*Bank of Columbia *v.* George Sweeny.

Mandamus.

The court refused to issue a *mandamus* to the circuit court for the county of Washington, commanding the court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiff's counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia.[1]

Motion for *Mandamus.*

Jones and *Key* moved the court for a *mandamus*, to be directed to the Circuit Court of the United States, for the county of Washington in the District of Columbia; commanding them to have a certain issue joined, which issue had been tendered in a proceeding in that court against George Sweeny, and in which the Bank of Columbia were plaintiffs.

George Sweeny being indebted to the Bank of Columbia, upon a promissory note, the president of the bank, in conformity with the provisions of the statute of Maryland, incorporating the bank, passed in 1793 (Acts of 1793, vol. 20), instituted proceedings in the circuit court, under which, by virtue of a *capias ad satisfaciendum*, he was arrested by the marshal; and he applied to the court to be allowed, under the authority of the 14th section of the act incorporating the bank, to "dispute" the debt claimed by the bank. The court, thereupon, ordered an issue to be joined, and the attorney of the bank being directed to draw a declaration, offered one tendering an issue upon the allegation that the debt mentioned in the execution was due. To this issue, the attorney for the defendant objected, and he claimed the right to put in issue the plea of the statute of limitations. The circuit court held, that the defendant was entitled to avail himself of the statute, and that the attorney of the bank should file a declaration, in the common form, on the promissory note mentioned in the execution, to which the defendant might plead the statute of limitations, as running from the time of payment mentioned in the note; and that the bank should reply, so as to make up the issue under the statute of limitations. The court refused to make up the issue offered by the bank, or to make up the issue in any other way than as stated.

The plaintiffs claimed, and by this motion sought to maintain their claim, to have an issue joined, as offered by the bank, upon the debts being due, as provided in the statute. The following are the provisions of the 14th section of the charter, upon which the proceedings were had, and by which *the plaintiffs insisted, they had a right to the proceedings they had adopted: "And whereas, it is absolutely necessary, that debts due to [*568 the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them: Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make

[1] A *mandamus* cannot be made a substitute for a writ of error. Commonwealth *v.* Common Pleas of Philadelphia, 3 Binn. 273.

payment at the time the same becomes due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his place of abode ; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt, reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a *capias ad satisfaciendum*, *fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note ; and the clerk of the general court, and the clerks of the several county courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same, which shall first sit after the issuing thereof, and shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court ; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor : provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this state to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due ; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue ; and if the defendant shall *dispute* the whole or any part of the said *debt*, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner."

*569] *The case was argued by *Jones* and *Key*, for the plaintiffs, at great length, upon the meaning and objects of the section, and that it authorized the demand make by the bank to exclude the plea of the statute of limitations ; and *contrà*, by *Swann* and the *Attorney-General*, for the defendant. The court, in their decision, did not take notice of the arguments of counsel, as they considered the case not such as entitled it to the summary proceeding demanded.

Marshall, Ch. J., delivered the opinion of the court :—This case arose under the provision of the act of the legislature of Maryland incorporating the bank of Columbia, which authorizes summary process for the collection of debts due to the bank. That act allows an execution against the person of the debtor, to issue in the first instance, upon the application of the president of the bank ; but it also authorizes the court, if, upon the return of the execution, the defendant "dispute the debt," to order an issue to be made up, &c., to try the action. In the present case, the circuit court did not refuse to direct such an issue to be made up ; which had they refused

to do, a *mandamus* would have been the proper process to compel that to be done, which the act requires. But the circuit court did direct an issue, and allowed a plea of the statute of limitations. The application now is, that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up, according to what the counsel for the bank supposes to be the proper construction of the act.

We think, this is not a proper case for a *mandamus*. It does not differ in principle from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case, there is no doubt, that the revising power of this court could be exercised only by a writ of error. If this motion could now prevail, it would be a plain evasion of the provision of the act of congress, that *final* judgments only should be brought before this court for re-examination. This case might still be brought before this court by a writ of error, notwithstanding any opinion expressed upon the *mandamus*, and the same question again be discussed upon the final judgment. The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times, before there would be a final judgment. The court is, therefore, of opinion, that this is not a case for a *mandamus*, and the motion is denied.

Motion denied.

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*Stephen Waring, Plaintiff in error, *v.* James Jackson, *ex dem.* Medcef Eden and another, Defendants in error. [*570

The Same *v.* The Same.

Executory devise.—Adverse possession.—Lex loci rei sitæ.

The testator devised to his son, Joseph Eden, certain portions of his estate in New York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators, for ever; in like manner, he devised to his son, Medcef, his heirs and assigns, certain other portions of his property, and added the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs:" Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, both passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden, on the death of his brother, Joseph Eden, became seised of an estate in fee-simple absolute. p. 571.

Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the courts of New York, prevent the operation of a devise, by another, in whom the title to the estate was vested by the death of the defendant in the executions. p. 571.

It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. p. 571.

Wilkes *v.* Lion, 2 Cow. 333, followed.

Error to the Circuit Court for the Southern District of New York.

Thompson, Justice, delivered the opinion of the court.—These cases come up from the circuit court of the United States for the southern district of New York, upon writs of error. The question in the court below turned