

THE CHANCELLOR :

If the case is to be governed by the principles applicable to the relation of factor and principal, I am satisfied the complainants cannot succeed, as the lien resulting by operation of law, from that relation, cannot be extended to property situated as this was, at the period of the death of Mr. Bowie. If at that time the property had been in the hands of these parties, I incline to think, that, independently of contract, and looking alone to the rights resulting from the usages of trade, the complainants would have been entitled to retain it, not only for the charges and advances connected with the disposition of this identical property, but for the general balance due the complainants, growing out of other dealings of the like nature. *Story on Agency, sec. 354.*

But as this property was not, either actually or constructively, in possession of these complainants, when the testator died, the lien founded upon the relation of the parties as factor and principal, cannot be maintained ; that lien being merely a right to *retain* a thing, of which the party retaining, must of course be in possession, it being impossible to predicate the right to retain that of which the party has not the actual or constructive possession. *Story, sec. 361.*

The plaintiffs' title to relief, then, must depend, not upon the mere operation of law, independently of contract, but upon the contract of the parties, as shown by the letters, and the facts appearing by the pleadings.

It is very evident to me, from a perusal of these, that Mr. Bowie did not ask or desire, nor did the complainants intend to make the advances in cash, and accept his drafts upon his general credit—on the contrary, it is perfectly manifest, that all the transactions between them, were founded upon the express promise on the part of Mr. Bowie, to send them his produce, then in his hands, or growing, or to become available in 1848. There is nothing in his letters from which it is possible to come to a different conclusion, and I am therefore entirely satisfied, if I refuse the relief asked by this bill, I defeat the clear design and intention of the contracting parties.