occupation and cultivation had not been complied with before the restraining act of 1804 was passed, or before the 10th day of March, 1804.

Nor have the claimants under Clamorgan more right to complain than others. His neglect extended through nearly eight years, during the existence of the Spanish government; whereas many similar claims have been rejected where the neglect was not half so long. If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the onerous conditions his contract imposed, so could every other claimant who had neither taken possession, nor in any manner complied with his contract, do the same; and on this assumption, concession issued by France or Spain would be

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without condition, and a simple grant of the land described in the paper. Its genuineness, and proof of identity of the land, would settle the question of title.

No tribunal has ever accorded any credence to this claim. Two boards of commissioners have pronounced it invalid, the first in 1811, and the second in 1835; the latter on the ground that the conditions of the grant had not been complied with. By this decision it fell into the mass of public lands, according to the third section of the act of July 9, 1832, which declares that the lands contained in the second class (being that rejected) shall be subject to sale as other public lands. By the act of the 17th of June, 1844, another opportunity was afforded to apply to the district court for a confirmation. That court agreed with the board of commissioners, and again declared the claim invalid, because the conditions had not been complied with, and dismissed the petition; and with this decree we concur.

Decree affirmed.

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CASES

DECIDED IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE

NINTH CIRCUIT,

FROM 1839 TO 1856.

JOHN HALDERMAN, complainant, *vs.* PETER HALDERMAN, defendant.

1. Before a bill can be taken for confessed, the defendant must have been ruled to answer, according to the 17th rule of equity adopted in 1822. 5 Wheaton, 5.
2. The 18th rule commented on and construed in relation to filing answer.
3. A court of equity would not permit a bill to be taken for confessed, when at the same time the defendant offers to file his answer; but the court can impose terms on the defendant.

April, 1839. — Bill in chancery, before Benjamin Johnson, district judge, holding the Circuit Court.

F. W. Trapnall and *John W. Cocke*, for complainant.

A. Fowler, for defendant.

OPINION OF THE COURT. — This is a motion by the complainant to take the bill for confessed, and to reject the answer of the defendant, which he now offers to file, on the ground that the time allowed by law for filing the answer has elapsed. The

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bill was filed on the 30th of November last, and the subpœna made returnable to the first day of the present term, which commenced on the 4th Monday in March last, and was duly executed on the defendant on the 12th day of February of the present year. The eighth rule of practice for the courts of equity of the United States, prescribed by the supreme court of the United States in 1822 (7 Wheaton, 5), provides, that "if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly." A question here arises, What proceeding on the part of the plaintiff is necessary in order to entitle him to take his bill for confessed? The answer is furnished by the seventeenth rule of the supreme court, which provides, "that rules to plead, answer, reply, and rejoin, when necessary, shall be given from month to month, with the clerk in his office, and shall be entered in a rule book, for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof." Before any proceeding can be taken by the plaintiff, on account of the failure of the defendant to file his answer, he must give the rule to answer as prescribed in the above rule of practice. If this is not required, the seventeenth rule of practice is useless, and destitute of any sensible meaning whatever. In this opinion, I am sustained by Judge Washington, in the case of *Pendleton* v. *Evans*, 4 Wash. C. C. Rep. 336, who says: "I hold it to be indisputable to the success of the application to take the bill for confessed, that the defendant should have been ruled to answer under the seventeenth rule of the court." He further remarks in the same case, that "the rules do not require that the bill should be set down for hearing in order to the decree *nisi* being made; but as the court, according to the English practice, is to pronounce the decree, and not to permit the plaintiff to take such a decree as he is willing to abide by, there seems to be a propriety in removing the cause from the rule docket to that of the court, by setting down the cause for hearing. This will operate, too, as an additional notice to the defendant, without producing any additional de-

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lay." Upon this point, in relation to the necessity of setting down the cause for hearing upon the court docket, I withhold the expression of any positive opinion, merely observing that I do not at present very clearly perceive its utility.

It may be further remarked, that by the eighteenth rule of the court, the defendant is allowed, at any time before the bill is taken for confessed, or afterwards with the leave of the court, to demur or plead to the whole bill or part of it, and he may demur to part, plead to part, and answer as to the residue.

Now it must be admitted that an answer to the whole bill is not enforced by the letter of the above rule; but it is difficult to perceive any good reason why the defendant shall not be permitted to file his answer to the whole bill, when he is allowed to demur or plead to the whole bill or part of it, and demur to part, plead to part, and answer as to the residue. By a liberal construction of the rule, it seems to me that an answer to the whole bill is as clearly allowed as a demurrer or plea to part, and an answer as to the residue. Indeed, it seems to me that in no case would a court of equity permit a bill to be taken for confessed, when at the same time the defendant appears and tenders his answer. In such cases, it is always in the power of the court to impose terms upon the defendant, and thus in some degree compensate the plaintiff for the laches of the defendant. Dick. 70; 3 Paige, 408; 6 Ib. 377.

The motion to reject the answer is overruled, and the same is ordered to be filed.

JAMES D. CAGE, plaintiff, *vs.* RICHARD JEFFRIES, defendant.

1. Every material and traversable fact was formerly required to be alleged with a venue, as it regulated the summoning of the jury, who were anciently always returned from the vicinage; but with us, in transitory actions, venues are of no practical utility.
2. The jurisdiction of the court is not affected by the venue laid, or a wrong one, or by the entire omission to lay one.
3. When two States are named, one in the margin, and the other in the body

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of the declaration, the words "State aforesaid" have a general reference to the State or venue in the margin.

4. A special demurrer may be filed in all actions in the courts of the United States. 1 Stat. 91.

April, 1839. — Debt, determined before Benjamin Johnson, judge of the district court, holding the Circuit Court.

William C. Scott, for plaintiff.

William Cummins and *Albert Pike*, for defendant.

OPINION OF THE COURT. — This is an action of debt, in which the plaintiff declared as follows, namely: —

"James D. Cage, a citizen of and residing in the State of Tennessee, complains of Richard Jeffries, a citizen of and residing in the State of Arkansas, of a plea that he render unto him the sum of five hundred and thirty-nine dollars, which to him he owes and from him unjustly detains.

"For that whereas the said defendant, on the 1st day of April, 1837, at the State aforesaid, by his certain writing obligatory, promised to pay," and then proceeds as in the ordinary form.

To this declaration, the defendant has filed a special demurrer, and assigned as cause "the uncertainty of the venue laid in the declaration, the averment being that the defendant, at the State aforesaid, by his certain writing obligatory, promised to pay, having previously mentioned the State of Tennessee and the State of Arkansas."

In England, the general rule respecting laying the venue in declarations was, that every material and traversable fact should be alleged with a venue, as it regulated the summoning the jury, who were anciently always returned from the vicinage, on account of their supposed personal knowledge of the matter in dispute. With us venues in transitory actions are of no practical utility (Stephen on Pl. 280 to 292, and cases cited in the notes), and the rule became so modified there, that in transitory actions the jurisdiction of the court was not affected by the venue laid, or the entire omission to lay one. Cowper's Rep. 176. Venues, however, have been always considered as a part of the technical form, but not as a substantial part of the declaration. A declaration without a venue, or with a wrong one,

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may be bad in form, by reason of long, immemorial, and technical usage (1 Chitty's Pl. 310); but where the jurisdiction of the court depends on the sum in controversy and citizenship of parties, the objection ought not to be allowed.

There does not, however, appear to be any uncertainty in the venue laid in the declaration in this case. The venue, as laid in the margin, is the State of Arkansas, and the State of Tennessee is only mentioned as a part of the description of the plaintiff. The words "State aforesaid" have a general reference to the State of Arkansas in the margin, and not a particular reference to the addition of the plaintiff's name. 1 Chitty's Pl. 305. Where a county is in the margin of a declaration, and the trespass or thing is alleged to have been done at D., and it is not shown in what county D. is, yet it is well enough, because it shall be intended to be in the same county stated in the margin; for a general intendment shall there serve. 3 Wilson, 340; 1 Saund. Rep. 308, note 1; 5 Mass. R. 95.

A question has been made as to whether a special demurrer is allowable by the practice of this court. The 32d section of the judiciary act of congress of 1789 (1 Story's Laws U. S. 66), expressly gives the right of filing a special demurrer in all actions in the courts of the United States.

Demurrer overruled.

THE UNITED STATES *vs.* MOSES TERREL, a Cherokee Indian.

1. There is no law of congress punishing the crime of robbery, as such, committed on land; and judgment on an indictment therefor will be arrested.
2. As to jurisdiction of the United States courts in criminal cases.
3. Opinion of Judge Wells of Missouri, in note.

April, 1840. — Indictment for robbery, in the Circuit Court, before the Hon. Benjamin Johnson, district judge, holding the court.

The indictment charged in proper form that Moses Terrel, a Cherokee Indian, on the 29th of November, 1839, in the Indian country west of Arkansas, feloniously assaulted John Ballard,

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a white man, "and in bodily fear and danger of his life then and there feloniously did put the said John Ballard, and one bowie-knife of the value of ten dollars, one pocket-knife of the value of fifty cents, and one pistol of the value of ten dollars, the goods and chattels of the said John Ballard, from the person and against the will of the said John Ballard then and there feloniously and violently did steal, take, and carry away." The defendant plead not guilty, and the case was tried before the Hon. Benjamin Johnson, district judge, holding the circuit court: *William C. Scott*, district attorney, for the United States; *F. W. Trapnall* and *John W. Cocke*, for the defendant.

The jury found the defendant guilty in manner and form as alleged in the indictment, and he filed a motion in arrest of judgment, on the principal ground that there was no law of congress punishing robbery committed on land, and that the court had no jurisdiction of the offence; and this motion was argued by the counsel respectively.

The COURT said, it was not to be doubted that the only authority which this court had to try and punish offences was derived from acts of congress; for although the courts of the United States might, in the absence of statutory provisions, look to the common law for rules to guide them in the exercise of their powers, in criminal as well as civil causes, yet it is to the statutes of the United States, enacted in pursuance of the constitution, that these courts must resort to determine what constitutes an offence against the United States, and whether committed on the land or the "high seas." The United States have no unwritten criminal code, to which resort can be had as a source of jurisdiction, but as was said in *The United States* v. *Hudson* (7 Cranch, 32; 2 Cond. Rep. 406), "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence," before cognizance can be taken of it.

Referring to the statutes of the United States to ascertain what offences on land are punishable, it will be perceived that they are few, and that the crime of robbery is not among them. This is an indictment for robbery. Of larceny, this court has cognizance (Gordon's Digest, 939); and although it is true that

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every robbery includes a larceny, yet it would be quite impossible to uphold this proceeding on that ground, because the indictment is for the crime of robbery as such, and the finding of the jury, responsive to it, is that the defendant is guilty in manner and form as charged in the indictment. There is no alternative after verdict but to treat it as a case of robbery. Doubtless the party might have been legally indicted and found guilty of larceny; but of robbery, as such, this court has no jurisdiction, and judgment must be arrested.[1]

Judgment arrested.

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[1] This decision is sustained by an able opinion of Judge Wells, district judge of Missouri, reported in 1 Western Law Journal, 246, and on account of its bearing on the question, and general interest, is here transcribed at length.

At a circuit court of the United States, for the District of Missouri, held at Jefferson City in September, 1843, the Hon. Robert W. Wells, district judge, presiding, absent Catron, associate judge of the supreme court; the grand jury appeared in court and requested the answer of the court to the following inquiry: "Is robbery, when committed in the Indian country, indictable as such, and punishable with death?" The court informed the jury that it could only be indicted and punished as a larceny; and Judge Wells, holding the court, gave the following written opinion:—

Is robbery committed in the Indian country attached to the District of Missouri a crime indictable as such, and punishable with death?

The 25th section of the act of 1834, "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," provides, "that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country."

If robbery committed in "a place within the sole and exclusive jurisdiction of the United States," be punishable with death, then, if committed in the Indian country, it is also punished with death, and not otherwise.

The 16th clause of the 8th section of the 1st article of the constitution provides that congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of the particular States and the acceptance by congress become the seat of government of the United States, and to exercise the like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Here is a grant of "exclusive legislation" which is jurisdiction, and here we are to look for the grant of sole and exclusive jurisdiction as to places, to the United States. *United States* v. *Bevans*, 3 Wheaton, 386.

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The 3d section of the act of 1790, "for the punishment of certain crimes against the United States," (1 Stat. 112) provides, "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted shall suffer death." Other sections provide for other offences committed in the same places, but nowhere provide for the crime of robbery committed in these places, that is, in "forts, arsenals, dockyards, magazines, or in any other place or district of country within the sole and exclusive jurisdiction of the United States."

Here is the exercise by congress of the grant of exclusive jurisdiction, "as to places," given by the clause of the constitution above cited; and the terms, "any other place or district of country," refer to territorial objects of a similar character to those enumerated. *United States* v. *Bevans*, supra.

The constitution (art. 1, sect. 8) gives congress the power "to define and punish piracies and felonies committed on the high seas, and other offences against the law of nations." Here there is no grant of sole and exclusive jurisdiction as to place; for everybody knows that the high seas are common to all nations, and that every nation punishes crimes committed thereon. 1 Kent, 186, 187.

"The judicial power shall extend to all cases of admiralty and maritime jurisdiction." Const. art. 3, sect. 2. Here is no grant of sole and exclusive jurisdiction as to place, although there may be as to certain crimes. *United States* v. *Bevans*, supra, is in point, and Chief Justice Marshall, in delivering the opinion of the court in that case, says:—"Can the cession of admiralty and maritime jurisdiction be construed into a cession of the waters on which these cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory, or of general jurisdiction. It is obviously designed for other purposes. It is in the 8th section of the 1st article we are to look for cessions of territory and of exclusive jurisdiction over this district, and over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

In extending the judicial power in all cases of admiralty and maritime jurisdiction, the 8th section of the act of 1790 provides, "that if any person or persons shall commit upon the high seas, or upon any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or vessel shall piratically or feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars (the section enumerates other piracies), every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death. And the trial of crimes committed on the high seas, or in any place out of the

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jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought." 1 Stat.

This is the section which it is alleged is in force in the Indian country, and by the provisions of which it is said robbery there committed is punishable with death.

If the places mentioned in this section be within the sole and exclusive jurisdiction of the United States, then it is in force in the Indian country. But it is the place, and not the crime, which is required to be within the sole and exclusive jurisdiction of the United States.

If this 8th section be but the exercise by congress of the power of extending the judicial power to all cases of admiralty and maritime jurisdiction, the matter, as I conceive, is decided by the case of the *United States* v. *Bevans* (3 Wheat. 386), above alluded to; for if, as shown, that grant of power was not intended to give exclusive jurisdiction as to places, then congress could not extend it to that length. And if it be not founded on that power, I confess I am wholly at a loss to know on what clause or provision of the constitution it is based; for, as already shown, if founded on the power to define and punish piracies and felonies on the high seas, and other offences against the law of nations, it would be absurd to claim the sole and exclusive jurisdiction as to the place there mentioned, that is, the high seas.

But I think it can be shown that the 8th section of the act of 1790 was not intended by congress to apply to any crimes but piracies; that none of the places mentioned in that section are within the sole and exclusive jurisdiction of the United States, or so declared to be; and that the 25th section of the act of 1834 meant, by "any place within the sole and exclusive jurisdiction of the United States, and the laws for the punishment of offences committed therein," the forts, arsenals, magazines, dockyards, and other needful buildings, and the provisions of the act of 1790 applicable thereto.

The crime of robbery, as already mentioned, is not included in any of the provisions for the punishment of crimes committed in "any fort, arsenal, magazine, dockyard, or other place within the sole and exclusive jurisdiction of the United States."

Larceny is included, and I presume every robbery includes a larceny. But larceny is not punishable by these provisions with death.

In no part of the act of 1790 are "the high seas, or rivers, havens, basins, or bays, out of the jurisdiction of any particular State," spoken of, considered, or treated as places within the sole and exclusive jurisdiction of the United States; whereas the forts, arsenals, magazines and dockyards, places on land, are always enumerated and spoken of as the places within the sole and exclusive jurisdiction of the United States.

Nor are the rivers, havens, basins, or bays, out of the jurisdiction of any particular State, ever spoken of as including the internal watercourses of our territories, or of any country, but always as the seas or the high seas, which would wholly exclude the idea of their being internal waters. Thus the 6th section provides for the punishment of misprision of felony "upon the high seas, or

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within any fort, arsenal, dockyard, magazine, or other place or district of country under the sole and exclusive jurisdiction of the United States." The 7th section provides for the punishment of manslaughter, when committed in any "fort, arsenal, dockyard, or other place or district of country under the sole and exclusive jurisdiction of the United States." The 8th section provides for the punishment of piracy, which includes murder, robbery, &c., "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State." The 9th section provides for the punishment of any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, by a citizen of the United States, under color of a commission from a foreign State, &c., "upon the high seas." The 10th section provides for the punishment of accessories "upon the land or the seas." The 11th section provides for the punishment of accessories after the fact "upon the land or at sea." The 12th section provides for the punishment of manslaughter "upon the high seas." The 13th section provides for the punishment of maiming "within any of the places upon land under the sole and exclusive jurisdiction of the United States, or upon the high seas." The 15th section provides for the punishment of larceny and other offences "within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas."

It will thus be seen, the "rivers, harbors, basins, and bays out of the jurisdiction of any particular State," "the high seas," "at sea," &c., in all this statute, seem to mean the same thing. And this is the English statute law and common law. For rivers, harbors, basins, bays, &c. out of the limits of any particular country, are generally denominated "high seas" or "sea" (2 Chitty's Crim. L. 891, 1127; 2 Hale, 12, 16), and are within the admiralty jurisdiction. Not but that there is a distinction, correctly speaking, between "high seas" and "seas," but the distinction is nice, and not frequently attended to.

The supreme court has decided, however, that manslaughter, committed in a foreign river above the forts, cannot be punished under the 12th section.

Indeed to me it is manifest that congress so understood it, because if the terms "seas," "high seas," and "at sea," do not embrace the "rivers, harbors, basins, and bays within the jurisdiction of any particular State," then there is no punishment for many offences committed in those rivers, basins, harbors, and bays out of the jurisdiction of any particular State, which are yet punishable when committed at sea or on land. Thus it is with maiming, in section 13, which is punishable if committed "within any of the places upon land within the sole and exclusive jurisdiction of the United States, or upon the high seas;" so also of the offences specified in sections 10 and 11. The declaring an offence to be piracy, which is done in the 8th section, or robbery, would of itself show that it must be committed on the seas. "The word itself is derived from a Greek word which signifies to pass over the sea, and refers rather to a place than a specific crime." 2 Chitty's Crim. L. 1127; 3 Just. 113. And the crime, both by the laws of England and America, and by the law of nations, is defined to be "robbery, or forcible depredation on the sea, *animo furandi*." 4 Bl. Com. 71; *United States* v. *Smith*, 5 Wheat. 153; *The United States* v. *Furlong*, Ib. 184; 1 Kent's Com. 183.

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In England, the mouths of great rivers without the limits of any county, where the sea ebbs and flows, are considered as part of the sea, and within the admiralty jurisdiction. 2 Hale, 12, 16.

I think it manifest, from what has been said, that the 8th section of the act of 1790, and which declares robbery, when committed on the high seas, or in any river, basin, or bay, without the limits of any particular State, to be piracy, applies only to the various parts of the sea, and not to any internal rivers or waters, whether in our own territories, the States, or foreign States. It may be said that the words of the act, "any river, haven, basin, or bay, without the limits of any particular State," would apply to a river and those waters within the interior of our territories, and so they would; and would also apply to those in the interior of any foreign kingdom; yet no person has ever contended that it was to be so construed.

This is further illustrated by the act of 15th May, 1820, the 3d section of which provides, that if any person upon the high seas, or upon any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in and upon any vessel, he shall be adjudged a pirate. This shows the sense of the legislature, as to the parts of a river in which piracy can be committed, that is to say, where the sea ebbs and flows.

The courts of the United States have never claimed any sole and exclusive jurisdiction as to the place under the 8th section of the act of 1790, or under that clause of the constitution which declares that the judicial power shall extend to all cases of admiralty and maritime jurisdiction, but, on the contrary, have expressly disclaimed. *United States* v. *Bevans*, 3 Wheat. 386.

I need not cite authorities to show that the seas are not within the sole and exclusive jurisdiction of the United States. The observations made above are intended to show that all places named in the 8th section are parts of the sea, and consequently, as it regarded crimes committed thereon, the United States have no sole and exclusive jurisdiction. If the 8th section does not apply to places within the sole and exclusive jurisdiction of the United States, then its provisions do not apply to crimes committed in the Indian country, as provided by the 25th section of the act of 1834 above cited.

To me it is manifest that congress intended to make no distinction in punishment of offences committed on land; and when it provided for the punishment of offences committed in the Indian country, it had the same object in view. Hence it is provided in the 25th section of the act of 1834, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country.

The places within the sole and exclusive jurisdiction of the United States are the forts, arsenals, dockyards, and magazines, so often mentioned in the act of 1790 as being places within the sole and exclusive jurisdiction of the United States. In regard to offences committed on the seas, it was thought proper to make special provisions; and as piracy, which is robbery on the seas, is an

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offence against all nations, and is perhaps by all punished with death, on account of its enormity and the difficulty of suppressing it, it was thought proper to punish it by our code with death. 1 Kent, 183.

The act of 1817, "to provide for the punishment of crimes and offences committed within the Indian boundaries," contained a provision substantially like that in the 25th section of the act of 1834. After its passage; the supreme court in 1818 decided that robbery committed on land was not punished with death; but otherwise if committed on the sea. *United States* v. *Palmer*, 3 Wheat. 627. Indeed this was admitted by the United States' counsel.

I have examined this case more at length than it might seem to require, because my brother judge decided at St. Louis, on application to be admitted to bail, that robbery committed in the Indian country was punishable with death. For the opinions of Judge Catron I have great respect; but the reasoning in his written opinion in this case does not satisfy me, and no authorities are cited. I will here copy that part of Judge Catron's opinion applicable to the point in which I consider the error to consist.

"The 8th section of the act of 1790," says he, "provides that if any person or persons shall commit upon the high seas, or on any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, such offender shall be deemed a felon and suffer death. The crime is to be committed, first, on the water, and second, out of the jurisdiction of any particular State.

"Suppose the crime of murder or robbery had been committed in a bay or in a river of Florida, within the country belonging to the Creek Indians, after Florida had been acquired by the United States from Spain, then the murderer or robber would have been punishable with death, because the place where the crime was committed was not within the jurisdiction of any particular State, and because it had been committed in a bay or river.

"The act of 1817, ch. 265 (3 Story's Laws, 1644) provides that if any Indian or other person shall, within the United States, and within any town, district, or territory belonging to any nation of Indians, commit any crime, which if committed in any place or district of country under the sole and exclusive jurisdiction of the United States would, by the laws of the United States, be punished with death, the offender, on conviction, shall in like manner be punished with death.

"In the case supposed of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony, committed in 'a place and district of country' under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790.

"The act of 1817 is as broad as it well can be, when it extends the same punishment to the land. It declares if the crimes shall be punishable with death 'in any place or in any district of country,' &c., the offender shall be punished in like manner as if he committed the same crime on the land and in the Indian country."

The judge then proceeds to say that the offence with which the prisoner was

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charged, robbery, was committed in the Indian country attached to the State of Missouri; that he had confessed the robbery, and that the crime was therefore not bailable.

I will here remark that the 8th section of the act of 1790, recited by the judge, declares that the person who shall commit the offences therein named, among others robbery, "shall be deemed, taken, and adjudged to be a pirate and a felon," and not merely a felon, as set forth by the judge; and that it also enumerates other offences besides murder and robbery, such as piratically and feloniously running away with a vessel, or any goods or merchandise to the value of fifty dollars; and that the act of 1817 is repealed, and that of 1834 sub stituted.

The judge says:—"In the case supposed, of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony, committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790."

Now if he means that "any river, harbor, basin, or bay," in the interior of Florida, and to which the admiralty jurisdiction does not extend, is a place enumerated in the 8th section, and in which piracy may be committed (for all the offences in that section specified are declared to be piracies), then I am constrained to dissent. But if, on the contrary, he means that the mouths of the great rivers where the tide ebbs and flows, and the harbors, basins, and bays, within the admiralty jurisdiction, are the places in the 8th section mentioned, and where piracy may be committed, then I am constrained to deny that they are "places under the sole and exclusive jurisdiction of the United States," as to crimes. The reasons and authorities I have already given.

In the territories of Florida and Louisiana, and perhaps others, certain laws, including the act of 1790, were declared to be in force. They are of course yet in force in Florida, and what remains of Louisiana, as purchased of France; and I presume in the other territories. Has any one ever heard of a prosecution for piracy committed in the interior waters of these territories, or of any person being hung for robbery, or running away with goods to the amount of fifty dollars? Certainly nothing of the kind ever took place in the Territory of Missouri, where the law was in full force, nor have I ever heard of it taking place anywhere.

If, as declared by Lord Coke, the word piracy "refers rather to a place than a species of crime," and if, as I have already shown, the definition of the crime, both by the laws of England and America, and the law of nations, is "robbery" or forcible depredation *animo furandi* on the seas, it would look somewhat singular to be punishing persons as pirates for offences committed in our territories two or three thousand miles from any sea; for all the offences in the 8th section, and many other offences, are declared to be piracies when committed on "any river, harbor, basin, or bay, out of the jurisdiction of any particular State."

The offence of larceny (which is included in a robbery) could clearly be pun-

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ished by the provisions of the 16th section, if committed in any fort, arsenal, dockyard, or magazine, under the sole and exclusive jurisdiction of the United States, and of course could be punished by the act of 1834 if committed in the Indian country; and, according to my brother judge, may also be punished under the 8th section. So we have two laws for the punishment of the same offence, and under each a different punishment.

The crime of murder is declared to be punishable when committed in a place within the sole jurisdiction of the United States, and is again declared to be punishable when committed on "any river, harbor, basin, or bay, out of the jurisdiction of any particular State." Now if rivers, harbors, basins, and bays, beyond the jurisdiction of any particular State, are places within the sole and exclusive jurisdiction of the United States, this double enumeration of the places was both idle and mischievous.

Let it be remembered that the act of 1790 was enacted, not for the territories or the Indian country, but was subsequently introduced therein, as far as it was applicable. Now it may well be questioned whether the crime of robbery on the seas, or piracy, can be committed in the Indian country. The place enters essentially into the offence, and an aggravated punishment is annexed to it on that account. It may be likened to robbery on or near the highway, by certain English statutes, to which an aggravated punishment is annexed. The offence could be committed only on or near a highway. 1 Hale's P. C. 535.

If we had such an act, and it was declared to be in force in the territories or Indian country, yet if there were no highways, the offence could not be committed there. Here we have the statute of 1790, which provides for the punishment of a great number of different crimes, and is if you please declared to be in force in the Indian country. Among them is robbery on the seas, or in rivers, harbors, basins, or bays, out of the jurisdiction of any particular State, or in other words piracy. If there are no such places in the Indian country, then the offence could not be committed there; or if robbery is there committed on land, it would not be the offence declared in the statute.

We have a code of criminal law for the land, that is, for forts, magazines, dockyards, arsenals, &c., which are under the sole and exclusive jurisdiction of the United States. That these are applicable to the Indian country, no one questions. We have also a code of criminal law for the seas. Now, according to the ingenious reasoning of my brother judge, we are to have a part of those intended for the seas transplanted to the Indian country, which gives them two sets of laws on the same subject, and makes different criminal laws for different parts of the same country enacted by the same authority. Thus if robbery be committed in a fort, arsenal, dockyard, or magazine, under the sole and exclusive jurisdiction of the United States, it is punishable, as a larceny, by fine and imprisonment.

But if committed in the Indian country, it is to be punished with death. If a person in the forts, arsenals, magazines, and dockyards run off with goods to the amount of fifty dollars, he is punishable by fine and imprisonment. But if he commit the same act in the Indian country, he is punishable with death.

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But a difficulty will arise, for as both codes are in force in the Indian country, by which shall we be governed? Crimes committed at sea have great and aggravated punishments denounced against them, because committed at sea. This is especially the case in regard to robbery on the sea, or piracy. 1 Kent, 183. And yet we are to punish them in the same manner, and to the same extent, when committed on land. These consequences must all follow, if my brother judge be correct in his opinion.

The act of 1790 was very unskilfully written. In some of its provisions, the words, if literally and strictly taken, go far beyond what could have been the intention of the writer; and the act has in some respects copied too closely the act of 39 Geo. III., without adverting to the difference in our constitutions. In but few of its provisions can it be taken literally. Thus section 8 provides for the punishment of all murders committed by foreigners within a foreign vessel, although upon the high seas; and so also of piracy. So it must also be in regard to piracy and murder committed on any river, &c., for this would lead us to the punishment of murders committed on rivers in the heart of foreign countries by their own citizens or subjects, where it would be absurd to claim jurisdiction. The act must be construed with an eye to the jurisdiction of the United States and the subject-matter, and then the 8th section will be construed not to apply to any place where the United States have not jurisdiction, nor to a place where piracy, from its nature, cannot be committed. *United States* v. *Palmer*, 3 Wheat. 631, 634.

I have referred to and examined the constitution and laws of the United States to show that the places "under the sole and exclusive jurisdiction of the United States," mentioned in the constitution, the act of 1790, and the acts of 1817 and 1834, were the same, and were places purchased by the United States, with the consent of the legislatures of the States in which they might be, for forts, arsenals, magazines, dockyards, and other needful buildings; and that the high seas, and rivers, harbors, basins, and bays, out of the jurisdiction of any particular State, were not places within the meaning of those acts, within the sole and exclusive jurisdiction of the United States.

I will now venture a step further. Judge Catron, in his opinion, says:—"In the case supposed of the commission of murder or robbery on the water in the Indian country, it would clearly be a capital felony committed in a place and district of country under the sole and exclusive jurisdiction of the United States, and be punishable by the 8th section of the act of 1790." Now I deny that the Indian country, even technically, either land or water, is under the sole and exclusive jurisdiction of the United States. The United States have not, in any instance within my knowledge, exercised such sole and exclusive jurisdiction. By the acts of 1817 and 1834, above referred to, nothing of the kind is attempted. They both expressly except crimes committed by Indian on Indian, and confine their operation to regulating trade and intercourse, and preserving peace. A sole and exclusive jurisdiction would exclude all Indian laws and regulations, punish crimes committed by Indian on Indian, and regulate and govern property and contracts and the civil and political relations of the inhabi-

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THE UNITED STATES *vs.* MOSES TERREL and DANIEL NEWMAN.

Assault with intent to kill, or an assault and battery when committed in the Indian country, are not punishable by the courts of the United States.

April, 1840. — The defendants, described as white men, were indicted in the circuit court for an assault with intent to kill, committed on John Ballard, also a white man, in the Indian country west of Arkansas, on the 29th of November, 1839, and they plead not guilty; and on trial before the Hon. Benjamin Johnson, district judge, holding the circuit court, the jury found them "guilty of an assault and battery, but not with the intent to kill."

The defendants moved in arrest of judgment, on the ground that there was no law of the United States to punish an assault with intent to kill, or an assault and battery committed in the Indian country, and this was argued by *F. W. Trapnall* and *John W. Cocke*, in support of the motion, and by *William C. Scott*, district attorney, against it.

OPINION OF THE COURT. — This case stands on the same footing as the one against Moses Terrel, just determined, and the same reasons for arresting the judgment apply.

There is no law at present to punish the offence when oc-

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tants, Indians and others, in that country. It would be wholly opposed to a self-government by any Indian tribe or nation. This self-government is expressly recognized and secured by several treaties between the United States and Indian tribes in the Indian country attached by the act of 1834 to Arkansas or Missouri District for certain purposes. This may be seen from the treaty with the Choctaws in 1830, and the treaty with the Creeks in 1832, and other Indian treaties.

The United States could not, therefore, assume a sole and exclusive jurisdiction over the Indian country without violating their treaties, which treaties are the supreme law of the land.

I conclude, therefore, that the Indian country is neither in fact nor in law under the sole and exclusive jurisdiction of the United States. Indeed if congress considered the Indian country as being under the sole and exclusive jurisdiction of the United States, it was wholly unnecessary to extend to that country the laws for the punishment of crimes committed in places under the sole and exclusive jurisdiction of the United States.

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curring upon land; and it rests with congress to provide a remedy. Assault with intent to kill, if committed on the "high seas" or within any place within the admiralty jurisdiction, and out of the jurisdiction of any particular State, is undoubtedly punishable in the courts of the United States, by fine and imprisonment, and confinement to hard labor. That is the only law on the subject, and it has no application to this case. Gordon's Digest, 939.

Judgment arrested, and defendants discharged.

WELLINGTON DONALDSON, plaintiff, *vs.* THOMAS HAZEN, defendant.

1. Where a demurrer was sustained to a declaration, on account of a failure to show a case within the jurisdiction of the court, and the declaration was afterwards so amended as to cure that defect, it becomes substantially a new suit, and the defendant may interpose a plea to the jurisdiction of the court, averring that both parties are aliens.
2. The facts and circumstances upon which jurisdiction over the case depends, must be set forth in the declaration or pleadings.
3. Various examples given, and cases cited to illustrate this rule.
4. And where the jurisdiction does not appear on the face of the declaration, such omission may be taken advantage of by motion to dismiss the suit, at any time before final judgment, or after verdict, by motion in arrest of judgment, or by bringing a writ of error and having the judgment reversed.

April, 1840. — Debt, determined before the Hon. Benjamin Johnson, district judge, holding the circuit court.

A. Fowler, for plaintiff.

Albert Pike, for defendant.

OPINION OF THE COURT. — This action of debt was brought by the plaintiff against the defendant, upon three promissory notes, alleged to have been executed by the defendant to Laughlan Donaldson, and by him assigned to the plaintiff. In his declaration the plaintiff failed to aver the citizenship of the assignor of the notes, and at the last term of this court the defendant filed a general demurrer to the declaration, which was sustained by the court, on the ground that the plaintiff had failed to state

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a case of which the court could take cognizance. The plaintiff then, with the leave of the court, amended his declaration by averring L. Donaldson to be a citizen of the State of Kentucky. On the 28th October, 1839, the defendant filed a plea to the jurisdiction of this court, averring both the plaintiff and defendant to be aliens. The plaintiff now moves the court to strike out this plea, and whether the motion should be sustained is the only question now to be considered.

The plaintiff contends that the defendant, by a general demurrer to his declaration, has waived the question of jurisdiction, and is no longer at liberty to raise it by plea. It may be conceded for argument, that if the demurrer to the original declaration did not reach the question of jurisdiction, but went only to the merits of the case, that even to the amended declaration the defendant would not be permitted to file a plea to the jurisdiction of the court.

But this would not help the case, because the demurrer was sustained on the sole ground that the plaintiff had failed to state a case in his declaration of which the court could take cognizance. That this judgment of the court upon the demurrer was in accordance with the well-settled principles of law, can hardly admit of a doubt.

It is settled by uniform and repeated decisions of the supreme court, that the facts or circumstances upon which the jurisdiction over the case depends must be set forth in the declaration. Thus, in a suit between an alien and a citizen, the alienage of the one and the citizenship of the other must be stated. *Hodgson* v. *Bowerbank*, 5 Cranch, Rep. 303; *Jackson* v. *Tentyman*, 2 Peters, Rep. 136.

When the suit is between citizens of different States the citizenship of the parties, to show not only that they are citizens of different States, but also that one of them is a citizen of the State where the suit is brought, must be stated. 3 Dall. 382; 1 Cranch, 343; 2 Ib. 9, 126; 3 Ib. 515; 5 Ib. 57; 6 Wheaton, 450; 1 Peters, 238.

And in a suit to recover the contents of a promissory note, or other chose in action, except foreign bills of exchange and debentures, brought by an assignee of such note, it is necessary

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to aver that the original promisee, through whom the plaintiff claims to recover, is an alien or citizen of another State, as the case may be, so as to show that he also might have maintained the action in the court to recover such contents. *Montalet* v. *Murray*, 4 Cranch, 46.

And when the want of jurisdiction is apparent upon the face of the declaration by reason of the omission of a statement of the facts requisite to bring the case within the cognizance of the court, it is well settled that the defendant may take advantage of such omission, either by motion, at any time before judgment, to dismiss the suit, or after verdict he may move in arrest of judgment, or after judgment he may bring a writ of error and have the judgment reversed. 4 Wash. C. C. Rep. 624; 9 Wheat. Rep. 537; Peters, C. C. Rep. 431; 5 Cranch, 57; 1 Ib. 343; 2 Peters, Rep. 136.

If, then, the omission is a good ground to arrest the judgment, or to reverse it on a writ of error, it can admit of no doubt that it is a good ground of demurrer; for no principle is better established, than that a demurrer will reach every defect in the pleadings, which would be fatal on a motion in arrest of judgment, or on a writ of error to reverse the judgment.

The defendant, then, by demurring to the original declaration, did not admit the jurisdiction of the court; for indeed the decision upon the demurrer was given upon the express ground of want of jurisdiction.

The plaintiff then amended his declaration, and for the first time stated a case within the jurisdiction of the court, and which became, as it were, a new case. The defendant could then only call in question the jurisdiction of the court by an appropriate plea, traversing the facts alleged by the plaintiff. Shall the defendant be precluded from filing a plea denying the facts upon which the jurisdiction of the court rests, because he demurred to the original declaration on the ground that it failed to state a case within the cognizance of the court? I think not. Such a rule would be unjust.

The motion to strike out the defendant's plea to the jurisdiction of the court is overruled.

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DAVID F. ROBINSON and HENRY G. PRATT, plaintiffs, *vs.* WILLIAM D. HOLT and JOSEPH H. HOLT, defendants.

1. An affidavit to hold to bail must state the indebtedness positively, and specify the exact amount due, leaving nothing to inference; otherwise it will be fatally defective, and the order allowing a capias will be vacated.
2. Affidavits to hold to bail must be strictly construed.

June, 1840. — Motion, before the Hon. Benjamin Johnson, district judge, holding the circuit court.

F. W. Trapnall and *John W. Cocke*, for the plaintiffs.

A. Fowler and *S. D. Blackburn*, for the defendants.

OPINION OF THE COURT. — This is a motion made by the attorney of the defendants, to vacate the order allowing the *capias ad respondendum*, and to direct the bail bond to be cancelled, and the common appearance of the defendants to be accepted in the action. Rev. Stat. sect. 24, p. 622.

The affidavit to hold to bail is in the following words: "District of Arkansas, ss. I, F. W. Trapnall, state on oath, and verily believe, that the said Robinson, Pratt & Co., the plaintiffs in the above suit, have a subsisting and unsatisfied cause of action against the said defendants W. D. and J. H. Holt, namely, a promissory note for $644\frac{20}{100}$, dated 26th October, 1838, and due at eight months with all exchange on New York, and that said defendants are about to remove out of the State of Arkansas."

The insufficiency of the affidavit is relied upon to sustain the motion, and the only question is, whether the affidavit is sufficient to hold the defendants to bail.

The statute of this State on the subject, which is adopted as the rule of practice in this court, provides, "that no order to hold to bail shall be made, unless the court or officer be satisfied by the affidavit of the plaintiff, or some other person for him, that the plaintiff has a subsisting and unsatisfied cause of action against the defendant." Rev. Stat. sect. 9, p. 620.

"When the amount of the plaintiff's demand is liquidated, the amount must be specified in the affidavit; and in all other cases the facts and circumstances must be stated therein." Rev. Stat. sect. 10, p. 620.

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This affidavit is certainly defective in not specifying the amount of the plaintiffs' demand. It is true it is stated that the plaintiffs have a subsisting and unsatisfied cause of action against the defendants, to wit, a promissory note for $\$644\frac{20}{100}$, dated the 26th October, 1838, and due at eight months; but it is not stated that the whole, nor how much of the note is unsatisfied and unpaid. This may be true, although only a small portion of the note remains unpaid. If one hundred dollars only, or any lesser sum was due on the note, still the affidavit is true, and the plaintiffs have a subsisting and unsatisfied cause of action against the defendants. The affidavit, thus failing to state and specify the exact amount due to the plaintiffs, but leaving it entirely uncertain, is on that account fatally defective, and was insufficient to require the defendants to be held to bail.

The affidavit is also defective, in not being positive as to the indebtedness of the defendants. It must expressly state that the defendant is indebted to the plaintiff, without any thing being left to be collected by inference. And if the words be not strictly words of reference, yet if they be of the same tendency, leaving any thing to be collected therefrom, the affidavit will be bad. 1 Sellon's Prac. 112, and cases there cited; 3 Term Rep. 575; 2 Nott & McCord, Rep. 585.

The present affidavit refers to the note of the defendants, which appears to be the basis of the belief of the affiant. In the case of *Taylor* v. *Forbes*, 11 East, 315, Lord Ellenborough observed, that "the strictness required in these affidavits is not only to guard defendants against perjury, but also against any misconception of the laws by those who make them, and the leaning of my mind is always to great strictness of construction, where one party is to be deprived of his liberty by the act of another;" and in this sentiment of the chief justice of England, I heartily concur. *Motion sustained.*

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ISAIAH DELOACH, plaintiff, *vs.* THOMAS DIXON, WILLIAM STRONG, and THOMAS J. CURL, defendants.

1. In a suit on a joint and several contract the plaintiff may sue all or one or any intermediate number of the co-contractors, although he could not do so at the common law. The statute of Arkansas authorizes this proceeding.
2. The plaintiff may, after bringing suit against all, discontinue as to any defendant before final judgment, although he may be served with process, and this will not operate as a discontinuance of the action, nor can the other defendants avail themselves of it.
3. A discontinuance and *nolle prosequi* stand on the same ground; neither operating like a *retraxit* to release and bar the cause of action.
4. A *nolle prosequi* amounts to no more than an agreement not to proceed further in that suit as to the particular person or cause of action to which it is applied, but does not prevent the commencement of a future suit.

August, 1840. — Motion, determined before Benjamin Johnson, district judge, holding the circuit court.

A. Fowler, for the plaintiff.

Chester Ashley and *George C. Watkins*, for the defendants.

OPINION OF THE COURT. — This is an action of assumpsit, brought by the plaintiff against the defendants, upon an assignment by them to the plaintiff of a promissory note, which, after presentment and demand for payment to the makers, they failed and refused to pay. The process having been served on all the defendants, they pleaded in abatement that Dixon was not a citizen of Arkansas at the commencement of the suit. The plaintiff thereupon discontinued his suit against him; and the defendants move the court to enter final judgment for them against the plaintiff; and whether this motion ought to be sustained is the only question to be now considered.

The defendants contend that as the action is founded on a contract, the discontinuance of the suit against one of the joint contractors after service of process on all, operates as a discharge and release of all the defendants from liability, and hence that final judgment should go in their favor. They further contend that the plaintiff can maintain an action against all or one only of the defendants, and not against an intermediate number; and, moreover, as he could not originally main-

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tain his action against two of the defendants, he ought not to be allowed to do that indirectly which he could not do directly.

If the rules of the common law upon this subject stood unchanged, the latter part of the defendants' argument is unquestionably sound; because at the common law, upon a joint obligation or contract, the plaintiff is compelled to sue all the joint makers or obligors; and upon a joint and several contract, must sue all or one and not an intermediate number.

But the common law in this respect has been changed by the statute law of Arkansas; and in deciding this case we are to look to that law, because the law of the State furnishes the rule, except where the constitution, treaty, or statute of the United States otherwise provide. 2 Stat. 70.

In the Revised Statutes of this State, (sect. 64, p. 628,) we find the following provision, namely, "Every person who may have cause of action against several persons, and entitled by law to but one satisfaction therefor, may bring suit jointly against all, or as many of them as he may think proper."

By which it is clear that the plaintiff had his election to bring the action against the two defendants, Strong and Curl, without joining their co-contractor Dixon. He had the unquestionable right to institute suit against all or one or any other number of the joint contractors. If the plaintiff could maintain the action originally against Strong and Curl, are they at all prejudiced by the institution of the suit against all three of the joint contractors, and its dismissal as to one of them? If so, I am unable to discover it, and certainly the injury has not been pointed out. The plaintiff commenced his suit against all who were liable on the contract, and was proceeding against them; but they file a plea in abatement of the action, averring that one of them, namely Dixon, is not amenable to the jurisdiction of the court. If this be so, shall the plaintiff then not be permitted to discontinue the suit as to the defendant beyond the jurisdiction of this court, and proceed against those within the jurisdiction, when it is plain, that he might in the first place have omitted Dixon altogether, and proceeded against the two resident defendants?

It is well settled doctrine, that in cases of tort against several

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defendants, the plaintiff may at any stage of the cause before final judgment, enter a *nolle prosequi* as to some of them, and proceed against the others. 1 Ld. Raym. 597; 1 Wils. 306; 2 Salk. 457; 1 Wils. 90; 1 Saund. Rep. 207, note 2. The reason is said to be that the action is in its nature joint and several; and as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution, so he might even after verdict against several elect to take his damages against either of them. Carthew, 20. These reasons are equally applicable to the present case; because here, too, the plaintiff had his election to sue all, or two, or one, of these defendants, and having sued all, it must follow that he may be permitted to dismiss against one, and proceed against the others. As he might in the first instance have sued any number he chose, so the right of election continues until final judgment, otherwise the privilege would be worthless. The practice of discontinuing is not injurious to defendants; and it is moreover calculated to suppress litigation, as a contrary practice would often compel a party to bring several suits to guard against the effect of a discontinuance of the entire action. No valid objection is perceived to this practice, and it seems to be sanctioned by authority.

There is an act of congress of 1839, (9 Laws U. S. 962,) which provides, "that where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties, who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit."

This provision I consider conclusive in support of the present opinion, and of the jurisdiction of the court.

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With regard to the effect of a discontinuance, little doubt can be entertained. A discontinuance and *nolle prosequi* stand on the same ground; neither of them operating, like a *retraxit*, to discharge, release, and bar the cause of action. The supreme court of the United States in the case of *Minor* v. *The Mechanics Bank of Alexandria*, 1 Peters, Rep. 74, says: "The nature and effect of a *nolle prosequi* was not well defined or understood in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit* operating as a full release and discharge of the action, and of course as a bar to any future suit. In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. And this latter doctrine has been constantly adhered to in modern times, and constitutes the received law."

The discontinuance, then, in the present case as to Dixon having no greater effect than a *nolle prosequi*, (3 Bl. Com. 296,) does not operate to discharge and release the cause of action, either as to Dixon or the two remaining defendants. The principles here advanced will be found to be fully sustained by the case just cited in 1 Peters, 74, and by the authorities summed up with great accuracy in a note of Mr. Serjeant Williams to the case of *Salmon* v. *Smith*, 1 Saund. Rep. 207, note 2. The motion must be overruled.

CORA ANN SLOCOMB, ROBERT RICHARDS, and ROMAZO MONTGOMERY, plaintiffs, *vs.* BEVERLY H. LURTY, and REASON BOWIE, defendants.

1. A draft of a third person does not discharge the original consideration, unless it is received unconditionally as payment.
2. Consent may be implied from circumstances and from silence.
3. Where H. drew a draft as agent for L. and B., to cover the purchase-money for goods, and the latter persons received the goods, and refused to pay the draft, on the ground that H. was not authorized to draw it: — *Held*, that

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the plaintiffs may abandon the counts in the declaration on the draft, and recover the value of the goods on the common count, for goods sold and delivered.

4. A verdict against evidence will be set aside and a new trial granted, the costs to abide the event of the suit.

June, 1841. — Assumpsit, determined before Benjamin Johnson, district judge, holding the circuit court.

F. W. Trapnall and *John W Cocke*, for plaintiffs.

A. Fowler, for defendants.

OPINION OF THE COURT. — This was an action of assumpsit brought by the plaintiffs against the defendants, upon a bill of exchange, for goods sold and delivered, and on an account stated. The defendants filed the plea of nonassumpsit sworn to, the effect of which was to deny the execution of the bill of exchange as well as the whole cause of action. Rev. Stat.

It may be admitted that the plaintiffs failed to prove the execution of the bill of exchange, and cannot recover upon the counts founded upon it. Can they recover on the evidence on the count for goods sold and delivered?

From the evidence it appeared that John J. Bowie, as the authorized agent of the defendants, purchased the goods from the plaintiffs, and the defendants afterwards received the goods. John J. Bowie expressly stated that Littlebury Hawkins did not assist him in purchasing the goods; he alone purchased them for the defendants, as their authorized agent. He also stated that when he purchased the goods from the plaintiffs, he perhaps told them that he was doing business for the defendants; but informed them that Hawkins was to pay them by a draft on Turman, Curdy & Co. He further stated that he believed that the draft declared on was drawn by Hawkins in liquidation of the amount of the purchase-money of the goods, and that he was present at the time; but did not know that Hawkins signed any other name than his own. It is, then, apparent from the evidence of John J. Bowie, that he, as the authorized agent of the defendants, purchased the goods from the plaintiffs, and at the time informed them that Hawkins was to pay, by a draft on Turman, Curdy & Co.; that Hawkins, in the presence of

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John J. Bowie, did draw such a draft and deliver it to the plaintiffs; but that he drew it as agent of the defendants, and not in his own name. Bowie does not say whether Hawkins was to draw in his own name, or as agent of the defendants; but the latter in fact drew as agent of the defendants in the presence of John J. Bowie, and delivered the draft to the plaintiffs.

It is highly improbable that John J. Bowie should have been ignorant of the character in which Hawkins drew the draft; but admitting that he was, still his presence gave sanction and approval to the bill of exchange as drawn by Hawkins. The plaintiffs received it with the approbation of John J. Bowie, because he was present; was cognizant of the matter, and did not object. 13 Peters, 119; 1 Sumner, 314; 2 Stark. Ev. 21.

Take another view of the case. Suppose the contract between the parties to be, that the plaintiffs would take the draft of Hawkins in his own name, as payment for the goods; does that discharge the defendants in case Hawkins does not give such a draft? I apprehend not. If Hawkins had given such a draft, and the plaintiffs had received it unconditionally as payment, it might have operated to discharge the defendants, whether the draft was afterwards paid or dishonored. 1 Salk. 124; 2 Ld. Raym. 929; 6 Cranch, 253, 264; 5 Johns. 72; 9 Ib. 311.

But there is no proof that Hawkins ever gave such a draft, and on the contrary there is full proof by John J. Bowie's deposition that Hawkins drew a draft as agent of the defendants, in their names and in the presence of John J. Bowie, and delivered it to the plaintiffs. This draft the defendants have refused to pay, and have denied the authority of Hawkins to draw in their names. There is full proof that the plaintiffs sold and delivered the goods to the defendants; and the latter having failed to show payment for the goods, it follows that they are entitled to recover on the common counts therefor. From the testimony it is clear enough that the goods were purchased on the credit of the defendants, and not on the credit of Hawkins, who cannot be held responsible for them, in any manner, or in any form of action.

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I am satisfied that the verdict of the jury in favor of the defendant, is contrary to the evidence, and a new trial must therefore be granted, the costs to abide the event of the suit.

Ordered accordingly.

SAMUEL JOHNSON and BENONI C. DUPLAINE, plaintiffs, *vs.* RICHARD C. BYRD, defendant.

1. At the common law, the plaintiff was compelled to sue all the partners, on a note executed in the name of the partnership, and a failure to do so might be pleaded in abatement.
2. But in Arkansas that rule has been changed by statute (Rev. Stat. 628), and the plaintiff on a contract, may sue all or as many of the joint contractors as he may see proper.
3. Where two statutes are inconsistent with each other, the latter impliedly repeals the former.
4. Statutes should be so construed that both may stand, if possible.

June, 1841. — Assumpsit, determined in the Circuit Court, before Benjamin Johnson, district judge.

Chester Ashley and *George C. Watkins*, for plaintiffs.

F. W. Trapnall and *John W. Cocke*, for defendant.

OPINION OF THE COURT. — This is an action of assumpsit brought by the plaintiffs against the defendant upon two promissory notes, signed by "R. C. Byrd & Co.;" the plaintiffs averring that the company consisted of the defendant and one Sterling H. Tucker. A plea in abatement has been filed by the defendant for the non-joinder of Sterling H. Tucker, averring that he is living and resident within this State.

The plaintiffs have demurred to this plea, and the sole question is, Can this action be maintained against the defendant alone? According to the principles of the common law the plaintiff is compellable to sue all the partners upon a note executed in the name of the copartnership, and cannot maintain it against a part of them only, if others are living. 7 Term Rep. 253; 1 H. Bl. 236. But a statute of this State has changed the common law upon that subject. Two provisions, incom-

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patible it is true, are contained in the Revised Statutes. Under the title of "Practice at Law," sect. 64, the following provision will be found: "Every person who may have cause of action against several persons, and entitled by law to but one satisfaction therefor, may bring suit jointly against all, or as many of them as he may think proper." This act is approved December 18, 1837. Under the title "Abatement," sect. 3, will be found the following provision: "When one or more of the partners of any company or association of individuals shall be sued, and the person or persons so sued shall plead in abatement, that all the parties are not joined in the suit, such suit for that cause shall not abate, if the plaintiff forthwith sue out a summons against the other partners named in such plea, and on the return of such summons, the names of the other partners named in such plea may be inserted in the declaration, and the suit shall proceed in other respects thereafter as if the partner named in such plea had been included in the original suit." Rev. Stat. 58. This act was approved December 9th, 1837.

That there is an incongruity and incompatibility in the provisions just recited, seems to me manifestly clear. One declares that any person who may have cause of action against several persons and entitled to but one satisfaction, may bring suit jointly against all, or as many of them as he may think proper. The other provides, that when one partner of a company shall be sued, he may, by plea in abatement, compel the plaintiff to join the other partners in the suit, and upon his failure to do so, his suit shall be abated.

By one enactment of the legislature the plaintiff on a joint cause of action is permitted to sue all or as many as he may think proper. By the other he is compellable to sue all the joint contractors.

These provisions, in my judgment, cannot stand together. They are repugnant and inconsistent, one with the other. If by one enactment the plaintiff has a right to sue one only of several joint contractors, can it be affirmed to be consistent and compatible with the right to allow the defendant to meet him with a plea in abatement for his failure to do that which by law he was not bound to do?

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If the plaintiff is permitted by law to sue one joint contractor, the defendant surely cannot, by the same law, be permitted to defeat his action, because he refuses to sue all joint contractors. In this repugnancy between the two enactments, one must yield to the other, as they cannot both stand and be reconciled. It is a well-settled principle that between repugnant and inconsistent enactments the latter law repeals the former. The provision conferring the right to sue one joint contractor was approved subsequently to the provision giving the right to one partner, if sued alone, to plead it in abatement. The latter, therefore, is impliedly repealed by the former.

The demurrer is sustained.

WILLIAM S. HOYT, WILLIAM WADE, ALFRED H. P. EDWARDS, and BENJAMIN HOYT, plaintiffs, *vs.* RICHARD C. BYRD, STERLING H. TUCKER, and JAMES SCULL, JR., defendants.

1. A bond conditioned for the payment of "all costs that may accrue in a suit, and be adjudged against the plaintiff," is a sufficient compliance with the rule requiring an indorser "for all costs for which the plaintiff may be liable in the suit."
2. Each party is supposed to pay his own costs as they arise in the course of proceedings; and the court will compel the performance of this duty by attachment if necessary.

June, 1841. — Motion to dismiss, determined before the Hon. Benjamin Johnson, district judge, holding the circuit court.

S. H. Hempstead and *R. W. Johnson*, for plaintiffs.

F. W. Trapnall and *John W. Cocke*, for defendants.

OPINION OF THE COURT. — The motion is to dismiss the suit, "because the plaintiffs have not filed, before the institution of this suit, a bond for costs as required by the rules and practice of the court."

The rule of this court, upon this subject, is as follows: "The clerk shall require of all non-residents of this district an indorser for costs." The following form upon the declaration, petition, or bill of complaint may be substantially pursued: "I, A. B. ac-

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knowledge myself security for all costs for which the plaintiff may be liable in this suit." The bond or indorsement made in this case is in the following words: "I acknowledge myself held and firmly bound to the defendants for all costs that may accrue in this suit, and be adjudged against the plaintiff." The objection taken to the bond just recited is, that it does not in substance conform to the one required by the rule. The rule requires a bond for "all costs for which the plaintiff may be liable in the suit;" and this bond is "for all costs that may accrue in this suit, and be adjudged against the plaintiff." If all the costs for which the plaintiff may be liable, may be adjudged against him, then the obligation of this bond is coextensive with the obligation required by the rule. It can admit of no doubt, that the court may and is bound to adjudge against the plaintiffs all the costs for which they are liable in this suit, upon the motion of those entitled to receive them.

Suppose the plaintiffs recover in this action their demand and costs of suit, and fail to collect the costs from the defendant, are they in that event exempted from the payment of the costs occasioned by them? I apprehend they are not, but that upon the application of those entitled, the court will order the plaintiffs to pay their costs, and will enforce the payment by a writ of attachment. 2 Tidd, 905; 1 Peters, C. C. R. 233.

This order is an adjudication and a judgment which may be enforced by the incarceration of the party against whom it is rendered.

According to the English practice, each party pays his costs, as they arise in the course of the proceedings, and upon their failure to do so the court will compel them to pay by the process of attachment. 2 Tidd, 905.

The same power is possessed by this court, and will be exercised whenever a party liable for costs shall fail to pay them. If, then, all the costs for which the plaintiffs are liable in this suit may be adjudged against them, and which cannot be doubted, it follows conclusively that the obligation of this bond is coextensive with the obligation required by the rule, and the motion must be denied. *Motion overruled.*

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RICHARD H. CHINN, plaintiff, *vs.* ROBERT HAMILTON, executor of Samuel P. Carson, deceased, defendant.

1. Interest need not be demanded in the declaration, nor its payment negatived in the breach.
2. The uniform practice is to declare for the debt alone, and interest is recoverable as damages.
3. Interest payable by the stipulation of the parties before the contract falls due, is a part of the contract, and the effect of a failure to demand and negative its payment, is that the plaintiff can only recover the debt and interest from the maturity of the note.
4. On a contract containing various undertakings, the plaintiff complaining of the breach of one, thereby waives any right as to the others.
5. A plaintiff is not allowed to split up various covenants or promises contained in one contract, and sue upon them separately, but he can have but one recovery, and the contract becomes merged in the judgment of the court.

July, 1841. — Debt, determined in the circuit court, before Benjamin Johnson, district judge.

A. Fowler, for plaintiff.

Albert Pike and *D. J. Baldwin*, for defendant.

OPINION OF THE COURT. — This is an action of debt upon a promissory note by which the testator, Samuel P. Carson, acknowledged himself indebted to Brander, McKenna & Wright, in the sum of $3,919.53, to be paid one day after the date thereof, with interest thereon at the rate of 10 per cent. per annum, from the date thereof until final payment, for value received, which promissory note has been assigned by Brander, McKenna & Wright to the plaintiff. In his declaration the plaintiff demands the sum of $3,919.53, and assigns as a breach the non-payment of the said sum of $3,919.53, or any part thereof, and makes no averment in relation to the interest, and concludes the breach in these words: "To the damage of the plaintiff two thousand dollars."

The defendant has filed a general demurrer to the declaration, and insists that it is substantially defective in omitting to aver the non-payment of the interest, as well as the failure to pay the original debt; and this is the only question presented by the demurrer.

In actions upon obligations, or promissory notes for the pay-

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ment of money, containing no stipulation in regard to interest, it has not been deemed necessary to demand in the declaration the interest that may be due, nor to negative its payment in the assignment of breaches.

The uniform and settled practice is to declare for the debt alone, and interest is recovered as damages for its detention. Upon a failure to pay money at the time it becomes due, the creditor is justly and legally entitled to be remunerated by the debtor, the damages he has sustained by the fault of the debtor.

The law has declared the amount of these damages, and fixed them at the rate of six per cent. per annum, and allowed the parties to the contract to vary this rate, so that in no case shall it exceed the rate of ten per cent. per annum upon the amount loaned or withheld. In lieu of the damages which the creditor would be entitled to recover for the unjust detention of the debt the law has given interest; and although the law denominates it interest, it is in fact the damages which the creditor has sustained. He is, therefore, always allowed to recover the interest due at the rendition of the judgment, as damages for the detention of the debt.

But in cases where the parties stipulate in the contract for the payment of interest, before the debt falls due, the interest cannot be regarded in the light of damages, but constitutes a part of the contract itself.

The interest in this case accrues by the stipulations of the contract, and not as a legal consequence of its breach. It cannot be in the nature of damages, for it arises before any infraction of the contract or failure to perform it.

In the case at bar the plaintiff in his declaration has demanded the original debt alone, and damages for its detention. Is the declaration defective in omitting to claim the interest due him by the contract before the debt itself became due? I think not; the promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate and distinct promises or undertakings, — one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of

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the covenants or promises. If he complains of the breach or non-performance of one only of the covenants or promises, he thereby admits that the others have been performed.

The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It at all events waives any right of action upon them; for, having sued upon the contract once, he is for ever barred from suing again. It will not be allowed to split up the various covenants or promises contained in one contract, and sue upon each of them; he can have but one recovery upon one contract, which then becomes merged in the judgment of the court.

If the foregoing remarks are well founded, the declaration is not defective. Can the plaintiff in this case recover interest after the debt became due; and if he can, at what rate? He is entitled to recover interest, as damages for the detention of the money after it became due, and where the contract is silent the law fixes the rate at six per cent. per annum; but when the contract fixes the rate not exceeding ten per cent. the law declares that to be the rate. In this case the contract is set out in the declaration and fixes the rate of interest at ten per cent. per annum, consequently the plaintiff is entitled to recover interest at the rate of ten per cent. per annum. The fact that the parties have agreed upon the rate of interest, does not change the nature of interest after the debt becomes due, but it is still justly regarded in the nature of damages for the failure to pay at the time stipulated by the parties.

Demurrer overruled.

WOOD TUCKER, complainant, *vs.* GEORGE W. CARPENTER, defendant.

1. Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction, on application, may be reinstated.

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2. The granting or dissolving an injunction rests in the sound discretion of the chancellor, and on the justice and equity of each particular case.

October, 1841. — Bill in chancery, before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Chester Ashley and *George C. Watkins*, for complainant.

F. W. Trapnall and *John W. Cocke*, for defendant.

Opinion of the Court. — In this case the injunction was dissolved on the coming in of the answer denying the equity of the bill. Testimony has been taken and published on the part of the complainant since that time, which certainly goes far to sustain the complainant's right to relief, as set forth in the bill; and at this point an application, supported by special reasons, is made by the complainant to reinstate the injunction. The counsel of the defendant contend that this cannot be done, and consequently resist the application.

It is not to be denied that there are many cases where an injunction will be revived, although it has been dissolved on the merits. Eden on Injunctions, 146, 153; *Fanning* v. *Dunham*, 4 Johns. Ch. R. 36. Where new facts are stated in an amended or supplemental bill, a fresh injunction may be awarded on special motion. *Travers* v. *Lord Stafford*, 2 Vesey, sen. 19, 21.

It is true that in such a case an injunction is not as a matter of course, but depends on the sound discretion of the court. And it may be safely asserted as a general rule in our courts, that all injunctions depend upon the discretion of the chancellor, and are to be granted or denied according to the justice and equity of each particular case.

A writ of injunction may be said to be a process capable of more modifications than any other in the law; it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications for the purposes of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual; and it may be dissolved, revived, continued, extended, or contracted; in short, it is adapted and is used by courts of equity as a process for

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preventing wrong between, and preserving the rights of parties in controversy before them.

The court is always open to reinstate an injunction. *Radford's Executors* v. *Innes' Executors*, 1 Hen. & Munf. 8; *Bellingslea* v. *Bradford*, 1 Bland, 568.

It could not, however, be allowed to a complainant, after an injunction had been denied or dissolved on the merits, to move for another on the same state of case; nor could he have one upon an immaterial amendment in his bill. But on the other hand, where an injunction has been dissolved, and it afterwards appears, from proof taken, that the injunction ought to be continued, a court, in the exercise of a sound discretion, will reinstate it, because otherwise irreparable mischief might ensue.

In this case, the testimony taken since the filing of the answer and dissolution of the injunction goes far towards overturning the answer and sustaining the right of the complainant to relief, and if not weakened by counter proof, would probably be sufficient for that purpose; but at all events is, in my judgment, quite sufficient to warrant me in reinstating the injunction originally granted until the further order of the court.

Ordered accordingly.

NOTE.—In April, 1844, this cause came on for final hearing on the equity side of the circuit court, before the Hon. Peter V. Daniel, associate justice of the supreme court, and the Hon. Benjamin Johnson, district judge, and the injunction was by decree made perpetual.

DANIEL MORRISON, complainant, *vs.* SIMEON BUCKNER, defendant.

1. A mortgagee may bring his ejectment and sue on the bond at law, and file his bill to foreclose in equity at the same time.
2. The general rule is, that receivers will not be appointed in mortgage cases, unless it clearly appears that the security is inadequate, or there is imminent danger of the waste, removal, or destruction of the mortgage prop-

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erty; or that the rents and profits have been expressly pledged for the debt.

3. The exercise of this power depends upon sound discretion, and is governed to a great extent by the circumstances of each particular case.

April, 1843. — Motion before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Chester Ashley and *George C. Watkins*, for complainant.

Albert Pike and *F. W. Trapnall*, for defendant.

OPINION OF THE COURT. — This is a motion by the complainant to direct the marshal or a receiver to hire out the slaves mentioned in the bill and in the mortgage, on the ground that the mortgaged property is wholly insufficient to pay the debt due the complainant. Substantially the application is for the appointment of a receiver before the hearing; and in such cases the court always reluctantly interferes, and upon some pressing necessity, which does not appear to exist on the present occasion.

It seems to be well settled by the English chancery practice, that in a case like this a receiver will not be appointed. Lord Chancellor Eldon, in *Berney* v. *Sewell*, 1 Jac. & Walk. 647, uses the following language: — "The rule about receivers is very clear; if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but take possession." And Chancellor Kent says, "the mortgagee may at any time enter and take possession of the land mortgaged, by ejectment or writ of entry." 4 Kent, 164. And Coote, in his Treatise on Mortgages, 518, correctly asserts that a mortgagee may at the same time resort to and proceed on all his remedies at law and in equity; he may, for example, at the same moment bring his ejectment, file his bill to foreclose the mortgage, and proceed on the bond and other collateral securities. Dougl. 417; 2 Vesey, sen. 678; 2 Atk. 343, 344. The English cases clearly sustain that doctrine; and to the same effect is the case of *Jackson* v. *Hull*, 10 Johns. Rep. 482. Coote, above referred to (18 Law Lib. 256), also says, that "if the mortgagee having the legal estate neglect to take the precaution of an agreement with the mortgagor for the appointment of a receiver, he cannot obtain such appointment by order of the court, but must pro-

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ceed to eject the mortgagor." Now without adopting this rule to its fullest extent, it is proper to observe generally, that receivers in mortgage cases will never be appointed unless it is clearly shown that the security is inadequate, or that the rents and profits have been expressly pledged for the debt (*Shotwell* v. *Smith*, 3 Edw. Ch. Rep. 588), or that there is imminent danger of the waste, removal, or destruction of the property. There must be some very strong special reason for it. 16 Vesey, 59; 1 Powell on Mortgages, 295, 296, and cases there cited. The exercise of this power must depend upon sound discretion, and be governed to a great extent by the circumstances of each particular case (*Verplank* v. *Caines*, 1 Johns. Ch. Rep. 58); but I find no difficulty in saying that such an appointment should not be made where there is, as in this instance, another adequate remedy already pointed out, and where imperative reasons do not exist for this summary interference before the hearing of a cause. There is not such a showing here as would justify this sort of interference, and the motion is, therefore, denied.

THE UNITED STATES *vs.* MOSES ALBERTY.

1. The circuit and district courts of the United States can take cognizance of civil and criminal matters only so far as the power so to do is conferred upon them by statutes of the United States.
2. The jurisdiction of these courts, so far as it results from the terms of their creation, or is necessarily implied in their constitution, is restricted to the territorial limits within which they are placed.
3. Acts of congress of the 30th of March, 1802, and of the 30th of June, 1834, to regulate intercourse with the Indian tribes and preserve peace on the frontiers; the act of 3d of March, 1825, relating to crimes against the United States; the act of 15th June, 1836, admitting Arkansas into the Union, and the act of March 3d, 1837, amendatory of the judicial system of the United States, commented on and explained.
4. Courts of the United States are of limited, though not of inferior, jurisdiction; and hence their jurisdiction must, in every instance, be apparent on the face of the pleadings.

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5. The circuit court of this district, in the absence of any statute attaching the Indian country west of Arkansas thereto, has no jurisdiction over such Indian country, and cannot punish an offence committed therein.

April, 1844. — Indictment for murder, determined in the Circuit Court, before Peter V. Daniel, associate justice of the supreme court of the United States, and Benjamin Johnson, district judge.

G. D. Royston, district attorney, for the United States.

A. W. Arrington and *Albert Pike*, for the prisoner.

DANIEL, J., delivered the opinion of the Court. — At the very threshold of this case the court is met by the important inquiry, whether it has jurisdiction to try the offence with which the prisoner stands charged. This offence is murder, alleged to have been committed by the prisoner, who is an Indian, upon the body of a white man, without the limits of the State and district of Arkansas, within the Indian country.

On either side of the question here propounded, it is admitted that the circuit and district courts of the United States can take cognizance of matters, civil or criminal, so far only as the power so to do is conferred upon them by statute; and it would seem to be a proposition equally plain as a general one, that the jurisdiction of those courts, so far as it results from the terms of their creation, or is necessarily implied in their constitution, is restricted within the territorial limits within which they are placed. Amongst the exceptions to this general principle, or perhaps it might with stricter propriety of language be said, amongst the instances which extend the powers of these courts beyond the restrictions above laid down (and there are unquestionably such), are said to be certain provisions in the acts of congress which vest this court with cognizance of the offence on which the accused now stands before us; that is, which authorize the trial before the circuit court of the District of Arkansas of a murder committed by an Indian upon a white man out of the district of Arkansas, as defined by the law creating the State, without the limits of any circuit of the United States, and within the Indian country. Let the provisions relied on for this position be traced and compared, in order to ascertain how far the position can be sustained by

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them. By the act of congress "to regulate trade and intercourse with the Indians, and to preserve peace on the frontiers," approved on the 30th March, 1802, the government of the United States assumed jurisdiction over the Indian country, by enumerating many acts which should be punished as offences, if committed within that country, and by authorizing certain courts designated in the statute to take cognizance of them. It will be perceived, however, that most of the offences thus denounced are such as should be committed by white men, and that in the enumeration in that statute is not included murder committed by an Indian, within the Indian boundary, on the body of a white man.

It is presumed, therefore, that the statute of March 30th, 1802, can have no application to a case like that at bar. On the 3d day of March, 1825, was passed the law entitled "An Act more effectually to provide for the punishment of certain crimes committed against the United States."

The crimes enumerated in this act, so far as locality beyond the limits of the State is imparted to them by the law, will be found to belong naturally and properly to the maritime jurisdiction of the Union, or to be in some degree connected therewith by operation of express law. The 14th section of the above statute contains the following clause, at the close of that section:—"And the trial of all offences which shall be committed upon the high seas, or elsewhere, out of the limits of any State or district, shall be in the district where the offender is apprehended, or into which he may be first brought." The offence charged in the indictment being committed in the Indian country, and consequently out of the limits of a State or district, it is insisted for the prosecution that the clause of the law above mentioned brings it within the jurisdiction of the circuit court for this district, the accused having been first brought therein. With regard to this argument it may, in the first place, be remarked, that implications of power are scarcely allowable in any cases in relation to the courts of the United States. They have repeatedly, even in civil cases, been adjudged to be courts of limited, though not of inferior, jurisdiction; and it has been in like manner required that their jurisdiction must in every in-

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stance be apparent on the face of the pleadings. *A fortiori*, then, would such implications be discountenanced in penal or criminal proceedings, and still more would they be disclaimed where the issues of life and death are involved. But, conceding for the present that such implications could be permitted, it may be asked whether there is not enough on the face of the act of 1825 fully to answer and satisfy the clause of the 14th section, without attempting to extend that clause so as to embrace other matter than that which the statute expressly and plainly embraces. Amongst the offences of which the statute was treating, many of them were of a character which might be consummated within the limits of the States and districts of the Union. Others, as for instance those touching the maritime rights of the nation and its citizens, were of a nature to be committed beyond those limits, such as the destruction of ships on the high seas and in foreign ports, and the abandoning of seamen in foreign countries; for these delinquencies it was necessary to designate a forum, and public convenience pointed to the State or district in which the offender might be apprehended, or that into which he should happen to be first brought.

This interpretation of the statute appears to satisfy both its language and its reason, and to forbid forcing its provision to purposes within neither its natural nor necessary scope.

On the 30th June, 1834, there was passed an act of congress with a title similar to the act of 1802, namely, "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." In most of its provisions, this act is a literal transcript from the act of 1802, and like the latter law, it comprises nowhere in the enumeration of offences the crime of murder by an Indian on the body of a white man, committed within the Indian country; but the act of 1834, in its 24th and 25th sections, contains the following provisions. It declares, "that so much of the laws of the United States as provide for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country, provided, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian; and that for

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the sole purpose of carrying into effect that act, all that part of the Indian country west of the Mississippi River that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the State of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the Territory of Arkansas and State of Missouri, shall be and the same is hereby annexed to the Territory of Arkansas." The region thus described is admitted to be Indian country, and it is within its limits that the crime alleged in the indictment is charged to have been committed.

As cognizance of crimes and offences generally, and certainly of the crime of murder, by whomsoever committed, within forts, dockyards, arsenals, on the high seas, and in all other places within the exclusive jurisdiction of the United States, is unquestionably given to the courts of the United States designated by law for the trial of those offences, and as the Indian territory above described has been placed under this exclusive jurisdiction of the courts of the United States, and by the same law has been annexed to the Territory of Arkansas, as little can it be doubted that by virtue of this statute of 1834 jurisdiction of the like crimes was vested in the courts of the United States for the Territory of Arkansas. But how and by what means, and to what extent, was this jurisdiction so vested? Solely by the extension to the Indian country of the laws punishing crimes in places within the exclusive jurisdiction of the United States, and by the annexation of that country, for the purpose of enforcing those laws, to the Territory of Arkansas; for it cannot be reasonably contended, that the mere creation of the territorial government would clothe it with power over a people, and over regions beyond the boundaries of the territory, and with which it had no inherent or necessary connection.

These special provisions, made by congress, are in themselves an admission of their necessity, of their previous non-existence as a part of the territorial jurisdiction, and of their peculiar and limited annexation to that jurisdiction by force of that statute alone. By an act of congress approved on the 13th June, 1836, the State of Arkansas was admitted into the Union; its limits

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and boundaries as a State were by that act ascertained and fixed, and the State was created a judicial district. By the operation of this act of congress, the territorial government of Arkansas may be said to have been annihilated. Its political and civil powers were transferred to other functionaries; those of a peculiarly internal character, to functionaries of the newly formed State; those which bore any relation to the system of which the State formed a part, to functionaries holding new and distinct commissions under that system, and possessing no powers save those to be derived from those commissions. Then as one of the States of the Union, and in virtue of that character forming one of the districts of the United States, the State of Arkansas and the federal powers within that State would possess no peculiar jurisdiction or authority; none which did not appertain to other districts and the circuit court having cognizance of matters within those districts.

To invest the federal courts within the State and District of Arkansas with such peculiar powers, some special legislation would appear to be indispensable. Has any such special legislation taken place? We have been able to perceive nothing of the kind in the act which invested the district court of the State of Arkansas with circuit court powers; and if the act of March 3, 1837, entitled "An Act supplementary to the act entitled an act to amend the judicial system of the United States," which created a circuit court within the State of Arkansas, be examined, it will be found equally destitute of any similar provisions. This act last mentioned first revokes simply the circuit court powers theretofore existing in several district courts, of which the district court of Arkansas was one, and declares that within the several districts named circuit courts shall be held by the chief or associate justices of the supreme court of the United States, assigned or allotted to the circuit to which such district shall belong, and the district judges of such districts severally and respectively; either of whom shall constitute a quorum. Nay, this act would seem to inhibit and exclude the exercise of any extraordinary or peculiar power, either by the circuit or district judges, within the newly created districts or circuits, for the law proceeds to declare: "which

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circuit courts, and the judges thereof, shall have like powers and exercise like jurisdiction as other circuit courts and the judges thereof, and the said district courts and the judges thereof shall have like powers and exercise like jurisdiction as the district courts and judges thereof in other circuits."

Upon the whole, then, we conclude that no power exists by law in the circuit court of the district of Arkansas which does not appertain to other circuit courts of the Union; that the power and jurisdiction now claimed for the court is a peculiar and extraordinary power, and does not belong to it regularly by its constitution, nor has been bestowed upon it by any special legislation. We think, therefore, that it cannot be legally and properly exercised, and that the court cannot take cognizance of the prisoner's case. *Prisoner discharged.*

ANONYMOUS.

1. The marshal is not entitled to commissions on a forfeited delivery bond.
2. The marshal is entitled to mileage actually travelled, in enabling him to make a return of *nulla bona.*

April, 1845. — Before the Hon. Benjamin Johnson, district judge, holding the circuit court.

The COURT held (1) that the marshal cannot charge any commissions where a delivery bond is given and forfeited; and (2) that the marshal is entitled to mileage on a return of *nulla bona* for mileage actually travelled by him or his deputies, in enabling him to make that return.

THE UNITED STATES *vs.* WILLIAM S. ROGERS.[1]

1. The United States have adopted the principle originally established by European nations, namely, that the aboriginal tribes of Indians in North America are not regarded as the owners of the territories which they respectively

[1] This case is reported in and taken from 4 Howard's S. C. Rep. 567, and was argued in that court by Mr. *Mason*, attorney-general, in behalf of the United States.

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occupied. Their country was divided and parcelled out as if it had been vacant and unoccupied land.

2. If the propriety of exercising this power were now an open question, it would be one for the lawmaking and political department of the government, and not the judicial.
3. The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian.
4. The 25th section of the act of the 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian."
5. This exception does not embrace the case of a white man, who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law.
6. The treaty with the Cherokees, concluded at New Echota, in 1835, allows the Indian council to make laws for their own people or such persons as have connected themselves with them. But it also provides, that such laws shall not be inconsistent with acts of congress. The act of 1834, therefore, controls and explains the treaty.
7. It results from these principles, that a plea set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the circuit court of the United States, is not valid.

At the April term, 1845, of the said circuit court, the grand jury indicted William S. Rogers for the murder of Jacob Nicholson. Both Rogers and Nicholson were alleged in the indictment to be "white men and not Indians." The offence was charged to have been committed within the jurisdiction of the court, that is to say, in that part of the Indian country west of the State of Arkansas, that is, bounded north by the north line of lands assigned by the Osage tribe of Indians, produced east to the State of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the now State of Arkansas and the State of Missouri, the same being territory annexed to the said district of Arkansas, for the purposes in the act of congress in that behalf made and provided.

The defendant filed the following plea: — "And the defendant in his own proper person, comes into court, and, having heard the said indictment read, says, that the court ought not

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to take further cognizance of the said prosecution, because, he says, heretofore, namely, on the —— day of November, 1836, he then being a free white man and a citizen of the United States, and having been born in the said United States, voluntarily and of his freewill removed to the portion of the country west of the State of Arkansas, assigned and belonging to the Cherokee tribe of Indians, and did incorporate himself with said tribe, and from that time forward became and continued to be one of them, and made the same his home, without any intention of returning to the said United States; and that afterwards, namely, on the —— day of November, 1836, he intermarried with a Cherokee Indian woman, according to their forms of marriage, and that he continued to live with the said Cherokee woman, as his wife, until September, 1843, when she died, and by her had several children, now living in the Cherokee nation, which is his and their home.

"And the defendant further says, that from the time he removed, as aforesaid, he incorporated himself with the said tribe of Indians, as one of them, and was and is so treated, recognized, and adopted by said tribe and the proper authorities thereof, and exercised and exercises all the rights and privileges of a Cherokee Indian in said tribe, and was and is domiciled in the country aforesaid; that before and at the time of the commission of the supposed crime, if any such was committed, namely, in the Indian country aforesaid, he the defendant, by the acts aforesaid, became and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of congress in that behalf provided. And the said defendant further says, that the said Jacob Nicholson, long before the commission of said crime, if any such was committed, although a native born free white male citizen of the United States, had settled in the tract of country assigned to said Cherokee tribe of Indians, west of the State of Arkansas, without any intention of returning to said United States; that he intermarried with an Indian Cherokee woman, according to the Cherokee form of marriage; that he was treated, recognized, and adopted by the said tribe as one of them, and entitled to exercise and did exercise all the rights and privileges of a Cherokee Indian, and was perma-

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nently domiciled in said Indian country as his home up to the time of his supposed murder.

"And the defendant further says, that by the acts aforesaid, he, the said Jacob Nicholson, was a Cherokee Indian at the time of the commission of the said supposed crime, within the true intent and meaning of the act of congress in that behalf made and provided. Wherefore, the defendant says, that this court has no jurisdiction to cause the defendant to make a further or other answer to said bill of indictment, for said supposed crime alleged in the bill of indictment. And the defendant prays judgment, whether he shall be held bound to further answer said indictment."

To this plea the district attorney of the United States filed the following demurrer: —

"And the said United States, by Samuel H. Hempstead, district attorney, come and say, that the said first plea of the defendant to the jurisdiction of this honorable court is insufficient in law, and that by reason of any thing therein contained, this court ought not to refuse to entertain further jurisdiction of the crime in said bill of indictment alleged.

"And the following causes of demurrer are assigned to said plea: —

"1st. That a native born citizen of the United States cannot expatriate himself so as to owe no allegiance to the United States without some law authorizing him to do so.

"2d. That no white man can rightfully become a citizen of the Cherokee tribe of Indians, either by marriage, residence, adoption, or any other means, unless the proper authority of the United States shall authorize such incorporation.

"3d. That the proviso of the act of congress relating to crimes committed by one Indian upon the property or person of another Indian, was never intended to embrace white persons, whether married and residing in the Indian nation or not."

And, upon the argument of the said demurrer, by *S. H. Hempstead*, district attorney, for the United States, and *E. L. Johnson*, for the prisoner, the following questions arose, and were propounded for the decision of the court; but the judges being divided in opinion upon the same, upon motion, ordered

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that they be entered of record, and certified to the next term of the supreme court of the United States for its opinion and decision thereupon.

1st. Was it competent for the accused, being a citizen of the United States, either under the fourth clause of the eighth section of the first article of the constitution of the United States, or under any act of congress passed in virtue of the constitution of the United States, upon the subject of naturalization, or in virtue of any admission, obligation, or duty, incumbent upon the government of the United States and implied by the said clause, section, and article of the constitution; or any of the said acts of congress in reference to citizens of the United States, or to foreign governments, their subjects or citizens, upon the authority of the will and act of the accused, and without any form, mode, or condition prescribed by the government of the United States, to divest himself of his allegiance to that government, and of his character of citizen of the United States?

2d. Could the accused, as a citizen of the United States, or a resident within the same, possess the right or the power resulting from the nature and character of the civil and political institutions of the United States, or as appertaining to, and inherent in, him as a free moral and political agent, or derived to him from the law of nature or from the law of nations, founded either upon natural right or upon convention, voluntarily and entirely put off his allegiance to, and his character of citizen of, the United States, and transfer that allegiance and citizenship to any other government, state, or community?

3d. Could the tribe of Indians residing without the limits of any one of the States, but within the territory of the United States, as set forth in the pleadings in this prosecution, and designated as the Cherokee tribe, and also as the Cherokee nation, and by whom the accused alleges that he has been adopted, be held and recognized in reference to the government and under the laws of the United States as a separate and distinct government or nation possessing political rights and powers such as authorize them to receive and adopt, as members of their State, the subjects or citizens of other States or

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governments, with the assent of such subjects or citizens, and particularly the citizens of the United States, and thereby to sever their allegiance and citizenship from the States or governments to which they previously appertained, and to naturalize such subjects or citizens, and make them exclusively or effectually members, subjects, or citizens of the said Indian tribe, with regard to civil and political rights and obligations?

4th. Could the accused, by any act or assent of his own combined with the acts, authority, or assent of the above-mentioned tribe, residing within the territory aforesaid, so change and put off his character, rights, and obligations as a citizen of the United States, as to become, in his social, civil, and political relations and condition a Cherokee Indian?

5th. Does the 25th section of the act of congress of the 30th June, 1834, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers," and the proviso to that section limit the operation of the said act, and give effect to the said proviso, as to instances of crimes committed by natives of the Indian tribes of full blood, against native Indians of full blood only; or do the said section and proviso have reference also to Indians, natives, or others adopted by and permanently resident within the Indian tribes; or have they relation to the progeny of Indians by whites or by negroes, or of whites or negroes by Indians, born or permanently resident within the Indian tribes and limits, or to whites, or free negroes born and permanently resident within the Indian tribes and limits, or to whites and free negroes owned as slaves, and resident within the Indian tribes, whether procured by purchase or there born the property of Indians?

6th. Does the plea interposed by the accused in this prosecution, the facts whereof are admitted by the demurrer, constitute a valid objection to the jurisdiction of this court?

The 25th section of the act of 1834, referred to in the fifth point certified, enacts as follows: —

"That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country; provided, that the same shall

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not extend to crimes committed by one Indian against the person or property of another Indian."

The defendant moved the court for an order to discharge him from imprisonment, on the ground that the court were divided in opinion on his plea to the jurisdiction; but the court overruled the motion, and remanded him to the custody of the marshal.

Mr. Chief Justice TANEY delivered the opinion of the court. — This case has been sent here by the circuit court of the United States for the district of Arkansas, under a certificate of division of opinion between the justices of that court.

It appears by the record, that William S. Rogers, a white man, was indicted in the above-mentioned court for murder, charged to have been committed upon a certain Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians.

The accused put in a special plea to the indictment, in which he avers that, having been a citizen of the United States, he, long before the offence charged is supposed to have been committed, voluntarily removed to the Cherokee country and made it his home, without any intention of returning to the United States; that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the Cherokee nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of congress in that behalf made and provided; that the said Jacob Nicholson had in like manner become a Cherokee Indian, and was such at the time of the commission of the said supposed crime, within the true intent and meaning of the act of congress in that behalf made and provided; and that, therefore, the court had no jurisdiction to cause the defendant to make a further or other answer to the said indictment. This is the substance of the plea, and to this plea the attorney for the United States demurred, setting down the causes of demurrer, which appear in the foregoing statement of the case.

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Several questions have been propounded by the circuit court, which do not arise on the plea of the accused, and some of them we think cannot be material in the decision of the case, and need not, therefore, be answered by this court.

The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control. It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject, which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them, if possible, from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the lawmaking and political department of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dis-

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pute, that the Indian tribes residing within the territorial limits of the United States, are subject to their authority, and where the country occupied by them is not within the limits of one of the United States, congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. Consequently, the fact that Rogers had become a member of the tribe, Cherokees, is no objection to the jurisdiction of the court and no defence to the indictment, provided the case is embraced by the provisions of the act of congress of the 30th June, 1834, entitled, "An Act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers."

By the 25th section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is, that the provisions of that section "shall not extend to crimes committed by one Indian against the person or property of another Indian." And we think it very clear, that a white man, who, at mature age, is adopted in an Indian tribe, does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned.

He may, by such adoption, become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would, perhaps, be found difficult to preserve peace among them if white men of every description might, at pleasure, settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that congress intended to grant such exemptions, especially to men of that class who are most likely to

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become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

It may have been supposed that the treaty of New Echota, made with the Cherokees in 1835, ought to have some influence upon the construction of this act of congress, and extend the exception to all the adopted members of the tribe. But there is nothing in the treaty in conflict with the construction we have given to the law. The fifth article of the treaty stipulates, it is true, that the United States will secure to the Cherokee nation the right, by their national councils, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the constitution of the United States, and such acts of congress as had been or might be passed regulating trade and intercourse with the Indians. Now the act of congress under which the prisoner is indicted, had been passed but a few months before, and this proviso in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions, or affect its construction. Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man of the white race, and therefore not within the exception in the act of congress.

We are, therefore, of opinion, that the matters stated in the plea of the accused do not constitute a valid objection to the jurisdiction of the court, and that, if he is found guilty upon the indictment, he is liable to the punishment provided by the act of congress before referred to, and is not within the exception in relation to Indians.[1]

And we shall direct this opinion to be certified to the circuit

[1] Rogers was never tried, having been afterwards drowned in the Arkansas River, in attempting to make his escape.

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court as the answer to the several questions stated in the certificate of division. We abstain from giving a specific answer to each question, because, as we have already said, some of them do not appear to arise out of the case, and upon questions of that description, we deem it most advisable not to express an opinion.

WILLIAM S. WISDOM *vs.* JOHN W. WILLIAMS and HUGH A. BLEVINS.

A plea *puis darrein continuance*, admits the plaintiff's cause of action, displaces all previous pleas and defences, and the defendant must stand on that alone.

April, 1846. — Debt, before the Hon. Benjamin Johnson, district judge, holding the circuit court.

A. Fowler, for the plaintiff.

Daniel Ringo and *F. W. Trapnall*, for the defendants.

PER CURIAM. — A plea *puis darrein continuance* admits the plaintiff's cause of action, and even if the plea is established still the plaintiff is entitled to costs. It has the effect of displacing all other pleas and previous defences, and the party is obliged to stand on that alone. 10 Wend. 679; 1 Chitty, Pl. 441; 2 Peters, 548; Stephen, Pl. 81, 83; 13 Peters, 152; Story, Pl. 53, 54. By operation of law the previous pleas are considered as stricken from the record, and every thing is confessed except the matter contested by the plea *puis darrein continuance*.

THE UNITED STATES *vs.* THE BANK OF THE STATE OF ARKANSAS.

1. The removal of a marshal before he has sold real estate on execution in his hands, destroys his right to proceed; and a sale of land, after such removal, is null and void, and will be set aside on motion.

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2. Such removal would not affect his right to sell personal property in his possession, and for which he is answerable.
3. When an appointee has received a commission from the president, taken the oath of office, and given the requisite bond, the present incumbent is superseded, and his removal is complete.
4. Notice is not necessary to effect such removal.
5. Different modes of removing an officer stated.
6. Notice to a deputy marshal who performs an act, is equivalent to notice to the marshal himself.
7. Notice to an agent is notice to his principal.

May, 1846. — Motion to quash sales of real estate on execution, determined before the Hon. Benjamin Johnson, district judge, holding the Circuit Court; the Hon. Peter V. Daniel, absent.

S. H. Hempstead, district attorney, for the United States.

Lemuel R. Lincoln and *Williamson S. Oldham*, for the bank.

OPINION OF THE COURT. — A judgment having been rendered in this case in favor of the plaintiff, an execution was issued on the 17th May, 1845, and placed in the hands of Henry M. Rector, then United States marshal for the District of Arkansas.

On the 23d May, 1845, the president of the United States, by letters patent, appointed Elias Rector marshal, who executed the requisite bond, and took the oath of office on the 30th June following.

Between the 8th and 30th days of June, 1845, Nathaniel T. Gaines, as deputy marshal under Henry M. Rector, turned over sundry writs and executions to Elias Rector; during which time Henry M. Rector was absent from the State of Arkansas.

Deputy marshal Gaines having previously levied on real estate belonging to the defendant, and duly advertised the same, proceeded to sell it on the 25th July and 2d and 18th of August, 1845.

On these facts a motion has been made by the defendant to set aside those sales, on the ground that the removal of Henry M. Rector deprived him *eo instanti* of all right to sell the real estate thus levied on by him.

The 28th section of the judicial act of the 24th September, 1789, provides, that "every marshal or his deputy, when re-

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moved from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." 1 Stat. 88. The 3d section of the act of the 7th May, 1800, provides, that "where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of his commission expire before sale, or other final disposition made of the same, in every such case, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." 2 Stat. 61.

The intention of this act is plain. If a marshal be removed before he has actually sold land, he cannot proceed to do so; but a new writ must issue to his successor. As to personal property in his possession, and for which he is answerable, the case would be different.

But here the inquiry arises, When shall he be said to be removed from office? There are various modes of effecting it. It may be made by a notification, by order of the president, that an officer is removed. In such a case, the removal would be complete on the reception of the notice. A removal may also be effected by a new appointment, operating as a revocation of the commission of the present incumbent. *Hennen's case*, 13 Peters, 230, 261.

In this mode the president does not remove the old marshal instantly, and then proceed to make a new appointment, but leaves him to discharge the duties of his office until certain acts are performed by the new appointee, and then the removal is complete, and the predecessor gives place to the successor. This is the usual practice of the president in removing federal officers, adopted doubtless with a view of preventing any thing like an interregnum in offices in which the public is deeply concerned. What are these acts? The new marshal must receive a commission from the president, take the oath of office, and give the requisite bond. 1 Stat. 87. He is then, and not until then, marshal of the district, qualified to act in that capacity, and the removal of the old marshal is then effected.

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In other words, it may fairly be presumed that the president has removed the present incumbent from office when a new one, capable of discharging the same duties, has been appointed. The office is then filled, the newly appointed person becomes an efficient officer, and is legally entitled to act; and this, it seems to me, is the true point of time from which the removal is to be dated. *Johnston* v. *Wilson*, 2 New Hamp. R. 202; *The People* v. *Carrique*, 2 Hill, 95, 101.

In *Bowerbank* v. *Morris*, Wallace's Rep. 118, it was held that a removal by a new appointment was not complete until the old marshal received notice of such appointment, and all acts done by him before such notice were good. Even admitting this to be a sound construction of the acts of congress alluded to, I am clearly of opinion that the late marshal received notice of the new appointment before the sales in question were made. Those sales, as stated, were made by deputy Gaines, and it appears in evidence that he received notice from Elias Rector of his appointment previous to that time. Notice to the deputy marshal who made the sales is certainly equivalent to notice to the marshal himself. Notice to the deputy who performs the act is, in legal contemplation, notice to the principal. 9 Serg. & R. 390; 6 Cowen, 467; 4 Bibb, 53; 6 Alabama, 314; 3 Stark. Ev. 1013; 1 Ld. Raym. 190; 10 Johns. 478; 12 Mass. 163.

But I do not consider notice essential to render the removal complete; and this position is sustained by an express decision of Judge McLean, in the case of *Overton* v. *Gorham*, 2 McLean's Rep. 509. He there says:—"Notice to the late marshal of his removal was not necessary, for his functions were terminated by the act of removal."

In this case, Elias Rector took the oath of office and executed the bond required by law on the 30th June, 1845; and as the sales in question were made subsequent to that period, they are consequently null and void, and must be set aside.[1]

Ordered accordingly.

[1] In *Doolittle's Lessee* v. *Bryan*, 14 How. S. C. Rep. 563, it was held that a sale of land by a marshal, after he is removed from office and a new marshal appointed and qualified, is not void.

It was said that the act of 1789 was not expressly or by implication repealed

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CHARLES T. NELSON, complainant, *vs.* WINSLOW ROBINSON, defendant.

1. Where there is equity on the face of a bill, an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts from which that equity arises, based on the personal knowledge of the defendant.
2. A denial on information and belief is not sufficient for that purpose.
3. It is in the sound discretion of the court to continue an injunction even after answer, where the nature and circumstances of a case require it, and where justice will be attained by that course.

July, 1846. — Bill in equity, before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

S. H. Hempstead, for complainant.

Daniel Ringo and *F. W. Trapnall*, for defendant.

OPINION OF THE COURT. — This is a motion to dissolve an injunction; and on looking into the case, it appears that some of the specific material and positive allegations in the bill upon which the injunction may well be sustained, are only denied on information and belief, and not on the personal knowledge of the defendant. Where there is equity on the face of the bill, the rule is well settled that an injunction will not be dissolved on the coming in of the answer, unless there is a positive denial of all the material facts which form that equity, and such denial, too, must be based on the personal knowledge of the defendant; and a denial on information and belief is not sufficient. *Roberts* v. *Anderson*, 2 Johns. Ch. R. 202; *Apthorpe* v. *Comstock*, Hopkins, R. 143; *Ward* v. *Van Bokelen*, 1 Paige,

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by the act of 1800, and that the latter was only intended to give cumulative rights and powers for the benefit of suitors. That being the case, it follows that the old marshal may sell lands where the process comes to his hands before his removal, and the sale will be good.

Under this decision, it is clear that the above sales made by marshal Henry M. Rector were valid, and should not have been set aside, although the decision of Judge Johnson is sustained by the very respectable authority which he cited, and on which he relied.

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R. 100. And the plain reason of this rule is, that a denial on information cannot be equal in weight with a statement made from personal knowledge; for a defendant may have derived his information from one no better informed than himself on the subject. 1 Paige, 160, 426. Although it is doubtless a general rule that an injunction obtained on filing the bill will be dissolved on the coming in of the answer denying all the equity of the bill (2 Madd. Ch. R. 238; 8 Vesey, 35; 9 Ib. 355; 19 Ib. 144; 1 Johns. Ch. R. 211; Ib. 444), yet it is equally well established as an exception to it, that it is in the sound discretion of the court to continue an injunction where the nature and circumstances of a case require it, and where justice will be attained by that course. 2 Johns. Ch. R. 202; 3 P. Wms. R. 255; 2 Brown, Ch. R. 88; 3 Ib. 463; 16 Vesey, 49; 19 Ib. 149; 2 Madd. Ch. 366; 1 Newland, Ch. Pr. 227. It does not follow, then, as a necessary consequence, that an injunction will be dissolved on the coming in of the answer; and at all events, to produce that result, the answer must have the requisites above alluded to, and which this, in my opinion, does not possess. *Poor* v. *Carlton*, 3 Sumner, 70. *Motion denied.*

April, 1853. — This cause came on for final hearing before the Hon. Peter V. Daniel, associate justice of the supreme court, holding the Circuit Court.

The Hon. Daniel Ringo, district judge, having been of counsel, did not sit.

S. H. Hempstead, for complainant.

In January or February, 1837, Charles T. Nelson, the complainant, purchased from Theodoric A. Bennett the north-west quarter section three, the south-west quarter of the north-east quarter of section three, in township fourteen, south of range twenty-five west; also the south-west quarter of section thirty-four in township thirteen, south of range twenty-five west, containing altogether $361\frac{57}{100}$ acres, at $5 per acre.

There was no written contract between the parties, but Bennett was to make Nelson a title, which of course means one in

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fee-simple; and Nelson gave his obligation for the purchase-money.

Nelson took possession of the lands and made valuable and lasting improvements, worth, according to the proof, $1,200 or $1,500, and upon a rescission of the contract, is willing to lose, so the parties can be placed *in statu quo* without injury to any one, except that Nelson must be loser.

Bennett, the vendor, died in August, 1837, without having made title, the purchase-money remaining unpaid, and Henry M. Robinson administered on the estate. Bennett left a widow, who afterwards married Joel J. Robinson, and she is still alive. Bennett left two children, namely, Lucy Ann, who is still alive, and a child born after his death, which child died in minority; and according to our law, the mother inherited from the child. Lucy Ann, the living child, never had a guardian. Henry M. Robinson, the administrator of Bennett, became insolvent and removed from the State without closing the administrationship, and it is not yet closed.

The obligation that was given by Nelson for the purchase-money appears to have been split up into small sums, within the jurisdiction of a justice of the peace, and judgments to have been confessed on these sums. And these judgments were afterwards consolidated by Winslow Robinson, and a note given to him by Nelson and others, on which judgment was obtained, and the collection of it enjoined by this court, on the principal ground that no title could be obtained from Bennett or his representatives.

The answer of Winslow Robinson sets up, by way of avoidance, that Nelson, the complainant, was to take title through Norlove Nelson, and was not to obtain any from Bennett at all; that this was the contract between the parties.

This is new matter, and it will not be controverted that the defendant must prove it. This he has not done, according to our understanding of the case; and the proof is, that he was to obtain title from Bennett, and not that Bennett was to substitute some other person in his place.

The rule of law we take to be clear, that where a person con-

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tracts with another for real estate, and the understanding is, that A., the vendor, is to make a title, the vendee cannot be required to take a title from B., because that would be to make a new contract. *Yeates* v. *Pryor*, 6 English, 76.

In the case of *Taylor* v. *Porter*, 1 Dana, 422, it was said by the court that the vendee had a right to insist on the title he contracted for, and that the vendor could not substitute another person in his place as the maker of the title. And the reason is plain; if he could do that, he might offer one less solvent and able to remunerate the vendor, should the title fail. 6 English, 76.

It is not an answer to say that the title offered by B. is unexceptionable, and as good or better than a title which A. could make. My contract is to take title from A., and not from B.; and I have a right to stand on my contract.

The patents that are produced here we repudiate; we say there was no contract with Norlove Nelson, and we were not to take title through him, because, putting every thing else aside, it is proven that he was a minor, and could not make a binding contract, except for necessaries. He died in minority.

The transfers made by him to Charles T. Nelson, on which these patents purport to have issued, were void. The transfers could be of no possible benefit to him; in fact they were prejudicial to him, and hence void, not voidable merely, but absolutely void. 10 Peters, 70.

We do not deny that an infant may be a trustee; but here no trust has been shown, nor any thing equivalent to it.

These transfers must be treated as void.

There is no proof that the patents ever came to the possession of Charles T. Nelson, or that he ever saw them.

This controversy cannot be settled in this court, and the appropriate remedy is to enjoin this judgment perpetually, and let the parties resort to the State courts, where Mrs. Robinson, formerly the wife of Bennett, and Lucy Ann, her child, and the heirs of Norlove Nelson can be made parties, and justice done between them. These persons, on account of citizenship, cannot litigate their rights in this court, for there would be no jurisdiction.

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There are equitable rights and interests behind these patents vested in others; and Charles T. Nelson could only get an apparent title, with a vast ocean of litigation beyond it.

A specific performance against a purchaser should not, it is said, be enforced, unless the title to the estate is free from suspicion. 2 Sugden, 110.

The inclination of the court is to favor the vendee, and it will always see that he has a good title. Where there is doubt, where there is suspicion, where the court sees that there are difficulties or equities beyond the legal title, a specific performance will not be decreed.

In substance, this involves the specific performance of a contract.

But the judgment ought to be perpetually enjoined, on the ground that Winslow Robinson has no such interest in this debt as will authorize him to control or collect it. The money belongs to the estate of Theodoric A. Bennett, and this suit would be no protection to Nelson against a claim brought by the heirs of Bennett for it. If he pays it, it is at his peril, and he is liable to pay it again to that estate.

According to the showing made by Winslow Robinson, in his answer, this money, or a part of it, will be misapplied; as a part of it is to discharge a private debt of Henry M. Robinson, the administrator of Bennett, to Hendley and Robinson.

Surely a court of equity will not stand by and allow such a proceeding, nor remove the restraint by which a party will be enabled to do it.

It is no answer to say that we have no concern in this, or in the application of the fund. We have the deepest concern; because, if we ought to pay the purchase-money to any one, it is to the estate of Bennett, and not to Winslow Robinson, who is not connected with that estate in any way, and can make us no title.

F. W. Trapnall, for defendant.

The COURT, on the whole case, considered that the injunction should be dissolved, the defendant remitted to his remedy at law, and the bill dismissed at the costs of the complainant, but gave no written opinion. *Decreed accordingly.*

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THE UNITED STATES *vs.* ELLIS STARR.

1. Until the act of 17th of June, 1844, (4 Stat. 733,) was passed by congress, the courts of the United States had no jurisdiction to hear, try, and punish offences committed in the Indian country west of Arkansas.
2. That act was prospective, and did not operate on the past.
3. Laws are generally made to operate upon the future, not the past; transactions of men, and courts will not give them a retroactive effect unless that intention is clearly expressed.
4. Penal laws must be construed strictly.
5. If there is no tribunal competent at the time to punish an offence, the jurisdiction cannot afterwards be conferred.

July, 1846. — *Habeas corpus*, determined in the circuit court, before the Hon. Benjamin Johnson, district judge.

S. H. Hempstead, district attorney, for the United States.

E. H. English, for the prisoner.

OPINION OF THE COURT. — By act of congress, passed the 30th of June, 1834, so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, are declared to be in force in the Indian country west of Arkansas; but not to extend to crimes committed by one Indian against the person or property of another Indian. And for the sole purpose of giving jurisdiction to the territorial court, that part of the Indian country was annexed to the Territory of Arkansas. 4 Stat. 723; 4 Story, Laws U. S. 2399; 9 Laws U. S. 128.

On the 15th of June, 1836, the Territory of Arkansas became one of the United States, by the name of the State of Arkansas, (5 Stat. 50,) and on the 3d of March, 1837, this court was created, and invested with like jurisdiction as other circuit courts of the United States. 5 Stat. 176.

At a previous term, in the case of *The United States* v. *Alberty*, ante, p. 444, we held that this court possessed no jurisdiction beyond the limits of the State of Arkansas, and, consequently, had no power or authority to hear, try, and punish offences committed in the Indian country. Subsequent to that decision, and to remedy that defect, congress, on the 17th of

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June, 1844, passed the act entitled, " An Act supplementary to the act entitled ' An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,'" passed 30th of June, 1834, and thereby provided "that the courts of the United States in and for the district of Arkansas be and they hereby are vested with the same power and jurisdiction to hear, try, determine, and punish all crimes committed within that Indian country designated in the 24th section of the act to which this is a supplement, and therein and thereby annexed to the Territory of Arkansas as were vested in the courts of the United States for said territory before the same became a State. And for the sole purpose of carrying this act into effect, all that Indian country heretofore annexed by the 24th section of the act aforesaid to the Territory of Arkansas, be and the same hereby is annexed to the State of Arkansas." 5 Stat. 680.

It will be seen by this act that anterior to the 17th of June, 1844, this court had no jurisdiction of crimes committed in the Indian country, and on that day acquired such jurisdiction.

In the case now before the court, it is agreed and admitted by the parties to this proceeding, and is evident from the proof, that Ellis Starr is charged with the commission of the crime of murder in the Indian country annexed to the State of Arkansas by the act of 1844, on a day anterior to its annexation, that is to say, before the 17th of June, 1844, and the question made and argued by the counsel is, whether this court has jurisdiction of the crime.

It seems to me plain that at the time the offence charged was committed, neither this court, nor any other court of the United States, had power and jurisdiction to hear, try, and punish it. Indeed, it is manifest that from the time this court was created, on the 3d of March, 1837, up to the 17th of June, 1844, there existed no judicial tribunal of the United States competent to try and punish offences committed in this Indian country, and so this court decided in the case cited when its presiding judge, [Hon. Peter V. Daniel] was present. And to give that jurisdiction was the sole object of the act of the 17th of June, 1844. It is, however, insisted that this act confers upon this court jurisdiction to punish all offences against the laws of the United

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States committed in the Indian country, — those before as well as those after its enactment. The argument is that the crime was committed against an existing law, and within the jurisdictional limits of the United States, although this court could not then, yet may now punish it; and in carrying out this idea, it is said by the district attorney to get clear of a difficulty which lies in his path, that it is not a case where there was no law anterior to the 17th of June, 1844, creating the offence, and then doing it for the first time, for that, he concedes, would be an *ex post facto* law within the rule laid down in *Calder* v. *Bull*, 3 Dallas, 386; but he insists that without creating any new offence, the law merely designates a tribunal to punish one already committed against an existing law of the United States forbidding it.

If this be a sound position, then it is manifest that the act must have a retrospective operation; because, otherwise, it could not affect transactions which took place before its passage. The crime charged against the prisoner, as stated, was committed when neither this nor any other court of the United States was clothed with jurisdiction and power to try and punish it, and to proceed to do so now would be to give the act in question a retroactive effect.

Now in the construction of a statute it is a cardinal and well-established principle, that the court will never give to it a retrospective operation, unless it clearly appears from the language used, that its makers intended it to have that effect; because laws are generally made to operate upon the future, not the past, transactions of men. 9 Bac. Abr. tit. Statute (C). Legislatures seldom, if ever, especially in the enactment of criminal laws, intend them to have a retroactive effect, and certainly courts will never give them that operation, even if it can be done at all, unless the intention is clearly expressed. *Prince* v. *The United States*, 2 Gallison, 204. Penal laws must be construed strictly.

The inquiry then is, Has congress, by the terms used in the act of the 17th of June, 1844, giving this court jurisdiction, clearly expressed the intention, that it shall take cognizance of past as well as future crimes? Let us examine the words of

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the statute itself. It provides that the court shall have the same power and jurisdiction of these offences that were vested in the courts of the United States for the Territory of Arkansas before the same became a State. And for the sole purpose of carrying the act into effect, all that Indian country heretofore annexed to the Territory of Arkansas is thereby annexed to the State of Arkansas. By this act nothing beyond jurisdiction of crimes committed in the Indian country is conferred on this court, and in order to make the grant effectual, the Indian country is attached to this judicial district and constitutes a part of it. This is all. There is nothing from which an inference can be drawn that it was intended by its makers to have a retrospective operation. They have neither said so expressly nor have they intimated that it shall have that effect. In the absence of any express intention to the contrary, the court is bound to presume that the makers of the law intended it to operate upon the future and not upon the past. If congress had made it retrospective, a nice question would then have been presented, upon which I give no positive opinion, although my mind inclines to the belief, for reasons that need not now be stated, that if there is no tribunal competent at the time to punish an offence, the jurisdiction cannot be afterwards conferred. For these reasons the prisoner must be discharged.

Discharged accordingly.

DAVID WILLIAMS, as administrator of Orville Shelby, deceased, complainant, *vs.* ELIAS E. BYRNE, ABSALOM FOWLER, THOMAS T. TUNSTALL, W. W. TUNSTALL, and W. B. MILLER, defendants.

1. A bill to enjoin a judgment in the circuit court is not considered an original bill between the same parties, as at law, but as growing out of, and as auxiliary to, the suit at law.
2. But if other parties are introduced, and different interests involved, it is to that extent an original bill, and the jurisdiction of the court must then depend on the citizenship of the parties; and one of the parties must be a citizen of the State where the suit is brought.

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3. There is no jurisdiction to entertain a bill to enjoin a judgment at law in the circuit court, brought by a citizen of Tennessee, not a party to the judgment, against a citizen of Mississippi, the plaintiff in the judgment.

August, 1846. — Bill in equity for an injunction, determined before Benjamin Johnson, district judge, holding the Circuit Court.

Pleasant Jordan, for complainant.

S. H. Hempstead, for Elias E. Byrne.

OPINION OF THE COURT. — The complainant, a citizen of the State of Tennessee, has brought this suit in chancery against Elias E. Byrne, a citizen of the State of Mississippi, and Absalom Fowler, Thomas T. Tunstall, and W. W. Tunstall, citizens of the State of Arkansas, and W. B. Miller, whose residence is unknown and not alleged, and thereupon moves for an injunction.

By the 11th section of the Judiciary Act of 1789 (1 Stat. 78), this court can entertain jurisdiction of suits at common law or in equity only "where the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State." The complainant being a citizen of Tennessee, and the defendant (Byrne) a citizen of Mississippi, this court has no jurisdiction, unless there is something in the case itself to take it out of the operation of the rule prescribed by the above act. And to do that, the complainant contends that as this is a suit to enjoin proceedings on a judgment at law rendered in this court, in which Byrne was plaintiff, it is not an original bill, but is auxiliary, growing out of and subsidiary to the suit at law. If this position is correct, the jurisdiction of the court is clear enough.

Now it has been held repeatedly, that the defendant in a judgment at law in the circuit court of the United States may file a bill in chancery in the same court to enjoin the plaintiff from proceeding on the judgment, and that such a bill is not to be regarded as an original suit, but only as auxiliary to and springing from the suit at law. *Logan* v. *Patrick*, 5 Cranch, 288; *Dunlap* v. *Stetson*, 4 Mason, 349; *Dunn* v. *Clarke*, 8 Peters, 3.

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Is this such a bill? It is not the case of a defendant against whom a judgment has been obtained, invoking the aid of the chancellor to relieve him from it as unjust and inequitable, but it is the case of one who was neither party nor privy to the judgment, seeking to restrain the plaintiff from enforcing it, and also praying a decree for the amount recovered. This bill sets up an equity between the complainant therein and Byrne, the plaintiff in the suit at law, but not between the parties to the judgment. The defendant in the judgment has no interest in the subject-matter of this suit. The bill cannot be said to be auxiliary to the defendant Tunstall's defence, for it is not filed by him; nor has he any interest in any decree that might be made. Is it not, then, an original proceeding? I cannot doubt that it is. In every case in which the courts of the United States have held the bill to be auxiliary to the suit at law, and consequently not original, the defendant at law has become the complainant in chancery.

In *Dunn* v. *Clarke*, 8 Peters, 3, the supreme court says:— "The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill, and consequently the jurisdiction of the circuit court must depend upon the citizenship of the parties." Under the Judiciary Act, one of the parties must be a citizen of the State where the suit is brought.

Now here the bill is not between the same parties as at law, and moreover an entirely different interest is involved. For all practical purposes, it must be considered as an original bill; and as the complainant Williams is a citizen of Tennessee, and the defendant Byrne a citizen of Mississippi, this court can take no jurisdiction of the case.

Upon the ground, also, that Williams failed to swear to his bill, without showing any sufficient reason for it, I should not hesitate to overrule the motion for an injunction.

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JAMES OAKLEY, complainant, *vs.* THOMAS B. BALLARD, and JAMES W. FINLEY, administrator of Allen M. Oakley, deceased, defendants on original bill; and THOMAS B. BALLARD, complainant, *vs.* JAMES OAKLEY, and JAMES W. FINLEY, administrator of Allen M. Oakley, deceased, defendants on cross-bill.

1. A vendee cannot occupy the attitude of an innocent purchaser without notice, where the vendor was not vested with the legal title.
2. Courts of chancery will not make contracts for parties, nor enforce contracts when uncertain.
3. Where in a contract it was stipulated that a previous agreement relative to the same subject-matter should be rescinded, and this second contract was afterwards rescinded; *held*, that this did not revive the first agreement, and that the rescission of one contract cannot revive another without express words, or a necessary implication to that effect.

October, 1846. — Bill in chancery, determined before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

F. W. Trapnall, *John W. Cocke*, and *Daniel Ringo*, for complainant.

Absalom Fowler, for defendants.

OPINION OF THE COURT. — From a review of the allegations and proofs in this case, the following appear to be the material facts: Thomas B. Ballard, the defendant in the original and complainant in the cross-bill, being entitled to a donation from the United States of three hundred and twenty acres of land, sold the same on the 10th day of July, 1828, to Allen M. Oakley, for $100, the receipt of which was acknowledged on the writing between them. On the 21st May, 1830, an agreement, under hand and seal, was entered into between Thomas B. Ballard, Allen M. Oakley, James Lemmons, and John H. Fowler, reciting that the said Ballard, by virtue of the act of congress of the 24th May, 1828, had been allowed a donation claim of two quarter sections of land, and had selected them adjoining the town of Little Rock, and had made and erected certain improvements thereon, and then occupied the house and premises so situated; and that for divers good and lawful considerations, the said Lemmons, Oakley, and Fowler had fur-

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nished the said Ballard with certain work and labor, care and diligence, and certain sums of money, to enable the said Ballard to carry on his clearing and improvements, and to enable him to go to Batesville to establish his claim to the said two quarter sections of land. Lemmons, Oakley, and Fowler further agreed to aid and assist Ballard, and to furnish such other and further necessaries towards his said settlement as should make his house fit for occupation; and he, on his part, agreed with them that he would do and perform all such acts and things as might be necessary to establish his claim to the above-named lands; and he also thereby granted, bargained, and sold to them four fifths of the land to be acquired by virtue of his settlement right. It was further stipulated that as soon as the title should be acquired, the land should be divided into five equal parts, and Lemmons was to have two parts, and Ballard, Oakley, and Fowler one part each.

Shortly after this contract was made, the parties, finding that the land officers at Batesville refused to allow Ballard's claim to be located on the two quarter sections of land on which he had settled and made an improvement, abandoned the contract and surrendered the writings into the hands of Ballard.

It is proven by the testimony of two witnesses, that at the time the second contract was entered into, Allen M. Oakley expressly agreed that his first contract with Ballard for the purchase of his claim was rescinded, and he promised to destroy the papers, which were not then present.

Ballard's claim has been located on two quarter sections of the public lands on the Mississippi River, and patents therefor have issued to him; but whether the entry was made by Ballard or Oakley, does not appear. It seems that Allen M. Oakley did not destroy the writings containing the original contract between himself and Ballard relative to the purchase of Ballard's donation claim; but after the claim had been located, namely, on the 21st January, 1837, sold and conveyed the land thus located to the complainant by a deed of that date. It may be material to remark, that James Oakley stands in the shoes of Allen M. Oakley, of whom he purchased. The legal title to the land never was vested in Allen M. Oakley, and of

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course his vendee cannot occupy the attitude of an innocent purchaser without notice. *Boone* v. *Chiles*, 10 Peters, 177; *Wood* v. *Mann*, 1 Sumner, 500; *Flagg* v. *Mann*, 2 Ib. 487.

The question then arises, whether the claim of Ballard, or rather the land on which it was located, belongs to Oakley or to Ballard.

By the first contract, Ballard sold his claim to Allen M. Oakley; by the second contract between Ballard, Oakley, Lemmons, and Fowler, the first contract was rescinded and annulled. They are inconsistent with each other and cannot stand together, and in fact Oakley agreed to burn or destroy the writings, then absent, containing the only evidence of that contract.

The second contract, by the mutual consent of the parties, was also rescinded and annulled. To whom does the claim now belong? The claim originally belonged to Ballard. Oakley purchased it from Ballard, and afterwards rescinded the contract of purchase; and from that time it had no vitality. By a second contract, Oakley takes an interest of one fifth in the claim, and this second contract is also rescinded, and the writings surrendered into the hands of Ballard.

If Oakley can now have any interest in Ballard's claim, it must be by virtue of the revival and resuscitation of the first contract; and this indeed is insisted on by the counsel of the complainant.

I cannot perceive the principle upon which the rescission of one contract can revive another without express words, or a necessary implication to that effect. In this case it is not pretended that there was any express agreement to revive the first contract, nor do I perceive any thing in the circumstances from which such an intention can be implied.

If, then, under both of these contracts, Oakley surrendered his rights, he cannot call on this court to restore them, in the absence of fraud or mistake, which are not alleged in the case, nor pretended to exist.

It is the province of a court of chancery to enforce contracts fairly entered into, but not to make contracts for parties where

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they have made none, nor enforce them when uncertain. *Colson* v. *Thompson*, 2 Wheaton, 336; 4 Cond. Rep. 144.

I am therefore of opinion, that the bill of James Oakley, the complainant, should be dismissed, and that the writings evidencing the first contract between Thomas B. Ballard and Allen M. Oakley ought to be cancelled; and that each party pay his own costs. *Decreed accordingly.*

At the same term, on the 31st October, 1846, it was proved orally before the court that the lands in controversy exceeded the value of two thousand dollars (*Course* v. *Stead's Executors*, 4 Dallas, 22; 1 Cond. Rep. 217; *United States* v. *The Brig Union*, 4 Cranch, 216; 2 Cond. Rep. 91); and after tendering an appeal bond, with security, to prosecute the appeal according to law, James Oakley, and James W. Finley, as administrator of Allen M. Oakley, deceased, prayed an appeal to the supreme court of the United States from the final decree rendered in the case, which was granted; but the case was not taken up, and the appeal was abandoned.

THE UNITED STATES *vs.* JOHN W. SCROGGINS, a white man.

1. To disable or disfigure any limb or member of a person by means of shooting, stabbing, cutting, biting, gouging, or any other means, with intent to maim or disfigure, constitutes an offence under the 13th section of the Crimes Act of 1790, and is punishable as therein prescribed. 1 Stat. 115.
2. The particular mode of effecting this disfiguration or disability, or the particular weapon, or instrument, or means used, are not material, provided the result is maiming or disfiguration with intent so to do.
3. It is not necessary that it should be done by cutting or by the use of some sharp instrument or edged tool. This is one mode, but not the only mode.

April, 1847. — Before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Maiming. Indictment that Scroggins, a white man, shot James Rawles, also a white man, with a rifle gun, in the right arm, with intent to disable and maim.

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E. H. English, for the defendant, moved to quash the indictment, on the ground that to disable the limb or member of a person by means of shooting, was not embraced by the act of congress. He argued that the act punishing maiming was a literal transcript of the Coventry Act, and that the construction of that act in the English courts had been that the maiming or disfiguration must be done with some sharp instrument or edged tool, and that the language of the act seemed to contemplate maiming by means of cutting or stabbing.

S. H. Hempstead, district attorney, resisted the motion, and contended that the obvious policy of the law was to punish maiming, and that to narrow it down to maiming by cutting or stabbing merely would present a strange anomaly, and would be imputing to the lawmaker the absurdity of attaching a penalty to the means employed rather than the offence itself.

Maiming is depriving another of the use of such of his limbs or members as may render him less able in fighting, either to defend himself or annoy his adversary. 4 Bl. Com. 206; 1 Hawk. P. C. 111. The statute in question, among other things, provides in effect, that if any one shall "disable any limb or member of any person with intention in so doing to maim or disfigure." The indictment is founded on this particular part of the statute, and although the maiming was effected by shooting, yet the indictment is believed to be well founded. It would certainly be difficult to assign a sensible distinction between maiming by shooting and cutting; and it cannot be denied that the act of congress is comprehensive enough to embrace a case like this. Gordon, Dig., art. 3196, p. 938.

Opinion of the Court. — The indictment with requisite particularity of time and place, and by proper averments, charges that the defendant disabled the right arm of James Rawles, a white man, and not an Indian, by means of shooting with intent to maim, and the question is, whether the case is within the purview of the 13th section of the act of 1790, relative to maiming. If it is not, it is conceded that there is no law to punish the offence. I have carefully examined this section upon which the indictment is founded, and entertain no doubt that the motion ought to be overruled.

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In some parts of that section cutting is contemplated as a mode by which maiming or disfiguration may be effected, but not the only mode; and indeed there could be no reason for confining the offence to that particular mode. Now to "disable the tongue" or "put out an eye" is punishable, but according to the argument of the defendant's counsel, it would not be within the statute unless it was done by cutting, by the use of some sharp instrument or edged tool. The correctness of this position cannot be admitted. No adjudged case has been adduced to sustain it. To disable any limb or member of a person is expressly declared to be an offence, and that is the crime charged in this indictment.

If any person should purposely and maliciously disable the tongue of another by biting, or put out an eye by shooting, striking, gouging, or such like means, or should disable any limb or member of another, by cutting, shooting, or any other means, with intent to maim or disfigure, such person would, undoubtedly, be liable to conviction on this statute. That position is clear enough to my mind. The particular mode of doing it, as by stabbing, cutting, shooting, or striking, or the particular weapon or instrument used, are not material. The real inquiry is, whether a limb or member has been disabled or disfigured purposely and maliciously, and with intent to maim or disfigure; and if so, the offence is complete. This is deemed to be a fair construction of the statute in question, and to give it any other would enable offenders to evade it at pleasure.

It is urged, however, that this section is almost a literal transcript from the statute of 22 and 23 Charles II., chap. 1, (Gordon, Dig. 3196, p. 938; 1 Hawk. P. C. 108,) commonly called the Coventry Act, and that the English courts have put the construction upon it contended for by the defendant's counsel. I can find no case to that effect, nor has any been referred to or produced; and even if there were such cases, I should not feel at all bound by them, for such a construction would, in my judgment, be manifestly absurd, and contrary to the obvious intention of the law. It would be destroying it, by astute construction and unmeaning refinement. It would be carrying technicality much further than it ought to be carried; and it is

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difficult to perceive any sense or reason in it. Considering this case to be within the act, and the indictment to be good both in form and substance, the motion to quash is overruled, and the defendant ordered to plead to the indictment.

Ordered accordingly.

The prisoner was found guilty, and was sentenced to pay a nominal fine and to be imprisoned one year.

THE UNITED STATES *vs.* JOHN RAMSAY.

1. There is no act of congress punishing an accessory before the fact to murder, and an indictment for that offence will be quashed.
2. To commit murder and to be accessory to it, are different and distinct offences.
3. The courts of the United States are only authorized to try and punish such crimes as congress expressly, or by necessary implication, has designated and affixed known and certain penalties to, and such courts have no common law jurisdiction in that respect.

April, 1847. — Before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

The indictment charged, in substance, that certain persons to the grand jurors unknown, in the Indian country west of Arkansas, feloniously, wilfully, and of their malice aforethought, murdered one Charles Butler, an Indian, and that John Ramsay, a white man, was accessory thereto before the fact.

E. H. English, counsel for the prisoner, filed a motion to quash the indictment, on the ground that there was no law of congress punishing the offence charged in the indictment, and this point he argued at length.

S. H. Hempstead, district attorney, in his argument in opposition to the motion, insisted on the following points, namely: (1) The law of congress of the 30th of April, 1790, section 3, declares that the crime of murder shall be punished with death. Gordon, Digest, 937. (2) That if a statute enacts an offence to be felony, though it may mention nothing of accessories before or after the fact, yet virtually and consequentially they are

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included. 1 Russ. on Crimes, 35; 1 Hale, P. C. 613, 614, 704; 3 Inst. 59. (3) That accessories before the fact and principals were subject to capital punishment at common law, and as the above act punishing murder, *ex vi termini*, embraces accessories according to a well-settled rule of construction; therefore, accessories before the fact must be punishable capitally under that law. 4 Bl. Com. 39; 3 Inst. 188. (4) That the only reason originally for the distinction between principals and accessories was the benefit of clergy; but in contemplation of law and morals, the accessory before the fact is guilty of as deep enormity as the actual perpetrator of a murder, and therefore he ought to receive the same punishment. (5) That it cannot be supposed that congress meant to exempt accessories from punishment, and the fact that there is no specific legislation with regard to them is almost conclusive proof that they were intended to be included in the general law against murder, and to receive the same punishment as principals.

Opinion of the Court. — It is true, as urged by the district attorney, that he who advises or counsels the commission of a murder, is, in point of morals, as guilty as the principal, and should, doubtless, be punished accordingly. In legal language, however, he is not guilty of murder, but is only accessory to it; and this distinction is preserved in all the books on criminal jurisprudence. It is said that the act of congress punishing murder necessarily embraces an accessory before the fact, and subjects him to the punishment of death. I cannot assent to the correctness of this position; but, on the contrary, applying the known rule that penal statutes must be construed strictly, I entertain no doubt that the point made by the prisoner's counsel is well taken and must be sustained. Certainly, to commit the crime of wilful murder, and to be accessory to it, are different offences; and in the trial of Burr for treason, Chief Justice Marshall very clearly lays down that proposition. That an accessory before the fact ought to be punished will not be questioned by any one, for he is, indeed, frequently involved in deeper guilt than the principal. This is a question, however, for the consideration of the legislative department, and this court is only authorized to try and punish such crimes as con-

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gress expressly or by necessary implication have visited with known and certain penalties, and the court has no common law jurisdiction in that respect. The defects in the criminal code of the United States have been severely felt, but it is for congress, not this court, to interpose and apply the corrective; and as I should not feel warranted in pronouncing sentence of death on the prisoner in case of conviction, I shall sustain the motion to quash the indictment, and direct him to be discharged, regretting, at the same time, that there is no law to reach his case. *Prisoner discharged accordingly.*

THE UNITED STATES *vs.* ELLIS SANDERS.

1. The declarations of a father as to the maternity of his child are competent evidence; but the circumstances under which they were made and the weight to be given to them must be left to the jury.
2. The child must partake of the condition of the mother; and if the mother is an Indian, the child will be so considered, for the purposes of the Intercourse Act of 1834, whether the father is a white man or an Indian.
3. The child of a white woman, by an Indian father, would be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins determining the condition of the offspring.
4. The offspring of a free-woman is free, and so on the other hand, the issue of a slave is a slave likewise.
5. The rule *partus sequitur ventrem* generally obtains in this country.
6. Questions of jurisdiction ordinarily belong to the court as matters of law; but where the jurisdiction depends upon facts to be found by a jury, the latter may, under the direction of the court, as to matter of law, affirm through the medium of a general verdict, that there is or is not jurisdiction.
7. The court has no jurisdiction to punish offences under the intercourse law of 1834, (9 L. U. S. 135,) committed by one Indian against the person or property of another Indian.

April, 1847. — Before the Hon. Peter V. Daniel, associate justice of the supreme court, and the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Murder. The defendant, a Cherokee Indian, was indicted for the murder of Billy, a white boy, in the Cherokee country, west of Arkansas, in 1844. The defendant plead not guilty,

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and on the trial the proof on the part of the prosecution was, that in the latter part of July, 1844, the defendant, without any provocation or excuse, killed Billy by a blow on the head with a large maul, breaking the skull, and of which blow Billy instantly died. It was proved that the deceased was an inoffensive idiot boy, and was reputed to be white. The evidence fully established the fact that it was a wanton and unprovoked murder, and on that point there was no difference of opinion.

The prisoner introduced various witnesses, who proved that they knew the father of the deceased, and had frequently heard him say in his lifetime that the mother of this boy was an Indian woman, and on this the prisoner rested his defence. On this point there was some contradictory evidence, but the weight of it was in favor of the position that the mother of the boy was an Indian woman, although it did not appear to what tribe she belonged, or whether she was a full-blooded Indian or not.

E. H. English, for the prisoner, contended that the exception in the Intercourse Act of 1834, (9 L. U. S. 135) applied to this case, and that the evidence sufficiently established the fact that the offence charged in the indictment was committed by one Indian upon the person of another Indian, within the meaning of that exception, and that, consequently, he was not punishable by this court, however enormous the offence, which the counsel was not disposed to palliate.

S. H. Hempstead, district attorney, for the prosecution, in his argument to the jury, insisted that the deceased was a white boy in contemplation of law. The proof was clear that the father was a white man, of the white race, and although the testimony adduced by the prisoner, if believed, favored the idea that the mother was an Indian woman, or had Indian blood in her veins, yet it was not satisfactorily shown, for no one ever saw her, — no one pretended to say to what tribe, if any, she belonged, — whether she was a full blood, half breed, or quarter breed Indian, where she lived, or when she died.

Unimpeachable witnesses had sworn that the boy was generally reputed to be white, and this should outweigh the vague testimony for the defence; and that as to the guilt of the prisoner that could not and had not been disputed, for every one saw it was a cold-blooded and shocking murder.

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DANIEL, J., charged the jury that it would not be necessary to give any particular direction as to the law of murder, because there was no contest on that point at all, nor had any justification been attempted for the killing of the deceased. If the jury believed the witnesses, who had not indeed been impeached in any way, it was an atrocious and wilful murder.

The prisoner did not rest his defence on his innocence, but on the want of jurisdiction in this court to punish him at all. He is charged in the indictment to be a Cherokee Indian, and the deceased to have been a white boy and not an Indian, thus presenting a case, as far as the indictment is concerned, within the jurisdiction of the court.

The witnesses for the government, if believed, establish the averment in the indictment, that the defendant is a Cherokee Indian, and also state that the deceased was called and generally reputed to be a white boy, not of any Indian tribe. To rebut this the prisoner introduced witnesses, who have stated that they knew the father of the boy, that he was a white man, lived in the Indian country, and that they had frequently heard him declare that the mother of the deceased was an Indian woman.

The declarations of a father as to the maternity of a child are admissible and competent evidence. (1 Phil. Ev. 238, 239; 2 Ib. Cowen & Hill's notes; notes 463, 464, 465, 466, 468,) but the circumstances under which they are made, and the weight to be attached to them are matters for the jury to determine.

There has been considerable discussion as to who ought to be considered an Indian within the purview of the proviso of the 25th section of the intercourse law of 1834, which declares, that the laws of the United States, for the punishment of crimes in the Indian country, shall not extend to crimes committed by one Indian against the person or property of another Indian. Gordon, Digest, 430. That act does not define an Indian, but uses a general term without embracing or excluding any particular class of persons. On consultation with my brother judge we concur in laying down this rule as the safest: that the child must follow the condition of the mother. If the

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mother is an Indian woman her offspring must be considered Indians within the meaning of the proviso alluded to, whether the father be a white man or Indian. And so, on the other hand, the child of a white woman by an Indian father, would, for all the purposes of that act, be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining the condition of the offspring.

This is substantially following the common law rule, which was borrowed from the civil law. Justinian's Inst. book 1, tit. 4, p. 13. The rule of the civil law was, that one born of a free mother was free, although the father was a slave; and so on the other hand, if the mother was a slave the offspring partook of her condition. Rutherford's Inst. 247; *Shelton* v. *Barbour*, 2 Wash. 67. There can be no doubt that the rule *partus sequitur ventrem* generally obtains in this country. *Hudgins* v. *Wrights*, 1 Hen. & Munf. 137; *Pegram* v. *Isabell*, 2 Hen. & Munf. 193; *Chancellor* v. *Milton*, 1 B. Mon. 25; *Esther* v. *Akin*, 3 B. Mon. 60.

If the jury believe from the evidence that the mother of the boy Billy was an Indian woman, we are of opinion on the rule just laid down, that her offspring was also an Indian within the meaning of the exception alluded to, and consequently that the court is destitute of authority to punish the prisoner, however guilty he may be, and that the jury ought to return a verdict of not guilty.

Questions of jurisdiction ordinarily belong to and are decided exclusively by the court as pure matters of law; but here it is necessary that certain facts should be passed upon by the jury before that question can properly arise. Where the jurisdiction, however, depends upon the existence of facts, the jury may, under the direction of the court as to matter of law, affirm through the medium of a general verdict that there is or is not jurisdiction.

Verdict not guilty, and prisoner discharged.

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The United States *vs.* Robert Beaty.

1. Every steamboat master, manager, captain, owner, or person having charge thereof, is subject to a penalty of one hundred and fifty dollars under the thirteenth section of the act of 1845, for failing to deliver letters as prescribed in the sixth section of the Post-Office Act of 1825. 4 Stat. 104; 5 Ib. 736.
2. Any person employed on any steamboat failing to deliver a letter to the master, captain, or manager of such steamboat, incurs a penalty of ten dollars. 4 Stat. 104.
3. Before a person can be subject to the penalty of one hundred and fifty dollars for failing to deliver a letter, it must have been brought by him, or intrusted to his care, or within his power; and in a case where he has no knowledge of it, and could not obtain such knowledge by the exercise of reasonable diligence, he is not responsible.
4. Express knowledge on the part of a defendant need not be proved; but it is essential to show such facts and circumstances as render it probable, that a defendant by the use of ordinary and reasonable diligence obtained that knowledge or could have done so, so as to authorize the jury to presume it.
5. The master, captain, manager, or owner are not responsible under the act of 1845, for the conduct of the clerk of the boat in the matter of failing to deliver a letter, where they are ignorant of the existence of such letter, or could not obtain a knowledge of it by the use of reasonable diligence.
6. The law does not require the exercise of the utmost diligence of which the case is susceptible; but only such as rational men ordinarily employ in their own affairs.
7. Where the court has misdirected the jury, a new trial will be granted without imposing costs, or any terms whatever.

April, 1847. — Debt on statute, before Peter V. Daniel, associate justice of the supreme court, and Benjamin Johnson, district judge holding the Circuit Court.

This was an action of debt brought against Robert Beaty, master and owner of the "Arkansas No. 4," by the direction of the postmaster-general, on the information of A. Gordon, postmaster at Lewisburg, Arkansas.

The declaration filed the 30th of December, 1846, was substantially as follows, namely: —

The United States of America, plaintiffs, by S. H. Hempstead, their attorney, complain of Robert Beaty of a plea that he render unto them one hundred and fifty dollars, which to them he owes and from them unjustly detains.

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For that the defendant at a time past, namely, on the 16th of June, 1846, being then master, commander, and owner of a certain steamboat called the " Arkansas No. 4," then lying and being at the port of New Orleans, (where a post-office of the United States was, and had long theretofore been established with a postmaster thereof,) in the State of Louisiana, and bound and destined for the Arkansas River and the several ports and places on said river, in the district of Arkansas aforesaid; did receive on said Arkansas No. 4, a written letter purporting to have been written by one Moses Greenwood, at said port of New Orleans, dated June 16, 1846, and addressed and directed to one M. Whisler, at Lewisburg, a port and place on said Arkansas River, in the district aforesaid, to be conveyed, transported, and brought by the said steamboat Arkansas No. 4, to the said port and place of Lewisburg, in the district aforesaid, and to be there delivered, and which said letter did not relate to the cargo of the said steamboat Arkansas No. 4, or any part thereof of that voyage, and whereof the said defendant had notice.

And the said plaintiffs in fact further say, that the said letter was conveyed, brought, and transported on and by the said steamboat to the port and place of Lewisburg aforesaid, in the district aforesaid, and that afterwards, namely, on the 30th of June, 1846, the said steamboat Arkansas No. 4, whereof the defendant still continued to be such master, commander, and owner as aforesaid, on the trip and voyage aforesaid, landed at said port of Lewisburg, where a post-office was then and there, and had long theretofore been established, with a postmaster thereof, then and long theretofore had been acting as such, of which the defendant had notice, and that the defendant utterly failed and neglected to deliver the said letter to the postmaster at Lewisburg, or to deposit the same in the post-office there, in manner and form as required by the acts of congress in that behalf provided, although the said postmaster was then and there ready and willing to receive the same, and that the defendant in violation of his duty and contrary to the form and effect of the acts of congress aforesaid, did then and there deliver and place the said letter into the hands of a private person who was not postmaster at Lewisburg aforesaid, nor in anywise an agent of the post-office department, or connected with that post-

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office, namely, into the hands of one B. W. Owens, to be delivered to the said Whisler, to whom the same was addressed and directed.

And the plaintiffs in fact further say, that the said letter was then and there delivered by the said Owens to the said Whisler; contrary to the form and effect of the statute in that behalf made and provided.

By means whereof and by force of that statute, an action has accrued to the plaintiffs, to sue for and recover from the defendant, as a penalty for the violation of that statute, the sum of one hundred and fifty dollars above demanded.

Yet the said defendant, although often requested so to do, has not paid to the plaintiffs the said sum of money above demanded or any part thereof.

To the damage of the plaintiffs of one hundred and fifty dollars, and therefore they sue.

S. H. Hempstead, Attorney of the United States for the District of Arkansas.

On the 16th of April, 1847, the defendant, by *Daniel Ringo* and *F. W. Trapnall*, his attorneys, filed a demurrer to the sufficiency of the declaration, assigning various causes; but after argument, and on consideration, the court adjudged the declaration sufficient and overruled the demurrer.

The defendant then plead the general issue, and the cause was tried by a jury on the 30th of April, 1847, before Peter V. Daniel, associate justice of the supreme court of the United States, and Benjamin Johnson, district judge, and a verdict was found for the United States for the amount of the penalty and costs.

On the 3d of May, 1847, the defendant filed his motion for a new trial; on the grounds principally that the verdict was contrary to law and evidence, and because the court had misdirected the jury; and this motion was argued and determined at the same term.

S. H. Hempstead, district attorney for the United States, contended, that the motion for a new trial should not be granted; that the charge of the court to the jury was well sustained by principle and authority, and that to establish a different doctrine

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would enable the post-office acts to be evaded with perfect impunity. He commented on the Post-Office Acts of 1825 and 1845, and then insisted that the master, captain, or manager of a steamboat, was responsible for the acts of those who were under him, and more especially where the master, as in this case, was the owner. The master has the charge of the boat; may employ or discharge such servants as he pleases, and it is difficult to perceive why he should not be responsible for their conduct. They are selected by him, and it is to be presumed that he will be careful to employ competent, discreet, and skilful persons, as his agents or servants, and surely there can be no hardship in holding him liable for their acts. That liability rests upon clear principles of public law, and cannot be denied.

In *Bussey* v. *Donaldson*, 4 Dallas, 206, the owner of a vessel was held liable for the negligence of the pilot, on the ground that he was the agent or servant of the owner, although not chosen by him, but placed in his service by an act of the legislature.

And so the captain of a steamboat is responsible for the acts of the pilot. *Denison* v. *Seymour*, 9 Wend. 9; 1 Taunt. 569; 14 Johns. 304; *Nicholson* v. *Mounsey*, 15 East, 383; 6 Mees. & Welsby, 499, 510.

Masters of ships are responsible for the negligences, nonfeasances, and misfeasances of subordinate officers and others employed by and under them. Story on Agency, 314, 316, 317; 14 Pick. 71.

The clerk of the boat was the agent of the master, and the act of the clerk was the act of the master, on that received maxim of law, *qui facit per alium facit per se.* The actual knowledge of the master cannot be material. He is bound with or without knowledge on the footing of responsibility for the conduct of the clerk, his servant and agent. If any knowledge is necessary, the law intends it to exist, and will not allow any proof to the contrary; any more than allow proof of the ignorance of the law as an excuse.

If clerks or servants on a steamboat may receive letters, put them in their pockets, and deliver them out to the persons to whom they are addressed, without making the master or owner

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liable unless knowledge is brought home to him by the government, an important part of the Post-Office Act is a dead letter, because it can be successfully evaded. All that a master of a steamboat would have to do would be to shut his eyes to these violations of law, and escape responsibility. All he would have to do would be to plead ignorance, and that would be potent enough to defeat this kind of prosecutions. Such a construction of the Post-Office Act could never have been anticipated. If the law is unpopular, let it be repealed by congress; not destroyed by judicial construction.

The principle contended for has not the effect of making the principal or master responsible criminally for the act of the agent or clerk. Undoubtedly it is a general rule of law, that a principal cannot be held amenable for the crimes and misdemeanors of the agent, without participation in them. Even that rule, though general, is not universal; for the principal is said to be sometimes liable in a criminal suit. Story on Agency, 452, and cases there cited.

But this is a civil, not a criminal proceeding; and although a fixed penalty is in question, yet it is like the recovery of unliquidated damages against the principal, for the wrong of the servant. It is no more criminal than that, and stands on the same footing. In the one case the agent violates the rights of a fellow man; and in the other he violates the rights of the government. In both, he acts against law; and that law affords a vindication through its ministers, for the wrong, in the shape of a pecuniary compensation, — in one instance, to an individual; in the other, to the government.

Daniel Ringo and *F. W. Trapnall*, for the defendant, and for the motion, examined and commented on the Post-Office Acts at length, and then argued that the court had misdirected the jury in point of law, and for which error a new trial should be granted, and without costs. There was no evidence to prove that the defendant had the slightest knowledge of the existence of the letter in question, and that it was manifest that the clerk of the boat acted on his own responsibility as to its reception and delivery, and without the sanction of the defendant. The letter was never in the care or within the

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power of the defendant, because he was ignorant of it. It could not have been intended by congress to inflict a heavy penalty on the master of a steamboat for the non-delivery of a letter of which he knew nothing, and could have ascertained nothing by the exercise of reasonable diligence.

It may be admitted, that if a master has the means of ascertaining the existence of a letter, and does not choose to do it, he cannot escape liability. But this case has no such feature in it. There are no facts or circumstances from which knowledge might be implied by the jury.

That there must be knowledge on the part of the master, is evident; and not until the moment he is affected with it, could he possibly be said to be a *particeps criminis* with the clerk or servant in the violation of the law; and there then might be some more plausible reason for inflicting the penalty than at present. But without knowledge, express or implied, to hold him liable, would in reality amount to making the master answerable for the criminal act of the servant, which is contrary to the well-established doctrines of law. This is not in form a criminal proceeding, but is so in its nature; and the attempt of the district attorney to assimilate it to a civil suit for damages, must fail. There is no analogy between the two. The defendant here, in the form of an action of debt, is prosecuted by the law-officer of the government for a violation of a highly penal law, and a large penalty is claimed for that violation. It is, therefore, totally different from a mere civil, personal suit for damages for an injury received from an agent or servant.

If knowledge is essential to a recovery on the part of the government, as we think is clear, a new trial must be granted; for it is not pretended that there was any evidence conducing to prove any thing of the kind.

JOHNSON, J., delivered the opinion of the Court. — This suit was brought for the recovery of the penalty provided for a violation of the thirteenth section of the Post-Office Act of 1845. 5 Stat. 736.

That section declares in substance that nothing contained in the last-named act shall have the effect, or be construed to pro-

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hibit the conveyance or transportation of letters by steamboats, as authorized by the sixth section of the act of 1825 regulating the post-office department (4 Stat. 104), provided that the requirements of such sixth section be strictly complied with, by the delivery, within the time specified by that act, of all letters so conveyed not relating to the cargo or some part thereof, to the postmaster at the post or place to which such letters may be directed or intended to be delivered over from the boat; but it is expressly enacted that all the pains and penalties provided by that act for any violation of the provisions of the eleventh section thereof shall attach in every case to any steamboat, or to the owners and persons having charge thereof, the captain, or other person having charge of which, shall not comply with the requirements of the sixth section of the act of 1825. The eleventh, by reference to previous sections, fixes the penalty at $150, and to recover which this action of debt has been instituted.

The sixth section of the act of 1825, above referred to, enacts substantially that it shall be the duty of every master or manager of any steamboat which shall pass from one post or place to another in the United States, where a post-office is established, to deliver within three hours after his arrival, if in the daytime, and within two hours after the next sunrise, if the arrival be in the night, all letters and packets addressed to or destined for such post or place to the postmaster there; and if any master or manager of a steamboat shall fail so to deliver any letter or packet which shall have been brought by him, or shall have been in his care or within his power, he shall incur the penalty therein prescribed; and every person employed on board any steamboat shall deliver every letter and packet of letters intrusted to him to the master or manager of such steamboat before the vessel shall touch at any other post or place; and for every failure or neglect so to deliver, a penalty of ten dollars shall be incurred for each letter or packet. 4 Stat. 104.

These constitute the substance of the Post-Office Acts, as far as applicable to the present case.

On the trial, the plaintiff proved that Robert Beaty, the defendant, was the master and owner of the steamboat "Arkansas No. 4;" that upon her arrival at Louisburg, in this State,

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from the city of New Orleans, at each of which places a post-office had been established, the clerk of the boat was in possession of a letter bearing date at New Orleans, written by M. Greenwood, residing there, and directed to M. Whisler at the town of Louisburg, and that the letter did not relate to the cargo of the boat, or any part thereof; and that on the arrival of the boat at Louisburg, the postmaster there demanded the letter of the clerk of the boat, who refused to deliver it to him, but did deliver it to a private individual, who handed it to the person to whom it was addressed; and that it was not placed in the post-office at all. This was the substance of the evidence on the part of the plaintiffs.

There was no evidence adduced, other than the above, to prove that the defendant had any knowledge that the letter was on board the boat, or in the possession of the clerk, or that it was in his power, or that he knew of the failure and refusal of the clerk to deliver this letter to the postmaster at Louisburg upon the arrival of the steamboat there.

Before the jury retired, at the request of the district attorney, the court, by the presiding justice (the Hon. Peter V. Daniel), instructed them that the defendant, as master of the boat, was responsible for the acts of the clerk; and if they found from the evidence that he received the letter at New Orleans and brought it up to Louisburg, and there failed to deliver it to the postmaster, and that the letter did not relate to the cargo of the boat, or any part thereof, the defendant was subject to the penalty, although he was in fact ignorant of its delivery at New Orleans, of its transmission, and of the failure of the clerk to deliver it to the postmaster at Louisburg.

The jury found a verdict for the plaintiff for the penalty of $150, and the defendant has interposed this motion for a new trial, on the ground of misdirection on the part of the court.

Upon looking into the acts of congress imposing this penalty, and giving them the best consideration of which I am capable, I am of opinion that we erred in the instructions we gave to the jury, and which doubtless influenced their finding.

By the terms of the act of congress, the defendant is subject to the penalty prescribed when he fails to deliver any letter or

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packet to the postmaster, which shall have been brought by him, or shall have been in his care or within his power. Now, as already observed, there was no evidence adduced to the jury from which they could presume that the defendant had brought the letter, or that it was in his care or within his power. In either of these cases, the letter must have been within his knowledge, for it could hardly be said to be brought by him, or to be in his care or within his power, according to the obvious meaning of the act, if he was ignorant of the existence of the letter, its conveyance, and destination. The clerk alone was proved to have had the letter at Louisburg, in the absence of the defendant; and for any thing that appeared from the evidence, the clerk may have received the letter at New Orleans, secretly, kept it in his own possession, and failed to deliver it to the defendant, or inform him that he had it, or place it in a situation to enable him to obtain a knowledge of it, or bring it to the knowledge of the defendant in any way. It is not necessary to bring express knowledge home to the defendant, and the court is not to be so understood. But it is essential to show such facts and circumstances as render it probable that the defendant, by the use of ordinary and reasonable diligence, obtained that knowledge, or could have done so, and thus authorize the jury to presume it.

If, in the absence of all knowledge, the master or captain or owner of the steamboat is absolutely responsible under this act for the conduct of the clerk, as the district attorney insists, and as we instructed the jury, then the verdict was right; for in that view, the liability was clearly established, and the case fully made out on the part of the government. But under the circumstances of the case, I think, as already stated, that we erred in instructing the jury that the defendant was responsible for the acts of the clerk; that it was not material whether the defendant did or did not know of the existence of the letter, and that in either event he was equally liable for the penalty, provided the letter was delivered to the clerk, brought up by such clerk, and not delivered to the postmaster at Louisburg, according to the sixth section of the act of 1825.

The clerk, for every failure or neglect to deliver to the master

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of the boat any letter or packet of letters intrusted to him before the vessel touches at any other place, incurs a penalty of ten dollars. 4 Stat. 104. It would seem strange indeed, that the clerk should be subjected to the penalty of ten dollars only for a wilful failure to deliver the letter to the master of the boat, and the master subjected to the penalty of one hundred and fifty dollars for an omission to deliver a letter, of the existence of which he was entirely ignorant. The act is penal in its consequences, and must be strictly construed; and as knowledge is generally a principal and indispensable ingredient in offences, it would seem reasonable to hold the government to the proof of it, or to the proof of circumstances from which it might be fairly inferred, before the penalty can be demanded.

The master of a steamboat is liable for this penalty when he fails to deliver a letter or packet which has been brought by him, or was in his care, or was in his power; but, in my judgment, the sound construction of the acts of congress is, that the defendant could not be placed in this category at all, where the letter was not within his knowledge, nor placed in a situation to enable him, with the use of reasonable diligence, to obtain such knowledge. Knowledge on his part, express or implied, I regard as essential to his liability, and without which the acts of congress have no application, and do not embrace the case. It is not to be supposed that it was the intention of the lawmaker to inflict a penalty upon the master of a steamboat in a case where he was ignorant that a letter had been brought upon the boat, either by the clerk or any person employed on board, and had not the means of ascertaining the fact by the use of reasonable diligence. This would be little less unjust than the disreputable device of the Roman tyrant who placed his laws and edicts on high pillars, so as to prevent the people from reading them, the more effectually to ensnare and bend the people to his purposes.

For these reasons, I think a new trial ought to be granted, and it is so ordered; but, as it was the error of the court which renders this necessary, the costs must abide the event of the suit. *Ordered accordingly.*

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On the second trial, which was had 22d April, 1848, the Hon. Benjamin Johnson, district judge, presiding; the Hon. Peter V. Daniel, associate justice of the supreme court of the United States, absent; the plaintiffs, in addition to the evidence on the previous trial, proved that the letter in question was, on its reception at New Orleans, placed by the clerk of the "Arkansas No. 4" with other letters in the letter box of the boat, and impressed with the boat stamp; that the defendant at all times had access to this letter box, and that it was his habit to examine and see what letters were placed on the boat; but there was no other proof as to his knowledge of the letter.

S. H. Hempstead, district attorney, for the United States.

Daniel Ringo and *F. W. Trapnall*, for the defendant.

JOHNSON, J., instructed the jury, that by the act of congress of 1845, section thirteen (5 Stat. 736; 4 Stat. 104), the master of a steamboat is liable for a letter brought by him, or committed to his care, or within his power. It is the province of the jury to determine from the evidence whether the letter in question was either brought by the defendant, or committed to his care, or was within his power. If so, he is subject to the penalty of one hundred and fifty dollars claimed by the plaintiffs. Was it in his power by the use of reasonable diligence? The law, in my judgment, does not require the exercise of the utmost diligence of which the case was susceptible. It only requires such diligence to discover the letter as rational men ordinarily employ in their own affairs; and of this the jury must judge.

Verdict and judgment for plaintiffs for one hundred and fifty dollars penalty and costs, and motion for a new trial denied.

THE UNITED STATES *vs.* THOMAS RAGSDALE.

1. A white man who is incorporated with an Indian tribe at mature age, by adoption, does not thereby become an Indian, so as to cease to be amenable to the laws of the United States.
2. He may, however, by such adoption, become entitled to certain privileges in the tribe, and also make himself amenable to their laws and usages.

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3. Therefore, the second article of the treaty of Washington, of the 6th of August, 1846, between the United States and Cherokee Indians (9 Stat. 871), had the effect to pardon an offence previously committed by an Indian, in the Cherokee country west of Arkansas, against a white man who had been adopted by that tribe, and become a part of it.
4. The case of *The United States* v. *Rogers*, 4 Howard, 571, cited.
5. In the construction of penal statutes, it is a general rule that an offender who is protected by its letter, cannot be deprived of its benefit, on the ground that his case is not within the spirit and intention of the law.
6. Where there is no ambiguity there is no room for construction.

April, 1847. — Indictment for murder, determined in the circuit court, before the Hon. Peter V. Daniel, associate justice of the supreme court, and the Hon. Benjamin Johnson, district judge.

S. H. Hempstead, district attorney, for the United States.

Daniel Ringo and *F. W. Trapnall*, for the prisoner.

JOHNSON, J., delivered the opinion of the Court. — Thomas Ragsdale, a Cherokee Indian, has been indicted in this court for the crime of murder, charged to have been committed upon a certain Richard Newland, a white man, in the country now occupied by the Cherokee Indians.

After putting in the general issue of not guilty, the defendant has pleaded three additional pleas: in the first of which he avers that the said Richard Newland, in the year 1835, legally intermarried with a Cherokee woman, who was a member and citizen of the Cherokee tribe, in their country east of the Mississippi; and according to the laws and usages of the Cherokee nation, said Newland was incorporated into and became a citizen of said tribe, for all the purposes of citizenship, and by virtue of said marriage became and was entitled to all the rights and privileges, civil and political, which belonged to any other citizen of said nation. That when the United States removed the said tribe to their country west of the Mississippi, in the year 1838, said Newland was removed with them, and received from the United States his transportation money, rations, and year's subsistence after arriving in the country assigned to them west of the Mississippi, as a citizen and member of said tribe. That after said Newland was removed to the Cherokee country west of the Mississippi, he was and continued to be by

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virtue of his marriage and in accordance with the constitution, laws, and usages of said nation, until the time of his alleged murder, entitled to all the rights and immunities, civil and political, which appertained to any and all other citizens of the tribe, and was subject and amenable to the laws and regulations of the Cherokee nation. That said Newland, at the time of his said supposed murder, was an individual of the Cherokee nation, within the meaning of the second article of the treaty made and concluded at Washington on the 6th day of August, 1846, between the United States and the Cherokee nation of Indians; and that the murder of said Newland, if committed at all by the defendant, which he denies, was an offence by a citizen of the Cherokee nation against an individual thereof, within the meaning of the said second article of said treaty, and was thereby fully and for ever pardoned.

The motion to strike out this plea made by the district attorney, is in the nature of a demurrer, and admits it to be true, for the purposes of this investigation.

The second article of the treaty of Washington, of the 6th of August, 1846, contains the following provision: "All difficulties and differences heretofore existing between the several parties of the Cherokee nation are hereby settled and adjusted, and shall, as far as possible, be forgotten, and for ever buried in oblivion. All party distinctions shall cease, except so far as this may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee nation against the nation, or against an individual or individuals, are hereby pardoned." Acts of Congress of 1846, p. 269.

The only material inquiry presented by this plea is, whether the person charged in the indictment with the commission of the crime, and the person against whom it was committed, were, at the time, citizens or individuals of the Cherokee nation, or tribe, for if they were, it is manifest that the offender has received a full and plenary pardon, by virtue of the second article of the treaty, above cited. The defendant Ragsdale is averred in the indictment to be an Indian of the Cherokee tribe, and not a white man; and consequently he is a citizen of the Cherokee

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nation. Thomas Newland, upon whom the murder is charged to have been committed by Ragsdale, is averred in the plea to have incorporated himself with the Cherokee tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country, and that by these acts he became a citizen or an individual of the Cherokee nation.

The question here arises, Whether a white man can become a member of the Cherokee tribe of Indians, and be adopted by them as an individual member of that tribe?

It is certainly true that the United States have never acknowledged or treated the native tribes of Indians as independent nations, nor regarded them as the owners of the territory they respectively occupied. On the contrary, they have always considered and treated them as dependent nations or tribes, subject to their dominion and control, and have exercised legislative power over them, by the punishment of crimes committed within their limits, no matter whether the offender be a white man or an Indian. But this dependent condition has never prevented them from having laws and usages, for their own internal government, and of adopting other persons as members of their tribe. This, however, is not an open question, but is expressly affirmed by the chief justice in delivering the opinion of the supreme court in the case of *The United States* v. *Rogers*, 4 Howard's Rep. 571; s. c. ante, p. 450. He uses the following language: "We think it very clear, that a white man who, at mature age, is adopted into an Indian tribe, does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may, by such adoption, become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages; yet he is not an Indian, and the exception is confined to those who, by the usages and customs of the Indians, are regarded as belonging to the race. It does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them, both as regarded their own tribes and other tribes also, to be governed by Indian usages and customs."

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The above language is too clear to be misunderstood; that in the opinion of the supreme court, a white man may incorporate himself with an Indian tribe, be adopted by it, and become a member of the tribe. The plea avers that the said Newland did so incorporate himself, was adopted, and became a member of the Cherokee tribe of Indians, and continued to be a member thereof, to the time he is charged to have been murdered by Ragsdale.

The language of the treaty granting the pardon is clear, and free from ambiguity. Its language is, that "All offences and crimes committed by a citizen or citizens of the Cherokee nation against the nation or an individual or individuals, are hereby pardoned." It cannot be doubted that the latter clause of the above sentence means "against an individual or individuals of the Cherokee nation." The offence of the defendant, then, is expressly embraced by the second article of the treaty granting a pardon, and the plea, if true, is a good bar to the indictment.

It has, however, been earnestly contended on the part of the United States by the district attorney, that even admitting that the letter and words of the treaty apply to and embrace the defendant's case, that it is clearly not within the spirit and intention of the treaty.

It is a sound rule in the construction of penal statutes, that if the case of the accused is clearly within the letter of a statute in his favor, the court will rarely, if ever, take his case out of it, upon the ground that it is not within the spirit and intent of the act. 4 Term Rep. 665; 6 Ib. 286; Leach's C. L. 73; Dwarris on Statutes, 736; *United States* v. *Wilson*, Baldwin's C. C. R. 101, 102. The case must be clear and free from all doubt, to justify the court in making this construction. It is also a maxim of the law, that where there is no ambiguity, there is no room for construction. *United States* v. *Wiltberger*, 5 Wheaton, 95, 96. But looking at the spirit, object, and intent of the treaty, I can see no reasonable ground for the opinion that the crime charged against the defendant was not intended to be embraced. One great object of the treaty was the restoration of peace and harmony among the hostile parties

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of the Cherokee tribe, who by their conflicts and civil wars had disturbed the peace and threatened to deluge their land in blood; and to effectuate this desirable end a general amnesty of all past offences was declared, and as far as possible to be forgotten and buried in oblivion. In this plenary pardon to all native born Cherokees, why should it not also extend to adopted members of the tribe? After adoption they became members of the community, subject to all the burdens, and entitled to all the immunities of native born citizens or subjects; and it is reasonable, in my judgment, to suppose that they were intended to be included in the general amnesty.

The two remaining pleas are in substance a former trial and acquittal for this offence under the Cherokee laws in the Cherokee country. These pleas are, in my judgment, clearly insufficient, upon the ground that the Cherokee court had no jurisdiction of his case. As for us, congress legislates for the punishment of crimes committed in the Indian country; that legislation is, in its nature, exclusive. The reasons upon which this position is based, I have not time at present to state, nor indeed do I deem it material, as I consider it free from doubt, and the reasons for it will suggest themselves to every reflecting mind.

The third and fourth pleas of former acquittal are ordered to be stricken out; but the motion to strike out the second plea of pardon is overruled. *Ordered accordingly.*

DANIEL, J., concurred.

The prisoner was discharged on his plea of pardon.

JOHN M. PINTARD, complainant, *vs.* ARCHIBALD W. GOODLOE, WILLIAM RODES, and THOMAS T. TUNSTALL, defendants.

In the Circuit Court.

1. The vendor and vendee, and the purchasers from the vendee, stand in the relation of landlord and tenant, and neither the vendee nor those claiming under him, are permitted to disavow the vendor's title.

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2. If they buy up a better title, or an outstanding title, where the vendor has been guilty of no fraud, it will enure to the benefit of the vendor, and he can only be compelled to refund the amount paid for the better title.
3. Where a vendee enters into possession under the vendor, he will not be suffered to dispute the title of the latter, unless he yields up the possession.
4. A vendor has a lien on the land for the purchase-money against the vendee, his heirs, privies in estate, and purchasers.
5. This lien rests on the principle, that a person having acquired the estate of another, as between them, ought not in conscience to be allowed to keep it and not pay the consideration money; and the lien attaches as a trust, whether the land be actually conveyed or contracted to be conveyed.
6. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment, for it attaches to him also as a matter of conscience and duty.
7. Where P. in the possession of public land, and having a right of preëmption thereto, sold such land to R., who afterwards sold to G. and the latter agreed with R. to pay P. the purchase-money when P. should make him a good title, and G. afterwards, by virtue of his possession, was able to and did obtain title in his own name, and then refused to pay P. the purchase-money, *held* that G. was responsible to P. for the purchase-money, and that P. also had a lien on the lands therefor, and which were decreed to be sold to discharge it.

In the Supreme Court.

Where a settler on the public lands had a preëmption right to them, and sold them to a person who again sold them to a third party, the original vendor has a lien on the land for the balance of the purchase-money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent preëmption law.

April, 1847. — Bill in Equity determined in the Circuit Court, before Hon. Peter V. Daniel, associate justice of the Supreme Court, and Hon. Benjamin Johnson, district judge.

S. H. Hempstead, for complainant.

The case, as made out in the bill, is mostly admitted in the answer of Goodloe, and such allegations as he has denied have been proved, — fully and conclusively proved.

But Goodloe denies the equity of the bill, resting his defence principally, if not entirely, on the ground that, when Pintard sold the lands mentioned in the bill to William Rodes on the 23d day of May, 1835, he had no title thereto, — was a mere trespasser; "inasmuch," says his answer, "as he, Pintard, never

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settled on said land in time to be entitled to preemption under the act of the year 1834;" thus conceding, if such settlement was made, that Pintard had a title, subject to sale.

As far as the south-west quarter of section six is concerned, there is no contest as to title. The contest arises upon the south-east quarter of section one, township eighteen south, range one west, containing $168\frac{96}{100}$ acres. This tract of land was originally claimed by Jane Mathers, by virtue of occupation and cultivation, under the Preëmption Act of the 12th of April, 1814. (3 Stat. at Large, p. 122, sec. 5.) She assigned to Thomas T. Tunstall, and he, as her legal representative, her assignee, purchased it, in due form of law, at the Little Rock land-office, on the 24th of July, 1834, and obtained a patent certificate therefor. On the 24th of February, 1838, without any notice, or any judicial proceeding of any kind, this purchase was ordered to be cancelled by the commissioner of the general land-office, and the purchase-money refunded, on the ground that it was not government land, until the ratification of the Quapaw treaty, on the 24th of August, 1818.

It was certainly a strong exercise of power in the commissioner to set aside this entry. Rights had grown up under it; Tunstall, the vendor, and Pintard, his vendee, were resting securely upon it; and it would seem just that some sort of notice should have been given to them, and their rights taken away, if at all, by some kind of formal proceeding, affording an opportunity to be heard. Passing this over, however, I will merely refer to an act of Congress of March 1, 1843, (5 Stat. at Large, p. 603,) the 3d section of which was intended to confirm claims, under the Preëmption Act of 1814, to lands south of the Arkansas River, and would be construed, I suppose, to have that effect. It operated by way of confirmation; and certainly, if Pintard had not sold, and had retained the possession of the land, this act alone would have given him a title against all the world, irrespective of the preëmption acts subsequent to 1814; especially the act of 1834, under which he had a perfect right of preëmption to this land, as is amply demonstrated by the proof. Pintard, however, does not entirely rest his right to relief on the validity of the preëmption of Jane Mathers, under the act of

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1814; he occupies other ground, and I only refer to that as a part of the history of the case, — a link in the chain of events connected with his title, of no inconsiderable importance.

This tract of land was in fact purchased by Pintard of Tunstall, in the spring of 1833; (the bond of 1834 having been substituted for a previous one;) possession was taken by Pintard through an agent, and the improvement and cultivation thereof commenced, as shown by the evidence, in the spring of that year. The tract is referred to by some of the witnesses as the "first quarter below the meridian line," and was improved and cultivated by Pintard, through agents and his slaves, in 1833, until he removed there himself with his family in the autumn of that year. In December, 1833, I say he was there in person, had ten or twelve slaves on the place, engaged under his own superintendence in clearing land and making fences, and from that time forward, until the sale to Rodes, Pintard improved and cultivated the south-west quarter of section 1, and built houses, cabins, stables, and other fixtures. Early in the spring of 1834, seventy-five or eighty acres of this land had been cleared, and was ready for planting; and upon which he raised corn and cotton that year. He was in possession of it on the 19th June, 1834; was a settler and occupant of it prior to that time, and cultivated it in 1833; thus fully entitling himself to a right of preëmption under the act of June 19, 1834. (4 Stat. at Large, 678.)

The right of Pintard to a preëmption under this act, is most clearly and conclusively established by the proof.

On the 23d March, 1835, he sold this south-west quarter of section 1, and a portion of the south-west quarter of section 6, to a conditional line, supposed to contain together about 200 acres, at the rate of forty dollars per acre, to William Rhodes, and Rodes gave his two notes therefor, bearing ten per cent. interest. There were at least eighty acres cleared and fit for cultivation; there were valuable and permanent improvements thereon, put there by the capital and labor of Pintard, and consisting of the buildings and tenements necessary to a plantation; and the land is proved to have been the best in the country, and to have been worth the price agreed to be paid for it per

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acre. There could be no stronger proof of the fact than the sale by Rodes to Goodloe of this identical land, on the 13th March, 1837, not quite two years afterwards, for sixty-five dollars per acre — an advance of more than fifty per cent on the cost of it.

Rodes obtained the peaceable and quiet possession of this land by virtue of the sale made to him by Pintard; and Goodloe expressly admits, in his answer, "that he received possession of both of the said tracts from said Rodes, who received it from said Pintard, and that, by virtue of that possession, be became entitled to a preëmption" under the act of June 22d, 1838.

In the contract between William Rodes and Archibald W. Goodloe, of the 13th March, 1837, the land purchased from Pintard is expressly referred to, and the purchase-money due from Rodes to Pintard reserved in the hands of Goodloe, and to be paid by him upon obtaining regular title. Thus Goodloe stepped into the shoes of Rodes, and with his eyes open, and with full notice, assumed, under hand and seal, the payment of the purchase-money to Pintard, — assumed it as a part of the consideration of the contract just alluded to.

On the 15th February, 1839, Goodloe proved up a preëmption in his own name, under the act of June 22d, 1838, to the south-east fractional quarter section one, township eighteen south, range one west, containing 168 $\frac{96}{100}$ acres, at the land-office in Helena, Arkansas.

The bill alleges that Goodloe assured Pintard that he desired nothing more than to perfect his title, and that he was bound and would pay the purchase-money due to Pintard. I beg leave to call the attention of the court, in passing along, to a portion of the answer of Goodloe, in response to this allegation. It is denied, in the face of six of his letters to Pintard, commencing the 6th of January, 1840, and ending the 26th of October, 1841. In three of them the preëmption is expressly referred to. "I will," says he, in the letter of May 1, 1840, "have no difficulty in obtaining the preëmption." In a letter of November 10, 1840, he says: "I have not, as yet, been able to get the land-office department to act on the preëmption for the quarter of land you sold Rodes." I shall not critically analyze

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these letters, but merely add that all of them contain assurances, promises to pay money to Pintard, either directly or indirectly, upon this preëmption or tract of land. Now Goodloe felt himself obliged to admit that the money spoken of in those letters was the purchase-money due by Rodes to Pintard; but to destroy the effect of this admission, and forgetting the inconsistency into which he would fall, he proceeds to refer these promises, and this money so due, to the fractional part of section six, which he informs us did not contain more than ten or eleven acres! Say it was eleven acres; that would amount, at $40 per acre, to $440, although he puts it at one half of that sum, but on what data we are not informed. On the 28th May, 1838, he paid to Pintard, for Rodes, $600, and on the 31st May, 1839, the further sum of $1,363.82, making an aggregate payment up to that time of $1,963.82! According to his account, it not only required near two thousand dollars to discharge four hundred and forty, but further means were required, and to which we must add the trouble of more than a year's correspondence!

If his answer is to be credited, he had, on the 31st May, 1839, paid for this eleven acres of section six more than four times over! His answer avers, that "he never made any other promises to pay said Pintard than are contained in said letters, and than are stated in his said original answer; and he admits that the money spoken of in said letters was the money due by said Rodes to said Pintard for the purchase of said fractional part of section six, but not for the residue of said lands; which money this respondent had agreed to pay, and never did refuse to pay!" Strange as it may appear, yet it is certainly true, that exhibits C. and D., appended to his original answer and made part thereof, (being vouchers for these payments,) both show that the amounts paid as above stated were regarded and received as partial payments of the purchase-money due for the land sold by Pintard to Rodes, and were credited upon the notes of Rodes held by Pintard, securing the purchase-money.

The agreement on the part of Goodloe, to pay the purchase-money to Pintard, was founded upon a valuable consideration, and necessarily enured to the benefit of the latter, and upon

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which he might seek a remedy, although the contract was between Rodes and Goodloe alone. *Piggott* v. *Thompson*, 3 Bos. & Pul. 149; Chitty on Contracts, 5th ed. 53; *Marchington* v. *Vernon*, 1 Bos. & Pul. 101, in notes; *Martyn* v. *Hinde*, Cowp. 438; *Dutton* v. *Poole*, 2 Levinz, 210; 1 Ventris, 318.

A preëmption right is property, so regarded by the government and the community at large. In Arkansas, "all improvements on the public lands of the United States are subject to execution." Rev. Stat. 377.

To call a settler upon the public lands a "trespasser," is an outrage upon a policy of the government which has been steadily pursued for more than twenty-five years.

The great point, to which the others are subordinate is, that Goodloe obtained the possession of both parcels of land through Pintard, and by a recognition of his title. By means of that possession, Goodloe was enabled to obtain a preëmption to the principal tract, and which he could not have obtained if Pintard had not sold to Rodes, and Rodes to Goodloe. This fact is admitted in his answer; and indeed it is perfectly manifest that, if Pintard had remained in possession, he could and would have obviated any defect in his title, by availing himself of some confirmatory act of congress, or of the later preëmption acts, *i. e.* of 1834 or 1838.

It was not competent, therefore, for Goodloe to disavow the title of Pintard, because they stood in the relation of landlord and tenant. The purchase of Goodloe from Rodes was made on the 13th of March, 1837. The preëmption of 1814 was ordered to be cancelled on the 28th February, 1838, while Goodloe was in possession; and it was worth while to observe that one of the reasons for allowing him to enter the tract he did, under the act of 1838, was, that he alleged "himself to be the purchaser from the individual who made the first-mentioned entry."

It is not pretended that Pintard was guilty of any fraud, or that Rodes was guilty of any; and, if there was fraudulent conduct, this court will be obliged to attribute it to Goodloe. Of that I say nothing, because the case, as I view it, does not demand it

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The principle stated by the supreme court, in *Galloway* v. *Finley*, 12 Peters, 295, most strongly and pointedly applies: "That if the vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title." *Searcy* v. *Kirkpatrick*, Cooke's Tenn. Rep. 211; *Mitchell* v. *Barry*, 4 Haywood's Tenn. Rep. 136. See *Morgan's Heirs* v. *Boone's Heirs*, 4 Monr. 297. Both the cases of Galloway and Searcy, above cited, must, I think, be regarded as conclusive upon the present. There is, indeed, a strong analogy between the three, — a similarity not often found to exist, — with this difference, as it appears to me, that in the one at bar there are more equitable circumstances in favor of the vendor, and demanding the interposition of a court of equity, than in the others.

In the case in 12 Peters, the court further declare, that "in reforming the contract, equity treats the purchaser as a trustee for the vendor, because he holds under the latter; and acts done to perfect the title by the former, when in possession of the land, enure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed was derived. The vendor and vendee stand in the relation of landlord and tenant; the vendee cannot disavow the vendor's title." *Willison* v. *Watkins*, 3 Peters, 45; *Connelly's Heirs* v. *Chiles*, 2 A. K. Marshall, Rep. 242; *Wilson* v. *Smith*, 5 Yerger, Rep. 398; *Blight's Lessee* v. *Rochester*, 7 Wheat. 547. The vendor will be obliged to make an abatement in the purchase-money equal to what it cost to clear the title. *Officer* v. *Murphy*, 8 Yerg. 502; *Meadows* v. *Hopkins*, 1 Meigs, Tenn. Rep. 181; *Marshall* v. *Craig*, 1 Bibb, 396. No court will allow a vendee to pry into and discover defects in his own title, with a view to purchase an outstanding claim, to the prejudice of the vendor. He may perfect his title, it is true, but then it must enure to the benefit of the vendor, and all the vendee can conscientiously demand is the cost and expense of procuring the better title.

This very case furnishes a striking and forcible illustration of the soundness and justice of the doctrine thus laid down.

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Goodloe, through Pintard, obtained title to a tract of land by an expenditure of nine hundred dollars, which was worth sixty-five dollars per acre, or more than ten thousand dollars; and if he can escape the payment of the purchase-money due from Rodes to Pintard, and which was assumed by Goodloe, he will pocket the last-mentioned sum, and obtain the rich fruits of Pintard's two years' labor on the land for nothing! Can this be tolerated? Can it be thought of? In *Winlock* v. *Hardy*, 4 Littell, Rep. 274, it was said, "that a tenant cannot deny the title of his landlord; nor can a person who enters upon land, in virtue of an executory contract of purchase, deny the right of him under whom he enters; for he is *quasi* a tenant, holding only in virtue of his vendor's title, and by his permission." See *Turly* v. *Rodgers*, 1 Marsh. 245; *Logan* v. *Steele's Heirs*, 7 Monr. 104; *Tevis's Reps.* v. *Richardson's Heirs*, Ib. 659; *Fowler* v. *Cravens*, 3 J. J. Marshall, 430.

Goodloe never placed himself in a situation to contest the title of Pintard. If upon the discovery of the defect in the title of the latter; if upon the cancellation of the preëmption certificate, under the act of 1814, Goodloe had surrendered the land to Pintard, *bonâ fide*, he might, perhaps, have purchased a better title, and arrayed it in hostility to that of Pintard, and resisted the relief prayed for in the bill. This he did not do. He continued in possession; bought up a better title while in possession; nor is there any proof that he ever disavowed the title of Pintard, until the filing of his answer. 3 Marshall's Rep. 287.

The case of *Wilson* v. *Wetherby*, 1 Nott & McCord's Rep. 373, fully sustains this doctrine, and with regard to which it was said, in *Willison* v. *Watkins*, 7 Wheat. 53: "In the case of Nott & McCord, 374, the court decide, that where a defendant enters under a plaintiff he shall not dispute his title while he remains in possession, and that he must first give up his possession and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of common law applicable to the cases of fiduciary possession before notice." Ib. 54, 55, 56.

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Goodloe, by holding the possession, and proving up a pre-emption in his own name, prevented Pintard from complying with his covenant as to making title; and such being the fact, the familiar and well-settled principle applies, that if the obligee shall do any act to obstruct or prevent the obligor from performing his part of the contract, the obligor is thereby discharged from its performance; or, to speak more properly, the contract, as far as he is concerned, is in legal contemplation actually performed, and authorizes him to demand performance at the hands of the other party. Bac. Abr., title "Conditions," Letter Q. 3; 3 Com. Dig. title "Condition," L. 6.; Co. Lit. 207; Powell on Contracts, 417, 418, 419; Pothier on Obligations, 127. In the case of *Marshall v. Craig*, 1 Bibb, Rep. 395, which in many of its features was analogous to the present, it was laid down as a correct principle, abundantly established by authority, "that wherever a man by doing a previous act would acquire a right, if, owing to the conduct of the other party, he is prevented from doing it, he acquires the right as completely as if it had been actually done." See the case, from page 379 to 396, and authorities cited.

In the cases of *Majors* v. *Hickman*, 2 Bibb, 217, and *Carrell* v. *Collins*, Ib. 429, it is decided that he who prevents the performance of a condition cannot avail himself of the non-performance. 3 Com. Dig., Condition, L. 7. *Borden* v. *Borden*, 5 Mass. 67; *Clendennen* v. *Paulsel*, 3 Misso. Rep. 230; *Crump* v. *Mead*, Ib. 233.

"If a purchaser," says Sugden, "takes possession under a contract, and he afterwards rejects the title, he must relinquish the possession." 2 Sugden on Vendors, p. 23.

The same principle, as to obstructing or preventing the performance of a covenant, is applicable to the portion of the south-west fractional quarter of section six, township eighteen south, range one east; because Goodloe, by obtaining the bond of Benjamin Taylor from Tunstall, prevented Pintard from getting title to the part embraced in the bond, and which Goodloe says has been found to contain only eleven acres. For this, however, he acknowledges himself liable, and expresses his willingness to pay, and says he "never did refuse to pay." As to title

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to eleven acres of this section, as to his liability to Pintard therefor, Goodloe makes no contest, does not resist performance; but, on the contrary, recognizes Pintard's right to relief to that extent.

Indeed, from the proof we are warranted in believing and assuming it as true, when taken in connection with his answer, that Goodloe has obtained the legal title. In his letter to Peter O'Flynn, employed by him as an agent to procure from Tunstall the bond of Benjamin Taylor, dated June 1, 1840, he says: — "I have purchased a tract of land of John M. Pintard, the same he purchased of Thomas T. Tunstall; the title is all perfect, except about twenty acres of the south-west fractional quarter of section six, township eighteen, range one east. Tunstall holds Benjamin Taylor's obligation to convey to a particular line known to the seller. Taylor is willing to convey, if Tunstall will send me the obligation. . . . I have the original contract between Pintard and Tunstall, handed to me by Pintard, as an order for the obligation on Taylor. Colonel Taylor's wife resides in Kentucky. If you will see Tunstall and forward me the obligation, directed to Richmond, Ky., I can have a deed acknowledged to bring down with me in September."

Now, O'Flynn testifies that the obligation was procured by him from Tunstall and sent to Goodloe, and that Goodloe acknowledged the receipt thereof, and paid him for his services. The same fact is acknowledged in a letter from Goodloe to Pintard, dated November 10, 1840. As Taylor, who held the legal title, was willing to convey to Goodloe, provided Goodloe could obtain this bond from Tunstall; as Goodloe did obtain the bond in 1840; and as at the time of filing his amended answer, near five years afterwards, he acknowledged his liability to this extent, and did not even hint at any inability to obtain title, nor declare that he had not obtained it, I think we are bound to conclude that the deed, which he said he could procure from Taylor, had been procured, or that he had derived a title to this part satisfactory to himself, and thus entitling Pintard to compensation and relief. If he could not or had not obtained title, with the means in his hands to do so, he would

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most undoubtedly have insisted on it by way of defence in his answer. Under all the circumstances, silence is conclusive against him; but we have something more than that, namely, a distinct admission of liability, contained in his answer.

It may perhaps be said that Taylor ought to have been made a party to the bill. In the first place, I beg leave to remark that he was not materially interested in the suit; if he had any interest at all, it was only nominal, and no beneficial purpose could have been effected by making him a party. He was ready and willing, as Goodloe informs us, to convey, and in fact no decree could have been taken against him; he would have been at best but a passive party; and as he could do nothing necessary to the perfection of the decree, the court was fully warranted in proceeding without him. *Joy* v. *Wirtz et al.* 1 Wash. C. C. Rep. 417; *Van Reimsdyk* v. *Kane*, 1 Gallison, C. C. Rep. 371; *Mallow* v. *Hinde*, 12 Wheat. 193; *Hoxie* v. *Carr*, 1 Sumner, C. C. Rep. 173; *Wormley* v. *Wormley*, 8 Wheat. 451.

But, in the second place, it is too late to make the objection in this court. It was an objection not taken at the hearing, either by demurrer, plea, or answer; and surely Goodloe cannot be allowed to surprise us with it now. Want of proper parties must be objected to by demurrer, or plea, or answer, and cannot be urged at the hearing. Mitford's Equity Pleading, 146; *Milligan* v. *Milledge*, 3 Cranch, 320.

The next inquiry is as to the lien of Pintard for the unpaid purchase-money. The lien of a vendor of land against it is peculiar to a court of equity, and can be enforced only in that court. It exists as a charge or incumbrance on the land against the vendee and his heirs, and other privies in estate, and also against all subsequent purchasers with notice of the non-payment of the purchase-money. It is wholly independent of possession on the part of the vendor, and attaches to the estate as a trust equally, whether it be actually conveyed, or only contracted to be conveyed. 2 Story, Equity, 462 to 467.

"Where a vendor" (says Sugden on Vendors, 3d vol., ch. 18, p. 182, 183,) "delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the es-

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tate be or be not conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold, gives the vendor a lien on the land for the money." And he cites, as sustaining these positions, *Chapman* v. *Tanner*, 1 Vernon, 267; *Pollixfen* v. *Moore*, 3 Atk. 272; 1 Bro. Ch. Cases, 302, 424; 6 Ves. 483; *Mackreth* v. *Symmons*, 15 Ib. 329; *Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 152; *Topham* v. *Constantine*, Toml. 135; *Evans* v. *Tweedy*, 1 Beav. 55; *Winter* v. *Lord Anson*, 3 Russ. 488.

"So, on the other hand," says he, "if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate." 3 Atk. 1; 2 You. & Jerv. 493; 3 Ib. 262. Thus proving that the lien does not arise nor depend upon perfect title. The term "estate" is used, which "imports," says Coke, "the interest which a man has in lands." Co. Lit. 345, *a*; 4 Com. Dig. Estates (A 1).

According to Judge Story, "the principle upon which courts of equity have proceeded in establishing the lien in the nature of a trust is, that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not to pay the consideration money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty." 2 Story, Equity, 465.

Did not Goodloe get the land through Pintard, and with full notice that the purchase-money was unpaid? Nay, did he not engage to pay that purchase-money himself? As long as he held the possession of the land thus acquired, could he resist this lien? It must certainly be manifest that he could not. The proposition is clear, that Pintard has a lien upon the land derived by Goodloe through him, which ought to be recognized and enforced.

It is insisted in the answer, that the dwelling-house of Pintard was upon section six, and that he was not entitled to a preëmption under the act of 1834. To this I reply, that whether he was or was not entitled to a preëmption under that act, is

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not material to the support of his right to relief. But in fact he was so entitled. The dwelling-house which was there when Pintard purchased of Tunstall, in the spring of 1833, was probably situated on or near the meridian line which divides section six and section one; but the proof is clear, that all the other buildings, improvements, and cultivation were upon the south-east quarter of section one, or the large tract, and to which Goodloe subsequently proved up a preëmption and obtained the legal title in his own name. Pintard was a settler or occupant of that tract, within the meaning of the act of 1834 (*vide* Instructions and Opinions, 2d vol. p. 589, No. 535; p. 597, No. 543), and as such, most unquestionably entitled to a preëmption.

Goodloe insists that of section six, sold to Rodes by Pintard, and by Rodes to himself, there was not enough embraced in the bond of Benjamin Taylor to make, with the other tract, two hundred acres; and that, upon ascertaining the boundaries and lines specified in the bond, it was found that it did not contain more than eleven acres. How it was ascertained, he does not state; and we only have his own assertion, without proof, that there was but eleven acres. From the proof, it appears that the portion of land thus described by boundaries in the bond must have amounted to more than eleven acres. That there was not two hundred acres in the whole, could be no ground for a rescission of the contract, if Goodloe were complainant; nor can it furnish any defence to a specific performance, when he is defendant. He obtained what he principally desired,—obtained the dwelling-house and all the other buildings, all the cleared lands, and all the improvements,—he obtained the principal object of his purchase; and, as there was no fraudulent misrepresentation or concealment on the part of Pintard, the case is a proper one for abatement in the amount of the purchase-money, to the extent of the small deficiency. This is well settled by authority. Newland on Contracts, ch. 12, p. 251, 252; 2 Atkins, 371; 4 Bro. C. C. 494; *Drewe* v. *Crop*, 9 Ves. 368; 7 Ib. 270; 6 Ib. 678; *Calcraft* v. *Roeback*, 1 Ves. jr. 221; *Dyer* v. *Hargrave*, 10 Ves. 505; 2 Story, Eq. 88; 1 Sugden on Vendors, 506, 507, 508, 525, 526.

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If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey. 1 Sugden on Vendors, ch. 7, sect. 3, p. 525 to 535, and notes and cases therein cited, 6th Am. edition. Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words more or less, or by estimation. Ib. 526; *Hull* v. *Buckley*, 17 Ves. 394; 1 Call, 313; 4 Mason, 419.

The utmost that Goodloe could claim would be an abatement for the deficiency.

Goodloe has waived his right, if any he ever had, to object to Pintard's title. His letters, after having proved up a preemption in his own name, and especially the payment made by him to Pintard on the 31st of May, 1839, of $1,363.82, amount to a waiver. The preëmption having been proved up on the 15th February, 1839, this payment was made more than three months afterwards. The letters alluded to, beginning in January, 1840, and ending in October, 1841, embrace a period of near two years; and when that payment and these promises to pay are taken into consideration, there could hardly be more conclusive evidence of such waiver. 2 Sugden on Vendors, 10 to 14; *Margravine of Anspach* v. *Noel*, 1 Madd. 310; 2 Swanst. 172; 3 You. & Coll. 291.[1]

F. W. Trapnall, and *Daniel Ringo*, for Tunstall.

Albert Pike, for Goodloe.

We insist, that in this case, this court has no jurisdiction of the subject-matter of the suit; and this upon the ground that it plainly appears to be a case in which a court of equity can have no jurisdiction whatever.

The only ground on which the aid of a court of chancery is

[1] This argument was prepared by *Mr. Hempstead*, printed, and filed in the supreme court; but as he had not been admitted in that court, it was signed by *Mr. Foote* and *Mr. Sebastian*, and appears in the case as positions for which "the counsel for the appellee contended." 12 How. 28 to 36.

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here invoked, is, that the complainant has a lien on certain lands, sold by him to Rodes, and by Rodes to Goodloe, for the unpaid purchase-money. We think there is no such lien, and that being the case, nothing is presented but a mere legal demand for money, with which a court of equity has nothing to do.

The bill alleges, that on the 1st of April, 1834, complainant purchased of the defendant Tunstall the north-east fractional quarter of section twelve, and the south-east quarter of section one, in township eighteen south of range one west, claimed by Tunstall under the Preëmption Act of 1814; and also a part of the south-west fractional quarter of section six, in township eighteen south of range one east. That in April, 1833, he sent a young man and two negroes on the land, and moved to and settled on it with his family in November, 1833. That on the 23d of March, 1835, he sold to Rodes the north-east quarter of section one, and so much of the south-west fractional quarter of section six, as made with it two hundred acres of land, embracing the front lands, at forty dollars an acre, to be paid in 1836 and 1837; and Rodes gave him his two notes for the purchase-money, on which some payments have been made. That when he sold to Rodes, he gave him possession of the land and the improvements thereon; a dwelling-house being on the land, and part of it cleared prior to April, 1833, and the land being in cultivation in 1833 and 1834.

That on the 13th of March, 1837, Rodes sold the same land to Goodloe at sixty-five dollars per acre; and by the contract made between them, Goodloe was to pay complainant the amount due him by Rodes, as soon as a complete title should be made to him. That Goodloe has made some payments on the notes and promised to pay the residue.

That the preemption claimed under the act of 1814, was afterwards decided to be invalid; and Goodloe, of his own motion, proved up and established a preëmption to the south-east quarter of section one, under the act of 1838, in his own name, and by virtue of it, entered and purchased that tract of land.

In regard to the south-west quarter of section six, he states that one Benjamin Taylor, of Chicot county, Arkansas, holds

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the legal title to it. That he gave one John T. Bowie his bond for title to part of it, and Bowie assigned and delivered the bond to Tunstall; that Goodloe has bought the bond from Tunstall, and so prevents complainant from getting legal title to that tract.

The bill prays a correction of certain alleged mistakes in the title papers, — that the lands may be subjected to payment of the purchase-money, — and that Taylor's bond may be given up, so that the complainant may procure the legal title, and comply with his contract made with Rodes.

Rodes is averred to be a non-resident, and not a citizen of the State of Arkansas; and it is expressly averred that when complainant sold, the title to the south-east quarter of one was in the United States, and is now in Goodloe by purchase from the United States; and the title to the south-west quarter of six was and is in Benjamin Taylor.

The answer of Goodloe admits that Tunstall sold to Pintard, Pintard to Rodes, and Rodes to him, as alleged; that Pintard gave Rodes possession as alleged, and that respondent has paid Pintard $1,963.82 on Rodes's notes. It avers that Pintard had no title to the south-east quarter of one, but a mere claim under the Preëmption Act of 1814, which was set aside; that he afterwards proved up a preëmption in his own name, and entered the land, and has obtained a patent for it. As to the south-west quarter of six, he alleges that Taylor has the legal title to it; that he never gave John T. Bowie any bond for it, but that he did execute a bond to Resin Bowie; that on getting a patent for that tract, he would convey to Tunstall a patent, supposed to contain about ten acres, more or less, by certain boundaries; by which boundaries the quantity to be conveyed is only eleven acres. The quantity of land in the south-east quarter of one, is stated at $168\frac{96}{100}$ acres.

He denies that Pintard settled on the place in 1833, nor until 1834, though in 1833 he had a negro on it, and a white man who died there. He admits that Pintard had made improvements on the land when he sold to Rodes; but that he never did reside on the south-east quarter of one, but his dwelling-house and residence was always on the other tract.

The agreement of counsel, and the evidence taken in the case,

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show that Pintard took possession of the land early in 1833; placed hands upon it, improved and cultivated it, and moved on it in the fall of that year.

We have not noticed the allegations or evidence in regard to Goodloe's promises to pay Pintard, because they are not material to the questions which we propose to discuss.

We have no objection to admit that Pintard might sustain an action at law against Goodloe for the money due him, after making him complete title to the lands in question. That will only prove that he can have his action in another forum.

The case shows that Pintard sold two tracts of land. The title to one was in the United States, and he never obtained any title whatever to it. He was a mere trespasser on it. Goodloe has since purchased and entered it. That his improvements on it were a good consideration for the notes may or may not be true; with that we have nothing to do in the present case. The title to the other was in a third person, Taylor. Taylor contracted to convey to Resin Bowie part of that tract, about ten acres; but no bond or deed from Bowie to Tunstall, who sold to Pintard, is shown. The title of Pintard to that tract wholly fails.

He now claims by his bill a lien on the first tract, and enough of the second to make up 200 acres, and for a decree of sale of said lands, for payment of his purchase-money. Is he entitled to it? Has he any lien?

As a preliminary matter, he remarked: — First. That there is a want of jurisdiction as to Rodes, because the bill shows him to be a non-resident of Arkansas, and there has been no service on him in the case.

Second. That it is a still more fatal objection that the bill seeks a sale of land, the title to which is in Taylor, without making him a party. How can his land be sold unless he be made a defendant? In fact, what land is it? How much, and what part of the tract? His obligation is to convey to Resin Bowie about ten acres. What obligation is shown to rest on him to convey to Pintard? Ought not Resin Bowie to be also a defendant, or is this court to dispose of the rights of both of these parties when neither of them is before it?

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Again, Goodloe is only bound to pay forty dollars per acre, when complete title is made to him. How can a decree go against him for the purchase-money on the Taylor land, when the title is still, and may perhaps always remain, in Taylor? Does the court even know for how much the decree ought to go? The first business of Pintard should have been to get title to this part of the land, before he could claim to have it sold, or assert a right to any purchase-money for it.

As far, therefore, as the south-west quarter of six is concerned, we may spare all further remark. As to that, Taylor should have been a party; so should Bowie. And, as the evidence shows that Pintard never had any title, and that the title is still in Taylor, except Bowie's equitable right to ten or eleven acres, as to this tract the bill cannot be sustained.

Does it show any lien on the other tract, which this court, exercising the ordinary power of a court of chancery, can enforce?

Pintard sold government land on which he was a mere trespasser. His claim to it failing, the purchaser's assignee entered and paid for the land. He takes his title through the United States. He may be bound, at law, to pay Pintard a stipulated price, or he may not. That is not the question. His promises may be binding on him; if so, they are binding at law, and give a legal right of action. Has he a lien on the land? If so, how was it created, and on what principles of law does it depend? If there is no lien, there is no equity.

A lien is not, in strictness, either a *jus in re*, or a *jus ad rem*, that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. Liens necessarily suppose the property to be in some other person, and not in him who sets up the right. See Story, J., in *Ex parte Foster*, 5 Law Rep. 63. *Lickbarrow* v. *Mason*, 6 East, n. 21, 24.

Now certainly there can be no lien without an estate to support it. The lien of a vendor for unpaid purchase-money is in the nature of a reservation. It springs out of the estate of the vendor himself. If he had nothing to convey, if nothing passes by his deed, he can reserve no lien. The lien is a right to have the land sold for payment of the debt. If the land did not

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belong to the vendor, he certainly could not reserve a right to have it sold. When he undertook to sell the land, it belonged to the United States. Of course, no lien was created at that time. Did any spring up when Goodloe purchased from the United States? If A. sells to B. land which belongs to C., of course he has no lien for the purchase-money. If B. afterwards buys of C., does a lien accrue to A.? Certainly not. Upon what principle? The lien is a reservation. If A. had nothing to grant, he had nothing to reserve. Thus Chancellor Kent says, in *Garson* v. *Green*, 1 J. C. R. 309: "The vendor has a lien on the estate for the purchase-money, while the estate is in the hands of the vendee, and when there is no contract that the lien by implication was not intended to be reserved."

The vendor can have his lien only upon what he sells. In this case he sold no interest in the land, because he had none. If the notes were based on any solid consideration, it was the value of his improvements, and the benefit of his labor which has been enjoyed by the defendant. This is what he sold — his labor and improvements — not any present interest in the land, but something past and done, the fruits of which defendant enjoyed. This is the estate which he sold. Could there be any lien on such an estate? The notes may be sustained, or may not, as based on a solid consideration; but this gives no lien on land in which Pintard had no interest.

No such case as the present is to be found in the books. In every case where the question of lien has arisen, the vendor had conveyed, or contracted to convey, away the estate. Admit that Pintard sold his improvements, and the United States sold the land; by what process can his debt for the improvements descend upon and become a lien on the land? The idea is absurd.

The English cases will be found reviewed in *Mackreth* v. *Symmons*, 15 Ves. 329. Later cases are *Smith* v. *Hibbard*, 2 Dick. 730; *Topsham* v. *Constantine*, 1 Tamlyn, 135; *Winter* v. *Lord Anson*, 3 Russ. 488; *Clarke* v. *Royle*, 3 Sim. 499. They are all considered in *Gilman* v. *Brown*, 1 Mason, 190. Other American cases will be found in all the books of reports; and

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there is not a single case which gives any countenance to the attempt made by this bill.

The vendee, say the books, becomes, to the extent of the purchase-money, a trustee for the vendor. 2 Story Eq. 463. On what ground shall A. hold in trust for B. an estate which he did not purchase from or obtain through him? The principle is, that if I part with my property to another, it shall stand charged with the purchase-money. But if the property is not mine, and he has to buy it of another, with what face can I pretend to charge it?

The principle on which courts of equity have proceeded, in establishing this lien, in the nature of a trust, is, that a person having gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the consideration money. Goodloe has not got the estate of Pintard, because the land never was Pintard's. He was a mere trespasser on it without title. 2 Story, Eq. 465.

We are aware that the bill has an equitable aspect. But we desire again to remark, lest we may be misunderstood, that we are arguing simply the question whether this is the proper forum in which Pintard should prosecute his claim against Goodloe; and that we are not now denying that he has a legal demand against him. He has clearly mistaken his forum. He is asking this court to give him a lien on property which he never owned, and consequently could never sell. Goodloe has promised Rodes, and perhaps Pintard, to pay the debt due by the former to the latter, whenever he should obtain from Pintard complete title to the land. If he is in default, if his promise is binding on him, and the time for its performance has come and passed, let him be impleaded in the proper forum, and he will answer.

But there is clearly no lien, and, therefore, no equity. An application so novel to a court of chancery ought not to be entertained, and this new stride in equity jurisdiction will not, we are sure, be taken by this honorable court.

JOHNSON, J., delivered the opinion of the Court. — The material facts shown by the pleadings and evidence in this case are as follows: —

That on the first day of April, 1834, the complainant Pintard

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purchased of the defendant Tunstall, as evidenced by a writing under the hand and seal of Tunstall, the south-east quarter of section one, in township eighteen south of range one west, and a part of the south-west fractional quarter of section six in township eighteen south of range one east, for the consideration of 1,500 dollars, paid by Pintard to Tunstall. An improvement having been made on the south-east quarter of section one, Tunstall claimed a preëmption right thereto under the Preemption Act of 1814, was in the possession thereof, and transferred and delivered possession to Pintard, and bound himself to convey the same by a good and sufficient title, so soon as the patent issued from the president of the United States. That on the 24th day of July, 1834, a preëmption right and a certificate of purchase was granted and issued to said Tunstall for such quarter section of land under the Preëmption Act of the 12th of April, 1814, by the land-officers at Little Rock. That Pintard resided on said land during the year 1834, built additional houses, extended the clearing, and cultivated seventy or eighty acres during that year. That, being so in possession of said land, Pintard, on the 23d day of March, 1835, bargained and sold to William Rodes the said quarter section of land and so much of said south-west fractional quarter of section six adjoining thereto, as would make the quantity of two hundred acres, at and for the price of forty dollars per acre, binding himself in writing to convey the same by a general warranty deed so soon as the patents could be procured; and, to secure the payment of the purchase-money, said Rodes executed his two promissory notes for $4,000 each, the first due and payable on the 1st of March, 1836, the second due and payable one year thereafter; and thereupon Pintard delivered possession of said land, and improvements thereon, to said Rodes. That subsequently the said Rodes, by a contract in writing, signed by himself and the defendant Goodloe, on the 13th March, 1837, bargained and sold the said tracts of land and improvements thereon to said Goodloe, for the sum of sixty-five dollars per acre, the said Goodloe stipulating in said contract to pay, as part of the price, the purchase-money due by said Rodes to Pintard, as soon as the title with general warranty should be made to him.

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Rodes thereupon delivered possession of said tracts of land and improvements to Goodloe, who has held the same ever since.

That on the 24th of February, 1838, the said preëmption right and certificate of purchase, by Tunstall, was declared to be null and void by the commissioner of the general land-office at the city of Washington, upon the ground that the land was not the property of the United States until the ratification of the treaty with the Quapaw Indians, on the 24th of August, 1818, and directed the land-officers at Little Rock to refund the said Tunstall the purchase-money paid by him.

That on the 9th of April, 1840, Goodloe obtained a preëmption right in his own name for said quarter section of land, by virtue of his occupancy thereof, under the Preëmption Act of the 22d of June, 1838, and on the 3d day of March, 1841, obtained a patent therefor from the president of the United States.

That on the 28th of March, 1838, Goodloe paid to Pintard $600, and on the 31st of May, 1839, the further sum of $1,363.82, for which credits are indorsed on one of the promissory notes executed by Rodes to Pintard, for the purchase-money of said land, and no other or further payments have been made by Rodes or Goodloe in discharge of said two promissory notes. It is admitted that Rodes resides in Kentucky, and is utterly insolvent. From the proof in the case it is difficult to ascertain the precise quantity of land contained in the south-west fractional quarter of section six, which Pintard sold to Rodes, and Rodes to Goodloe; but taking the bond of Benjamin Taylor to Tunstall for its conveyance, and the admission of Goodloe in his answer, as the best evidence, there appears to be about eleven acres; Goodloe having obtained possession of Taylor's bond to Tunstall for the conveyance of said land, he seems to admit his liability to Pintard to that extent, and avers that he has more than paid for the same.

This bill is filed by Pintard, praying a decree against Goodloe for the remainder of the purchase-money due him for said tracts of land, and claiming a lien thereon to have them subjected to sale for the payment of said money. Upon the foregoing facts and circumstances two questions arise: First, Is Goodloe personally liable to Pintard for the purchase-money

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agreed to be paid by Rodes; and secondly, Has Pintard a lien upon the lands for the payment of the purchase-money yet unpaid?

It may be material to remark, that Goodloe, having purchased and received possession of the land from Rodes, who had purchased and received the possession from Pintard, Goodloe holds the lands under Pintard, and there exists a privity of estate between them. Pintard and Goodloe stand in the relation of vendor and vendee of the estate.

The principal ground upon which Goodloe resists the payment of the purchase-money to Pintard is, that Pintard never had any good and valid claim or title to the land, either in law or equity, and therefore is not entitled to demand and receive the consideration agreed to be paid. Pintard purchased the land of Tunstall, who gave him his bond for the conveyance of the legal title so soon as it could be obtained from the United States.

Tunstall claimed the land as a preëmption right under the Preëmption Act of 1814, and on the 24th day of July, 1834; and before Pintard sold to Rodes, a right of preëmption and certificate of purchase was granted and issued to Tunstall for the said south-east quarter of section one, by the land-officers at Little Rock.

Subsequently to Pintard's sale to Rodes, and Rodes's sale to Goodloe, namely, on the 24th day of February, 1838, this right of preëmption and certificate of purchase was declared to be null and void by the commissioners of the general land-office. The title, then, under which Pintard held the land, was defective and invalid.

But Goodloe, instead of claiming a rescission of his contract, and surrendering possession of the land, which he had a perfect right to do, continued to hold it, applied for and obtained a preëmption right thereto in his own name, by virtue of his occupancy, and has obtained the legal title from the United States.

Under these circumstances, the doctrine is well established that Goodloe is to be considered as a trustee for Pintard, under whom he held the land, and that all acts done by him to perfect

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the title while in possession, enure to the benefit of Pintard. The vendor and vendee, and assignees and purchasers from the vendee, stand in the relation of landlord and tenant, neither the vendee nor the purchasers from him are permitted to disavow the vendor's title; and where they buy up a better title than that of the vendor, and the latter has been guilty of no fraud, the vendor can only be compelled to refund the amount of money paid for the better title. This doctrine is clearly held by the supreme court of the United States in the case of *Galloway* v. *Finley* and others. 12 Peters, Rep. 295.

The case of *Searcy* v. *Kirkpatrick*, decided by the supreme court of Tennessee, (Cooke, Rep. 211,) is in all its important and material features precisely analogous to the present case. Searcy had made an entry of two hundred and twenty-eight acres of land, by virtue of a military warrant, which land he afterwards sold and covenanted to convey to Kirkpatrick. Some person fraudulently appropriated the warrant to his own use, in consequence of which Searcy was unable to obtain a grant for the land.

Upon the sale Searcy delivered the possession of the land to Kirkpatrick, who continued to hold it, and finding out the condition of Searcy's title, he made an entry of this land, as an occupant, in his own name, and obtained the legal title from the State.

He afterwards brought a suit at law against Searcy on his covenant to convey, and recovered damages to the amount of $1,700. Searcy filed a bill in chancery to enjoin this judgment, and the court decreed a perpetual injunction thereto, upon the payment by Searcy to Kirkpatrick of the sum he paid and expended in obtaining the title in his own name.

Judge White, in giving the opinion of the supreme court, says: "If a man, under the belief that he has a good title to a tract of land, sells it, and either conveys or stipulates to convey it, putting at the same time the vendee in possession, and the vendee discovering a better title in some other person, purchases it with a view to prejudice the vendor, a court of equity will view the purchase as made for the benefit of the vendor, through the agency of his vendee, and will relieve the vendor

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from the obligation of his covenant by paying the money, with interest, which the vendee has advanced in purchasing up the preferable title." In the present case Goodloe became entitled to a right of preëmption by virtue of his possession and occupancy derived through Rodes from Pintard. Had he surrendered the possession when he discovered the defect in Pintard's title, Pintard might have obtained by his occupancy a valid title to the land. By holding the possession Goodloe has prevented Pintard from acquiring a title to the land, and it would be highly inequitable and unjust to withhold from him also the consideration for which he sold it. Another ground of objection on the part of the defendant Goodloe, to his liability for the purchase-money to Pintard, is, that his promise to pay was not made to Pintard, but to Rodes. It is true that he entered into no contract with Pintard, but in his written contract with Rodes, by a fair construction of its terms, he expressly bound himself to pay to Pintard the purchase-money due by Rodes, so soon as a good title should be made to him.

It can hardly be doubted that this undertaking, made upon a valuable consideration, in discharge of his debt to Rodes, and of Rodes's debt to Pintard, will be enforced in a court of equity.

It is consonant to the principles of equity and justice, and I know of no technical objections to its enforcement.

The conclusion at which I have arrived is, that Goodloe is personally bound to Pintard for the payment of the purchase-money due him for the land, after deducting the amount paid by Goodloe for the better title, to the United States, and all expenses incident to the procurement of that title.

The remaining question is, Had Pintard a lien on the land sold by him so as to subject it to sale, if necessary, for the payment of the purchase-money due him for sale? No doctrine is more firmly established by a uniform current of decisions, than that the vendor of the land has a lien on the land for the amount of the purchase-money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor and his heirs; and all

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other persons claiming under them, with such notice, are treated as in the same predicament.

The principle upon which courts of equity have proceeded in establishing this lien in the nature of a trust is, that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it and not pay the consideration money.

A third person having full knowledge that the estate has been so obtained, ought not be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. It would otherwise happen, that the vendee might put another person into a predicament better than his own, with full knowledge of all the facts. (See vol. 2, Story's Equity, 463, and the authorities there cited.) The lien attaches as a trust, whether the land be actually conveyed, or contracted to be conveyed. 2 Sugden on Vendors, 541; *Smith* v. *Hubbard*, Pick. Rep. 730.

Pintard, then, has a lien upon the lands sold by him, in the hands of the defendant Goodloe, for the payment of the purchase-money remaining unpaid with the abatement before stated.

The amount paid and expended by Goodloe in obtaining the title to the land from the United States does not definitely appear from the evidence in the cause; and, indeed, it would not be expected that he could show with certainty all the expenses to which he was put in procuring said title.

In his answer, he states the sum amounted to nine hundred dollars. I think it reasonable to allow this amount.

It appears that on the 26th of January, 1840, Goodloe loaned to Pintard two hundred dollars, for which a note was given, and is filed in this case; and it is admitted by Pintard, as a just credit, to be allowed to Goodloe.

From the bill, answers, exhibits, and proofs in the cause, the court is of opinion that the complainant is entitled to the relief prayed for in his bill of complaint.

Decree. — It is ordered and decreed that the said defendant, Archibald W. Goodloe, do pay to said John M. Pintard the sum of ten thousand five hundred and fifty-two dollars, together with ten per cent. interest per annum thereon, from rendition of

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this decree, till paid; which sums, after deducting all the credits before mentioned, to which said Goodloe is entitled, is found by the court here to be due from said Goodloe to the said Pintard, as the balance of the purchase-money for the lands mentioned in the pleadings in this case. And it is further ordered and decreed, that the said south-east quarter of section one, in township eighteen south of range one west, and eleven acres adjoining thereto, being the same sold by said Pintard to William Rodes, and by Rodes to Goodloe, in the south-west fractional quarter of section six, in township eighteen south of range one east, be and the same is hereby charged with the said sum of ten thousand five hundred and fifty-two dollars, and accruing interest, as a lien for said purchase-money; and that unless the said defendant, Archibald W. Goodloe, shall pay to the complainant, John M. Pintard, the said sum of money, with the accruing interest, on or before the first day of November, then and in that case it is further ordered and decreed, that the lands just mentioned, or so much thereof as may be necessary to pay the sum before mentioned, be sold by a commissioner appointed by this court, to the highest and best bidder for cash in hand, at the court house, in the town of Columbia, Chicot county, State of Arkansas, after the said commissioner shall have advertised the same four weeks successively, in some newspaper printed in this State, and shall have put up advertisements thereof at the said town of Columbia, and three other public places in said county of Chicot. And that the said commissioner, out of the proceeds of said sale, if sufficient therefor, shall pay, in the first place, all proper and legal expenses attending the execution of this decree.

Secondly, shall pay to the complainant, or to his solicitors of record, the amount of principal and interest hereby awarded and decreed to the complainant; and thirdly, shall pay over to the defendant Goodloe, or to his properly authorized agent, any balance which may remain in his hands after satisfaction of the amount of the principal, interest, and charges aforesaid and shall moreover deliver to the purchaser possession of the lands, and convey the same to him by and in fee-simple, to him and his heirs for ever, and shall make report of his proceedings

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in the premises to this court at the next term thereof; and liberty is hereby reserved to the complainant to apply from time to time to the court for such further and other proceedings as may be necessary for the execution and carrying into complete effect the decree herein pronounced.

And it is further ordered, that Johnson Chapman, of Columbia, in this State, is hereby appointed a commissioner for the purposes before mentioned, who shall be furnished with a certificate copy of this decree, which shall be to him a sufficient warrant for action in the premises. And the question of costs is reserved until the further order of this court herein.

The bill as to Rodes and Tunstall dismissed.

Mr. Justice Daniel concurred in the foregoing opinion and decree.

From this decree, Goodloe entered into an appeal bond to stay the execution of the decree, took a transcript, and removed the case into the supreme court. Having departed this life during its pendency there, it was revived against Joseph P. Thudgill, his administrator.

At the December term, 1851, it was argued by Mr. *Lawrence*, for the appellant, and Mr. *Crittenden*, attorney-general, for the appellee, and the case will be found fully reported under the name of *Thudgill* v. *Pintard*, in 12 How. S. C. Rep. 24 to 39, and the decision was as follows: —

Mr. Justice McLean delivered the opinion of the supreme court. — This is an appeal from the decree of the Circuit Court for the District of Arkansas.

Under the act of the 12th April, 1814, Jane Mathers claimed a right of preëmption by virtue of occupancy and cultivation to the south-east quarter of section one, township eighteen south of range one west, containing one hundred and sixty-eight acres and ninety-six hundredths, lying south of the Arkansas River. She assigned her right to Thomas T. Tunstall, who entered and paid for the land at the land-office at Little Rock, the 24th of July, 1834, and obtained a patent certificate. On the 24th of February, 1838, this purchase was annulled by the commissioner of the land-office, on the ground that the Indian title to the land had not been extinguished when the settlement

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was made. The Indian title was relinquished to the United States by the Quapaw treaty the 24th of August, 1818.

This tract was purchased of Tunstall by Pintard, in the spring of 1833, who took immediate possession and made improvements on it. In the autumn of the same year he removed his family to the land, constructed cabins, stables, and other fixtures, and in the spring of 1834, cultivated seventy-five or eighty acres in corn and cotton.

On the 23d March, 1835, Pintard sold the above quarter section and a part of the south-west quarter of section six, so as to make a tract of two hundred acres, at forty dollars per acre, to William Rodes, who gave two notes of four thousand dollars each, payable in one and two years, with interest at ten per cent. per annum. The two hundred acres were sold by Rodes to Goodloe, on the 3d of March, 1837, for sixty-five dollars per acre. As a part of the consideration for this purchase, Goodloe agreed to pay Pintard the amount of his claim as soon as a regular title for the premises should be obtained.

Goodloe, on the 15th of February, 1839, proved up a preemption in his own name, under the act of June 22, 1838, to the quarter section, and paying the purchase-money into the land-office, he obtained a patent in his own name. Prior to this, in his contract with Rodes, he paid to Pintard nineteen hundred and sixty-three dollars and eighty-two cents.

But having obtained the title to the land in his own name, he refused to make any further payments to Pintard, on the ground that his claim was void. To enforce the payment of the sum due him on the sale to Rodes, Pintard filed the bill now before us, with a prayer that the land might be sold or so much of it as should be necessary to discharge the balance due to him.

It must be conceded that the first settler upon this land, the Indian title to it not having been extinguished, could claim under the act of 1814, no preëmption right. No laws giving to settlers a right of preëmption, can be so construed as to embrace Indian lands. Such lands have always been protected from settlement and survey by penal enactments. But it appears that the Indian claim to this land was relinquished to the

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United States, by treaty, in 1818, after which it was embraced by all general acts giving to settlers a right of preëmption.

By the act of the 26th of May, 1824, preëmption rights were given north of the Arkansas River, to all who were entitled to such rights under the act of 1814, and by the third section of the act of the 1st of March, 1843, every settler on the public lands south of the Arkansas River was entitled to the same benefits under the provisions of the act of 1814, as though he had resided north of said river. By these acts a right of preëmption was given in virtue of the first settlement upon the land.

But there was another and prior act which gave to the occupant of this tract a right of preëmption. By the act of the 19th of June, 1834, every settler upon the public lands prior to the passage of that act who was in possession of a quarter section and cultivated a part of it in 1833, was entitled to a preëmption. In 1833, Pintard was in possession of the quarter section and cultivated a part of it, and he continued to occupy and improve it until the spring of 1835, when he sold his right to Rodes.

By his purchase Goodloe entered into the possession of a valuable property, and if he desired to rescind the contract it was incumbent on him to relinquish the possession of the quarter section and claim the cancelment of the contract. He cannot avail himself of the benefit of the contract and resist a performance of it on his part.

But Pintard, when he sold to Rodes, was entitled to the preemption of the quarter section. His claim was not only a valid one, but it was sold on reasonable terms, as Rodes in two years sold the same to Goodloe at an advance of twenty-five dollars per acre. Under such circumstances the attempt of Goodloe to avoid the payment of the consideration by procuring the title in his own name, is fraudulent. A title thus procured would have enured to the benefit of the vendor, even if the preëmption right had not been vested in him.

A doubt is suggested in the argument, whether Goodloe, having purchased from Rodes, can be made responsible to Pintard. In his contract of purchase, as a part of the consideration, Goodloe bound himself to pay the amount due to Pintard from Rodes on the previous purchase. It has been held

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that, under such circumstances, an action at law may be maintained in the name of the person to whom the payment is to be made. But this is a case in chancery, and no one has doubted that in equity such a contract may be enforced.

Has Pintard a lien on the land for the balance of the purchase-money? We think he has. Goodloe not only had notice of this claim, but he bound himself to pay it.

It is alleged that there is a mistake in the computation of the amount due as decreed in the circuit court. If there be an error in the calculation it is in favor of Goodloe, and of which he has no right to complain.

In the decree the circuit court gave the defendant a credit for the money paid to Pintard, and also a loan to him of two hundred dollars and a liberal allowance for the expense of procuring the title. A proper deduction was also made for the deficiency in the number of acres sold.

There appears to be no error in the decree; it is therefore affirmed, with costs. *Affirmed.*

RICHARD C. JOHNSON and CHARLES L. TILDEN, plaintiffs, *vs.* JOHN W. BOND, defendant.

1. A law which takes away all remedy is equivalent to a law impairing the obligation of the contract, and hence unconstitutional and void.
2. The repeal of the 20th section of the limitation law, (Rev. Stat. 529,) without allowing any, even the shortest time to sue, after the return of the absent person to the State, was unconstitutional, and the repealing act (Acts 1844, p. 25) void.

April, 1847. — Debt, determined before Benjamin Johnson, district judge, holding the Circuit Court.

A. Fowler, for plaintiffs.

George C. Watkins, *J. M. Curran*, and *P. Jordan*, for defendant.

OPINION OF THE COURT. — To the defendant's fifth plea of set-off, the plaintiff has replied the statute of limitations of three

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years, to which the defendant, in his second rejoinder avers, that at the time of the accrual of the causes of action as stated in the plea of set-off, the plaintiffs were, and from thence until within three years next before the commencement of this suit, continued to be out of, and did not return to, the State of Arkansas. The plaintiffs move to strike this rejoinder from the record files, on the ground that it is no answer to the replication.

The rejoinder is valid, unless the 20th section of the statute of limitations, providing for absence from the State, has been repealed. Rev. Stat. 529.

The act of 1844, (Acts of 1844, p. 25,) does, in fact, repeal this section, and the question arises, whether the repealing act is constitutional. I am clearly of opinion that it is not; because it takes from the party all remedy upon his contract, without affording him any, even the shortest time in which to bring suit after the return of the person absent to this State. *Piatt* v. *Vattier*, 1 McLean, 156. It has been repeatedly held that a statute of limitations which abrogates all remedy upon contracts, is equivalent to a law impairing the obligation of the contract itself, and, consequently, unconstitutional and void. *Bronson* v. *Kenzie*, 1 Howard, Rep. 311.

The motion to strike out must, therefore, be overruled, and the rejoinder adjudged good.

ROBERT G. CAMPBELL, plaintiff, *vs.* BENJAMIN F. JORDAN, defendant.

1. An indorsee of a writing obligatory, who is a citizen of another State, may sue his immediate indorser in this court, whether the maker is suable in such court or not, because the indorsement is regarded as a new contract, and is not within the prohibition of the 11th section of the Judiciary Act of 1789.
2. Where an indorsee of paper other than a foreign bill of exchange sues a remote indorser, and is obliged to trace his title through intermediate persons, he must show that they could have sustained an action in the circuit court of the United States to recover the contents of the paper; and without that, the court has no jurisdiction.

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3. By the law of Arkansas, all indorsers or assignors of any instrument in writing, assignable by law for the payment of money, become equally liable with the maker, obligor, or payee, on receiving due notice of the non-payment or protest of such instrument.
4. An action of assumpsit may be brought on the indorsement of a writing obligatory, the undertaking of the defendant not being under seal.

April, 1847. — Before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Assumpsit, brought by the indorsee of a writing obligatory, a citizen of the State of Tennessee, against the defendant, his immediate indorser, a citizen of the State of Arkansas, and who was also payee of the writing obligatory.

Demurrer to the declaration, assigning special causes: —

1. That the declaration contained no averment or showing that the indorsee could have sued the maker, and therefore the court had no jurisdiction.

2. That assumpsit will not lie upon a sealed instrument.

Albert Pike and *D. J. Baldwin*, for the plaintiff.

Pleasant Jordan, for the defendant.

Opinion of the Court. — A suit may be brought in the circuit court by an indorsee against his immediate indorser whether a suit could be there brought against the maker or not. In such a case, the plaintiff does not claim through an assignment. It is a new contract, entered into by the indorser and indorsee, upon which the suit is predicated; and if the indorsee is a citizen of a different State, he may bring an action against his indorser in the circuit court. This rule has been established and acted on by the supreme court in several cases, and must be considered as settled law. *Young* v. *Bryan*, 6 Wheat. 146, 151; *Evans* v. *Gee*, 11 Peters, 83.

It is true, that where an indorsee of paper other than a foreign bill of exchange sues a remote indorser, and is obliged to trace his title through intermediate persons, he must show that they could have sustained an action in the circuit court. *Mollan* v. *Torrance*, 9 Wheat. 537. He there claims, not in virtue of a new contract, but through an assignment and in the character of assignee, and comes directly within the prohibition of the eleventh section of the Judiciary Act of 1789, unless he can

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show that the intermediate indorsers were suable. 1 Stat. 79. This is not that kind of a case, and the principle does not apply.

As to the second cause of demurrer, it is sufficient to observe that this suit is not founded upon the writing obligatory, but is predicated on an indorsement of it by the defendant to the plaintiff. If it was made in this State, as seems to be admitted at the bar, it is negotiable paper; and all indorsers or assignors become equally liable with the original maker, obligor, or payee, on receiving due notice of the non-payment or protest of the instrument. Rev. Stat. 108.

The writing obligatory is properly set out in the declaration to give a history of the case, and to show the amount for which the defendant is liable on his indorsement. The indorsement, as already observed, constitutes a new contract, upon which this suit is founded. The undertaking of the defendant is not under seal, but arises solely from the indorsement, and consequently the action is well brought. 1 Chitty, Pl. 118.

Demurrer overruled.

ALEXANDER D. MOORE, plaintiff, *vs.* ABSALOM FOWLER, FELIX G. SECREST, LEWIS SNAPP, and WILLIAM BROWN, Jr., defendants.

1. A State law, providing that a sale shall not be made of property under execution unless it will bring two thirds of the valuation affixed to it by three householders, is unconstitutional and void, as to contracts made before its passage. *McCracken* v. *Hayward*, 2 How. U. S. R. 608.
2. But such a law is valid as to contracts made after its passage, because the laws in existence at the time are necessarily referred to, and form a part of the contract, as effectually as if incorporated in it.
3. Motion to quash appraisement, overruled.

May, 1847. — Motion to quash appraisement, and the return of the marshal on execution, determined before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

George C. Watkins and *J. M. Curran*, for plaintiff.

A. Fowler, for himself and other defendants.

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OPINION OF THE COURT. — In the case of *McCracken* v. *Hayward*, 2 How. Rep. 608, the supreme court of the United States have established the doctrine, that a State law, providing that a sale shall not be made of property levied on under an execution, unless it will bring two thirds of its valuation, according to the opinion of three householders, is unconstitutional and void. My opinion was different (*United States* v. *Conway*, ante, p. 313); but the rule established by the supreme court is the law of this court, and to which I shall always cheerfully conform, whatever may be my own views. But the court expressly limit and restrict the operation of this principle to contracts made before the passage of the law, and declare it inapplicable to contracts made after its passage, upon the ground that the laws in existence when the contract is made are necessarily referred to and form a part of the contract, as the measure of the obligation to perform it by the one party, and the rights acquired by the other.

Was the contract in the present case made prior, or posterior to the Appraisement Act of 1840? The writing obligatory, upon which the action is founded, bears date on the 16th of August, 1844, and consequently was made subsequent to the passage of the act, and is subject to its provisions. Acts 1840, p. 58, 59.

It is contended, however, that this latter contract grew out of a prior one made by the defendant Fowler, before the passage of the act of 1840, and that the date of the original contract is to be considered as the time of making the contract upon which the judgment is based in this suit.

I cannot accede to this position. The original contract, on which the first judgment rests, was entered into jointly by Robert Crittenden and Absalom Fowler. The contract upon which the judgment rests in this case was entered into and made jointly by Absalom Fowler, Felix Secrest, Lewis Snapp, and John Brown. The three latter persons were not parties to the original contract, and, as far as they are concerned, it is undoubtedly a new contract; and if it is a new contract as to them, it is equally so as to Fowler; it being an entirety, and not in its nature divisible. *Motion overruled.*

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FRANCES B. TRIGG *vs.* JAMES S. CONWAY.

1. A record of another State is not admissible, if the certificate of the presiding magistrate omits to state, that the attestation of the clerk is in due form.
2. Courts cannot officially know the forms of the courts of another State, and such forms should be proved in the manner directed by the act of congress of 26th May, 1790, and the certificate of the presiding justice is the only evidence that can be received for that purpose.
3. A new trial will be granted where improper evidence has been admitted, against the objection of the adverse party.

May, 1847. — Detinue in the Circuit Court, before the Hon. Benjamin Johnson, district judge, presiding.

Daniel Ringo and *F. W. Trapnall*, for the plaintiff.

S. H. Hempstead, for the defendant, contended on the motion for a new trial, 1. That the damages were excessive. There had been no demand for the negro boy before the institution of the suit, and the suit was the only demand which he admitted to be sufficient to maintain the action, and a sufficient demand to entitle the plaintiff to damages after the suit. But an actual demand was necessary to entitle the plaintiff to recover damages for the detention before the commencement of the suit, and cited *Tunstall* v. *Mc Clelland*, 1 Bibb, 186; *Cole* v. *Cole's administrator*, 4 Ib. 340; *Jones* v. *Henry*, 3 Lit. 49; *Carroll* v. *Pathkiller*, 3 Porter, 279; *Vaughn* v. *Wood*, 5 Ala. 304; *Carraway* v. *McNeice*, Walker, 538; *Gentry* v. *McKehen*, 5 Dana, 34. The jury had evidently found a large amount, as damages for the detention before the suit, and without any actual demand having been made. Walker, 538.

2. The lapse of time was sufficient to bar the action. The statute of limitations may avail a defendant in detinue under the general issue. The plea of *non detinet* is in the present tense, and under this issue any thing (except a pledge) which will show a better right in the defendant than in the plaintiff, may be admitted as competent evidence. Five years' uninterrupted adverse possession confers a right, which may be relied on as a perfect defence. 1 Saund. Pl. & Ev. 434; *Smart* v. *Baugh*, 3 J. J. Marsh. 365, 366; *Smart* v. *Johnson*, 3 J. J. Marsh. 373.

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3. The plaintiff did not show any right to the slave demanded. This, among other slaves, devised by the father of the plaintiff to her, vested in Elias Rector, her husband, on the death of the father, and Rector had the power of disposing thereof, which he appears to have exercised by his will. *Meriwether* v. *Booker*, 5 Lit. 258; *Bank's administrator* v. *Marksberry*, 3 Lit. 280, 281.

Where a legacy is given to a wife during coverture, it is in effect and by law a gift to the husband himself. 1 Swift's Dig. 28; *Fitch* v. *Ayer*, 2 Cow. Rep. 143. If a husband dies without reducing it to possession, it survives to the wife, but if she dies before him, it goes to the husband. *Beresford* v. *Robson*, 1 Madd. Rep. 205. But what is more pointed, a share of personal estate accruing in right of the wife during coverture vests even before distribution in the husband absolutely, and does not, in the event of her prior death, survive to him. *Griswold* v. *Penniman*, 2 Cow. Rep. 564; *Toller's Executors*, 225; *Swan* v. *Gauge*, 1 Hayw. 3. This was no chose in action. They are debts due by bond, simple contract, and the like, — something existing in promise. 3 Lit. 281. The case of *Gallego* v. *Gallego*, 2 Brock. 286, relied on by the counsel of the plaintiff, is not applicable.

4. The record of the Jefferson county court of Kentucky was improperly admitted. It was essential to the recovery of the plaintiff, and if there was an error here, a new trial must be granted.

The record of the proceedings of a court of another State cannot be admitted as evidence, unless it is under the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. 1 Stat. 122. This is the requisition of the act of congress. The omission to certify that the attestation or certificate is in due form is fatal, as has been frequently decided. *Ferguson* v. *Harwood*, 7 Cranch, 408; 2 Cond. Rep. 548; *Green* v. *Sarimento*, Peters C. C. Rep. 80; *Drummond's administrator* v. *Magruder*, 9 Cranch, 122; 3 Cond. Rep. 304; *Craig* v. *Brown*, Peters, C. C. Rep. 352, 354; *Smith* v. *Blagge*, 1 Johns. Cas. 238; *Stevenson* v. *Bannister*, 3 Bibb, 369.

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In this record the judge merely states that the person attesting the record as clerk was such at the time, and that full faith and credit are due to his official acts, but wholly omits to state that the certificate or attestation is in due form.

OPINION OF THE COURT. — On the trial of this cause, the counsel for the defendant made two objections to the admissibility of the record from the Jefferson county court of Kentucky: first, that it was not properly authenticated; and second, that it purported on its face to be a partial record.

This record is conceded on all hands to have been indispensable to a recovery on the part of the plaintiff; and, as the jury have found for her, it follows, as a necessary consequence, that a new trial must be granted on this ground alone, if that record was not admissible, irrespective of the other points urged by the defendant's counsel, and on which no opinion is intended to be expressed.

The counsel of the defendant has produced a number of adjudged cases of controlling authority, and which are conclusive, to show, that the first objection made by him to the admissibility of the record, was tenable, and should have been sustained.

The specific objection to it is, that the presiding magistrate has omitted the statement in his certificate, that the attestation of the clerk is in due form. This is a fatal defect, as the cases cited by him demonstrate. And other cases to the same effect will be found industriously collected, in note 771, by Cowen and Hill, in 3 Phillips on Evidence, 1120, 1132.

The act of congress of 26th May, 1790, (1 Stat. 122,) expressly declares that "the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." And when so authenticated, they are entitled to the same faith and credit as in the courts of the State from whence the same are taken.

In *Smith* v. *Blagge*, 1 Johns. Cas. 238, it was said by the

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court: "We cannot officially know the forms of another State, and therefore they ought to be proved. The act of congress directs the mode of proof, and requires that the presiding judge of the court from which the copy is obtained, shall certify that the attestation is in due form."

Hence a mere certificate verifying the handwriting of the clerk is not enough. *Craig* v. *Brown*, 1 Peters C. C. Rep. 352.

The intention of the act of congress was, not that the attestation should be according to the form used in the State where offered, or to any other form generally observed, but according to the forms of the court where the proceeding was had; and the certificate of the presiding judge is the only evidence that can be received that such form has been observed.

The record not being admissible, it follows, that a new trial must be granted, the costs to abide the event of the suit.

Ordered accordingly.

THE GOVERNOR OF THE STATE OF ARKANSAS, plaintiff, *vs.* BENNETT B. BALL, JOHN S. BLAIR, and BENJAMIN F. HOWARD, defendants.

1. On an administration bond, payable to the governor by name, and to his successors in office, the suit for the benefit of the party injured must be brought in the name of the governor for the time being, and not by his style of office.
2. Although he is a purely naked trustee for any party injured, yet the legal title is in him, and he must sue.
3. A suit by the style of office, namely, "The Governor of the State of Arkansas, plaintiff," cannot be maintained.

May, 1847. — Debt, determined before Benjamin Johnson, district judge, holding the Circuit Court.

A. Fowler, for the plaintiff.

Daniel Ringo and *F. W. Trapnall*, for the defendants, made the following points on the demurrer to the declaration: —

(1.) The legal title to, or interest in, said bond is not in the plaintiff, but in the State of Arkansas, or the legal representatives of John Pope, deceased, to whom it was made payable

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(2.) That there is no such corporate being known to or recognized by law as "The Governor of the State of Arkansas," capable of suing or being sued, or of creating or receiving any obligation; but the right, if any, in the bond set forth in the declaration, is, by law, vested in the present incumbent of the office of governor, who holds the same as a naked trust, for the use of such as have been damnified by a breach of the condition. And in the name of the individual who holds the office, and not in the name of his style of office only, we presume every suit on such obligations has been prosecuted, and so the statutes certainly contemplated they should be prosecuted, unless, indeed, they must be sued in the name of the State, by virtue of the provisions of the 171st section of the administration law. See sec. 15, tit. Abatement, Rev. Stat. p. 59, which shows conclusively that such suits, when brought in the name of the governor, must be in the name of the person holding the office for the time being, and not in the name of his style of office, otherwise there could be no substitution of the name of his successor, where the plaintiff dies or is removed from office as there provided.

Taylor et al. v. *Auditor*, 2 Ark. Rep. 174, held that the auditor can maintain suit on sheriffs' bonds made to the governor and his successors in office, by virtue of statute of 1836; but on such bond suit in his name can be maintained, only when the State is the beneficiary, or entitled to the money recovered by the suit. This was adjudged before the taking effect of the Revised Statutes.

Phillips & Martin v. *Governor, use of, &c.*, 2 Ark. Rep. 382, was instituted before the taking effect of our Revised Statutes, and not subject to the provisions of the 171st section of our administration law, as this suit is, was brought in the name of "James S. Conway, Governor, &c., as successor of Pope," in whom, as the law then was, the legal interest in the bond was vested, as a naked trust, as Pope's successor in office, and so that suit was properly in the name of Conway; was rightly decided; and the principle there adjudged, as regards the party in whose name the suit on such bond is maintainable, rightly understood, is a direct authority against the plaintiff in this

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suit; as the law, when this suit was instituted, expressly required it to be in the name of the State; as the law preëxisting required it, to be in the name of the person who, at the time, was the incumbent of the office of governor.

To the same effect is one of the cases read by the plaintiff's counsel from the Missouri Reports, while the others read from same book neither uphold the view of the plaintiff, nor militate against that of the defendants; but we infer that it was a suit in the name of the person holding the office of governor. The breaches assigned were various, not confined as here, simply to non-payment of the judgments, and an alleged failure to sell lands and slaves without showing the personal estate insufficient for the payment of debts — in which case only such sale is authorized.

The insufficiency of the first four breaches assigned, (each being for the non-payment of the debt allowed in favor of Pinkard & Arnold,) consists in the omission to show or set forth in any manner, the fact, that upon a settlement of their administration accounts with the county court, or any other court of competent jurisdiction, moneys sufficient to pay the debts and expenses, by law required to be paid, was at any time in the hands of administrators; that the same was by such court appropriated to the payment of this debt; or that they were ever ordered to pay the same by such court; and neglected to pay the same within ten days after the making of such order. Until these facts are shown the administrators were not bound to pay, in fact could not pay, without taking upon themselves the whole burden and risk of adjusting the rights and priorities of all the creditors, and of making good the loss to any creditor, if, upon settlement made, the court should direct the payment to be made in a different order, or a greater or less proportion, a burden and responsibility of which the law has entirely exempted the administrator, by only requiring him to pay upon the order of the court only. And so it has been expressly adjudged by the supreme court of this State in *Outlaw et al.* v. *Yell*, Governor, &c., 5 Ark. Rep. 470, and against the principle of this decision, we confidently believe, no case can be found; besides it applies to proceedings under the statutes in

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force prior to March 20, 1839, as forcibly as to those contained in the Revised Statutes, as is manifest upon a comparison of their provisions. See Ark. Dig. title Administration, sections 28, 29, 30, 31, 33, 43, 45, to show that the administrator shall only pay over or part with the estate upon settlement made and an order directing the appropriation thereof, whether in discharge of debts, legacies, or distributive shares; and contrast same with the corresponding provisions of the Revised Statutes, title Administration, sections 104, 105, 106, 107, 121, 122, 123, 124.

To show that prior to March 20, 1839, as well as subsequently, the amount recovered in any proceeding for waste, shall be appropriated for the common benefit of all the creditors, contrast sections 32, 33, 35, 36, 37, in Ter. Dig. with sections 171, 172, 173, Rev. Statutes.

The two last breaches, one for non-sale of slave, the other for non-sale of land, are respectively defective in not showing a deficiency of other personal estate to pay the debts, legally allowed, and chargeable against the administrator; without which deficiency administrators could neither sell slaves nor lands. Old. Ark. Dig. sect. 22, 26.

In regard to all the questions at present presented on the demurrer, as regards the breaches assigned, the law will be found to have been substantially the same before and since the 20th of March, 1839, and the demurrer is, as we conceive and insist, in every point well taken.

Opinion of the Court. — The only question I deem it necessary to decide on the present demurrer is, whether this suit is brought in the name of a person competent to maintain it. The declaration and writ described the plaintiff in the following manner: "The governor of the State of Arkansas, who sues for the use of Pinckard & Arnold, &c."

This suit is not brought in the individual name of the governor of the State of Arkansas, but in the manner above stated, by the style of office.

The administration bond upon which the action is founded was executed to John Pope, governor of the Territory of Arkansas, and his successors in office, in 1833, in accordance with the provisions of the 9th section of the Territorial Act of 1825.

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Ter. Dig. 50. The thirty-seventh section of the same act provides that "the bond to be given by the administrator may be put in suit by the party injured in the name of the governor of the territory to the use of the party injured." Ter. Dig. 64. And the fourth section of the schedule to the constitution of Arkansas declares that all bonds executed to the governor of the territory in his official capacity shall pass over to the governor of the State and his successors in office, for the use therein expressed, and may be sued for and recovered accordingly. Rev. Stat. 40.

In my judgment it is clear, that an action may be maintained if it is brought in the name of the governor of this State at the time it is commenced, and the only question is, Has this suit been so brought? The plain and obvious meaning of bringing a suit in the name of a public officer is, that it shall be in the name of the individual holding the office for the time being. He is a purely naked trustee for any party injured, — a mere conduit through which the law affords a remedy. The legal title is in the officer, and in his name alone can an action at law be maintained; and to that effect are adjudged cases. *Brown* v. *Strode*, 5 Cranch, 303; *Wormley* v. *Wormley*, 8 Wheaton, 421; *Irvine* v. *Lowry*, 14 Peters, 300; *McNutt, Governor*, v. *Bland*, 2 Howard, S. C. Rep. 9.

That this is the meaning of the legislature in using these terms is abundantly manifest from the fifteenth section of the Revised Statutes, under the title "Abatement," which provides that "when an action is directed or authorized by law to be brought by or in the name of a public officer, his death or removal from office shall not abate the suit, if the cause of such suit survive to his successor; but the same may be continued in the name of such successor as plaintiff therein." Rev. Stat. 59. Thus showing that the suit is to be brought in the individual name of the officer and not by his style of office.

This action is brought by using the style of office and not by using the name of the officer, and it can hardly be contended that it can be maintained in its present form. This may be said to be a mere technical objection as the plaintiff on the record cannot prevent the institution or prosecution of the suit, nor

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exercise any control over it, the real and only plaintiffs being the persons injured by a breach of the bond. To this it may be answered that the legal right to bring an action upon the bond is alone vested in the person exercising the functions of governor and his successors in office, to whom, in his individual name as governor, it is executed, and he alone or his successors in office, although naked trustees for others, can maintain an action on the bond. And this accords with the general rule of pleading, that the right of action at law is vested in the party having the strict legal title and interest. 1 Chitty, Pl. 3; 1 East, 497, 501; 7 Ib. 48; 5 Wend. 191; 9 Ib. 233.

I have seen no case establishing a different doctrine from that here laid down, and the cases, as far as my researches have extended, were all brought in the individual name of the officer, describing himself as holding the office. *McNutt, Governor*, v. *Bland*, 2 Howard, U. S. Rep. 9. *Demurrer sustained.*

NOTE. — The plaintiff obtained leave to amend; but subsequently dismissed the suit.

WILLIAM RUSSELL, plaintiff, *vs.* CHESTER ASHLEY, defendant.

1. The deposition of a witness, residing more than one hundred miles from the place of trial, may be taken *de bene esse* in or out of the district, in suits at common law, under the Judiciary Act of 1789. 1 Stat. 88.
2. After it is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting, shall show that fact, and that it was known to the opposite party, in time to have had the witness subpœnaed. 5 Peters, 613.
3. A witness residing more than one hundred miles from the place of trial, is beyond the coercive power of a subpœna, whether he resides in or out of the district; and the party who issues a subpœna for him, must pay the costs attending it, and cannot throw them on the opposite party.
4. The officer taking depositions should certify each item of costs, and transmit the evidence of services rendered, so that the court may see that the services have been performed, and that the charges are such as the law allows.
5. Costs retaxed, on the principle above stated, and errors ascertained.

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6. Process Act of 1828, law of Arkansas as to subpœnas; those addressed to the marshal adopted by usage of the court.
7. Mode of taking depositions under 30th section of act of 1789; subpœnaing witnesses, and rules of court, explained in note.

May, 1847. — Retaxation of costs, before Benjamin Johnson, district judge, holding the Circuit Court.

Daniel Ringo and *F. W. Trapnall*, for the plaintiff.

Chester Ashley, for himself.

OPINION OF THE COURT. — The defendant objects to the costs taxed against him upon the subpœnas, and the service thereof upon witnesses in the case, upon the ground that the subpœnas are void on their face, being directed to the marshal instead of to the witnesses themselves.

By the act of Congress of May 19, 1828, (4 Stat. 278), to regulate the processes in the courts of the United States, and made applicable to Arkansas by the act of August 1, 1842, (5 Stat. 499), it is enacted in substance, that the forms of mesne and final process, except the style, shall be the same in the courts of the United States, as in the highest State courts of original and general jurisdiction; subject, however, to such alterations and additions, from time to time, as the courts of the United States shall, in their discretion, deem expedient.

The forms of subpœnas, as well as every other process, then, must conform to those used in the circuit courts of this State, unless this court has deemed it expedient, under the power vested in it by congress, to alter the same.

A subpœna for a witness, by the laws of this State, is to be directed to the person to be summoned, and not to an officer commanding him to summon the witness. Rev. Stat. 774.

The subpœnas which have issued from this court, since its first organization, have uniformly been directed to the marshal of the district, and not to the witnesses themselves. Although this form of subpœna has not been prescribed by an express rule of this court, yet it has received its sanction ever since its creation, and the legality of this form has never been called in question until the present time. The power of this court to adopt the form of a subpœna cannot be disputed, for it is

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expressly conferred by act of congress. The question then is, Has this court adopted this form? Uniform practice in the use of this form, from the origin of the court to the present time, would seem to be sufficient to establish the fact that the present form of the subpœna had been adopted. Uniform practice, acquiesced in by the bar, and never contested by any one, for a period of ten years, as firmly establishes that practice and makes it the act of the court, as if it had been prescribed by the written rules of the court. The subpœnas were not void.

But the variance between the subpœna provided by the State law, and that used in this court, is in form only. They are substantially the same. In each of them the witness is commanded to appear at court and testify, and each may be served by an officer of the court or by a private person, the latter making oath to the service. They are, in fact, precisely the same, except in form. But even if they were substantially different, it is clear that the court has the power to alter the form of the writ; and the court in effect has exercised that power in the manner alluded to.

The defendant objects to the item in the taxation of costs against him for the subpœna and its service on William F. Moore, a witness who resided more than one hundred miles from this place, and whose deposition the plaintiff had taken before the service of the subpœna on him. This objection is well taken. The deposition of a witness residing more than one hundred miles from the place of trial, is to be taken, not *de bene esse*, but in chief, and he cannot charge the defendant with the costs of taking his deposition, and also the costs of summoning him as a witness. Having used the deposition, he cannot charge the defendant with having him summoned to appear and give evidence orally in court. This item is disallowed.

He also objects to the costs incident to suing out two commissions for the purpose of taking Moore's deposition. This objection is also well founded. I can perceive no necessity for more than one commission. These costs are disallowed.

He also objects to all the costs incident to the taking the rejected deposition of Moore, including the fees of the clerk

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of this court. I deem this objection well taken, and these costs are disallowed as against the defendant.

The certificate of the justice of the peace of the costs of taking depositions before him, is to be regarded so far only as it states legal items of costs incurred before him. All beyond that is disallowed.

Let the costs be retaxed in accordance with this opinion.

Ordered accordingly.

The plaintiff having moved for a reconsideration, the following opinion was delivered:—

By JOHNSON, J.— Upon reconsidering the opinion previously given in this case, I am satisfied I erred in stating "that the deposition of a witness, residing more than one hundred miles from the place of trial, is taken, not *de bene esse*, but in chief." In a suit at common law, the deposition of a witness so residing, is taken *de bene esse*, or conditionally; the only condition, however, being, that the witness shall remove to a place less than one hundred miles to the place of trial, before the deposition is offered to be read; and, unless this shall be shown by the party objecting, the deposition may be read at the trial, without the service of a subpœna upon the witness.[1]

Indeed, a witness residing more than one hundred miles from the place of trial, is beyond the coercive power of a subpœna. The party may take his deposition, but cannot compel him to attend at court, and give oral testimony. This had been expressly held by the supreme court of the United States, in the case of *The Potapsco Insurance Company* v. *Southgate*, 5 Peters, Rep. 615.

The party desiring his testimony has no right to issue a subpœna to coerce his attendance, and if he does he must pay the costs incident thereto, and not throw them upon the other party. One other principle stated in the former opinion requires explanation. It relates to the costs of taking depositions.

It is the duty of the person before whom depositions are taken, to state and certify each item of costs before him, that

[1] *Merrill* v. *Dawson*, post.

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the court may see that the charges are such as the law allows, and that the services have been performed.

In this case, the justice before whom the depositions were taken has not sent up a statement of the items of costs before him, but has certified them as follows: — "Justice's fees, $3.17; constable's, $2.18; witnesses', $2.50."

This certificate is inadmissible to prove the amount of costs incurred before him.

He should have stated the items of costs, and transmitted the evidence of the services rendered, that this court might see that the charges were legal, and such as the law allows.

This certificate, however, is evidence that he claimed the fees allowed him by law.

It is proper, then, to look at the services rendered by the justice to ascertain the amount of fees to which he was entitled; and in doing so, it appears he was entitled to the sum of $3.17 for taking the five depositions. Rev. Stat. 395.

It is contended that the fees to the constable of $2.18, and to the witnesses of fifty cents each, ought to be allowed. There is no proof that the constable rendered any service; nor is there any proof that the witnesses were summoned to testify before the justice, and that they claimed to be paid therefor, except the statement of the justice, of $2.18 as constable's fees, and $2.50 as witnesses' fees. This is not sufficient. He should have certified the items of the services performed by the constable, and that the witnesses were summoned before him to testify, and that they claimed to be paid for their attendance.

Governed by the principles stated in this opinion, and looking into the taxation of the costs, I find that the defendant has been illegally taxed with costs, to the amount of eighteen dollars and forty-six cents, which he has paid upon the execution against him. The plaintiff must refund and pay to the defendant that sum, together with the costs of the motion for a retaxation. *Ordered accordingly.*[1]

[1] The mode of obtaining proof by depositions in suits in equity and at law, in the courts of the United States, depends upon various enactments of congress, not altogether clear and explicit.

In the common law courts of England, the practice was this: When a mate-

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rial witness resided abroad, or was going abroad, or from sickness, age, or infirmity, was unable to attend the trial, the party needing his testimony might move the court in term time, or apply to a judge in vacation, for an order or rule to examine him on interrogatories *de bene esse* before any of the judges of the court, if he resided in London, or if in the country or abroad, before commissioners specially appointed. The rule or order, however, for this purpose, could not be obtained, unless by the consent of the opposite party; and hence, if such consent was withheld, the common law courts possessed no power to permit the testimony to be taken. The most that the court, in the exercise of a sound discretion, could do, was to postpone the trial for a reasonable time, to afford the party an opportunity of applying to the court of chancery for a commission for that purpose. 2 Tidd, 740; 1 Bos. & Pull. 210; 3 Bl. Com. 383; 1 Phil. Ev. 16.

When consent was given and a deposition taken, it was considered as being taken *de bene esse*, or conditionally, that is, that the deposition might be read at the trial by first showing reasonable exertions to obtain the personal attendance of the witness. The death of the witness, inability to find him after diligent search; residence or absence beyond the jurisdiction of the court; incapacity to testify, as where he had become a lunatic, or infamous, or interested; or inability to attend at the trial, from age, sickness, or infirmity, were among the instances which authorized the reading of the deposition as testimony. 1 Stark. Ev. 264 et seq. and authorities there cited; 2 Tidd, 741.

When consent was withheld, the party was then obliged to resort to a court of chancery for a commission to take the deposition of the witness. It was a proceeding in which equity had a general jurisdiction to prevent a failure of justice. It was a regular bill, praying for a commission to examine witnesses in aid of a trial at law; and it was necessary to show the pendency of the action, the materiality of the testimony, and due diligence and inability to procure it by any of the means which the common law court was competent to afford. The commission was not grantable of course; but rested in the sound discretion of the chancellor, in view of all the circumstances of the case. And it was competent for the court, by injunction, to stay proceedings at law, to afford time to obtain the testimony. Eden on Injunctions, 112.

But that circuitous mode has been shortened in England by Statute 1 William 4, c. 22, sect. 4; and now the common law courts are authorized, upon the application of either party, to issue a commission for the examination of witnesses at places out of their jurisdiction. But the jurisdiction of courts of equity is not taken away, but still exists. 2 Daniel, Ch. Pr. 1097; 4 Sim. 546.

The principal provision, as to taking depositions in the courts of the United States, is to be found in the Judiciary Act of 1789, section 30, and is as follows: —

"That the mode of proof, by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be neces-

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sary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court, or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party to be present at the taking of the same, and to put interrogatories if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such capture, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid, shall be taken before a claim put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they were taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used in the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court; but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to

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witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. Provided, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken." 1 Stat. at Large, 88, 89, 90.

The commissioners appointed under the act of congress of February 12, 1812 (2 Stat. 679), by the courts of the United States to take affidavits and acknowledgments of bail, were expressly authorized by the act of March 1, 1817 (3 Stat. 350), to take depositions under the foregoing section; and so they are to be added to the number of those competent to take depositions. Conkling, Pr. 56, 253.

Thus it will be seen that the 30th section of the Judicial Act of 1789, authorizes the deposition of a witness to be taken "who shall live at a greater distance from the place of trial than one hundred miles;" and this provision applies equally to the depositions of witnesses living within or without the district. 5 Peters, Rep. 616. Notice of time and place must be given to the opposite party, or his attorney, whichever may be nearest, provided either is within one hundred miles of the place where the testimony is to be taken, and after notification time is allowed for attendance, which is prescribed to be not less than at the rate of one day for every twenty miles travel, excluding Sundays. If neither the adverse party nor his attorney is within that distance, notice is not necessary; and if the deposition is in other respects regular, it is admissible as evidence. 1 Stat. 89.

The main feature in a deposition of this kind is the distant residence of the witness, and which is the reason of resorting to this mode of procuring testimony. The authority to take the written testimony of a witness is given for the convenience of suitors; but as that authority is in derogation of the rules of the common law, it must be strictly pursued, and it is therefore necessary to show that the requisites of the law have been complied with before such testimony is admissible. The certificate of the officer who takes the deposition is good evidence of the facts therein stated; and if the facts necessary to bring a case within the provisions of the law are sufficiently disclosed in such certificate, the deposition is entitled to be read; but no presumption can be admitted to supply any defects in taking the deposition. *Pettibone* v. *Derringer*, 4 Wash. C. C. R. 219; *United States* v. *Smith*, 4 Day, 121; North Carolina Cases, 81; *Bell* v. *Morrison*, 1 Pet. 355, 356; *Patapsco Ins. Co.* v. *Southgate*, 5 Ib. 617.

The witness must be sworn or affirmed to testify the whole truth, the testimony reduced to writing by the magistrate, or by the deponent in the presence of such magistrate, and then subscribed by the witness. It has accordingly been held, that a deposition reduced to writing by the witness himself, and formal in every respect, with the exception that the magistrate did not certify that

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the deposition was reduced to writing by the witness in the presence of the magistrate, was inadmissible; the court remarking, that where evidence is sought to be introduced contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken, and that there ought to be direct proof that the requisitions of the statute have been fully complied with (*Bell* v. *Morrison*, 1 Pet. 356); which proof, as will be perceived from the same case, is properly made by the certificate of the magistrate taking the deposition. Conkling's Practice, 2d ed. p. 255; *United States* v. *Smith*, 4 Day, 121.

The act of congress then proceeds to declare, that a deposition so taken shall be retained by the magistrate until he deliver the same with his own hand into the court for which it was taken, or shall, together with a certificate of the reasons of taking the same, and of the notice, if any was given to the adverse party, be by such magistrate sealed up and directed to such court, and remain under his seal until opened in court. 1 Stat. 89. The mode of transmission is not prescribed by the act; and it was doubtless intended to be left to the ordinary and usual means of conveyance resorted to in the business affairs of life. In practice, it is usual to employ the mail for that purpose; and perhaps it would be most prudent to do so where the mail facilities will allow it.

In the treatise of Judge Conkling, it is, however, stated, that a suitable private agent may be employed. That is undoubtedly within the spirit and intention of the act of congress. Conkling's Practice, 2d ed. 255. A deposition, therefore, may be transmitted by the mail, by a steamboat or vessel, or a private individual; for these are means of conveyance indiscriminately used in business transactions, and it is not to be supposed that congress intended to provide for a different or exclusive mode of transmission. If that had been the intention, the mode would have been specifically designated.

The deposition cannot be opened out of court, except by consent of parties; and if it is, it is a fatal objection to its admissibility, as was decided in the case of *Beale* v. *Thompson*, 8 Cranch, Rep. 70; 3 Cond. Rep. 35.

A deposition taken on account of the residence of a witness more than one hundred miles from the place of trial, cannot be considered as taken *de bene esse*, according to the usual meaning of that term. The only contingency on which a deposition thus taken cannot become absolute, is where the witness moves within one hundred miles before trial, and that fact is known to the opposite party in time to subpœna him to testify. The onus of proving this rests on the party opposing the admission of the deposition. 5 Peters, 617. But in the other instances mentioned in the 30th section of the Judicial Act, the party offering the deposition must show that the disability of the witness to attend personally still continues, the law presuming it temporary. 5 Ib. 617.

In *Evans* v. *Eaton*, 6 Wheat. 426, a deposition had been taken according to the State practice, instead of being taken pursuant to the provisions of the act of congress of 1789, and had been excluded. The supreme court, in passing upon this point, said:—"It is not pretended that the deposition was admissible

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according to the positive rules of law, or the rules of the circuit court. No practice, however convenient, can give validity to depositions which are not taken according to law, or the rules of the circuit court, unless the parties expressly waive the objection, or by previous consent agree to have them taken and made evidence."

Without pretending to determine the precise scope of power which is thus recognized in the circuit courts to adopt rules with regard to taking testimony, it is clear enough that it recognizes the power to adopt the State practice on that subject, by appropriate rules for that purpose. The exclusion of the deposition in that case was vindicated on the ground that it was not taken pursuant to any rule of court, nor the act of congress; thus admitting that if it had conformed to a rule of court, it would have been admissible.

In *Buddicum* v. *Kirk*, 3 Cranch, 293, C. J. Marshall says there are two modes of taking depositions under the act of congress. By the first, notice in certain cases is not necessary; but the forms prescribed must be strictly pursued. By a subsequent part of the same section, depositions may be taken by *dedimus potestatem*, according to the common usage. Of the deposition in that case, which was taken by *dedimus potestatem* in Virginia, he says: "The laws of Virginia are to be referred to on the subject of notice. Those laws do not authorize notice to an attorney at law. The word attorney in the act of assembly means attorney in fact." This case shows satisfactorily the meaning that is to be attached to the mode of taking testimony by *dedimus potestatem*, according to common usage. The phrase, common usage, cannot refer to any common law usage or custom, because the taking of testimony in writing, so far from being a common law right, depends upon statutory provisions. It must necessarily refer to State usage, sanctioned by statute law, pointing out a particular mode of taking testimony. And accordingly, in the case last cited, the then chief justice proceeded to determine the validity of a notice according to the law of the State of Virginia, where the deposition was taken, and to give a construction to the State law with regard to the point of notice.

By referring to the rules of the district court for the northern district of New York, it will be perceived that commissions to take the examination of witnesses resident without the district might issue in the manner and subject to the regulations, so far as the same were applicable, *mutatis mutandis*, prescribed by the Revised Statutes of New York (Conkling's Practice, App. p. 540); and it is likely that most if not all the courts of the United States have a rule of the like character, adopting the State practice as to taking depositions.

The circumstances under which a *dedimus potestatem* will be issued, and the mode of obtaining, executing, and returning it, in the several districts, depend upon the laws and practice of the several States, and the rules of the several courts of the United States. Conkling, 258; 3 Cranch, 293.

On the 26th June, 1839, the following rule was adopted by the circuit court of the United States for the District of Arkansas:—

"13. It shall be lawful for the clerk of this court, in vacation, to make and enter rules, and issue commissions for taking the depositions of witnesses, to be

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read as evidence in any suit pending, or which may hereafter be pending in this court, upon the application of either party interested."

And on the 19th July, 1841, adopted the following additional rule:—

"16. Ordered, That from this time, either party to any suit pending in this court shall be at liberty to take depositions, either in the manner prescribed by the laws of this State, or in conformity to the several acts of congress in that regard, as well before as after issue joined in such suit; and depositions taken at any time after suit commenced, either under the laws of the United States, or by rule entered in open court, or in vacation, may be used on the penal trial or hearing of such suit, in the same manner as though such depositions had been taken after issue joined."

The law of Arkansas, as to taking depositions, will be found in the Digest, ch. 55, p. 431 to 435.

The forms for taking depositions and giving notices, where notice is necessary under the 30th section of the Judicial Act, will be found in Conkling's treatise, App. 571 to 574; also the form of a *dedimus potestatem*, p. 561; and the form of subpœna to compel attendance of witnesses before commissioners, p. 562.

By the act of March 2, 1793 (1 Stat. 335), subpœnas for witnesses may run to all places in or out of the district, not more than one hundred miles distant from the place of holding the court, at which the attendance of the witness is required. 4 Wheat. 511.

And by an act of congress of January 24, 1827, "to provide for taking evidence in the courts of the United States in certain cases," (4 Stat. 197,) provision is made for issuing subpœnas, and subpœnas *duces tecum*, for witnesses to appear and testify before commissioners, and punishing witnesses for disobedience. But they are not required to go out of the county where they reside, nor more than forty miles from their residences, for that purpose. And they cannot be punished for contempt, unless their fees for going to and returning from, and one day's attendance at the place of examination, shall be paid or tendered at the time of serving the subpœnas.

The act of August 23, 1842 (5 Stat. 517, 518), provides as follows:—

"Sec. 5. That the district courts, as courts of admiralty, and the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon the merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties in the clerk's office, or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions, and interlocutory orders, rules, and proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

"Sec. 6. That the supreme court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other

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process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law or in admiralty, and in equity, pending in said courts; and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and mode of drawing up, entering, and enrolling decrees; and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."

Under this authority, the supreme court, on the 2d of March, 1842, promulgated "rules of practice in suits in equity in the circuit court," which took effect on the 1st of August, 1842.

The following relate to testimony in equity causes:—

"67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

"68. Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition, taken under the acts of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable."

"70. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony."

"78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring

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ALEXANDER P. GRAY and ALEXANDER GRIFFITH, plaintiffs, *vs.* THOMAS T. TUNSTALL.

1. Justices of the peace, and masters in chancery of the State of Arkansas, are authorized to take affidavits, to be used in the circuit court of the United States, in civil causes, and affidavits so taken, are as valid and effectual as if subscribed in open court.
2. Non assumpsit sworn to, puts in issue the execution of the writing sued on, and it then devolves on the plaintiff to prove the execution.

June, 1847. — Motion, determined before the Hon. Benjamin Johnson, district judge, holding the Circuit Court.

Daniel Ringo and *F. W. Trapnall*, for plaintiffs.

A. Fowler, for defendant.

OPINION OF THE COURT. — The defendant has made oath to the truth of his plea of non assumpsit to the last count of the amended declaration, before Graham Witherspoon, a justice of the peace in and for Jackson county, in this State, and the question for the decision of the court is, whether the affidavit is made before a person authorized by law to take it.

By the act of 1812, "for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," (2 Stat. 679,) this court is vested with authority "to appoint such and so many discreet persons, in different parts of the district, as it shall deem necessary, to take acknowledgments of bail and affidavits, which shall have the like force and effect as if taken before a judge of this court."

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the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon, by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in court. But nothing herein contained shall prevent the examination of witnesses *vivâ voce*, when produced in open court, if the court shall in its discretion deem it advisable."

These rules sufficiently indicate the mode and manner of taking testimony in suits in equity in the courts of the United States, and need no comment.

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On the 20th June, 1839, this court made the following rule: "That affidavits required in the progress of any civil cause in this court, to pleas, motions for continuance, and to all other steps in a cause to which an affidavit may be necessary, may be taken before any judge or justice of the peace, or master in chancery, of the State of Arkansas, and shall have the same effect and validity as if subscribed in open court."

The question here arises, whether this rule is warranted by the act of congress above recited. I think it is; and moreover, that it substantially complies with the requirements of that act.

Now it is seen that by that act, this court is authorized to appoint as many discreet persons in different parts of the district, as it shall deem proper to take affidavits. The rule of this court virtually appoints all the justices of the peace of the State of Arkansas, and empowers them to take affidavits to be used in this court, in civil causes. True, it does not in express terms make such appointment; but in authorizing such affidavits to be taken before them, and declaring that when thus taken, they shall be valid and effectual; impliedly, necessarily, and substantially appoints them for the purposes indicated in the rule.

The motion to strike the plea from the files, must therefore be overruled, and as the plea of non assumpsit sworn to puts in issue the execution of the note, it will devolve on the plaintiff to prove it. Rev. Stat. sect. 104, p. 633.

Motion overruled.

WALTER N. HALDERMAN, administrator of John Halderman, deceased, complainant, *vs.* PETER HALDERMAN, defendant.

1. A copy is inadmissible unless the original is lost or destroyed, or beyond the power of the party to produce it.
2. Until there is a final settlement and adjustment of all partnership accounts, and a balance struck, one partner is not permitted to sue the others, either at law or in equity, for money paid by him on account of the partnership concern.
3. For money due to a partner from the partnership, payment, except in a few

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special cases, can only be enforced by application to a court of equity for an account and dissolution of the partnership.

4. When upon the dissolution of a partnership, all accounts have been adjusted, and a balance struck, an action at law will lie for such balance.
5. The jurisdiction of a court of equity in such a case doubted.

August, 1847. — Bill in chancery, determined before the Hon. Benjamin Johnson, district judge, holding the circuit court.

F. W. Trapnall and *John W. Cocke*, for complainant.

Absalom Fowler, for defendant.

OPINION OF THE COURT. — John Halderman filed this bill in chancery against the defendant, Peter Halderman, in which he alleges that many years ago he entered into partnership with the defendant, together with William Knox and Alexander Scott, who, being non-residents, are not made defendants, and carried on business under the name, firm, and style of Knox, Halderman & Scott, and after carrying on the partnership business for some time, it was dissolved by mutual consent of the parties concerned. And on final settlement of all the concerns of the partnership on the 1st of January, 1822, the firm was found to be indebted to John Halderman, individually, in the sum of three thousand one hundred and four dollars, one fourth of which he claims from the defendant, as one of the partners, being seven hundred and seventy-six dollars, and for that sum prays a decree against the defendant.

The defendant, in his answer, admits the partnership, but denies the final settlement, as stated in the bill, and also positively denies that he is indebted to the complainant to even the smallest amount, on account of the partnership.

The present complainant has produced in evidence a copy of the individual account of his intestate against the firm, signed by John Halderman, William Knox, and Alexander Scott, dated at Pittsburgh, the 18th of March, 1820, without accounting for the absence of the original.

It is a rule of evidence that the original paper must be produced, and that a copy is inadmissible unless the original is lost, destroyed, or beyond the power of the party to produce it. 9 Wheat. 483, 558, 581; 1 Peters, 596; 9 Ib. 663.

But waiving this objection, upon looking into the account

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against the firm, it appears to be a statement of payments made by John Halderman, of debts due by the firm for which he is entitled to be credited. It does not purport to be a final settlement of the affairs of the partnership. On the contrary, it is manifest that it was not; because, in the memorandum on the account, it is expressed that "the accounts as stated in the books are to stand, and each partner to be charged with a fair proportion of all losses and expenses which may accrue in settling up the business. Each partner is to keep a correct account of all receipts and expenditures, returns of which are to be forwarded to William K. Rule, at St. Louis, quarterly, in order to enable him to square the accounts, without the trouble and expense of again coming to Maysville or Pittsburgh."

From this memorandum it clearly appears that a final settlement was not then made, and that many things were to be done before one could be made. There was no final adjustment — no balance struck. Until there is a final settlement and adjustment of all accounts between partners, and a balance struck, one partner is not permitted to sue the others, either at law or in equity, for money paid by him on account of the partnership concern. Where money is due from one partner to another, by simple contract on the partnership account, payment, except in a few special cases, can only be enforced by application to a court of equity on a bill for an account and a dissolution of the partnership. Collyer on Partnership, 144. When upon a dissolution of a partnership, all the accounts have been adjusted and a balance struck, an action at law will lie for such balance. 1 Story's Eq. sect. 664, note 1; Collyer on Partnership, 151, 153; 1 Hall, Rep. 180. Whether a bill in chancery will also lie in such a case, need not now be determined, as the evidence shows that this is not a case of that description. My impression is, that the remedy at law would be ample and complete, and that unless a discovery is asked and obtained, or some special reason exists for invoking the aid of a court of equity, a chancellor ought not to entertain such a bill.

The bill in the present case not being filed with a view to obtain a general account and settlement of all the partnership

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transactions, but for the payment of a balance claimed to be due to one partner from another, and the case being unsustained by proof of any final settlement among the partners, must be dismissed at the cost of the complainant.

Decreed accordingly.

UNITED STATES *vs.* JOSEPH IVY.

1. The circuit court of the United States had no jurisdiction to punish offences committed in the Indian country west of Arkansas, anterior to the 17th of June, 1844.
2. Cases of *United States* v. *Alberty*, ante, p. 444, and *United States* v. *Starr*, ante, p. 469, cited and confirmed.

December, 1847. — *Habeas corpus*, before Benjamin Johnson, district judge, at chambers.

S. H. Hempstead, district attorney, for the United States.

E. H. English, for the defendant.

OPINION OF THE COURT. — On hearing this case and carefully examining the evidence, it appears clearly that the defendant has been committed for trial in the circuit court, charged with the murder of Larkin Eckles, a white man, in the Cherokee nation, west of Arkansas, on the 7th September, 1840. The offence having been perpetrated in the Indian country anterior to its annexation to the District of Arkansas, by the act of congress of the 17th of June, 1844, (10 Laws U. S. 583,) the circuit court of the United States has no jurisdiction to try the defendant, as has been heretofore expressly decided in the *United States* v. *Alberty* (ante, p. 444), and the *United States* v. *Starr* (ante, p. 469), the doctrine of which cases is deemed to be entirely correct, and decisive of the present question, and consequently the defendant must be discharged from further imprisonment. *Discharged accordingly.*

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AYRES P. MERRILL, complainant, *vs.* JAMES L. DAWSON, WILLIAM DAWSON, JAMES SMITH, SAMUEL C. ROANE, SAMUEL TAYLOR, NATHANIEL H. FISH, GARLAND HARDWICK, ABSALOM FOWLER, NOAH H. BADGETT, and SOPHIA M. BAYLOR, defendants.

Circuit Court.

1. Where the name of a defendant is omitted in the caption of a deposition, but appears in the commission and proceedings, such deposition should not be excluded.
2. Notice to take depositions is sufficient, if served by delivering a copy to the party, or leaving such copy at his dwelling-house or usual place of abode with a free white person, a member of, or resident in the family.
3. If a witness resides more than one hundred miles from the place of trial, his deposition may be taken under the 30th section of the Judicial Act of 1789, (1 Stat. 88,) without notice. But the requisites of that act must be observed strictly.
4. The residence of the witness and distance from the place of trial, are facts proper for the inquiry of the officer taking the deposition, and his certificate of those facts is competent evidence and sufficient to authorize the deposition to be read.
5. The probate court of Mississippi being a court of record, and possessing a seal, the judge thereof is the judge of a county court, within the meaning of the above act, and as such, authorized to take a deposition under it.
6. Notice of the time and place of taking depositions is necessary under a joint commission; but when the opposite party, after notice, fails or refuses to join, and the commission issues *ex parte*, notice is not necessary.
7. On an *ex parte* commission, the party suing it out, is at liberty to put as few of the interrogatories as he thinks proper; except that he must put the last general interrogatory.
8. The courts of the United States will judicially take notice of the laws of the several States in the same manner as of the laws of the United States.
9. Until the act of the 20th February, 1838, (Rev. Stat. 578,) and which took effect on the 19th March, 1839, there was no law requiring mortgages of personal property to be recorded; yet mortgagees, before that time, under laws in force, were permitted to have such mortgages recorded if they deemed it expedient.
10. Such recording was legal, but not *per se* operating as constructive notice to creditors and purchasers, although it tended to give publicity to the mortgage as well as repel fraud.
11. The statute of frauds (Ter. Dig. 266) cited and explained.
12. Notice of a lien or incumbrance on property, binds the purchaser when received before the actual payment of the purchase-money, and arrests all

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further steps towards the completion of the purchase, and if persisted in, is held to be in fraud of the equitable incumbrance.

13. A purchaser, to be protected, must deny notice before the actual payment of the purchase-money, and this essential averment cannot be supplied by intendment.
14. Where the existence of a mortgage was known and talked of in a neighborhood, and publicly proclaimed at a sale of such mortgaged property, under execution against the mortgagor; *held*, to be sufficient actual notice to purchasers at the sale, to hold them responsible.
15. Actual notice proved by facts and circumstances.
16. A bill of sale absolute on its face, and the vendor still retaining the possession of the property sold, has been held to be *per se* fraudulent as to creditors and subsequent purchasers of the vendor; such possession being inconsistent with the deed.
17. Possession of slaves by the mortgagor, either before or after forfeiture, is neither fraudulent, nor a badge of fraud requiring explanation; such possession being consistent with the deed.
18. Declarations by a grantor impeaching a deed he has made, are incompetent evidence.
19. The practice in mortgage cases is by interlocutory decree to allow until the next term to redeem; and if the debt is not then paid or tendered, by final decree, to foreclose and bar the equity of redemption, and direct a sale if proper to be had.
20. An absolute foreclosure, in many cases, may be decreed without sale. It is a matter of sound discretion.

Supreme Court.

1. A mortgage must be presumed to be executed at its date unless the contrary appears. The time of acknowledgment or recording may furnish the date.
2. The fact that the mortgage was transcribed on the record book in the handwriting of the mortgagor, does not impair the legality of the record, as it is presumed to be allowed by the register and adopted by him.
3. Increase of slaves belong to the owner of the mother.
4. Decree that the purchasers at a sheriff's sale, should either surrender property to the mortgagee or pay the value; *held*, that such value was properly computed as of the time of rendering the decree.
5. If it is doubtful whether the death of a slave occurred before or after the filing of a bill, to subject such slave to the mortgage, that doubt must operate against the defendant, whose duty it was to prove satisfactorily that it happened before, in order to be exonerated.
6. The hire of slaves mortgaged, is properly charged from the filing of the bill of foreclosure.
7. The decree in this case affirmed with costs.

May, 1848. — Bill in equity, determined before the Honorable Benjamin Johnson, district judge, holding the circuit court.

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The facts of the case sufficiently appear in the opinion and decree of the court.

S. H. Hempstead, for complainant.

I. It is too well established at this day to be controverted, that a mortgage is a chattel interest. The object of the transaction in its original construction, is to create a security and that only. The mortgagor is equitably the sole owner until foreclosure, and has an estate of inheritance which may be devised, granted, or sold. 1 Atk. 603; 12 Ves. 334; 2 Ball & Bea. 402. The property in equity is regarded as only charged by the mortgage, and in no way passed, modified, altered, or affected, and the mortgagee, after foreclosure, acquires a new estate. 1 Powell on Mortgages, 112 *a*; *Radcliffe* v. *Warrington*, 12 Ves. 334; 4 Kent, 135, 142, 159; 1 Hilliard, Abr. 276; *Clark* v. *Beach*, 6 Con. Rep. 142; *Wilson* v. *Troup*, 7 Johns. Ch. Rep. 38; 1 Sch. & Lef. 380; 1 Powell, 187 *b*, 188 *a*, and note P; *Bogart* v. *Perry*, 1 Johns. Ch. Rep. 55; Dougl. 630–632; *Jackson* v. *Willard*, 4 Johns. Rep. 42; *Jackson* v. *Bronson*, 19 Ib. 325; *Runyon* v. *Mersereau*, 11 Ib. 534.

The foreclosure operates as a new sale and purchase, and creates an estate in the mortgagee when there was none before. 3 Powell, 1022, note B; *Hill* v. *Price*, 1 Dick. 344; 2 Burr. 978.

And so mortgaged property cannot be sold on execution against the mortgagee, before possession acquired on foreclosure of the equity of redemption, although the debt be due, and the estate of the mortgagee has become, technically speaking, absolute at law. *Huntington* v. *Smith*, 4 Con. 235; *Blanchard* v. *Colburne*, 16 Mass. 345; *Jackson* v. *Dubois*, 4 Johns. Rep. 216; *Hitchcock* v. *Harrington*, 6 Ib. 290; *Collins* v. *Torrey*, 7 Ib. 278; *Fish* v. *Fish*, 1 Con. 559. And it is on the same principle that a mortgagee in possession is accountable to the mortgagor for rents and profits. 1 Powell, 171; 2 Mass. 435. And the former must account for the hire of mortgaged slaves while in possession. 1 Bibb, 195; 3 Ib. 18; 6 Monr. 122.

The principle, then, is clear, and sustained by the authority of all respectable courts, that the debt is the principal and the mortgage the incident; and as it is a rule in equity that what is once a mortgage is always a mortgage, (2 Story, Eq. 287;

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1 Vern. 8; 1 Eden, 59; 7 Ves. 273; 7 Johns. Ch. Rep. 43; 1 Powell, 116 *a*,) it would seem to follow irresistibly that the mere fact of forfeiture could not change the relative situation of the parties so as to divest one of an estate and vest it in another, and that so long as the right of redemption exists, there is no change at all, and the mortgage, whether before or after forfeiture, remains a mere security for a debt.

The object of the mortgage in this case was to indemnify Merrill, on account of his indorsement for the accommodation of Dawson, of the two notes mentioned in the bill, amounting to twelve thousand five hundred and seventy-eight dollars and twenty-two cents, and which were subsequently discounted at the Planters Bank of Mississippi, at Natchez, for the exclusive benefit of Dawson, and the proceeds paid to him. Merrill was, in fact, security, and as such was obliged to take up these notes on the 4th of March, 1842; and at that point of time his right to proceed on the mortgage accrued. He was, then, actually damaged, and the condition of the mortgage was broken. The formal wording of the mortgage provides for the payment of the notes to Merrill, but that is quite immaterial, since the object is to ascertain the true nature of the transaction between the parties; and it was as I have stated it. *Flagg* v. *Mann*, 1 Sumner, 530; 2 Story, Eq. 287; 1 P. Wms. 270; 1 Ves. jr., 406. It has been well said, that courts of equity do not regard the forms of instruments, but look to the intention and give to the acts of parties such construction as that intention justifies and requires. *Barrow* v. *Paxton*, 5 Johns. R. 258; *Read* v. *Jewett*, 5 Greenleaf, R. 96.

In all cases of indemnity it would seem to be a clear proposition, that actual damage must alone invoke redress, and so are adjudged cases. 1 Saund. 116, n. 1; *Douglass* v. *Clark*, 14 Johns. R. 177; *Aberdeen* v. *Blackmar*, 6 Hill; *Churchill* v. *Hunt*, 3 Denio, 321; *Gilbert* v. *Wiman*, 1 Comstock, 550.

There was no default for which the mortgage could be foreclosed until the 4th of March, 1842, and he asserted his rights in the proper tribunal within six months afterwards, and in shorter time than non-residents usually allow themselves to seek a remedy in our courts. Looking to the true nature of

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the transaction, it is apparent that he could not foreclose before payment; because, otherwise, he might at any moment have possessed himself of the mortgaged property or the value, without paying a farthing, or being injured to the extent of a penny, in opposition to the clear intention of the parties, and against the well-established principles of equity. *Marsh* v. *Lawrence*, 4 Cowen, 461. On the 4th of March, 1842, then Merrill was obliged to take up those notes by payment; on that day he became the legal holder of them; on that day his right to seek indemnity from the mortgaged property became perfect, and not until then. This is a point of some consequence, because it entirely destroys the chief ground of defence of the defendants, if ground that can be called, which is unsustained by authority and condemned by reason, namely, that the mortgagor retaining the possession of the slaves rendered the transaction fraudulent. In point of fact, so far from the mortgagor's having remained in possession after forfeiture, the very reverse is true, because he was dispossessed of the slaves in 1841 by the levy and sale under which the appellant claims; so that whether such possession would or would not be fraudulent, must be a purely speculative inquiry, not strictly applicable to the facts of the present case.

But, as a matter of curiosity, let us see how the question stands on the score of authority.

Now I assert the general rule in the American and English courts to be, that the possession of personal property by the mortgagor, either before or after default or forfeiture, is not fraudulent, the possession being consistent with the deed. And that doctrine has been established by the supreme court of the United States in the cases of *Hamilton* v. *Russell*, 1 Cranch, 309; *United States* v. *Hooe*, 3 Ib. 75; *Conrad* v. *The Atlantic Insurance Co.*, 1 Peters, 449. And by Judge Story in *Wheeler* v. *Sumner*, 4 Mason, 183; *De Wolf* v. *Harris*, 4 Ib. 537. And in the following cases, decided in the State courts, namely, *Head* v. *Ward*, 1 J. J. Marsh. 280; *Hundley* v. *Webb*, 3 Ib. 645; *Maples* v. *Maples*, 1 Rice, Eq. Rep. 300; *Callen* v. *Thompson*, 3 Yerg. 475; *Somerville* v. *Horton*, 4 Ib. 551; *Bruce* v. *Smith*, 3 Har. & J. 499; *Hambleton* v. *Haywood*, 4 Ib. 443; *McGowen*

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v. *Hoy*, 5 Lit. 239; *Haven* v. *Low*, 2 N. H. 15; *Ash* v. *Savage*, 2 Ib. 547; *Barrow* v. *Paxton*, 5 Johns. R. 258; *Beals* v. *Guersey*, 8 Ib. 446; *Craig* v. *Ward*, 9 Ib. 197; *Marsh* v. *Lawrence*, 4 Cowen, 461; *Weller* v. *Wayland*, 17 Johns. R. 102; *Smith* v. *Acker*, 23 Wend. 653; *Planters and Merchants Bank* v. *Willis*, 5 Ala. Rep. 780.

In the English courts, in *Stone* v. *Grubham*, 2 Bulstrode, 225; *Cadogan* v. *Kennett*, Cowp. 432; *Edwards* v. *Harben*, 2 T. R. 587; *Jarmin* v. *Wooloton*, 3 Ib. 618, 620; *Eastwood* v. *Brown*, 1 Ry. & Moody, 312; *Reed* v. *Wilmot*, 5 M. & P. 564; 7 Bing. 583; *Latimer* v. *Batson*, 7 Dow. & Ry. 110; 4 Barn. & Cres. 653; *Prodger* v. *Langman*, 2 W. Bla. Rep. 701; 3 Barn. & Ald. 507; *Lady Arundell* v. *Phipps*, 10 Ves. 145.

The same principles will be found in elementary treatises of high character, namely, Roberts on Frauds, 550; Long on Sales, 71–76; 2 Kent, 518; 1 Powell on Mortgages, 155; 2 Ib. 646; Sheppard's Touchstone, 65.

In *Lady Lambert's case*, referred to in Sheppard's Touchstone, 65, it was determined, that a mortgage or other conditional sale being good at the commencement, without a transfer of possession to the mortgagee or vendee, it will in law continue so, notwithstanding the retention of possession by the mortgagor or vendor, after forfeiture. In fact, to hold that possession by a mortgagor would even be *primâ facie* evidence of fraud, would be an outrage on the common sense of society. *Head* v. *Ward*, 1 J. J. Marsh. 280.

Jurists of this age content themselves with combating fraud, in fact, when discovered; and do not feel warranted in assuming its existence, either at law or equity, without conclusive proof. Not stopping at the explicit declaration that fraud shall never be presumed, they have thought it just to go further and say, that where an act does not necessarily import fraud, and may have been more probably done through a good than a bad motive, the presumption of innocence must prevail. *Gregg* v. *The Lessee of Sayre*, 8 Peters, 244; *Fleming* v. *Slocum*, 18 Johns. R. 405; 1 Story, Eq. 199.

An attentive examination of the cases with regard to the possession of property by the vendor, even after an absolute

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sale, and where such possession is not consistent with the nature or terms of the deed, will show that the weight of authority is in favor of this proposition, namely, that such possession as to creditors and purchasers, without notice, is only *primâ facie* fraudulent, and may be explained, and is not, *per se*, fraudulent, admitting no explanation.

But when we come to the consideration of mortgages, where, by the very nature and terms of such instruments, the possession of the mortgagor, both before and after default, is consistent with the deed itself, how is it possible for any one who has shaken from his robes the dust of the black letter tomes of past ages, to maintain before an enlightened court that such possession is either fraudulent or a badge of fraud; and what court, at this day, would have the courage to sanction such a doctrine?

It is worthy of observation that cases upon mortgages of chattels, where continuance of possession by the mortgagor occurs, do not turn upon any distinction between possession before or after forfeiture, but upon general principles, and thus completely refuting the idea, if such a fallacy requires refutation, that possession is unobjectionable before, but fraudulent after default. It is believed that there is no respectable case predicated upon any such distinction, and which, indeed, would be in disregard of the universal maxim — "Once a mortgage, always a mortgage." The decisions are the reverse. *Bucklin* v. *Thompson*, 1 J. J. Marsh. 223; *Head* v. *Ward*, Ib. 281; *McGowen* v. *Hoy*, 5 Litt. Rep. 239.

In considering mortgages of chattels, it must not be forgotten that prominent distinctions exist between a pledge or mortgage of goods which are consumed in the use, and a mortgage of slaves, which partake more of the nature of realty, and are so regarded in the southern States, for many purposes not material to be here enumerated. They are a peculiar species of property, and on account of their value and capability of commanding ready money on sudden emergencies, are oftener subjects of mortgage than any other species of property denominated personal. And general practice as to slaves has so familiarized possession by the mortgagor that it is justly regarded as one of the conditions and incidents of the contract, whether the mortgage is recorded

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or not; and delivery of possession would be out of the common course. *Maples* v. *Maples*, Rice, Eq. R. 300; *Fishburne* v. *Kunhardt*, 2 Speers, Rep. 564. In the case last cited Frost, J., said: "The presumption of fraud from possession by a mortgagor after condition broken would be arbitrary, because contrary to almost universal experience." And in *Maples* v. *Maples*, above cited, which involved a mortgage of slaves, Chancellor Johnson said: "Permitting the mortgagor to remain in possession of the mortgaged property, although there is no covenant to that effect, is too common here to excite suspicion." And in the same case, on appeal, Chief Justice Dunkin held that possession by the mortgagor after forfeiture was neither fraudulent nor a badge of fraud requiring explanation.

Indeed, in South Carolina, that doctrine has been so repeatedly adjudged as to have become a permanent landmark in her jurisprudence, as will be seen by the following cases, in addition to those cited, and to which particular attention is invited, especially as they relate to mortgages of slaves, and are, therefore, directly in point. *Gist* v. *Pressley*, 2 Hill, Ch. R. 325; *Bank* v. *Gourdin*, 1 Speers, Eq. R. 439, 458; *Henry* v. *Smith*, 1 Hill, R. 23. On this question we are obliged to go to slave States for authority, because in non-slaveholding ones sales and mortgages of slaves do not occur, and consequently no such cases arise.

In the case of *United States* v. *Hooe*, 3 Cranch, 73, above cited, Chief Justice Marshall says: "The difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If in the latter case the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money, and either chooses, or is compelled to exert, his right. *Barrow* v. *Paxton*, 5 Johns. R. 258.

It may not be inappropriate to observe, that in New York there is an express legislative act declaring that bills of sale, and mortgages of goods and chattels, shall be presumed to be fraudulent, when possession continues in the vendor or mortgager, unless the person claiming under such sale or mortgage

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shall show the absence of an intent to defraud and the good faith of the transaction. 2 Kent, 528; *Stoddard* v. *Butler*, 20 Wend. R. 548; *Butler* v. *Van Wyck*, 1 Hill, 442. Hence decisions made after that statute, based upon or influenced by it, would not furnish a safe guide as to the general question here discussed, out of New York, that being among the few States where such a statute exists. And yet, even there, it has been repeatedly held, and has now become settled doctrine, that such possession is only *primâ facie* evidence of fraud, and that almost any excuse is sufficient to destroy that presumption, and show the good faith of the transaction. *Smith* v. *Acker*, 23 Wend. R. 653; *Fuller* v. *Acker*, 1 Hill, 473; *Butler* v. *Van Wyck*, 1 Hill, 438, 447. "Perhaps," says Cowen, J., delivering the opinion of the majority of the court, in the last case, "it is necessary for the vendee or mortgagee, claiming in the face of a continued possession in his vendor or mortgagor to give evidence, slight at least, that the consideration was a true debt. Beyond this the verdict of the jury must be received as final. The convenience of the vendor or mortgagor, the declared purpose of enabling him to pay debts, even the comfort of his family, in retaining household furniture, according to their rank in life; in short, motives of humanity, and almost of mere courtesy, may, I think, on the authority of *Smith* v. *Acker*, 23 Wend. 653, be given in evidence to the jury, who may, if they please, allow them as legitimate excuses."

And in *Stoddard* v. *Butler*, 20 Wend. R. 548, Senator Verplanck held this language: "Thus it happened here and in England, that, whilst the courts and the books laid down the rule broadly, and often applied it strictly, that 'unless possession accompanies and follows the deed, it is fraudulent and void,' — in the words of Justice Butler, *Edwards* v. *Harben*, 2 T. R. 587, adopted and incorporated in our own statute; yet first case after case, and then class after class, of exceptions was exempted from the rule, until with us there were no less than twenty-four distinct grounds of exemption; such as the kind of sale, purchase under execution or distress for rent, necessity, convenience, the custom of trade, the distance or situation of place, the relation of parties, motives of humanity or of friendship,

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and special circumstances of various kinds, more or less accurately defined, all enumerated by Judge Cowen. 3 Cowen, 190."

At an early period of English jurisprudence, fraud was arbitrarily inferred from acts susceptible of a satisfactory explanation. But when the extension of commerce rendered the frequent transmission of property necessary, and created a corresponding demand for securities of various kinds, the harsh rules of a darker age yielded to a wiser policy, more compatible with the actual condition of mankind, and the usual course of human affairs. *Twyne's case* (3 Co. 80) is a leading one on the subject of fraudulent sales of personal property. It was decided in the forty-fourth year of the reign of Elizabeth, in the court of Star-chamber, — a tribunal which, becoming odious in consequence of its usurpations, was abolished in the sixteenth year of the reign of Charles I.; and, as Lord Clarendon informs us, "to the general joy of the whole nation." The case derives no weight from adventitious circumstances, such as the dignity and authority of the tribunal, or the eminence and integrity of the judges; but it must be supported, if at all, on the intrinsic justice of its doctrines. Now, when we recollect that the proceeding was a criminal information on the part of the crown, and remember, too, the historical fact, that the tribunal itself was an instrument of tyranny in the hands of the sovereign, we shall not wonder that the information was sustained by "the whole court of Star-chamber," and Twyne himself branded as a criminal. It is sufficient to observe that the resolutions in that case would hardly be adopted to their full extent in modern times, although it cannot be denied that there were such marks and signs of an intent to defraud creditors as might create suspicion and demand explanation, and might probably authorize fraud to be inferred as a question of law, without the intervention of a jury, if that course of practice could be tolerated at all. 1. The gift was general and absolute, without exception of apparel, or any thing of necessity; 2. The donor continued in possession and used them as his own, and by reason thereof traded and trafficked with others, and defrauded and deceived them; 3. It was made in secret; 4. It was made pending the

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writ; 5. There was a secret trust between the parties, for the donor possessed all and used them as his proper goods, notwithstanding the gift was absolute and unconditional; 6. The deed stated that the gift was made honestly, truly, and *bonâ fide.* These were the principal, and by no means slight, badges of fraud in that celebrated case; and yet a court at this day would not feel warranted in holding such a transaction fraudulent *per se* as the court of Star-chamber did, but would allow a party to explain it if in his power.

To hold that retention of possession is *per se* fraudulent, is to establish an artificial rule not founded in truth nor upheld by the principles of justice. It is to destroy an important element of trade and commerce, and take us back to the primitive ages, where the transactions between men were few and simple, and where ignorance of writing and the absence of records, rendered actual delivery the more necessary as an indication of title. It is to crush the energies of the debtor by depriving him, in many cases, of the means of extricating himself from embarrassment without absolute ruin. Harshness to debtors has yielded to an enlarged and liberal philanthropy. Imprisonment for debt, the relic of a barbarous age, is fast disappearing everywhere. The debtor cannot be put in chains and sold to foreigners, nor can his body be cut in pieces; both of which were allowed by the laws of the twelve tables of Rome. Cooper's Justinian, 658. In place of such cruelty certain property, necessary for his sustenance and comfort, is, in most if not all of the States, preserved to him against the rapacity of the creditor, and the exemption of homesteads is now becoming a very general policy in our country.

In the strongest cases in favor of the proposition that possession must accompany the deed in absolute sales, as *Twyne's case*, 3 Co. 80; *Stone* v. *Grubbam*, 2 Bulstrode, 218; *Cadogan* v. *Kannet*, Cowper, 432; and *Edwards* v. *Harben*, 2 Term Rep. 594, it is expressly conceded, that if the conveyance is conditional, or if, by the terms or nature of the instrument or deed, possession is consistent therewith, such possession is not only not *per se* fraudulent, but not even a badge of fraud, requiring any explanation at all. The weight and respectability of

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authority undoubtedly is, that possession by the vendor, even after an absolute sale, and where such possession is incompatible with the deed, is only *primâ facie* evidence of fraud, and subject to explanation, and is not *per se* fraudulent. *Kidd* v. *Rawlinson*, 2 Bos. & Pull. 59; *Lady Arundell* v. *Phipps*, 10 Ves. 145; *Beals* v. *Guernsey*, 8 Johns. R. 452. And the same doctrine has been established by the supreme court of Arkansas in the cases of *Cocke* v. *Chapman*, 2 English, 200; *Field* v. *Simco*, 2 English, 275, and cases there cited; *Costar* v. *Davies*, 3 English, 218.

There is a principle connected with this question of possession which deserves consideration.

The only reason why absolute sales of chattels, where there was no transfer of possession, were declared fraudulent and void, was on the supposition that there was a secret trust between the parties, and that the retention of possession was calculated to deceive those with whom the vendor might subsequently deal. As expressed by Justice Burnet, (1 Atk. 168), "Possession can be no otherwise a badge of fraud than as it is calculated to deceive creditors; as to the possession of goods, I have no way of coming to the knowledge of the owner but by seeing who is in possession of them." Such a sale is held fraudulent and void as to creditors and purchasers, although good between the parties themselves. Whenever the rule is enforced it is for the benefit of creditors and purchasers, and they are the only persons who can avail themselves of it. *Twyne's case*, 3 Co. 80; Long on Sales, 67.

Now where a creditor or purchaser has notice of a *bonâ fide* sale for a valuable consideration, he cannot say or pretend that he has been deceived, deluded, or defrauded, although the vendor retains possession, uses the property as his own, and such possession is inconsistent with the deed or contract.

With such knowledge, to allow the second to overreach the first purchaser would be to sanction a fraud. In such a case the retention of possession would be of no consequence, and could not be available for any purpose.

This doctrine is sustained by the case of *Sanger* v. *Eastwood*, 19 Wend. 514, where it was held that a purchaser of personal

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property, with notice of the existence of a mortgage covering it, cannot avail himself of the facts, that the mortgage was unaccompanied by delivery of possession, and that it had not been filed for record.

And from other cases the rule is deducible, that if a creditor has knowledge of a sale, the mere retention of possession is a matter of no consequence. *Steel* v. *Brown*, 1 Taunt. 381; *Stuttevant* v. *Ballard*, 9 Johns. 337; *Barrow* v. *Paxton*, 5 Johns. 258; *Ryall* v. *Rolle*, 1 Atk. 165; *Bissell* v. *Hopkins*, 3 Cow. 166.

It is said that there is no clause in this mortgage, authorizing the mortgagor to retain possession, and that that is a badge of fraud. It is sufficient to reply that it was not necessary; because, first, the transaction was of such a nature that the mortgagee was not entitled to the possession of the slaves until he paid the notes; and, second, the effect of the mortgage is the same as if it contained such a clause, for this right in the mortgagor is incidental to a mortgage, and implied by law without such clause.

"There is usually in English mortgages," says Kent, "a clause inserted in the mortgage, that until default in payment the mortgagor shall retain possession. This was a very ancient practice, as early as the time of James I., and if there be no such express agreement in the deed, it is the general understanding of the parties, and at this day almost the universal practice, founded on a presumed or tacit assent." 4 Kent, 148; 5 Johns. 258; 2 Hill, Ch. Rep. 328.

In mortgages of slaves, very general practice has familiarized possession by the mortgagor, as one of the conditions and incidents of the contract. It is too common and universal to excite suspicion. *Fishburne* v. *Kunhardt*, 2 Speers, Eq. Rep. 564; *Bank* v. *Gourdin*, 1 Ib. 439, 458; *Maples* v. *Maples*, Rice, Eq. Rep. 300.

The general custom in Arkansas, as proved by witnesses, accords with this doctrine, and it is just and reasonable, and a different one could not be tolerated as to slaves.

But even if it were necessary to show any circumstances in this case by way of explanation of possession, the record contains an abundance of reason to justify it.

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1. The nature of the transaction between Dawson and Merrill, which was only to secure Merrill from loss and damage, in consequence of the indorsement of these notes, and not in fact allowing Merrill the right of possession at all; until he was damnified by the payment of the notes, which was not until the 4th of March, 1842, and then the negroes had been sold.

2. That at the time Dawson made the mortgage, Nov. 25, 1837, he was a wealthy and solvent man, with a large property, and able or supposed to be able to pay all his debts, and who did not become embarrassed until long afterwards.

3. The mortgage was made in Natchez, Mississippi; the negroes were upon Dawson's plantation, in Jefferson county, Arkansas, and the mortgage was placed upon record, thus showing that it was not a secret transaction.

4. Merrill was then, and ever has been, a non-resident of this State, within the saving in the statute of limitations, even if it could be pretended that any statute applied. This is no stale demand; nor is it pretended that Merrill slept upon his rights, for after he paid the notes, he immediately commenced proceedings to subject the mortgaged property.

5. The whole testimony shows, and Dawson's answer under oath admits, that the mortgage was made *bonâ fide* and for a valuable consideration, and to secure Merrill; and the conduct of the latter proves the fact. In addition to this, the defendants had actual, if not constructive, notice, as will presently appear, and they purchased in their own wrong.

6. Last of all, the possession of Dawson, while he did have possession, was consistent with the deed of mortgage, and in fact Merrill was not entitled to possession at all until March 4, 1842.

That there was at any time, any actual fraud in the transaction, has not been proved. There is no circumstance or fact, which would justify even a suspicion of fraud as to Merrill. The idea that they colluded with each other to defraud a subsequent creditor, to defraud a person who was not a creditor of Dawson until long afterwards, is absurd.

As to subsequent acts and declarations of Dawson, referred to by some of the defendants in their answers, suffice it to say, they are not proved, and if they were proved, they could not

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affect Merrill in the slightest degree, he being wholly unconnected with them. That there was any fraud in fact is a naked assumption, without the slightest evidence to sustain it.

II. It is insisted by the defendants, that this mortgage was not legally acknowledged, and that it was not in fact properly or legally recorded, although the recorder certified under his hand and official seal, on the original mortgage, that it was duly recorded in book B, page 174, on the 29th of December, 1837, and hence that it does not act as constructive notice.

It is true that the record does not show on what day it was recorded, but that is not material, nor can the certificate of the registering office be contradicted, as we shall presently perceive.

This was such an instrument as the law authorized to be recorded. The law in force in 1837 required the recorder to record all deeds and conveyances which were presented to him for that purpose. Ter. Dig. 454. It does not limit such deeds and conveyances to real property; personal chattels would therefore be embraced. It does not require any particular mode of acknowledgment or authentication, or indeed any at all. Act of 1804; Ter. Dig. 454.

The same act, under the title "mortgages," (sect. 1, Ter. Dig. 433,) requires every mortgagee of real or personal estate, when the mortgage is satisfied, at the request of the mortgagor, to "enter satisfaction upon the margin of the record of such mortgage recorded in said recorder's office." The second section prescribes a penalty for failure to do so. The fifth section of same act gives the same remedy upon a "mortgage of personal property" as upon real estate. Ter. Dig. 434.

These provisions show conclusively that mortgages of personal property were authorized to be recorded, (*Hodgson* v. *Butts*, 3 Cranch, 140; 1 Cond. 476; *McKeen* v. *Delaney's Lessee*, 5 Cranch, 22; 2 Cond. 179,) whether such recording would operate as constructive notice or not.

The mortgage was made in the State of Mississippi, and was properly acknowledged before the judge of the probate court of Adams county, an officer competent to take the acknowledgment of deeds in that State. Howard and Hutchinson's Digest,

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sect. 99, p. 368; *Lessee of Talbot* v. *Simpson*, Pet. C. C. Rep. 188.

A judge of probates in Mississippi is a judge of a county court, within the meaning of the act of congress of 1789.

The recorder acts ministerially and not judicially in the matter of recording deeds. *Elliott* v. *Piersol*, 1 Pet. 341; 2 Binney, 40; *Dawson* v. *Thurston*, 2 Hen. & Munf. 135. When a deed, therefore, is presented to the recorder for record, he ought to admit it, and has no authority to reject it. Ib.

The recording of a deed is evidence that it was legally proved and admitted to record, (*Lessee of Talbot* v. *Simpson*, Pet. C. C. 189,) and the certificate of the registering officer cannot be impeached or controlled by producing the record and showing a variance, (*Ames* v. *Phelps*, 18 Pick. 314,) or traversing such certificate. *Rex* v. *Hopper*, 3 Price, 495. If after a deed is left for record with the clerk to be recorded, he delivers it to the grantor without recording it, this is a breach of official duty for which the clerk would be liable to creditors for any injury they might sustain, but would not render the deed void or impair the rights of the grantee. *Bank of Kentucky* v. *Haggin*, 1 Marsh. 307; *Avent* v. *Reed*, 2 Stewart, 488. Hence if a deed after it is received by the clerk remains unrecorded through no fault of the grantee, until after an attachment of the land embraced in the deed, the attachment shall not prejudice the grantee. *Franklin* v. *Cannon*, 1 Root, 500; *Hartmeyer* v. *Gates*, Ib. 61; *Judd* v. *Woodruff*, 2 Ib. 298. The same principle is substantially decided in *Mc Gregor* v. *Hall*, 3 Stew. & Port. 397.

The principle upon which these cases rest is, that the officer is presumed to discharge his duty, and that if he omits to do so, the grantee or mortgagee shall not be prejudiced — shall not lose his rights, which would indeed be against the dictates of justice. It is not required of him "that he should stand by and see that the clerk does his duty." *Beekman* v. *Frost*, 18 J. R. 563; s. c. 2 J. C. R. 300.

In the case of *The King* v. *Hopper*, 3 Price, 495, it was expressly held, that the lodging of a deed in the officer's hands is an enrolment. "And indeed," says Richards, B., "the affairs of mankind would be in a dreadful condition if it were not so,

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for when the deed is once lodged, the party interested in it loses all dominion and control over it, and it is from that moment left entirely with the officer. If an actual and complete enrolment were necessary, this deed had not been enrolled on the 22d nor on the 24th of July; but the cases all decide that that is not necessary, and that the instant a deed is lodged in the office, from that instant it must be considered as enrolled, and the practice accords with that rule."

The same principle was explicitly asserted in *Garrick* v. *Williams*, 3 Taunt. 544.

In *McDonald* v. *Leach*, Kirby, 72, it was held, that where a deed is received for record, this entry made upon it by the register and the deed lodged in the office, is equivalent to actual registration. 2 Hilliard, Abr. p. 432, sect. 87; *McConnell* v. *Brown*, Lit. Sel. Cas. 462.

When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument in law is considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. *Marbury* v. *Madison*, 1 Cr. 147; 1 Cond. Rep. 273, 274.

The receiving of an instrument, marking it filed by the clerk, and signing such indorsement officially, is a sufficient recording to protect the rights of the grantee from subsequent incumbrances. See cases above cited.

Nor is it necessary that the date of recording should be put upon the record. If the recording of the deed with the acknowledgment is prior to the opposing title, it is sufficient. *Galusha* v. *Sinclair*, 3 Vt. 394; *Morey* v. *McGuire*, 4 Vt. 327; *Wickes* v. *Caulk*, 5 Har. & J. 36; *Rex* v. *Hopper*, 3 Price, 495.

It has been held that registry acts are remedial, and ought to be liberally and beneficially construed. *Jackson* v. *Town*, 4 Con. 499; *James* v. *Morey*, 2 Con. 247; *Jackson* v. *Bowen*, 7 Con. 13; 2 Powell on Mort. 624 *a*.

Hence a memorial of registry containing the substance of a covenant in a lease, without expressly setting it forth, has been held to be a good registration. *McAlpine* v. *Swift*, 1 Ball & Beatty, 285.

In *Latouche* v. *Dunsany*, 1 Sch. & Lef. 157, Lord Redesdale

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said that if registration was to be considered notice, it must be notice whether the deed be duly registered or not.

A clerk may record a deed made by an agent without inquiring into the validity or fact of agency. 3 A. K. Marsh. 92.

The registry of a deed executed by several, but acknowledged by one only, is good and sufficient. *Shaw* v. *Poor*, 6 Pick. 86.

A clerical error or mistake does not vitiate the registry of a deed. As where a term assigned was of sixty-one years, and was stated in the enrolment to be sixty-two years; or, as where the consideration was 250 pounds and was enrolled 280 pounds; or, as where the name of the trustee was enrolled "Seden," when it was spelt "Soden" in the deed, and where the assignment was stated to be to Seden, *habendum* to Corrie; in these cases the enrolment was held good. *Ince* v. *Everard*, 6 Term Rep. 545; *Wyatt* v. *Barnwell*, 19 Vesey, 435; 2 Powell on Mortgages, 621, note.

Where lands lie in several counties, it is sufficient to record the deed in any one of them. *Scott* v. *Leather*, 3 Yeates, 184; *Duffield* v. *Brindley*, 1 Rawle, 91. Deeds were enrolled at the common law for safe custody. 1 Salk. 389.

The enrolment of a deed under the statute 27 Henry 8, c. 16, is a record, and, therefore, is not traversable. *Rex* v. *Hopper*, 3 Price, 495.

The indorsement of the registry of a deed on the deed itself is sufficient evidence of enrolment. *Pyne* v. *Dor*, 1 Term Rep. 155.

The production of a deed with the memorial indorsed, is sufficient proof of the enrolment. *Compton* v. *Chandlers*, 4 Esp. Rep. 18; Buller, N. P. 229; *Kinnersley* v. *Orpe*, 1 Dougl. 56.

The date of enrolment indorsed by the clerk of enrolments on the deed, is conclusive evidence of the date and fact of enrolment. *Rex* v. *Hopper*, 3 Price, 495; 1 Saund. Pl. & Ev. 425; and there can be no averment or proof against it.

The object of every registry act is to afford publicity, and if a deed was in reality recorded, before a subsequent incumbrance accrued, it would be strange if the subsequent incumbrancer could say, that although the deed was on record, yet it afforded no notice, because the precise day of placing it there did not appear from the record. That would be to say, that the registry is utterly void, unless the date of it appears from the record,

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which would entirely destroy the beneficial construction which has ever been placed on registry acts, and would be at war with the first principles of justice as well as adjudged cases.

Under the registry act of 27 Henry 8, a party might be permitted to give evidence of the day of an enrolment having been actually made, because it was not the usage to insert on the record the particular day. *Rex* v. *Hopper*, 3 Price, 495; 1 Eng. Ex. Rep. 403.

It has, as I think, been demonstrated (1) That the mortgage from Dawson to Merrill was lodged and filed for record December 29, 1837, and was from that day, in contemplation of law, enrolled, so as to protect the rights of the mortgagee; (2) that no evidence is admissible or can be received to impeach or contradict the certificate of the recorder indorsed on the mortgage. But if such evidence can be received, then I contend (3) that the mortgage was actually recorded, and that it is immaterial whether the manual labor of transcribing it was performed by the clerk in person, by Dawson, or any other amanuensis, provided the clerk adopted and sanctioned the act, which he did, as is manifest from his certificate, and which certificate is not to be controverted by parol proof, for that would be to set up inferior in the place of the higher evidence.

In England, registration is not of itself notice, and a mortgagee or purchaser is not bound to search the register; but if he does, he will be deemed to have actual notice of all incumbrances on the register, within the period of his search, (2 Powell, 631 *a*, note; *Wiseman* v. *Westland*, 1 Younge & Jerv. 117; *Bushell* v. *Bushell*, 1 Sch. & Lef. 103; *Latouche* v. *Dunsany*, Ib. 157,) thus showing it may be made the medium of actual notice. But in this country registry is constructive notice to all the world. *Johnson* v. *Stagg*, 2 J. R. 510; *Frost* v. *Beekman*, 2 J. C. R. 299; *Peters* v. *Goodrich*, 3 Con. 146; *Grant* v. *Bisset*, 1 Caines, Cas. Err. 112; *Packhurst* v. *Alexander*, 1 J. C. R. 398; *St. Andrews' Church* v. *Tompkins*, 7 Ib. 14.

Where a person claims to be a purchaser without notice, he is bound to deny, fully and in the most precise terms, every circumstance and fact from which notice might be inferred. *Gerard* v. *Saunders*, 2 Ves. Jr. 454; *Frost* v. *Beekman*, 2 J. C. R.

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303; and this he must do, although notice is not charged in the bill. 3 P. Williams, 244, n.; *Bodman* v. *Van Den Bendy*, 1 Verm. 179; *Murry* v. *Ballou*, 1 J. C. R. 573, and cases there cited; *Murray* v. *Finster*, 2 J. C. R. 155; *Gallatin* v. *Erwin*, 1 Hopkins, 55, 56; *Carr* v. *Callagan*, 3 Litt. 365.

"If a purchaser wishes to rest his claim on the fact of being an innocent *bonâ fide* purchaser, he must deny notice, even though it be not charged, and he must deny it positively, not evasively; he must even deny fully and in the most precise terms every circumstance from which notice may be inferred." Per Chancellor Kent, in *Denning* v. *Smith*, 3 J. C. R. 345; *Pillow* v. *Shannon*, 3 Yerg. 511.

Every case on the registry acts has been determined on the ground that those acts do not affect the great fundamental principles of equity; but that every purchaser claiming under a registered deed, with notice of a prior incumbrance or purchase, is subject to any equity which such prior incumbrance or purchase may create. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 428, vide 3 Sugd. on Vendors, p. 307, and notes *b* and 1, and authorities there cited; 1 Story, Eq. 385; *Cotton* v. *Hart*, 1 A. K. Marsh. 58. So, too, in *Portwood* v. *Outton's Adm'rs*, 3 B. Mon. 253, it is said, that a mortgage of land without seal or scroll was not a recordable instrument within the statute, so as to make the record constructive notice, yet that it was good against a subsequent purchaser with notice of its existence.

III. But, supposing there was no constructive notice arising from the registry of the mortgage, the defendants had actual notice. It is a just and salutary rule, calculated to preserve good faith and protect the rights of individuals, that whatever is sufficient to put a party upon inquiry is good actual notice. *Johnson* v. *Bloodgood*, 1 J. C. 53; *Sterry* v. *Arden*, Ib. 267; 1 Story, Eq. 389; *Ferrars* v. *Cherry*, 2 Vernon, 384; *Smith* v. *Low*, 1 Atk. 490; *Taylor* v. *Stibbert*, 2 Ves. 437; *Daniels* v. *Davison*, 16 Ves. 250; *Newman* v. *Kent*, 1 Merivale, 240; *Green* v. *Slayter*, 4 J. C. R. 46; *Peters* v. *Goodrich*, 3 Conn. 146; *Ward* v. *Fox*, Hughes, 231; *Johnston* v. *Gwathmay*, 4 Litt. 317; *Roberts* v. *Stanton*, 2 Munf. 129; *Pitney* v. *Leonard*, 1 Paige, 462; *Willis* v. *Bucher*, 2 Binn. 466; Newland on Contracts, 54; Sugden on Vendors, 498.

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In a great variety of cases it must necessarily be a matter of considerable difficulty to decide what circumstances are sufficient to put a party upon inquiry. Such, certainly, however, as to facts, as that a reasonable mind could not hesitate to deem sufficient to call for further inquiry, and to put a party upon his diligence, is good actual notice. 1 Story, Eq. 389; *Nantz* v. *McPherson*, 7 Mon. 599; *Jackson* v. *Sharp*, 9 J. R. 166; *Jackson* v. *Burgott*, 10 Ib. 460; *Dunham* v. *Dey*, 15 Ib. 567; 2 Powell on Mort. 561.

Examples of actual and implied notice, sufficient in equity. In *Fry* v. *Porter*, 1 Mod. 300, Hale, C. B., speaking of the point of notice, said: "Here are several circumstances that seem to show there might be notice, and a public voice in the house, or an accidental intimation, &c., may possibly be sufficient notice." *Butcher* v. *Stapeley*, 1 Vern. 364; 2 Powell, 561.

A verbal communication to a purchaser before he receives a conveyance, that A. B. has a claim to the land, is a sufficient notice to charge the purchaser with A. B.'s equity. *Currens* v. *Hart*, Hardin, 37.

Lis pendens is sufficient notice. *Green* v. *Slayter*, 4 J. C. R. 38. A violent presumption of notice or proof of facts which imply it is sufficient. *Cunningham* v. *Buckingham*, 1 Ohio, 235; 2 Hilliard's Abr. 458, sect. 246.

Where a grantor notified his grantee in writing, that the title of the land was in another as collateral security, to pay certain notes, this was held a sufficient notice to the purchaser, although nothing was said of date, amount, or time of payment. *Dunham* v. *Dey*, 15 J. R. 567.

H. went as an agent for the defendant to purchase a lot of B., who refused to sell, and told him he had already conveyed the lot to G., one of the lessors of the plaintiff. "Here, then," says the court, "was a direct and positive notice to the agent of the defendant," equivalent to a notice to his principal. *Jackson* v. *Sharp*, 9 J. R. 168.

Notice of a prior incumbrance may be presumed from inadequacy of price. 2 Powell, 578, *a*, note.

On the principle, that whatever puts a party on inquiry is good notice in equity, it is observable that if a person be ap-

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prised that the legal estate is in a third person at the time he purchases, he will be bound to take notice of the trusts with which the legal estate is clothed. 2 Freem. 137, pl. 171; 2 Powell on Mortgages, 578, note.

While H. was in negotiation for the purchase of a lot, he was informed that G. claimed the lot and had title, and was cautioned against purchasing, but he made the purchase and took a quitclaim deed. Kent, C. J., held that this was actual notice beyond all controversy, and that the purchase was subject to G.'s prior right. *Jackson* v. *Burgott*, 10 J. R. 460.

A subsequent purchaser admitted in his answer that before the execution of the deed to him, he had heard that the grantor had made some provision for his daughters, out of property in Greenwich street, and there was no evidence in the case that the grantor owned any other property in that street, except the lots included in the settlement. Chancellor Kent held this purchaser chargeable with constructive notice, or notice in law of this settlement, "because he had information sufficient to put him on inquiry." *Sterry* v. *Arden*, 1 J. C. R. 267.

Where a sheriff stated and declared to all bidders, at the time of the sale, that the property offered was subject to a mortgage, this was deemed sufficient actual notice to charge a purchaser at the sale with such mortgage. *Muse* v. *Setterman*, 13 Serg. & R. 168; *Lindle* v. *Neville*, Ib. 227.

Notice sometimes resolves itself into matter of fact, and sometimes into matter of law; each case, to a great extent, depends upon its own circumstances as to notice. 1 Story's Eq. 387–389; Com. Dig. Chancery, 4 C. 2.

If a man purchases land, and is informed of the existence of a lease, this is sufficient to put him on inquiry, and is therefore good notice; or if he is informed that the estate is in the possession of tenants, he is bound to inquire into the claims of those tenants, and is affected with notice of all the facts as to their estates, and is bound by the leases they hold. *Taylor* v. *Stibbert*, 2 Ves. Jr. 437; *Hiern* v. *Mill*, 13 Ves. 118; *Hall* v. *Smith*, 14 Ves. 426; 1 Story's Eq. 389, and note 3, and authorities therein cited; *St. Andrew's Church* v. *Tompkins*, 7 J. C. R. 16.

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The recital in a deed is notice; thus the recital of a letter of attorney, by which a deed was made, is notice to the purchaser of the existence of such a power. *Jackson* v. *Neely*, 10 J. R. 374; *Cuyler* v. *Bradt*, 2 Caines' Cas. Err. 326; 2 Powell on Mort. 620 *a*; 1 Story's Eq. 389; *Hall* v. *Smith*, 14 Ves. 426.

Evidence that a tenant cut wood on the land is constructive notice to the demandant, that the former held a deed of the land. *Kendall* v. *Lawrence*, 22 Pick. 540.

So possession of land is notice to a purchaser, and he must inquire of the title of the occupant. *Knox* v. *Thompson*, 1 Lit. 352; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. 434; 4 Monroe, 196; 2 J. J. Marsh. 180; *Brown* v. *Anderson*, 1 Monroe, 201.

The deposit of title deeds, as a security for money, constitutes an equitable mortgage; and a person, knowing such deposit, cannot take a mortgage or purchase to the prejudice of the equitable incumbrance so created. 1 Story's Eq. 383, 384.

Notice may be either actual and positive, or constructive, or implied. 1 Story's Eq. 387. And the fact of notice may be inferred from circumstances as well as proved by direct evidence. 4 Mass. Rep. 637.

"Any circumstance," says the court in *Knox* v. *Thompson*, 1 Lit. 353, "that puts another on the search, is sufficient to convict him of notice."

Nothing can destroy the effect of actual notice. 2 Powell on Mortgages, 617 (note), 572 *a*.

It is also a rule, that where there is notice of a deed the purchaser is bound by the effect and consequence of it, whatever opinion he may entertain as to its validity. Thus in the case of *Ferrars* v. *Cherry*, 2 Vernon, 384, it was held, that the defendant purchased with notice of the settlement, but he contended that the settlement did not recite or contain any notice that it was made pursuant to articles entered into before the marriage, and that the settlement was therefore voluntary, and fraudulent as to him; but the court said "he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary or made pursuant to an agreement before marriage; and, having notice of the deed, must at his peril purchase, and be bound by the effect and consequences of the deed." 2 Powell on Mortg. 572, 573.

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So in *Brackett* v. *Wait*, 6 Verm. Rep. 424, it was expressly held, that where a person has notice of a prior unrecorded deed, he is not protected from the effect of such notice by any erroneous opinions as to its validity, and must purchase at his peril.

There is another point connected with notice, which seems to me entitled to great weight, and it is this: By the English registry acts, recording is not constructive notice; but, if the records are searched, that is actual notice to a purchaser of all incumbrances within the period of his search. 2 Powell, 631 *b*, note. In this country the unauthorized registry of a deed would not amount to constructive notice. In all the cases upon this class of deeds in the American courts, the principle has not been carried further than that they are not constructive notice; but it has not been determined, that, when such deeds are actually recorded in a register office, that a search for and examination of the deed so recorded, would not be actual notice, or a circumstance from which notice would be presumed. On every principle of reason it would seem that the actual fact of examining a record, in an office where incumbrances are preserved, although the deed was not authorized to be recorded at all, would, at least, be equivalent to a verbal communication of an incumbrance, and would have the advantage of furnishing more precise and certain information, — such, at least, as would be sufficient to put a prudent man upon inquiry, which is all that is necessary to constitute actual notice.

In *Morrison* v. *Trudeau*, 13 Martin's La. Rep. 384, it was held that a deed unduly registered, either from want of valid acknowledgment, or otherwise, will, notwithstanding, operate as notice to third persons. I understand the court to declare that such a record may constitute medium of actual notice, as, for example, by examination or means of a like character.

So in the British courts judgments on record are not of themselves notice, and yet if it can be proved that a party searched the records of the court, it will be enough to bind him with notice of all judgments entered, though he might have overlooked them. 2 Powell, 597 and notes.

But it is unnecessary to pursue the point for the proof of actual notice, independent of this circumstance, is clear and

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conclusive, leaving no doubt on the mind as to the knowledge of the defendants of the existence of the mortgage at the time of their purchase. It was proclaimed at the sale, — the record book, where the mortgage was recorded, was lying open near at hand and all persons referred to it, and some of the defendants made search. Proof could not be more conclusive.

IV. Notice of a lien or incumbrance on property, binds the purchaser, if received by him at any time before the execution of the conveyance and payment of the purchase-money, and arrests all further proceedings towards the completion of the purchase; and, if persisted in, it is held to be done in fraud of the equitable incumbrance. 2 Powell on Mortg. 617; 2 Fonb. Eq. book 2, chap. 6, sect. 2, note I; sect. 3, note M; book 3, chap. 3, sect. 1, note B; *Taylor* v. *Stibbert*, 2 Ves. Jr. 441; *Jewett* v. *Palmer*, 7 J. C. R. 68; *Blair* v. *Owles*, 1 Munf. 38; *Le Neve* v. *Le Neve*, 3 Atk. 654, 304; 1 Paige, 208–284; *Frost* v. *Beekman*, 1 J. C. R. 301.

In *Wormley* v. *Wormley*, 8 Wheat. 449, it is said by Story, J., to be a settled rule in equity, that a purchaser without notice to be entitled to 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. *Mead* v. *Orrery*, 3 Atk. 238.

And in *Jewett* v. *Palmer*, 7 J. C. R. 68, above cited, Chancellor Kent said: "A plea of a purchase for a valuable consideration without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice at or before the time of the execution of the deeds, but that the purchase-money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money. *Harrison* v. *Southcote*, 1 Atk. 538; *Story* v. *Lord Windsor*, 2 Atk. 630. Even if the purchase-money be secured to be paid, yet, if it be not in fact paid before notice, the plea of a purchase, for a valuable consideration, will be overruled. *Hardingham* v. *Nicholls*, 3 Atk. 304."

Now Roane and Taylor, in their answers, show that they had notice before the sale; they do not deny notice. Fish denies notice generally; Fowler states that he did not receive actual

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notice until after the negroes came to his possession. In none of these answers is there any denial, or any thing equivalent to it, that the purchase-money was actually paid when the notice was received. This is absolutely necessary, as shown by the above cases. It must be positively averred in the answer, and cannot be inferred or supplied by intendment; and without it the plea of a purchase for a valuable consideration without notice, must be overruled.

It is to be observed also, that Roane, Taylor, and Fish, do not show themselves to be *bonâ fide* purchasers for a valuable consideration at all. They do not specify the judgment under which they purchased, — do not show, or exhibit, or refer to, or produce a judgment and execution, — which they were bound to do, to bring themselves within the character of purchasers.

The rule is, that an unregistered mortgage has preference over a subsequent docketed judgment. But if the property mortgaged be sold by the sheriff, prior to the registry of the mortgage, a *bonâ fide* purchaser at the sheriff's sale, without notice, will be protected against the mortgagee, if he has actually paid the consideration, and shows a conveyance, good in form, by the recording of which he obtains priority as a purchaser. *Jackson* v. *Terry*, 13 J. R. 472.

In fact a sheriff's deed, in the absence of statutory provisions, cannot be received in evidence at all, unless the judgment and execution are produced, for the purchaser claims under the judgment and execution, which is the only authority for the sheriff to sell. *Bowen* v. *Bell*, 20 J. R. 338; *Weyand* v. *Tipton*, 5 Serg. & R. 332; *Dunn* v. *Meriwether*, 1 Marsh. 158; *Cox* v. *Nelson*, 1 Monroe, 94; *Hinman* v. *Pope*, 1 Gilman, Rep. 136. Nor do those persons show any deed from the sheriff, and in these particulars have failed to show themselves purchasers.

But be this as it may, the defendants, Roane, Taylor, Fish, Fowler, and Badgett, had actual notice. Badgett, in addition to having notice himself, purchased from Fowler, who had notice. The purchasers of these negroes could acquire no better right than Dawson himself had to them. The officer only professed to sell the right and interest of Dawson, whatever it might be, as his deposition amply proves. The defendants who

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purchased stand in Dawson's shoes, — the sale, if valid, was a judicial assignment or transfer of Dawson's interest, subject, undoubtedly, to all subsisting prior incumbrances, and to the rights of third persons. To that sale the rule of *caveat emptor* most strongly applies. Merrill was neither party nor privy to the judgment under which the negroes were sold, and of course his rights were not affected by any proceeding under it.

If A. is in the possession of a slave, and it is sold as his property, but in fact belongs to B., may not the owner reclaim his property; and is it any defence for the purchaser to say that he purchased without notice, that B. was the true owner? A court of justice would inform him that he bought at his peril, and could acquire no greater right than A. had to the property.

This principle, necessary to preserve the sacred rights of property, rests upon a foundation, unconnected with the doctrine of notice of another's right. It rests upon the great principle applicable to all sales of personal property, whether by the agreement of parties or by the authority of law under judicial process, that the purchaser must look to the title and buy at his peril, — that the maxim *caveat emptor* must govern. *Ash* v. *Livingston*, 2 Bay, 85; Long on Sales, 164; *Clute* v. *Robinson*, 2 J. R. 595; 2 Powell, 589 *a*.

VI. Roane, Taylor, Fowler, Fish, and Badgett, are liable personally for the value of the slaves, in case they do not surrender them. *Blair* v. *Owles*, 1 Munf. 38; *Hughes* v. *Graves*, 1 Lit. 317.

They were appraised at the sale by three respectable and disinterested persons, under oath, according to the appraisement law, and that must necessarily constitute the criterion of value. The testimony proves that they were very likely negroes. The parol testimony very satisfactorily proves that they were not valued beyond what they were worth. I insist upon that criterion of value, for it is the only one to which we can rightfully resort.

VII. It is perfectly manifest from the pleadings and proofs in the cause, that the negroes will be insufficient to discharge the mortgage debt, and that it is, therefore, necessary to apply the hire thereto, which hire is claimed of the defendants by the complainant, in his bill.

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The defendants are personally accountable for the reasonable hire of the slaves, at least from the time of the service of process upon them, which is equivalent to a demand. *Graves* v. *Sayre*, 5 B. Mon. 390; 7 Dana, 227; B. Mon. 159. As to other cases relative to hire, vide *Reed* v. *Lansdale*, Hardin, Rep. 6; 3 Bibb, 18; 6 Monroe, 122; 7 Ib. 544; 4 Ib. 347; *Mims* v. *Mims*, 3 J. J. Marsh. 108.

In detinue the institution of suit is a sufficient demand to entitle the plaintiff to the hire of slaves by way of damages from that time. *Tunstall* v. *Mc Cleland*, 1 Bibb, 186; *Cole* v. *Cole's Adm'rs*, 4 Ib. 340; *Jones* v. *Henry*, 3 Litt. 49; *Carroll* v. *Pathkiller*, 3 Port. 279. And so in this case, the hire must be computed at least from the service of the writ of subpœna on the defendants.

A. Fowler argued the case for himself and other defendants fully and elaborately, on the principal grounds (1) that as the possession of the slaves did not accompany and follow the mortgage, but remained continuously in the possession of the mortgagor, the mortgage was, therefore, fraudulent and void as to creditors and purchasers; (2) that it was not properly acknowledged or recorded, and that the defendants had no constructive notice, and no sufficient actual notice of its existence, and that they were innocent and *bonâ fide* purchasers, for a valuable consideration, without notice; (3) that the mortgage was fraudulent in fact, and was designed and intended to protect Dawson's property from creditors, and that the suit was prosecuted for Dawson's benefit.

These points and others were argued with great ability by Mr. Fowler, but the reporter having no notes of it, or of the authorities cited and relied on, is unable to insert them here, which he would otherwise do with great pleasure.

On the 18th of July, 1846, the defendants filed exceptions to depositions taken by complainant, on which, on the 12th of October, 1846, the following opinion was delivered by

JOHNSON, J. — The first exception points to the omission of the name of James L. Dawson, as one of the defendants, in the caption of the depositions of Trapnall, Dorris, Walker, White, Bogy, and Hammett; but his name appears as a defendant in

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the order of the court appointing commissioners, in the notices served on the defendants, in the caption of the interrogatories which were filed and attached to, and issued with, the commission, in the commission which issued under the authority of this court, and in the oath of the commissioners to execute the same. The commissioner states, in the caption of the depositions, that they were taken in pursuance of said commission and interrogatories, in each of which the names of all the defendants are fully stated.

Under these circumstances, it cannot, in my judgment, be said, that the depositions do not appear to be taken in this case, and this exception is overruled. 3 Peters, 6.

The second exception is, that notice of filing interrogatories, and the time and place of taking such depositions, was not given to Roane, Badgett, Taylor, and Fowler. The notice was served on Taylor, Roane, and Fowler, by delivering to each of them a true copy of the notice, and on Badgett and Fish, by leaving a true copy of the notice with a white member of the family, and on Dawson and Baylor by delivering a true copy to their counsel, they not being residents of this district. This, in my opinion, is a good service of the notice. By the 13th rule of practice for the courts of equity of the United States, the service of a subpœna may be made by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

If this be a sufficient service of a subpœna to notify the defendant of the suit, it ought to be considered sufficient service of a notice in any subsequent proceeding in the cause. This exception is also overruled. The third exception is in these words: "Only a part of the interrogatories of said complainant were propounded to and answered by, each of said witnesses."

Not having arrived at any satisfactory conclusion upon this exception, in the absence of the presiding judge, a decision upon it will be deferred to the next term of this court. The fourth exception is, "that the deposition of Henry D. Mandeville, taken at Natchez, on the 8th of March, 1845, was taken without

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any sufficient notice having been served on said defendants, of the time and place of taking the same."

The answer to this exception is, that where the deposition is taken according to the acts of congress, at a greater distance from the place of trial than one hundred miles, no notice is required. By the certificate of the magistrate before whom the deposition was taken, it appears that the witness lives more than one hundred miles from this place. That his certificate is competent evidence of the fact, is established by the adjudication of the supreme court, in the case of the *Patapsco Insurance Company* v. *Southgate*, 9 Peters, Rep. 617 The court say: It was sufficiently shown, at least *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. This is a fact proper for the inquiry of the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of *Bell* v. *Morrison*, 1 Peters, 356, it is decided that the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury. This exception is overruled.

The fifth exception is to the competency of the evidence contained in the deposition of Mandeville. The decision of this exception will be reserved to the final hearing.

The sixth exception is to the authority of the magistrate, before whom Mandeville's deposition was taken. It was taken before Thomas Fletcher, "judge of the probate court, within and for the county of Adams, and State of Mississippi;" and the inquiry is, whether he is authorized by the acts of congress to take depositions. By the thirtieth section of the Judiciary Act of 1789, depositions *de bene esse* may be taken before any judge of a county court of any of the United States. Is Thomas Fletcher a judge of a county court of any of the United States? In order to decide this question, we must look into the laws of the State of Mississippi. That this court is bound to take notice of the laws of Mississippi, is clearly settled by the supreme court of the United States, in the case of *Owings* v. *Hull*, 9 Peters, 625. The court there held that the laws of all the States in the Union are to be judicially taken notice of, in the same manner as the laws of the United States are to be

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taken notice of by the circuit courts of the United States. Looking, then, into the laws of Mississippi, we find a court of probate established in each county of the State, with jurisdiction in all matters testamentary, and of administration, and of orphans' business; in the allotment of dower, in cases of idiocy and lunacy, and of persons *non compos mentis;* see section eighteen of the fourth article of the constitution, and the acts of the legislature of 1833, law 444. By the fourth section of the act it is provided, that the court of probate in each county shall provide a seal for said court, thereby constituting it a court of record.

The question then is, Is this a county court? It is a court of record established in each county in the State, and styled "the probate court of the county of ———." I am clearly of opinion that it is such a county court as is contemplated by the act of congress, and that depositions may be taken before the judge thereof. The deposition of Mandeville is a deposition taken *de bene esse*, and may be read on the final hearing, unless the defendant shall show that the witness has removed within the reach of a subpœna after the deposition was taken, and that fact was known to the party, according to the decision of the supreme court in the case of the *Patapsco Insurance Company* v. *Southgate*, 5 Peters, 617; *Russell* v. *Ashley*, ante, p. 546. This exception is therefore overruled.

On the 3d day of June, 1847, the following opinion was given on the exceptions to depositions previously filed: —

JOHNSON, J. — At the last term the defendant's second exception to the plaintiff's depositions was overruled. The attention of the court is again called to that exception, as not having been fully considered.

The notice of the time and place of taking the depositions, is insisted to be insufficient.

I am, however, of opinion that no notice was necessary. It was an *ex parte* commission, in which the defendants, after being duly notified, failed to join, by filing cross interrogatories.

In taking depositions under a commission, notice of the time

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and place of executing the commission is requisite, where the commission is a joint one.

But when it is not joint, but *ex parte*, notice is not required. See 1 Smith's Ch. Pra. 364; 1 Newland's Ch. 262.

Upon the defendant's third exception, no opinion was expressed at the last term. It is as follows: "Only a part of the interrogatories of said complainant were propounded to, and answered by each of said witnesses, &c., they should be therefore suppressed."

I am now satisfied that this exception is not well taken. The commission for taking these depositions, is not a joint, but an *ex parte*, commission in which the defendants failed to join; and it is only in cases of a joint commission that it becomes necessary that all the interrogatories should be propounded. Where the commission is *ex parte*, the party refusing or failing to join it, would not be permitted to put any interrogatory to the witness, although he might be present at the examination.

In such a case it is not incumbent on the person taking the deposition to cause all his interrogatories to be propounded to the witness. He is at liberty to put as many or as few of them as he thinks proper, with the exception of the last interrogatory, which must be put.

This is the settled practice in the high court of chancery in England. See Newl. Ch. 267. *Exception overruled.*

On the 23d of August, 1847, the cause came on for hearing, and the court delivered the following opinion:—

JOHNSON, J. — This is a bill in chancery, filed by Merrill, for the foreclosure of a mortgage of sundry slaves, executed to him by the defendant, James L. Dawson; and from the bill, answers, and evidence in the cause, the material facts appear to be as follows: That on the 11th of April, 1837, one N. L. Williams made his promissory note to the defendant Dawson, for the sum of $11,428.22, payable two years after date, and negotiable at the Planters Bank of Mississippi at Natchez; and on the 1st June, 1837, said Williams executed to said Dawson a like promissory note for the sum of $1,150, payable twelve months after date; and said Dawson, being desirous of

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raising money on said notes, obtained from the complainant his indorsement upon said notes, as additional security thereto, and to secure and indemnify him against his liability thus assumed as the surety of Dawson; the said Dawson, on the 25th of November, 1837, executed to said Merrill a mortgage upon sundry slaves therein named and described, the condition of which said mortgage was, that "if the said Dawson shall pay to said Merrill the sum of $12,578.22 (the amount of said two promissory notes), on the day the said notes shall become due, then the said indenture to be void." That on the 29th day of December, 1837, the said mortgage was recorded in the recorder's office in Jefferson county in this State, without acknowledgment or proof of its execution, except before a judge of the State of Mississippi.

That the slaves named and described by the said mortgage were in the said county of Jefferson, on the plantation of Dawson, where he resided; and so remained in his possession until the 11th day of October, 1841, when all of them, except those claimed by the defendant, Sophia M. Baylor, were sold by the sheriff of Jefferson county, upon judgments and executions against the said Dawson; at which sale the defendants purchased, and received possession of a part thereof.

That on the 28th day of November, 1837, the said Dawson presented said notes to said Planters Bank, and by the discount thereof obtained the money to become due by said notes; that when the said notes became due and payable, neither the said Dawson nor the said Williams ever paid any part thereof, but suffered them to remain wholly unpaid until the 4th day of March, 1842, when the complainant, as the indorser thereof, paid the full amount of principal and interest due by said notes. Dawson, in his answer, admits all the material allegations in the complainant's bill.

The defendant, Sophia M. Baylor, claims the following slaves, embraced in the mortgage, namely, Dick, Beverley, Lucas, Porter, and William, as her own property at the time the mortgage was executed by Dawson, who admits, in his answer, that he had only conditionally bought them of her,

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which condition he was unable to perform, so as to get a title to said slaves.

From an examination of the evidence in the cause, I am satisfied that these five slaves were the property of Mrs. Sophia M. Baylor, and that Dawson had no right to mortgage or otherwise dispose of them.

The bill, therefore, as to the defendant Baylor, will be dismissed.

The remaining defendants allege, in their answers, the mortgage set up by Merrill, the complainant, is as to them fraudulent and void, not having been made upon a good and valuable consideration, and *bonâ fide*, but with the intent to defraud the creditors and purchasers of Dawson; that it never was legally recorded; that the possession of the slaves did not accompany and follow the mortgage, but remained and continued with Dawson, the mortgagor, after the mortgage is alleged to have been made, and never were in the possession of Merrill, and is therefore fraudulent and void.

The exceptions to the mortgage I will proceed to consider; and, first, as to the registry or recording of the mortgage.

Previous to the enactment of the Revised Statutes of this State, which took effect and went into operation by the governor's proclamation of the 19th March, 1839, there existed no law or statute requiring mortgages of personal property, made on consideration deemed good or valuable in law, to be recorded.

The statute concerning conveyances (Steel and McCampbell's Digest, 131), relates solely to deeds, conveyances, bonds, and other obligations for lands, tenements, and hereditaments, and contains no provision whatever relating to deeds, conveyances, or mortgages of personal property.

The Statute of Frauds (same Digest, 267) contains the following provisions:—

"And moreover, if any conveyance be of goods, chattels, and be not on consideration deemed good or valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing

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acknowledged or proved by the witnesses in the office of the clerk of the superior court of this territory, the clerks of the circuit courts, or before any justice of the peace or other competent authority within the county wherein one of the parties lives, within three months after the execution thereof, or unless possession shall really and *bonâ fide* accompany the gift or conveyance; and in like manner, where any goods or chattels shall have been pretended to have been loaned to any person with whom, or, claiming under him, in whose possession (they) shall have remained for the space of five years without demand made and pursued by due process of law, on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of any use of property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken as to creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation, or limitation, or use of property were declared by will or deed in writing, proved and recorded as aforesaid, and even then the creditors or purchasers may show actual fraud; and on such fraud being established, every such gift, contract, sale, loan, or possession shall be set aside in favor of such creditors or purchasers; and the provisions of this section shall also be extended to subsequent creditors after such pretended gift, sale, contract, loan, or conveyance."

The second section of this act expressly provides, that "this act shall not extend to any estate or interest in any lands, tenements, or hereditaments, goods or chattels, which shall be upon good or valuable consideration, and *bonâ fide* and lawfully conveyed as aforesaid, nor to any person or persons who may be subsequent purchasers for *bonâ fide* considerations without notice." It is manifest, then, that the Statute of Frauds (which is only declarations of the common law), does not extend to the mortgage in this case, nor embrace it in any of its provisions, provided it was made upon a valuable consideration and

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bonâ fide; and if it were not, then it is inoperative and void, independent of the statute.

But although mortgagees of personal property were not required to have their mortgages recorded, yet they were allowed and permitted to have them recorded if they deemed it expedient.

This I infer from the following provisions, under the heads in the above digest of "recorder" and "mortgages." The first section under the head "recorder" provides that there shall be an office of recorder in each and every district or county, which shall be called and styled "the recorder's office;" and the recorder shall duly attend the service of the same, and provide well bound books, wherein he shall record all deeds and conveyances which shall be brought to him for that purpose, according to the true intent and meaning of this act.

The first section under the head of "mortgages" provides, that every mortgagee of any real or personal estate in this district (territory), having received full satisfaction and payment of all sum or sums of money as are really due him by such mortgage, shall, at the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage recorded in the said recorder's office, which shall for ever after discharge, defeat, and release the same. From these provisions, it can hardly admit of doubt, that mortgagees were entitled to have their mortgages recorded in the recorder's office; for unless they were recorded, how is it possible that the entry of satisfaction could be made upon the margin of the record of such mortgage?

The statutes are silent as to the acknowledgment or proof of the execution of the mortgage before it shall be admitted to record, but expressly requires the recorder to record all deeds and conveyances which shall be brought to him for that purpose; neither do the statutes declare that the registry of a deed or mortgage of personal estate shall operate as notice to creditors or purchasers; and in the absence of such a provision, I do not feel warranted in giving to it such a construction.

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The mortgage, then, in the present case, was properly admitted to record in the recorder's office, in Jefferson county, without requiring acknowledgment or proof of its execution. The acknowledgment before the judge in Mississippi being unauthorized by law, is to be considered as null and void. It stands, then, as a mortgage legally recorded, notwithstanding the registry thereof does not operate as constructive notice to creditors and purchasers.

The next inquiry is, Whether the defendants had notice of the mortgage before they became purchasers? They claim to be *bonâ fide* purchasers at the sheriff's sale, without notice of the complainant's mortgage or lien upon the property.

Notice of a lien or incumbrance upon property binds the purchaser, if received by him at any time before the execution of the conveyance and payment of the purchase-money, and arrests all further proceedings towards the completion of the purchase; and if persisted in, is held to be done in fraud of the equitable incumbrance. 2 Powell on Mort. 619; *Frost* v. *Buckman*, 1 John. Ch. Rep. 301. In the case of *Wormly* v. *Wormly*, 8 Wheat. Rep. 449, it was said by Judge Story to be a settled rule in equity, that a purchaser without notice, to be entitled to 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; and in *Jewitt* v. *Palmer*, 7 John. Ch. Rep. 68, Chancellor Kent said: A plea of purchase for a valuable consideration without notice, must be with the money actually paid; or else, according to Lord Hardwicke, you are not hurt.

The averment must not only be that the purchaser had not notice at or before the time of the execution of the deeds, but that the purchase-money was paid before notice.

There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money. Even if the purchase-money be secured to be paid, yet if it be not in fact paid before notice, the plea of a purchaser for valuable consideration will be overruled. *Hardingham* v. *Nicholls*, 3 Atk. 304.

There is not in the answers of the defendants, or either of them, any denial or any thing equivalent to it, that the pur-

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chase-money was actually paid before they had notice of the mortgage.

This averment is essential, and cannot be supplied by intendment in order to make the plea available. The defendants, then, have not placed themselves in the attitude to call for proof on the part of the complainant, that they really and in fact had notice.

But admitting their denial of notice to be full and complete, the evidence in the cause conclusively establishes the fact that they and each of them had actual notice of the mortgage before they made the purchase.

The defendants Roane and Taylor admit that they saw the record of the mortgage in the recorder's office, before they purchased, but believed it to be fraudulent and made merely for effect. The defendant Fish says, in his answer, "this respondent thinks there was no general notoriety on the subject of this mortgage, as he never heard it spoken of but once before he purchased one of said negroes, and then it was said to be fraudulent by the persons speaking of it."

These admissions are amply sufficient to charge these defendants with notice of the mortgage. But by adverting to the depositions taken in this case, it will be seen that actual notice of the mortgage is conclusively proved against each of the defendants before the sale was made by the sheriff. Martin W. Dorriss, in his deposition, says, "I believe that F. W. Trapnall proclaimed the existence of said complainant's incumbrance, and forbid the sale; and that Samuel C. Roane, Samuel Taylor, N. H. Fish, and Col. Fowler, were present in hearing of such proclamation; and that he heard Samuel Taylor say since the said sale that he was aware of the existence of said mortgage."

Robert W. Walker in his deposition, says, "I know that said record book B. was lying open at page 174, in the clerk's office of said county, on the morning of said sale, subject to inspection, and that Absalom Fowler, in person, examined said record book, and inspected said deed of mortgage. I believe that it was generally known and spoken of at the sale by those present, that the complainant Merrill had a mortgage on the negroes."

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Drew White says, that he, as deputy sheriff, sold the negroes in contest, and that when said sale was about to commence, he proclaimed, in the presence and hearing of said Roane, Taylor, Fowler, and Fish, that said negroes would be sold subject to all incumbrances, without reference to any particular incumbrance. He further states, that F. W. Trapnall did forbid the sale of said negroes on behalf, he thought, of William Dawson.

Ignace Bogy states, that "at the time said slaves of Dawson were sold by the sheriff of Jefferson county, I heard F. W. Trapnall, Esq., in an audible voice, forbid the sale of them, at the time when they were offered for sale, at the instance of some person whose name I do not now recollect; and said defendants, Roane, Taylor, Fish, Badgett, and Fowler, were present at the time, but as I did not have their ears, I cannot say that they also heard him."

John J. Hammett, sheriff of Jefferson county, who made the sale, states, "that it was generally understood and spoken of by those present at said sale of said negroes, that said complainant Merrill had a mortgage upon them. I believe said Trapnall did, on behalf of one William Dawson, forbid publicly, the sale of said negroes. I believe that said defendants were all present at that time; and that when about to commence the sale of said negroes, I, as sheriff as aforesaid, proclaimed publicly and audibly, in the hearing of all present, and notified all persons that I offered said negroes for sale subject to all incumbrances, and that I would convey to the purchasers of said negroes the interest and title of said Dawson only; and that there were some three or four mortgages recorded in the clerk's office upon said negroes, to which mortgages I referred all persons present, and requested them to go into the clerk's office and examine for themselves before purchasing; and I believe that said defendants Roane, Taylor, Fowler, Fish, and Badgett were all present and heard such proclamation."

Frederick W. Trapnall states: "I was present at the sale of the negroes of J. L. Dawson, at the October term of the circuit court of Jefferson county, in 1841, and at the request of Dawson at the time the sale was about to take place, I proclaimed in a loud voice that the negroes then offered for sale by the

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sheriff were embraced in a deed of mortgage, made by him to A. P. Merrill, which was then of record in Jefferson county, which was then unsatisfied, and I therefore forbid the sale. My impression is, that Absalom Fowler, Samuel C. Roane, Samuel Taylor, Nathaniel H. Fish, and Noah H. Badgett, defendants in this suit, were present on that occasion, and were within hearing of my voice. Badgett was standing by me at the time, and heard my proclamation; a good deal of conversation took place upon the subject. The sheriff then proclaimed that the negroes had been appraised, and would be sold subject to it."

The evidence just recited is, in my judgment, amply sufficient to charge the defendants with actual notice of the mortgage under which the complainant claims; the proof is too clear, direct, and positive, to admit of any reasonable doubt.

The remaining inquiry is, Whether the mortgage in this case was made upon a good and valuable consideration, and *bonâ fide*, or with the design and intention of defrauding the creditors and purchasers of Dawson. The main ground relied upon by the defendants' counsel is, that the possession of the slaves did not accompany and follow the mortgage, but was retained by the mortgagor, and this circumstance is insisted to be conclusive and untraversable evidence of fraud; but that, if not conclusive evidence, at least a strong badge of fraud, sufficient, in this case, to render the mortgage inoperative and void against the defendants. A bill of sale absolute upon its face, made by a person who still continues in possession of the property, has been held both in England and in this country, by the highest tribunals, to be, *per se*, fraudulent as to creditors and subsequent purchasers of the person so retaining possession. This doctrine received the sanction of the supreme court of the United States in the case of *Hamilton* v. *Russell*, 1 Cranch, 309.

The fact of possession not accompanying such a bill of sale, is considered conclusive evidence of a fraudulent intent, and as to creditors and purchasers the bill of sale is, in a judgment of law, fraudulent and void; but the continuance of possession by a mortgagor is not considered as having the same conclusive and vitiating effect upon the mortgage.

There is an essential difference between the effect of a pos-

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session retained by the maker of an absolute bill of sale, and the possession retained by the maker of a mortgage. The object of the one is to pass the absolute right of property, and the object of the other is to give a security defeasible upon a particular contingency; the possession in the former case is utterly incompatible with the deed; whereas, in the latter case, there exists no such incompatibility. Whilst, therefore, the possession in the former case may be correctly said to form the conclusive and untraversable evidence of fraudulent intent, and under the deed, *per se*, fraudulent, such cannot be admitted to be the effect of the possession in the latter case.

Possession by the mortgagor before forfeiture cannot be construed to be fraudulent, because it is consistent with the title, that not vesting until forfeiture. Nor can the continuation of the possession, after a breach of the condition, of itself, unconnected with any other circumstance of lapse of time, or the conduct of the mortgagee, be considered as a strong badge of fraud. The deed is still a mortgage; the right of the mortgagee is still contingent and collateral, and the possession of the mortgagor is not necessarily inconsistent with the title.

The utmost extent to which the authority of the decision can be carried, is that the tribunal, whose province it is to decide the facts, may infer a fraudulent intent, from the fact of possession remaining in the mortgagor. But this inference may be dispelled by the proof of other facts showing the transaction to be fair and *bonâ fide*. *Mc Gowan* v. *Hay*, 5 Littel, Ky. Rep. 240, and the authorities there cited; *Head* v. *Ward*, 1 J. J. Marsh. Rep. 280. See the case of *The United States* v. *Hooe*, 3 Cranch, 73; also *Wheeler* v. *Sumner*, 4 Mason, 183; Ib. 537; *Maples* v. *Maples*, Rice, Ch. Rep. 300; *Fishbourne* v. *Reinhardt*, 2 Speer, S. C. Rep. 564; *Gist* v. *Presly*, 2 Hill, Ch. Rep.; 2 N. Hamp. Rep. 15, 547; *Smith* v. *Aiken*, 23 Wend. 653.

Are there any other marks or badges of fraud in the present case? From all the facts and circumstances connected with the mortgage, independent of the declaration of Dawson after he made the mortgage (and they are clearly incompetent evidence), I have seen nothing from which an inference of fraud and collusion can be deduced. The execution of the mortgage

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by Dawson, and his indorsement of the two promissory notes, is established by Dorris and Hammett, who prove his handwriting; and the indorsement of the notes by Merrill, is proved by the cashier and teller of the Planters Bank. The discount of the notes, and the payment of the money to Dawson by the Planters Bank, and the payment to the bank of the notes by Merrill, on the 4th March, 1842, is established by the testimony of the same witnesses. The mortgage itself was actually recorded in the recorder's office in Jefferson county, on the 29th December, 1837. These facts clearly prove that the mortgage was made upon a good and valuable consideration, and *bonâ fide*, and not with the design or intent to defraud creditors and purchasers.

Where this appears from the evidence in the cause, the inference of fraud, if any, arising from the mortgagor's possession is dispelled, and not calculated to cast a shade upon the mortgage.

The defendants in their answers aver, that from the declaration of Dawson stating that the mortgage was merely nominal, and made only for effect to shield his property, they regarded the mortgage as fraudulent and void. No principle of the law of evidence is better settled than that the declarations of the grantor impeaching a deed he has made, are incompetent, and cannot be received for that purpose.

The conclusion to which I have arrived from a consideration of all the circumstances of the case is, that the mortgage was made upon a valuable consideration and *bonâ fide*, is free from the taint of fraud and collusion, and that the complainant is entitled to the relief he seeks.

The inquiry here arises as to the decree which ought now to be made. In the case of *Downing* v. *Palmateer*, 1 Monroe, Rep. 66, the court of appeals of Kentucky states the practice in the following terms: "The practice of the courts of equity on this subject is simple, and ought not to be departed from. Whatsoever controversies may arise about the validity of a mortgage, its forfeiture and its payment, in whole or in part, is decided upon at its first hearing, and the courts ascertain what is due, and by interlocutory decree declare that unless this sum is paid, or tendered by a particular time, the mortgage shall be

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foreclosed, and a sale decreed, if a sale is proper to be had. The time so given ought to expire in term time, and is sometimes, under extraordinary circumstances, lengthened by the chancellor. If, when that time expires, payment is moved with such costs as the chancellor shall adjudge, the mortgage is released, and there is an end to the controversy.

"If a tender and refusal is relied on, the money is brought into court, with such costs as shall be allowed, and the party is thus permitted to redeem. If, on the contrary, neither payment nor tender is relied on (in all of which matters the court ought to adjudge), the court may decree an absolute foreclosure in many cases without sale; but if a sale is prayed for, and deemed expedient, the chancellor decrees it accordingly, and appoints his commissioners to execute it."

The principle and practice above laid down I deem to be correct, and they will be acted upon in the present case.

DECREE.—This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely: That the bill as to the defendant, Sophia M. Baylor, be, and the same is hereby dismissed with her costs to be paid by her [to] the said complainant. And it is further ordered and decreed, that unless the sum of eighteen thousand nine hundred and thirty-four dollars shall be paid or tendered to the said complainant, or his solicitor, by the remaining defendants, or any or either of them, on or before the first day of next term of this court, they, the said defendants, are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged property in the bill mentioned, and a sale of said mortgaged property decreed, if a sale thereof shall be deemed expedient by this court.

And the question of hire of the mortgaged property, of costs, and all other questions in the cause not now decided, are reserved to the further decree of this court.

William Dawson, James Smith, and Garland Hardwicke, having disclaimed, the bill was dismissed as to them.

On the 15th of May, 1848, the cause came on for further and

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final hearing, and the court pronounced the following *final decree:* —

This day come the parties by their respective solicitors, and this cause coming on for a further and final decree in the premises, it doth satisfactorily appear to the court here, from the pleadings and proofs herein, that the indenture of mortgage mentioned in the bill was made in good faith, for a good and valuable consideration, on the 25th of November, 1837, by the said James L. Dawson, one of said defendants, to and with the said Ayres P. Merrill, the complainant, for the purpose of securing the payment by the said Dawson of the two promissory notes particularly mentioned in the said mortgage and bill of complaint, namely, one for eleven thousand four hundred and twenty-eight dollars and twenty-two cents, dated 1st of April, 1837, and due two years after the date thereof; the other for eleven hundred and fifty dollars, dated 1st of June, 1837, due twelve months after the date thereof, drawn by N. L. Williams, and payable to the order of the said James L. Dawson at the Planters Bank of Mississippi at Natchez, and indorsed by said James L. Dawson, and also by the said Ayres P. Merrill, as security for said Dawson, to enable the said Dawson to obtain the discount thereof at the said Planters Bank, as alleged in the bill; and which said mortgage was also made, and intended to be made, to indemnify and save the said Merrill harmless in regard to his indorsement of said notes. That on the 28th of November, 1837, said bank discounted said notes for the sole and exclusive use and benefit of him, the said Dawson, and placed the proceeds to his credit on the books of the bank, and subsequent to that time paid said proceeds to him or order, and that said bank thus became the *bonâ fide* holder of said notes for a valuable consideration; that when said notes respectively became due and payable, the said N. L. Williams, as well as the said Dawson, wholly failed to pay the same to said Planters Bank, nor did any other person pay the same for them, nor any part thereof; and therefore the notes were duly protested for non-payment. And on the 4th day of March, in the year 1842, the said Ayres P. Merrill, by reason of the premises and as last indorser, was obliged to pay and did pay the

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sums of money in said promissory notes specified, together with interests, costs, &c., up to that time, amounting in the aggregate to fifteen thousand five hundred and ninety-three dollars and sixty-one cents, to the said Planters Bank of Mississippi at Natchez, and then took up the same, and became, and from thenceforward continued to be, the legal holder and owner of said notes; and that being such legal holder and owner thereof, by virtue of the payment aforesaid, he did, on the 7th day of September, 1842, commence this his suit, to avail himself of the provisions of said mortgage, and to foreclose the same.

That at the making of said indenture of mortgage, the said James L. Dawson was possessed, as of his own absolute property, of certain negro slaves specified in said mortgage and bill of complaint, and then upon his plantation in the county of Jefferson and State of Arkansas, of the names and then of the ages respectively next mentioned, namely, negro man named Jim, sometimes called old Jim, forty years old; Governor, twenty-two years old; Sandy, twenty-one years old; Connell, twenty years old; Tom, nineteen years old; negro woman named Phebe, seventeen years old; Catharine, eighteen years old; Maria, sixteen years old; Mary, fifteen years old, and Eliza, eighteen years old; negro boy named Ransom, twelve years old, and Jim, sometimes called young Jim, eleven years old; all of whom were likely and valuable slaves, and continued in the possession of the said James L. Dawson until the 11th of October, 1841, and were and are hereby declared subject to the mortgage debt mentioned in the pleadings. That a male infant child of said Phœbe, named Jackson; that another male infant child of said Phœbe, named Beverly; that an infant boy of said Mary, named Henry; and that an infant girl of said Maria, named Frances, born since the making of said mortgage, as well as such other of the issue of such mortgaged slaves, not herein specially named, as may have been born since the making of said mortgage, ought to be, and hereby are declared to be, subject to the operation of said mortgage, and are to be sold towards discharging the said mortgage debt.

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That on the 11th of October, 1841, the said negro slaves, men, women, and children (excepting Beverly, born since), having been first valued according to law by three appraisers, sworn for that purpose, were sold as the property of said James L. Dawson, under execution, at the court house door of Jefferson county, and which sale, if valid at all, was, in the opinion of the court, subject to said mortgage and to the rights of said Merrill, under and by virtue of the same; and that on that occasion the said Samuel Taylor purchased and obtained possession of old Jim, Catharine, and Ransom; that at the same time Samuel C. Roane purchased and obtained possession of Sandy, Connell, and young Jim; that at the same time the defendant Fish purchased and obtained possession of Governor; that at the same time the defendant, Absalom Fowler, purchased and obtained possession of Tom, Mary and her infant boy named Henry, Maria and her infant girl named Frances, Phœbe and her infant boy named Jackson, and said negro woman named Eliza.

That about a week after said sale, the defendant, Noah H. Badgett, purchased of said Fowler the said negro woman Phœbe and her infant boy named Jackson, and also the said negro woman Eliza; and that said Phœbe, since her acquisition by the said Badgett, has given birth to a male infant boy named Beverly. That if any notice was necessary, the said defendants respectively, as it satisfactorily appears to the court from the pleadings, circumstances, and proofs herein, had sufficient actual notice of the existence of said mortgage, before and at said sale, to render their purchases respectively subject to it.

That upon the proof in this cause, the court is of opinion, and doth find the said negro slaves respectively to be of the following value, namely, old Jim, five hundred dollars; Governor, eight hundred and fifty dollars; Sandy, eight hundred dollars; Connell, eight hundred dollars; Tom, eight hundred dollars; Phœbe and her said child Jackson, one thousand dollars; Beverly, another child of said Phœbe, fifty dollars; Catharine, eight hundred dollars; Mary and her said child Henry, seven hundred and fifty dollars; Maria and her said child Frances,

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nine hundred dollars; Eliza, seven hundred dollars; Ransom, eight hundred dollars; young Jim, six hundred dollars; that the subpœnas in this case were served on the said Fowler on the 10th, on said Badgett on the 12th, on said Roane on the 14th, on said Taylor on the 14th, and on the said Fish on the 15th day of September, 1842; and the court here being well satisfied that said negro slaves are insufficient to discharge said mortgage debt, and that the hire thereof, according to the rate as proved by the depositions in this cause, ought to be applied towards the extinguishment of said interest and principal, such hire to be estimated from the time of the service of the subpœna on said defendants respectively, up to this time.

That from the proofs in the cause, the court is of opinion, and doth find the value of the hire of the following negro slaves in the possession of Absalom Fowler: for Mary, seventy dollars; for Tom, one hundred dollars; for Maria, seventy dollars per annum; and for which the said Fowler is declared accountable, at the rates aforesaid, to be computed against him from the 10th day of September, 1842, when the subpœna was served upon him, and which makes an aggregate amount of thirteen hundred and fifty-eight dollars, and for which said amount a decree ought to be rendered in favor of the complainant. That the court is also of opinion, and doth find the value of the hire of Phœbe, in the possession of the said Noah H. Badgett, to be seventy dollars per annum, which being computed from the 12th day of September, 1842, the time when the subpœna was served upon him, amounts to three hundred and ninety-six dollars, which is chargeable against said Badgett, and for which a decree ought to be rendered in favor of the complainant. That S. H. Hempstead, Esq., the solicitor of the said complainant, produced and read in open court a certain memorandum or agreement in writing, executed in duplicate by and between the said Ayres P. Merrill, acting in that behalf through S. H. Hempstead, his attorney in fact, of the one part, and Samuel Taylor and Nathaniel H. Fish, two of said defendants, of the other, dated the 10th day of December, 1847; and also a certain other memorandum or agreement in writing, also executed in duplicate, by and between the said

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Ayres P. Merrill, acting in that behalf through S. H. Hempstead, his attorney in fact, of the one part, and Samuel C. Roane, one of said defendants, of the other, dated the 22d day of April, 1848; whereby it manifestly appears that the said Samuel Taylor, Nathaniel H. Fish, and Samuel C. Roane, acknowledging the right of said complainant to subject the said slaves so purchased by them respectively to the said mortgage, and to recover reasonable hire therefor, and also with a view to end any further litigation, as far as they are concerned, adjusted and compromised with said complainant, and in such adjustment, said Samuel Taylor, not delivering the said slaves purchased by him, accounts for the same as follows: old Jim at five hundred dollars, Ransom at eight hundred dollars, and Catharine at eight hundred dollars, amounting in the aggregate to twenty-one hundred dollars, and which is the appraised as well as the real value thereof, and for the hire thereof nine hundred dollars; making an aggregate of three thousand dollars. That said Nathaniel H. Fish, not surrendering Governor, accounts for him at eight hundred and fifty dollars, the appraised as well as the real value of him, and for his hire three hundred dollars, making together eleven hundred and fifty dollars. That said Samuel C. Roane, not delivering Sandy, accounts for him at eight hundred dollars, the appraised as well as the full value, and for the hire of the slaves purchased by him as aforesaid six hundred dollars, making together fourteen hundred dollars; that he elects to surrender to the complainant Connell, who is to be received at eight hundred dollars, the appraised as well as the full value thereof, and young Jim at six hundred dollars, the appraised as well as the full value thereof, making for the two fourteen hundred dollars; and which two last-mentioned slaves are hereby decreed to the complainant, by consent of parties and to carry out said agreement, making altogether the sum of six thousand and nine hundred and forty-nine dollars, to be applied towards the extinguishment of said mortgage; and with which the said James L. Dawson is to be credited on said mortgage debt, as of the day of the rendition of this decree.

The court here being satisfied, that by said compromise the said defendant Dawson obtains as large if not a larger credit

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on said mortgage debt than if said negroes were sold; and there is nothing in controversy, as far as said Taylor, Fish, and Roane are concerned, except costs. That the court here, from the pleading and proofs in the cause, is of opinion, and doth find the indebtedness of the said defendant Dawson, up to this time, upon said mortgage, to be twenty-one thousand and three hundred and twenty-eight dollars for principal and interest, and deducting therefrom the said credit of six thousand and nine hundred and forty-nine dollars, that the balance justly [due] and owing by the said defendant Dawson to the said Ayres P. Merrill, and in arrear at this time upon said mortgage, and secured thereby, is fourteen thousand three hundred and sixty-nine dollars ($14,369).

It is therefore ordered and adjudged and decreed, that the said James L. Dawson do pay to the said Ayres P. Merrill the said balance of fourteen thousand three hundred and sixty-nine dollars, which includes principal and interest, and is the sum now justly due upon said mortgage, after allowing the credit aforesaid. That the said James L. Dawson, Absalom Fowler, and Noah H. Badgett be, and they are hereby, absolutely barred and foreclosed from all equity of redemption in and to all or any of the slaves specified in the said mortgage, or to the issue thereof born since the making of said mortgage; and it is further ordered, adjudged, and decreed, that Samuel A. White be, and he is hereby, appointed a commissioner in this case, and to whom the said Absalom Fowler and Noah H. Badgett, without any unnecessary delay, and upon request being made by him, are required to surrender and deliver said slaves so purchased and possessed by them respectively as aforesaid; that is to say, that the said Absalom Fowler be, and he is hereby, required to surrender to such commissioner said slaves, Tom, Mary, and her child Henry, and Maria and her child Frances, aforesaid, and the issue thereof, if any, by whatever name known or distinguished, and born since he acquired them; and that said Noah H. Badgett also be, and he is hereby required to surrender to such commissioner said slaves Eliza and Phœbe, and her two children named Jackson and Beverly, and such other of her issue, if any, by whatever names known, born since he

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acquired her; and the said commissioner may, if it is necessary, sue out a writ of assistance to obtain the possession of said slaves, or any of them.

And it is further ordered, adjudged, and decreed, that in case the said Absalom Fowler and Noah H. Badgett, or either of them, should be unable to deliver, or should fail or refuse to deliver, the slaves so purchased by them as aforesaid, upon the request of said commissioner, then and in that event it is further ordered, adjudged, and decreed, that for Tom, Mary, and her child Henry, and Maria and her child Frances, or any one of them which the said Absalom Fowler is unable, or should fail or refuse to deliver, he shall be held accountable and liable, and shall pay to the said complainant, Ayres P. Merrill, the value thereof, as fixed and ascertained in a previous part of this decree, and to which reference is now made for the value thereof respectively, and for the collection thereof a special execution may issue, as at law; and for said negro Eliza and negro woman Phœbe and her said children, Jackson and Beverly, or any of them which the said Noah H. Badgett is either unable or should fail or refuse to deliver up to such commissioner, he shall in like manner be held accountable and liable to said complainant, Ayres P. Merrill, for the value thereof respectively, as fixed and ascertained in a previous part of this decree, and to which reference is now made respectively, and for the collection of which a special execution may issue, as at law; but before any such execution can be taken out in either case, the said commissioner must file in the office of the clerk of this court an affidavit stating such inability, failure, or refusal to deliver on request, and then said execution may issue against the proper persons upon the application of the complainant or his solicitor, and which shall be executed by the marshal as executions in ordinary cases; and whatever moneys may be made thereon shall be applied towards the extinguishment of the balance of said mortgage debt; and it is further ordered, adjudged, and decreed, that if the said commissioner shall obtain the possession of all or any of said slaves, or the issue thereof aforesaid, either by voluntary delivery to him, or by his own exertions, or by a writ of assistance, he shall sell the

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same at the front steps of the state house in the city of Little Rock, at public auction, for cash in hand, on some convenient day to be fixed by him, first giving at least thirty days' notice of the time and place of sale, by publication in the "Arkansas Banner," and advertisements posted up at three public places in the city of Little Rock; and that said commissioner be, and he is hereby empowered to make proper bills of sale to the purchaser or purchasers, and that, after paying the expenses of sale, he pay to the said complainant or his solicitor the proceeds of such sale, and which proceeds must be applied towards the extinguishment of said mortgage debt; or if the complainant should purchase the negroes, or any part of them, at such sale, the amount bid by him must be allowed as a credit on said mortgage debt; and that a copy of this decree be furnished by the clerk to said commissioner, and that he make a full report of his proceedings to the next term of this court; and it is further ordered and decreed, that the said Absalom Fowler do pay to the said complainant the said sum of thirteen hundred and fifty-eight dollars, it being the hire of said slaves, Tom, Mary, and Maria, according to the rates and computed hire mentioned in the introductory part of this decree, and for which sum an execution may issue as at law, upon the application of the complainant or his solicitor, and the amount, when collected, is to be placed as a credit upon the said mortgage debt; and it is further ordered and decreed, that the said Noah H. Badgett do pay to the said complainant the said sum of three hundred and ninety-six dollars, being the hire of the said slave Phœbe, according to the rate and computed hire mentioned in the introductory part of this decree; for said sum execution may issue, as in the last-mentioned case, and the amount collected shall be placed in like manner upon said mortgage debt; and it is further ordered and decreed, that the costs of this suit be taxed by the clerk against the said defendants Taylor, Roane, Fowler, Fish, and Badgett, the proportion of one fifth part thereof to each one of them, and that they respectively pay said costs in that proportion; but the costs of the defendants, James L. Dawson, Baylor, Smith, Hardwick, and William Dawson, are excepted out of the costs as above ordered to be

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paid. The costs occasioned by these defendants must be paid by the complainant. Whereupon the said defendants, Absalom Fowler and Noah H. Badgett, come and pray an appeal from the decree rendered herein to the next term of the supreme court of the United States; and thereupon, the court being fully advised in the premises, is of opinion that said prayer ought to be, and the same is hereby granted.

And thereupon, it is further considered and ordered by the court, that, upon the said defendants Fowler and Badgett, or either one, giving security according to law for the prosecution of said appeal to effect, and to answer all damages and cost, if they fail to make their plea good in the said supreme court; that the appeal hereby granted is to operate as to both or either, who may give the required security, against said complaint as a *supersedeas.*

Appeal bond was given by Fowler, a transcript taken, and the case removed into the supreme court, and at the December term, 1850, thereof, came on to be heard, and was argued by Mr. *Lawrence* for the appellants, and Mr. *Addison* for the appellee, and is fully reported in 11 Howard, S. C. Rep. 375 to 397. The decision of that court is as follows: —

Mr. Justice WOODBURY delivered the opinion of the supreme court. — This was an appeal from a decree of the circuit court of United States for the District of Arkansas.

The decree was in favor of Merrill, on a bill in chancery, to foreclose a mortgage of certain negroes, described therein and executed to him November 25, 1837, to secure him for indorsing two notes made in April and June, 1837, the first payable in one year, and the other, in two years, for $12,578.42 in the aggregate. These notes run to J. L. Dawson or order, and were by him indorsed to plaintiff Merrill, and by him to the Planters Bank for Dawson, who obtained the money thereon for himself. This mortgage was recorded December 29, 1837.

The notes not being taken up by Dawson, Merrill was compelled to pay their amount and interest, on the 4th of March, 1842.

The bill then proceeded to aver, that the defendants below, namely, James L. Dawson, James Smith, William Dawson, and

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others, had since got possession of these negroes, some of one portion of them and some of another. And that, although they were bought with full notice of Merrill's prior rights to them under the above mortgage, yet the respondents all refuse to deliver them to him, or pay their value and hire towards the discharge of the mortgage. Whereupon he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire or to pay their value.

The court below decided, that $18,934 be paid to Merrill by the respondents, excepting Mrs. Baylor, and, on failure to do it, that the redemption of them be barred, and other proceedings had, so as eventually to restore the slaves or their value to the mortgagee.

Several objections to this decree and other rulings below were made, which will be considered in the order in which they were presented.

Some of the depositions which were offered to prove important facts, had been taken before "a judge of the probate court" in Mississippi, where the act of congress allows it in such cases before "a judge of a county court." 1 Stat. at Large, 88, 89.

But we think, for such a purpose, a judge of probate is usually very competent, and is a county judge within the description of the law.

In Mississippi, where these depositions were taken, a probate court is organized for each county, and is a court of record, having a seal. Hutch. Dig. 719, 721. Under these circumstances, were the competency of a probate judge more doubtful, the objection is waived by the depositions having been taken over again in substance before the mayor of Natchez.

The other objections to the depositions are in part overruled by the cases of *Bell* v. *Morrison et al.*, 1 Peters, 356, and *Patapsco Ins. Co.* v. *Southgate et al.*, 5 Peters, 617.

On the rest of them not so settled, we are satisfied with the views expressed below, without going into further details.

The next exception for our consideration is, that the time of the execution of the mortgage is not shown, and hence, that it may have been after the rights of respondents commenced.

But it must be presumed to have been executed at its date,

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till the contrary is shown; and its date was long before. Besides this, it was acknowledged probably the same day, being certified as done the 24th of November, 1837. And though this was done out of the State, yet, if not good for some purposes, it tends to establish the true time of executing the mortgage. It must also have been executed before recorded, and that was December 29th of the same year, and long before the sale in October, 1841, under which the respondents claim.

The objections, that the handwriting of the record is Dawson's, does not impair this fact, or the legality of the record as a record, it having doubtless been allowed by the register, and being in the appropriate place in the book of records.

It is next insisted, that as the negroes were left in the possession of Dawson after the mortgage, and were seized and sold to the respondents in October, 1841, to pay a debt due from Dawson to the Commercial Bank of Vicksburg, and as the respondents were innocent purchasers, and without notice of the mortgage, the latter was consequently void. This is the substance of several of the answers. Now, whether a sale or mortgage, without changing the possession of the property, is in most cases only *primâ facie* evidence of fraud, or is *per se* fraud, whether in England or in some of the States, or in Arkansas, where this mortgage and the sale took place, may not be fully settled in some of them, though it is clear enough in others. See cases cited in 2 Kent, Com. 406–412. So, whether a sound distinction may not exist at times between a mortgage and a sale, need not be examined, though it is more customary in all mortgages for the mortgagor honestly to retain the possession, than to pass it to the mortgagee. *United States* v. *Hoe*, 3 Cranch, 88; *Haven* v. *Low*, 2 N. Hamp. 15. See 1 Smith, Leading Cases, 48, note; *Brooks* v. *Marbury*, 11 Wheat. 82, 83; *Bank of Georgia* v. *Higginbottom*, 9 Pet. 60; *Hawkins* v. *Ingalls*, 4 Blackf. 35. And in conditional sales, especially on a condition precedent *bonâ fide*, the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled. See in 9 Johns. 337, 340; 2 Wend. 599. See most of the cases collected in 2 Kent, Com. 406.

But it is unnecessary to decide any of these points here, as,

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in order to prevent any injury or fraud by the possession not being changed, a record of the mortgage is in most of the States required, and was made here within four or five weeks of the date of the mortgage, and whereas the seizure and sale of the negroes to the respondents did not take place till nearly four years after.

Yet it is urged in answer to this, that the statute of Arkansas, making a mortgage, acknowledged and recorded, good, without any change of possession of the articles, did not take effect till March 11th, 1839, over a year after this record.

Such a registry, however, still tended to give publicity and notice of the mortgage, and to prevent as well as repel fraud, and it would, under the statute of frauds in Arkansas, make the sale valid, if *bonâ fide* and for a good consideration, unless against subsequent purchasers without notice. Rev. Statutes, c. 65, sect. 7, p. 415.

There is no sufficient proof here of actual fraud, or *mala fides*, or want of a full and valuable consideration. And hence the objection is reduced to the mere question of the want of notice in the respondents. In relation to that fact, beside what has already been stated, evidence was offered to show, that the existence of the mortgage was known and talked of in the neighborhood, and proclaimed publicly at the sale.

Indeed, some of the evidence goes so far as to state, that after the notice of the mortgage at the sale, the sheriff proceeded to sell only the equity of redemption, or to sell the negroes subject to any incumbrances. His own deed says expressly, "hereby conveying all of the rights, title, estate, interest, claim, and demand of the said James L. Dawson, of, in, and to the same, not making myself hereby responsible for the title of said slaves, but only conveying as such sheriff, the title of said James L. Dawson in and to the same."

The proof likewise brings this actual notice home to each of the respondents, before the purchase, independent of the public record of the mortgage, and the public declaration forbidding the sale at the time, on the ground that the mortgage existed and was in full force.

According to some cases, this conduct of theirs, under such

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circumstances, would seem more fraudulent than any by Merrill. *Le Neve* v. *Le Neve*, 3 Atk. 646; 1 Stor. Eq. 395; 8 Wheat. 449. Beside this, the answer should have averred the want of notice, not only before the sale, but before the payment of the purchase-money. Till the actual payment the buyer is not injured, and it is voluntary to go on or not, when informed that the title is in another. *Wormley* v. *Wormley*, 8 Wheat. 449; *Hardingham* v. *Nicholls*, 3 Atk. 304; *Jewett* v. *Palmer et al.*, 7 Johns. Ch. 68. See *Le Neve* v. *Le Neve*, 3 Atk. 651.

There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded, passed February 20, 1838. Rev. Stat. p. 580. This mortgage was on record then and since, and had been from December, 1837, thus covering both the time when the law took effect, and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi; and in most States the acknowledgment may be before a magistrate out of the State as well as in, if he is authorized to take acknowledgments of such instruments. Nothing appears in the record here against his power to do this. Some complaint is next made of the delay by Merrill to enforce his mortgage against Dawson.

But it will be seen, on examining the evidence, that he was not compelled to pay Dawson's notes to the bank till March 4, 1842, and that these negroes were sold to the respondents and removed some months before, namely, October 18, 1841, so that no delay whatever occurred on his part to mislead the respondents.

It was next objected, that two or three children, born since the mortgage, should not be accounted for, and one woman, who is supposed to have died after the sale and before this bill in chancery. But it seems to accord with principle, that the increase or offspring should belong to the owner of the mother. 2 Bl. Com. 404; *Backhouse's Adm'r* v. *Jetts's Adm'r*, 1 Brock. C. C. 511. And the evidence is so uncertain whether the death of Eliza occurred after this bill or before, that the doubt must

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operate against the respondents, whose duty it was to prove satisfactorily that it happened before, in order to be exonerated.

It is argued further against the decree, that the respondents were made to account below for a boy, not proved clearly to have been born of one of the mortgaged women. But there seem circumstances in the case from which it might be inferred that he was so born. He was brought up among them, he was under the care chiefly of one, and no other person is shown to have been his parent.

We do not see enough, therefore, to justify us in differing from the judge below on this point. The rules adopted in the circuit court for fixing the value to be paid for the negroes, are also objected to, but seem to us proper. 1 Brock. C. C. 500.

The mortgaged property is given up or taken possession of by the mortgagee usually at the time of the decree; and if not surrendered then, its value at that time, instead of the specific property mortgaged, must be and was regarded as the rule of damages.

The injury is in not giving it up when called for then, or in not then paying the mortgage, and not in receiving it some years before, and not paying its value at the time.

This is not trover or trespass for the taking it originally, but a bill in chancery to foreclose the redemption of it by a decree, and hence its value at the time of the decree is the test of what the mortgagee loses, if the property is not then surrendered.

There is another exception to the estimate made of the value of the hire of the slaves. Their hire or use was charged only from the institution of this bill in chancery. This surely does not go back too far. 1 Brock. C. C. 515.

And some analogies would carry it back further, and in a case like this, charge it from the period of their going into the possession of the respondents. But they object to the hire allowed; because, it is said, that clothing, medicine, &c., during this time should have been deducted. 1 Dana, 286; 3 J. J. Marsh. 109.

We entertain no doubt, however, that in fact the hire here was estimated as the net rather than gross hire, and all proper

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deduction made. It is only a hundred dollars in one case, and seventy in others, which manifestly might not equal their gross earnings, while nothing is charged for the children. Testimony, too, was put in as to the proper amount for hire, and the judge as well as witnesses belonging to the country, and being acquainted with its usages, doubtless made all suitable deductions. There is no evidence whatever to the contrary. And on the whole case, we think the judgment below should be affirmed. *Affirmed with costs.*

JOHN BOYLE, plaintiff, *vs.* WILLIAM G. ARLEDGE, defendant.

1. The legislature of Arkansas, by repealing the saving in favor of non-residents, in effect enacts a limitation law as to them from the 14th of January, 1843, until which time there was no limitation against them whatever.
2. The cases of *Dickerson* v. *Morrison*, 1 Eng. 264; *Watson* v. *Higgins*, 2 Ib. 475; and *Carneal* v. *Thompson*, 4 Ib. 56, cited and approved. Construction of the act of 14th of January, 1843. Acts 1843, p. 57.
3. On a writing obligatory, a non-resident had five, and on a promissiory note, three years to sue from the 14th of January, 1843.
4. The decisions of the State tribunals, on the construction of their statutes, are uniformly, and as a matter of principle, adopted by the federal tribunals, when passing on these statutes, or when they come under review.
5. These expositions are considered as a part of the law, and become a rule of property.
6. The affidavit of a party of the loss of a paper, and inability to find or produce it, after the use of due diligence, is sufficient to let in secondary evidence of the contents of such paper.

April, 1849. — Debt, determined in the Circuit Court before Hon. Benjamin Johnson, district judge.

S. H. Hempstead, for the plaintiff.

George C. Watkins and *J. M. Curran*, for the defendant.

OPINION OF THE COURT. — This is an action of debt, brought by the plaintiff on the 5th day of March, 1847; and in the first count of his declaration, he has declared upon a writing obligatory, executed to him by the defendant, payable on the 25th day of March, 1831; and in his second, third, and fourth counts, upon promissory notes made by the defendant to the plaintiff;

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the first payable on the 25th of March, 1833; the second on the 25th of March, 1834; and the third on the 25th of March, 1835. The defendant plead the statute of limitations, averring "that the cause of action in the first count stated did not accrue to the plaintiff at any time within five years next before the commencement of this suit; nor did either of the said several causes of action in the second, third, and fourth counts accrue to said plaintiff, at any time within three years next before the commencement of this suit." To this plea the plaintiff replied, that at the time when the several causes of action set out in his declaration accrued to him, he was a non-resident of the State of Arkansas, and from thence until the institution of this suit, continued to be, and was at its institution, a non-resident of the State of Arkansas. To this replication the defendant filed a general demurrer.

The first inquiry is, Whether the cause of action in the first count of the declaration, on the writing obligatory, is barred by the statute of limitations of this State? In the case of *Watson* v. *Higgins*, 2 Eng. Rep. 475, the supreme court of this State held, that previous to the 20th of March, 1839, when the Revised Statutes took effect, there was no statute of limitations of this State, applicable to writings obligatory; and on such causes of action then existing the statute of limitations commenced running from its passage; and in *Dickerson* v. *Morrison*, 1 Eng. Rep. 284, the same court held, that five years was the time fixed by the act as a bar to actions upon writings obligatory. According to these principles, the defendant's plea, that the cause of action had not accrued within five years next before the commencement of the suit, is a valid plea, and a good defence, if true, to the action, unless the plaintiff has brought himself within one of the exceptions contained in the 13th section of the limitation act. This, however, he has done, by replying that he was and continued to be, up to the commencement of the suit, a non-resident of this State. Rev. Stat. 528. But this 13th section of the statute of limitations was repealed by the act of the 14th of January, 1843, (Acts 1843, p. 57,) and the inquiry arises as to the effect of this repealing statute.

In the case of *Watson* v. *Higgins*, before cited, the supreme

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court of this State have given a construction to the intent, meaning, and effect of this act. They use the following language: "This leads us to inquire into the effect of the repealing statute. Until the time of its passage, there was no limitation as to non-residents. Did the legislature, by repealing the saving in favor of non-residents, remit them back to the time when the Revised Statutes took effect? If such be the case, many causes of action existing at the time of the repealing statute were by that act barred instantly. Such consequences would have been exceedingly unjust, and were surely not designed by the legislature.

"We conceive that the true construction is, that the legislature, by repealing the saving in favor of non-residents, in effect enacted a limitation law applicable to non-residents; and which took effect from the date of its passage. Hence all causes of action existing in favor of non-residents upon writings obligatory, on the 14th of January, 1843, had five years to run from that date." This doctrine is again affirmed by the same court, in the case of *Carneal* v. *Thompson*, 4 Eng. Rep. 56, in which the court says: "Previous to the act of the 14th of January, 1843, there was no limitation on causes of action belonging to non-residents. That act being simply a repeal of the exception in favor of non-residents, they had the same time after its passage, for the institution of their suits, as residents had, prior to its enactment," and cite the case of *Watson* v. *Higgins*, 2 Eng. Rep. 475.

This construction of the act of the 14th of January, 1843, is decisive of the question now under consideration. For as the action was commenced on the 5th of March, 1847, five years had not elapsed after the passage of the act of the 14th of January, 1843, within which time the plaintiff had a right to bring his suit upon the writing obligatory. I see no ground to dissent from the construction given to this act by the supreme court of this State; and I adopt it as a correct exposition of the statute. But if I thought it erroneous, still according to the repeated decisions of the supreme court of the United States, it is my duty to receive it as the true construction of the act. In the case of *Green* v. *Neal*, 6 Peters, Rep. 291, the supreme court of

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the United States say: "This court have uniformly adopted the decisions of the State tribunals respectively, in the construction of their statutes. This has been done as a matter of principle in all cases where the decision of a State court has become a rule of property. In a great majority of the causes brought before the federal tribunals, they are called on to enforce the laws of the States. The rights of parties are determined under these laws, and it would be a strange perversion of principle, if the judicial exposition of these laws by the State tribunals should be disregarded. These expositions constitute the law, and fix the rule of property. The decision of this question by the highest tribunal of a State should be considered as final by this court; not because the State tribunal, in such a case, has any power to bind this court, but because a fixed and received construction by a State in its own courts makes a part of the statute law." *Thatcher* v. *Powell*, 6 Wheat. 127; *Elmendorf* v. *Taylor*, 10 Ib. 159, 160; *Shelby* v. *Guy*, 11 Ib. 367; *Jackson* v. *Chew*, 12 Ib. 162.

On the 14th of December, 1844, the legislature again passed an act concerning the limitation of actions. But it is manifest from its inspection, that it does not abridge the time allowed by the statutes then in force upon causes of action that had then accrued. On the contrary, it enlarged the time and gave to non-residents two years from the passage to bring their suits, although these suits were then actually barred by that or any other act of limitation then in force. Acts of 1844, p. 24. Three years being the time limited in the Revised Statutes for bringing suit upon a promissory note, and this suit not having been brought within three years from the 14th of January, 1843, nor within two years from the 14th of December, 1844, the action, as far as respects the second, third, and fourth counts of the declaration, is barred. The replication to the plea to the first count, on the writing obligatory, must be overruled, and sustained to the replication to the second, third, and fourth counts of the declaration founded on the promissory notes.

Ordered accordingly.

The plaintiff entered a *nolle prosequi* to the second, third, and

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fourth counts, and the case was submitted on the issues formed on the first count of the declaration. One of the issues was, that the obligation was not lost, and to prove the affirmative of that issue, the plaintiff offered to read his affidavit, to show the loss of the obligation, and that he had used due diligence to find it, but without success, and that it was not in the possession, or under the control of S. H. Hempstead, his attorney; to the reading of which the defendant objected.

PER CURIAM. The doctrine is well settled by the supreme court of the United States, in the cases of *Riggs* v. *Tayloe*, 9 Wheaton, 483; and *Tayloe* v. *Riggs*, 1 Peters, 591, that the affidavit of a party to a suit is competent and admissible, for the purpose of proving the loss of a paper, in order to let in secondary evidence of its contents. The same principle has been followed by the supreme court of Arkansas, in *Kellogg* v. *Norris*, 5 English, 18. And such is doubtless the prevailing rule on the subject. *Davis* v. *Spooner*, 3 Pick. 284; *Donaldson* v. *Taylor*, 8 Pick. 390; *McDowell* v. *Hall*, 2 Bibb, 630; *Hamit* v. *Lawrence*, 2 A. K. Marsh. 366; *Hart* v. *Strode*, 2 Ib. 115.

The proof of the loss is addressed to the court, and cannot go to the jury at all; and it therefore becomes in all cases a question for the court to decide, when the loss of a paper is sufficiently proved, so as to let in secondary evidence. A party by his own oath can do no more than prove the loss of the paper. The contents must be proved in a different manner. The affidavit in this case is sufficient to establish the loss, and is admissible for that purpose.

The plaintiff took a nonsuit.

TRUEMAN ROBERTS, plaintiff, *vs.* JEROME B. PILLOW, defendant.

1. A seal impressed on paper is equivalent to sealing with wax, and a deed attested by such an impression is admissible in evidence.
2. By the law of Arkansas the deed of a collector of the revenue for land sold for taxes, is *primâ facie* evidence of the regularity and legality of the sale,

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and of a good and valid title in the grantee, his heirs or assigns, unless there is something on the face of the deed to show it to be void.

3. And such deed is admissible in evidence without first proving that the requisites of the law have been complied with.
4. Statutes of limitation are statutes of repose, and are founded on sound policy, and should not be evaded by a forced or astute construction.
5. It is not necessary that a person claiming the protection of the statute should have a good title, or any title but a possession adverse to the true owner.
5. Color of title under a worthless or void deed, has always been received as evidence of adverse possession.

June, 1851. — Ejectment, determined in the Circuit Court of the Eastern District of Arkansas, before the Hon. Daniel Ringo, district judge, holding the court.

Absalom Fowler, for the plaintiff.

Albert Pike, for the defendant.

Opinion of the Court. — This is an action of ejectment for lands, to which the defendant pleads the general issue and two special pleas in bar. The first asserts "that, more than five years before the commencement of this suit the south half of the south-east quarter of section twenty-three, township fifteen, north of range three east, was sold by Miller Irvin as sheriff and collector of the taxes and revenue of the State of Arkansas and county of Phillips, in which the lands were and are situate, under and by virtue of the statute in such case made and provided, for the payment of the taxes and costs, then due said State and county on said lands, to the last and highest bidder at public auction at the court house door in said county, and then and there purchased by and struck off to one William Vales, on the 5th of November, 1839, said taxes and costs being then due for that year, and after twelve months from that time, namely, on the 22d of October, 1844, said Irvin as such sheriff, under and by virtue of said sale, by deed of that date, duly executed, acknowledged, and recorded, conveyed the same lands in fee to one Richard Davidson as the assignee of, and by the direction of the said William Vales, and in like manner shows a sale of the residue or north half of said quarter section of land by Irvin as such sheriff and collector, on the 1st day of March, 1841, for taxes and costs due thereon for 1840; that the same was then and there purchased by, and struck off to one

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John J. Powell, and after the expiration of twelve months from that time, namely, on the 22d of October, 1844, said Irvin, as such sheriff, under and by virtue of said sale, by deed of that date, duly executed, acknowledged, and recorded, conveyed said and to said Richard Davidson as assignee of, and by direction of said Powell, and on the 20th of January, 1848, the said Davidson by deed of that date by him and his wife duly executed and acknowledged, and thereafter duly recorded, conveyed and assigned said premises to one Samuel Henry Armstrong, who on the 16th of May, 1849, by deed of that date, by him and his wife duly executed and acknowledged, and thereafter duly recorded, conveyed and assured the said premises to said defendant, and that from the dates of said respective sales, the said defendant and said several grantors have successively had exclusive and undisturbed possession of said premises, and more than five years had elapsed after each of said sales before the commencement of this suit," concluding with a verification and prayer of judgment.

The second alleges simply "that said plaintiff was not, nor was his ancestor, predecessor, or grantor seized or possessed of said premises or any part thereof within ten years next before the commencement of this suit," concluding with a verification and the usual prayer of judgment.

To these special pleas the plaintiff demurs, and by the special causes assigned therein insists, that the first is defective in failing to aver "that the collector's sales therein specified were made in conformity with the statutes then in force, and that the assessment and listing for taxation of said lands were in conformity therewith, and the execution and acknowledgment of such conveyances by such collector were made in like manner, and all the proceedings under which said lands so sold by said collector were regular and in strict conformity with the statute in such case made and provided. (2.) That it does not specifically aver that such sales so alleged to have been made by the collector were regular and valid sales according to the laws then in force."

To the third plea, "that it fails to aver that the defendant and those under whom he claims during the said period of ten years,

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therein mentioned, have continually held said tract of land in their possession, and adversely to said plaintiff. (2.) That it does not show that defendant and those under whom he claims hold said tract of land by any right or title whatever. (3.) The same concludes with a verification, whereas it should conclude to the country."

The second plea appears to be designed to place the defendant within the act of March 3, 1838, which enacts that "all actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter, saving to minors, persons of unsound mind, and persons beyond seas, the period of three years after such disability shall have been removed." Digest, 696.

This is strictly a statute of limitations, and was designed to protect the purchasers of lands at judicial sales, or sales by collectors of the revenue for the non-payment of taxes, from actions which might otherwise have been brought for the recovery of lands purchased at such sales, after the evidences requisite to establish the regularity of the proceedings, and the validity of the sale might in the usual course of events be lost to the purchaser without culpable or gross negligence on his part, while within such period, by the use of ordinary diligence and common prudence, the truth of the facts as they transpired and really existed could be generally established, and his title acquired by such purchase vindicated. But there is nothing in this act indicating a design to dispense in such case with any act or thing required by law to justify such sale, and thereby divest the right or title thereto out of the owner, and invest the purchaser therewith. On this subject it is silent.

To make such defence available, it is not to be questioned, that certain facts must exist and be properly shown by the pleadings.

The land when assessed must have been subject to be taxed, must have been listed for taxation, must appear in the lists of taxable property returned to and acted on by the county court of the county in which the land was at the time situate, and

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from which, under the order of the county court, the tax book must be made out by the clerk. In both the assessment list and tax book it must be stated or appear, whether it is taxed as the property of a resident or of a non-resident of the county, because the legal course of proceeding, after as well as before the sale, differs where the land belongs to a resident from that prescribed where it is charged as belonging to a non-resident of the county. To the tax book the clerk must attach a special warrant, by virtue of which warrant and the tax book, the sheriff, to whom the warrant is addressed as "collector," and who receives and holds it in that capacity, is alone authorized to proceed to collect the revenue, and upon default of payment by the person charged, to levy the amount charged of the property of the person charged, or of the lands to the amount charged thereupon. After having demanded payment of the owner, or person against whom the same is charged, if he be a resident of the county, and personal property cannot be found of which to levy the tax, in such case, but not otherwise, the lands shall be levied and sold as they are required to be, "under executions on judgments at law." Digest, c. 139, sec. 48, 49, and 90. When not inconsistent with the provisions of this act, or in case the lands are owned by and assessed to a person not resident in the county in which the lands are situate, the taxes charged thereon not being paid, the collector, on or before the 15th day of September, annually, shall make out and file in the office of the clerk of the county court a list thereof, setting forth the owners' names, and a description of the lands, as the same are described in the tax book, and charge thereon the taxes due for the current or preceding year, together with a penalty of twenty-five per cent. on the amount of taxes due, and cause a copy of such list to be set up at the court house door of his county, and published in some newspaper printed in this State at least four weeks before the first Monday of November, to which list he shall attach a notice that the whole of the several tracts of land or town lots described in such list, or as much thereof as shall be necessary to pay the taxes and penalty charged thereon will be sold at the court house door of his county on the first Monday of November thereafter, unless such

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taxes, penalty, and expenses of advertising be paid before that time (Digest, c. 139, sec. 95, 96), and shall cause such list and notice to be recorded in the office of the clerk of the county court before the day of sale mentioned in such notice, and in conformity with such notice shall, on the first Monday of November, at and after the hour of 10 o'clock, A. M., proceed to offer for sale separately each tract of land and town lot contained in such list, on which the taxes and penalty have not been paid (Ib. sec. 97, 98), and may continue such sale from day to day until the whole shall be sold or offered for sale.

And where from any cause the collector shall fail to offer for sale the lands or town lots in his county liable to be sold for the payment of taxes and belonging to persons non-resident thereof, at the time prescribed for the sale of lands for taxes, the county court of such county on good cause shown, shall have power to order the collector to offer such lands and town lots for sale at a time to be therein expressed and on giving at least thirty days notice thereof in some newspaper printed in the State, in the same manner as required by this act in other cases. Digest, c. 139, sec. 129.

Some of these provisions of law may be regarded as merely directory, and the failure to observe and strictly follow their injunctions in every particular may not invalidate and make void a sale. Yet there are others indispensable to invest in the collector a legal authority to sell, and without which his sale, if he should assume to make one, would, as it seems to me, be simply void. To this class may be referred the tax book with the prescribed warrant thereto attached, which is based upon the assessment list, returned and made of record in the county court, and the orders of that court thereon, adjudicating and adjusting the same and must be in accordance therewith. The possession of this alone conveys to the officer a legal authority to collect the revenues charged upon the lands and other property and persons within the county. Without it the collector can neither legally receive any revenue required to be embraced therein, or levy the amount of any property or lands subject to sale for the payment of taxes, and any sale for the non-payment of taxes made by him without such authority

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would be illegal and void, and no deed of the sheriff founded upon such sale would be sufficient to pass the title from the former owner to the purchaser.

But these as well as other objections alike fatal to the claim of the purchaser if shown to exist, are to the extent of casting the burden of proof of the same on the former owner said to be obviated by the provisions of the 111th, 112th, and 113th sections of the same chapter which declare as follows, namely: —

"SEC. 111. At any time after the lapse of one year from the time of such sale for taxes, if the land or lot sold shall not have been redeemed, the collector shall on request, and on the production of the certificate of purchase, and in case of the sale of part only of any tract, or production of the county surveyor's return of the survey in conformity with the requisition of such certificate execute and deliver to the purchaser, his heirs or assignee, a deed of conveyance for the tract of land, or town lot, or part thereof that shall have been sold as aforesaid."

"SEC. 112. The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs or assigns, and shall be evidence of the regularity and legality of the sale of such lands."

"SEC. 113. No exception shall be taken to any deed made by a collector for lands sold for the payment of taxes; but such as shall apply to the real merits of the case, and are consistent with a liberal and fair interpretation of the intention of the general assembly."

The legal effect imparted to such deed is said to dispense with the necessity of alleging in a plea the facts required to be done prior to such conveyance, as the deed itself is made by law to vest in the grantee a good and valid title, both in law and equity, and also is made evidence of the existence of such facts, and therefore the allegation, that such deed was made and exists, amounts in law to a substantive and substantial allegation of every fact essential to the validity of the sale, and

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the vesting of the title in the grantee, and if it be for any cause invalid or insufficient, the facts rendering it so must be shown by the party who questions or denies its sufficiency.

But does the law impart such efficacy to every deed executed by a sheriff or tax collector, without regard to the existence of such facts as alone enable him to act in the matter; or only to his deed made in the execution of such authority? If to every deed, then, a conveyance by him of lands not taxed or contained in the tax book, or sold on a day or at a place not authorized by law, or without his having at the time of sale any warrant to collect the taxes, or levy the amount of the lands or other property; would *primâ facie* be sufficient to transfer the lands of A. to B., and do so effectually in the absence of any showing of the non-existence of such facts as invest the collector with authority to sell, and without which his sale or any conveyance founded thereon would be void, he having no jurisdiction or cognizance of, or power over, the subject to do any act in relation thereto. Such does not appear to be the design of the law. It only authorizes a conveyance upon and in pursuance of a sale of the land, "that shall have been sold as aforesaid." How sold as aforesaid? The answer seems to be plainly indicated, for in its terms the reference is direct to the precedent provisions of the law authorizing the sale of lands by the collector for unpaid taxes on the conditions and subject to the limitations thereby prescribed.

When such sale has been so made, the making of such deed is authorized after the lapse of one year from the day of sale, and in such case and under such circumstances the operation and effect thereof is such as is declared by the statute provisions; but this application cannot with justice, or under any known or recognized rule of interpretation, be extended to deeds made by the collector under other circumstances. If this be the true understanding of this law, and I do not perceive how it can reasonably be interpreted otherwise, it is manifest that a party relying on such deed must in connection therewith, show such facts as in law vested in the collector authority to sell property circumstanced as that was when sold, in relation to which he claims a right derived from such sale and a conveyance founded

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thereon, before he can receive the advantages, or entitle himself to the legal presumptions and effect declared by the statute as incidents to such deed.

What particular facts may be sufficient for this purpose it is the business of the pleader to ascertain, and not the duty of the court to indicate or specify in advance. Yet it seems to me, and I perceive no impropriety in so declaring, that it must at least be shown, that there was a tax book with a proper warrant attached thereto in the hands of the collector; that it embraced the lands in question, — especially if they are not sold as the property of a resident of the county; that a sale by the collector was made, by authority of the tax book and warrant, at a time and at the place prescribed or authorized by law; that the sale was by public auction and to the highest bidder as prescribed by the 99th section of chapter 139, (Digest, 887).

Unless these facts be shown, and perhaps some others not here enumerated, it seems clear that the officer would possess no authority to act or sell, and if he did so, his act would be void. No legal right could be derived from or through such act, and the most favorable view for the purchaser at any sale made for the non-payment of taxes under the laws in question, which can be indulged, is to consider him in the like position as a purchaser of land levied and sold by virtue of a writ of execution. The law certainly never designed to place him in a better situation; but, liberally construed, may possibly admit him to occupy the like position as regards the right acquired by such purchase, and to establish the same by corresponding evidences, or such as bear a close analogy thereto.

But, the question is not as to the effect of the deed or the testimony which it supplies; but as to what facts are necessary to be alleged in a plea of the statute of limitations of five years, to show that the defendant, or person through whom he claims is a purchaser of lands, sold by some collector of the revenue for the non-payment of taxes, within the purview of the statute, which as before indicated implies a sale in fact, by the proper officer, upon or by virtue of sufficient legal authority for that purpose, vested in him at the time, and without any refer-

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ence to the deed based on such sale, or its effect as an instrument of evidence, or means of passing the title.

Such sale and purchase doubtless may be shown without any reference whatever to the deed afterwards to be made, and whatever effect the deed may have, the law does not admit the substitution of allegations showing its execution, etc., for those distinctly averring such specific facts as show a sale authorized by law. When this shall be done and not otherwise, the party is in a position to avail himself of the provisions of the statute. The plea under consideration, failing to show such sale and purchase, is therefore insufficient.

The third plea is the exact converse of the statute on which it is based. The statute declares that "no action for the recovery of any lands or tenements, or for the recovery of the possession thereof, shall be maintained unless it appear, that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of such suit."

This action is for the recovery of land which is alleged to be the property of the plaintiff. If so the right of property draws to it the right of possession, where no other right or interest in the land is shown. If the possession be vacant or not adverse, the law regards the legal owner as seized, though he may never have occupied or been upon the land. This is not a traverse or denial of any matter or fact alleged. But impliedly admitting or confessing that the plaintiff has no title to the land in question, and that the defendant entered and ejected the plaintiff therefrom, seeks to justify these acts, and avoid the right demanded, by simply denying that the plaintiff or any party, through whom he claims, was seized or possessed of the land within ten years next before the commencement of the suit. Is this sufficient in law to avoid the admitted title of the plaintiff and his rights incident thereto?

So far as disclosed by the pleadings, the title or legal estate in the lands and its incidents, are the principal, if not the only matters in question. How, then, the title being admitted, may the seizin, which is its incident, be divested out of the plaintiff? To this the law seems to furnish this distinct answer, namely,

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by a possession adverse, or hostile to that of the plaintiff; a holding in opposition to, and in defiance of the title of the plaintiff. This constitutes a disseisin of the party, but in nowise affects its title; but effects a separation between the title and seizin, which otherwise generally remains united; leaving, however, with the title a legal right of entry and possession within the period prescribed by law. This, by the common law, was twenty years, but by our statute, is supposed to be reduced to ten years; and such possession seems to be necessary to enable a party to avail himself of the statute of limitations.

In the case of *Kirk* v. *Smith*, 9 Wheat. 288, the supreme court, speaking of those rules which apply to acts of limitation generally, says: "One of these, which has been recognized in the courts of England and in all others where the rules established in those courts have been adopted is, that possession to give title must be adverse," and that "to allow a different construction would be to make the statute of limitations a statute for the encouragement of fraud — a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction." In *McIver* v. *Ragan*, 2 Wheat. 29, the same court says: "The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of a title believed to be good."

It has been repeatedly held as law in the courts of New York and other States, that to constitute an adverse possession, there must be possession under color and claim of title; but it has never been considered as necessary to constitute an adverse possession that there should be a rightful one. It has also been held in numerous cases, that a mere entry upon another is no disseisin, unless it be accompanied with expulsion or ouster from the freehold, and that a peaceable entry upon land apparently vacant, furnishes *per se* no presumption of wrong, and that where the entry is peaceable, it cannot work a disseisin. The disseizor is bound to show his tortious seizin affirmatively, because the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every

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possession lawful, the commencement and continuance of which is not proved to be wrongful. 1 Johns. Cas. 33, 36; 6 Ib. 197; 5 Cow. 371.

These, as well as other principles affecting the rights of parties in such case, especially such as define and determine what acts and facts must combine to invest a party with the rights and character of a disseizor, conduce to show what facts must appear to produce a bar to such action as the present.

But it may be said that under this plea, these may be shown in evidence, as without their being made to appear, the want of seizin in the plaintiff and those through whom he claims cannot be established, and which want or absence of seizin is the very essence of the plea. That such proof would be requisite to bar the action, if on the trial the plaintiff shall produce or show in himself a valid legal title to the land, (which by this plea is confessed,) may be admitted, and also that proof of such facts would show the plaintiff disseized, and as a consequence of such disseizin, that the plaintiff was not seized within ten years. This is the fact alleged, and if true and properly pleaded, creates, undoubtedly, a good bar unless he should bring himself within some exception or saving provided by the law. Yet it does not follow that such plea is admissible; but the contrary seems to me the necessary result of this view of the law. For the seizin of the plaintiff being confessed by the admission of his title, the law continues it, and preserves to him all the benefits thereof, until he is met by such facts as in law amount to a disseizin, continued for the space of ten years, and this appears to be the scope and import of the statute. If a defendant will by special plea avail himself of its provisions, he must distinctly allege and show a disseizin, for otherwise his plea amounts to nothing more than the general issue, under which the plaintiff is bound to establish a seizin or possession in himself, or some one under or through whom he claims, or fail in his action. To this objection the present plea appears to be subject.

It avers nothing — no fact or matter — which the plaintiff on the general issue would not be bound to prove in support of his case. If on that issue the plaintiff fails to prove seizin or pos-

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session within ten years before the action was brought, he cannot recover. The fact alleged in this plea is nothing but a simple negation of such seizin, and is therefore unnecessary. It is but an argumentative denial, and a departure from the prescribed forms of pleading the general issue. As a plea in confession and avoidance, it fails to give color, or a plausible ground of action to the plaintiff; or if regarded as confessing the cause of action and attempting to avoid it by matter subsequent, it entirely fails to show any matter destructive of the plaintiff's seizin or possession, shows no disseisin or dispossession of the plaintiff or those under or through whom he claims, nor even so much as alleges either, and in this respect it is also defective, and produces no bar pleadable as such in this form of action. *Demurrer sustained.*

June 18, 1851. — This case having come on for trial before a jury on the plea of the general issue, the collector's deeds mentioned in the foregoing pleas were offered in evidence by the defendant, and on the grounds expressed in the above opinion, were excluded, to which the defendant excepted, and the court signed a bill of exceptions, and verdict and judgment were rendered for the plaintiff.

The defendant sued out a writ of error, and removed the case to the Supreme Court, where, at the December term, 1851, the cause was argued by Mr. *Lawrence* and Mr. *Pike* for the plaintiff in error, and Mr. *Crittenden* for the defendant in error, and the case will be found reported at large in 13 Howard, S. C. Rep. 472.

Mr. Justice GRIER delivered the opinion of the supreme court as follows: —

"Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant below, pleaded the general issue and two special pleas: the first setting forth a sale of the land in dispute, for taxes, more than five years before suit brought; the second pleading the statute of limitations of ten years. These pleas were overruled on special demurrer as informal and insufficient, and the judgment of the court on this subject is here alleged as error. But

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as the same matters of defence were afterwards offered to be laid before the jury on the trial of the general issue, and overruled by the court, it will be unnecessary to further notice the pleas; as the defence set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment (with the exception perhaps of a plea to the jurisdiction), any and every defence to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defence.

On the trial, the plaintiff below gave in evidence a patent for the land in dispute from the United States to Zimri V. Henry, dated 7th May, 1835; and then offered a deed from said Henry to himself, dated 10th November, 1849. This deed purported to be acknowledged before the clerk of the circuit court of Walworth county, in the State of Wisconsin, and was objected to, 1st, because there was no proof of the identity of the grantor with the patentee, other than the certificate contained in the acknowledgment; 2d, because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers; and 3d, because the seal of the circuit court authenticating the acknowledgment was an impression stamped on paper and "not on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention.

Formerly wax was the most convenient and the only material used to receive and retain the impression of a seal. Hence it was said, "*sigillum est cera impressa; quia cera sine impressione, non est sigillum.*" But this is not an allegation that an impression without wax is not a seal. And for this reason courts have held that an impression made on wafers or other

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adhesive substance capable of receiving an impression, will come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed, and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

After the plaintiff had closed his testimony, the defendant offered in evidence two certain deeds from Miller Irwin, sheriff of Phillips county, and assessor and collector of taxes therein, to Richard Davidson, dated the 22d of October, 1844, one for the north half and the other for the south half of the quarter section of land now in dispute. On objection, the court refused to permit these deeds to be received, and sealed a bill of exceptions. The defendant then offered the same deeds to Davidson, and in connection therewith, a deed from Davidson to Armstrong, and also a deed from Armstrong to the defendant; and to accompany them with proof of possession by himself and those under whom he claims for more than ten years, as to the south half of said land, and more than five years as to the whole of it. The plaintiff objected to this evidence. "And it was by the court ruled that the possession of such deeds accompanied by possession of the land, was not sufficient to prove such pos-

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session of the land to be adverse to the plaintiff and his grantor without further proof that the defendant or his grantors claimed adversely; so the court refused to permit any deeds to be read in evidence to the jury."

These bills of exception may be considered together. They present two questions: (1.) Whether, by the law of Arkansas, the deeds offered in evidence (and which were regularly acknowledged and recorded according to law) should have been permitted to go to the jury as evidence of a regular sale of the land mentioned therein for taxes; and (2.) Whether, without regard to their validity as elements of a good legal title *per se*, they should not have been received for the purpose of showing color of title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of the plaintiff.

I. In considering these questions it will not be necessary to set forth at length all the provisions of the revenue laws of Arkansas, for compelling the payment of taxes assessed on land. A brief recapitulation of their most prominent provisions will suffice. These laws make it the duty of the collector, on or before the 15th of September of each year, to make a list of lands assessed to persons non-resident, and the tax due thereon, with a penalty or addition of twenty-five per cent., and to file this list with the county clerk. He is directed also to set up a copy of the same at the court house, and to publish it in a newspaper at least four weeks before the first Monday of November, giving notice that, unless the taxes shall be paid on or before that day, the land will be sold. On that day the collector is authorized to offer for sale, at public auction, such tracts or lots of land, or so much of them as will be sufficient to raise the taxes, and penalty assessed and unpaid, and to continue the sales from day to day. The purchaser to pay down forthwith the amount of taxes, &c., and receive a certificate describing the land purchased; directing, if necessary, the public surveyor to lay off the tract purchased, by metes and bounds, after one year allowed for redemption.

This certificate, which is made assignable, may be presented to the collector, who is authorized to execute and deliver a deed

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to the holder of it, for the land described therein. Then follows the ninety-sixth section of the act, which is as follows:—

"The deed, so made by the collector, shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs, or assigns, a good and valid title, both in law and equity, and shall be received in evidence in all courts of this State, as a good and valid title in such grantee, his heirs or assigns, and shall be evidence of the regularity and legality of the sale of such lands."

The deeds, offered in evidence, were regularly acknowledged and recorded. It is not denied that Irwin, the grantor therein, was sheriff, assessor, and collector of taxes in the county of Phillips, as he is described in the deed. The deed for the south half recites an assessment of the same for taxes in 1839, according to law; that the taxes remained unpaid; that the land was regularly advertised and offered for sale, on the 5th of November, 1839, by auction; struck down to William Vales, who paid the purchase-money and received a certificate; that the time for redemption having long expired, and Richard Davidson became the assignee or holder of the certificate; therefore the said collector granted, &c., the said south half to said Davidson, his heirs, &c. The deed for the north half has similar recitals, showing a tax assessed in 1840, a sale in 1841 to John Powell, and a certificate transferred by him to Davidson.

These deeds come within the description of the ninety-sixth section. They are made by a collector of the revenue; they are acknowledged and recorded according to law; they purport to be for land assessed for taxes, and regularly sold according to law, and the law enacts that deeds so made shall be evidence, not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein.

It is easy, by very ingenious and astute construction, to evade the force of elementary statutes, where a court is so disposed. We might say that the expression, "deeds so made by the collector," means deeds made strictly according to the requirements of all the preceding sections of the revenue law, and decide that only deeds first proved to be completely regular and legal, can be received in evidence; and thus, by qualifying

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the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts?

Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the act was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were fully complied with antecedent to the sale and conveyance by the collector. Experience had shown that where such conditions were enforced, a purchaser at tax sales who had paid his money to the government and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator.

The power of the legislature to make the deed of a public officer *primâ facie* evidence of the regularity of the previous proceedings cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land, has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is no doubt at liberty to prove it, and thus annul the sale. If he has not he has no right to complain if he suffers the legal consequences of his own neglect.

The plain and obvious intention of the legislature is clearly expressed in the ninty-sixth section, that the deed made by the collector as authorized by the preceding section when acknowledged and recorded, should be received in evidence as a good and valid title, and that the recitals of the deed, showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale under and by virtue of that act. The deed being thus made *per se*, *primâ facie* evidence of a legal sale and a good title, the court were bound to receive it as such. There is nothing on the face of these deeds showing them to be irregular or void. They are each for a different portion of the tract or quarter section of land having known boundaries, according to the plan of the public surveys;

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one being for the south half and the other for the north half of the quarter section, it required no survey to ascertain their respective figure, boundaries, or location.

II. But, assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence in connection with proof of possession in order to establish a defence under the statutes of limitation.

The first section of the act of limitations of Arkansas, bars the entry of the owner after ten years. And the thirty-fifth section enacts that "all actions against the purchaser, his heirs, or assigns, for the recovery of lands, sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sales and not after."

Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them, must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseizor. One who enters upon a vacant possession, claiming for himself, upon any pretence or color of title, is equally protected with the forcible disseizor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner, in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend why evidence offered and competent to prove that fact, should be rejected till the fact is otherwise proven.

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With regard to the five years' limitation, we need not inquire whether the legislature intended that the action should be barred, where the purchaser at the tax sale was not in possession. In this case, possession for more than five years by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show that he and those under whom he claimed, held under a deed from a collector of the revenue of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof, before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title.

The case of *Moore* v. *Brown*, 11 How. 424, had reference to a deed void on its face, and the consequences of this fact under the peculiar statutes of Illinois. It furnishes no authority for the decision of the court below in the present case.

The judgment of the circuit court is therefore reversed, and a *venire de novo* ordered. *Ordered accordingly.*

THE UNITED STATES *vs.* JAMES L. DAWSON and JOHN R. BAYLOR.

1. Persons indicted in 1845 in the circuit court of the United States for the district of Arkansas, for a felony committed in the Indian country west of Arkansas, and which territory was transferred to the western district of Arkansas by the act of 3d March, 1851, (9 Stat. 594,) are subject to be tried in the court where the indictment was found, and the court in the western district has no jurisdiction.
2. That act did not deprive the court where an indictment was pending, of the right to try and determine the same.

April, 1853. — Indictment for murder, before the Hon. Peter

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V. Daniel, associate judge of the supreme court of the United States, and the Hon. Daniel Ringo, district judge.

The indictment was as follows, namely:—

"The United States of America, District of Arkansas, ss.

"In the circuit court of the United States, begun and holden within and for the District of Arkansas aforesaid, at the April term thereof, A. D. 1845.

"The grand-jurors of the United States of America duly elected, impanelled, sworn, and charged to inquire within and for the body of the District of Arkansas aforesaid, upon their oath, present, That James L. Dawson, who is a white man, and not an Indian, late of said district, on the 8th day of July, in the year of Christ, eighteen hundred and forty-four, with force and arms, in that part and portion of the Indian country west of the Mississippi River that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the State of Missouri, west by the Mexican possessions, south by Red River, and east by the west line of the now States of Arkansas and Missouri, (the same being territory annexed to the District of Arkansas, for the purposes in the act in that behalf made and provided,) namely, in the District of Arkansas aforesaid, and within the jurisdiction of this honorable court, in and upon one Seaborn Hill, who was a white man and not an Indian, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said James L. Dawson, a certain pistol of the value of five dollars, then and there loaded and charged with gunpowder and one leaden bullet, which pistol the said James L. Dawson, in his right hand, then and there had and held at, to, against, and upon the said Seaborn Hill, then and there feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said James L. Dawson, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder and shot sent forth as aforesaid, the said Seaborn Hill in and upon the left breast of him the said Seaborn Hill, a little below the left pap of him the said Seaborn Hill, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Seaborn Hill then and there

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with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the pistol aforesaid by the said James L. Dawson, in and upon the left breast of him the said Seaborn Hill, a little below the left pap of him the said Seaborn Hill, one mortal wound of the depth of six inches, and of the breadth of half an inch, of which mortal wound the said Seaborn Hill then and there instantly died.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, That John R. Baylor, yeoman, who is a white man, and not an Indian, late of said district, on the day and year aforesaid, with force and arms, in the Indian country west of Arkansas, that is to say, in the Indian country bounded and described as aforesaid, and within the jurisdiction of this court, namely, in the district aforesaid, feloniously and wilfully, and of his malice aforethought, was present, aiding, abetting, and assisting the said James L. Dawson, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, and so the jurors aforesaid, upon their oath aforesaid, do say that the said James L. Dawson and John R. Baylor, the said Seaborn Hill, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in that behalf made and provided, and against the peace and dignity of the United States of America aforesaid, and this indictment is founded on the testimony of witnesses sworn to testify before the grand-jury.

"S. H. HEMPSTEAD,

"Attorney of the U. States, for the Dist. of Arkansas.

"A true bill.

"P. T. CRUTCHFIELD, foreman of the grand-jury.

"Filed April 16th, 1845. WM. FIELD, Clerk,

by A. H. RUTHERFORD, D. C."

Dawson was arrested on the 8th day of November, 1852, in Texas, by the marshal thereof, on process issued on the indictment, and was delivered to Luther Chase, the marshal of the eastern district of Arkansas, on the 24th of November, 1852, and was from thenceforward confined in the jail of Pulaski county. John R. Baylor was never arrested.

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On the 23d day of December, 1852, Dawson presented to the Hon. Daniel Ringo, district judge at chambers, a petition for a *habeas corpus*, setting out the indictment, and his commitment under it, and insisting that all jurisdiction over the case totally ceased after the passage of the act of the 3d of March, 1851, creating a western district of Arkansas and attaching the Indian country, where this offence was alleged to have been committed to the court of that district; and praying to be discharged from imprisonment.

Joseph Stilwell, district attorney for the United States.

Albert Pike, *E. Cummins*, and *E. H. English*, for Dawson.

January 29, 1853. RINGO, J. — On hearing the petition of James L. Dawson, praying a writ of *habeas corpus* and discharge from imprisonment, and upon hearing the argument of counsel thereupon, as well on behalf of the prisoner as of the United States, it appears by the showing of petitioner that he stands charged by indictment in the circuit court of the United States for the District of Arkansas with the crime of murder, committed in the Indian country, on a white person, on the 8th day of July, A. D. 1844, within the limits of that part of the Indian country then attached to that district; — That this indictment was in due form found by the grand-jury impanelled and sworn in the circuit court, at the April term thereof, A. D. 1845, and by the jury returned and delivered into court as a true bill, on the 16th day of April, A. D. 1845, and then filed; That writs of *capias* founded thereupon, for his arrest to answer the United States on said charge have been from time to time by order of court issued thereout, and that the prosecution is still pending; That on and by virtue of one of the writs of *capias*, issued in due form, bearing date the 20th day of May, A. D. 1852, addressed to the marshal of the district of Texas, and returnable to said court at the April term thereof, 1853, petitioner was on the 8th day of November, 1852, arrested in the State and District of Texas, by a deputy of the marshal of the District of Texas, by whom he was thence conveyed to the District of Arkansas, and on the 24th day of November, turned over and delivered into the custody of Luther Chase, "marshal of the United States for the eastern district of Arkan-

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sas, and by him committed to the jail of Pulaski county in the last-named district, where he has ever since remained and still is imprisoned, to answer to said indictment, and that no cause, other than said charge, indictment, *capias*, and proceedings exist, or ever did exist for his imprisonment and detention in custody. He therefore claims the benefit of the writ of *habeas corpus*, and that upon the hearing he may be discharged from imprisonment and custody, on the ground that this court is not possessed of jurisdiction of the crime, because the same if committed, was committed at a place not now within its jurisdiction, the place where said crime is charged to have been committed, being in that part of the Indian country, which by act of congress of March 3, 1851, dividing the District of Arkansas, is attached to the western district of Arkansas for which a separate district court was by said act created and vested with all the jurisdiction and powers of a circuit court, without any reservation to said circuit court of jurisdiction of any crimes previously committed within the limits of said western district, or the Indian country attached thereto, or any transfer of any prosecution, or case, then pending in the circuit court, to any other court, and without any provision for the trial of such crimes in the district court for the western district. Wherefore he insists he is legally discharged from any prosecution for said crime, no court possessing the power to punish offences committed in the Indian country now attached to said western district committed prior to the creation thereof by the division of said Arkansas District, and is now illegally imprisoned and held in custody to answer the said indictment.

I am not satisfied that by the division of the district, and the attaching of the place and Indian country where the crime is charged to have been committed, to the western district of Arkansas, the jurisdiction of the circuit court over the crime, and the prosecution thereof was divested, or that this court notwithstanding does not possess ample jurisdiction thereof, and may lawfully proceed to try and punish in such case although the place where the crime was committed, if committed at all, is not now within, or attached, to the eastern district of Arkansas and within which the place, where by law the circuit court

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is required to hold its sessions, is situated, and inasmuch as the crime charged against the petitioner is a felony, and no sufficient ground for his discharge from imprisonment is shown, admitting all of the facts to be true, as stated in his petition, (with which is exhibited a duly certified copy of the indictment and writ of *capias*, with the return thereto of the marshal above mentioned,) the prayer of the petition is denied.

At the April term, 1853, a motion was made by Dawson, to quash the indictment on the same ground set out in the petition, namely, that the act of 3d March, 1851, creating a court in the western district of Arkansas, had the effect of destroying the jurisdiction of this court over the case.

This motion was argued, before judges Daniel and Ringo, by *Joseph Stilwell*, district attorney for the United States; and *A. Pike*, *E. Cummins*, and *E. H. English* for Dawson, and upon this motion the judges differed in opinion and certified two questions to the supreme court, which are stated in the decision of that court, hereafter introduced.

Dawson applied for bail, but the court on hearing the testimony refused his application.

The case in the supreme court was argued at the December term, 1853, Mr. *Cushing*, attorney-general for the United States; and Mr. *Lawrence* and Mr. *Pike* for Dawson; and will be found reported in 15 How. S. C. R. from 467 to 494.

Mr. Justice NELSON delivered the opinion of the supreme court. — The defendant was indicted in the circuit court of the United States for the District of Arkansas, for the alleged murder of one Seaborn Hill, in the Indian country west of the State of Arkansas.

The defendant is a white man and so was Hill, the deceased.

At a circuit court held at the city of Little Rock, on the 28th of April, 1853, the indictment came on for trial before the judges of that court; whereupon a motion was made on behalf of the defendant, to quash the indictment for want of jurisdiction of the court to try the same.

And upon the argument, the judges being divided in opinion,

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the following question was certified to this court for its decision:—

1. Did the act of Congress, entitled "An Act to divide the District of Arkansas into two judicial districts," approved the 3d of March, 1851, by which the western district of Arkansas was created, take away the power and jurisdiction of the circuit court of the United States for the eastern district of Arkansas, to try the indictment pending against the prisoner, James L. Dawson, a white man, found in the circuit court of the United States for the District of Arkansas, by a grand-jury impanelled on the 16th of April, 1845, for feloniously killing Seaborn Hill, a white man, on the 8th of July, 1844, in the country belonging to the Creek nation of Indians west of Arkansas, and which formed a part of the Indian country annexed to the judicial district of Arkansas by the act of congress, approved on the 17th of June, 1844, entitled "An Act supplementary to the act entitled 'An Act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers,'" passed 30th June, 1834.

To state the question presented for our decision in a more simple form, it is this: At the time the State of Arkansas composed but one judicial district in which the federal courts were held, the Indian country lying west of the State was annexed to it for the trial of crimes committed therein by persons other than Indians. In this condition of the jurisdiction of these courts, the crime in question was committed in the Indian country, and the indictment found in the circuit court at the April term, 1845, while sitting at the city of Little Rock, the place of holding the court.

Subsequent to this the State was divided into two judicial districts, the one called the Eastern and the other the Western District of Arkansas. The Indian country was attached to, and has since belonged to the western district. The question presented for our decision is, whether or not the circuit court for the eastern district is competent to try this indictment, since the change in the arrangements of the districts.

By the 24th section of the act of congress, June 30, 1834, (4 Stat. 733,) it was provided that all that part of the Indian

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country west of the Mississippi River, bounded north by the northern boundary of lands assigned to the Osage tribe of Indians, west by the Mexican possessions, south by Red River, and east by the west line of the Territory of Arkansas and State of Missouri, should be annexed to the territorial government of Arkansas for the sole purpose of carrying the several provisions of the act into effect. And the 25th section enacted, that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided the same shall not extend to crimes committed by one Indian against the person or property of another Indian.

The act of congress of June 7th, 1844, (5 Stat. 680,) which was enacted after the Territory of Arkansas became a State, provided that the courts of the United States for the District of Arkansas should be vested with the same power and jurisdictian to punish crimes committed within the Indian country, designated in the 24th section of the act of 1834, and therein annexed to the Territory of Arkansas, as were vested in the courts of the United States for said territory before the same became a State; and that for the sole purpose of carrying the act into effect, all that Indian country theretofore annexed by said 24th section to the said territory, should be annexed to the State of Arkansas.

As we have already stated, the crime in question was committed in this Indian country, after it was annexed for the purposes stated, to the State of Arkansas; and the indictment was found in the circuit court of the United States for the District of Arkansas, which we have seen was coextensive with the State. And if no change had taken place in the arrangement of the district before the trial, there could of course have been no question as to the jurisdiction of the court.

But by the act of congress 3d March, 1851, it was provided that the counties of Benton and eight others enumerated, and all that part of the Indian country annexed to the State of Arkansas for the purposes stated, should constitute a new judicial district, to be styled " The Western District of Arkan-

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sas," and the residue of said State shall remain a judicial district, to be styled "The Eastern District of Arkansas."

The 2d section provides, that the judge of the district court shall hold two terms of his court in this western district in each year at Van Buren, the county seat in Crawford county. And the third confers upon him, in addition to the ordinary powers of a district court, jurisdiction within the district of all causes, civil or criminal, except appeals and writs of error which are cognizable before a circuit court of the United States. The fourth provides for the appointment of a district attorney and marshal for the district, and also for a clerk of the court.

It will be seen, on a careful perusal of this act, that it simply erects a new judicial district out of nine of the western counties in the State, together with the Indian country, and confers on the district judge, besides the jurisdiction already possessed, circuit court powers within the district, subject to the limitation as to appeals and writs of error; leaving the powers and jurisdiction of the circuit and district courts, as they existed in the remaining portion of the State, untouched. These remain and continue within the district after the change, the same as before; the only effect being to restrict the territory over which the jurisdiction extends. Hence no provision is made as to the time or place of holding the circuit or district courts in the district, or in respect to the officers of the courts, such as district attorney, marshal, or clerk, or for organizing the courts for the despatch of their business. These are all provided for under the old organization. 5 Stat. 50, 51, 176, 177, 178.

We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it in our judgment necessarily operated to deprive them of it.

It has been supposed that a provision in the sixth amendment of the constitution of the United States has a bearing upon this question, which provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime

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shall have been committed, which district shall have been previously ascertained by law." The argument is, that since the erection of the new district out of the nine western counties in the State, together with the Indian country, it is not competent for the circuit court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires that the district within which the offence is committed, and the trial to be had, shall be ascertained and fixed previous to the commission of the offence.

But it will be seen from the words of this amendment, that it applies only to the case of offences committed within the limits of a State; and whatever might be our conclusion, if this offence had been committed within the State of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offence was committed out of its limits, and within the Indian country.

The language of the amendment is too particular and specific to leave any doubt about it. "The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall be committed, which district shall have been previously ascertained by law."

The only regulation in the constitution, as it respects crimes committed out of the limits of a State, is to be found in the 3d art. sect. 2 of the constitution, as follows:—"The trial of crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the congress may by law have directed.

Accordingly, in the first Crimes Act, passed April 30, 1790, sect. 8 (1 Stat. 114), it was provided, that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought."

A crime, therefore, committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as congress shall designate by law. This furnishes an answer to the argument against the jurisdiction

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of the court, as it respects venue, trial in the county, and jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offence. These considerations have no application or bearing upon the question.

In this case, by the annexation of the Indian country to the State of Arkansas, in pursuance of the act of 1844 for the punishment of crimes committed in that country, the place of indictment and trial was in the circuit court of the United States for that State in which the indictment has been found and was pending in 1851, when the western district was set off; and as that change did not affect the jurisdiction of the court as it respected pending cases, but remained the same after the alteration of the district as before, it follows that the trial of the indictment in this court will be at the place and in the court as prescribed by law, which is all that is required in the case of an offence committed out of the limits of a State.

We shall direct, therefore, an answer in the negative to be certified to the court below to the first question sent up for our decision, as we are of opinion the court possesses jurisdiction to hear and give judgment on the indictment.

The second question sent up in the division of opinion is as follows: —

Can the district court of the United States for the western district of Arkansas take jurisdiction of the case aforesaid, so found in the year 1845, in said circuit court for the district of Arkansas?

As our conclusion upon the first question supersedes the necessity of passing upon the second, it will be unnecessary to examine it, and shall therefore confine our answer and certificate to the court below to the first.

Mr. Justice McLean dissenting. The facts and law of this case, as I understand them, have led me to a different conclusion from that of a majority of the court.

The 24th section of the act of the 30th June, 1834, after making various provisions defining the limits of the Indian country, and imposing penalties for several offences by white persons, provides, "that for the sole purpose of carrying this act into effect, the Indian country bounded east by Arkansas

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and Missouri, west by Mexico, north by the Osage country, and south by Red River, shall be, and hereby is, annexed to the Territory of Arkansas."

On the 8th of July, 1844, a murder was committed at the Creek agency, in the Creek country west of Arkansas, for which the grand-jury found a bill of indictment in the circuit court of Arkansas at April term, 1845.

By an act of March 3, 1851, it is provided, "that from and after the passage of this act, the counties of Benton, Washington, Crawford, Scott, Polk, Franklin, Johnson, Madison, and Carroll, and all that part of the Indian country lying within the present judicial district of Arkansas, shall constitute a new judicial district, to be styled the Western District of Arkansas; and the residue of said State shall be and remain a judicial district, to be styled the Eastern District of Arkansas."

After the division of the district, Dawson the defendant was arrested for the alleged murder; and the question whether the circuit court of the United States sitting within the eastern district has jurisdiction to try the case, has been referred to this court.

When the offence was committed and the indictment was found, the District of Arkansas included the State and the Indian country described; but when the defendant was arrested and the case was called for trial, the district had been divided; and the question is raised in the eastern district, the murder having been committed in the western.

In the act dividing the district, congress had power to provide that all offences committed in the district before the division should be tried in the eastern district. But no such provision being made, the question is, whether the jurisdiction may be exercised in that district without it.

Since the division of the district, capital punishments have been inflicted in the western district for offences committed before the division. This deprived the accused of no rights which they could claim under the Constitution of the United States or the laws of the Union. The sixth article of the amendment to the constitution declares, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and

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public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

As the State and district are connected by the copulative conjunction in this provision, the case before us is not technically within it. The crime is alleged to have been committed within the Indian country which the district includes; but it is not within the State. But the case appears to me to be within the policy of the provision. Nine counties of the State of Arkansas are within the district, and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. Had the place of the murder been within one of the above counties, the constitutional provisions must have governed the case. All the rights guaranteed by the constitution would have been secured to the criminal by a trial in the western district; but those rights are not realized by him on a trial in the eastern district. And that is made the place of trial because the alleged murder was not committed within the State.

In the 2d section of the 3d article of the constitution it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The latter clause of this provision covers the case now before us. The crime charged was not committed within any State; but it was committed within a district, within which such offences are to be tried as "directed by Congress." And there seems to me to be no authority to try such an offender in any other district or at any other place. The act of 1834 provides that an offender under the act, when arrested, shall be sent for trial to the district where jurisdiction may be exercised.

The punishments inflicted in the western district of Arkansas for crimes committed before the division of the district, were in accordance with the above provision of the constitution and the principles of the common law, both of which are opposed to a trial of the same offences in the eastern district.

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The tribunal is the same in both districts, except the circuit judge may not be bound to attend the western district; but the western district includes the place of the crime, which by the laws of England and of this country is the criterion of jurisdiction in criminal cases. This is never departed from where the limits of the jurisdiction are prescribed.

On what ground can jurisdiction be exercised in the eastern district? Not, I presume, on the ground that the crime was committed before the district was divided. If this be assumed and sustained, the capital punishments which have been inflicted in the western district for similar offences have been without authority. The offenders have been tried and they have had substantially the benefits secured by the constitution. They have had a jury from the district and as near the vicinage as practicable. These privileges they would not have realized had they been tried in the eastern district. If tried in the eastern district the jury must have been summoned from that district, and not from the district in which the offence was committed. The considerations in favor of the western district as the legal place of trial, greatly outweigh, it seems to me, any that can arise in favor of the eastern district.

There is, however, a fact which may be supposed of great weight in deciding the question; and that is, the indictment was found before the division of the district. I will examine this. It is admitted the jurisdiction was in the circuit court for the entire district when the indictment was found. This gave jurisdiction; but every step taken in the cause subsequent to the finding of the bill, is as much the exercise of jurisdiction as the finding of the bill. The establishment of the western district in effect repealed the jurisdiction of the eastern district as to causes of action arising in the western district as fully as if the law had declared "no jurisdiction shall hereafter be taken in any case, civil or criminal, which is of a local character and arises in the western district." Offences committed in that district are made local by the acts of Congress. This is not a case where, if jurisdiction once attaches, the court may finally determine the matter. There seems to me to be no reason for such a rule in a criminal case, especially when it is opposed to the

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policy of the constitution and to the principles of the common law.

A case lately decided in this court may have some bearing on this question. Under the fugitive slave law of 1793, certain penalties were inflicted for aiding a fugitive from labor to escape. A number of actions were brought in several of the States — in Ohio, Indiana, and Michigan — for the recovery of this penalty; but it was set up in defence that this penalty was repealed by repugnant provisions in the law of 1850 on the same subject, and this court so held. The actions which had been pending for years were stricken from the docket. But it may be said the repeal in the case stated operated on the right of action. This is admitted. And so it may be said the western district was repugnant to the eastern, so far as causes of local actions arise in the western district; and is not this repugnancy as fatal to the trial, as the repeal of the penalty in the act of 1793?

All this difficulty arises from an omission of Congress to make in the law dividing the district, the necessary provision; and it appears to me we have no power by construction or otherwise to supply the omission. This could not be done in an action of ejectment. A writ of possession in such a case could not be issued to the western district on a judgment entered in the eastern. And if such jurisdiction could not be sustained in a civil action, much less can it be sustained in a criminal case.

If a person guilty of a crime in the Indian country before the division, could not be indicted and tried in the eastern district, it follows that the fact of the crime having been committed in the Indian country can afford no ground of jurisdiction in the present case. It must rest alone then, it would seem, for jurisdiction on the ground that the indictment having been found in the eastern district, the same jurisdiction may try the defendants, and if found guilty sentence them to be executed. This view must overcome the locality of the crime, and the right which the defendants may claim to have, a jury as near the vicinage as practicable, at least a jury from the district where the crime was committed. These appear to me to be objections

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entitled to great consideration. A jurisdiction in so important a case should not be maintained under reasonable doubts of its legality.

The cases referred to in the argument to retain the jurisdiction, do not, as it appears to me, overcome the objections. Numerous instances are cited where the territory of a judicial district has been changed, provision being made in the act that the jurisdiction should be continued where suits had been commenced. This shows the necessity of such a provision, and is an argument against the exercise of the jurisdiction where no provision has been made. And in those cases like the present, where a district has been changed without any provision as to jurisdiction, there is no exercise of it shown in a criminal case, especially where the punishment is death.

Where jurisdiction attaches from citizenship of the parties, a change of residence does not affect the jurisdiction. The case of *Tyrell* v. *Roundtree*, 7 Peters, 464, seems to have no bearing upon this question. That action was commenced by an attachment, which was laid upon the land before the division of the county; and this court said the land remained in the custody of the officer subject to the judgment of the court. An interest was vested in him for the purposes of that judgment. The judgment was not a general lien on it, but was a specific appropriation of the property itself. And they say a division of the county could not divert this vested interest, or deprive the officer of power to finish a process which was rightly begun.

There may be cases where counties have been divided after jurisdiction was taken in a local action, and the suit has been carried into judgment; but such cases afford no authority in the present case.

The case relied upon as in point, in 4 Wash. C. C. R. 725, the court said: "At the first or second session of this court, which succeeded the passage of the act of 1824, which added this and other counties to the western judicial district, we were called upon to decide whether the present action, together with some others then on our docket for trial, together with the papers belonging to them, should be sent to the western district or retained here. After hearing counsel on the question

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the opinion of the court was that those cases were not embraced either by word or the obvious intention and policy of the act."

This does not appear to be a well considered case. The counties were annexed to another jurisdiction, and yet the court speak of "the obvious intention and policy of the act;" and on that ground entertain jurisdiction over cases pending in the former district. This was right in regard to transitory actions; but not where the actions were of a local character.

Ordered to be certified that the circuit court of the United States for the eastern district of Arkansas had jurisdiction to hear, try, and determine the indictment.

At the April term, 1855, the case was tried before the Hon. Daniel Ringo, district judge, holding the circuit court; absent the Hon. Peter V. Daniel, associate justice of the supreme court of the United States.

J. W. McConaughey, district attorney, and *M. Quail*, for the United States, and *Albert Pike* and *S. W. Williams*, for the prisoner.

The jury returned a verdict of guilty of manslaughter, and recommended Dawson to the mercy of the court. And the court subsequently pronounced sentence, which was, that the said Dawson should be imprisoned for the space of two years in the common jail of Pulaski county in the State of Arkansas.

The case as to John R. Baylor was continued.

Upon a petition very numerously signed, Dawson was pardoned by President Pierce in the summer of 1855.

ALEXANDER SNEED, plaintiff, *vs.* THOMAS B. HANLY, defendant.

1. An attorney at law is a trustee for his client as to moneys collected, and cannot avail himself of the statute of limitations, until demand, directions to remit, or some equivalent act.
2. Nor is he liable to an action, nor to interest, except from that time; for the cause of action does not before accrue.
3. Cases cited in notes showing that an attorney is not liable until demand, or instructions to remit, or unless he denies the plaintiff's right, and thus disavows the trust relation.

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April, 1853. — In the circuit court, before the Hon. Peter V. Daniel, associate judge of the supreme court, and the Hon. Daniel Ringo, district judge.

Assumpsit for money collected by the defendant as an attorney at law, and which he failed to pay over to the plaintiff on demand. The defendant plead the general issue and the statute of limitations.

The case was submitted to the court, and the proof was that the defendant collected the money in 1835 or 1836; and that a demand was made upon him, the 19th of September, 1848, to pay the money to the plaintiff, and he refused; and this suit was commenced on the 5th March, 1849. The question was on the statute of limitations of three years.

D. J. Baldwin, for the plaintiff, contended that the relation between attorney and client was that of trustee and *cestui que trust;* and which was fully developed in the present case, and consequently that the statute did not run; and he cited on that point, *Overstreet* v. *Bate*, 1 J. J. Marsh. 370; *Coster* v. *Murray*, 5 Johns. Ch. R. 522; 1 J. J. Marsh. 401; 2 Kinne, Law Compendium, 118, 119; *Taylor* v. *Bates*, 5 Cowen, 376.

A. Pike and *E. Cummins*, for the defendant, insisted that where a statute of limitations did not make an exception, the courts could create none; and they cited 1 Cow. 357; 5 Ib. 74; 18 Johns. 40; 12 Wend. 676; 3 Port. 393; 3 Johns. Ch. R. 142; and to show that an attorney can plead the statute, they cited *Denton* v. *Embury*, 5 English, 228; and as to demand, cited *Lillie* v. *Hoyt*, 5 Hill, 396, and the cases there referred to.

DANIEL, J. — An attorney stands in the light of a trustee in respect of moneys collected for the latter, and consequently cannot avail himself of the statute of limitations, which only begins to run from demand, directions to remit, or some equivalent act. This rule seems to be sustained by very respectable authority; and certainly is conformable to justice and fair dealing. *Taylor* v. *Bates*, 5 Cowen, 376; *Rathbun* v. *Ingals*, 7 Wend. 320; *Hutchings* v. *Gilman*, 9 N. Hamp. 369. That may perhaps be considered as ending the trust relation, and the holding of the attorney afterwards would be adverse to, and not for the client. *Walradt* v. *May-*

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nard, 3 Barb. 584. For the protection of the attorney, the law is settled that he is not subject to an action as to moneys collected nor to interest on such moneys, until the trust is ended by some of the means indicated. The cause of action accrues at that point of time, and as it would be unjust to subject an attorney to an action before he is thus put in default, so, on the other hand, it would be equally unjust to allow him to obtain an advantage over his client, while trust relations exist between them. The case of *Denton* v. *Embury*, 5 Eng. 228, we are not disposed to receive as authority. Although the money in the present case was in all probability collected as far back as 1836, yet no demand appears to have been made until the 19th of September, 1848; nor does any thing appear equivalent to a demand, or to excuse it, previous to that time. This suit was commenced on the 5th of March, 1849, within three years after demand, and hence the defence of the statute of limitations cannot prevail.

RINGO, J., concurred. *Judgment for plaintiff.*

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[1] See notes to case of *Sevier* v. *Holliday*, ante, p. 160. Where money was placed in the hands of an agent to purchase slaves, which was neglected to be done, it was held, in a suit brought for the money, that the statute of limitations did not begin to run until demand on the agent by the principal. *Buchanan* v. *Parker*, 5 Iredell, 597.

In *Ferris* v. *Paris*, 10 Johns. 285, a foreign factor was held not to be liable for the proceeds of sales till he should first be directed how to remit, and refuse to comply.

In *Ex parte Ferguson*, 6 Cowen, 596, a rule against an attorney who had collected money and failed to pay it over, was denied, on the ground that the money had not first been demanded from him.

In *Lillie* v. *Hoyt*, 5 Hill, 398, Cowen, J., in delivering the opinion of the court, said, "if the attorney is to be protected until demand, it follows that he ought not to be allowed the benefit of the statute running till a demand is made."

In *Mardis* v. *Shackleford*, 4 Ala. 493, it was held that an attorney was not liable to an action for money collected, until demand, or instructions to remit.

And the same doctrine will be found in *Staples* v. *Staples*, 4 Greenl. 553; *Satterlee* v. *Frazier*, 2 Sand. Sup. Ct. R. 141; *Walradt* v. *Maynard*, 3 Barb. 485; *Krause* v. *Dorrance*, 10 Barr, 462.

As to demand, it may be observed, that it may be sometimes dispensed with as being both unnecessary and useless. As where the attorney denies the right

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THOMAS T. TUNSTALL, plaintiff, *vs.* ELISHA WORTHINGTON, defendant.

1. A garnishment is a suit or proceeding, in which a party has day in court; and it must therefore appear on the face of the pleadings, or by the record, that the judgment creditor and the garnishee are citizens of different States, to give the court jurisdiction.
2. Where it appears, that the judgment creditor and garnishee are citizens of the same State, the court will of its own motion dismiss the case for want of jurisdiction at any stage of the proceedings.
3. Courts of the United States, though not inferior, are nevertheless of limited jurisdiction.

April, 1853. — In the Circuit Court, before Peter V. Daniel, associate justice of the supreme court, and Daniel Ringo, district judge.

Garnishment. The writ was issued on the 1st December, 1852, and recited the recovery of a judgment in this court by Thomas T. Tunstall against Abner Johnson, on the 15th April, 1851, for $9,584 and costs; and that the same was unsatisfied; and commanding the marshal to summon Elisha Worthington, the garnishee, to appear before the court on the first day of the next term, and answer what goods, chattels, moneys, credits, and effects he had in his hands or possession belonging to the

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of the other to call on him, or claims the right to hold money collected against the client. A demand in such a case would be an idle act, which the law never compels; because the legitimate object of a demand is to enable the party to discharge his liability agreeable to the nature of it. But where the right is denied, it would be an useless ceremony to go through the formality of a demand when no good could result from it. In such cases the acts of the party would be equivalent to an actual demand. *Walradt* v. *Maynard*, 3 Barb. 586; *Krause* v. *Dorrance*, 10 Barr, 462; *Beebe* v. *De Baun*, 3 Eng. 510.

In the case of *Lockhart* v. *Ross*, decided at the April term of the United States circuit court for the eastern district of Arkansas, 1855, Daniel, J., presiding, it was held, that an attorney was not liable for interest on moneys collected by him, except from the date of the demand, where an actual demand was made, or instructions to remit, and where neither existed, then from the institution of the suit, considering that as a demand, and the above case of *Sneed* v. *Hanly* was cited as authority on that point.

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defendant in the judgment. The writ was issued under, and comformed to a statute of Arkansas concerning garnishment. Digest, 559.

In the writ, Worthington was stated to be a citizen of Arkansas, residing in the eastern district; and in the allegations, Tunstall was stated to be a citizen of Arkansas, and Abner Johnson a citizen of Texas. The writ having been executed and returned, the plaintiff, on the 11th April, 1853, filed allegations, setting out said judgment with particularity, and averring that Worthington was indebted to Johnson, and propounding special interrogatories to the garnishee in relation thereto, and as to effects in his hands. On the 14th April, 1853, he filed his answer, denying any indebtedness to Johnson, or that he had any goods, chattels, credits, or effects in his hands belonging to Johnson. To this answer the plaintiff entered a denial on the record, and a jury was sworn to try the issue. Evidence was adduced on both sides; and after the testimony was closed, instructions were asked and discussed by counsel, and taken under advisement, until the next morning, when the court being of opinion, on inspection and consideration of the pleadings and record, that jurisdiction over the case could not be maintained, delivered the following opinion, dismissing the case, and to which the plaintiff excepted.

A. Fowler and *J. M. Curran*, for plaintiff.

Albert Pike, for defendant.

DANIEL, J., delivered the opinion of the Court. — The proceeding of garnishment, as regulated by the statute of Arkansas, is anomalous, being partly legal and partly equitable. But it must be regarded as a civil suit, and not as process of execution to enforce a judgment already rendered. It may be used as a means to obtain satisfaction of a demand, in the same manner as a suit may be resorted to on a judgment of another State, with a view to coerce the payment of such judgment. In this proceeding the parties have day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment. It is in every respect a suit in which the primary object is to obtain judgment against the garnishee, and certainly cannot

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with any plausibility be treated as process of execution, or as part of the execution process; for if so, there could be no necessity or propriety in resorting to this forum to investigate the relations of debtor and creditor.

Considering it, then, as a suit, we have, on full examination of the pleadings and record, come to the conclusion that the suit ought to be dismissed, because it is not shown by the pleadings or record that this is a controversy between citizens of different States, which we think essential to give this court jurisdiction. The courts of the United States, although not of inferior, are of limited jurisdiction; and it is too well settled to admit of question, that the citizenship of the parties must be stated, so that it may affirmatively appear that the suit is between citizens of different States. 2 Pet. 136; 9 Wheat. 537. And the omission is fatal at any stage of the cause. 1 Sumner, 578.

In the writ of garnishment it is stated that Elisha Worthington, the garnishee, is a citizen of Arkansas, and in the allegation that Thomas T. Tunstall, the plaintiff, is a citizen of Arkansas, and Abner Johnson, the judgment debtor, a citizen of Texas.

It thus appears affirmatively on the face of these proceedings, that the plaintiff and defendant are both citizens of the same State. The contest is between them; and the fact that Abner Johnson is a citizen of Texas, cannot help the matter. The plaintiff, or judgment creditor, and the garnishee, must be citizens of different States; and that fact must appear by the pleadings or the record to give this court jurisdiction.

Upon our own motion, we dismiss this case for want of jurisdiction. *Dismissed accordingly.*

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ELIZABETH J. BERNARD, MARY A. BERNARD, CORINE BERNARD, and THOMAS BERNARD, heirs of Thomas Bernard, deceased, by WILLIAM CANNON, their next friend, complainants on original bill, *vs.* MARY W. W. ASHLEY, executrix of Chester Ashley, deceased, WILLIAM E. ASHLEY, and HENRY C. ASHLEY, heirs of Chester Ashley, deceased, and SILAS CRAIG, defendants on original bill; and same defendants as complainants against the same complainants as defendants on cross-bill.

In circuit court.

1. It is competent for the government to sanction the widest departure from its regulations relative to the public lands, or waive any irregularity in the acts of its agents, and which will be binding as against itself, but cannot affect rights which have vested in others.
2. Preëmption claims rejected, patents ordered to be vacated, and title quieted.

April, 1853. — Bill in chancery in the circuit court, before Peter V. Daniel, associate justice of the supreme court. Daniel Ringo, district judge, having been of counsel, and being also interested in the suit, did not sit.

Albert Pike, for complainants.

J. M. Curran and *F. W. Trapnall*, for defendants.

DANIEL, J. — The original bill is brought to vacate patents to four quarter sections of land granted to defendant Craig, and in which Ashley and Craig were jointly interested, and one patent granted to William Nooner, who conveyed the land in that patent to Ashley.

The allegations on which the prayer of the original bill is founded, are, that Bernard and the several persons under whom he derives title had, under the act of congress of June 19th, 1834, a valid right of preëmption to the several parcels of land above mentioned, which right had been established to the satisfaction of the government, and patents issued in conformity therewith; that under an act of congress, approved on the 2d of March, 1831, vesting in the Territory of Arkansas ten sections of the public unappropriated lands, for the purposes in that act specified; the governor of the territory, John Pope,

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selected and conveyed to the defendants, Ashley and Craig, for a price stipulated between them, the lands comprised in the several sections set forth in and claimed by the bill, and that in accordance with such selection, transfer, and conveyance patents, anterior in date to those held by the complainants, had been granted to the defendants for the lands in question; that the acts of the territorial governor and of the defendants were irregular and in contravention of the general and established system and policy of the government relative to the disposition of the public lands; and although the irregularities in the proceedings of the territorial governor had, by subsequent act of congress, been cured, and those proceedings ratified, so far as the rights of the government were involved, yet the intervening and vested rights of preëmption in the complainant or his vendors could not be affected by such ratification, but remained in full force.

In the answers to the original bill, Craig disclaims all title to the south-east fractional quarter of section twenty-two in township eighteen, south of range one west; but both Craig and Ashley insist upon the validity of the acts of the territorial governor, as sanctioned and confirmed by the government of the United States; they expressly deny all foundation for any right of preëmption on the part of the complainants to any of the lands in question, aver that the representations by the complainants and their vendors, under which their claim had been urged, were false and fraudulent as respects both the government and the complainants, and insist upon their elder patent.

The cross-bill of Ashley reiterates the statement in his answer to the original bill, as to the foundation of his title to the several sections, with the exception of the south-east fractional quarter of section twenty-two. To this last quarter section, he sets out a title derived from William Nooner, who had obtained a patent for it in virtue of a donation warrant under authority of an act of congress. In his cross-bill, Ashley denies all right of preëmption in Bernard or his vendors, and prays that the junior patent to Bernard may be vacated as fraudulent and illegal.

In the joint cross-bill of Craig and Ashley, the right and title of these complainants, derived from their contracts with and

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conveyances from the territorial governor, and from the acts of congress in relation thereto, and under the elder patent granted them, are set forth and insisted on. The bill further denies all right of preëmption in the defendants, prays a vacation of the junior patent, and an account of the rents and profits of the land held and cultivated by Bernard, in opposition to the complainants, from the period of Bernard's adversary occupation.

It has been strenuously urged in argument, that the contract of the defendants in the original bill and complainants in the cross-bill with the territorial governor, and his selections and conveyances in execution of those contracts, were illegal, and therefore could form no just foundation for the patents issued in pursuance thereof. This proposition could derive force only from the supposition that the alleged right of preëmption intervening between the grant by congress to the territory and the act by the same body in ratification of the proceedings by the governor, constituted a vested interest which could not be affected by any subsequent acts of the body having the title to and possession of the subject it had undertaken to dispose of.

This position involves a delicate and difficult question as to the extent of the political power over subjects within its appropriate province, which the court would reluctantly determine. But there can be no serious doubt that if such vested interest had not certainly grown up, the government would have the right and the power, as against itself, to waive any irregularity, however palpable, which should appear in the acts of its own agents. There can be no question, certainly, that the government could sanction the widest departure from the regulations it had laid down in relation to the sale of the public lands. This same power would equally apply to any supposed or real omission in the transmission or deposit of any document in any of the land-offices, especially if shown to have been the consequence of accident, misapprehension, or of delay necessarily incident to pressure of business. But is any speculation of this character rendered necessary by the evidence in this case? Is there shown by that evidence either the origin or maturity of any legal or equitable right on the part of the complainants in the original bill, defendants in the cross-bills, which has been impaired by either the contracts or by the pro-

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ceedings in execution of those contracts with the governor? In other words, have they proved that they are or ever were entitled to a preëmption to the lands in question, within the just intent and meaning of the law? And here it should be noted as a circumstance by no means unimportant in this inquiry, that the holders of the elder patent were purchasers for value under a contract open and public, and recorded both in the State and national archives, and which therefore might be regarded as notice to all the world, — a title which public policy and private security would dictate should not be displaced but in obedience to the clearest and strongest demands of justice. There is nothing obscure or equivocal, as to the commencement of this title, in the modes by which it was matured, or the agents concerned in its concoction, and it has been sanctioned by the legislative body which possessed the undoubted authority to dispose of the rights and interests of the government.

In turning to the character of the evidence on which the claim of the complainants in the original bill is founded, it is seen to consist mainly in the statements of those who had a direct interest in setting up that claim. It is mostly *ex parte*, and obtained from persons manifestly ignorant and in a situation in society peculiarly liable to influence from others. But these are not the only circumstances calculated to impair the testimony adduced in support of the preëmption. That evidence, explicitly contradicted by the statements of witnesses whose intelligence and necessary knowledge of the subjects of controversy and familiarity with the matters as to which they have deposed should give, it is thought, to their statements a decided preponderance. A detailed analysis of the evidence on the one side or the other, or any minute comment upon its separate portions, is not deemed necessary in this place; nor would this be practicable within the time now at the command of the court. But the examination of that evidence has led the court to these conclusions: —

1. That the claim to the preëmption alleged in the original bill is altogether pretended and without just foundation.

2. That this claim, therefore, could interpose no valid objection to the contracts between the defendants in the original bill

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and the territorial governor; nor in any respect impair the authority of congress to cure any irregularities in these contracts or in their execution; even conceding that such irregularities had in fact existed.

3. That the junior patents granted to the complainant in the original bill or to his vendors, are illegal, fraudulent, and void as it respects the defendants in that bill and all persons claiming under them, and such patents should therefore be vacated.

4. That the right and title of the heirs of Chester Ashley as derived from William Nooner to the south-east fractional quarter section twenty-two, mentioned in the bill, should be confirmed and quieted as against the complainants in the original bill, and all persons claiming under them in virtue of a pre-emption.

5. That the right, title, and estate of the complainants in the second cross-bill, and the elder patent granted them in virtue of the contracts and proceedings therein set forth, should be and are hereby established, confirmed, and quieted as against the defendants in said bill, and as against all others claiming from or under them.

6. That an account of the rents and profits of the several portions of land embraced within the patents to the defendants in the original bill or to their vendors, so far as the same now are, or since the sale and selection and conveyance by the territorial governor have been held, occupied, and cultivated by the said Bernard, or for his benefit, or for the benefit of his heirs, should be taken before and stated by a commissioner of this court, excluding however such parts of the said land as have been sold and conveyed by the said Ashley and Craig from the dates of any conveyances or alienations made by them to others.

7. That the complainants in the original bill and the defendants in the said cross-bills pay the costs incident to each of those suits. *Decree accordingly.*

The complainants in the original bill appealed from the decree to the Supreme Court, where the case was argued at the December term, 1855, by *Albert Pike* for the appellants, and *A. H. Lawrence* for the appellees; and is reported in 18 How. S. C. R. The decree was affirmed.

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Mr. Justice CATRON delivered the opinion of the court.

The proceedings in the court below consisted of a bill filed by Bernard against Ashley and Craig, praying that certain patents for lands issued to the defendants might be decreed to be cancelled, upon the ground of a violation of preëmption rights on the part of the complainant, to the following tracts, namely, north-east quarter and south-west fractional quarter of section twenty-seven; south-east fractional quarter of section twenty-eight, township eighteen south, range one west; south-west fractional quarter of section fifteen, township nineteen south, range one west; south-east quarter of section twenty-two, township eighteen south, range one west; and a cross-bill on part of Ashley to be quieted in his title to the south-east quarter of section twenty-two, against the right set up by Bernard to that tract, under a junior patent therefor, upon the ground that Bernard had no right to this tract, and that the patent was issued to him improperly.

The title of Ashley and Craig (the appellees) to the first four tracts is derived from a sale to them of the land in controversy by the governor of Arkansas, in consequence of a selection made by him of the land under certain provisions of the acts of congress of 2d March, 1831, and 4th July, 1832, (4 Stat. 473, 563,) upon which selection and sale patents were issued by the United States. The title to the south-east quarter of section twenty-two, township eighteen south, range one west, is derived from the location of what is called a "Lovely donation claim" on this quarter section, by virtue of the provisions of the eighth section of the acts of 24th May, 1828, (4 Stat. 306,) and 6th January, 1829, (Ibid. 329).

According to the conceded facts, it is insisted, on part of Ashley and Craig, that the register and receiver having, on due proof and examination, rejected Bernard's claims to a preference of entry of the four quarter sections, he is thereby concluded from setting them up in a court of equity, because the register and receiver acted in a judicial capacity, and their judgment, being subject to no appeal, is conclusive of the claim. And the cases of *Jackson* v. *Wilcox*, and *Lytle* v. *The State of Arkansas*, are relied on to maintain this position.

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In cases arising under the preëmption laws of 29th May, 1830, and of 19th June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of preemption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the commissioner of the general land-office," and, if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits which were impeached, and the land claimed by another, founded on an opposing entry, the course pursued at the general land-office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the general land-office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And, on this return, the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, sect. 1, which provides: "That, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States." The necessity of "supervision and control," vested in the commissioner, acting

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under the direction of the president, is too manifest to require comment, further than to say, that the facts found in this record show that nothing is more easily done than, apparently, to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836, to this effect, were *doubtful*, the practice under it for nearly twenty years could not be disturbed without manifest impropriety.

The case relied on, of *Wilcox* v. *Jackson*, (13 Peters, 511,) was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the commissioner had no power of supervision, such as was given to him by the act of July 4, 1836, after the cause was in court.

In the next case, (9 How. 333,) all the controverted facts on which both sides relied had transpired, and were concluded, before the act of July 4, 1836, was passed; and therefore its construction, as regards the commissioner's powers, under the act of 1836, was not involved. Whereas, in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the commissioner.

In Lytle's case we declared that the occupant was wrongfully deprived of his lawful right of entry under the preëmption laws, and the title set up under the selection of the governor of Arkansas was decreed to Cloyes, the claimant, — this court holding his claim to the land to have been a legal right, by virtue of the occupancy and cultivation, subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase-money. There the facts were examined to ascertain which party had the better right, and, following out that precedent, we must do so here.

Governor Pope was authorized to select lands equal to ten sections in the Territory of Arkansas, in tracts not less than a quarter section each, and to sell the same for the purpose of

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raising a fund to erect public buildings in the territory. The three first-named quarter sections lie in township eighteen, the survey of which was made and returned to the local land-office, and approved June 4, 1834, when the lands therein were subject to entry by the governor.

He made his final amended selections of the three tracts in township eighteen, June 6, 1834. The bill claims title to these tracts under the occupant law of June 19, 1834. As Governor Pope's assignees, Craig and Ashley had a vested right when the act of June 19th was passed; it did not operate on these lands, which were appropriated to the use of the United States; and patents for them were properly awarded to the purchasers from the governor.

The condition of the south-west quarter of section fifteen, township nineteen, differs from the preceding lands in this: The township survey of number nineteen was found to be inaccurate when first returned to the land-office at Little Rock, and a resurvey was ordered as to some of the section lines, which were not finally adjusted till the 19th of July, 1834.

Governor Pope had selected the south-west quarter of section fifteen, on the 29th May preceding, relying on the inaccurate survey; and it is insisted for Bernard's heirs, that the selection was invalid, as it could not be made of unsurveyed lands; and that township number nineteen could not be legally recognized as surveyed, until the survey was settled and adopted by the surveyor general of the district.

Our opinion is, that the selection could only take effect from the 19th of July, 1834, when the township survey was sanctioned, and became a record in the district land-office. As the occupant law passed June 19th, 1834, Bernard's assignor, Richmond, could lawfully enter the quarter section, if he had occupied the same as required by law; that is to say, if he was in possession when the act was passed, and cultivated any part of the land in the year 1833.

The bill alleges that Richmond occupied the quarter section June 19, 1834; that he had cultivated the same in 1833, and made due proof of his right of preëmption.

It is further alleged, that on the 20th day of January, 1834,

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some five months before the occupant law was passed, Bernard purchased from Richmond the quarter section in dispute, and took his title bond for a conveyance when Richmond should obtain a patent for the land, and by force of this bond the bill prays to have the patent to Craig and Ashley adjudged to have been for Bernard's benefit, and that the land be decreed to Bernard's heirs.

The act of 1844 revived the act of 29th May, 1830, "to grant preëmption rights to settlers." That act provides, (section three,) "that all assignments and transfers of rights of preëmption given by this act, prior to the issuing of patents, shall be null and void."

The act of January 23, 1832, allowed a transfer of the certificate of purchase; here, however, the assignment was made in January, 1834, when no law allowing of a preference of entry existed; but, as no reliance seems to have been placed in the pleadings on this ground of defence, we will not rest our decree on it.

As respects Richmond's occupation according to the act of 1834, John Monholland, Edward Doughty, and Daniel Kuger, each swear, in similar language, "that Richmond, in the year 1833, cultivated part of the south-west fractional quarter, section fifteen, in township nineteen south, range one west of the principal meridian, and raised a corn crop on the same in that year, (1833,) and was in possession of the same on the 19th day of June, 1834." Kuger says, Richmond had his dwelling-house on the quarter section, and resided there on the 19th of June, 1834.

Jacob Silor, examined on part of the respondents Ashley and Craig, states, that he resided on Grand Lake, quite near the quarter section in dispute, since 1830. He says: "In February, 1833, when I arrived on the aforesaid lake, there was a turnip patch on the south-west fractional quarter of fractional section fifteen, in township nineteen south of range one west, claimed by one Edward Doughty; which, I believe, he abandoned in consequence of the location of the ten-section claim on the land. After Doughty left the aforesaid fractional quarter, William Richmond, in December, 1833, built a cabin where the

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turnip patch claimed by the said Edward Doughty was made, and planted some eschallots. The aforesaid William Richmond lived in the same township, on the Mississippi River, on the lands owned by Mr. Cummins or Mr. Shaw, on the 19th of June, 1834; and never did live on section fifteen, from the time I went on the lake to the present day."

Benjamin Taylor deposes, that he settled with his negroes on township eighteen, in February, 1834; that in the spring of that year he examined, with care, the several tracts of land of Ashley and Craig, with a view to purchase them; and being asked what the situation of the south-west quarter of section fifteen was, when he examined it, answers, that "there was a small burn of cane, perhaps twenty yards square, uninclosed, without the appearance of ever having been cultivated, and no house was thereon." We suppose that it had been burnt up by fire in the woods, or removed during the winter of 1833–34.

We hold the truth to be, that Richmond built a cabin in 1833, and in January, 1834, sold out his improvements to Bernard and removed away, and resided elsewhere in June, 1834; and, consequently, was not entitled to a preference of entry.

The next subject of controversy is the south-east quarter of section twenty-two, township eighteen. Ashley, by cross-bill, prayed to have his title quieted to this quarter section against Bernard's heirs, and the circuit court granted him the relief he asked.

The half of section twenty-two was entered by Ashley, on a floating warrant, known as a Lovely claim. By the act of January 6, 1829, no one was permitted to enter the improvement of an actual settler in the territory, by virtue of such floating warrant; and it is alleged that Bernard was such an actual settler, and had an improvement on the south-east quarter of section twenty-two, township eighteen, before Ashley entered it.

The cross-bill alleges that Bernard had improvements on section twenty-three, but that they did not extend to the south-east quarter of section twenty-two previous to the 4th of June, 1834, when Ashley entered the land. It was shortly before that time that Martin had corrected the eastern boundary of section twenty-two, locating it about one hundred yards further west, and

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which was adopted as the true line at the land-office. In support of the bill Benjamin Taylor deposes, as already stated, that he removed to the immediate neighborhood of the lands in dispute in February, 1834, when he examined the half section twenty-two, with a view to purchase it from Ashley. He states that Thomas Bernard cultivated the south-west quarter of fractional section twenty-three, in 1834; but that his cultivation and improvement did not extend to the south half of section twenty-two, nor had any other person residence or cultivation thereon.

Philip Booth states that Bernard showed him (Booth) an improvement on the south-east quarter of section twenty-two early in 1834; thinks it was an extension of his farm of two or three acres. It had been cleared the year before, but there was no cultivation. The witness does not recollect whether the clearing extended beyond the old line or the new one.

Silas Craig, who was a competent witness for Ashley in this separate proceeding, deposes that he was with Martin, the surveyor, when the lines were run and adjusted, late in February, 1834; that the new and proper line bounding the section east is about one hundred yards west of the first line, which was rejected by the surveyor general; that when he was at the south-east corner of the section, he examined Bernard's improvement, and ascertained that it did not extend west to the new line at any place. He seems to have made it his business to see if the improvement of Bernard extended to the south-east quarter in dispute.

Romulus Payne was called on to prove the value of mesne profits and improvements; he says that Bernard commenced the cultivation on the south-east quarter of section twenty-two, in 1837.

John Monholland, Edward Doughty, and several other witnesses, swear on behalf of the defendants to the cross-bill, in general terms, that Bernard had possession of the south-east quarter of section twenty-two, on the 19th of June, 1834, and that he had an improvement on part of it in 1833.

Bernard, in proving up his preëmption right, swore that he was cultivating the quarter section in 1833, and in possession

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on the 19th of June, 1834. And this affidavit is indorsed by two witnesses, Harrison and Butler, who merely say that they have heard Bernard's affidavit read, and that it is true.

So, likewise, Jacob Silor indorsed Wm. Richmond's affidavit, made before a justice of the peace, and intended to secure a preference of entry for Bernard in Richmond's name, and which was declared sufficient by the register and receiver; and yet when Silor was reëxamined as a witness in this cause, he conclusively proved that Richmond left the land, and resided elsewhere when the occupant law of June 19, 1834, was passed.

The *ex parte* affidavits of Butler and Harrison, and those of Monholland and Doughty, were obviously written out for them to swear to as matter of form, but made with so little knowledge on the part of the witnesses, of the section lines, and the number of quarter sections on which they deposed improvements existed in 1833 and 1834, as to be of little value. And the same may be safely said of other witnesses whose affidavits were taken without cross-examination.

It is most obvious that these loose affidavits obtained by the interested party have been made, as to the improvement being on the quarter section claimed, on the information of him who sought the preference of entry; the witnesses not knowing, of their own knowledge, where the true section line was, over which they swear Bernard's improvement extended in the year 1833.

When the last examination was had before the register and receiver in 1837, Bernard's own witnesses, Philip Booth and John F. Harrison, swore the facts to be, that Bernard had "deadened the timber and cleared away the cane," on a part of south-east quarter of section twenty-two; that he fenced it early in 1834, and made a crop of corn on it that year, and was in possession June 19th, 1834. Booth, in a subsequent affidavit, contradicts his first statement. That there was no cultivation on the quarter section in 1833 we think is satisfactorily established; nor had Bernard any right to enter it. And such was the final opinion of the register and receiver, which the commissioner of the general land-office reversed, and ordered a patent to issue to Bernard.

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The circuit court were obviously of opinion, as appears from the decree it made, that Craig and Taylor's evidence established the fact that Bernard had no part of the quarter section in possession in 1833 or 1834, and hence decreed for the complainants in the cross-bill. And, in the doubtful state of the evidence, we are not prepared to say that this court can hold otherwise, and therefore affirm the decree, and order the cause to be remanded for further proceedings, as respects the profits and improvements.

RICHARD H. SESSIONS, DANIEL H. SESSIONS, and SANDFORD C. FAULKNER, complainants, *vs.* JOHN M. PINTARD, defendant.

1. On failure to make an appeal good, the sureties in the appeal bond become liable to the extent of the penalty of the bond, and have no right to have a *pro ratâ* application of proceeds made, under the original decree, towards the extinguishment of their liability.
2. Nature and obligation of appeal bond.

April, 1854. — Bill in chancery, for an injunction determined before the Hon. Daniel Ringo, district judge, holding the Circuit Court. Absent the Hon. Peter V. Daniel, associate justice of the Supreme Court.

This case was argued by *Pike* and *Cummins* for the complainants, and *S. H. Hempstead* for the defendant, and submitted to the court, and on the 29th April, 1854, the following decree was rendered: —

This day came the complainants by Pike and Cummins, their solicitors, and the defendant by S. H. Hempstead, his solicitor, and by agreement the answer of said Pintard is to have the like effect as if sworn to, and the complainants enter their general replication to the said answer in short on the record by consent. And, by consent of parties, this cause was submitted to the court, and came on for final hearing on bill and exhibits, answer and exhibits, and replication to the answer. On consideration whereof it is the opinion of the court, that

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the appropriation of the proceeds of the sale of the land, under the original decree referred to in the bill, was rightfully and properly made, and that the judgment mentioned in this bill is not entitled to any greater credit than that given by the said Pintard, as shown by the entry made on the record; and that the complainants are not entitled to the relief prayed for in their bill, and that the injunction ought to be dissolved, and the bill dismissed, for want of equity, with costs.

It is, therefore, considered, adjudged, and decreed by the court here in chancery sitting, that the injunction heretofore granted in this case be and the same is hereby dismissed; and the defendant remitted to his judgment at law, and that the bill of complaint be and the same is hereby dismissed. And it is further ordered, adjudged, and decreed, that the complainants pay all the costs of this suit and execution issue therefor as at law.

And the said complainants in open court prayed an appeal from said decree to the supreme court, and which is granted by this court, upon the complainants at any time, within six months from this date; entering into an appeal bond in the penal sum of six thousand dollars, with good and sufficient security to the said John M. Pintard, conditioned that the appellants aforesaid, shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal and plea good, and to be approved according to law; and, upon the filing of which in this court, the clerk is hereby ordered to send a transcript of this case to the supreme court, according to law.

The record entry in the suit at law, referred to in said decree, is in the words following, namely: —

"This day [21 April, 1853,] appeared the plaintiff by S. H. Hempstead, his attorney, and admitted and acknowledged in open court on the record, that the sale of lands mentioned in the decree in the case of John M. Pintard, complainant, against Archibald W. Goodloe, defendant, in the circuit court of the United States for the District of Arkansas, in chancery, as such sale was made by Randolph Deaton, as commissioner, on the 15th day of November, 1852, as appears by his report, amounted to eight thousand and twenty-five dollars, and which has been appropriated and disposed of as follows, namely: to pay costs

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in the chancery case in the supreme and circuit courts, three hundred and twenty-nine dollars; commissioner's fee, one hundred dollars; and costs of advertising and executing the commission, seventy-one dollars; making an aggregate for entire costs and expenses, five hundred dollars; thus leaving seven thousand five hundred and twenty-five dollars, applicable, as of the 15th of November, 1852, towards the extinguishment of the principal and interest of said decree in chancery, which, on that day, amounted, principal and interest, to sixteen thousand eight hundred and seventy-seven dollars; and from which, deducting said sum of seven thousand five hundred and twenty-five dollars, paid to the said complainant Pintard, leaves eight thousand nine hundred and twelve dollars, due on said decree in chancery of that date, and interest estimated on this balance to the 17th day of April, 1853, the day of the rendition of the judgment in this case, makes nine thousand two hundred and eighty-three dollars, as the amount actually due on said decree on the 17th day of April, 1853; and by reason of which premises, a credit of two thousand seven hundred and seventeen dollars ought to be and hereby is admitted as of the 17th of April, 1853, as a credit and payment on the damages assessed by the jury in this case on that day, to be noted and entered of record, and to be indorsed on any execution that may be issued on the judgment in this case.

The appeal bond was given, approved, and filed on the 20th September, 1854, and the case removed into the Supreme Court of the United States, and was argued at the December term, 1855, by Mr. *Pike* for the appellants, and Mr. *Crittenden* for the appellee, and will be found reported in 18 Howard, S. C. Rep. The decree was affirmed.

Mr. Justice McLEAN delivered the opinion of the Court.

This is an appeal from the circuit court of the eastern district of Arkansas.

Pintard, on the 10th of April, 1847, obtained a decree against Archibald Goodloe for ten thousand five hundred and fifty-two dollars, with ten per cent. interest per annum on the amount decreed. There was also an order that a certain tract of land

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should be sold, and the proceeds applied to the payment of the decree.

An appeal was taken from this decree to this court, by which the decree was affirmed. On the 20th of February, 1852, Pintard commenced an action against Sessions and others on the appeal bond, and at April term, 1853, obtained a judgment on the bond for the penalty thereof, amounting to the sum of twelve thousand dollars.

At the same time Pintard procured an order for the sale of the land specified in the decree, which was sold on the 15th of November, 1852, for the sum of eight thousand and twenty-five dollars; which, after paying the expense of the sale, left a balance of seven thousand five hundred and twenty-five dollars as a credit on said decree, as of the 15th of November, 1852. The interest, with the sum decreed, up to that eriod amounted to sixteen thousand eight hundred and seventy-seven dollars. The proceeds of the sale of the land being deducted from this sum, leaves a balance on the decree of eight thousand nine hundred and twelve dollars, with interest from the 17th day of April, 1853. The interest on this sum, up to the time judgment was rendered on the appeal bond, makes the sum of nine thousand two hundred and eighty-three dollars, as the amount to be collected on the judgment.

An execution was issued on the judgment the 14th May, 1853, for twelve thousand dollars, with an indorsement of a credit of two thousand seven hundred and seventeen dollars. This execution was levied on a number of slaves, of the value of twelve thousand dollars, as the property of Sessions, the defendant. A delivery bond was taken for the slaves, with Daniel H. Sessions as security; but the slaves not being delivered on the day of the sale, an execution was issued against principal and surety on the delivery bond.

At this stage of the proceedings a bill was filed by the appellants, complaining that the distribution which had been made of the proceeds of the sale of the land was inequitable, and that such proceeds should be credited on the judgment entered upon the appeal bond, *pro ratâ*, and not exclusively on the decree; and the complainants pray that Pintard may be decreed

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to enter a credit upon the judgment as aforesaid, as of its date, for the sum of five thousand three hundred twenty-three dollars and thirty-five cents; and that a perpetual injunction might be granted to prevent him from collecting any more than the residue of the judgment, after deducting the above sum.

A temporary injunction was granted, Pintard filed his answer, and, upon the final hearing, the injunction was dissolved and the bill dismissed, at the costs of the complainants. From this decree an appeal was taken, and that brings the case before us.

The complainants in their bill allege no fraud nor mistake, as a ground of relief. They claim that the money received under the decree for the sale of the land shall be applied, *pro ratâ*, in the discharge of the judgment against them, and the balance of the decree which remains after deducting the judgment. This would give to them a credit on the judgment of five thousand seven hundred and twenty-four dollars; and that Pintard, in claiming the whole amount of the judgment, seeks to recover from them three thousand five hundred sixty-eight dollars and ninety-nine cents, more than in equity he is entitled to.

This claim of the appellants rests upon the ground that there was a lien on the land sold by the original decree, which operated as an inducement to them to become sureties on the appeal bond. The land, by the original decree, was directed to be sold; consequently the proceeds of the sale could be applied only in discharge of the decree. On what ground could the appellants claim a *pro ratâ* distribution of this fund? They were bound to the extent of the penalty of their bond, on which a judgment was entered. They had a direct interest in the application of the proceeds of the land to the payment of the original decree, including the interest and costs; and so much as such payment reduced the original decree below the amount of the judgment against them, they were entitled to a credit on the judgment. The judgment has been so made and the credit entered, and beyond this they have no claim either equitable or legal.

In the argument a subrogation of the land or its proceeds, for the benefit of complainants, is urged; but on what known principle of equity does not satisfactorily appear. Had the appel-

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lants paid the decree in full, they might have claimed a control over the land decreed to be sold, or its proceeds. They made no payment, but assert a general equity to have the fund applied, *pro ratâ*, on their judgment. This would leave a large amount of the original decree unsatisfied. On what ground could Pintard be subjected to such a loss? He looked to the land and the surety on the appeal bond, which more than covered his decree, including interest and cost.

The condition of the appeal bond was, "for the prosecution of said appeal to effect, and to answer all damages and costs, if" there should be a failure to make the plea good in the supreme court.[1] There was a failure to do this, and the penalty

[1] NATURE OF APPEAL BOND.—The Judiciary Act of 1789, (1 Stat. 85,) requires a party who appeals to the supreme court to give good and sufficient security to prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good.

This is the only condition prescribed, and must be followed, substantially, in equity and common law cases. 9 Wheaton, 553.

The meaning of the words "prosecute with effect," in an appeal bond, is that the appellant will prosecute the decree to a successful termination, that is to say, that he will reverse the decree. It may be considered an engagement on his part to achieve that result. *Karthaus* v. *Owings*, 6 Har. & J. 134; *Fowler* v. *Wilson*, 4 Ark. 210.

The meaning of these words, furthermore, is, that if the appellant shall fail in that respect, the sureties become liable for the payment of the whole amount decreed.

Thus in *Evans* v. *Hardwick*, 1 J. J. Marsh. 435, it was held that the legal effect of a bond conditioned simply "for the due prosecution of the appeal," will bind the parties for the payment of the debt as well as the damages and costs on the affirmance of the judgment or dismissal of the appeal.

And so in *Harrison* v. *The Bank of Kentucky*, 3 J. J. Marsh. 375, it was decided that where the law prescribed that an appeal bond should be conditioned for the due prosecutiou of the appeal, and an appeal bond was given conditioned for "the prosecution of the appeal with effect, or on failure to do so, that the obligors should pay the amount of the judgment and all damages and costs which might be adjudged against them in consequence of the appeal," that this condition was not more extensive than a fair exposition of the law would justify. *Feemster* v. *Anderson*, 6 B. Monroe, 540. And to the same effect is the case of *Moore* v. *Gorin*, 2 Littell, 186; and *Talbot* v. *Morton*, 5 Ib. 327.

These cases decide that a bond for the due prosecution of an appeal, is equivalent to an obligation to pay the judgment, if the same shall be affirmed on

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of the bond was incurred. Whatever hardship may be in this case is common to all sureties who incur responsibility and have

appeal. And this is the justice and good-sense of the matter. And the dismissal of an appeal has the effect of an affirmance within the meaning of an appeal bond. 1 J. J. Marshall, 436; 3 Ib. 375; 2 Dana, 65.

The intention of the law in all these cases is to secure the payment of the debt in the event of failure to succeed. *Evans* v. *Hardwick*, 1 J. J. Marsh. 435; *Butterworth* v. *Brown*, 7 Yerger, 467; 12 B. Monroe, 523. In the supreme court of Arkansas, in the case of *Fowler* v. *Thorn*, 4 Ark. 208, it was held that a bond conditioned that the plaintiff in error would prosecute the writ with effect, denoted and expressed that he would succeed in the action, and that if he did not the obligors in the bond would pay the money for his failure. And it was also said that where the condition of the bond is "that the plaintiff in error will prosecute the writ with effect, and pay the money adjudged against him by the supreme court, or otherwise abide its judgment," the mere affirmance of the judgment in the supreme court binds the parties to the bond to pay the debt, damages, and costs in both courts.

And it was further said, that it was the same thing whether the supreme court adjudges the money against the party directly, or orders the circuit court to adjudge it.

Now a literal construction of the bond, in the case just cited, would have precluded the recovery of any thing except the costs adjudged by the supreme court on the affirmance of the judgment; for that was all directly adjudged by the supreme court. But regarding substance, not form, that construction so well expressed in the ancient maxim, *qui hæret in literâ, hæret in cortice* was, as it should be in such cases, repudiated. 3 Monroe, 391.

The nature of the breach on an appeal bond sheds some light on the extent of the liability, and may be usefully referred to determine it.

Now, in assigning a breach of an appeal bond, it is sufficient to allege that the defendant did not prosecute his suit with effect, that the judgment was affirmed, and that the debt and costs had not been paid. *Wood* v. *Thomas*, 5 Blackford, 553; *Fowler* v. *Thorn*, 4 Ark. 208; *Fournier* v. *Faggott*, 3 Scam. 349; *Gregory* v. *Stark*, 3 Scam. 612.

That is a good breach, thus showing that the non-payment of the debt is the very gist of the action.

And for that reason an appeal bond should be for double the amount of the debt, damages, and costs, as held in *Norwood* v. *Martin*, 3 Har. & J. 199. It must be sufficient to cover the judgment below. *Shannon* v. *Spencer*, 1 Blackf. 120.

The intention of the Judicial Act of 1789 was to provide for and secure the payment of the judgment or decree in the event of a failure to prosecute, or after prosecution on failure to reverse the judgment or decree. This is clear. 1 J. J. Marsh. 193; 1 Stat. 87.

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money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree, the appellants

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If the law had simply provided that the condition of the bond should be for the prosecution of the writ or appeal with effect, we have seen that language of itself, according to its legal import, would oblige the parties to the bond to satisfy the judgment or decree. With these words, and no more, the sureties would be liable to the extent of the penalty of the bond at least; and the obligee it is said can recover interest on the penalty from the institution of the suit on the bond. *Ives* v. *Merchants Bank*, 12 Howard, 159.

In the last case the supreme court held that the security in an appeal bond could be sued and judgment had against him without proceedings against the principal. And also that the security was positively bound to the amount of the bond.

But under the act of 1789, not only does the appeal bond provide for a prosecution of the case to effect, the meaning of which has been explained; but out of abundance of caution contains the further engagement "to answer all damages and costs if he fail to make his plea good."

The word "answer," in this connection, means to pay or satisfy; and that is one of the meanings of the word, and probably the most common, when the word is used in laws or judicial proceedings. *Lincoln* v. *Beebe*, 6 Eng. 697; 1 Bouvier's L. Dic.

And so, too, the technical term "plea," is used to denote the removal of the cause into a superior court, and in which the appellant assumes the attitude of plaintiff. "Plea," in its ancient sense, meant suit or action, and is sometimes used in that sense. Stephen 38, 39, n. (9), 2 Bouv. L. D. 325.

The condition of a bond under that act is broad enough to, and was in fact intended to secure and cover what had been adjudged, and what might be adjudged in the shape of damages and costs in the appellate tribunal. It was to provide for both — it was to furnish ample security for the whole debt.

The word "damages," does not mean the nature of the action or kind of suit; but denotes the amount adjudged, whether called debt, damages, interest, or by any other name.

The act is not, nor is the condition of the bond limited to such damages and costs as the supreme court on the appeal or writ of error shall adjudge, if any, for the delay.

If this was the correct interpretation, then in cases where the supreme court dismisses, or dockets and dismisses, or does not award damages, or the party fails to prosecute the case, the opposite party is without indemnity, for the bond is worse than nothing, and affords no security for the debt at all.

Now it cannot be denied that in these cases there is a remedy on the bond, and that must necessarily be for the amount of the judgment or decree complained of. *Duncan* v. *M'Gee*, 7 Yerger, 103.

The idea here advanced has been sanctioned by the supreme court in the case

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have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may

of *Catlett* v. *Brodie*, 9 Wheaton, 553. In that case the court repudiated the argument that the act only provided for damages and costs adjudged in the supreme court, and held that the word damages was there used not as descriptive of the nature of the claim upon which the original judgment was founded, but as descriptive of the indemnity which the defendant was entitled to if the judgment was affirmed. "Whatever losses," said the court, "he may sustain by the judgment not being paid and satisfied after the affirmance, these are the damages which he has sustained, and for which a bond ought to afford good and sufficient security."

This case is conclusive of the present question, because the court required the plaintiffs in error to give bond, with good and sufficient security, in due form of law, in an amount sufficient to secure the whole judgment, conditioned to prosecute his writ with effect and to answer all damages and costs if he fail to make his plea good, and the case to stand dismissed on failure to give such bond. 1 J. J. Marsh. 193.

The previous bond had been given in a small sum only sufficient to respond to such damages and costs as might accrue in and be adjudged by the supreme court, but not sufficient to secure the debt.

In fact it is difficult to conceive how a different opinion could be entertained; because as the judges of the United States have no authority to take any other bond than the one prescribed by this act; and in practice, take no other, as is manifest from the case in 9 Wheat. 553, it follows, that if the debt is not embraced and secured by the bond in this case, it cannot be in any, and so congress has legislated in vain, and a person may be harassed by a long litigation, without any thing in the shape of indemnity or security from his adversary. This is against the whole policy of the law, for that is to end litigation speedily, and discourage frivolous or unfounded appeals from one court to another; and especially that the party who takes an appeal shall not be suffered to tie up the hands of his adversary and suspend all action on his judgment without securing the payment of it on failure to succeed.

This is just and reasonable, and accords with the manifest intention of the law; because an appeal entirely vacates the decree appealed from. *Paine* v. *Cowdin*, 17 Pick. 142; *Davis* v. *Cowdin*, 20 Ib. 510.

A *supersedeas* operates to set aside and annul the act. 9 Bac. Abr. 274.

After an appeal, all authority on the part of the inferior court over the cause, entirely ceases; and every act and proceeding of such court is void. The judgment or sentence becomes wholly inoperative. *Tealon* v. *United States*, 5 Cranch, 281; *The Venus*, 1 Wheat. 113; even though the appeal be not prosecuted. *Campbell* v. *Howard*, 5 Mass. 376; 3 Dallas, 87, 119; 13 Mass. 266; Coxe, 159; Gilpin, 34.

Now, after appeal, the judgment or decree is considered as lost to the party,

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be distributed *pro ratâ* between them. Pintard has a claim on both funds; first, on the proceeds of the land, and, second, on

and the appeal bond is substituted for it. The decree becomes entirely unavailable to the party in whose favor it was rendered, and if a person can be said to have lost what cannot be obtained, then it is clear that the appellee, by virtue of the appeal and *supersedeas*, has lost the money decreed to him. Whether he may get it at some future time, or on some future contingency, is quite a different question. The lapidist who loses a valuable diamond, has hopes of its recovery; and although it may be regained at some future time, yet it is lost for the present.

The amount of the judgment or decree is at least *primâ facie* evidence of the measure of damages, conceding that it is competent for the defendants to show that no damages have been sustained, or only partial damages, which seems to be intimated in the case in 9 Wheat. 554; still this must come from the defence in mitigation, because when the plaintiff has shown an appeal and *supersedeas* of the decree, the affirmation of the decree, and the non-payment of the decree, he has made out to say the least, of it, a *primâ facie* case, which entitles him to recover the amount of the decree, and costs and damages, if within the penalty of the bond, and if beyond it, then the amount of the penalty, with interest on it from judicial demand, according to the case in 12 How. 159. He is not obliged to prove that he could have made the amount of the decree out of the principal, or give any evidence of the solvency of the principal in the bond. He has established a right in himself and a presumed loss, and that is enough in the first instance. 17 Wend. 545; 9 Johns. 300.

The right and remedy are perfect, because the moment judgment is rendered in an appeal cause, if the money is not paid immediately, the condition of the bond is forfeited, and an action can be brought upon it at any time before that judgment is actually satisfied. *Gregory* v. *Stark*, 3 Scam. 612.

And execution against the principal is not necessary. 12 How. U. S. 158.

The same rule applies in actions against sheriffs for escapes, or taking insufficient bail. The plaintiff is entitled to recover his whole debt, which is presumed to be lost by the negligence. That is the measure of damages; and circumstances of mitigation must come from the defendant. 3 Conn. 423; 17 Wend. 547; 2 Cowen, Rep. 504; 6 Pick. 468; 9 Conn. 380; 9 Johns. 300; 11 Mass. 89; 13 Ib. 187; 17 Wend. 543.

And such is the rule for a failure to execute or return final process. 6 Hill, 550; 1 Ib. 275; 10 Mass. 474; 11 Ib. 89; 9 Johns. 300; 3 Denio, 327. See 8 Ala. 285; 1 La. Ann. Rep. 122; 17 Ohio, 244.

A creditor having several remedies, may pursue any one or all of them until he obtains satisfaction, but can, of course, only have one satisfaction. *Tayloe* v. *Thomson*, 5 Peters, 369.

The plaintiff may proceed with a *fi. fa.* on his judgment, and at the same

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the judgment entered on the appeal bond for the satisfaction of the original decree.

The decree of the circuit court is affirmed, with costs.

CHARLES A. MARSTIN, plaintiff, *vs.* BRACY MCREA, as administrator of John D. Bracy, deceased, defendant.

A deposition taken under the 30th section of the Judiciary Act of 1789, must be reduced to writing by the magistrate or witness, and no other person is competent to perform that duty.

April, 1854. — In the Circuit Court, before the Hon. Daniel Ringo, district judge, holding the court.

J. M. Curran, for plaintiff.

A. Fowler, for defendant.

The court suppressed depositions taken on the part of the plaintiff under the 30th section of the Judiciary Act of 1789, (1 Stat. 88,) because the judge taking the same certified that the testimony of the witnesses taken by him, "was reduced to writing under my direction." It was held, that the act of congress must be strictly complied with, and, as according to the express requisitions of that act, the deposition of a witness shall be reduced to writing "only by the magistrate taking the deposition or by the deponent in his presence;" no other person was legally competent to perform that duty, and that the magistrate could not depute any one to perform it; that the act

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time sue the appeal bond to enforce payment of the same judgment. *Sasscer* v. *Walker*, 5 Gill and J. 102.

Hence Pintard might proceed on the appeal bond, and also proceed on the decree against the estate of Goodloe; and could bring separate suits on the appeal bond, but can have but one satisfaction. Digest, 621, 806; 4 Ark. 510; 1 Eng. 92.

The rule of 30th of March, 1839, adopted the forms and modes of proceeding and the practice in the State courts, to be used in this court; excepting by a subsequent rule of June 25, 1841, the sections relating to discovery in suits at law.

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itself excluded the idea that any others than those named could perform it, and so it was a fatal defect.

Deposition suppressed.

THOMAS G. RAINER, use of Joseph H. Bogle, plaintiff, *vs.* JOHN D. HAYNES, defendant.

1. In taking depositions under the act of 1789, (1 Stat. 88,) it must appear that the witness was sworn to testify the whole truth; also, that the deposition was written by the magistrate, or by the deponent in his presence; otherwise, it is not admissible.
2. The magistrate cannot depute a person to write the deposition.
3. Form of certificate, and judicial decisions as to depositions in note.

S. H. Hempstead, for plaintiff.

E. Cummins and *J. M. Curran*, for defendant.

April 20, 1854. — Depositions taken on behalf of the defendant under the 30th section of the Judiciary Act of 1789, were objected to by the plaintiff on the following grounds: —

1. That the magistrate certified that the witnesses were by him first "carefully examined and cautioned and duly sworn to testify the truth in regard to the matters in controversy," whereas by the act of congress the oath or affirmation should have been to testify "the whole truth." 1 Stat. 89; *Garrett* v. *Woodward*, 2 Cranch, C. C. 190; *Burroughs* v. *Booth*, 1 Chip. 106; *Pentleton* v. *Forbes*, 1 Cranch, C. C. 507.

2. That the magistrate certified that the several depositions of the witnesses were reduced to writing by one of the witnesses, and not by himself.

3. That the magistrate failed to state that the depositions were reduced to writing in his presence.

On the first objection it was argued, that the object in view by the act was to obtain the whole truth from a witness with regard to the matter in dispute, that to swear a witness to state the truth, was manifestly not equivalent to an oath to state the whole truth, and that a witness might truly state the facts as far as he went, keeping back material facts, and could well say

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on an indictment for perjury, that he had testified the truth; and that the oath he had taken did not oblige him to state the whole truth, and so he must be sworn to testify the whole truth, and that must appear in some form. It was admitted that where the form of the oath was not given; but it was certified, that the witness "was duly sworn, according to law," or "sworn in pursuance of the act of congress," that would be sufficient; because then it must be intended that the oath, as prescribed by the act, was properly administered. 3 McLean, 384; *Doe* v. *King*, 3 How. Missis. 125. But where the magistrate, as in this case, sets out the oath administered, and it thereby appears that the act has not been observed, no intendment can be made, and the objection is fatal.

As to the second objection, that that was fatal, as had been just decided in the case of *Marston* v. *McRea*, ante, p. 668; *Wilson* v. *Smith*, 5 Yerg. 379.

That the third objection was fatal, as appeared from the act of congress and adjudged cases. 1 Peters, 355; 4 McLean, 204; *Edmondson* v. *Barrell*, 2 Cranch, C. C. Rep. 228; *Pettibone* v. *Derringer*, 4 Wash. C. C. Rep. 219.

RINGO, J., assenting to these views, held, that for either of the objections, the depositions were inadmissible, and ordered the same to be suppressed, and on the affidavit of the defendant, and it appearing that the depositions were material, continued the cause.[1]

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[1] As depositions under the act of 1789, are required to be taken with great care, and to comply with the requisitions of the act, it may be useful to copy the certifying portion of a deposition taken and used in a case in the circuit court of the United States for the eastern district of Arkansas, at April term, 1854, and which is unusually formal and correct, and will stand all tests. The form can be easily varied to suit any case where a deposition is desired on account of the residence of the witness more than one hundred miles from the place of trial.

It is as follows: —

"United States of America, State of Pennsylvania, County of Philadelphia, City of Philadelphia, ss.

"I certify that on the sixth day of March, A. D. 1854, before me, Charles Gilpin, mayor of the city of Philadelphia aforesaid, at the mayor's office in said city, county, and State, between the usual hours of business, was produced to

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and personally came before me, Alexander J. Fromberger, a witness in behalf of the plaintiffs, to depose in a civil cause depending in the circuit court of the United States for the eastern district of Arkansas, held at Little Rock in said district, on the common law side of said court, wherein John Eckel, William Raignel, Augustus H. Raignel, Samuel Moore, John G. Ulph, and William G. Skillman, late partners, and trading and doing business under the partnership name and style of 'Eckel, Raignel & Co.' are plaintiffs, and Samuel Adler is defendant, in an action of assumpsit, and whose testimony is alleged to be material in said civil cause, in behalf of the plaintiffs.

"And the said Alexander J. Fromberger, being of lawful age and sound mind, and being by me first carefully examined, cautioned, and duly sworn to testify the whole truth touching the matters in controversy in said civil cause, deposes and says, [then followed the deposition, which was reduced to writing by the mayor and signed by the witness, and the certificate proceeded as follows]:—

"I further certify that the foregoing deposition of Alexander J. Fromberger was then and there reduced to writing by me in the presence of the deponent and by him subscribed in my presence after having been so reduced to writing.

"I further certify that the reason for taking said deposition was and is, and the fact was and is that the deponent lives at the city of Philadelphia, more than one hundred miles from Little Rock, in the said eastern district of Arkansas, where the said civil cause is appointed by law to be tried; and that no notice was made out or given by me to the said Samuel Adler, the defendant and adverse party, or his attorney, to be present at the taking of the said deposition, and to put interrogatories if thought fit, because neither said defendant nor attorney, were, to my knowledge, within one hundred miles of the place named in the caption, where said deposition was taken, so as to enable notice to be given.

"I further certify that I am not of counsel, nor attorney to either of the parties to this suit, nor interested in the event of this cause.

"I further certify that it being impracticable for me to deliver said deposition with my own hand into the court for which it was taken, I have retained the same for the purpose of being sealed up by me, and speedily and safely transmitted by the United States mail to the said court, for which it was taken, and to remain under my seal until there opened.

"I further certify that the fee for taking said deposition, amounting to six dollars and fifty cents, has been paid to me by the plaintiffs, and that the same is just and reasonable for the services performed.

"Given under my hand at the city of Philadelphia, State of Pennsylvania, this sixth day of March, A. D. 1854. CHARLES GILPIN, *Mayor.*"

On the back of the package was indorsed:—

"Sealed up and deposited this package in the post-office this sixth day of March, A. D. 1854, post-paid, for the purpose of being forwarded to its destination by mail. CHARLES GILPIN, *Mayor.*"

On the face of the package was indorsed:—

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WILLIAM OVERMAN, plaintiff, *vs.* ROBERT A. PARKER and MILES WHITE, defendants.

1. The courts of the United States may entertain a bill or petition to remove clouds on the title.
2. A tax deed is only *primâ facie* evidence of the legality of the sale, and will be annulled in this proceeding if illegality appears.
3. In a sale of land for taxes, the purchaser must show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute.
4. Under the statute of Arkansas, if it appears that the sheriff has not filed an oath as assessor on or before the 10th of January, and has not filed the original assessment on or before the 25th of March, and given notice thereof, as prescribed by law, no legal sale can be made for taxes, and the sale is void.
5. The case of *Pillow* v. *Roberts*, 13 Howard, 472, distinguished from this.

May, 1854. — Petition to confirm tax sale, determined in the Circuit Court, before Hon. Daniel Ringo, district judge, holding said court; absent, the Hon. Peter V. Daniel, associate justice of the supreme court.

William Overman, at the September term, 1847, of the Dallas circuit court, State of Arkansas, filed his petition under the statute for the confirmation of a tax title, setting out the assessment of the tract of land for the taxes of 1845 as the property of R. A. Parker, which, with penalty and costs, amounted to six dollars and seventy-eight cents; that the taxes were unpaid, and that the land was sold in due form of law, setting forth how, by whom, and when; that the same not being redeemed within the time prescribed by law, a tax deed was obtained regularly, and notice given that a confirmation would be applied for, and the notice and deed were exhibited with the petition.

Robert A. Parker and Miles White, alleging themselves to

"To the clerk of the circuit court of the United States, eastern district of Arkansas, Little Rock, Arkansas."

And further, as follows: —

"Deposition on the part of the plaintiffs, in the case of Eckel, Raignel & Co. *v.* Samuel Adler."

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be citizens of the States of Tennessee and Maryland, made themselves defendants to resist the confirmation; and on their petition for that purpose, the case was removed into the circuit court of the United States for the eastern district of Arkansas, under the act of congress in that behalf.

Parker and White answered the petition, setting up several irregularities in the sale, and among others, that there was no lawful assessment of the land, and specifying the illegality complained of. Proof was taken in the cause, and came on for final hearing on the 2d of May, 1854, and was argued by *James M. Curran* and *George A. Gallagher*, for the petitioner, and *Pleasant Jordan*, for the defendants.

The court decreed, that the title of, in, and to the tract of land, namely, section thirty, township nine south of range fifteen west of fifth principal meridian, containing 696 acres, do pass and be confirmed to, and vest in William Overman and his heirs and assigns for ever, in fee-simple, free, clear, and discharged from the claim of said defendants and all persons whomsoever, and that the sale thereof for taxes be in all things confirmed, and the defendants be perpetually enjoined from setting up or asserting any claim thereto, and that the title of said Overman be granted and assured, and that he recover costs from the defendants.

From this decree the defendants appealed to the supreme court of the United States, it appearing that the land in controversy was worth more than two thousand dollars, and security for the appeal was given according to law.

At the December term, 1855, the Supreme Court reversed the decree, and declared the tax sale contrary to law and void. The case is reported in 18 Howard, S. C. R. The opinion is as follows, namely:—

Mr. Justice GRIER delivered the opinion of the court. — As some doubts were entertained and have been expressed by some members of the court, as to its jurisdiction in this case, it will be necessary to notice that subject before proceeding to examine the merits of the controversy. It had its origin in the State court of Dallas county, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or

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other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and "calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed."

In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made "contrary to law," it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates "as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings."

It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new States, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes, there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in *Clark* v. *Smith*, 13 Peters, 203, with regard to a similar law of Kentucky: "A State has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The State legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at

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the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the State court."

In the case before us, the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State. He is therefore entitled to have his suit tried in this court, under the same condition as in other suits or controversies.

In the petition to remove this case from the State court, there was not a proper averment as to the citizenship of the plaintiff in error; it alleged that Parker "resided" in Tennessee, and White in Maryland. "Citizenship" and "residence" are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case.

What we have already stated sufficiently shows the nature of the present controversy. The decree appealed from "adjudges the absolute title to the land to pass and be confirmed to and vest in said William Overman, his heirs, &c., free, clear, and discharged from the claim of said defendants, and all persons whatsoever; and that the said sale thereof for taxes so made by the sheriff of Dallas county to said Overman is hereby confirmed in all things, and said defendants perpetually enjoined from setting up or asserting any claim thereto," &c.

The plaintiffs in error allege that this decree is erroneous, and should have been for defendants below.

Much of the argument of the learned counsel in this case was wasted on the effect to be attributed to the recitals in the deed, and the decision of this court in the case of *Pillow* v. *Roberts*, 13 How. 472.

That was an action of ejectment, in which this court decided that under the 96th section of the revenue law, the sheriff's or collector's deed was made *primâ facie* evidence of the regularity of the previous proceedings. The effect of that section

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of the act, and of the decision in that case, was to cast the burden of proof of irregularity in the proceedings on the party contesting the validity of the deed; but as the present controversy is for the purpose of giving an opportunity "to all persons who can set up any right or title to the land so purchased, in consequence of any informality or illegality connected with such sale," to contest its validity, it would be absurd to make the deed, whose validity is in question, conclusive evidence of that fact. Consequently, the statute enacts, that in this proceeding, "the deed shall be taken and considered by the court as sufficient evidence of the authority under which said sale was made, the description of the land, and the price at which it was purchased. The deed is to be received as *primâ facie* evidence of these three facts, and casts the burden of proof as to them on the defendant. The term "sufficient" is evidently used in the statute as a synonym for *primâ facie* and not for "conclusive."

In judicial sales under the process of a court of general jurisdiction, where the owner of the property is a party to the proceedings, and has an opportunity of contesting their regularity at every step, such objections cannot be heard to invalidate or annul the deed in a collateral suit. But one who claims title to the property of another under summary proceedings where a special power has been executed, as in case of lands sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute.

The principal objection to the regularity of the sale in this case, and the only one necessary to be noticed, is, that the land was not legally assessed. A legal assessment is the foundation of the authority to sell; and if this objection be sustained, it is fatal to the deed.

In order to qualify the sheriff to fulfil the duties of assessor, the statute requires, that "on or before the 10th day of January, in each year, the sheriff of each county shall make and file in the office of the clerk of the county an affidavit in the following form," &c.: "And if any sheriff shall neglect to file such affidavit within the time prescribed in the preceding section, his

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office shall be deemed vacant, and it shall be the duty of the clerk of the county court, without delay, to notify the governor of such vacancy," &c.

The statute requires, also, "that on or before the 25th day of March, in each year, the assessor shall file in the office of the clerk of the county the original assessment, and immediately thereafter give notice that he has filed it," &c. This notice is required, that the owner may appeal to the county court "at the next term after the 25th day of March, and have his assessment corrected if it be incorrect." If the assessor shall fail to file his assessment within the time specified by this act, he is deemed guilty of a misdemeanor, and subjected to a fine of five hundred dollars.

These severe inflictions upon the officer for his neglect to comply with the exigencies of the act, indicate clearly the importance attached to his compliance in the view of the legislature, and that a neglect of them would vitiate any subsequent proceedings, and put it out of the power of the sheriff to enforce the collection of taxes by a sale of the property.

The record shows that Peyton S. Bethel, the then sheriff of the county of Dallas, did not file his oath as assessor on or before the 10th of January, as required by law. He did file an oath on the 15th of March; but this was not a compliance with the law, and conferred no power on him to act as assessor. On the contrary, by his neglect to comply with the law, his office of sheriff became *ipso facto* vacated, and any assessment made by him in that year was void, and could not be the foundation for a legal sale. The neglect also to file his assessment and give immediate notice on the 25th of March, so that the purchaser might have his appeal at the next county court, was an irregularity which would have avoided the sale even if the assessment had been legally made.

The statute makes the time within which these acts were to be performed material; and a strict and exact compliance with its requirements is a condition precedent to the vesting of any authority in the officer to sell.

We are of opinion, therefore, that the sale of the land of the

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appellants was "contrary to law;" and that the deed from Edward M. Harris, sheriff and collector of Dallas county, to William Overman, set forth and described in the pleadings and exhibits of this case, is void, and should be annulled.

WILLIAM WYNN, complainant, *vs.* JAMES H. WILSON and representatives of Samuel S. Wilson, deceased, defendants.

1. Notice should be given to the adverse party or his attorney, of the time and place for moving for an injunction.
2. If a defendant omits to make his defence at law, equity will not afford him relief on the same grounds.
3. Mere negligence in an attorney, unaccompanied by fraudulent combination or connivance, is not sufficient to arrest a judgment at law.

March 26, 1855. — Application for injunction on bill in chancery, to the Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States, at chambers, in Washington City.

The bill alleged, that on the 22d April, 1854, Samuel S. Wilson, son of James H. Wilson, recovered judgment for two thousand nine hundred eighty dollars and forty-six cents; that on 10th of June, 1854, execution issued on the judgment, that the marshal levied on certain slaves; that the complainant gave a delivery bond, which had been forfeited, and that execution was about to be issued thereon, unless prevented; that the judgment was rendered on two notes, assigned by James H. Wilson to his son, Samuel S. Wilson; that these notes, in an arrangement and compromise between the complainant and said James H. Wilson, had been paid and satisfied before the assignment, but were not delivered up; that complainant employed counsel to defend the suit, but such counsel failed to make defence, and judgment was rendered against him by default; that at the time of the rendition of said judgment and suing out process thereon, the plaintiff was dead, and the process of the court thus abused, and praying for injunction and

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general relief. No notice was given of the intended application for an injunction. The bill was duly verified.

A. Pike and *E. Cummins*, for complainant.

George C. Watkins and *George A. Gallagher*, for defendants.

DANIEL, J.—1. By the act of congress of 1793, sec. 5, (1 Stat. 334,) it is declared that no writ of injunction shall be granted in any case, without notice to the adverse party or to his attorney, of the time and place of suing for the same. And this provision has been sanctioned as long since as the case of *New York* v. *Connecticut*, 4 Dall. 1, and applied to injunctions granted by the supreme court, as well as to those that may be granted by a single judge.

2. Again, it is a rule perhaps without an exception, that whenever a defendant, in a suit at law, is possessed of a defence of which he may avail himself in the action, he cannot, after waiving or omitting that defence, invoke the aid of a court of equity for relief, upon the same ground, nor upon any others which he might have asserted at law.

3. It is believed that mere negligence of an attorney, unaccompanied by fraudulent combination or connivance, has never been deemed a sufficient reason for equitable interposition to arrest a judgment at law.

If the judgment in question was in truth obtained in behalf of a man who was dead at the time, that judgment is merely void, and may be quashed by summary proceedings, upon notice and proofs, by which all acts in virtue of a judgment *ipso facto* void, would fall to the ground. If the death of the plaintiff at law was known to his attorney, or the officer of the court when entering that judgment, or when suing out process therefor, such acts would constitute an abuse of the authority of the court such as should be strongly disapproved and promptly set aside. They could create no rights in the plaintiff's representative, nor in any person pretending to claim under the judgment.

Upon the principles herein stated, the injunction prayed for in this case, as made by the bill, must be denied.[1]

[1] The application was renewed at the April term of the circuit court, 1855, before the same judge. Ringo, J., having been of counsel did not sit, and

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G. W. READ and J. READ, plaintiffs, *vs.* F. HAYNIE, defendant.

1. A continuance will not be granted on the affidavit of an attorney, stating what his client told him.
2. The facts in an affidavit for a continuance should be within the knowledge of the affiant.

April, 1855.—Debt, in Circuit Court, before Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States, and the Hon. Daniel Ringo, district judge.

George A. Gallagher, attorney for the defendant, made an affidavit for the continuance of the case, founded on statements made to him by the defendant, as to the matter he expected to prove, and thereupon moved for a continuance. This, among other objections, was made to the affidavit by A. Pike, namely, that it was not such as the law required; the statement of the client to the counsel being an unsworn statement.

DANIEL, J.—In view of the fact that this court is held once a year only, continuances ought not to be granted, except on the strongest grounds. What a client says to his counsel, although it may be sworn to by the latter, is at least an unsworn statement, which the court cannot act on. It would be very dangerous to give it credence, for it would place the continuance of causes within the power of defendants, and without exacting from them any oath at all. All they would have to do would be to tell their counsel what they expected to prove, and for the counsel, having no knowledge of the facts on his part, and swearing to none, to simply swear that the client told

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notice of the application was waived. It was now stated and shown in the bill that the assignment of the notes to the plaintiff, in the suit at law, was fraudulent, and done to enable the said James H. Wilson to cheat and defraud complainant; and the particular facts constituting the fraud were set out and specified.

Upon the second application the injunction was granted, bond and security given and approved, and a writ of injunction ordered to issue, which was done accordingly.

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him so and so. Such a practice cannot be tolerated; and no continuance can be granted on such an affidavit. The facts stated should be within the knowledge of the affiant, and proper diligence should be shown.

The motion for a continuance must be overruled.

Motion denied and judgment by nil dicit *for plaintiffs.*

JAMES M. WASKERN et al., plaintiffs, *v.* ELI T. DIAMOND, as executor of Dennis Griffin, deceased, defendant.

1. In a deposition taken under the act of congress of 1789, if the names of any of the parties do not appear in the caption or some part of the deposition, it is a fatal objection to it. The names of all the parties must appear.
2. Cases as to depositions cited in note.

April, 1855. — Detinue in the Circuit Court before the Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States; Ringo J., district judge, having been of counsel, not sitting.

P. Trapnall, for plaintiff.

S. H. Hempstead and *A. Pike*, for defendant.

DANIEL, J. — Said it appeared the depositions of George S. Yerger and T. B. Case, offered by the defendant, had been taken, under the act of congress of 1789, (1 Stat. 88,) *ex parte*, on account of the residence of the witnesses more than one hundred miles from the place of trial, and that the names of three of the plaintiffs did not appear in the caption or any part of the depositions. He said great strictness had always been required in depositions taken under that act, and he thought this omission fatal. He held that it was necessary to specify the names of all the parties to the suit in the caption or some part of the depositions, to the end that it might appear on their face that the testimony was taken in the same suit.

The depositions were rejected; but it appearing that they,

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were material, the court on the application of defendant granted a continuance, and gave him leave to retake the depositions.

Depositions rejected.[1]

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[1] If the name of one of the defendants be omitted in the caption of the deposition, it cannot be read in evidence in the cause. *Smith* v. *Coleman*, 2 Cranch's C. C. R. 237; *Brown* v. *Piatt*, Ib. 253.

In the caption of a deposition, all parties, both plaintiffs and defendants, must be individually and correctly named. *Haskins* v. *Smith*, 17 Vermont R. 263. The caption of a deposition taken by a plaintiff must state the names of all the defendants. *Swift* v. *Cobb*, 10 Verm. R. 282.

The caption should be correct in naming the suit; but where from the facts there can be no uncertainty as to the case, the deposition should be admitted. *Buckingham* v. *Burgess*, 3 McLean, 368.

In *Allen* v. *Blunt*, 2 W. & M. 137; it was said to be doubtful whether a caption is not insufficient, by describing the action as against one, when it was against two, and so entered and defended, though with service since only on one.

A mistake in the name of the plaintiff or defendant, referring to him as plaintiff or defendant, the name being truly stated in the title, is no ground for rejecting a deposition. *Voce* v. *Lawrence*, 4 McLean, 203.

The authority to take testimony under the act of congress has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible. *Bell* v. *Morrison*, 1 Peters, S. C. Rep. 351; *Harris* v. *Wall*, 7 How. S. C. Rep. 704, 705; *The Thomas* v. *United States*, 1 Brock. 373. The authority conferred on the magistrate by the act is special, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. *Harris* v. *Wall*, 7 How. 705.

The certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read, if all the necessary facts are there sufficiently disclosed. *Bell* v. *Morrison*, 1 Peters, 355; *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 617.

A deposition cannot be rejected because it does not appear that the commissioner had been sworn. Commissioners are officers appointed by the courts of the United States, and their official acts are *primâ facie* valid. *Hoyt* v. *Hammeken*, 14 How. 349, 350.

Primâ facie the officer is to be presumed *de facto* and *de jure*, such as he, by his official act, describes himself to be. This is according to universal practice in taking depositions authorized by statute, unless the statute itself indicates the evidence, that shall accompany the act showing its authority. The act of 1789 requires no such authentication; and if upon the face of the certificate it appears that the person before whom the deposition was taken, was an officer

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JAMES ERWIN, use of James Shelby, plaintiff, *vs.* EBENEZER CUMMINS, as administrator of William Cummins, deceased, defendant.

1. Where property is not sold, nor money made nor received by the marshal on execution, he is not entitled to half commissions.
2. Taxation of costs reformed on motion.

April, 1855. — Motion to retax costs, determined before Hon.

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authorized by the act of congress to take the same, it is all that can be required in the first instance. *Ruggles* v. *Bucknor*, 1 Paine, C. C. Rep. 362; *Fowler* v. *Merrill*, 11 How. 375.

The officer taking the deposition is presumed to know the residence of the party entitled to notice, and if he certifies that the adverse party or attorney is not within one hundred miles, that is *primâ facie* sufficient to dispense with notice. But the certificate may be controverted by parol proof with regard to stated facts, of which the magistrate is not supposed to have official knowledge; and therefore if it be proved that the adverse party or attorney, did actually live within one hundred miles, or was temporarily within that distance to the knowledge of the magistrate, and might have been served with notice, the effect would be to set aside the deposition. *Dick* v. *Runnels*, 5 How. S. C. Rep. 9.

A notice left at the residence of either would be good. *Ib.*

The judge of the probate court of Mississippi, the same being a court of record and having a seal, is the judge of a county court, within the meaning of the act of 1789, and one of the officers authorized to take depositions. *Fowler* v. *Merrill*, 11 How. 393.

A judge of a county court having power to administer oaths, may do so in any county in the State. *Voce* v. *Lawrence*, 4 McLean, 204.

As to requisites of act of congress, see *Harris* v. *Wall*, 7 How. S. C. Rep. 704, 705.

As the deposition must be reduced to writing by the magistrate or the deponent in his presence, it is almost superfluous to observe that it will be a fatal objection if the depositions be written by a party to the suit or his agent, counsel, or attorney. The law for wise and obvious reasons forbids it; because to allow it, would be to place it in the power of an adroit counsel, to give a coloring and effect to the statement of a witness not intended by the witness himself, and which he may not be able to discover at the time.

As to depositions under act of congress, see *Russell* v. *Ashley*, ante, p. 546; *Merrill* v. *Dawson*, ante, p. 563; *Rainer* v. *Haynes*, ante, p. 689; *Marstin* v. *McRea*, ante, p. 688.

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Daniel Ringo, district judge, holding the Circuit Court; absent Daniel, J.

P. Trapnall, for motion.

RINGO, J. — There was no legal authority for any charge of half commissions by the marshal when no property was sold or money made or received by him on execution, at any time from the 26th of February to the second Monday of April, 1849. Therefore the item of one hundred and two dollars and eighty cents charged by and taxed in favor of the marshal, on the execution, as half commissions on ten thousand and eighty dollars, the amount of the judgment and interest specified in the execution, is improperly and illegally charged and taxed as costs, and must be disallowed and stricken from the bill of costs, and the taxation thereof reformed in that respect.

Ordered accordingly.

WILLIAM RUSSELL, complainant, *vs.* ROSWELL BEEBE, GEORGE C. WATKINS, MARY W. W. ASHLEY, as executrix of Chester Ashley, deceased, WILLIAM E. ASHLEY, HENRY C. ASHLEY, and MARY A. FREEMAN, defendants.

1. Public officers, when acting under the scope of their duty, must be presumed to have fulfilled every requisite which the discharge of their duty demands.
2. Rights of preëmption cannot be acquired to lands whilst the Indian title to occupancy still remains.
3. But conceding the title thus acquired invalid, yet if A. and R. hold under it jointly, the acts of the former in destroying it, and subsequently acquiring a better title, and claiming exclusively for himself and adversely to his associate, will be considered as fraudulent as against R., and title will be decreed to him.
4. This case distinguished from that of *Cunningham* v. *Ashley*, 14 How. 377.

April, 1855. — Bill in chancery, before the Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States, holding the Circuit Court; the Hon. Daniel Ringo, district judge, having been of counsel, did not sit.

A. Pike, for complainant.

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George A. Gallagher, *George C. Watkins*, and *S. H. Hempstead*, for defendants.

DANIEL, J. — Between the case of *Cunningham* v. *Ashley*, (14 Howard, 377,) which has been referred to, and the case now under consideration, there are some differences of fact which materially distinguish them. In the former case the right of Cunningham was not impeached upon the grounds of the exemption of the territory from all claim from settlement and preëmption, or of the absolute incompetency of the land-officers to receive proofs of preëmption, or to issue patent certificates; but the impeachment of Cunningham's title rested upon the allegations that the individual from whom Cunningham claimed as assignee, never had, in truth, entitled himself by actual settlement, and that the certificate granted to the agent of Cunningham was signed by the receiver alone, when it should have been the joint act of both the register and receiver. The court, acting upon the principle repeatedly sanctioned by them, that public officers, when acting within the scope of their duty, must be presumed to have fulfilled every requisite which the discharge of their duty demands; or that at any rate in such cases the maxim applies, "*Omnia rite acta donec probetur in contrariam*," and especially as the receipt for the dues to the government was given by the officer authorized to receive those dues, it was proper to conclude that the proceedings were all regular, and had been concurred in by both the agents appointed to conduct them; disallowed the exception.

In the present case the impeachment of the complainant's title begins a step higher. It strikes at the competency of the parties. It alleges the absolute nullity of the origin of the title of the complainant, and as a consequence of that nullity, insists that such a title could never be transmissible to any person under any circumstances. True, it denies the fact of settlement by Lewis, but insists that conceding the fact of such a settlement, it was an intrusion merely upon the right of occupancy by the Indians, and upon the right, too, of the government, and absolutely void unless subsequently recognized and ratified by the latter.

This is certainly an imposing aspect of this case, and if it

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rested simply and confessedly upon the allegations thus relied on, and was wholly unaffected by the acts of the parties and the relations they sustained to each other arising from their own acts, might, perhaps, be decisive of this controversy; for the interpretation placed by law-officers of the government seem quite explicit to the effect, that rights of preëmption cannot be acquired to lands whilst the Indian title to occupancy still remains.

But conceding this to be the law to its fullest extent, does it conclude the rights of the parties to this cause?

It is not denied by the complainant that the defendant holds the legal title to the property in dispute. This is conceded, and is a main ground of complaint. The inquiries are, whether the defendant, after being united with the plaintiff in pursuit of what the complainant certainly believed and what the defendant Ashley professed to believe to be the regular and legal acquisition of the property; after recognizing the legality of the acquisition by participating in the distribution of the property between himself and others standing upon the same grounds; after undertaking to perfect the title by possessing himself of what may be termed the muniments thereof, has he not by lulling the complainant into security by a reliance on his coöperation and aid, by a breach of trust and confidence, circumvented and deceived the complainant, and endeavored to obtain exclusively for himself advantages which his previous association with the plaintiff, and all his acts conjointly with the plaintiff, bound him to share with him?

Such appear to be the legitimate inquiries presented by the pleadings and testimony of the cause, and if answered in the affirmative, it would seem to be unimportant whether the Indian title was extinguished or not, or whether or not the land was subject to preëmption. For, suppose the Indian title to occupancy existed in full force, suppose the land was not subject to settlement; could these things justify the defendant after embarking *bonâ fide* with the complainant in an effort to acquire the land, after sharing it with him and making himself his agent for the completion of the title, in violating every relation he filled to the complainant, and in cutting him off from

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every benefit of their compact as evidenced by their acts as well as their language? Was he not bound, holding the receipts for the money paid in the complainant's name, to put him in possession of those documents to enable him to perfect his title if he could?

Admitting the irregularities of the original entry, it is as probable that the government would confirm a title to a *bonâ fide* claimant under a preëmption, though informal, especially where the property had been extensively improved, as that they would lavish it upon the holder of a floating warrant to the injury of those who actually held and had improved the land.

In this view of the case, the question whether the deeds from Ashley do or do not contain covenants for warranty of title, becomes one of little importance.

Russell is not now suing upon a covenant of warranty. He is complaining of a fraud, and seeking protection against it; and in such a state of the case, the deeds from Ashley are conclusive to show that he held the property in common with Russell, and held it under the very title which Ashley subsequently attempted to destroy. Nay, the deed to the corporation of Little Rock implies all this; for no comprehensible meaning or purpose can be ascribed to that transaction except it be taken as an acknowledgment that Ashley had held the town under the title described from Murphy, and that it was the purpose of the grantor in that deed to assure and quiet the purchases of property under that title.

It is, perhaps, unnecessary, and might be extrajudicial, to express an opinion upon the validity of the patent beyond the right in opposition thereto claimed in this cause; but it would seem, were the question before the court as a general one, or were directly in point in the case, to reconcile with the law the entry of these floating warrants upon property not merely settled upon but extensively improved at a great cost; and it is manifest, from the assurances given by the defendants, that it was to enure to the benefit of all the occupants of property, and not to the exclusive benefit of Ashley and Beebe, and of those with whom they were in amity. Nothing can be more explicit than the declaration of the officers of the General Land-

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Office, that they considered the petition and declared purpose of Ashley and Beebe as securing the right of all holders of property, and for that reason, and that only, regarded the grant to them as a virtual compliance with the law which protected settlers against the location upon their possession and improvements by floating warrants.

The opinion of the court is designed to embrace only this cause and the parties regularly before it; and upon the consideration which it has been enabled to bestow upon the very voluminous papers in the case, it has been led to the conclusion that the patent possessed by the defendants, or under which they claim, should, as regards the complainant and the property embraced within his bill, be held as void, and as having been obtained in fraud of the rights of the complainant, and that the defendants should be decreed to assure to the complainant by proper and sufficient deeds, his title in and to said property, and to remove, so far as on them may depend, all obstruction to his possession to that property. *Decreed accordingly.*[1]

MOSES GREENWOOD and THOMAS E. ADAMS, plaintiffs, *vs.* HENRY M. RECTOR, defendant.

1. After the institution of a suit in this court against a defendant, a garnishment subsequently sued out against him in a State court cannot affect it, nor be plead as a defence to the action.
2. If jurisdiction has once attached, it cannot be divested or impaired by matter occurring subsequently.

April, 1855.— Assumpsit on a bill of exchange, before the Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States, and the Hon. Daniel Ringo, district judge.

The defendant plead that since the institution of this suit, a

[1] The defendants appealed to the Supreme Court of the United States from the decree pronounced in the case.

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writ of garnishment had been sued out of the Pulaski circuit court of the State of Arkansas and served on him, in respect to the same debt mentioned in the declaration, which was still pending, and prayed to be discharged from this suit; to which plea the plaintiffs demurred, on the ground that this suit having been just commenced in this court could not be defeated by any subsequent proceeding in a State court.

S. H. Hempstead, for the plaintiffs.

Henry M. Rector, in proper person.

DANIEL, J. — It would certainly be an extraordinary procedure if an action in this court could be defeated by a subsequent proceeding in a State court. Such a pretension cannot be tolerated. The jurisdiction of this court, and the right of the plaintiffs to prosecute their suit therein, having attached, that right certainly cannot be arrested or taken away by any proceedings in another court; for the effect of such a practice would be to produce collision in the jurisdiction of courts, that would embarrass the administration of justice. State courts can no more interfere in our business and proceedings than we can in theirs. The plea cannot be allowed and the demurrer to it must be sustained. *Judgment for plaintiffs.*[1]

[1] Where the suit in one court is commenced prior to the institution of proceedings under attachment in another, such proceedings cannot arrest the suit. *Wallace* v. *M'Connell*, 13 Peters, 151. The commencement of another suit for the same cause of action in the court of another State, since the last continuance, cannot be pleaded in abatement of the original suit. A subsequent suit may be abated by the allegation of the pendency of a prior one; but the converse of the proposition, in personal actions, is never true. *Resever* v. *Marshall*, 1 Wheat. 215; *Collins* v. *Hanna*, 5 Johns. 101; *Haight* v. *Holley*, 3 Wendell, 262.

A suit having been commenced in the circuit court of the United States is not abated by a subsequent suit in the State court by attachment against the defendant in the first suit who is summoned as garnishee. Jurisdiction having vested in the circuit court it cannot be divested by any subsequent proceeding in a State court. *Campbell* v. *Emerson*, 2 McLean, C. C. R. 30.

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JOSIAH GARLAND, complainant, *vs.* WILLIAM BOWLING, as administrator of William J. Bowling, deceased, defendant.

1. Before a contract can be rescinded for any cause whatever, the parties must be placed *in statu quo*.
2. Where a person had purchased slaves, and given a note therefor, on which judgment was obtained at law, the vendee cannot enjoin the collection of it on the ground that the negroes were unsound, if he still retains the possession of them.
3. A person cannot hold the property of another and refuse to pay him for it.

April, 1855. — Bill for injunction, in the Circuit Court, before the Hon. Peter V. Daniel, associate justice of the Supreme Court, Ringo, J., district judge, having been of counsel in the case, did not sit.

The bill was brought to enjoin a judgment at law, rendered in the circuit court on the 25th of April, 1845, in favor of the defendant, and against the complainant, for 1,626 dollars and 25 cents, on the ground that it was part of the purchase-money of five slaves sold by William J. Bowling, deceased, to complainant, on the 7th of December, 1843, for $1,600, and which slaves were warranted to be sound and healthy in body and mind, and slaves for life; that the said slaves were unsound and diseased, and not worth as much as they were represented; and that the judgment ought to be perpetually enjoined. Prayer for injunction and general relief.

The bill did not offer to return the negroes, or place the parties *in statu quo;* and it clearly appeared from the proof, that the slaves that were living, two having died, remained in the possession of the complainant, and no wish was expressed on his part to surrender them and rescind the contract.

A. Fowler, for complainant.

A. Pike and *P. Trapnall*, for defendant.

DANIEL, J. — The proof taken in the case is not sufficient to show that the slaves were unsound at the time of their purchase as alleged by the complainant in his bill. This is a ground to be made out by him clearly and satisfactorily before he could be entitled to relief in any aspect of the case. And having

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failed in that respect, he could not in any event succeed. But there is another objection which is fatal to his claim to relief. It is that he still holds the slaves in possession, and does not offer to surrender them, or to place the parties *in statu quo*. His object appears to be to enjoin the collection of the purchase-money and retain the negroes. Such conduct a court of equity cannot sanction. If he desires to rescind the contract for any cause whatever, and is entitled to do so, he is bound to restore to the adverse party what he received from him. This is demanded by the rules of equity and fair dealing, and is without exception in the forum of conscience. He cannot hold the property of another, and refuse to pay for it; and as it appears by the evidence that he retains the possession and claims the slaves as his own, and does not offer to surrender them, it is not only a complete bar to relief, but very significant evidence that the slaves are not so valueless as the complainant has alleged them to be in his bill.

The injunction granted in this case must be dissolved, the bill dismissed with costs, and the defendant remitted to his judgment at law, and execution to be issued thereon.

Decreed accordingly.

JOHN T. TRIGG, as administrator of Francis B. Trigg, deceased, plaintiff, *vs.* ELIAS N. CONWAY, as executor, and MARY JANE CONWAY, as executrix of the will of James S. Conway, deceased, defendants.

1. In an action of detinue the cause of action on the death of the plaintiff survives.
2. Where the jurisdiction has once attached, it is not divested by subsequent changes or events.
3. Representatives of deceased parties may be substituted although citizens of the same State.
4. Such substitution is no new proceeding, but to enable the original suit to progress.
5. The 31st section of act of 1789 cited — construction thereof — death and substitution of parties — jurisdiction of the court — explained in note, and divers cases there cited.

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April, 1855. — Detinue in the Circuit Court, before the Hon. Peter V. Daniel, associate justice of the Supreme Court, the Hon. Daniel Ringo, district judge, not sitting, having been of counsel in the case.

This was an action of detinue brought by Francis B. Trigg against James S. Conway (ante, p. 538), subsequent to which time both parties died, and their deaths respectively were suggested and proved. After the institution of the suit, the plaintiff removed to, and became a citizen of Arkansas, and after her death, John T. Trigg, also a citizen of Arkansas, took out letters of administration therein, and became her administrator; and, producing the letters, by his counsel moved to be substituted as plaintiff, and for leave to prosecute the suit, and for a *sci. fa.* to bring in the representatives of James S. Conway, deceased, at the next term, to which motion the counsel of the defendants objected.

P. Trapnall and *George A. Gallagher*, for plaintiff.

S. H. Hempstead and *A. Fowler*, for defendants.

DANIEL, J. — This is a case in which the cause of action survives. Digest, 98; 1 Blatch. 394. It appears that administration has been granted to John T. Trigg on the estate of Frances B. Trigg by the proper authority, and he is entitled to be substituted as plaintiff, and to prosecute the suit to final judgment. This is expressly authorized by the Judiciary Act of 1789. 1 Stat. 90.

It is objected by the counsel of the defendant, that after the commencement of the suit, the deceased plaintiff ceased to be a citizen of Missouri, and became a citizen of Arkansas, and of which last-named State her administrator is a citizen, and here took out letters of administration, and that as the suit is now between citizens of the same State, it should be dismissed for want of jurisdiction.

This objection is not maintainable, for it is undeniable that where jurisdiction has once vested, a change of residence of either of the parties will not divest it. That has frequently been decided by the Supreme Court of the United States. 2 Wheat. 297; 2 Peters, 564; 9 Wheat. 537; 8 Peters, 1. The death of either party, pending the suit, does not, where the

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cause of action survives, amount to a determination of it. The substitution of the representative of the deceased is not the commencement of a new suit, but a mere continuation of the original suit, and whether the representative belongs to the same State where the suit is pending or not, is quite immaterial. If the jurisdiction attached, as between the original parties, it still subsists. *Clarke* v. *Mathewson*, 12 Peters, 164. It is proper to substitute the administrator, and to direct a *scire facias* to bring in the representatives of the deceased defendant, returnable to the next term.

Ordered accordingly.[1]

[1] The 31st section of the Judiciary Act of 1789 is as follows (1 stat. 90; Gordon's Digest, 687), namely: "Where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; and the court before whom such cause may be depending is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."

As to construction of the section. — This statute embraces all cases of death before final judgment, and is more extensive than the 17 Car. 2, and 8 and 9 W. 3. The death may happen before or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment; and in all these cases the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. *Hatch* v. *Eustis*, 1 Gall. C.

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C. R. 160; *Green* v. *Watkins*, 6 Wheat. 260. In real actions, the death of the ancestor without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant. The 31st section of the act of 1789 is clearly confined to personal actions, as the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee. *Macker's Heirs* v. *Thomas*, 7 Wheat. 530,

As to substitution of parties. — Unless the fact be admitted by the parties, the person applying to be substituted as representative must show himself to be such, by the production of his letters testamentary or of administration, before he can be permitted to prosecute; but if the order for his admission as a party be made, it is too late to contest the fact of his being such representative. *Wilson* v. *Codman's Executor*, 3 Cranch, 193.

Upon the death of the plaintiff, and appearance of his executor, the defendant is not entitled to a continuance. Nothing in the act induces the opinion that any delay is to be occasioned where the executor is substituted and is ready to go to trial. But an executor made defendant is entitled to one continuance to allow him to inform himself of the proper defence. Ib. 207.

As to jurisdiction. — If the jurisdiction of the court has attached, it cannot be divested by any subsequent events. If, after the commencement of the suit, the original plaintiff removes into and becomes a citizen of the same State with the adverse party, the jurisdiction over the cause is not divested by such change of domicil. *Morgan's Heirs* v. *Morgan*, 2 Wheat. 290, 297; *Mollan* v. *Torrance*, 9 Wheat. 537; *Dunn* v. *Clarke*, 8 Peters, 1; *Clarke* v. *Mathewson*, 12 Peters, 170; *Hatch* v. *Dorr*, 4 McLean, C. C. R. 112; *Hatfield* v. *Bushnell*, 1 Blatchford, C. C. R. 393.

In the section above alluded to, Congress manifestly treat the revivor of the suit by or against the representative of the deceased, as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same State where the cause is depending, or to another State. *Clarke* v. *Mathewson*, 12 Peters, 172. And accordingly in the last case, a bill of revivor, being treated as the continuance of the old suit, brought by the representative, who was a citizen of the same State with the defendants, was allowed, and the jurisdiction of the court sustained, and the decree of dismissal (2 Sumner, 262) reversed.

As an original suit, it could not be maintained (4 Cranch, 306; 8 Wheat. 642; 4 Mason, 435; 12 Peters, 170), because the parties to the record would be citizens of the same State. The court has jurisdiction, because it had it originally, and because the substituted party comes in to represent the deceased, and to prosecute a pending suit, and not to begin a new one.

In *Dunn* v. *Clarke*, 8 Peters, 1, an injunction bill was sustained, although the parties were citizens of the same State, because the original judgment under which the defendant in the injunction bill made title, as the representative in the realty of the deceased, had been obtained by a citizen of another State in the same circuit court.

And so in *Hatch* v. *Dorr*, 4 McLean, C. C. R. 112, it is held, that as a cred-

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FRANCIS SURGET, complainant, *vs.* WILLIAM BYERS, defendant.

1. Pleadings in equity are viewed without regard to form, and exceptions are never allowed if made under circumstances calculated to effect a surprise on either party.
2. Copies of deeds filed with the bill as exhibits become part of it, and if intended to be objected to, should be done before the hearing.
3. It is a rule of pleading at law, that every material averment not denied is admitted; and that rule would seem to apply *à fortiori* in equity, where all formal exceptions are discouraged.
4. Allegations in the bill may be considered as established, whenever the statements in the answer can, by fair interpretation, be construed into an admission of or acquiescence in the same.
5. Where inadequacy of consideration in a sale, either private or judicial, is so gross as to shock the conscience, it is presumptive evidence of fraud.
6. Courts of equity will refuse a specific performance where the consideration is grossly inadequate, or the contract is oppressive and unconscientious.
7. Where the attorney prepared the writ for the clerk, taxed the costs, prepared the advertisement of the sheriff, directed a large quantity of land

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itor's bill is merely the continuation of the suit at law, and intended to realize the fruits of the judgment, and cannot be considered as an original proceeding, the jurisdiction may be maintained, although the complainant has become a citizen of the same State with the defendant, where the judgment was rendered.

It was said, in *Green* v. *Watkins*, 6 Wheat. 260, that the death of the party neither raises any new right or cause of action, nor produces any change in the condition of the cause or in the rights of the parties. If these remain unaffected, it would seem to follow that the jurisdiction is likewise unaffected, irrespective of the citizenship of the personal representative.

The administrator, if admitted, is not to be considered in the light of an original party. The action was commenced and regularly pending in the lifetime of his intestate, who was the original party; and he comes in, not in his own right, but merely as the representative of such original party. It is in this special character, and under these special circumstances, that he appears and prosecutes. *Hatfield* v. *Bushnell*, 1 Blatch. 395.

An executor or administrator may bring a *scire facias* in the circuit court to revive a judgment recovered therein in a suit brought by the testator or intestate, or to have execution against the bail in the suit, or if no judgment be recovered in the suit so brought, but it be still pending, may become a party to and prosecute the same, although he may be a citizen of the same State with the adverse party, and for that cause incompetent to bring in such court an original suit against him. Ib.

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to be levied on, and himself became the purchaser at a grossly inadequate consideration: *held*, that the sale was fraudulent and void, and the same was set aside.

8. Facts and circumstances detailed and commented on, and a case of fraud developed.

April, 1845. — Bill in chancery, to set aside a sale of lands, determined in the Circuit Court, before Hon. Peter V. Daniel, associate justice of the Supreme Court of the United States; the Hon. Daniel Ringo did not sit, having been of counsel in the case.

P. Trapnall and *S. H. Hempstead*, for complainant.

A. Fowler and *A. Pike*, for defendant.

DANIEL, J. — This is a case, as to which, whatever may be the decision upon it, it cannot be denied that it is striking and singular in many of its features.

An outline or sketch of the most prominent of those features present these obvious lineaments or characteristics.

1. The institution of an action at law, by a creditor, for the satisfaction of an alleged (and indeed an undeniable) obligation.

2. The discharge of the debtor upon grounds wholly distinct and apart from any impeachment or satisfaction of that obligation, but upon a proceeding which admits the legality of that obligation, and the right to resort to courts of justice for its enforcement.

3. The adjudication of costs against the creditor, for having resorted to a court for the enforcement of his legal rights, and on account of the discharge of his debtor from an obligation and right of action confessedly legal.

4. The transfer, by means of this claim for costs, to the debtor, or to those deriving title under him (and who, from their position in relation to the proceedings above mentioned, and to the parties to those proceedings, were necessarily cognizant of their existence and nature), of landed property in value of more than seven thousand times the amount of the costs adjudged against the creditor, for having instituted his action upon an obligation which is neither impeached nor satisfied.

Such, I repeat, are the characteristics of this cause. That

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they are unusual and striking, none can for a moment hesitate to admit; nor can it be denied, that in their influence they have been, if not ruinous, most oppressive to the plaintiff at law, who is also the complainant in this suit; so unusual and so oppressive, indeed, as to force upon every one the inquiry, by what stern and unbending rule or principle that influence can be maintained; for it must be by the operation of some rule or principle too firm and inflexible to be shaken by considerations of inequality or hardship, or by any circumstances surrounding the transaction, that results such as have been shown in this cause can be operated by the means employed.

The complainant insists that the pretensions set up by the respondent are void: —

1. As being contrived by the respondent for the purposes of circumvention, oppression, and fraud.

2. For the gross inadequacy of consideration and effect produced by the contrivance of the respondent.

3. For the want of competency in the respondent to sell the property of the plaintiff to become the purchaser of it himself.

4. On account of the unreasonableness and excessiveness of the levy, this being an abuse of the process of the court, and an evidence of a fraudulent design, and as calculated to inspire suspicion and to deter purchasers, by reason of that suspicion, and by offering larger amounts of property than many persons were disposed or were able to buy.

5. By proof that the suit at law, on which the judgment for costs was rendered, was instituted without the consent or knowledge of the complainant, and that therefore whatever may have appeared on the face of that suit at law, there can arise hence no bar to the right of the complainant to aver and show, in a court of equity, the true position of the complainant with reference thereto.

6. That the process sued out on the judgment at law was not made out nor issued by the only legal and competent officer, but was made up and calculated and determined by the respondent, and by him delivered to the sheriff, who was ordered by the same party as to what particular property, and to what extent to levy the execution.

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That the sale by the sheriff was null, and could not divest the title of the complainant, beause it is proven by the witnesses examined on the part of the respondent, that the requisites of the law, a compliance with which was necessary to give validity to any sale of lands under execution, was not complied with, but were departed from, with the knowledge and participation of the respondent.

The positions on which the defendant rests his defence are substantially these:

1. The strength of his legal title under the execution and sale above mentioned, which sale he alleges was fair, and not fraudulent; and

2. That sacrifices of land in the same section of the State, similar to that complained of, were usual under execution sales.

Before considering the grounds as above stated, constituting what may be called the merits of this case, it seems proper to advert to some questions which have been raised upon the pleadings. These, it is well known, are viewed with very little regard to form in courts of equity, where exceptions are never allowed if they are made under circumstances calculated to effect a surprise on either party, and might have been made at a different stage of the cause, and consistently with fairness to all. This is a tribunal which addresses itself to the consciences of men, which looks to the substance of things, and acts upon the maxim, "*ut res magis valeat quam pereat.*"

Exception has been taken in this case, for the first time at the hearing, to Exhibits A. and B., purporting to be copies from the records of deeds by which portions of the lands levied upon and sold were conveyed by Stephen and Wm. B. Duncan to the complainant. The objection to these deeds or copies is twofold: first, that they were not regularly admitted to record in the State of Arkansas; and that as the complainant had proffered the production of the originals, if required, he should be strictly held to their production. In answer to the first of these grounds of exception, it may be remarked that these copies were filed with the bill as exhibits, and therefore, in legal intendment, made portions thereof.

The same notice, therefore, which was given of other portions

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of the bill, was given of the character of that part of it which was constituted by these documents. It was the undoubted right of the respondent to except to the whole or to portions of the bill, or to acquiesce in the regularity of its allegations, either by express admission or by necessary implication. It is a rule of pleading in the courts of common law, that every material averment which is not denied will be regarded as admitted.

This rule would seem to apply *à fortiori* before a tribunal which discourages all exceptions of a formal character. The respondent had the power, either by demurrer or plea, or by direct denial in his answer, to object to the structure of the bill, or to the competency of the parts or members thereof; and surely it was his duty to warn the complainant, to enable him to meet such exception, if designed to be insisted upon.

But it is contended that, by the rule of pleading in equity, where allegations in a bill are neither confessed nor denied by the answer, the complainant is bound to sustain them by proofs, on the final hearing. This rule, which applies rather to the substance than to the forms of proceeding, is, undoubtedly, true in cases where the respondent states that, with the knowledge possessed by him, he can neither confess nor deny the charges contained in the bill; but entirely untrue wherever the statements in the answer can, by fair interpretation, be construed into an admission of, or acquiescence in, the allegation of material facts.

It is insisted that for an insufficiency in an answer, exception may be taken to it. This is true; and, for a like imperfection in the bill, the like remedy may be resorted to; the rule and the obligation operates equally on complainants and respondent; but it is certain that, with respect to the bill or the answer, the court would not sustain a captious exception, when the pleading disclosed or admitted the real grounds of contest in the cause. Thus much it has been deemed proper to state with reference to the rules of pleading, which even if they went to the exclusion of these copies, would not, on further examination of the case, materially affect the question on which they are intended to bear. For the answer explicitly admits the interest of the complainant, not merely in the lands patented to him, but in all the lands embraced within this controversy.

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Leaving, then, this question, raised upon the pleading, we come back to those matters which enter essentially into the character of the proceedings impeached by the bill; and, on reviewing those proceedings, it might, perhaps, be considered *pro hac vice*, that mere inadequacy of consideration shall not *per se* amount to proof of fraud, although the concession, thus broadly stated, would scarcely be reconcilable with the qualification put by the courts, namely, unless such inadequacy be so gross as to shock the conscience, — for this qualification amounts necessarily to an affirmation, that if the inadequacy were of a nature so gross as to shock the conscience, it would *per se* be evidence of fraud.

In another instance the courts of equity have reprobated such gross inadequacy when standing solely and singly as the ground of objection, namely, in refusing for that objection alone to decree a specific performance of an oppressive and unconscientious contract; thus showing that they are not governed by mere legal or technical interpretation, but yield to a certain extent to the moral sense and feelings of mankind, and to that principle so strongly stated by Lord Camden: "that nothing can give life and activity to a court of equity, but honor, integrity, fairness; and that wherever these are wanting a court of equity cannot be incited to action, but neither listens, perceives, nor moves." Again, it is insisted that whatever presumption arising from inadequacy of consideration may be permitted as respects transactions strictly between vendor and vendee, no unfavorable influence from that cause is allowable, with respect to sales made under judicial process. In stating the position thus broadly, there seems to be overlooked the qualification uniformly put by the courts, namely, that such sales are to be fairly made. Certainly the fact that such sales are made under the authority of the law, and by the officers of the law, may justly weaken the presumption arising from great inadequacy; but to say that such inadequacy, connected with other facts or circumstances tending to evince fraud or unfairness, could never be regarded, would be about as rational as an assertion that the process of the law could not possibly be abused, and that the ministers of the law must necessarily be pure and upright.

The true, the intrinsic character of proceedings, both in court

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of law, and *in pais*, are alike subject to the scrutiny of a court of equity, which will probe and sustain or annul them, according to their real character.

In approaching an inquiry into the conduct of the parties, and into the circumstances surrounding the transactions impeached by the bill, it is deemed proper by the court *in limine* to advert to certain positions advanced by the counsel for the respondent; to which, as urged by those counsel, this court cannot lend its sanction. Thus it has been insisted, that an attorney, as the representative of his client, has a right to control the judgment rendered in favor of that client, and in so doing frame, and to sue out what final process he pleases; to direct the sheriff both as to the kind and amount of the property to be levied upon; to prepare such advertisements of the property as in his judgment may be deemed effectual; and, at the sale of the property, so prepared by himself, to purchase the whole of that property at any sacrifice of it, however great. To the affirmance of such doctrines, or of any practice in pursuance thereof, this court can never lend its assent. An executor, or administrator, or a trustee, cannot purchase at his own sale. If by the levy either the legal or equitable title to the property levied upon is vested in the judgment creditor, or in his attorney for him, the one or the other becomes a trustee, and in any aspect is bound to perfect fairness; and, therefore, cannot take advantage of untoward circumstances, although they may be induced by his own irregularity, to force a sale to the ruin of the debtor, and for his own profit. If such control of judicial proceedings, and of the officers of the law, can be tolerated, the widest door to fraud and oppression would at once be thrown open, and the most unscrupulous adventurer would be the most successful.

With reference to the judgment at law, and the proceedings under it, it has been insisted that this judgment, having been rendered by a competent court, and still remaining unreversed, neither the validity of the judgment nor the proceedings in virtue thereof can now be questioned. True, with respect to the regularity of that judgment, or with any legal errors in obtaining it, this court does not pretend to take cognizance, or to exercise

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any appellate jurisdiction for its reversal; and, in any attempt at law to impeach such judgment, it must be regarded as operative. But with any fraudulent conduct of any of the parties, in attempting to avail themselves of that judgment, this court can regularly take cognizance. Such a proceeding is within the legitimate province of courts of equity, and constitutes a most comprehensive ground of their jurisdiction.

With reference to the acts of the respondent, in obtaining and enforcing the judgment at law, those acts have been by his counsel sought to be sustained, upon the ground, that as an attorney for Marsh, he had a right to control the judgment, and to carry it into effect. That right, in this respect, like every other right, is bounded by rules of law and justice, and by a proper regard to the rights and duties of others. So far as it was proper to enforce the legitimate rights of Marsh, it was unquestionably within the power of his attorney to control and direct them; but he could have no power according to what he may have fancied was legitimate, or what he may have thought judicious and promotive of the interest of his client or himself, to usurp the powers of those officers and functionaries to whom the laws have intrusted its just administration, and preservation of the rights of the citizen.

The office of clerk or of sheriff, was never designed to be a mere name, or an engine, or a pretext, to be used at the will of any person. By what authority, then, could this respondent assume the functions of both clerk and sheriff? tax such costs as he deemed proper? seize upon property to any amount? advertise it himself, and ultimately become the purchaser? For, by converting the clerk and sheriff into mere ciphers, and becoming the really efficient actor in all their functions, he substituted himself entirely for these officers, in whom the law invested peculiar powers, and on whom it imposed peculiar responsibilities. By this assumption the respondent at once destroyed or evaded all those checks and securities designed for the protection of all. In justification or in excuse for this assumption, it has been contended in argument, (for the position is not sustained in proof,) that it was rendered necessary by the ignorance of those officers, to whom the duties of clerk and

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sheriff had been assigned, and had become a common practice among attorneys in the particular section of country where it occurred. If this position must be taken as true, it rather aggravates than extenuates the wrong here complained of, as it shows that by the ignorance or corruption of the officers of the law, the rights of the complainant had been handed over to the mercy of one having a direct interest to invade those rights; and evinces a practice in a profession deemed enlightened and honorable, highly calculated to bring that profession into merited disrepute.

Upon the question of illegality in the sale for want of notice, it has been contended in argument for the respondent that the bill contains no charge with respect to such illegality, and that therefore no proofs as to that point can be admitted.

It is undeniably the rule in equity, as well as at law, that the proofs must correspond with the allegations, and that evidence inapplicable or irrelevant to the latter, will be disregarded as immaterial. The bill in this case is less minutely and searchingly drawn, than it might have been on this particular point, yet it is considered as being sufficiently comprehensive and sufficiently specific at the same time to cover this point and to justify proofs in relation thereto. It alleges, as illegal and unwarrantable, the taxing of the costs, the writing of the execution, the sale of the property by the party, the description of the property, and the advertisement or notice of sale by the respondent, and the proceedings under that notice, all as being unwarranted by law and concocted and carried out in fraud. All these allegations it was competent to the complainant to prove. The answer of Byers, after a general denial of fraud and unfairness, after admitting the taxing of the costs, the writing of the execution, the direction to the sheriff as to the lands to be levied upon, and the preparation of the notice of sale — all by himself — next insists upon the regularity and propriety of all these acts. He then proceeds to aver the performance of every prerequisite of the law as to such sales. These prerequisites he enumerates in detail, and introduces evidence to establish them. He says the sheriff advertised the lands, and advertised them for twenty days, in three most public places in each

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township; and he introduces the evidence of the sheriff and of other witnesses to prove these averments. But in contravention of these statements are first, the admission of the respondent that he himself prepared the notice, and not the sheriff; and as to the evidence of the sheriff introduced and relied on by the respondent, so far from showing that the requisites of the law were complied with, it establishes the fact that they were violated and disregarded, for the sheriff shows that he took the description of the property and the notice of sale prepared by the respondent, and did not act upon any description or statement prepared by himself; in the next place this offence declares that he never did set up advertisements either in number or locality, as he was bound to do, nor could he swear to the fact. He says it was his practice to set them up in places in which it was convenient for him to do so; and to hand over other notices to persons in whom he had confidence. Here, then, is proof supplied by the respondents, that the law had not been complied with. The acts of an official deputy are regular evidence as acts of his principal, binding on that principal and on all persons falling within the scope of his acts. But it is not perceived how the rights of suitors can be at all dependent upon the unofficial and private confidence of an officer, even when that confidence may not have been misplaced. In this case there is no proof that it has been fulfilled; for no person shows that the notices had in fact been given according to law. The belief of either the sheriff or any other person can have no influence where the law calls for full legal proof.

The objections here stated, cannot be deemed narrow or technical in a case like the present, — a case admitted in the argument to be entitled to no favor either at law or in equity, — a case which presents us one feature of liberality or equality, — a case in which the respondent was and is bound to walk the hair line of legal strictness, and from which, if he trips or deviates never so small a space, he is doomed to fall.

The court has not deemed it proper to express an opinion upon the point raised as to the validity of sales under execution made *curia non sedente*. That is a point as to which there appears to be a considerable diversity, and as to which there is

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room for diversity of opinion. Not considering that point necessarily involved as a mere question of law in this case, and as it arises upon the statutes of this State, which have not yet been expounded by the local courts, it has been thought respectful to the latter to leave to them the interpretation of these statutes, on points not unavoidably in the path of this tribunal in the performance of its duty. In one aspect, however, the existence merely of the wide spread impression as to the time and place of making sales, may have a direct bearing on the present case, whether such impression was or was not warranted by the statutes, and that is as the knowledge of such an impression, and its effect upon bidding at sales may be an index to the *quo animo*, the intention and purposes of the respondent, and may point to him as the artificer or contriver of the entire train and machinery by which the interests of the complainant were sought to be and were in fact sacrificed.

Little weight has been given to the general statements of witnesses that property in the particular section of the State has, when sold under execution, commanded but a very small portion of its real value. The instances referred to are susceptible of explanation on two grounds, either of which would deprive them of influence in this cause. The sales thus mentioned might have been, and until the converse is shown, must be presumed to have been unaccompanied by any circumstances which could affect their validity; or they may have been acquiesced in from inability or indisposition of the victims in those sales to subject them to the test of judicial scrutiny. It may well be presumed that a majority of sufferers by such sacrifices would be persons possessed of slender means of resistance, or they would have brought to light any facts or circumstances, if such really had existed, rather than have submitted to oppression and ruin.

And here it must be remarked, as a striking and ominous feature in this cause, that amongst the numerous witnesses examined to establish the difference between the value of property and the proceeds of sales under execution; that to the oft repeated, and as it were, stereotyped interrogatory put to them, nothing is said about the quality of the lands so sacrificed, or

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about the clearness or defectiveness of the titles, and not one word about the situation or value of the lands embraced in this controversy. By evidence taken on the part of the complainant, it is stated that they were worth from one to five dollars, or from two to three dollars per acre, and, taking a mean valuation between these, giving the estimate of three dollars per acre, the lands at the time of the sale were worth not less than forty thousand dollars, and were purchased by the person who originated and controlled the whole transaction for nine dollars and thirteen cents!

An inadequacy so enormous as this, if not when regarded singly, yet when taken in connection with the attendant circumstances, with the agency of the defendant in the transaction, can be declared with sincerity to have shocked the conscience and every sense of right entertained by this court, and caused this transaction to be viewed as a proceeding which cannot be countenanced, without the subversion of every rule of legal or moral equity; caused it to be regarded as tainted with fraud from its inception to its consummation; calls upon this court to declare, as it does declare, the sale and conveyance of the property now claimed by the bill as fraudulent and void, and to decree, as it does hereby decree, that the respondent, by proper assurances, release to the complainant all right, title, interest, and property held or claimed by them in and to the lands purported to be conveyed to them by the deed from the sheriff, referred to in the proceedings in this cause.

Decreed accordingly.[1]

[1] From this decree the defendant appealed to the supreme court of the United States.

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APPENDIX.

THE RULES AND ORDERS OF THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF ARKANSAS.

I. MARCH TERM, MARCH 30, 1839.

THAT forms of mesne process, except the style and forms, and modes of proceeding, and the practice in suits at common law in this court, shall be the same as are now used in the circuit courts in this State, except so far as they have been otherwise provided for by acts of congress, subject, however, to such alterations and additions, as this court shall, in its discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rules to prescribe to this court concerning the same.

II. MARCH TERM, MARCH 30, 1839.

Ordered, that writs of execution, and other final process issued on judgments and decrees rendered in this court, and the proceedings thereupon, shall be the same, except their style, as are now used in the courts of this State.

III. MARCH TERM, JUNE 3, 1839.

On motion, it is ordered by the court, that William Field be, and he is hereby, appointed clerk of the circuit court of the United States for the District of Arkansas.

IV. MARCH TERM, JUNE 19, 1839.

Writs of execution upon final judgments, orders, or decrees, in equity, rendered in this court, shall issue in the same manner, and the proceedings thereon shall be the same in all respects, except their style, as is

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prescribed by chapter 60 of the Revised Statutes of this State, with the exceptions hereinafter mentioned: And the provisions of said chapter 60, so far as applicable to this court, and except as hereinafter specially provided, are hereby adopted as the rules governing executions from this court.

V. MARCH TERM, JUNE 19, 1839.

The following sections, and parts of sections, of said chapter 60, are declared to be excepted out of the above rule, and not to be in force as to proceedings in this court, namely: Sections 6, 7, 8, 9, 10, 17, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, and 47. (See Rule 17.)

VI. MARCH TERM, JUNE 19, 1839.

Executions upon judgments or decrees of this court, shall bear *teste* on the day of issuing thereof; and shall be made returnable to the first Monday in any month, so that there be not less than four calendar months, and not more than six calendar months, between the *teste* and return day of such writ.

VII. MARCH TERM, JUNE 19, 1839.

Executions against the estate and body of the defendant, shall be in the form, or of the effect following: —

United States of America, }
District of Arkansas. }

The President of the United States, to the Marshal of the Arkansas District — Greeting: —

Whereas A. B. on the ——— day of ———, A. D. 18 , in our circuit court of the United States for the District of Arkansas, hath recovered against C. D. for his debt, (or damages, as the case may be,) the sum of ——— dollars, which were adjudged to him for his debt and damages, (or damages alone,) together with the sum of ——— dollars, for his costs sustained the suit: You are, therefore, commanded, that of the goods and chattels, lands and tenements, of the said C. D., you cause to be made, the debt and damages, (or damages alone,) aforesaid, together with the costs aforesaid, so that you have the same before the clerk of our said circuit court, at his office in the city of Little Rock, on the first Monday of ——— next, to be paid over to the said plaintiff; and for want of sufficient goods and chattels, and real estate, whereon to levy and make the said debt, damages, and costs, you are commanded to take

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the said C. D. if he be found in your district, and him safely keep, so that you have his body before our said court, on the first day of the next term thereof, to satisfy the debt, damages, (or damages alone,) and costs aforesaid, and make due return of this writ to the said clerk on the first Monday of ——— next, and then and there certify how you have executed this writ. In testimony, &c.

And writs of *fieri facias* shall be in the form and effect above prescribed, omitting so much as has relation to the taking the body of the defendant in execution, and on such writs it shall not be lawful to take the body of the defendant.

VIII. MARCH TERM, JUNE 19, 1839.

No forthcoming bond, or delivery bond shall be taken or allowed for any property levied on by virtue of any execution from this court. (See Rule 17.)

IX. MARCH TERM, JUNE 19, 1839.

When any personal property, other than slaves, shall be levied on and taken by virtue of any execution issued from this court, the property so levied on may be sold by the officer seizing the same, at any public place in the county, where the same is levied on, and at such time as to enable the said officer to make his returns in proper time; but no such property shall be sold until the officer making the sale shall have given, at least, ten days' notice of the time and place of sale, and property to be sold, by at least three advertisements, put up in public places in the township in which the sale is to be made. (See Rule 17.)

X. MARCH TERM, JUNE 19, 1839.

When real estate and slaves, or either shall be taken by virtue of any execution issued from this court, it shall be the duty of the officer levying on the same, to expose the same to sale at the court house door of the county, where the real estate is situate, or the slaves are seized, at such time as to enable him to make his return in due season, having previously given twenty days' notice of the time and place of sale, by at least three advertisements put up in the most public places in the said county; one of which shall be put up at the court house door of said county; and if there be a newspaper published in said county, such notice shall be given by one advertisement in said newspaper, and by one advertisement put up at said court house door. (See Rule 17.)

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XI. MARCH TERM, JUNE 20, 1839.

Ordered, That affidavits required in the progress of any civil cause in this court to pleas, motions for continuance, and to all other steps in a cause to which an affidavit may be necessary, such affidavits may be taken before any judge, or justice of the peace, or master in chancery, of the State of Arkansas, and shall have the same effect and validity as if subscribed in open court.

XII. MARCH TERM, JUNE 26, 1839.

The clerk shall require of all non-residents of this district an indorser for costs; the following form upon the declaration, petition, or bill of complaint, may be substantially pursued:—I, (A. B.) acknowledge myself security for all costs for which the plaintiff may be liable in this suit.

XIII. MARCH TERM, JUNE 26, 1839.

It shall be lawful for the clerk of this court, in vacation, to make and enter rules and issue commissions for taking the depositions of witnesses to be read as evidence in any suit pending, or which may hereafter be pending in this court, upon the application of either party interested.

XIV. MARCH TERM, AUGUST 15, 1840.

If a complainant, or any person for him, should file with his bill an affidavit that part, or all, of the defendants are non-residents of the State, the court, or the clerk thereof in vacation, shall make an order directed to the non-residents, notifying them of the commencement of the suit, and stating fully the substance of the allegations and prayer of the bill or petition, requiring them to appear on a day therein named, allowing sufficient time for publication, or that the bill or petition will be taken as answered. (See Rules Supreme Court U. S., Jan. Term, 1842.)[1]

XV. MARCH TERM, JUNE 25, 1841.

It is ordered by the court, That the provisions of the 93d, 94th, 95th, 96th, and 97th sections, under the head of "Practice at Law," relating to discovery in any suits or proceedings in the Revised Statutes of Arkan-

[1] This rule is obsolete. Jurisdiction cannot be acquired by publication.

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sas, shall not hereafter be applicable or extend to any suits or proceedings at law in the circuit or district courts, within and for the District of Arkansas.

XVI. MARCH TERM, JULY 19, 1841.

Ordered, That from this time either party to any suit pending in this court shall be at liberty to take depositions, either in the manner prescribed by the laws of this State, or in conformity to the several acts of congress in that regard, as well before as after any issue joined in such suit; and depositions taken at any time after suit commenced, either under the laws of the United States, or by rule entered in open court or in vacation, may be used on the final trial or hearing of such suit, in the same manner as though such depositions had been taken after issue joined.

XVII. MARCH TERM, OCTOBER 6, 1842.

Writs of execution and other final process issued, and hereafter to be issued, on judgments and decrees, rendered in this court, and the proceedings thereupon, shall be the same, except their style, as are now used in the courts of this State. (See acts of [congress] 19th May, 1828, and of August 1st, 1842.) (See Rules 6 and 19.)

XVIII. MARCH TERM, OCTOBER 10, 1842.

When real estate and slaves, or either, shall be taken by virtue of any execution issued from this court, it shall be the duty of the officer levying on the same, to expose the same to sale at the court house door of the county where the real estate is situate, or the slaves are seized, at such time as to enable him to make his return in due season, having previously given twenty days' notice of the time and place of sale by at least three advertisements put up in the most public places in the said county, one of which shall be put up at the court house door of said county; and if there be a newspaper published in said county, such notice shall be given by one advertisement in said newspaper, and one advertisement put up at the court house door. (See Rule 17.)

XIX. MARCH TERM, APRIL 11, 1843.

Executions upon judgments or decrees of this court, shall bear *teste* on the day of issuing thereof, and shall be made returnable to the first Monday in any month, so that there be not less than four calendar months, and not more than six calendar months, between the *teste* and return day of such writs. (See Rule 17.)

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XX. MARCH TERM, APRIL 30, 1845.

Not more than two constables are to be in attendance on the court, unless the presence of a greater number shall be required by the court or a judge thereof, and no allowance or compensation will be made to constables, except for the days they shall actually attend.

XXI. MARCH TERM, APRIL 30, 1845.

There shall be employed a servant or messenger during the term, whose duty it shall be, under the superintendence of the marshal, to clean and prepare the court room, to supply water, and make fires, and to perform all the several offices incident to his situation, and which are requisite for the business and accommodation of the court: and for the services of such messenger or servant, the sum of one dollar *per diem*, and no more shall be allowed during the time he shall be actually employed.

XXII. MARCH TERM, APRIL 30, 1845.

In every suit or prosecution in which a subpœna or any other process shall be required, there shall be inserted in such subpœna or process, the names of all the witnesses or parties as the case may be, who are residents within the district, and on whom service of such subpœna or other process may be requisite and proper.

XXIII. MARCH TERM, APRIL 30, 1845.

In no instance shall blank subpœnas be issued by the clerk, unless the same shall be ordered by the court, or by a judge thereof, or shall be particularly directed in cases of the United States by the district attorney.

XXIV. MARCH TERM, APRIL 30, 1845.

One person in addition to the officer who may have a prisoner in custody, is in ordinary cases to be deemed a sufficient guard for each prisoner. No allowance will, therefore, be made for a greater number, unless they shall be ordered by the court, or by a judge thereof, or unless in the absence of such an order, it shall be satisfactorily shown that the circumstances of the particular case rendered such additional guard necessary. Every person regularly performing the duties of a guard for prisoners, shall, when his expenses shall be paid by the United States, be allowed the sum of one dollar and twenty-five cents *per diem*, and

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when his expenses shall be borne by himself, the sum of two dollars *per diem*, and no more.

XXV. MARCH TERM, APRIL 30, 1845.

In cases of criminal prosecutions on behalf of the United States, in which it shall be shown that the accused is wholly unable to pay for the issuing, or the execution of the process necessary for his or her defence, it shall be the duty of the clerk to issue, and of the marshal to execute such process, and the court will make to those officers the proper allowances for performing the duties hereby prescribed to them.

XXVI. MARCH TERM, APRIL 30, 1845.

In all accounts and claims against the United States, which shall be presented for the sanction of the court, the specific services alleged to have been rendered, the names of the persons by whom they have been performed, the dates of those services, and the occasions on which they may have been performed, and whether by order of the court, or by a judge thereof, or at the instance of the attorney for the United States, or of a party in court, together with all other matters necessary to a clear understanding of those claims, must be given in distinct and separate items, and no claim will be allowed, unless it shall be sustained by a formal and legal voucher.

XXVII. MARCH TERM, APRIL 30, 1845.

That sections 86, 87, 90, 91, and 92 of chapter 4, of the Revised Statutes of Arkansas, under the title Administration, shall not be in force as rules of practice in this court, nor binding on parties litigant therein.

XXVIII. MARCH TERM, APRIL 30, 1845.

The court being of opinion that it was the policy of the act of congress, passed on the 19th of May, 1828, entitled "An Act further to regulate processes in the courts of the United States," and of an act of congress passed on the 1st day of August, 1842, entitled "An Act to extend the provisions of an act entitled 'An Act to regulate processes in the courts of the United States, passed the 19th day of May, 1828,'" to establish substantial and practical uniformity between the operation of final process sued out of the courts of the United States, within the several States mentioned in the acts aforesaid, and the operation of the like process sued out of the courts of the said States, doth order that

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executions and other final process upon judgments and decrees of this court, shall bear *teste* on the day they are issued, and be made returnable either on the second Monday of October, or on the second Monday of April thereafter, at the election of the party suing out such process. And in all cases in this court, in which executions regular and legal in other respects have been or shall be, from misapprehension of the law, made returnable at periods or intervals different from those herein prescribed, such executions will not be regarded as void, but the same may be amended so as to render them conformable to this rule and the requisites of the law. So much of any rule of this court as is in conflict with the rule here laid down, is hereby rescinded.

XXIX. MARCH TERM, APRIL 30, 1845.

It is ordered by the court, that the clerk of this court cause the rules prescribed at this term to be printed, and that he furnish a copy thereof to each member of the bar of this court.

XXX. APRIL TERM, 1855.

Ordered, that all depositions taken in suits in equity, shall be opened and published by the clerk on the first rule day after the expiration of the time prescribed for taking the same; but if not then received, or deposited in the clerk's office, then on the first rule day after the same shall have been received or deposited as aforesaid; and all exceptions thereto, other than such as relate to the competency of the deponent, or the competency or relevancy of the testimony shall be taken and filed on or before the next succeeding rule day after the publication of any deposition as aforesaid; and if not so taken, all objections or exceptions to every deposition published as aforesaid, except such as relate to the competency of the witness, or the competency or relevancy of the testimony as aforesaid, shall at the trial of the cause be regarded as waived by the party failing to object or except thereto as aforesaid; and when no rule day shall intervene between the time of receiving, or depositing any deposition in the clerk's office, prior to the commencement of the term of the court, all depositions received or deposited as aforesaid, shall in like manner be opened and published, on the first day of the term, and such objections or exceptions be taken within three days thereafter, or otherwise at the hearing be regarded as waived; and all depositions received or deposited as aforesaid, during the session of the court, shall be published as aforesaid two days at least, and such objections and exceptions thereto as aforesaid, be taken and filed, one day at least,

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before the hearing of the cause, if received or deposited in time therefor, otherwise, at the hearing the same shall be regarded as waived. But no party failing to open and publish depositions as aforesaid shall be allowed to take additional testimony, or have any benefit at the hearing of any objection or exception to any deposition taken on behalf of any adverse party, except such as relate to the competency of the witness, or the competency or relevancy of the testimony.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1842.

PRELIMINARY REGULATIONS.

I.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

II.

The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings which are grantable of course and applied for, or had by the parties or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III.

Any judge of the circuit court, as well in vacation as in term, may, at chambers or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given

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to the adverse party or his solicitor to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

IV.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office on the day when they are made and directed; which book shall be open, at all office hours, to the free inspection of the parties in any suit in equity and their solicitors; and, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear, and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by any judge of the court, upon special cause shown.

VI.

All motions for rules or orders, and other proceedings which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on

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which the motion is made. And if the adverse party or his solicitor shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

VII.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

IX.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or

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order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process, as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

SERVICE OF PROCESS.

XI.

No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

XII.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendants a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpœna against all the defendants.

XIII.

The service of all subpœnas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

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XIV.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

XVI.

Upon the return of the subpœna, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

XVII.

The appearance day of the defendant shall be the rule day, to which the subpœna is made returnable; provided, he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day, when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro*

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confesso; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

XIX.

When the bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

XX.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of ——. A. B., of ——, and a citizen of the State of ——, brings this, his bill, against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says, that, etc."

XXI.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part, which is usually called the common confederacy clause of the bill,

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averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for.

XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason, why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons, who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXIII.

The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

XXIV.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instruc-

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tions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XXV.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State Court of Chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence, or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report, that the bill is not scandalous or impertinent, the defendant shall be entitled to all costs occasioned by the reference.

XXVII.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify, that further time is necessary for him to complete the examination.

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AMENDMENTS OF BILLS.

XXVIII.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course), after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended, and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

XXIX.

After an answer, or plea, or demurrer is put in, and before replication, the defendant may, upon motion or petition, without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed, as if no application for any amendment had been made.

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DEMURRERS AND PLEAS.

XXXI.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXXII.

The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period, as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

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XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXVI.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXVII.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

XXXVIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

XXXIX.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters, than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters, set

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forth in the bill to avoid or repel the bar or defence. Thus, for example, a *bonâ fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XL.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.[1]

XLI.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories, which each defendant is required to answer, shall be specified in a note at the foot of the bill; in the form or to the effect following: that is to say,—"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

XLII.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

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[1] Rescinded. See rule 93, adopted at December Term, 1850.

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XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say, —

"1. Whether, &c.

"2. Whether, &c."

XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLV.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

XLVI.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

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PARTIES TO BILLS.

XLVII.

In all cases where it shall appear to the court, that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

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LI.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

LII.

Where the defendant shall, by his answer, suggest, that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled, as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

LIII.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

LIV.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the

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cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

LV.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LVII.

Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the

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court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

LVIII.

It shall not be necessary, in any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

LIX.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

LX.

After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require, that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

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EXCEPTIONS TO ANSWERS

LXI.

After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify, that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the excep-

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tions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms, as the court or judge may direct.

LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

LXVI.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

LXVII.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If

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the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

(DECEMBER TERM, 1854).

Ordered, That the sixty-seventh rule governing equity practice, be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said court, general power to name commissioners to take testimony in like manner that the court or judge thereof can now do, by the said sixty-seventh rule.

LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

LXIX.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

LXX.

After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or

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infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

LXXI.

The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance, thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

CROSS-BILL.

LXXII.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

LXXIII.

Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court, what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

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LXXIV.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time, when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

LXXV.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

LXXVI.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

LXXVII.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before

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him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of congress, or otherwise as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXVIII.

Witnesses, who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall in its discretion deem it advisable.

LXXIX.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

LXXX.

All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

LXXXI.

The master shall be at liberty to examine any creditor or other person

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coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

LXXXII.

The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

LXXXIII.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month, from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or if not, then at the next sitting of the court, which shall be held thereafter by adjournment or otherwise.

LXXXIV.

And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party,

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and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

LXXXV.

Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court, or a judge thereof, upon petition, without the form or expense of a rehearing.

LXXXVI.

In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows:— "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely: [Here insert the decree or order.]

GUARDIANS AND *PROCHEIN AMIS.*

LXXXVII.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.

LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel; and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing

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shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

LXXXIX.

The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

XC.

In all cases where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

XCI.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

XCII.

These rules shall take effect, and be of force, in all the circuit courts of the United States, from and after the first day of August next; but they may be previously adopted by any circuit court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the rules of practice for the circuit courts in equity suits, promulgated and prescribed by this court in March, 1822, shall henceforth cease, and be of no further force or effect. And the clerk of this court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

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(DECEMBER TERM, 1850).

XCIII.

The fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

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The fact that the naked legal title to property is vested in a creditor, the beneficial interest to which is in the debtor, who has deceased insolvent, gives him no advantage over the other creditors, and he must share equally with them. *Moore* v. *Searcy*, 52.

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1. A direct and positive interest in the event of the suit, disqualifies a witness to testify. *Reece* v. *Johnson*, 82.
2. See DEPOSITION; EVIDENCE.

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See ACTION, 1.

WRIT OF ERROR.

1. A writ of error does not lie on an allowance against an executor or administrator. *Campbell* v. *Strong*, 195.
2. Where a new jurisdiction, unknown to the common law, is created, a writ of error will not, and a *certiorari* will, lie to it. *Ib.*
3. If a term intervenes between the issuing of the writ of error and filing the record and writ, the plaintiff in error will be non-prossed. *Janes* v. *May*, 288.
4. See APPEAL.

WRIT OF ERROR CORAM NOBIS.

1. A writ of error *coram nobis* may be brought in the same court where the judgment was given, when the error assigned is not for any fault in the court, but for some defect in the execution of the process, or for some default of the ministerial officers. *Phillips* v. *Russell*, 62.
2. It lies to set aside an erroneous execution. *Ib.*

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