

Waring v. Eden.

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.* [\*570  
MEDCEF EDEN and another, Defendants in error.

## 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

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upon the construction of the will of Medcef Eden, the elder, dearing date the 29th August 1798, by which the testator devised to his son Joseph, certain portions of his estate, among which were the premises in question in this cause, "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: "Item. 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, then 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."

\*571] \*The case of *Jackson v. Chew* (12 Wheat. 153), decided at the last term, brought under the consideration of this court the construction of this same clause in the will, and the records in the present cases have been submitted to the court, without argument, to see whether the decision in that case will govern the cases now before us. The facts disclosed in the case of *Jackson v. Chew*, did not require of the court to decide any other question, than whether Joseph Eden took under the will an estate-tail, which, by operation of the statute of New York, abolishing entails, would be converted into a fee-simple absolute. The court decided, that he did not take an estate-tail, but an estate in fee, defeasible in the event of his dying without issue, in the lifetime of his brother (which event happened), and thereupon, his interest in the land became extinct, and the limitation over to his brother Medcef was good, as an executory devise.

In the cases now before the court, it appears, that Medcef Eden has died without issue, having, by his last will and testament, devised his estate to his widow, and certain other devisees therein named; which has given rise to two other questions; viz., whether John Eden and the heirs of Hannah Johnson (she being dead) took any estate in the premises, under this clause in the will, on the death of Medcef Eden, without issue? And whether the possession taken and held under the sheriff's sale, by virtue of the judgments and executions against Joseph Eden, was such an adverse holding, as to prevent the operation of the will of Medcef Eden, the younger.

In deciding the case of *Jackson v. Chew*, we did not enter into an examination of the construction of this clause in the will, considered as an open question; but adopted the construction, which appears to be well settled in the two highest courts of law in the state of New York, not only upon this very clause, but in numerous other analogous cases; and has thereby become a fixed rule of landed property in that state. And this was in conformity with what has been the uniform course of this court, with respect to the titles to real property, to apply the same rule that we find applied by the state tribunals in like cases.

The additional questions presented in the cases now before us, have likewise undergone a very full examination in that state, and been decided, both by the supreme court, and the court for the correction of errors. In the case of *Wilkes v. Lion*, 2 Cow. 333, the decision turned upon these very points, and the court of errors, affirming the decision of the supreme court, held, with only one dissenting voice, that nothing passed under the ulterior devise

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over to John Eden and Hannah Johnson, but that Medcef Eden had become seised of an estate in fee-simple \*absolute.

No opinion appears to have been directly expressed by the court, [\*572 with respect to the effect of the adverse possession, upon the operation of the devise in the will of Medcef Eden, the younger. But this was a question necessarily involved in the result. And the decisions of the courts in that state are very satisfactory to show, that such an adverse possession will not there prevent the operation of a devise. The doctrine in the case of *Doe v. Thompson*, 5 Cow. 374, warrants this conclusion. And it is understood, that this precise question, arising on the construction of the statute of wills in that state, has recently been decided in the supreme court, in a case, the report of which is not to be found here.<sup>1</sup>

We are, accordingly, of opinion, that the judgment of the circuit court in these cases must be affirmed.

Judgment affirmed.

\*UNITED STATES, Plaintiffs in error, v. NICHOLAS STANSBURY and [\*573 EDWARD MORGAN.

*Discharge of surety.*

The discharge, by the secretary of the treasury, of a principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against his sureties, for the amount due upon the judgment, and unpaid. p. 575.

At common law, the release of a debtor, whose person is in execution, is a release of the judgment itself; the law will not permit proceedings by a creditor, at the same time, against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. p. 575.

ERROR to the Circuit Court of the United States for the district of Maryland. This was an action of debt, brought in the circuit court of the United States for the district of Maryland, at May term 1825, to recover \$3067, being the debt, damages, costs and charges, contained in a certain judgment between the same parties, recovered by the United States, in the district court of Maryland, at March term 1819. The original judgment was rendered upon a joint and several bond of these defendants, given for duties, on an importation by Sheppard, and was rendered for \$3050 debt, and \$17 damages, costs and charges.

The declaration in this case was in the usual form, containing averments that the said judgment still remained in full force and effect, not in any wise annulled, reversed or vacated; that the said United States had not obtained any satisfaction of, or upon, the said judgment, and that the said defendants had not yet paid the sum of \$3067, or any part thereof; but to pay the same or any part thereof, they had, and each of them had, hitherto wholly refused, &c.

The writ in this case was served upon Stansbury and Morgan only, and

<sup>1</sup> Eden v. Varick, 7 Cow. 238; s. c. 2 Wend. 166.

<sup>2</sup> s. p. Hunt v. United States, 1 Gallis. 32; United States v. Sturges, 1 Paine 526. And

the discharge from arrest of one of two sureties in a joint and several bond, does not affect the liability of the other. United States v. Beattie, Gilp. 92.