clerk of his county, and unless good cause be shown against it, it shall be affirmed by the court and recorded; but if the said inquisition should be set aside, or if, from any cause, no inquisition shall be returned to such court, within a reasonable time, the said court may, at its discretion, as often as may be necessary, direct another inquisition to be taken, in the manner prescribed."

Before entering on the merits of the judgment of the circuit court for quashing this inquisition, a preliminary question is made to the jurisdiction of this court. Its appellate jurisdiction is extended by the act of congress, creating the circuit court for the district, to "any final judgment, order or decree, in said circuit court, where the matter in dispute, exclusive of costs, shall exceed the value," &c. The order or judgment in quashing the inquisition in this case, is not final. The law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken."

*261] The order or judgment, therefore, quashing *the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*. The writ of error is to be dismissed, the court having no jurisdiction of the cause.

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 this writ of error be and the same is hereby dismissed, for want of jurisdiction.

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*262] *The Bank of the United States, Appellants, *v.* Jacob White, David Cummins and Robert Bennefil.

Chancery practice.

The 20th of the rules made by this court at February term 1822, for the regulation of proceedings in the circuit courts in equity cases, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly."

By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree; that may furnish a ground why that court should not proceed to a final decree, until such order was complied with; but any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without it, would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause.

No practice of the circuit court, inconsistent with the rules of practice established by this court for the circuit courts, can be admissible to control them.[1]

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[1] In the case of Packer *v.* Nixon, in November 1831, Mr. Justice Hopkinson said, that though the profession may have been in the habit of disregarding one of the rules of equity practice, adopted by the supreme court, this can only be sustained, on the ground of waiver; when the objection is made, the court is bound to enforce the rule. MS. These rules are obligatory on the circuit courts. Jenkins *v.* Greenwald, 1 Bond 126.

United States Bank v. White.

The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review.

APPEAL from the Circuit Court of Ohio. The case, as stated by Mr. Justice STORY, was as follows:

The Bank of the United States, in 1826, brought a bill in equity against the appellees, and Hugh Glenn, James Glenn and Thomas Graham. The object of the bill was, to set aside certain conveyances of real estate, made by the appellee, White, to the other appellees, Cummins and Bennefil, upon which estates, the bank, as judgment-creditors of White, the Glenns and Graham, had levied executions to satisfy those judgments. The bill charged the conveyances to be fraudulent.

The appellees appealed, and filed a demurrer to the bill; and at the July term of the court, in 1828, the demurrer was overruled, and the cause remanded to the rules, and a rule taken for an answer in sixty days. At the September rules 1828, *an entry "decree *pro confesso*" was minuted [*263 in the rule-book; and thereupon, the cause was continued from term to term, until July 1830, when a final decree was entered, as follows: "It appearing to the court, that the defendants in this cause are in default for answer, it is ordered, adjudged and decreed, the matters set forth in the complainant's bill, be taken as confessed and true; and the court, therefore, order and decree, that the several deeds set forth in the complainants' bill, as having been made by the said Jacob White, without any valuable consideration, and with a view to delay and hinder the complainants in the collection of their debts, set forth in the bill, are void; and that the same are, therefore, fraudulent as to the complainants. It is, therefore, ordered, adjudged and decreed, that the several tracts of land in said several deeds described, are liable to be sold for the satisfaction of the said several judgments, held by the said complainants against said Jacob White and others, mentioned and set forth in the complainants' bill. And it is further ordered, that so far as said deeds may interfere with the complainants in the collection of their said judgments, the same are hereby declared void; and the said defendants are perpetually enjoined from setting up or asserting title under the said deeds, as against the complainants, or any persons who may claim as purchasers at sales made on execution under any or either of the said judgments, held by the complainants; and it is further ordered, that the said complainants recover of the said defendants their costs in this behalf expended."

In July 1830, the appellees filed the present bill of review, for the purpose of reversing the foregoing decree; and the charging in the bill is, that the decree was irregularly and illegally made and entered as a final decree; when, according to law, and the rules of the circuit court, the same ought only to have been entered as an interlocutory decree, and a copy thereof served upon the appellees, before the same became final. The appellants filed an answer, admitting the proceedings and decree to have been as stated in the bill of review. But the answer avers, that at the time when the demurrer was overruled, the solicitor for the appellees gave the court and the solicitors for the appellants notice, that the appellees, then defendants in the cause, do not wish to file any answer to the said bill. And the answer expressly denies, that any error or *irregularity exists in said decree; [*264 or that the same was erroneously entered; or that the decree ought

to have been interlocutory ; and it does not admit that a copy ought to have been served upon the appellees, previous to rendering a final decision thereon, after they had appeared and demurred to the said bill.

The cause was set down for a hearing upon the bill of review and answer; and at the hearing, the circuit court reversed the original decree, for the reasons stated in the bill of review. The Bank of the United States appealed from this decree of reversal.

A printed argument was delivered to the court, in which *Fox* and *Caswell,* for the appellants, contended, that the decree, reversing the original decree, was erroneous.

1st. Because all the parties interested in the original decree were not parties to the bill of review.

2d. Because after defendants in an chancery cause have appeared and demurred to a bill, it is not necessary to serve them with copies of any decree made in the subsequent progress of the cause.

3d. That even admitting the necessity of the service of such a decree in ordinary cases ; in the present case, the pleadings show a waiver of a compliance with the rule, the answer not being replied to.

The appellants contend, that a decree on a bill of review is one from which an appeal can be taken. 10 Wheat. 146. It is a final determination of the suit ; and in case the party plaintiff succeeds, he gains the right of litigating again a matter once decided. It is precisely like a writ of error in its effects. The decree made on a bill of review, is the subject of a new bill of review. Cooper's Equity Pl. 92 ; 2 Chan. Pract. 633 ; Mitford's Pleading 79–80 ; 1 Vern. 417. And it makes no difference in this respect, whether the original decree was reversed or sustained, on the proceeding to review. If a decree reversing a former decree is the subject-matter for a new bill of review, it follows as a matter of course, that the decree is final; because none but a final decree can be either reviewed or reversed : and if final, then it is such a decree as can be appealed from.

*265] In support of the first error assigned, the appellants consider *the law as settled, that in bills of review, as in cases of writs of error, all parties to the original suit must be made parties, either plaintiffs or defendants, to the proceeding brought to be reviewed. Cooper's Eq. 95 ; Beames' Pleas in Eq. 314. In the present case, neither the Glenns nor Graham were made parties to the bill of review.

In support of the second error assigned, it is contended, that after a defendant in chancery has once appeared and demurred to a bill, it is not necessary to give him any further notice of the proceedings in the cause. A decree *nisi* need in no case be served upon such a party. The omission to file an answer is an admission, on his part, that the case is correctly stated in the bill, and that he has no valid defence to offer. The 20th rule established by the supreme court, for the practice of the courts of the United States, does not require the service of a copy of the decree. On the contrary, it is expressly provided, that if the defendant fail to answer the plaintiff's bill within two months (after the demurrer is overruled), the bill "may be taken as confessed, and the matter thereof be decreed accordingly." The clause attached to the sixth rule in these words, "which decree shall be absolute, unless cause be shown at the term next succeeding that to which

the process shall be returned executed," is altogether omitted in the 20th rule. By the ordinary rules of practice in courts of chancery, no decree could be taken *pro confesso*, until the defendant had entered an appearance. The plaintiff had no remedy against the obstinacy of the defendant, in refusing to enter his appearance. To remedy this defect in the administration of justice, the statute of 5 Geo. II., c. 25, was passed, by which the courts are authorized to enter an appearance for the defendant, and the cause is then prosecuted in the same manner as though the defendant had voluntarily appeared.

We suppose, the object of the sixth rule is, to enable the complainant to proceed without an actual appearance. The provisions of the sixth and seventh rules embrace substantially the provisions of the British statute, and the same construction applied to the statute, must be applied to the rules. 1 Harr. Chan. Pract. 203; 1 Newland's Chan. Pract. 97. If the court had intended to require the service of a copy of *the decree *pro confesso*, in cases where an appearance had been entered, and demurrer filed [*266 and overruled, language would have been used leaving no doubt of such intention. Such a requisition being contrary to be settled practice of the English courts, would not have been permitted to rest on mere inference or implication.

In support of the third error assigned, it is contended, that if the court should be of the opinion, that a copy of the decree ought to have been served, previous to its being finally entered; yet it is manifest, in the present case, that the service of the decree was waived. The court were distinctly informed, that the defendants in the cause did not wish or intend to file an answer; under such circumstances, it would have been useless to have served a copy of the decree upon the parties; without an answer, no other decree could have been pronounced than the one entered; and as it was known no answer would be filed, the service of a copy of the decree would have been a useless act. It is tantamount to a consent that the decree shall be entered. 5 Johns. Ch. 68. Why may not a party rest his case upon a demurrer? He knows the facts are correctly stated in the bill. He finds the law arising from those facts against him; upon what principle of law or justice is a party so circumstanced obliged to pay the expense of a copy and service of such a decree?

Sergeant, also for the appellants, after presenting to the court the printed arguments of *Fox* and *Caswell*, stated, that the whole case turned upon the rules for the regulation of equity proceedings in the circuit courts, as established by this court. He particularly referred to the 20th rule; and he contended, that the proceeding in the circuit court of Ohio was against those rules. Those rules were established for the general regulation of proceedings in chancery cases, and they form a part of the law of the land. A bill of review must be founded on new matter, and this of a peculiar character; but there is no allegation of new matter in this proceeding. The parties in this case demurred to the bill; they were thus in court, and there was no necessity, under the rules of practice, to serve a copy of the subsequent decree upon them. But in addition to this, the solicitor of the *original defendants expressly declared, the defendants had nothing [*267

to allege against the original bill. This is conclusive upon the appellees; they were bound by the admissions of their solicitor.

Hammond, for the appellees.—The first error alleged is, that all the parties interested in the original decree, were not parties to the bill of review. We reply, that none were affected by that decree but White, and Cummins and Bennefil, who claimed under him. Nothing was decreed affecting the other parties. The decree did not touch them. Consequently, they could not, properly, be complainants in a bill of review. As it respected them, there was nothing to be reviewed.

The second error alleged is, that the appellees having appeared and demurred, although their demurrer was overruled, and the cause remanded to the rules for further proceeding, service of a decree *nisi* was not necessary. The supreme court of the United States have established rules of practice touching this point. The circuit courts may not give them, everywhere, exactly the same construction; but may blend with them, in that construction, an existing practice. There is no reason why a cause, at the rules, upon rule for answer, should be distinguished from a decree *pro confesso*, for non-appearance. The object of serving on the respondent himself, a decree *nisi*, is, that the court may be assured he is wilfully in default. This is alike indispensable, in every case, where a decree *pro confesso* is to be taken. The supreme court will not readily control the circuit court in deciding any matter respecting its own practice. So it is decided in *Duncan* v. *United States*, 7 Pet. 451–2. The decision of the circuit court, in the case now under consideration, is predicated upon its own knowledge of its own practice. That decision is in aid of a full and fair administration of justice, and therefore, ought to be sustained, if possible.

The third error assigned assumes, that the pleadings, in this case, involve a waiver of the rule. That is, there being no replication, the allegation, in the answer to the bill of review, that the counsel for the appellees, the
*268] respondents in the original *suit, declared in court that the appellees did not wish to file an answer to the original bill, is a fact confessed. There can be nothing in this. No declarations of counsel, in court, unless formally made and recorded, or noted in writing, can authorize a departure from the established modes of practice. It seems an odd apology for error in a decree, that opposing counsel made declarations that induced the party to commit that error. But we go further; we maintain, that parties are not to be concluded by loose and general declarations of counsel. Parties are as well to be protected against these, as against the apprehended negligences, which the service of a decree *nisi* is intended to prevent. It is denied, that any declaration, either of the party himself, or of his counsel, can be set up in answer to a bill of review, for error on the face of the record, unless such declaration appears in the record of the proceedings, or on the face of the decree. With these remarks, the case is submitted.

Story, Justice, delivered the opinion of the court. After stating the case, he proceeded:—Several objections have been taken by the appellants to the decree. In the first place, it is said, that all the parties to the original decree are not made parties to the bill of review. How this matter is, does not distinctly appear, as the proceedings on the original bill, though made a part of the bill of review, are not, as they ought to have been,

spread upon the present record. The principle is unquestionable, that all the parties to the original decree ought to join in the bill of review; but, for aught that appears, no decree was ever had against the other defendants. If this constituted the turning point of the cause, we should deem it necessary to award a *certiorari*, as there is reason, from the answer, to doubt, if any decree was had against the other defendants, not made parties to the bill of review.

In the next place, it is objected, that, after an appearance and demurrer overruled, it is not necessary to serve the party defendant with a copy of the decree, taking the bill *pro confesso*, for want of an answer. The answer to the bill of review having expressly denied any error and irregularity in the decree, and not having admitted, that the service of any such *copy is necessary, that matter was directly put in controversy; and the [*269 cause having been set down for a hearing upon the bill and answer, without a replication, it is difficult to perceive, how this court can take judicial notice of what the practice of the circuit court is upon this subject, when that practice is the very hinge of the controversy. But it is not, in our opinion, necessary to enter upon this point; because, we are of opinion, that the decree is perfectly regular, without the service of any copy, according to the rules prescribed by this court, in equity causes, to the circuit courts; and no practice of the circuit court, inconsistent with those rules, can be admissible to control them. The 20th of the rules, made by this court at February term 1822, in equity causes, is as follows. "If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so, within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore, it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the circuit court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy, before the final decree, that may furnish a ground, why that court should not proceed to a final decree, until such order was complied with. But any omission to comply with it, would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree, without a compliance with it, it would not be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retains possession and power over the decree and the cause.

In the present case, the circuit court did proceed to make a final decree, after taking the bill *pro confesso*. There is no error on the face of that decree. It conforms to the requisitions of the rules of this court; and we are, therefore, of opinion, that it is not liable to reversal upon the present bill of review. *The decree of the circuit court is reversed, and [*270 the cause remanded to that court, with directions to dismiss the bill of review.

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 Ohio, and was argued

by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to dismiss the bill of review in this cause.

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*271] *UNITED STATES, Plaintiffs in error, *v.* ANDREW HACK, THOMAS SEWALL and JAMES WILKES, JR., Assignees of JOHN STOUFFER.

Priority of the United States.—Partnership.

The priority of the United States does not extend so as to take the property of a partner from partnership effects, to pay a separate debt, due by such partner to the United States, when the partnership effects are not sufficient to satisfy the creditors of the partnership.[1]

It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property, is his share in the surplus, after the partnership debts are paid; and that surplus, only, is liable for the separate debts of such partner.

ERROR to the Circuit Court of Maryland. The United States instituted an action of *assumpsit* against the defendants, in the circuit court of the United States for the district of Maryland. The defendants pleaded *non assumpsit*, and the case was submitted to the court by the counsel for the plaintiffs and the defendants, on the following statement of facts agreed:

"It is agreed between the parties in this case, by their counsel, that John Stouffer is largely indebted to the plaintiffs on sundry judgments rendered against him on custom-house bonds; that the said John Stouffer was, at the date of the said bonds, and of the rendition of the said judgments, a partner in trade with his brother Jacob Stouffer, and so continued until the execution of the deed of trust hereinafter referred to; that the said John and Jacob Stouffer becoming embarrassed and insolvent in their affairs, on the 19th day of May 1832, executed a deed of trust to and in favor of the defendants, of all their joint and partnership property, for the benefit of their joint and partnership creditors, having no private or undivided estate; that the said property is not sufficient for the payment of all said creditors, but that the said John Stouffer's undivided half, now in the possession of the said trustees, amounts to $974.71. It is also agreed, that the amount of the unsatisfied judgments of the United States against
*272] the said John Stouffer is, at *this date, $2100, and upwards, after exhausting his private and individual estate. And the amount now in the possession of the aforesaid trustees, being the proceeds of the said partnership estate, is $1942.42, one-half of which is $974.71. Upon the foregoing statement of facts, the district-attorney contends, that the plaintiffs are entitled to receive from the defendants the sum of $974.71, being the proceeds of John Stouffer's undivided half of, in and to the aforesaid partnership estate, to be applied to the satisfaction of the aforesaid judgments recovered against the said John Stouffer. The counsel for the defendants contends, that the plaintiffs are not entitled to receive anything from the defendants in this action, on the ground, that the money in their hands is the proceeds of partnership property, the whole of which is inadequate to

[1] United States *v.* Duncan, 4 McLean 607; United States *v.* Evans, Crabbe 60; Ex parte Webb, 2 Bank. Reg. 183.