Cherokee nation, and which laws and treaties have been, and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion. 3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought, therefore, to be awarded. And I am authorized by my brother STORY to say, that he concurs with me in this opinion.

Motion denied.

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*The Lessee of ROBERT G. SCOTT and SUSANNAH his wife, and JAMES C. MADISON, Plaintiffs in error, *v.* SILAS RATLIFFE, THOMAS OWINGS, JOHN OWINGS and others, Defendants in error. [*81

Hearsay evidence.—Land-law of Kentucky.

A witness testified, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, but was acquainted with his daughter only by report; that she never had seen her nor Mr. Scott, but recollected to have heard of their marriage, in Petersburg, as she thought, before the death of her father; that she could not state from whom she heard the report, but that she had three cousins, who went to college, at the time that she lived in Petersburg, and had no doubt that she had heard them speak of the marriage; that she heard of the marriage of Miss Madison, before her own marriage, as she thought, which was in 1810; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead: *Held*, that so much of this evidence as went to prove the death of Mr. Madison, was admissible on the trial, and ought not to have been excluded by the court.[1]

A patent was issued by the governor of Kentucky, for a tract of land containing 1850 acres, by survey, &c., describing the boundaries; the patent described the exterior lines of the whole tract, after which the following words were used, "including within the said bounds 522 acres entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c. Patents of this description are not unfrequent in Kentucky; they have always been held valid, so far as respected the land not excluded, but to pass no legal title to the land excluded from the grant. The words manifest an intent to except the lands of Preston and Garrard from the patent; the government did not mean to convey to the patentee lands belonging to others, by a grant which recognises the title of these others. If the court entertained any doubt on this subject, those doubts would be removed, by the construction which it is understood has been put on this patent by the courts of the state of Kentucky.[2]

The defendants claimed under a patent issued by the governor of Kentucky, on the 3d of January 1814, to John Grayham, and two deeds from him, one to Silas Ratliffe, one of the defendants, dated in August 1814, for 100 acres, the other to Thomas Owings, another defendant, for 400 acres, dated 25th March 1816; and gave evidence conducing to prove that they, and those under whom they claimed, had a continued possession, by actual settlement, more than seven years next before the bringing of this suit; the court instructed the jury, that if they believed from the evidence, that the defendants' possession had been for more than seven years before the bringing of the suit, that the act, commonly called the seven years' limitation act, of Kentucky, passed in 1809, was a bar to the plaintiffs' recovery; unless they found, that the daughter of the patentee, holding under a patent from the state of Virginia, was a *feme covert*, when her father, the patentee, died; or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham, the *patentee under the governor of Kentucky; the words, "at the time the defendants acquired their title by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title. The court cannot say, this instruction was erroneous. [*82

ERROR to the Circuit Court of Kentucky. On the 2d of April 1825, the plaintiffs commenced an action of ejectment against the defendants, assert-

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[1] Secrist *v.* Green, 3 Wall. 744.

[2] Armstrong *v.* Morrell, 14 Wall. 120.

ing a title and right of entry in and to 1850 acres of land, patented to their ancestor, James Madison, by the commonwealth of Kentucky. The grant was dated August 8th, 1798; and was in consideration of sundry land-office treasury-warrants, issued by the state of Virginia, and a survey bearing date 26th December 1796, founded on an entry made prior to the 1st of June 1792. At May term 1828, a verdict and judgment were rendered for the defendants.

On the trial, the plaintiff gave in evidence the patent to James Madison, and evidence conducing to prove the boundaries thereof; and that the defendants resided in said bounds, at the commencement of the suit. The patent recited, that in virtue of three land-office treasury-warrants, &c., "there is granted unto the Reverend James Madison, a certain tract or parcel of land, containing 1850 acres, by survey," &c.; and described the boundaries thereof, "including within said lands, 522 acres of land entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c.

They also proved by James Harvee, that he had known Bishop James Madison and his daughter Susan, the wife of one of the plaintiffs in error. He stated, that he had understood, Susan had married Mr. Scott, but he had never seen him; that Bishop Madison was dead, and he supposed, died in 1812. N. B. Beal, another witness, testified, that he had known Bishop Madison, had been to school to him, and he was well acquainted with his daughter Susan Madison, and with James C. Madison, his son, the lessors; they were the only children of Mr. Madison, living at his death; that he could not say, when Bishop Madison died, but he thought about twenty *years prior to 1828; that in 1818, he was at the house of Mr. Scott, in Virginia, saw Mrs. Scott, and they were then living as man and wife. Mrs. Eppes testified, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, and was acquainted with his daughter only by report; that she had never seen her or Mr. Scott, but recollected to have heard of her marriage with Mr. Scott, before the death of her father; that she had heard of Miss Madison's marriage, before her own marriage, which was in 1810; that she could not tell from whom she heard the report, but she had three cousins, who went to college in Williamsburg, at the time that she lived in Petersburg, and had no doubt, that she had heard them speak of the marriage; that she was, as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead.

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The defendants gave in evidence the patent to John Grayham, assignee of John Preston, issued by the governor of Kentucky, on the 13th day of January 1814, for 1445 acres of land; a deed from John Grayham to Silas Ratliffe, for 100 acres, by metes and bounds, dated 12th August 1814; a deed from John Grayham to Thomas Owings, for 400 acres, dated 25th of March 1816.

On the trial, the counsel for the plaintiffs took three bills of exception to the opinion of the court; the particulars of which are stated more at large in the opinion of this court. The first exception was to the instruction of the court to the jury, that if the plaintiffs did not show to their satisfaction, that the defendants resided within the plaintiffs' grant, and outside of the land claimed of Preston and Garrard, they ought to find for

the defendants. This bill of exception also set forth an objection, by the plaintiffs' counsel, to the ruling of the court as to the mode by which the location and survey should have been made. The second bill of exception stated, that the plaintiffs moved the court to instruct the jury, that the seven years' possession of the defendants was no bar to the plaintiffs' recovery; which the court overruled: and they instructed the jury, that *if they believed, from the evidence, that the defendants had been [*84 more than seven years in possession, next before the bringing the action, that the seven years' possession law of Kentucky, of 1809, was a bar to the plaintiffs' recovery; unless the jury should find, that Susan Madison was a *feme covert*, when her father died, and when the defendants acquired title under the patent of John Grayham. The third bill of exception stated, that the court, on the motion of the counsel of the defendants, overruled the evidence of Mrs. Eppes. The plaintiffs prosecuted this writ of error.

The case was argued by *Wickliffe*, for the plaintiffs in error. No counsel appeared for the defendants.

Wickliffe contended, that the evidence of Mrs. Eppes was improperly excluded in the circuit court. It was important to Mrs. Scott, and to her co-heir, to establish the facts in the knowledge of Mrs. Eppes; and such testimony to prove marriage, the death of the ancestor, and heirship, is within the rules of law and decided cases. 3 Bibb 238; 2 A. K. Marsh. 572; *Elliott v. Peirsol*, 1 Pet. 328.

As to the protection claimed under the seven years' law; the counsel for the plaintiffs contended, that it protects only those who are in under a supposed title from the commonwealth of Kentucky. This was not the fact as to all the defendants; but the instructions of the court were given as to the possession of them all. The party claiming under that act must connect himself with a legal or an equitable title. Ratliffe and Owings were the only persons who claimed in that manner. Even with such a title, it must be shown to have been adverse to the plaintiffs' title.

The instructions of the court upon the terms of the patent were also erroneous. The grant is to the whole extent of the boundaries of the land, and gives the legal title; but the equitable title of those who might be within those boundaries was not affected thereby. 1 T. B. Monr. 133. The court say the plaintiffs cannot recover, unless they prove that the defendants live outside of the undefined bounds of Preston's grant. These lines had not been run out; and it was impossible to prove the facts insisted upon, as the lines had not been ascertained.

*Marshall, Ch. J., delivered the opinion of the court.—This is a [*85 writ of error to a judgment rendered in favor of the defendants, in an ejectment brought by the plaintiffs in the court of the United States for the seventh circuit and district of Kentucky.

The plaintiffs claimed title as heirs of the Reverend James Madison, deceased, under a patent issued to him by the governor of Kentucky, on the 8th day of August 1798. A verdict and judgment having been rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error. The case depends on several bills of exception taken to certain opinions given by the court at the trial of the cause.

The plaintiffs gave in evidence the patent to their ancestor. It grants to the Reverend James Madison a certain tract or parcel of land, containing 1850 acres, by survey, &c., and "bounded as follows." It then describes the exterior lines of the whole tract, after which the following words are used; "including within said bounds, 542 acres of land entered for John Preston, 425 acres for William Garrard—both claims have been excluded in the calculation of the plat, with its appurtenances," &c.

They then gave evidence conducing to prove the death of the grantee, before the institution of the suit; that the plaintiffs, Susannah and James C., were his heirs-at-law, and that the plaintiff Susannah had intermarried with the plaintiff Robert G. Scott. They then introduced Mrs. Eppes as a witness, who swore, that she resided in Petersburg, Virginia, and that Bishop Madison resided in Williamsburg, Virginia; that while she resided in Petersburg, she had seen Bishop Madison, and was acquainted with his daughter only by report; that she had never seen her or Mr. Scott, but recollects to have heard of her marriage in Petersburg, as she thought, before the death of her father; that she could not state from whom she heard the report, but she had three cousins, who went to college, at the time that she lived in Petersburg, and had no doubt, that she heard them speak of the marriage; that she heard of the marriage of Miss Madison, before her own marriage, as she thought, which was in 1810; that she was, *as she believed, in 1811, in Williamsburg, and was told that Mr. Madison was dead. On the motion of the defendants, the court excluded this testimony as incompetent; and the counsel for the plaintiffs excepted to this opinion.

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In considering this exception, some diversity of opinion has prevailed in this court, with respect to that part of it which related to the time of the intermarriage between the plaintiffs, Robert G. Scott and Susan his wife. Some of the judges think, that the evidence given by Mrs. Eppes respecting the time, as well as respecting the fact of intermarriage, comes within the general rule excluding hearsay testimony, which was laid down by this court in the case of *Mima Queen* v. *Hepburn*, 7 Cranch 290. That rule is, "that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." Others think, that the fact of the marriage being established by other testimony, the circumstance that this fact was communicated to the witness, before another event took place, becomes itself a fact, and is evidence that the marriage was anterior to that other event. It becomes unnecessary to decide on this principle, because we are all of opinion, that so much of the testimony of Mrs. Eppes as goes to prove the death of Mr. Madison was admissible, and ought not to have been excluded.

On the motion of the defendants, the court also instructed the jury, "that if the plaintiffs did not show to their satisfaction, that the defendants resided within the plaintiffs' grant, and outside of the land claimed of Preston and Garrard, they ought to find for the defendants. An exception was taken to this opinion; and the plaintiffs contend, that it is erroneous, because the grant comprehends all the land within the exterior lines of the survey; and that the exception of the equitable claims of Preston and Garrard did not impair the legal effect of the grant, but subjected the grantee to the equitable demands of those claimants.

Patents of this description are not unfrequent in Kentucky. They have been always held valid so far as respected the land not excluded, but to pass no legal title to the land excepted from the grant. The plaintiff does not controvert this general *principle, but contends, that the peculiar language of this grant forms an exception to the general rule; and [*87 exempts this patent from its operation. The language is, that the lands entered for John Preston and William Garrard are included within the same bounds, but "both claims have been excluded in the calculation of the plat, with its appurtenances," &c. We think these words manifest an intent to except the lands of Preston and Garrard from the patent. The government could not mean to convey to Madison lands belonging to others, by a grant which recognises the title of those others. If we entertained doubts on this subject, those doubts would be removed, by the construction which we understand the courts of the state have put on this patent.

The defendants claimed under a patent issued by the governor of Kentucky to John Grayham, on the 3d of January 1814, and showed two deeds from John Grayham, one to Silas Ratliffe, one of the defendants, for 100 acres of land, dated the 12th of August 1814, the other to Thomas Owings, also a defendant, for 400 acres of land, dated the 25th of March 1816. They also gave evidence conducing to prove, that they, and those under whom they claimed, had a continued possession, by actual settlement, more than seven years next before the bringing this suit. The plaintiffs then moved the court to instruct the jury, that seven years' possession, as aforesaid, was no bar to the plaintiffs' recovery; but the court overruled the motion, and instructed the jury, that if they believed from the evidence, that the plaintiffs had been more than seven years in possession, next before the bringing the action, that the act, commonly called the seven years' limitation act, of Kentucky, passed in 1809, was a bar to the plaintiffs' recovery; unless the jury should find, that Susan Madison was a *feme covert*, when her father, the patentee, died, or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham. The plaintiffs excepted to this instruction.

Their counsel admits the constitutionality of the act of limitations referred to in the opinion of the court; and that it is a bar to the action as to those defendants who show title under John Grayham; but insists, that only two of the defendants *show such title, and that the plaintiffs are [*88 entitled to judgment against the others. There is no question respecting the law as applicable to the fact; but some doubt exists respecting the fact. It is understood, to be settled in Kentucky, that their limitation act of 1809 protects those only who are connected with a patent from government, by paper title; and the record shows conveyances from Grayham to Ratliffe and Owings only; but it cannot escape us, that the object of the plaintiffs' motion and exception was, to bring into review and question the constitutionality of the act of 1809. He, therefore, does not discriminate between those who have, and and those who have not, title; his motion comprehends all the defendants. The instruction given by the judge is also in general terms; obviously not contemplating any difference of situation or right between the several defendants. We find expressions in the conclusion of the instruction, leading to the opinion, that in fact there was no distinction between the defendants. After declaring that the statute

was a bar, the judge adds, "unless the jury should find that Susan Madison was a *feme covert*, when her father, the patentee, died; or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham." The words, "at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title. The language of the judge cannot be construed to indicate, that the conveyance to Ratliffe and Owings could avail those who did not claim under them. The defendants might all claim under them. Some confusion, undoubtedly, exists in the statement of the fact, both in the motion and in the instruction; but we think both may be fairly understood as applying only to defendants claiming under John Grayham. We cannot say, that this instruction is erroneous.

The judgment is reversed, for error in the entire exclusion of the testimony of Mrs. Eppes; and the cause is to be remanded, with instructions to award a *venire facias de novo.*

*89] This cause came on to be heard, on the transcript of the *record, from the circuit court of the United States for the seventh circuit and district of Kentucky, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the proceedings and judgment of the said circuit court in this, that the testimony of Mrs. Eppes, a witness in the said cause, was totally excluded; whereas, the same ought to have been admitted, so far as it conduced to prove the death of James Madison, the ancestor of the plaintiffs: Therefore, it is considered, ordered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled; and that the cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*90] *John R. Livingston, Plaintiff in error, *v.* Moses Smith, Defendant in error.

Pleading.—Attachment.

Insufficient and defective pleading.

A sheriff, having a writ of foreign attachment, issued according to the laws of New Jersey, proceeded to levy the same on the property of the defendant in the attachment; after the attachment was issued, the plaintiff took the promissory notes of the defendant for his debt, payable at a future time, but no notice of this adjustment of the claim of the plaintiff was given to the sheriff, nor was the suit on which the attachment issued discontinued; the defendant brought replevin for the property attached, the sheriff having refused to redeliver it: *Held*, that the sheriff was not responsible for levying the attachment for the debt so satisfied, or for refusing to redeliver the property attached.

A previous attachment, issued under the law of New Jersey, of property, as the right of another, could not divest the interest of the actual owner of the property in the same; so as to prevent sheriff attaching the same property, under a writ of attachment issued for a debt of the same actual owner.

Error to the Circuit Court of New Jersey. In the court below, John R. Livingston instituted an action of replevin against Moses Smith, the defendant in error, "for that he, Moses Smith, on the 2d of November 1826, at the township of Newark, in the county of Essex, and state of New Jersey, took the goods and chattels of the plaintiff in the replevin, to