*James Findlay, William Lytle, Charles Vattier, Robert Ritchie and others, citizens of Ohio, Appellants, *v.* Thomas S. Hinde and Belinda, his wife, citizens of Kentucky, Appellees.

Jurisdiction of equity.—Affidavit of loss of deed.—Discovery.—Parties. Joint appeal.

If, in case where the loss of a deed, or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer; yet, if the party charged by the bill fail to demur for that cause, but answer over, or permit the bill to be taken for confessed, by default, against him; it seems, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. p. 244.

If a deed has not been proved, acknowledged and recorded, and would, therefore, be insufficient against subsequent purchasers, without notice; parties who claim under such deed, have a right to come into a court of equity, for a discovery, upon the ground of notice; and if notice be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. p. 245.

Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the estate; and upon a receipt of the purchase-money, binding the party to convey the same; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. p. 245.

The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the the defendants; all the defendants appealed together to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did in the relation of vendors and warrantors, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened. p. 247.

Appeal from the Circuit Court of Ohio. The appellees filed their bill in the circuit court of the United States for the district of Ohio, praying a discovery; and that the defendants might convey to the complainants such a title as they have acquired, to a lot of ground in the town of Cincinnati, and deliver up the possession acquired by them; and also that they account for the profits; and for general relief.

The title set up by the complainants was alleged to be derived from a receipt given by Abraham Garrison, in whom the title to the lot was then vested, which receipt was in the following terms:

"Received, Cincinnati, 10th September 1799, of Wm. and *Michael Jones, fifty pounds, thirteen shillings and three pence, in part of a lot [*242 opposite Mr. Conn's, in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for the same, on or before the twentieth day this instant.

"Test.—Jacob Awl. (Signed,) Abraham Garrison."

And from a deed, executed on the following day, by which Abraham Garrison, for the consideration of $250, conveyed the lot to William and Michael Jones, which deed was said to have been lost by time and accident. The lot was, by subsequent conveyances, claimed to be vested in the complainants. No affidavit was attached to the bill, showing that the deed was not in the complainant's possession, or setting forth that it had been so lost

or destroyed. To this bill the defendants, James Findlay, Charles Vattier, William Lytle and Robert Ritchie answered separately; and a decree was entered against the other defendants for costs, the bill having been taken *pro confesso* against them, they not having answered. After hearing, the court gave a decree against the defendants who had answered; and all the defendants appealed to this court.

The bill, answer, exhibits and depositions showed a case containing many controverted facts and allegations; and the questions of law arising upon the same, were elaborately argued by *Webster* and *Caswell*, for the appellants; and by *Doddridge* and *Jones*, for the appellees.

The decision of this court, by which the decree of the circuit court of Ohio was reversed, and the cause remanded for further proceedings, was upon two questions of chancery practice; which were raised by the counsel for the appellants.

1. The court have decreed relief to the complainants, on the bare suggestion that the deeds once existed, which are lost, when no affidavit is attached to the bill, showing that the deeds were not in complainant's possession; and without such an affidavit, a court of chancery has no jurisdiction of the cause. The appellants cited the following cases, to show the error of this proceeding: Mitford's Pl. 52, 112; 2 P. Wms. 540–1; 3 Atk. 17, 132; 4 Johns. Ch. 297.

2. The complainants not having shown a deed from Garrison to the Jones's, must rely upon the receipt from Garrison to the Jones's, as an equitable title; and if they claim that equitable right, they, of course, must make Garrison, the elder, and the Jones's, parties of the suit. Upon this point, the counsel for the appellants cited *Simms* v. *Guthrie and others*, 9 Cranch 25.

No opinion having been expressed by the court, upon the merits of the cause, or upon the general questions presented by *the counsel; it *243] is not deemed proper to state the arguments of counsel, in this report.

Trimble, Justice, delivered the opinion of the court.—This is a contest for lot No. 86, in the city of Cincinnati. The appellees, who were complainants in the court below, claim the lot, in right of the complainant, Belinda, as half-sister and heir-in-law of Thomas Doyle, jr., only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seised in fee of the lot in controversy. The bill charges that on the 10th of September 1799, Abraham Garrison, being so seised, sold the lot to William and Michael Jones, brothers, and partners in trade, for the price of $250; part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey; which receipt is annexed, and made part of the bill: that a few days after, the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones's, for the lot; which deed has been lost by time and accident: that on the 26th of March 1800, William Jones, in behalf of the firm of William & Michael Jones, conveyed the lot to Thomas Doyle, jr.; and that although the intention of that conveyance was to pass the title of both partners, as is in equity good for that purpose; yet, as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants,

made a deed of confirmation to the complainant, Thomas S. Hinde. Various other matters are stated in the bill, as strengthening and confirming the equitable right of the complainants, in right of the said Belinda, as heir-at-law of Thomas Doyle, jr. The bill charges, that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, jr., and of the complainants, subsequently, obtained conveyances of the legal title, from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier and Robert Ritchie answered; and the bill was taken as confessed, against the other defendants, for want of answer. The answer put in issue, generally, the allegations of the bill, and the title of the complainants; but it is not at present necessary to say, whether they do, or do not, sufficiently deny notice. It appears, from the answers, and title deeds filed in the cause, that all the defendants, as well those who have not answered, as those who have, are interested in defending the title *of the lot—they standing in relation to each other as vendors, warrantors and vendees. At the hearing of [*244 the cause, in the circuit court, the defendants, Vattier and Ritchie, were decreed to convey to the complainants; and costs were decreed against all the defendants; and all of the defendants have joined in the appeal to this court.

The appellants contend, that the decree is erroneous, upon several grounds, which have been very elaborately argued at the bar. Among these, two preliminary objections have been raised to the regularity of the proceedings and decree; and if either of them be sustained, it will be unnecessary to consider the more important objections made to the decree, upon the merits of the conflicting claims of the parties. The first preliminary objection is, that no affidavit of the loss of the deed, from Garrison to the Jones's, "by time and accident," as charged in the bill, was made and annexed to the bill. In support of this objection, the counsel for the appellants have cited numerous authorities, to prove, that when the loss of a deed, or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made, and annexed to the bill; and that the absence of such affidavit, is good cause of demurrer to the bill. But no case has been cited, and none is recollected, in which it has been decided, that although the party charged, failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree. If such a decided case was shown, we should exceedingly doubt its reason and authority. The objection appears to us to be of that character, which ought to be made at the earliest practicable stage of the cause; and if not then made, should be considered as waived. Upon the face of the bill, there is an apparent jurisdiction, and the use of the affidavit is only to show, *primâ facie*, the truth of the matter. It is not like the cases in which there is an apparent want of equity, on the face of the bills, admitting all the facts stated to be true; nor like the case, in which it is apparent, on the face of the bill, that a court of equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will lie to the bill, yet none is necessary; inasmuch as there is either an absolute want of equity, or of jurisdiction.

We think, the supposed former existence and loss of the deed from Gar-

rison to the Jones's, was not the only ground for *appealing to a court of equity for relief. If the deed, as stated in the bill, were produced, it, in consequence of not being proved, or acknowledged, and recorded, would be insufficient, as a legal title, against subsequent purchasers, without notice. The complainants had a right to a discovery, upon the ground of notice, against the defendants; and if notice should be brought home to them, the complainants had a right to relief, by a decree quieting the title, &c. Again, if the complainants should fail, as we think they have failed, to prove, by competent and satisfactory evidence, the former existence, execution and contents of a formal deed of conveyance, sufficient to pass the legal title; we perceive no reason why they might not rely upon the executory contract contained in the receipt; and in this latter view of the case, the jurisdiction of the court of equity is unquestionable; and a general demurrer to the whole bill, for want of an affidavit, would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed, could have been maintained, for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree, is the want of proper parties. It has been argued, for the appellant, that Abraham Garrison was a necessary party; and that as the complainants claim through him, by an executory contract, he ought to have been before the court, before any decree could be made against the defendants; who also claim through and under him, by a subsequent conveyance of the legal title. The counsel for the appellees endeavored to overcome this objection, by arguing, that the deed from Garrison to the Jones's, conveyed the title from him to them; that the contract was, therefore, not executory, but executed between Garrison and the Jones's; and further, if it were not so, that there was no necessity for bringing Garrison before the court; he having conveyed away the legal title to the appellants; and that, therefore, no decree could be made against him. We have already said, the evidence in the cause does not establish a formally executed conveyance from Garrison to the Jones's, sufficient to convey the legal title; and that the complainants are, therefore, driven to rest their case upon the executory contract, contained in the receipt. Under this aspect of the case, was it necessary to make Garrison a party, to enable the court to pronounce a decree between the parties really before the court?

In the case of *Simms* v. *Guthrie*, 9 Cranch 25, this court declared the general rule to be, that, "regularly, the claimants who have an equitable title, ought to make those whose title they assert, as well as the person for whom they claim a *conveyance, parties to the suit." "And that for omitting so do so, an original bill may be dismissed." In the case of *Mallow and others* v. *Hinde*, 12 Wheat. 193, 196, the complainants claimed a survey in the military district in Ohio, by virtue of certain executory contracts with Elias Langham and the heirs of Sarah Beard; and sought, by their bill against Hinde, to obtain a conveyance from him of the legal title; which, it was alleged, he had fraudulently obtained, with notice of the complainants' prior equity. Langham and the heirs of Sarah Beard, were not made defendants; and for that cause the decree was reversed. There is no distinction, in principle, between that case and this. In that case, this court, in delivering its opinion, held the following language: "For the appellees, it is insisted, the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims;

*246]

and we are all of that opinion." "The complainants can derive no claim in equity to the survey, under or through Langham's executory contract with the Beards, unless these contracts be such as ought to be decreed against them, specifically, by a court of equity." "How can a court of equity decide, that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity, and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant Belinda's equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Jones's. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants, without first deciding, that the contract of Garrison ought to be specifically decreed. He might insist, the purchase-money had not been paid, or make various other defences. It is not true, that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him, the invalidity of his obligation to convey, and overrule such defence as he might make; and if the purchase-money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the legal title. We are all of opinion, that upon this second preliminary objection, the decree of the circuit court must be reversed.

A question of some difficulty presents itself, as to the extent of reversal. The decree of the circuit court directs the defendants, Ritchie and Vattier, to convey certain portions of *the lot of ground; and awards costs, generally, against all the defendants. There is no doubt, the defendants, [*247 against whom there is only a decree for costs, could not appeal alone, from the decree of costs. But the defendants below have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title; standing as they do, in the relation of vendors and warrantors, and vendees. Under these circumstances, we think the reversal should be general, as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course, because, so numerous, and so great, have been the irregularities in conducting the cause in the court below, from its commencement to its termination, by decree; that it seems impracticable that justice be done between the parties, without sending the cause back, as to all the parties; with directions, that the complainants have leave, if asked by them, to amend their bill, and make the proper parties; and to proceed *de novo* in the cause, from filing such amended bill.

This cause came on, &c.: On consideration whereof, it is the opinion of this court, that there is error in the proceedings and decree of said circuit court, in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon, it is adjudged, decreed and ordered, that the decree of said circuit court for the district of Ohio, in this cause, be and the same is hereby wholly reversed, annulled and set aside. And it is further ordered, that the cause

be remanded to the court from whence it came, with instructions to permit the complainants, upon application for that purpose, to amend their bill, and to make proper parties, and to proceed *de novo* in the cause, from the filing of such amended bill, as law and eqnity may require.

---

*248] *Old Grant, on the demise of Samuel Meredith, Plaintiff in error, *v.* John McKee, for the use of the Bank of the Commonweath of Kentucky.

Jurisdiction in error.

The court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error, under a patent, and which was recovered in ejectment, exceeded $2000, the title to a lot of ground, part of the whole tract, which was of less value than $500, was only involved in the case before the court.

Wickliffe moved to dismiss this cause, which was brought by a writ of error from the Circuit Court of the district of Kentucky, on the ground, that the property in controversy was not of the value of $2000; although the whole property owned by the lessor of the plaintiff in error, was under a patent, and which was recovered in the ejectment, is 1000 acres; yet, the title to a lot in the town of Falmouth, of less value than $500, held under the patent, is only involved in this case, and can only be affected by the decision of this court.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the court of the United States for the seventh circuit, and the district of Kentucky, awarding restitution of lot No. 108, in the town of Falmouth, to the defendants in error; who had been turned out of possession, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment, in favor of the plaintiff in error.

Previous to the institution of the suit, the town of Falmouth had been laid out, in pursuance of an act of assembly, and lot No. 108 had been sold and conveyed to George Hendricks. The law establishing the town of Falmouth, directed that the lots should be sold, subject to the condition of making certain improvements thereon, within seven years; on failure to do which, the trustees are empowered to enter on any lot not improved, and sell it again. These improvements were not made on lot No. 108.

The defendant in error moves to quash the writ of error, because the matter in controversy is not of the value of $2000. The motion is resisted, because the whole property which was recovered in the ejectment, may be considered as involved in this motion; since each tenant may move separately for an award of restitution, on the supposition, that the regularity of
*249] the proceeding, under the law by which the town *was established, and the lots sold, may be examined; on this motion, the plaintiff in error has brought that subject into view, and has discussed it fully. But the court is of opinion, that the question of title connot be considered on this writ of error. The town of Falmouth was separated from the tract out of which it was taken, and this lot was sold, before the suit was instituted; neither the trustees of the town, nor the proprietors of the lot, were parties