the local decisions, the refusal was right, and the instruction given was correct in point of law.

We think it proper to add, that no notice has been taken of the fact, that Clarke, the lessor of the plaintiff, was a non-resident; because it does not appear, that any of the instructions were asked or given, in reference to the legal effect of his non-residence.

The judgment is, therefore, reversed, for the errors stated in the first and second bills of exception; and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

Baldwin, Justice, dissented, as to the possession.

This cause came on, &c.: It is considered by the court here, that there was error in the circuit court in admitting the testimony of Moses L. Miller, under the circumstances set forth in the first bill of exceptions. And that there was error in the circuit court in refusing to instruct the jury, upon the motion of the plaintiff, that the instrument stated in the second bill of exceptions, under the proof, did not bind the plaintiff, and could not bar his recovery; and in instructing the jury, that the relinquishment stated in the same bill of exceptions for 49,952 acres, if the execution thereof was satisfactorily proved, was a bar to the recovery of all the land described in said relinquishment, as set forth in the same bill of exceptions. But there is no error in the court, in refusing to instruct the jury, on the motion of the plaintiff, that the possession of the defendants was no bar to the plaintiffs' action; and that the statute of limitations could only protect the defendants to the extent that (they) had actually inclosed their respective tenements, and occupied for twenty years preceding the commencement of the suit, as set forth in the third bill of exceptions; and that there was no error in the court, in giving the instruction to the jury, set forth in the same bill of exceptions, in the manner and under the circumstances therein set forth. And, &c.

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*John Tayloe, Plaintiff in error, *v.* Edward Thomson's Lessee, [*358
Defendant in error.

Lien of judgment.—Execution.—Insolvency.

It seems, there is no act of assembly of Maryland which declares a judgment to be a lien on real estate, before execution issued and levied; but by an act of parliament of 5 Geo. II., c. 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold.

It is admitted, that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors; and that this construction has been uniform throughout the state.

As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely of enactments of their own, or the statutes of England, in force or adopted by the legislature; the decisions of their courts; the settled and uniform practice and usage of the state in the practical operation of its provisions, evidencing the judicial construction of its terms; are to be considered as a part of the statute, and as such, furnish a rule for the decisions of the federal courts; the statute and its interpretation form together a rule of title and property, which must be the same in all courts. It is enough for this court, to know, that by ancient, well-established and uniform usage,

it has been acted on and considered as extending to all judgments in favor of any persons, and that sales under them have always been held and respected as valid.

Though the statute of 5 Geo. II. does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence, that it has always been so considered and acted on.[1]

The plaintiff in a judgment has an undoubted right to an execution against the person and the personal or real property of the defendant—he has his election; but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution; his remedies are cumulative and successive, which he may pursue until he reaches that point at which the law declares his debt satisfied.

A *capias ad satisfaciendum* executed, does not extinguish the debt for which it issued; if the defendant escape, or is discharged by operation of law, the judgment retains its lien, and may be enforced on the property of the defendant; the creditor may retake him if he escape, or sue the sheriff.

We know of no rule of law which deprives the plaintiff in a judgment of one remedy by the pursuit of another, or of all which the law gives him; the doctrine of election, if it exists in any case of a creditor, unless under the statutes of bankruptcy, has never been applied to a case of a defendant discharged under an insolvent act, by operation of law.

The greatest effect which the law gives to a commitment on a *capias ad satisfaciendum*, is a suspension of the other remedies, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them as fully as if he had never made use of any.[2]

*359] *The escape of the defendant, by his breach of prison-bounds, could not affect the lien of the judgment; the plaintiff is not bound to resort to the prison-bond as his only remedy; a judgment on it against the defendant is no bar to proceeding by *fieri facias*.

The 5th section of the act of congress for the relief of insolvent debtors declares, that no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, and attachment in the nature of execution, which shall have been put into the hands of the marshal antecedent to the application;" the application of this clause in the section was intended only for a case where one creditor sought to obtain a preference by process against the debtor's property, after his application; in such case, the execution shall have no effect or operation; but where the incumbrance or lien had attached, before the application, it has a priority of payment out of the assigned fund.

ERROR to the Circuit Court of the district of Columbia, for the county of Washington.

This was an ejectment, brought by the defendant in error, in the circuit court, for the recovery of a lot of ground in the city of Washington. The defendant pleaded the general issue, and on the trial, a verdict was given for the plaintiff below, subject to the opinion of the court, on a case agreed, which is stated at large in the opinion of the court.

The case was argued by *Jones*, for the plaintiff in error; and *Key* and *Dunlop*, for the defendant.

For the *plaintiff*, it was said, that the facts exhibited an extreme case, which brings up, under the strongest circumstances against it, the question of the continued lien on lands, of a judgment upon which execution has not been issued. The purchaser of a lot of ground, in possession under a complete title from the former owner, is to be deprived of it by a judgment-creditor of his grantor; who having exhausted all the personal remedies against his debtor, seeks to go back on his judgment, and to proceed against the real estate sold and conveyed, for a full and legal consideration, six years before.

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[1] Massingill *v.* Downs, 7 How. 766.

[2] Freeman *v.* Ruston, 4 Dall. 214; Spencer *v.* Benedict, 13 Johns. 533.

It is not intended to raise the question, whether any lien on lands exists under a judgment. A party having a judgment may elect to bind the lands- and he may proceed against them ; the statute having made lands subject to execution as personalty. The statute of 5 Geo. II., c. 7, made lands in the colonies subject to such execution in favor of British merchants : and although various constructions have been given *to that statute in [*360 the different states of the United States, in Maryland, it has been held to subject lands in general to execution and sale. But while it is admitted, that lands in Maryland are generally held to be subject to sale, under the lien of a judgment, no decisions of the courts of Maryland are to be found, by which this liability has been judicially established. The true construction of the statute is, therefore, within the power of this court ; and a common error as to its interpretation, if such error exists, will not support the mistaken interpretation, however universal it may be ; even if it had gone into judicial application, it will be corrected. 5 Rand. 53.

The principle on which the plaintiff below rests his claim is, that the judgment created a general lien on the land of the defendant in the judgment ; which continued and subsisted, until the debt was satisfied, or a sale was made of the land, under the judgment. It is contended, that the acts of the plaintiff amounted to a relinquishment of this lien ; and that the proceedings under the judgment against the debtor, with the effects of these proceedings, operated as an abandonment of the lien ; and that the surrender of his effects under the insolvent law, was a satisfaction of the lien.

The first process under the judgment was a *capias ad satisfaciendum ;* under which the body of the defendant was taken and committed to prison. Originally, at the common law, execution of the body was satisfaction of the debt, except there was an escape, or the party died in prison. The defendant Glover having broken the prison-rules, an action was brought on the bonds given by him, and the same was prosecuted to judgment. The effect of these proceedings was, to cancel the lien of the judgment on the real estate of the debtor. The plaintiff in the judgment has elected to proceed against the person of his debtor, and by these proceedings, and by the subsequent discharge of the defendant under the insolvent law, his powers under the judgment were exhausted.

For the plaintiff in error, it was also contended, that the operation of the insolvent law was to annul the judgment against the land, so far as to deprive the plaintiff in the suit *of the right to proceed by execution [*361 against the land, the surrender of the property of the debtor being a satisfaction of the judgment. This is the express operation of the fifth section of the insolvent law ; which directs the sale of the property of the insolvent, by the trustee, who, after satisfying all incumbrances and liens, shall divide the estate of the insolvent among the creditors, in proportion to their respective claims ; and which declares, " that no process against the real or personal property of the debtor, shall have any effect or operation, except process of execution, and attachment in the nature of execution, which shall have been put into the hands of the marshal, antecedent to the application of the insolvent." Thus all further process on the judgment was prevented ; and although the land in the hands of the trustee might be subject to the lien of the judgment, and the trustee bound to satisfy such lien out of the proceeds of the sale of the same, which he was directed to

make, the plaintiff could only obtain the fruits of the judgment through such sale.

Dunlop and *Key*, for the defendant.—It has been contended by the counsel for the plaintiff in error, that a judgment is no lien on lands in this district; that the true construction of the statute of 5 Geo. II., under which the lien is set up, does not warrant it; and that this court ought to take up the subject as *res integra*. We say, the question is no longer open; it is *res judicata*, and has long since been settled by judicial decisions and the practice or Maryland, of which this county formed part, before the cession. *McEldery* v. *Smith*, 2 Har. & Johns. 72; 3 Har. & McHen. 450; 3 Har. & Johns. 64.

The judgments, in June 1818, bound the premises in controversy. Glover had then, as the case admits, a valid title. The plaintiff in error bought afterwards, and was bound to take notice of the judgments. Upon *fieri facias* issued upon the judgments, the defendant in error acquired his title by purchase; and it is upon the plaintiff in error to show, that the judgments and executions were invalid, or satisfied, or the lien discharged.

*362] *It is not pretended, that there was any actual payment or satisfaction. To show a legal satisfaction, or, at least, an extinguishment of the lien on the lands, the plaintiff alleges: 1. The previous writs of *ca. sa.* against Glover, upon which he was committed and gave a prison-bounds bond, under the act of the 3d March 1803, § 16 (Burch's Digest 244). A recommitment on these executions, after the year, under the act of the 24th June 1812, § 3; and his release under the insolvent law. (Burch's Digest 277.) It is said, these writs and the proceedings under them satisfied the judgment in law; or, at least, amounted to an election by the judgment-creditor, to pursue his remedy against the body, and discharged the land. It is no case of election. The judgment-creditor could not pursue both remedies at once; but he could, successively, until he got the suits of his judgment. If one failed, he had a right to resort to the other.

Taking the body in execution is not payment; but, in the language of Coke, "a gage for the debt." His body is taken, "to the intent that he shall satisfy, and when the defendant pays the money, he shall be discharged from prison." It is true, if the plaintiff, after taking the body, release the debtor, or assent to his release, he cannot afterwards proceed on the judgment. He is presumed by law to be satisfied. But here there is no assent of the creditor; the proceedings, both as to the prison-bounds bond, and the discharge under the insolvent law, are had against him *in invitum*. They are for the easement of the debtor; and are statutory discharges, without the consent of the creditor, or power in him to resist them. "The plaintiff (says Lord Coke) shall not be prejudiced of his execution by act of law, which doth wrong to no one." "The death of the defendant is the act of God, which shall not turn to the prejudice of the plaintiff; and he shall have a new execution."

The authorities are clear, that an escape from the sheriff, or a statutory discharge, shall not prejudice the creditor, or extinguish his original judgment. Though in the case of escape, the creditor may sue the sheriff, he may also retake the debtor, and "until he be satisfied in deed, debtor can-

not have *audita querela;*" because "peradventure the sheriff may be worth *nothing." *Blumfield's Case*, 3 Co. 86 *b*; *Nadin* v. *Battie*, 4 East 147; *United States* v. *Stansbury*, 1 Pet. 573. The taking the body in [*363 execution, and the statutory discharge, without the assent of the creditor, does not extinguish the judgment or the lien, unless the statute says so. Here, the statute negatives the idea of a discharge. The insolvent law only releases the person, and the judgment is left in full force against property. The prison-bounds bond statute authorizes a recommitment, after the year. It looks to the judgment and execution, as in force, and only suspended, from motives of humanity to the debtor. If the debtor stays in the bounds, he is recommitted after the year; the execution not being discharged. Can he be better off, by breaking the bounds? Can he prejudice the creditor, by his own wrongful act, by violating the law, and abusing the privileges which its humane provisions gave him? The intent of the act of 1812 was, to limit the duration of the privilege of the bounds to the debtor, to force payment or a discharge under the insolvent law, at the end of the year. If, as is contended, the breaking of the bounds, and the forfeiture of the debtor's bond, releases the original judgment and execution, the very evil the statute meant to remedy will continue undimished. If the debtor's breach of the prison-bounds, discharges the original judgment, and gives the creditor, in substitution for it, the bond and sureties, the same course may be renewed by his sureties upon the executions against them, and so on, *ad infinitum*. There might be no end to the plaintiff's pursuit.

Again, it is argued, if the forfeiture of the prison-bounds bond did not extinguish the original judgment and lien, we had our election, to take the bounds-bond and sureties, or a *ca. sa.;* that we could not have both. That we elected the bond. We say, the bond is additional security; that it is a cumulative remedy; and that we can pursue both, until satisfaction of the debt. They are not incompatible, but may well stand together, like the case of appeal bonds. Both are given at the instance and for the benefit of the debtor, without the *creditor's consent, or his being consulted; and [*364 ought not to prejudice him. This is like the case of an escape; it is, in fact, an escape; the debtor, by the prison-bounds bond, is taken out of the custody of the sheriff, put into the custody of his sureties in the bond, and escapes. The creditor may sue the sheriff, or the bond sureties, and also retake the defendant. Peradventure, as Coke says, in *Blumfield's Case*, the sheriff or the sureties may be worth nothing. Esp. N. P. 611; Bull. N. P 69; *Ford* v. *Gwyn's Adm'r*, 3 Har. & Johns. 497.

Lastly, it is said, the fifth section of the insolvent law (Burch's Digest 242) makes void the *fi. fa.* under which we claim title. That section forbids process against the real or personal property of the debtor, not issued, or in the marshal's hands, previous to the debtor's application for relief. Its intent was, to pass the debtor's remaining property, not already bound by execution, into the trustee's hands, for equal distribution amongst his creditors. In this property (the lot now in controversy), there was no remaining interest of Glover to pass to the trustee. Subject to the plaintiff's lien, the whole remaining interest was in Tayloe, the alienee of Glover, and the plaintiff in error. The fifth section of the insolvent law does not apply to, and was never meant to cover, any such case.

BALDWIN, Justice, delivered the opinion of the court.—In the court below, this was an action of ejectment, brought by Thomson, to recover possession of a lot in the city of Washington. It came up on a case stated by the parties, which contains all the facts on which the cause depends, and is as follows:

In this case, it is agreed, "that one Charles Glover was seised in fee of the messuage, &c., in dispute, on and before the 15th May 1815, and so continued seised, until the 4th January 1819, when he bargained and sold the premises to the defendant, John Tayloe, as hereinafter mentioned; that on the 15th June 1818, Owen & Longstreth obtained two judgments at law
*365] against the said Glover, as indorser of two *promissory notes, passed to the said Owen & Longstreth; the one for $681.74, with interest from the 15th February 1817, till paid, and costs; the other for $674.20, with interest from the 15th December 1816, till paid, and costs; which judgments, by an arrangement between said Owen & Longstreth, and the lessor of the plaintiff, or the lessor of the plaintiff, together with his partner Maris, trading under the firm of Thomson & Maris, were transferred, with other choses in action, by Owen & Longstreth, to the lessor of the plaintiff, or to said Thomson & Maris, so as to place the proceeds of said judgments at the disposal of said Thomson, or Thomson & Maris, and make the same applicable to the security of said Thomson, or Thomson & Maris, against certain engagements entered into by him or them, for Owen & Longstreth; and were prosecuted for the benefit of said Thomson, or Thomson & Maris. "That *ca. sas.* were issued on said judgments, on the 10th May 1820, returnable to June term 1820, and duly served on said Glover, who was duly committed to the jail of the county aforesaid, under the said execution. That he was thereupon admitted to the benefit of the prison-rules, upon giving bonds and sureties, pursuant to the act of congress in such case provided. That the said Glover having broken the prison-rules and the conditions of his said bonds, suits were brought upon the same against him and his surety, returnable to October term 1822, at the instance and for the benefit of the said assignee or assignees of the said judgment; and judgments were duly obtained in said suits against said Glover (but not prosecuted to judgment against his surety, he having died, and no administration on his estate in this district), for the respective amounts of said original judgments, with interest and costs, at October term 1823; upon which judgments so obtained against Glover, on said prison-bounds bonds, *fi. fas.* were duly issued, returnable to December term 1824, and then returned *nulla bona.* That at the same term of December 1824, the attorney upon the record of the said Owen & Longstreth, still acting at the instance and for the benefit of the said assignee or assignees of the said original judgments, moved the court to recommit the
*366] said Glover, *under the original *ca. sas.* issued on said judgments, and before execution as aforesaid; the ground of which motion was, that more than twelve months had expired since the said Glover had been admitted to the benefit of the prison-rules, as aforesaid, and that the act of congress in such case provided, had limited the benefit of such prison-rules to the term of twelve months; upon which motion, the said Glover was recommitted, by order of said court, under the said *ca. sas.*, to the common jail aforesaid; where he remained, in virtue of his said recommitment, until

the 5th February 1825, when he was duly discharged as an insolvent debtor, pursuant to the act and acts of congress for the relief of insolvent debtors within the district of Columbia; he, the said Glover, having, in all things, complied with the requisites of the said act, to entitle him to such discharge. That after the said original judgments were rendered against the said Glover, as aforesaid, to wit, on the 4th January 1819, he bargained and sold the said messuage, &c., now in dispute, to the said John Tayloe, in fee-simple, for and in consideration of, the sum of $———, then and there duly paid to him by the said Tayloe, and conveyed the same to him in fee, by a deed of bargain and sale, duly executed, acknowledged, certified, and recorded according to law, by virtue of which bargain, sale and conveyance, said Tayloe entered upon said bargained and sold premises, and ever since has held, possessed and enjoyed the same. That no evidence is offered by plaintiff, that at the time of the said bargain, sale and conveyance, and of the payment of the said purchase-money to Glover, Tayloe had any actual notice of the said original judgments, or either of them; that is, no other than the constructive notice arising from the records of said judgments. That after said Glover had been discharged as an insolvent debtor, as aforesaid, *fi. fas.* were issued from the clerk's office on the said original judgments, at the like instance, and for the like benefit, of the said assignee or assignees of those judgments, returnable at May term 1825; and were levied upon the said bargained and sold premises (besides other real property, which had been before sold and conveyed to other persons by said Glover), then in possession of, and held by, said Tayloe, under his said purchase; and the said bargained and sold premises were afterwards exposed to *sale by the marshal, under said executions, and purchased by the lessor of the plaintiff, to whom they were conveyed by the said marshal, by a deed in the usual form, duly executed, acknowledged and recorded. That the lessor of the plaintiff, by whose order the said executions issued, had actual notice of the said bargain, sale and conveyance, from Glover to Tayloe, and of the possession of Tayloe, before the issuing of the said executions. That for the purchase-money, the lessor of the plaintiff paid nothing; but entered credit on said judgments, or one of them, for the amount of the same. Upon the foregoing case stated, it is submitted to the court, if the lessor of the plaintiff be entitled to recover the said messuage, &c.; and if the law be for the plaintiff, upon the facts aforesaid, then judgment in the usual form to be entered for the plaintiff; otherwise, for the defendant. It is agreed, the premises in dispute are of the value of $1000 and upwards."

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Upon the case stated, judgment in the court below was given for the lessee of the plaintiff, for his term yet to come, and unexpired, &c. To which judgment, the defendant below sued this writ of error.

The first point made by the plaintiff in error is, that by the law of Maryland, which it is admitted is the rule by which this point is to be determined, a judgment is no lien on real estate, before execution issued and levied. It seems, there is no act of assembly of that state applicable to the case; but that by an act of parliament of 5 Geo. II., 7, lands in the colonies are subject to execution as chattels, in favor of British merchants; that this statute has been adopted and in use in Maryland, ever since its passage, as the only one under which lands have been taken in execution and sold. It is admitted, that though this statute extends in terms only to

executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment-creditors. The plaintiff's counsel do not assert that this construction has ever been questioned, or that it has not been uniform throughout the state; but asks this court to review this construction, and give to the statute such an one as will confine it to the only case for which it makes a provision.

*368] *As congress has made no new law on this subject, the circuit court were bound to decide this case according to the law of Maryland; which does not consist merely in enactments of their own, or the statutes of England in force, or adopted by the legislature. The adjudications of their courts, the settled and uniform practice and usage of the state, in the practical operation of its provisions, evidencing the judicial construction of its terms, are to be considered as a part of the statute: and as such, furnishing a rule for the decisions of the federal courts. The statute and its interpretation form together a rule of title and property, which must be the same in all courts. Had this question occurred in the courts of that state, they would be bound to say, that it was now too late to overlook the practical construction which this statute has received for a century, and on which numberlesss titles depend. Property would be held by a very precarious tenure, and infinite confusion would be introduced, if any court should now resort to its terms as furnishing the class of cases in which lands could be sold on execution, and declaring it to extend to none other. It is enough for this court to know, that by ancient, well-established and uniform usage, it has been acted on and considered as extending to all judgments in favor of any persons; and that sales under them have always been held and respected as valid titles. The circuit court were right in deciding that the plaintiff below was entitled to all the benefits of the statute of 5 Geo. II. Though it does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence, that it has always been so considered, and so acted on.

Though the researches of the counsel for the defendant in error have not enabled them to furnish the court with any express judicial decision on this particular question, yet the evidence adduced is not less satisfactory to show that it has long since been settled. The case of *Dorsey* v. *Worthington*, in 4 Har. & McHen. 533, &c., shows, that so early as 1771, it was adopted as an established principle; and the later cases in 3 Har. & McHen. 450; 2 Har. & Johns. 64, 73; 3 Ibid. 497, are founded on it, as a well-known pre-existing rule, not questioned even by counsel; but apparently of a time so remote as to be beyond not only the memory of any living jurist, but the

*369] reported decisions of any *court. The decisions in the cases referred to are wholly unsupported and unaccountable, on any other construction of the statute, than the one contended for by the defendant in error.

If a judgment was not a lien from its date, an alienation before execution would prevent it from attaching afterwards. Yet the plaintiff may proceed and sell lands aliened after judgment, without a *scire facias* against the alienee. 2 Har. & Johns. 72. So of lands in the hands of a purchaser under a younger judgment, 3 Har. & McHen. 450; or against a *terre-tenant*, after the defendant had been arrested on a *ca. sa.* on the same judgment, imprisoned, escaped, and a judgment against the sheriff. 3 Har. & Johns. 497; s. p. 4 Har. & McHen. 533. There can, therefore, be no doubt, that

from the earliest period, the courts of Maryland had established it as a rule of property, which had become unquestioned, long before the cession of this district to the United States, that a judgment is a lien, *per se*, on the lands of the defendant.

The next question which arises is, whether the proceedings which have been had on the judgment in question, prior to the execution on which this lot was sold, have impaired or annulled its lien. The plaintiff had an undoubted right to an execution against the person, and the personal or real property of the defendant—he has his election; but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative and successive, which he may pursue, until he reaches that point at which the law declares his debt satisfied. A *ca. sa.* executed does not extinguish it. If the defendant escape, or is discharged by operation of law, the judgment retains its lien, and may be enforced on his property. The creditor may retake him, or sue the sheriff for the escape. A judgment against him does not amount to a satisfaction of the original debt, but it retains its lien, until the plaintiff has done or consented to some act, which amounts in law to payment; as the discharge of defendant from custody; or, in some cases, a levy on personal property. But we know of no rule of law, which deprives a plaintiff in a judgment of one remedy, by the pursuit of another, or of all which the law gives him. The doctrine of election, contended for by the plaintiff in error (if it exists in any case of a creditor, unless under the statutes *of bankruptcy), has never been applied to a case of a [*370 defendant in execution discharged under an insolvent act, by operation of law; a contrary principle is recognised, as well settled, in 5 East 147.

The greatest effect which the law gives to a commitment on a *ca. sa.* is, a suspension of the other remedies on the judgment, during its continuance; whenever it terminates, without the consent of the creditor, the plaintiff is restored to them all, as fully as if he had never made use of any. The cases cited by the defendant from Bull. N. P. 69; 5 Co. 86 *b* (*Blumfield's Case*), and those in the courts of Maryland, fully support, and are decided on this principle. In 1 Ves. 195, Lord HARDWICKE decided, that where a defendant was in custody under a *ca. sa.*, and a *fi. fa.* was afterwards taken out on the same judgment, and a farm levied on and sold, the purchaser, being a stranger, should hold it, as the *fi. fa.*, though irregular and erroneous, was not void. The authority of this decision has never been questioned, and fully establishes the position that a *ca. sa.* neither extinguishes the debt, nor annuls the subsequent proceedings on a *fi. fa.*; though the case would have been different, had the plaintiff in the judgment been the purchaser. In the present case, we must consider Thomson as the plaintiff in the judgment on which the lot in controversy has been sold, and that the sale may be open to objections, which would not be good against a stranger purchaser; but we can perceive in the case stated no facts which in any manner legally invalidate his purchase. He had a right to make use of the *ca. sa.*, until he obtained satisfaction. The escape of Glover, by his breach of prison-bounds, could not effect the lien of the judgment. The plaintiff was not bound to resort to the prison bond as his only remedy; a judgment on it against Glover was no more a bar to a

fi. fa., than a judgment against the sheriff for an escape ; and Glover could place himself in no better situation, by breaking his bond, than by remaining a true prisoner. Whether he escaped, or remained in prison-bounds, the marshal was bound to recommit him to close custody, after the expiration of twelve months from the date of the bond. (3d sect. of the act of June 1812, Burch 277.) This was a measure directed by law, without any application
*371] to the creditor ; its being done *in this case, on his motion, cannot vary the effects ; for Glover, in either case, must remain in custody, until the debt for which he was committed was paid, or he be discharged under the act of congress for the relief of insolvent debtors. Up to this time, no act was done by the judgment-creditor which could impair the legal effect of his judgment, by any rule of the common law, the laws of Maryland, or the district of Columbia ; or by any legal adjudication of the courts of that state on the construction of the statute.

It remains only to consider the effect of the proceedings under the insolvent law of the district, under which Glover was discharged. The counsel for the plaintiff in error relies on the last clause of the fifth section of this law, as conclusive against the proceedings on the judgment, subsequent to Glover's discharge. "And no process against the real or personal property of the debtor shall have my effect or operation, except process of execution, and attachments in the nature of executions, which shall have been put into the hands of the marshal antecedent to the application." The true meaning of this clause can be ascertained from the provisions of the preceding part of the law ; the debtor is to make out a list of all his property, real, personal and mixed, and offer to deliver it up to the use of his creditors ; the court then appoint a trustee, who is required to give bond with surety for the faithful performance of his trust. The debtor is then directed to execute to the trustee a deed, conveying all his property, rights and credits.

The lot in question was not the property of Glover, at the time of his application for the benefit of the law ; he had conveyed it in fee, in January 1819, and received the purchase-money, and therefore, neither could have any property in the lot, or right or credit arising from the sale ; nothing to deliver up to his creditors or convey to the trustee ; no question could arise between them and the judgment-creditor ; and the trustee could have no right to sell the lot, and distribute the proceeds among the creditors of Glover. The fifth section applies only to the property which passed to the trustee, by the deed from the insolvent, not to what he had conveyed to Tayloe, in 1819, six years before Glover's discharge. The trustee acquired
*372] what the debtor had at the time of his application, *or was in any way entitled to, that he could sell, and must distribute ratably among all the creditors, after satisfying incumbrances and liens. The application of the clause of this section, before recited, was intended only for a case where one creditor sought to obtain a preference, by process against the debtor's property, after his application. In such case, it declared, it should have no effect or operation ; but where the incumbrance or lien had attached, before the application, it had a priority of payment out of the assigned fund. Thus understood, the case is perfectly plain. This law can have no application to real estate, which never did, and never could, come into the hands of the trustee for distribution ; but left the judgment-cred-

itor with all his rights to enforce the lien of his judgment on lands of the debtor, in the hands of the plaintiff in error; who purchased after his rendition, and must hold it as the debtor did, subject to his lien.

It is not alleged, that the proceedings subsequent to the levy on the lot are erroneous or void; they appear to have been regular, and therefore, vested the title to the lot in controversy in the lessor of the plaintiff. The judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Bernard G. Farrar and Joseph C. Brown, Plaintiffs in error, [*373
v. United States.

Official bonds.—Action on bond.—Responsibilities of sureties.

F. and B. were sureties in a bond for $30,000, given to the United States, as sureties for one Rector, described in the bond as "surveyor of the public lands in the states of Illinois and Missouri, and the territory of Arkansas;" upon looking into all the laws on this subject, it can hardly be doubted, that this officer was intended to be included in the provisions of the act of congress of May 3d, 1822, requiring security of the surveyor-general; literally, there was, at that time, provision made under the laws for only one surveyor-general; but it is abundantly evident, that the officer who gave this bond was intended to be included in the provisions of that act, under the description of a surveyor-general; the indiscriminate use of this appellation in the previous and subsequent legislation of congress on this subject, will lead to this conclusion.

The surveyors of public lands are disbursing officers, under the provisions of the act of congress.

The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach that at the time of execution of the bond, there were in the hands of Rector, as surveyor, to be applied and disbursed by him, in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done; the jury found for the plaintiff, and assessed the damages for the breach of the condition at $40,000, and the judgment was entered "*quod recuperet*," the damages, not the debt: This judgment is clearly erroneous.

It would seem, that in adopting this form of rendering the judgment, the court below has been misled by the application of the 26th section of the act of 1789 to this subject; that section, if it sanctions such a judgment at all, is expressly confined to three cases: default, confession or demurrer.

The plaintiffs in error are sureties in an official bond; and if it is perfectly clear, as to them, a judgment cannot be rendered beyond the penalty, to be discharged on payment of what is due, which, of course, can only be, where it is less than the penalty; the statute expressly requires, that the surveyors of the public lands shall give bond for the faithful disbursement of public money, and in this bond, the words which relate to disbursement are omitted, and the only words inserted are "that he shall faithfully discharge the duties of his office." The court feel no difficulty in maintaining, that where the conditions are cumulative, the omission of one condition cannot invalidate the bond, so far as the other operates to bind the party.

Rector was commissioned surveyor of the public lands, on the 13th of June 1823, and the bond bears date the 17th August 1823; between the 3d of March and the 4th of June, in the same year, there had been paid to Rector, from the treasury, the sum of money found by the jury, and thus it was paid to him, before the date of his commission, and before the date of the bond. For any sum paid to Rector, prior to the execution of the bond, *there is but one [*374
ground on which the sureties could be held answerable to the United States, and that is, on the assumption that he still held the money in bank or otherwise; if still in his hands, he