

*JAMES ELLIOTT, the younger, BENJAMIN ELLIOTT, ANDERSON TAYLOR, REUBEN PATER, PATSEY ELLIOTT and WILFORD LEPPELL, *v.* Leesees of WILLIAM PEIRSOL, LYDIA PEIRSOL, ANN NORTH, JANE NORTH, SOPHIA NORTH, ELIZABETH F. P. NORTH and WILLIAM NORTH, Defendants in error.

Evidence of pedigree.—Objection to evidence.—Deed of feme covert.—Acknowledgment.—Absence of jurisdiction.

A letter from a deceased member of a family, stating the pedigree of the family, and testified by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter, had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. p. 337.

The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted.¹ p. 337.

In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. p. 337.

Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, but it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection. p. 338.

The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. p. 338.

In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; in those states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes, must be pursued. p. 338.

By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. p. 339.

The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. p. 339.

*329] It is the construction of the act of 1810, that the clerks of the county courts of Kentucky have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. p. 339.

What the law requires to be done, and appear on record, can only be done, and made to appear by the record itself, or an exemplification of it; it is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which make the deed effectual to pass the estate of a *feme covert*. p. 340.

A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by

¹ Pedigree includes not only descent and relationship, but also the facts of birth, marriage and death, which may be established by general report in the family, proved by a surviving member. *American Life Ins. Co. v. Rosenagle*, 77 Penn. St. 507.

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which the land of the *feme* was intended to be conveyed, for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford county court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows, "Attest—J. McKenney, jun., Clerk."

"Woodford County, ss. :

September 11th, 1813.

"This deed from James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

John McKenney, jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defect of the certificate of the clerk to state the privy examination of the *feme* (which, by the law of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. p. 340.

If the court of a state had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. p. 340.

Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decisions be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal; they constitute no jurisdiction, and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. p. 340.

The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings.² p. 340.

The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the state. p. 341.

The clerk of Woodford county court has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. p. 344.

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ERROR to the Circuit Court of Kentucky. William Peirsol and Lydia Peirsol, his wife, Ann North, Jane North, Sophia North, Elizabeth F. P. North and *William North, citizens of Pennsylvania, heirs of Sarah G. Elliott, commenced their action of ejectment against James Elliott, [*330 the younger, and others, the plaintiffs in error, in the circuit court for the district of Kentucky, to recover the possession of 1200 acres of land, part of 2000 acres patented to Griffin Peart.

The plaintiffs proved, that, upon the division of the whole body among the heirs of Griffin Peart, the 1200 acres in contest were allotted to Sarah G. Peart, one of the heirs, and that she was seised thereof in severalty. Sarah G. Elliott, formerly Peart, she having intermarried with James Elliott, died about 1822, without issue; Francis Peart and Le Roy Peart, brothers of Sarah Elliott, died shortly before her, also without issue. The boundaries of the 1200 acres, and the possession by the defendants, were not controverted.

¹ Thompson v. Tolmie, 2 Pet. 157; Wilcox v. Jackson, 13 Id. 499; Hickey v. Stewart, 3 How. 750; Williamson v. Berry, 8 Id. 495; Boswell v. Otis, 9 Id. 336. A party against whom a judgment is relied on, may attack it for want of jurisdiction and show the non-exist-

ence of jurisdictional facts, by evidence *dehors* the record; and this, though the record recite their existence. Roderigas v. East River Savings Institution, 11 J. & Sp. 217; s. c. 76 N. Y. 316. But see, s. c. 63 Id. 460; The Rio Grande, 1 Woods 279.

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The plaintiffs below claimed the premises, as the heirs of Sarah G. Elliott, formerly Sarah G. Peart; and they sought to establish their heirship, by the deposition of Mrs. Braugh, widow of Robert Braugh; who testified that the letter annexed to her deposition, addressed to William Piersol, Philadelphia, was in the handwriting of her deceased husband. She also stated, that she frequently heard him speak of his family connections, and had always understood from him, that the late Mrs. Mary North, formerly Mary Peart, and the late Mrs. S. G. Elliott, were cousins, both on the side of the father and mother; and that the statements in the letter corresponded with the other statements she heard him make upon the subject of the pedigree of the two ladies; which letter, proved the present plaintiffs to be the only heirs of Mrs. Sarah G. Elliott, at the time of her death. Other depositions were read to the same effect.

On the 12th of June 1813, James Elliott and Sarah G. Elliott executed a deed, by which the premises in question were expressed to be conveyed to Benjamin Elliott, under whom the plaintiffs in error claimed to hold the same.

The defendants below moved the circuit court to instruct the jury, that the evidence adduced by the plaintiffs to establish their heirship to Sarah G. Elliott was insufficient, and that the same ought to be excluded. The court refused so to do; but on the contrary, instructed the jury, that the said evidence, if believed by the jury; was *prima facie* testimony, that the lessors of the plaintiffs were the legal heirs of the said Sarah Peart, *alias* Sarah G. Elliott.

In relation to the deed of 12th June 1813, to Benjamin Elliott, it was contended below, that Sarah G. Elliott never did execute the same, in the manner described and required by law, and that the fee-simple estate of Mrs. Elliott did not pass thereby. The provisions of the law relative to *331] the privy examination of a *feme covert*, by the officer, the clerk of the court, or in open court, and to the recording thereof, were alleged not to have been complied with; and consequently, the estate of Mrs. Elliott did not pass, by the conveyance, to Benjamin Elliott. It was also claimed, on the part of the plaintiffs in error, that if a privy examination and acknowledgment were made, it was not recorded; and unless recorded, no title passed to divest the title of the *feme covert*. The circuit court decided this point in favor of the defendants in error, and the case was brought up, upon a bill of exceptions.

Wirt, attorney-general, for the plaintiffs in error.—I. The letter of Mrs. Ann Braugh to William Piersol, is not evidence. Although the declarations of members of families are evidence on question of pedigree, yet this rule is not universal, and it does not apply, when higher evidence can be obtained. 3 Stark. Ev. 1099, 1111; 3 A. K. Marsh. 321. The letter was written with a view to, or under the influence of, the approach of this suit; *post litem motam*; and such evidence is not admissible. 3 Stark. 1102, 1104.

II. As to the admissibility of the deed to Benjamin Elliott, and the alleged defect of the acknowledgment of the *feme covert*, Sarah G. Elliott.

1. The circuit court of the United States was not competent to inquire into the acts of the court of the state of Kentucky; before which the proceedings relative to the acknowledgment were entertained. This is not done

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by the court of king's bench, of England, in reference to the proceedings of ecclesiastical court, or courts of common pleas. The court circuit could look at nothing but the record from the state court, and could not inquire in what mode the certificate had been made.

But if this could be done, there were materials enough for that purpose. The examination of the *feme* was made according to the provisions of the law, but it was not, at the time, fully stated by the clerk so to have been made. He took the acknowledgment, and the court, subsequently, did no more than fill up the record of what had been actually done, from the testimony of the facts before them. This was done by virtue of the powers which courts have exercised, to correct their records at a subsequent period. 4 Madd. 371; 12 Mod. 384; 2 Stark. 1132, 1156, 1182; 3 Bulst. 114; 8 Co. 162; Palm. 509; 1 Roll. 272; 2 Saund. 289; Ld. Raym. 39. 209; Sid. 70; 1 Salk. 50; Plowd. 13; Ibid. 50; Ld. Raym. 695; Cro. Eliz. 435, 459, 677; 2 Roll. 471; Hob. 327; Roll. Abr. 209-10; 2 Jones 212; Gwil. Bac. 197, note; Pigot, Recov. 218; 1 Doug. 134; 1 H. Bl. 238; Barnes 216; 2 Caines 139; 4 Hen. & Munf. 498; 3 Call 221, 233; 3 Hen. & Munf. 449.

*2. The clerk of the court, who took the acknowledgment, acted as the ministerial agent of the court, and he acts as if he was in court. [*332 This act was, therefore, in the power of the court. But if the clerk had the powers of a court in reference to taking acknowledgments of deeds, the authorities cited, showing the rights of courts to correct errors, apply to his acts; and if such were his powers, the interference of the court, in this case, was surplusage.

Wickliffe, for the defendants in error.—1. The assumption of the power to correct his errors by the clerk of the court, was a nullity, in Kentucky, according to the established laws and decisions there. Hardin 171-2. The laws of Kentucky, relative to taking acknowledgments of deeds have undergone many modifications; but the law and practice now is, for the clerks to take the acknowledgment and the privy examination of a *feme covert*; and in this they act independent of the courts, and not under their authority; nor have the judges of the courts any power to interfere with their acts or proceedings, in relation to such acknowledgment.(a) The authorities cited

(a) By the kindness of Mr. Wickliffe, the reporter has been furnished with the following abstract of the present laws of Kentucky, relative to the execution of conveyances by non-residents, and by husband and wife; Laws of Kentucky, ch. 278, 1796.

If the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite,¹ of the sealing and delivering of the writing before any court of law, or the mayor, or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court, to be recorded within eight months after the sealing and delivering, shall be as effectual, as if it had been in the last mentioned court.

Conveyances by husband and wife, how to be executed, &c.

§ 4. When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the justices thereof, shall declare to

¹ Three witnesses, by a previous section of the law.

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to show the right and practice of *courts to correct errors or omissions, do not apply. As to the laws of Kentucky, relative to this subject, there was cited the act of assembly of 1795. 1 Litt. 595. The circuit court did not, in this case, inquire how the acts or proceedings of the court of Kentucky had been performed, but whether the laws of the state, on the subject-matter, had been complied with.

2. The facts of the case, as stated in the record, show that the testimony of Mrs. Ann Braugh was not liable to the objection that is was given *post litem motam*; as to the operation of evidence, *post litem motam*, he cited Cowp. 594; 14 East 331; 3 Stark. 1105.

TRIMBLE, Justice, delivered the opinion of the court.—This is an action of ejectment, brought in the circuit court for the district of Kentucky, by the lessors of the defendant in error, and against the plaintiffs in error, who were defendants in the court below.

The lessors of the plaintiff, in that court, claimed the land in controversy as heirs-at-law of Sarah G. Elliott, formerly Sarah G. Peart, deceased; who, in her lifetime, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliot and Sarah G. Elliot his wife, in her lifetime, to Benjamin Elliot, and a deed reconveying the land from Benjamin Elliot to James Elliot.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the court, in overruling motions made by the defendants for instructions, &c., and in granting instructions

him, that she did freely and willingly seal and deliver the said writing, "to be then shown and explained to her," and wishes not to retract it, and shall, before the said court, acknowledge the said writing, again shown to her, to be her act; or, if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment; the wife being examined privily, and apart from her husband, by those commissioners, shall declare that she willingly signed and sealed the said writing, "to be then shown and explained to her by them," and consenteth that it may be recorded; and the said commissioners shall return with the said commission, and thereunto annexed, a certificate, under their hands and seals, of such privy examination by them, and of such declaration made, and consent yielded by her; in either case, the said writing, acknowledged also by the husband, or proved by witnesses, to be his act, and recorded, together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower, thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman.

If out of the United States.

§ 5. If the dwelling of the wife be not in the United States of America, the commission to examine her privily, and take her acknowledgment, shall be directed to any two judges or justices of the peace of any court of law, or to the mayor or other chief magistrate of any city, town or corporation of the county in which the said wife shall dwell, and may be executed by them in the same manner as a commission directed to two justices in the United States of America; and the certificate of the judges or justices of such court, or the certificate of such mayor or chief magistrate, authenticated in the form, and with the solemnity by them used in other acts, shall be as effectual as the like certificate of the justices in the United States of America.

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to the jury, moved by the *plaintiff, in the progress of the trial ; and a verdict and judgment having been rendered against the defendants, they have brought the case before this court by writ of error.

The bill of exceptions states, " that upon the trial of the case, the plaintiffs read as evidence, a patent from the commonwealth to Griffin Peart, dated the 1st of May 1781, covering the land in controversy (which patent is made part of the bill of exceptions), and sundry depositions, taken and filed in the cause (also made part of the bill of exceptions), and proved, that upon a division of the land granted to Griffin Peart by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seised thereof in severalty ; that the said Sarah G. Elliott died, before the institution of this suit, about the year 1822, without issue ; and that the defendants were in possession of the land allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury, that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected ; but the court refused so to instruct, or to exclude the evidence ; and on the contrary, instructed the jury that the said evidence, if believed by them, was *prima facie* evidence, that the lessors were the legal heirs of the patentee, Griffin Peart, &c. To which opinion of the court, in all its parts, the defendants excepted.

The defendants then gave in evidence, the deed of conveyance from Sarah G. Elliott and her husband, to Benjamin Elliott (dated the 12th day of June 1813), for the land in contest, and the deed from Benjamin Elliott, to the said James, together with all the indorsements upon, and authentications annexed to, the first-mentioned deed ; which indorsements and authentications are in the following words and figures, to wit :

" Acknowledged by James Elliott and Sarah G. Elliott. September 11th, 1813. Attest—J. McKENNEY, jr., Clerk."

" Woodford County, sct. September 11th, 1813.

This deed from James Elliott and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

" JOHN McKENNEY, jr., C. W. C. C."

" Woodford County, sct. November County Court, 1823.

On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court, by the indorsement of the deed from James Elliott and wife, to him under date of 12th June 1813, and by parol proof, that said deed was *acknowledged in due form of law, by Sarah G. Elliott, before the clerk of this court, on the 11th of September [*335 1813 ; but that the certificate thereof was defectively made out : It is ordered, that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon, said certificate was directed to be amended, as to read as follows, so to wit :—

" Woodford County, sct. September 11th, 1813.

This day, the within-named James Elliot and Sarah G. Elliott, his wife,

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appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture, to be their act and deed : and the said Sarah being first examined, privily and apart from her husband, did declare, that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office.

“ Attest—JOHN MCKENNEY, jr., C. W. C. C.”

It was proved by John McKenney, a witness examined on the part of the defendants, that the indorsement made on the back of the deed, from Elliott and wife, to Benjamin Elliott, in these words, to wit : “ Acknowledged by James Elliott and Sarah G. Elliott, September 11th, 1813. Attest—J. MCKENNEY, Clerk,” was in the handwriting of the said clerk of the Woodford county court, and was the minute made by him, at the time said deed was acknowledged ; and it was also proved, that the certificate of the acknowledgment and recording of the said deed, indorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed, that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed ; that he knew what his duty required in such cases, and that the acknowledgment and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt, he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given, conducing to prove, that in point of fact, the said deed from Elliott and his wife, was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said McKenney, upon cross-examination, further proved, that after
 *336] the said deed and certificate of the acknowledgment *thereof, had been recorded, and in the lifetime of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgment thereof, by Elliott and wife, as they were then upon the record ; which copy, the plaintiff gave in evidence ; that after the death of Mrs. Elliott, application was made to him, by the counsel of the defendants, to alter the certificate of the acknowledgment of the deed from Elliott and wife, to Benjamin Elliott, so as to state her privy examination ; but which he declined. It was also proved, that the deed had remained in the possession of the clerk, from the time of its first acknowledgment, till after the certificate ordered by the county court was made upon it.

After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs' counsel, instructed the jury, that the parol evidence which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose ; that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate, could not, legally, be proved by parol testimony, but by record ; and that although they might believe, from the parol evidence, that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all

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proper explanations given to her ; yet, it constituted no defence to the action, unless such privy examination had been duly certified and recorded. The court further instructed the jury, that the certificate of the acknowledgement of said deed, by Elliott and wife ; and the after-certificate, by order of the county court, of her privy examination ; were not sufficient, in law, to pass her estate ; because, the first shows no privy examination, and the county court had no jurisdiction to order the second to be made. To all which opinions, and decisions of the court, the defendants excepted, &c.

It is argued, by the learned counsel in this court, that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this court has not put the question on the ground, that taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them, down from the patentee, through Sarah S. Elliott, who was seised therefore in severalty. We have, however, reviewed the evidence, with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here, is, that a part of the *evidence was incompetent and inadmissible. It is said, that so much of the [*337 depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition, as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition, were incompetent, and ought to have been rejected ; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence, as incompetent. The argument admits of several answers, deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions, in relation to the defendants' deed, can, by no fair construction, be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants ; and to use the language of the bill of exceptions, it was the plaintiffs' evidence "touching the derivation of the title of the lessors of the plaintiffs," which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed ; and when we come to consider the defendants' title, after the deed was introduced, it will appear, that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were, therefore, harmless.

We are not prepared to admit, that Mrs. Braugh's letter, on the subject of the family pedigree, proved by her evidence, and made part of her deposition, was not competent evidence, to be left to the jury, upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree, and several branches of the family, for about seventy years. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted. But it is argued, that this rule is qualified by this exception—that declarations, made *post litem motam*, cannot be given in evidence ; and it is insisted, this case comes within the exception ; for although no suit had been commenced, yet a controversy had arisen, or was expected to arise. We doubt the application of the

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exception to this case. A controversy had arisen, or was expected to arise, between the heirs of Mrs. Elliott, and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear, that any controversy had arisen, or was expected to arise, about who were her heirs. The *lis mota*, if it existed, was not, who were heirs, but whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any *338] positive opinion on this point, as other grounds exist, upon which the motion was rightfully overruled.

It is conceded, that the defendant's counsel had a right to move the court below to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent; but it is not admitted, that he exercised that right. It does not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence, as objectionable, and moved the court to exclude it. But on the contrary, resting his case upon the assumption, that the whole evidence of the plaintiff, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole, or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done, on the ground of incompetency, unless the whole was incompetent, which is not pretended; the court was not bound to do more, than respond to the motion, in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said, the evidence, taken altogether, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incompetent, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so. There is, therefore, no error in the decision of the circuit court, overruling the motion of the defendants; nor in the instructions given to the jury, upon that motion.

We now proceed to an examination of the questions arising out of the instruction given to the jury, on the motion of the plaintiffs, in relation to the deed of James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott; set up by the defendants in their defence. The general question involved in the first instruction, is, can the privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass or convey her estate, be legally proved by parol testimony? We hold, that they cannot. By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*, and subject to this will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely void *ab initio*. In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and in those states, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued.

*339] *The Virginia statute of 1748, ch. 1, after making provisions to enable *femes covert* to convey their estates by deed, upon acknowledgment and privy examination, according to prescribed forms, in the 7th section, has these words: "Whereas, it has always been adjudged, that

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where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The 8th section enacts and declares, "that the law herein shall always be held according to the said judgments, and shall never hereafter be questioned, &c." This law was adopted by Kentucky, at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1793 (see 1 Litt. Laws, p. 569) provides for the privy examination and acknowledgment of *femes covert* in open court; and where they cannot conveniently attend, authorizes a commission to issue to two justices, to take and certify the acknowledgment and privy examination; and declares, that "in either case, the said writing, acknowledged by the husband, and proved by witnesses to be his act, and recorded together with such privy examination and acknowledgment, &c., shall not only be sufficient to convey or release any right of dower, &c., but be as effectual for every other purpose, as if she were an unmarried woman."

The 1st section of this act authorizes clerks of the county courts, general court, and court of appeals, to take, in their offices, the acknowledgment or proof of the execution of deeds, and to record them, upon acknowledgments, or proofs so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes covert*. But by a subsequent statute, clerks are authorized to take, in their offices, the "acknowledgment of all deeds, according to law." And the act of 1810 (4 Litt. Ky. Laws 165) which authorizes the clerk of one county to take and certify the acknowledgment of a deed, to be recorded by the clerk of another county, where the land lies, &c., declares, that "if the due acknowledgment, or privy examination of the wife, &c., shall have been taken, &c., by the clerk receiving the acknowledgment of the deed, &c., and that being duly certified with the deed, and recorded, shall transfer such wife's estate, &c.," as fully as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded. It is by construction of these last-recited laws, that the clerks are held, in Kentucky, to be authorized to take the acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands.

The Kentucky statutes, above recited, show clearly, that the legislature of that state has never lost sight of the principle *declared by the Virginia statute of 1748, "that when any deed has been acknowl- [*340 edged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial, whether there be an acknowledgment, or privy examination, in fact, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiffs' motion, to manifest its entire correctness. It was, "that the first certificate of the acknowledgment and recording of the deed of

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Elliott and wife, was not sufficient in law to pass her estate; because it showed no privy examination of the *feme*."

The last instruction given by the court to the jury presents a question of more difficulty. It is, "that the after-certificate, made by order of the county court, of her privy examination, is insufficient, in law, to pass her estate; because the county court had no jurisdiction or authority to order the said second certificate to be made." It is argued, that the circuit court of the United States had no authority to question the jurisdiction of the county court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought, collaterally, before the circuit court. We know nothing in the organization of the circuit courts of the Union, which can contradistinguish them from other courts, in this respect.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising *authority over a subject, may be *341] inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings.

It is well known, that the jurisdiction and authority of the county courts of Kentucky are derived wholly from the statute law of the state. In argument, we were referred to no statute which was supposed, either in terms, or by fair construction, to confer upon the county court any supervising or controlling power over the acts of the clerk, in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed, none such exists. No such supervising and controlling power can result to the court, from the general relations which exist between a court and its clerk; for in this case, the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him, upon his own judgment and responsibility. We think, therefore, with the circuit court, that the county court had no jurisdiction or authority to order the after-certificate of Mrs. Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel, is, that the order of the county court may be disregarded; and the amendment considered as an amendment made by the clerk, of his own authority, and that the clerk was authorized to amend his own certificate and record, at any time. It would be difficult to maintain that the second certificate, or amendment as it is called, could rightfully

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be regarded as the clerk's own act, independent of the order of the county court; it appearing, that he refused to do the act, until the order was made. But be it so. Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion, he had not. We are of opinion, he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed, was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

If a clerk may, after a deed, together with the acknowledgment *or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we [*342 can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.

It is the opinion of this court, that there is no error in the judgment and proceedings of the circuit court, and the same are affirmed, with costs.

Judgment affirmed.

*Lessee of THOMAS SPRATT, ANDREW, WILLIAM, SARAH, JACOB, CATHARINE and PIERCE SPRATT, Plaintiffs in error, v. SARAH SPRATT, Defendant in error. [*343

Power of aliens to hold lands.

The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take, in the same manner as if he were a citizen.¹ p. 349.

A foreigner who becomes a citizen, is no longer a foreigner, within the purview of the act. Thus, after-purchased lands vest in him as a citizen; not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. p. 348.

Land in the county of Washington, and district of Columbia, purchased by a foreigner, before naturalization, was held by him, under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner.² p. 349.

ERROR to the Circuit Court of the District of Columbia, for the county of Washington. This was an action of ejectment, brought by the plaintiff

¹ Matthew v. Rae, 3 Cr. C. C. 699.

² But the act only extends to lands acquired by deed or will, and therefore, if an alien purchased lands, and before the execution of a

deed, died, or became a citizen by naturalization, such lands did not descend to his alien heirs. Spratt v. Spratt, 4 Pet. 393.