the present action, under such circumstances, would be compelling the defendant to take a law-suit, instead of the land for which he contracted.

Judgment affirmed, with costs.

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*469] *Doe, on the demise of John A. Elmore, Plaintiff in error, *v.* William A. Grymes and John J. Beatie, Defendants in error.

Nonsuit.

The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on a trial of a cause before a jury; the plaintiff may agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it.[1] p. 471.

Where the state of the record does not show a judgment of nonsuit to have been entered, although the bill of exceptions state the fact, the plaintiff may apply for a *certiorari*, to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. p. 472.

Error to the Circuit Court of Georgia. An action of ejectment was instituted in the circuit court of the United States for the district of Georgia, for the recovery of 287½ acres of land, in which the plaintiffs claimed title as follows:

A grant from the state of Georgia to Samuel Alexander; and a deed from John Cessna, styling himself "sheriff of Greene county in the state of Georgia," purporting to convey to Buckner Harris, by virtue of a sale under an execution against Herod Gibbs, "two hundred and eighty-seven and a half acres of land in said county, on Little Beaver dam, on the waters of Richland creek, and bounded on Academy lands, and land belonging to William Alexander, which land was formerly the property of Samuel Alexander;" a deed from Buckner Harris to Ezekiel E. Park, for a tract of land "containing two hundred and eighty-seven and a half acres, in the county of Greene, and state of Georgia, on the Little Beaver dam of Richland creek; being an equal half of the double bounty of land granted to Samuel Alexander, adjoining Academy lands."

The plaintiff then introduced a witness, who testified, that "Ezekiel Park was in possession of a tract of land, lying in Greene county, usually called Park's old mill tract, on Beaver dam creek, for about twenty years." He then produced a deed from Ezekiel E. Park to John A. Elmore, for a tract of land "in the county of Greene, and state of Georgia, on the Little Beaver dam creek, or fork Richland creek, being one equal half of a double bounty tract, originally granted to Samuel Alexander, adjoining lands belonging to the University; being the same originally sold and conveyed to Herod Gibbs, by the grantee, on the 14th of March 1790." He then exhibited a deposition of the county-surveyor, stating that he had made a re-survey of the premises in dispute, agreeable to a plot annexed to his deposition, which corresponded in its outlines with that annexed to the original grant, "completely *covering the premises in dispute;" which he designated on the plat. The plaintiff then called a witness, who testified that W.
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[1] De Wolf *v.* Rabaud, *post*, p. 476; Crane *v.* Morris, 6 Pet. 598; Silsby *v.* Foote, 14 How. 219; Castle *v.* Bullard, 23 Id. 172; Schuchardt *v.* Allen, 1 Wall. 369; Insurance Co. *v.* Folsom, 18 Id. 250; Carr *v.* Gale, 3 W. & M. 38; Boucicault *v.* Fox, 5 Bl. C. C. 87.

A. Grymes was in possession of the premises, at the commencement of the action, and closed his testimony.

The defendant's counsel, thereupon, moved for a nonsuit, on the following grounds: 1st. Because the plaintiff had failed to make out his title by the documentary evidence on which he rested his case. 2d. Because there was no sufficient evidence of possession, to give a title, under and by force of the statute of limitations of Georgia.

The circuit court ordered a nonsuit to be entered, against the consent of the plaintiff; and a writ of error was prosecuted by him, and the cause brought before this court. Upon the judgment of nonsuit, the defendants in error claimed to maintain before the court—that the circuit court had power to order a nonsuit, without the assent of the plaintiff.

The case was argued by *Wilde* and *McDuffie*, for the plaintiff in error; and by *Berrien*, for the defendant.

Berrien.—The doctrine laid down in the books of practice, and adopted in some of the state courts, is not supported by any express decision in the courts of Great Britain. That proposition is, that a plaintiff, on the bare allegations of his declaration, without a tittle of proof, is entitled to demand the verdict of a jury in his cause. Any modification of this proposition admits the power, and objects only to the mode of its exercise. An examination of the adjudged cases in England will show that they do not warrant the position. *Watkins* v. *Towers*, 2 T. R. 275, was a motion to enter nonsuit, after verdict. *Santler* v. *Heard*, was a verdict taken subject to the opinion of the court, whether plaintiff ought not to have been nonsuited; 2 W. Bl. 1031; 2 Salk. 669. *Macbeath* v. *Haldimand*, 1 T. R. 172, the point was not made, on a motion for a new trial; on reporting the fact, BULLER, J., said, that on the trial, he had thought the plaintiff ought to be nonsuited; but his counsel appearing, when plaintiff was called, he had left the question to the jury.

It is said, that the plaintiff would be deprived of his writ of error to this court: this is not so. Final judgments spoken of in the judiciary act, are meant to be contradistinguised from interlocutory judgments. Any judgment which is final in the suit, though not final as *between the parties, with the exceptions mentioned in the act, may be brought here [*471 by writ of error. A judgment of nonsuit is such a judgment, and may be the foundation of a writ of error. The defendant is entitled to judgment and execution for costs; the suit is finally disposed of. It is a final judgment in a civil action. In England, error lies on such a judgment; *Box* v. *Bennet*, 1 H. Bl. 432; *Kempland* v. *Macauley*, 4 T. R. 436. *Evans* v. *Phillips*, 4 Wheat. 73, does not contradict this; the ground of that decision was, that the plaintiff had assented to the nonsuit. Why may not the errors of the court below, be corrected in this form, as well as by an exception to instructions, or the refusal to give them?

Wilde and *McDuffie*, for the plaintiff in error:—1. It has always been considered, that a nonsuit cannot be ordered, without the consent of the plaintiff, who has a right to submit his case to a jury and the court; and the court, should the jury err, may order a new trial. In the courts of the United States, another objection exists to the exercise of such

power, as the court has decided, that a writ of error will not lie on a judgment of nonsuit (*Evans* v. *Phillips,* 4 Wheat. 73), it not being a *final* judgment. If the courts below should have this power, a plaintiff may be prevented the opportunity of bringing his case before the highest judicial tribunal of the United States. If a court can, in any instance, order a nonsuit, against the consent of the plaintiff, it may be only when no questions of fact are involved, but the only matter before the court is a question of law. This case exhibits facts upon which a jury were the proper judges. The plaintiff claimed the land by possession ; this, and the extent of the possession, was exclusively for the consideration of the jury.

The practice of the state of Georgia as to the entry of nonsuits has been fluctuating. The judicial system of that state does not comprehend an appellate court, with exclusive final judicial powers, but each circuit court has a right of granting appeals to itself, and on such appeals, a second trial takes place. Hence, this point has been decided differently in different courts, and at different periods ; and hence, the practice of the courts of Georgia is unsettled, and various, as it necessarily must be, in the absence of a supreme court to regulate and determine the same.

Marshall, Ch. J., delivered the opinion of the court.—The court has had this case under its consideration, and is of opinion, that the circuit court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had *a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit ; but if he did not so choose, the court could not compel him to submit to it. But the state of the record does not enable this court to render a final judgment, because the record is defective, in not showing a judgment of nonsuit, entered in the circuit court. Although the bill of exceptions states that fact, yet the record does not contain the judgment itself. The plaintiff may therefore apply for a *certiorari,* to bring up a perfect record, or dismiss the present writ of error and proceed anew, as his counsel may think best for the interest of their client.

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Johnson, Justice. (*Dissenting.*)—The only question of any importance in this cause is, whether a circuit court can, in any case, order a plaintiff to be nonsuited. I ordered the plaintiff below to be nonsuited, because the evidence was so inadequate to maintain his suit ; and had the jury found for him, I should have set aside the verdict, and ordered a new trial. The practice of the court from which this cause comes up, is this : when the plaintiff has closed his evidence, the defendant is at liberty to move for a nonsuit, or proceed with his testimony. If he introduces evidence, it is too late to move for a nonsuit ; and the question always to be examined is, whether, upon the evidence introduced by the plaintiff, admitting it to be true, the jury can find a verdict for him. So that, it is, in fact, a substitute for a demurrer to evidence, or for a motion for instruction that the plaintiff cannot recover upon the case made out by him in evidence.

There are several reasons, why I must maintain that the courts of the sixth circuit have a right to exercise the power to order a nonsuit, even against the will of the plaintiffs ; and why it would be wise, in all our circuits, to introduce the same practice. It happens, unfortunately for the defendant in error here, that a majority of the judges of this court have

pursued a different practice in their circuits ; but this, I must insist, is no sufficient reason for subverting, otherwise than by rule, the practice of other states in which this right has been recognised in the administration of justice, coevally with the existence of their courts. Such has been the case in the states of which the sixth circuit consists, and the acts of 1789 and 1792 have adopted into the courts of the United States, of the respective circuits, not only the forms of process, but the "modes of proceeding," in suits known to the states respectively. That this comes under the denomination of a mode of proceeding, or in the other words, an established practice of the state composing the sixth circuit, appears to me incontrovertible.

*By what right, then, can this court reverse a judgment of that circuit, founded in a practice thus sanctioned by law ? It does seem [*473 to me, that the defendant below has a right in this judgment, vested by express statute law, and ought not to be put to the expense of this reversal. For what purpose is power given to this court to alter the practice of the circuits, by such regulations as they may deem expedient, if such practice is not to be held legal, until altered by a rule of this court ? This court surely does not mean to decide, that such was not the received practice of that circuit ; this would be a decision in the teeth of positive fact ; and if the purport of the decision be, that it is an illegal practice, the immemorial practice itself, and the process acts of the United States, furnish an express negative to such a decision. The idea seems to be, that it is a practice inconsistent with the relation in which our circuit courts stand to this court —that ours is not a *nisi prius* system, or something to that effect. What then ? This court can alter the practice by a rule, but, to overturn a judgment that has already been rendered under such a practice, I must respectfully contend, approaches very near to *ex post facto* legislation, not adjudication ; the province of which is to operate only upon existing laws. But it is not a practice appropriate exclusively to a *nisi prius* system, as is proved by this, that writs of error are sued out, continually, in England, upon judgments on nonsuit (see the cases cited in 1 Arch. Pract. 229–30), and though it had been, the states were at liberty to adopt it into their practice, although the *nisi prius* system be unknown to them. That they had adopted it, is conclusive against this assumed incompatibility. And in practice, it subserves the purposes of justice, under our system, as effectually as a bill of exceptions, or a demurrer to evidence ; and in several respects, much better. It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary nonsuit, and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his client ; and it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or from surprise. In point of convenience and expedition, in the administration of justice, I presume, there cannot be two opinions. On this point, so far as *exemplum docet*, we may cite Great Britain, Massachusetts and New York, with some confidence, against Pennsylvania, Maryland and Virginia.

But it is contended, that in England, the plaintiff is not nonsuited, if he insists on answering, when called. If the fact be admitted, what then ? England is not altogether absolute in dictating to the courts of the United States, and if those of the *states of the sixth circuit have [*474

asserted some independence in their rules of practice on this subject, I presume, their right was unquestionable to do so.

But I want no other authority than the courts of Great Britain, to justify the practice of the sixth circuit, in this behalf. From the earliest period, we find the English courts in the exercise of this power, and whoever will examine the cases collected in Mr. Morgan's Treatise on the doctrine of New Trials (3 vol. Essays), will find what a very wide range has been taken by those courts in the application of that practice. Nor have the more modern cases manifested any inclination to retrace their steps. Its salutary effects are universally felt, and perhaps contribute as largely as any other cause to the rapid progress of their courts in disposing of their dockets. If there exists any case prior to that of *Macbeath* v. *Haldimand*, 1 T. R. 172, in which the right of the plaintiff to refuse to be nonsuited was recognised, I cannot recollect it; since, in that case, it would seem, that in ordinary cases the right is recognised. But there is abundant proof, that the British courts do assert the power to control the exercise of that right, by the plaintiff, when they think proper. In the cases of change of venue, on motion of plaintiff (3 W. Bl. 1031), the right is disputed, on the assumed ground, that he undertakes to prove some material fact. Now, where can be the objection to apply the same reason to every case that goes to a jury? Does not a plaintiff, in fact, undertake the same thing, whenever he troubles a court with his suit, and has a jury sworn to try his cause upon evidence? he is no longer subjected to amercement, if he fails to recover, and the right to nonsuit him, where he fails to produce evidence that will justify a verdict, is but a reasonable substitute for the absolute penalty to which he was once subjected.

But it is contended, that an absurdity is produced, and an acknowledged right violated. Yet the alternative exhibits a more direct and obvious absurdity, since in the case of *Macbeath* v. *Haldimand*, and in every case of the kind, the court asserts a positive control over the consciences of the jury, by telling them, "they are bound to find for the defendant." And the greater absurdity must henceforward be incurred, of swearing a jury in a cause, and requiring a verdict, at the caprice of a plaintiff, who produces not a tittle of evidence to maintain his issue. Nor is any right of the plaintiff taken from him, if his rights be regarded in their just extent. He cannot claim a verdict of the jury, if he does not produce evidence to sustain it, and it is only in that case, that he is precluded from submitting his case to their consciences. When we consider what were the ancient penalties for a false verdict, before they were superseded by the introduction of new trials; [*475] it must appear just *and reasonable, that the plaintiff should rather be exposed to the necessity of bringing a new suit, or moving for a new trial, than that the jury should be subjected to attaint at his will. And on the subject of fiction and legal absurdity, it is certainly too late, at this day, for our courts of justice to be very fastidious, on a consideration which has been so thoroughly set at nought, by the action of ejectment, fine and recovery, and sundry other matters of the kind; to which they have resorted for the purpose of substantial justice and public convenience.

I must submit, I suppose, but I cannot do it, without protesting against the right of forcing upon my circuit, the practice of other circuits in this mode. By a rule of this court, it is, unquestionably, in the power of the court to

do it. But until then, I can never know what is the practice of my own circuit, until I come here to learn it.

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*JAMES DE WOLF, junior, Plaintiff in error, *v.* DAVID JACQUES RABAUD, JEAN PHILLIPPE FREDERICK RABAUD, ALPHONSE MARC RABAUD, aliens and subjects of the king of France, and ANDREW E. BELKNAP, a citizen of the state of Massachusetts, Defendants in error. [*476

Nonsuit.—Citizenship.—Statute of frauds.—Promise to pay the debt of another.

A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff.[1] p. 497.

A question of a citizenship of the party to a cause, cannot constitute a part of the issue, on the merits; it must be brought forward by a proper plea in abatement, in an earlier stage of the cause, than the trial on the merits.[2] p. 498.

The statute of frauds of New York, is a transcript, on this subject, of the statute 29 Charles II., ch. 3; it declares, that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts, to explain its objects, and expound its true interpretation. p. 499.

Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very great deliberation; but it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states, where the English authorities have been fully recognised and adopted in practice. p. 499.

If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressly upon the understanding, that C. will do some act for the security of A. and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract; the contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act; each is an original promise; though the one may be deemed subsidiary or secondary to the other; the original consideration flows from A. not solely upon the promise of either B. or C. but upon the promise of both *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking; each is a direct original promise, founded upon the same consideration.[3] p. 500.

The case of Wain *v.* Walters, 5 East 10, was the first case which settled the point, that it was necessary, in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise, itself; if it contain it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the courts of New York, into its jurisprudence, as a sound construction of the statute.[4] p. 501.

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[1] Elmore *v.* Grymes, *ante*, p. 469, and cases cited in the note.

[2] Wickliffe *v.* Owings, 17 How. 47; Jones *v.* League, 18 Id. 76; Rateau *v.* Bernard, 3 Bl. C. C. 244; Bobyshall *v.* Oppenheimer, 4 W. C. C. 482; Hilliard *v.* Brevoort, 4 McLean 24; Morgan *v.* Curtenius, Id. 266; Evans *v.* Davenport, Id. 574. An objection to the apparent jurisdiction of the court must be taken by plea. Sheppard *v.* Graves, 14 How. 505, 512; Pond *v.* Vermont Valley Railroad Co., 12 Bl. C. C. 281.

[3] This is a mere *dictum* of the learned judge; he admits, that he is not following the construction of the statute, but merely suggests what might be the better construction, were it *res nova;* he admits, that the authorities are against his views. Carville *v.* Crane, 5 Hill 485, *per* COWEN, J. And see Hetfield *v.* Dow, 3 Dutcher, 440, 451.

[4] Townsley *v.* Sumrall, 2 Pet. 174. See Castle *v.* Beardsley, 10 Hun 343, and note to Castle *v.* Brown, 21 N. Y. 336 (Banks' ed.) In