*Mary Deneale, Executrix of George Deneale, and Nancy Patton Deneale, Plaintiffs in error, *v.* John Archer and John W. Stump, Executors of John Stump, deceased.

Statute of limitations.

By the revised code of Virginia, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after;" the proceedings in this case were a *scire facias* on a judgment against the testator, against his executrix, and an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution which was issued on the judgment against the executrix, is not an execution on the judgment against George Deneale.

It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them; it could not be given in evidence against them.

If the defence set up by the defendants in the district court, had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted the presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act; proceedings against the personal representative, is not one of the exceptions.

Error to the Circuit Court of the District of Columbia, and county of Alexandria.

This case came before the court on an earlier day in the term, and was dismissed in consequence of an informality in the writ of error (see the preceding case). By consent of the parties, the proceedings were amended, and a writ of error in proper form was substituted.

The case was argued by *Lee*, for the plaintiffs in error; and by *Coxe*, for the defendants.

Marshall, Ch. J., delivered the opinion of the court.—This is a *scire facias* to revive a judgment obtained by the *executors of John Stump against George Deneale, on the 19th of December 1817, in the [*529 court of the United States for the county of Alexandria. The writ of *scire facias* is against the heirs and devisees of Deneale, and was issued on the 17th day of May 1828. The *scire facias* was returned executed on two of the defendants, the others not found. Two *nihils* having been returned against the defendants who were not found, an office-judgment was entered against them all. At the succeeding term, Mary Deneale and Nancy P. Deneale, on whom the process had been executed, set aside the office-judgment and demurred to the *scire facias*. The plaintiffs joined in demurrer. The same defendants further pleaded, "that the plaintiffs ought not to have or maintain their said execution, because they say, that the judgment recited in the said *scire facias* was rendered more than ten years next prior to the day of the date of the said *scire facias*." The plaintiffs reply, that after the death of the said George Deneale, the plaintiffs issued out of the circuit court of the said district of Columbia, held for the county of Alexandria, a *scire facias* against the said Mary Deneale, executrix of the said George Deneale, to show cause, if any she could, why the plaintiffs should not have execution of their judgment aforesaid, of the goods and chattels which were of the said George Deneale, and which came to the hands of said Mary

Deneale to be administered. On which *scire facias*, such proceedings were had, that by the judgment of the court, it was considered, that the plaintiffs should have execution of their said judgment, &c.; on which said award of execution accordingly, on the 10th day of January 1820, an execution was, by the plaintiffs, issued out, returnable on the fourth Monday in March 1820, and on which execution the marshal made the following return—"no property found to levy this execution upon."

To this replication, the defendants demurred, and the plaintiffs joined in demurrer. The court, overruling the demurrer, both to the *scire facias* and to the replication, rendered judgment in favor of the plaintiffs against all the defendants. This judgment is brought before this court by writ of error.

Although the *scire facias* is entirely informal, the court is not satisfied, *530] that the demurrer to it ought to be sustained, and *will, therefore, proceed to inquire, whether the judgment be erroneous on other grounds.

A joint judgment has been rendered against those defendants who were not found, and against those who appeared and pleaded. The law of Virginia, as it stood when jurisdiction over this district was vested in congress, is the law of the courts of Alexandria. In the Revised Code of Virginia, vol. 1, p. 500, § 65, it is enacted, that "on writs of *scire facias* for the revival of judgments, no judgment shall be rendered on the return of two *nihils*, unless the defendant resides in the county, or unless he be absent from the commonwealth, and have no known attorney therein. But such *scire facias* may be directed to the sheriff of any county in the commonwealth wherein the defendant or his attorney shall reside or be found, which being returned served, the court may proceed to judgment thereupon, as if the defendant had resided in the county." It does not appear, that the defendants did not reside in the county, nor does it appear, that they were absent from the district. But there is great difficulty in applying this act to writ of *scire facias* issued in the county of Alexandria.

Without deciding whether the office-judgment against the defendants, not served with process, be legal or otherwise; the court will proceed to consider the demurrer to the plea of the act of limitations. In the first volume of the Revised Code, p. 389, it is enacted, that "judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." We are not informed, that any decision applicable to the question arising in this case, has ever been made in the courts of the state. We must, therefore, construe the statute, without the aid such decision would afford us. It certainly does not apply to any judgment on which an execution has issued; and if the proceedings which have taken place on the judgment obtained against George Deneale, in December 1817, be equivalent to an execution, the demurrer to the replication was rightly overruled.

Those proceedings are a *scire facias* against his executrix, *and *531] an execution on the judgment rendered against her on that *scire facias*. The writ of *scire facias* is no more an execution than an action of debt would have been; and the execution, which was issued on the judgment against the executrix, is not an execution on the judgment against

George Deneale. It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, nor in any manner affect them. It could not be given in evidence against them.

If the defence set up by the defendants in the district court had rested on the presumption of payment, the *scire facias* against the executor would undoubtedly have accounted for the delay, and have rebutted that presumption; but the statute creates a positive bar to proceeding on any judgment on which execution has not issued, unless the plaintiff brings himself within one of the exceptions of the act. Proceedings against the personal representative is not one of those exceptions. We are, therefore, of opinion, that the demurrer to the replication ought to have been sustained, and the judgment must be reversed, and the cause remanded to the circuit court for the county of Alexandria, with directions to enter judgment on the demurrer to the replication of the plaintiffs, in favor of the defendants.

This cause came on to be heard, on the transcript of the record of the United States court for the district of Columbia, sitting in the county of Alexandria, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the judgment rendered by the said court, in this, that the demurrer filed by the defendants in that court to the replication of the plaintiffs, filed to the plea of the statute of limitations, pleaded by the said defendants, was overruled, whereas, it ought to have been sustained. It is, therefore, considered by this court, that the said judgment be reversed and annulled, and the cause remanded to the said court of the United States for the district of Columbia, in the county of Alexandria, with drections to enter judgment on the said demurrer to the replication of the plaintiffs, in favor of the defendants in that court.

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*Thomas Boon's Heirs, Complainants, *v.* William Chiles *et al.*, Defendants. [*532

Parties in chancery.

T. Boon, a citizen and resident of Pennsylvania, filed a bill in the circuit court of Kentucky, against W. Chiles and others, praying that the defendant and such others of the defendants as might hold the legal title to certain lands, might be decreed to convey them to him, and for general relief.

The bill stated, that Reuben Searcy, being entitled to one moiety of a settlement and pre-emption right of 1400 acres of land, located in Licking, sold the same to William Hay, in September 1781, and executed a bond for a conveyance; in December following, Hay assigned this bond to George Boon, who, in April 1783, assigned it to the plaintiff; Hay, while he held the bond, obtained an assignment of the plat and certificate of survey, which he caused to be registered; and the patent was issued in his name, in 1785; in 1802, the plaintiff made a conditional sale of this land to Hezekiah Boon, but the conditions were not complied with, and the contract was considered by both parties as a nullity; yet, a certain William Chiles, and the said Hezekiah Boon and George Boon, fraudulently uniting the plaintiff's name with their own, without his consent or knowledge, filed a bill in chancery, praying that the heirs of Hay might be decreed to convey the legal title to the said William Chiles, who claimed the right of Searcy, through the plaintiff, under his pretended sale to Hezekiah Boon; a decree was obtained, under which a conveyance was made to Chiles, by a commissioner appointed by the court; the plaintiff averred his total ignorance of these transactions at the time, and disavowed them.

While this suit was depending, the decree of the Bourbon court was reversed in the court of appeals of the state, and the cause remanded to that court for further proceedings. The com-