tract, and that the tender was made, in consequence of an arrangement by which Saunders was to advance the whole purchase-money, and to receive half the land. But it was unimportant to them, whose money was tendered, or how it was obtained. Of this circumstance, therefore, they cannot avail themselves. The plaintiff insists, that the contract between the defendants and Saunders was a fraud on him, because he had a right to consider Saunders as his friend and agent. But the tender of the purchase-money was the only service he was to expect from Saunders, and this service has been performed. He is precisely in the same situation, as if the contract between Saunders and the defendants had never been made.

It has been also contended, that the concealment of the survey made by Joseph Gratz, in October 1807, and the demand of the whole amount of his *541] *notes, after a knowledge of the deficiency in the quantity of land, were fraudulent on the part of the defendants. Mr. Brashier knew that the survey had been made, and had reason to believe, that it disclosed a deficiency in the quantity of land. He has sustained no injury, by the omission to make a full communication to him. It is certainly true, that after the knowledge of this deficiency, Mr. Gratz, in his lifetime, and his heirs, since his decease, ought not to have demanded the full amount of his notes. The court, therefore, allows them no advantage from their repeated offers to convey, on receiving the whole amount of the notes; but considers the case as if no such offers had ever been made.

This, then, is a demand for a specific performance, after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made, after a great change, both in the title, and in the value, of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction. In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law.

Decree affirmed.

---

*542] *United States *v.* Daniel.

Division of opinion.

A division of the judges of the circuit court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291.

This was an indictment in the Circuit Court of South Carolina, against Lewis Daniel, charging him with having knowledge of the actual commission of the crime of wilful murder, committed on the high sea, by John Furlong; and with unlawfully, wickedly and maliciously, concealing the same, &c.

The indictment set forth, at large, the indictment and conviction of John Furlong, for wilful murder on the high seas, and then charged Lewis Daniel with the knowledge and concealment of that murder, and with not having disclosed the same, in the words of the act of congress. The prisoner was tried on the plea of not guilty. It was proved, that some of the persons present on board, when the principal felony was committed, had, in conversation, stated the fact of the murder to the defendant, who advised

them to escape, promised secrecy, offered them the means of escape, and actually assisted one of them in escaping; but there was no evidence that the defendant knew of any fact, which would have constituted legal evidence on the trial of the principal felon. The judge charged the jury, that the concealment, under the circumstances, was sufficient to convict the defendant, and the jury found a verdict *of guilty. The defendant then moved [*543
in arrest of judgment, and for a new trial, on the following grounds. That a person is not liable to be indicted and convicted under the 5th section of the act of April 1790, c. 36, for the punishment of certain crimes against the United States, unless he has such knowledge of the felony as will enable him to testify in court, at the trial of the principal felon, and particularly, that in this case, the evidence did not prove the defendant guilty of misprision of murder, according to the terms of the said act. The motion was also supported by an alleged misdirection of the court to the jury. The judges being divided in opinion on this motion, it was ordered to be certified to this court.

March 6th. *Hunt*, for the prisoner, argued: 1. That to constitute the offence of misprision of felony, under the 5th section of the crimes act of 1790, c. 36, the accused must be proved to have had such a direct and positive knowledge of the actual commission of the felony, as would be legal evidence on the trial of the principal felon. Here, the offence is, what, in law, is termed negative misprision. 4 Bl. Com. c. 9; 3 Inst. 140. All the definitions of misprision imply such a personal knowledge of the fact as would be legal evidence. 4 Jac. Law Dict. 295; Staundf. P. C. lib. 1, c. 19; Hawk. P. C. c. 20, § 4; 1 Hale's P. C. 375; Termes de la Ley 291; 3 Inst. 36; 1 Chitty's Crim. Law, 2. But here there was no such knowledge; and if the court, upon a review of the whole case, is satisfied that the *defendant has not been found guilty of any legal offence, the judg- [*544
ment will be arrested. 1 East's P. C. 146; 1 Chitty's Crim. Law 663; 1 Hargr. St. Tr. 290. In order to bring a case within the intention of a statute, its language must include the case; it is not sufficient, that it is within the reason or mischief, or that the crime is of equal atrocity, and of an analogous character. *United States* v. *Wiltberger*, 5 Wheat. 96. The prisoner could not have been a witness against the principal felon. The law never credits the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: and it also requires his personal attendance in court, that he may be examined and cross-examined by the different parties. The few instances in which this rule has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as, from their very nature, are incapable of positive and direct proof.

2. This court has decided, that the refusal of the circuit court to grant a new trial, is not matter for which a writ of error lies. But in those cases the judges of the court below were unanimous in refusing the new trial: here a division of opinions is certified, and this court is bound to decide, by the express words of the judiciary act of 1802, c. 291.

The *Attorney-General*, contrà, insisted: 1. That there was no ground for arresting the judgment, or *granting a new trial. The evidence [*545
brought the case completely within the crimes act of 1790, c. 36.

The object of the act was the prompt detection and punishment of the crimes enumerated. The degree of knowledge required to bring a party within the misprision described, is such as is sufficient to justify an arrest; and well-founded suspicion is sufficient for that purpose. Chit. Cr. Law 10, 27; 4 Bl. Com. 290.

2. The motion in the court below, in arrest of judgment, combined with a motion for a new trial, is novel and unprecedented. But this combination cannot vary the legal character of these two motions, which is entirely distinct. A motion in arrest of judgment must be confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous: therefore, no defect in evidence, or improper proceedings at the trial, can be urged as a ground for arresting the judgment. 4 Chit. Cr. Law 539. The exceptions in arrest of judgment are to the indictment. 4 Bl. Com. 375. On the other hand, a motion for a new trial is for causes other than defects in the pleadings; and the circumstance that the verdict was obtained, because the pleadings were defective, will not be permitted to operate on this motion. 1 Chit. Cr. Law 535. On inspection of the record in this case, it will be found, that the only grounds assigned in support of the joint motion are such as are entirely inapplicable to the motion for a new trial. These grounds are the misdirection of *the judge, and that the verdict was obtained on insufficient evidence. *546] The court will, therefore, throw out of view, the motion to arrest the judgment, and consider this as a motion for a new trial, on which the judges of the court below were divided in opinion. And if so, there is no question before this court: since it has repeatedly decided, that the granting or refusal of a new trial, is mere matter of discretion in the court below; and hence the refusal of a new trial, even though the grounds on which the motion was founded are spread on the record, is no sufficient cause for a writ of error from this court.(a) In a civil case, if the court below be divided on such a motion, the motion falls. Nor is it otherwise in a criminal case. This court has no appellate criminal jurisdiction. It is only by virtue of the 6th section of the judiciary act of 1802, that a criminal case can ever be brought to this court. That section was not, however, made exclusively for criminal cases. The provision is general: and it is only by reason of its generality, that a question in a criminal case can ever reach this court. But being general, it must have the same construction in all cases. If, then, in a civil case, a division of the judges on the mere discretionary question of a new trial, would bring no question here; neither will it, in a criminal case.

March 15th, 1821. MARSHALL, Ch. J., delivered the opinion of the court. —*The indictment in this case is certainly sufficient to sustain a judg- *547] ment, according to the verdict, and all the other proceedings are regular. There is, therefore, no cause for arresting the judgment.

The motion for a new has never before been brought to this court on a division of opinion in the circuit court. It had been decided, that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seemed entitled to great weight, when urged against

(a) 2 Wheat. Dig. tit. Practice, XV, a.

determining such a motion in this court, in a case where the judges at the circuits were divided on it. When we considered the motives which must have operated with the legislature for introducing this clause into the judiciary act of 1802, we were satisfied, that it could not be intended to apply to motions for a new trial.

Previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the supreme court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the supreme court should attend, and a division should take place, the cause was continued until the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case, that opinion should be the judgment of the court. But the act of 1802, made the judges of the supreme court stationary, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system, *was attended with this difficulty. The court being always composed of the same two judges, any division of [*548 opinion would remain, and the question would continue unsettled. To remedy this inconvenience, the clause under consideration was introduced. Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings in the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands. There is nothing, then, in the reason of the provision which would apply it to this case.

Although the words of the act direct, generally, "that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen shall" be certified, &c., yet it is apparent, that the question must be one which arises in a cause depending before the court, relative to a proceeding belonging to the cause. The first proviso is, "that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had, without prejudice to the merits."

It was also contended, that under the second proviso, Lewis Daniel ought to be discharged; that proviso is in these words: "And provided also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said *court are divided in opinion upon the [*549 question touching the said imprisonment or punishment." A motion for a new trial is not "the question touching the said imprisonment or punishment." That question must arise on the law, as applicable to the case; and is not, it would seem, to be referred to this court. The proviso, if applicable to such a case as this, would direct the circuit court not to certify their division of opinion to this court, but, in consequence of that division, to enter a judgment for the defendant. This court can only decide the question referred to it, and certify its opinion upon that question to the circuit court, who will then determine what judgment it is proper to render.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record; and on the points on which the judges in the circuit court were

divided in opinion, and was argued by counsel: On consideration whereof this court is of opinion, that there is no error in the record and proceedings of the circuit court, for which judgment ought to be arrested. And this court is further of opinion, that a division of the judges of the circuit court, on a motion for a new trial, is not one of those divisions of opinion which is to be certified to this court for its decision, under the act, entitled, "an act to amend the judicial system of the United States." All which is ordered to be certified to the United States court for the sixth circuit and district of South Carolina.

---

*550] *KERR *et al. v.* WATTS.

Decree.—Bonâ fide purchaser.

The decision of this court, in Massie *v.* Watts, 6 Cranch 148, revised and confirmed.

Who are necessary parties in equity.

The rule applied in equity to the relief of *bonâ fide* purchasers, without notice, is not applicable to the case of purchasers of military land-warrants, under the laws of Virginia.

Such purchasers are considered as affected with notice, by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the entry; so that purchases under conflicting entries are considered as purchasing under distinct rights; in which case, the rule as to innocent purchasers, does not apply.

The principle, that only parties or privies, or purchasers *pendente lite*, are bound by a decree in equity, how applied to this case.

The surveys actually made on the military land-warrants in Virginia, have not the force of judicial acts, or of acts done by the deputations of officers, as general agents of the continental officers.

APPEAL from the Circuit Court of Ohio.

Ferdinando O'Neal was owner of a Virginia military warrant for 4000 acres of land, dated the 17th of July 1783, and employed Nathaniel Massie, a deputy-surveyor, to locate it, and to survey and return the plats. John Watts purchased the right of O'Neal, and on the 7th of January 1801, paid Massie 50*l.*, in full satisfaction for locating and surveying the warrant. On the 3d of August 1787, Massie made an entry on part of O'Neal's warrant
*551] for 1000 acres. On *the same day, an entry had been made for 1000 acres for Robert Powell, which was purchased by Massie.

On the 27th of January 1795, Massie made an entry in his own name, for 2366 acres, and the bill filed in the court below, by the respondent, Watts, against the appellants, Kerr and others, charged, that on the 26th of April 1796, Massie fraudulently made a survey for O'Neal, for 530 acres, purporting to be made upon his said entry of 1000 acres; but, in fact, on different land, having fraudulently appropriated to himself the land covered by O'Neal's entry, by surveys made on Powell's and his own entries, having purchased Powell's warrant and entry, before the surveys were made. The bill further stated, that Massie had obtained grants upon his survey.

Watts commenced a suit in chancery against Massie, in the state court of Kentucky, claiming a conveyance of the legal title, and proceeded to a final hearing upon the merits, in the circuit court of Kentucky, to which it had been removed; which last court, in the November term 1807, made an interlocutory decree, in favor of Watts, and directed the proper surveyor to lay off the several entries, in the manner pointed out in that decree, and to report to the court, in order to a final decree in the premises. The cause was finally