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The certificate of the judges leaves no doubt that the whole cause was submitted to the circuit court, by the motion of the counsel for the prisoner. The whole testimony in support of the prosecution had been submitted to the court, and *upon this whole testimony, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not [*274 conduce to establish the offence denounced by any act of congress, under which the indictment was framed. This instruction necessarily embraced the whole cause. Had it been given, the prisoner must have been acquitted. Had the court declared, that the testimony did not support the indictment, the whole law of the case would have been decided against the prisoner; and the jury must have convicted him, or have disregarded the instruction of the court. It has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges; and as this is, we think, a case of that description, we cannot decide it in its present form. The case is remanded to the circuit court; this court not having jurisdiction over the question as stated.

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 Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the whole case has been certified to this court; and as it has been repeatedly decided by this court, that the whole case cannot be adjourned on a division of the judges, the court cannot decide this case in its present form. Whereupon, it is ordered and adjudged by this court, that this case be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, this court not having jurisdiction over the question as stated.

*JAMES BOYCE'S Executors, Appellants, v. FELIX GRUNDY. [*275

Rescission of contract.—Interest on affirmance.

On the hearing of the case of Boyce's Executors v. Grundy, at January term 1830, on an appeal from the decree of the circuit court of West Tennessee (3 Pet. 210), the decree of the circuit court was affirmed; by which, after decreeing a rescission of a contract made between Felix Grundy and James Boyce, the intestate, for the purchase, by the former from the latter, of a tract of land lying in the state of Mississippi; the court also decreed, that Robert Boyce, the administrator of James Boyce, of the goods, &c., of James Boyce, deceased, do pay the sum of \$2065.21, to be levied on the goods of the said James Boyce, in his hands to be administered: and execution issue therefor as at law; in this decree, nothing was said as to any allowance of damages or interest. A mandate was issued in the usual form, to the circuit court, to carry the same into effect; on filing the mandate in the circuit court, in 1830, the cause was referred to the clerk, as master, to take an account of the assets of James Boyce, in the hands of the administrator; who reported, that no assets appeared in the hands of the administrator, but that Robert Boyce had, under an agreement with the appellee, received for rents of the land in Mississippi, before the 1st of January 1824, \$2100, which, with interest thereon, \$1120, to the 1st of September 1830, would amount to \$3220; and that the land in Mississippi was devised by James Boyce, the intestate, to his son Robert Boyce. The report was confirmed, except as to the \$1120 interest; the circuit court decreed, that the plaintiff recover of Robert Boyce, \$2100, with interest from the decree; to be levied on his proper goods and chattels; and for the balance due the plaintiff, \$496.46, with interest, in case the same was not paid by him; the plaintiff had for the whole amount of the decree, a lien on the lands in the state of Mississippi; and that the same should be sold to satisfy the same, by the clerk of the court, acting as a commissioner.

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Held, that if the sum of \$2100, the rents of the lands in Mississippi, came into the hands of Robert Boyce, as assets of the estate of James Boyce, no decree could be had against him in his individual capacity, in this case; the rents, under the agreement, upon the rescission of the contract for the sale of the land, became virtually the money of James Boyce, the intestate, and were assets in the hands of his administrator; the decree should have been rendered against the defendant in the circuit court, as administrator, and not individually. *Held*, also, that no lien upon the land in Mississippi existed, under the decree of the circuit court of Tennessee, and that court had no jurisdiction to decree a sale to be made of land lying in another state. *Held*, also, that the decree was erroneous, in allowing interest on the original sum decreed in the circuit court, viz, \$2065.21, in 1816 (understood to be the sum of 496.46), to the affirmance of that decree in the supreme court in 1830.

It is solely for the decision of the supreme court, whether any damages, or interest (as a part thereof), are to be allowed or not, in cases of affirmance; *if, upon affirmance, allowance of interest or damages is made, it is equivalent to a denial of any interest or damages.

APPEAL from the Circuit Court for the District of West Tennessee. At January term 1830, this case was before the court on an appeal by the same appellants, and a decree was rendered in favor of the appellee. (3 Pet. 210.)

The appellee in that case had filed in the circuit court, a bill for the rescission of a contract entered into by him with the appellant's testator, James Boyce, for the purchase of a quantity of land in the state of Mississippi; and upon which contract, the two first instalments, payable by the same, being due and unpaid, a suit had been instituted, and a judgment for the amount obtained. The bill also prayed an injunction against the judgment. The circuit court decreed that the contract should be rescinded, and ordered a perpetual injunction of proceedings on the judgment: and the following mandate was issued from this court, on the affirmance of the decree of the circuit court.

"The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of West Tennessee, greeting: Whereas, lately, in the circuit court of the United States for the district of West Tennessee, before you, or some of you, in a cause wherein Felix Grundy was complainant, and Robert Boyce and Richard Boyce, executors of James Boyce, deceased, were defendants, in chancery, the decree of the said circuit court was in the following words, viz: 'His honor does order, adjudge and decree, that said contract or agreement between James Boyce, now deceased, and complainant, be in all things rescinded and annulled; and because it appears from the evidence, that complainant has never received any part of the rents for the plantation, but that an arrangement between him and Robert Boyce, authorized him (R. Boyce) to sue Reed, the complainant's tenant, in complainant's name, for Boyce's benefit, for the rents of 1819, 1820, 1821, 1822 and 1823, that he did so, and recovered therefor, and got the same, and that complainant did, by his agent, Harry L. Douglas, Esq., notify defendants to take possession of said land and *plantation, as he would not retain the same, on account of the fraud aforesaid; it also appearing, from the records of this court, that this bill was filed on the — day of — 1823; that at the June term of this court, 1824, complainant was ready and pressed for a trial, and that the defendants were not ready for trial, at that or any subsequent term, but continued the same on their affidavit; and it appearing to the court, that complainant did pay said James Boyce the sum of \$1250, on

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the 5th day of July 1818, and on that day executed to him his note for \$750, in part payment for said land, and that James Boyce had a counterpart of the agreement: It is further ordered, adjudged and decreed, that defendant, Robert, administrator of the goods, &c., of James Boyce, deceased, do pay to complainant the said sum of \$1250, with legal interest thereon, at the rate of eight per centum per annum; which appears to be the legal rate of interest in said Mississippi state; from the said 5th day of July 1818, until this day, making the sum of \$2065.28, to be levied of the goods, &c., of said James, in his hands to be administered, and execution issued therefor as at law; and that defendants do surrender to the clerk and master of this court, said note for \$750, and said counterpart, within three calendar months after final decree in this cause, which, together with the agreement exhibited in the bill, shall be by him cancelled, and that defendant be perpetually enjoined from executing said judgment on the law side of this court. It is further decreed, that defendants pay the costs of this suit, and the costs of said suit at law, and that execution issue therefor as at law:—as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the United States by virtue of an appeal, agreeable to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1830, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is ordered and decreed by the court, that the decree of the said circuit *court in this cause be and the same is hereby affirmed, with costs, February 2d, 1830: You, [*278 therefore, are hereby commanded, that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.”

In the circuit court, the proceedings on the mandate were the following:

“September 13th, 1830. This cause came on this day, and on a former day of this term, to be heard, before the Honorable John McLean and John McNairy, judges, in presence of counsel on both sides, upon the *mandamus* from the supreme court, affirming the decree formerly rendered in this court; and in obedience to said mandate, it is ordered, adjudged and decreed, that the defendants pay the costs of the supreme court of the United States, and the costs of appeal, to be taxed by the clerk and master; and upon motion and petition of complainant, the cause is set down for further directions; and it ordered, that the clerk and master take an account of the assets of James Boyce, deceased, in the hands of the defendant, Robert Boyce, to be administered, and make report, during this term, until the coming of which report other matters are reserved.

“And at the same term, to wit, 1830. This cause came on for further directions, this 28th of September 1830; and upon the exceptions filed by the counsel for defendants to the report of the clerk and master, which report was made in pursuance of a decree rendered at a former day of this term, and is in the words and figures following, to wit: ‘In obedience to the interlocutory order made in this cause, at the present term, the clerk and master reports, that it does not appear, that any personal assets of James Boyce, deceased, came to the hands of said defendants, as his executors; but it does appear, from the agreement between complainant and Robert Boyce,

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admitted to have been dated the 23d of May 1823, and from the depositions of Thomas B. Reed, Isaac Caldwell and James E. Gillespie, that Robert Boyce has received from rents, previous to the 1st day of January 1824, the sum of \$2100. That interest on this sum, from the 1st day of January 1824, till the 1st of September 1830 (at the rate of eight per centum per annum, *279] the transaction having taken *place in the state of Mississippi, where, by the pleadings in this cause, that is admitted to be the legal rate of interest), will amount to \$1120; amounting in all to \$3220. The above depositions of Reed, Gillespie and Caldwell, and said agreement are herewith produced as a part of this report. It appears from the answers of defendants, that the land in controversy was devised by James Boyce, deceased, to one Richard Boyce, one of the defendants in this cause. All of which is respectfully submitted.'

"And exceptions to said report being argued by counsel, and fully understood by the court here; it is ordered, adjudged and decreed, that the exceptions to said report be overruled, and that the report be confirmed, except so far as relates to the interest on the sum of \$2100. It is further ordered, adjudged and decreed, that the complainant recover of Robert Boyce the said sum of \$2100, with interest from this day, to be levied of his own proper goods and chattels, lands and tenements; and that for the balance due the complainant, amounting to \$496.46, with interest from this time, and also the afore-mentioned sum of \$2100, in case the same is not paid by the said Robert Boyce, on or before the first Monday in March next, and the costs of this suit, that the complainant has a lien on the tract of land in the state of Mississippi, in the pleadings mentioned; and is entitled to have the same sold to satisfy the above-mentioned sums of money. It is further ordered, adjudged and decreed, that in case the said sums of money and costs of suit, or any part thereof, be unpaid on the 1st day of March next, that in that case, the said tract of land and appurtenances be exposed for sale at Natchez, in the state of Mississippi, by commissioners to be appointed by the clerk and master of this court, on such credit as he may direct, forty days' notice of the time and place of sale being given, in some public newspaper printed in Natchez. And it is further ordered, adjudged and decreed, in case of said sale, that the defendants, Robert Boyce, as executor and administrator with the will annexed, and Richard Boyce, join in a deed or deeds to the purchaser or purchasers, under the direction of the clerk and master of this court. And it is further ordered, that the clerk and master of this court make report of his proceedings to the next term of this court."

*280] "The exceptions filed to the report of the clerk and master, were in manner following to the report of the clerk and master of this court in this cause. 1. It is not the fact, as stated by the said clerk and master, that the agreement between R. Boyce and F. Grundy, of date the 23d of May 1823, admits, either on its face, or by implication, that the said Robert Boyce had then, or has now, assets in his hands, as executor of the last will and testament of James Boyce, deceased. 2. Defendants except to said report, if by it, it is intended to render Robert Boyce liable, as executor of James, on the ground that he had assets in May 1823; because the same may have been long since paid away in discharge of debts due by the testator in his lifetime. 3. Defendant excepts to said report, because it should have been

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stated, that the agreement between R. Boyce and F. Grundy, of May 23d, 1823, was an agreement with said Boyce, not as executor, but in his own individual capacity, and that said Boyce was acting merely as attorney in fact for said Grundy, and is responsible, if at all, in his individual capacity—the collections to be made by said Boyce, if the contract between James Boyce and said Grundy was rescinded, to be, stand and remain subject to future arrangements between said parties. For these and many other reasons to be assigned on argument, defendant's counsel pray that said report be recommitted to said clerk and master."

The defendants appealed to this court.

The case was argued by *Loughborough*, for the appellants; and by *Key*, for the appellee.

Loughborough, for the appellants.—This cause was once before in this court; when, in 1830, the decree of the court below, of 1826, rescinding the contract for land between Grundy and Boyce, was affirmed. (3 Pet. 210.) By the decree of 1826, it was, amongst other things, directed *that Robert Boyce, administrator of James Boyce, should pay to Grundy \$1250 [^{*281} purchase-money, received by James Boyce, and \$815 for interest at eight per cent., making \$2065, to be levied of the goods of the intestate.

At the first term of the circuit court, after the affirmance of this decree, the mandate of this court was entered; and on the same day, the clerk and master was ordered to take and report an account of assets in the hands of Robert Boyce. On the 28th September, during the same term, the master reported, that no assets had come to the hands of the defendants, but that Robert Boyce had received \$2100 for rents, under an agreement with Grundy. This report was excepted to; but sustained, except as to the interest; and a decree entered against Robert Boyce, in his own right, for \$2100, and interest from the date of the decree. Also there was decreed to Grundy, \$496.46, and interest, making the sum of \$2596.46, with interest; for the whole of which the decree recognised a lien upon the land in Mississippi, and directed the same to be sold, unless the whole amount of principal, interest and costs should be paid by the 1st day of March, succeeding.

The proceedings in the court below, subsequent to the decree of 1826, are improper. That decree was final, and concluded the whole cause. It settled the sum, with interest, due to the plaintiff, gave him execution for it, and for the costs. It has every characteristic of a final decree. Nothing is reserved. It is a reservation of further directions in a decree that enables the court to give the plaintiff any subsequent incidental relief. 2 Madd. Ch. 456; 2 Atk. 284. The order for an account before the master was erroneous; such an order is in its nature interlocutory; it should precede, not follow a decree. After a final decree, an order for the defendant to account before the master, so as to vary the relief sought by the bill, cannot be granted on motion. *Hendricks v. Robinson*, 2 Johns. Ch. 484. There is no regular way to call an executor to account but by bill. 1 Ball & Beatty 75.

Though it be generally true, that when a cause comes up to this court a second time, the court will not look behind its mandate, yet the prior proceedings will be examined, so far as *it is necessary to an investigation [^{*282} of new points of controversy, between the parties, not disposed of by the first decree. *The Santa Maria*, 10 Wheat. 431. The decree now

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appealed from subjects Boyce in his own right ; yet the bill of Mr. Grundy does not charge a *devastavit*. It was not framed with a view to charge Boyce personally. It does not pray a discovery and an account of assets. It contains no allegations proper to found proceedings upon against the goods and chattels of Robert Boyce. The facts, the proof of which was necessary to subject R. Boyce in his own right, were not put in issue by the plaintiff's pleadings. The reference to the master, therefore, was not proper in this suit ; and the last decree is not sustained by the pleadings. *Carneal v. Banks*, 10 Wheat. 181.

Neither do the proofs sustain the last decree. In fact, no additional proof was taken after the first decree, either in court or before the master. The report of the master was a form only. It was wholly founded upon evidence in the cause, previous to the first decree. Can the circuit court, after a decree *de bonis testatoris*, which reserves nothing ; upon motion merely, and without further pleading or proof, make it a decree *de bonis propriis* ? Can a final decree, affirmed by this court, be afterwards changed in a substantial matter by the court below ? The proceedings in the circuit court, after receiving the mandate of this court, show an amendment made at the instance of one party, the other objecting, in the body of the first decree. If the last decree is proper, then the first, which was affirmed by this court, is wrong. The answer of Boyce does not admit assets. It responds to the matter of the contract only. But if it had admitted assets, the admission was waived by proceeding to an account before the master. 1 Bro. C. C. 484 ; 2 Madd. Ch. 379.

The master's report should not have been confirmed. The decree is not sustained by it. The reference was to ascertain the assets of James Boyce, in the hands of the defendant. The report states that no assets have come to defendant's hands. This was all the master had in charge. It was within the reference, and fully responsive to it ; and upon this, no decree against the defendant, personally, could be made. Indeed, the *report states *283] the fact which discharges Robert Boyce from individual responsibility. But the master, exceeding his authority, reports that R. Boyce has received a large sum for rents of the land in controversy, under an agreement with Grundy, of May 1823. The matter of rents was not referred to the master. When a master's report manifestly exceeds his authority, though not excepted to, but confirmed, still it must be considered a nullity. 2 Madd. Ch. 508 ; 1 Meriv. 179.

The receipt of the rents by Boyce, cannot charge him personally, in this suit for purchase-money paid to his intestate. Boyce received them as attorney in fact for Grundy ; and his responsibility for them, is in his individual capacity, not as administrator. The rents, when received by Boyce, did not become assets of the estate of James Boyce. The agreement under which they were collected, recites a contemplated suit for the rescission of the contract, and provides, that if the contract be affirmed, the rents may be applied by Boyce as purchase-money ; but if rescinded, they are to be held by Boyce, subject to future arrangement between the parties. Not only the event upon which alone they were to be applied as purchase-money, did not happen ; but, by the happening of the other event, the rescission of the contract, the express provision of the agreement took effect, and they were prevented falling into the estate of James Boyce as purchase-money

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Boyce's responsibility for these rents is at law, upon the agreement. Suppose, an action against him by Grundy, could he plead this decree against him as administrator, for money due from the estate of another, as a bar? In a suit by the distributees of the estate of James Boyce, for an account and distribution of the estate, can R. Boyce be charged with these rents, as part of the assets, in the face of the agreement, making him responsible to Grundy for them? If this cannot be done, then, it seems clearly to follow, that Boyce cannot be made responsible for them in this suit; because, a plaintiff cannot, in one suit in chancery, unite a demand against the estate of James Boyce, with one against the representative, personally, for which the estate was never chargeable. The whole effort in this case, is to satisfy a decree against the estate of James Boyce, out of money due to plaintiff from Robert. Will the *court permit the plaintiff thus to unite his demands? Will it allow him the privilege of substituting the report [*284 of a master in chancery for an action at law upon the agreement, and have a summary decree for his money? Boyce may have a good legal defence to an action at law, upon the agreement; yet of this he is deprived by the proceedings below.

Upon the view of the matter now taken in behalf of Grundy, he has paid for purchase-money, not only \$1250, but also \$2100 (the amount of the rents). Yet he alleged the payment of \$1250 only, and took his first decree for the return of that and interest. The report of the master is founded upon evidence in the court, prior to the first decree. It was not until after the affirmance of that decree by this court, that new light broke in upon Mr. Grundy. When a contract is rescinded, chancery puts the parties as nearly as may be *in statu quo*. If it returns to the one his money and interest, it gives to the other his land and rents. This has not been done here. Grundy possesses this land for five years, and now has a decree for his money and a large sum for interest, without the estate of James Boyce receiving any of the rents. This is unequal. The court should have done full justice.

The decree is erroneous in respect to interest. Interest is allowed upon interest. This is improper. *Waring v. Cuntliffe*, 1 Ves. jr. 99; *Turner v. Turner*, 1 Jacob & Walker 37; 3 Hen. & Munf. 89-116.

A lien is declared upon land in Mississippi, and a sale of it is directed to satisfy the money due. The circuit court for Tennessee had no jurisdiction to do this. No court can act directly *in rem*, when the thing is out of its jurisdiction. Here, neither the person of the defendant, nor the land, is within the jurisdiction of the court. Boyce is a citizen of Kentucky, and it is because he is not a resident within the jurisdiction of the court, that the case is within its cognisance. The chancery of England has, it is true, taken cognisance of cases respecting land in Ireland and the colonies, but in such cases, it never attempts to act directly upon the land itself. Having the person, it acts upon the land through the person, and compels a performance of its decrees, by committing the party to the Fleet for a contempt by disobedience. The court below has not *taken that course. [*285 It has decreed as though the land in Mississippi were within its jurisdiction, and has directed its officer to sell it. This is certainly a novel proceeding.

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Key, for the defendant.—The court below have only fairly proceeded, in obedience to the mandate, to such further proceedings as were proper. The mandate is referred to, to show that the cause was sent down for “such executions and proceedings to be had in said cause, as were according to right and justice.” The appellee filed a petition in the circuit court on this mandate, and had the cause “set down for further directions,” and then there was an order to the master to take an account. The report of the master says, there were no personal assets, but he reports other assets—real assets, equitable assets. The court then decreed, that out of these assets, thus found in defendant’s hands, he shall pay over to the complainant the amount adjudged to him by this court. This is a proper execution of the mandate. The original decree gave a certain relief, and all that was done by the court below was, to adopt such further proceedings as were necessary to give the complainant the relief decreed.

As to the orders of the court, they are correct ; and according to all the reasonable strictness required in chancery proceedings. Cited, 1 Swanst. 293, 573 ; 2 Bro. C. C. 548, as to motions and petitions, and further directions after decree : also, 1 Grant’s Chan. 230, 243, 244 ; 4 Madd. 464 ; 2 Grant 248.

The masters report was properly confirmed. The decree states the money to have been collected by Boyce. According to the evidence, it was the money of the testator ; having been received from the lands, which became his, by the rescission of the contract. The master finds that that sum was in his hands as executor, and was assets. If not assets, under the circumstances, the defendant might have been considered to have collected these rents, pending the controversy, as a receiver.

As to the objection that the court could not order land in the state of *286] Mississippi to be sold, he contended, that the court *(the parties being within its jurisdiction) could proceed *in rem*. *Penn v. Lord Baltimore*, 1 Ves. sen. 454 ; *Lord Cranstoun v. Johnson*, 3 Ves. 170 ; 1 Salk. 404 ; 1 Vern. 75, 405 ; *Carroll v. Lee*, 3 Gill & Johns. 509.

STORY, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the district of West Tennessee, rendered upon a mandate, directing that court to execute a former decree of this court. The case, when formerly before this court, will be found reported in 3 Pet. 210 ; to which reference may, therefore, be had, for a full statement of the facts.

The material facts are, that the original plaintiff, Mr. Grundy, in 1823, brought his bill against Robert Boyce and Richard Boyce, as executors of James Boyce, deceased, for the rescission of a contract for the sale of lands in the state of Mississippi, stated in the bill ; and for the repayment of the sums of money paid by the plaintiff on the contract, and for a perpetual injunction of a judgment obtained on the same contract. It appeared from the bill and answer, that Robert Boyce alone was qualified as executor under this will ; and the answer alleged, that another and later will had been subsequently discovered, by which the whole proceeds of the land in controversy were devised to Richard Boyce, who was appointed sole executor thereof ; but he renounced the executorship, and Robert Boyce was appointed administrator with the will annexed. Upon the hearing of the

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cause in the circuit court, in August 1826, it was, among other things, decreed, that the contract stated in the bill be in all things rescinded and annulled; and "that the defendant, Robert, administrator of the goods, &c., of James Boyce, deceased, do pay the said sum of \$1250, with legal interest thereon at the rate of eight per centum per annum, which appears to be the legal rate of interest in the said state of Mississippi, from the said 5th day of July 1818, until this day, making the sum of \$2065.28, to be levied of the goods, &c., of the said James, in his hands to be administered, and execution issued therefor, as at the law." From this decree, the defendants appealed to this (the supreme) court; and at the January term thereof, 1830, the decree of the circuit court was affirmed, with costs, nothing being *said as to any allowance of damages or interest. A mandate in the [*287 usual form was issued to the circuit court, to carry the same into effect. At the September term of the circuit court, 1830, in obedience to the mandate, the circuit court ordered the cause to be set down for further directions, and it was referred to the clerk, as master, to take an account of the assets of James Boyce in the hands of the defendant, Robert Boyce, to be administered, and to report thereon. The master made a report, at the same term, stating, in substance, that it did not appear, that any personal assets of James Boyce, came to the hands of the defendants, as his executors; but that it did appear from the agreement between the plaintiff and the defendant, Robert Boyce, admitted to have been dated on the 23d of May 1823, and returned with the report, and from certain depositions in the case, that Robert Boyce had received for rents, previous to the 1st of January 1824, the sum of \$2100, and that the interest thereon, from the 1st day of January 1824, to the 1st day of September 1830, at the rate of eight per cent., will amount to \$1120, making in all \$3220. The report also stated, that the land in controversy was devised by James Boyce to the defendant, Richard Boyce.

Upon the coming in of the master's report, exceptions were filed by the defendant, Robert Boyce, and upon hearing the same, they were overruled, and the report was confirmed by the circuit court, at the same term, except as to the \$1120. And thereupon, the court decreed, "that the plaintiff recover of Robert Boyce the sum of \$2100, with interest from this day, to be levied of his own proper goods and chattels, &c.; and that for the balance due the plaintiff, amounting to \$496.46, with interest from this time, and also the afore-mentioned sum of \$2100, in case the same is not paid by the said Robert Boyce, on or before the first Monday in March next, and the costs of suit, the plaintiff has a lien on the tract of land in the state of Mississippi, in the pleadings mentioned, and is entitled to have the same sold to satisfy the above-mentioned sums of money." And it then proceeded to direct the time, manner, &c., of the sale.

It is from this decree that the present appeal is taken; and various objections to it have been insisted upon in the arguments at the bar. Some confusion arises in the case, from the *report of the master; he hav- [*288 ing stated, in one part thereof, that no assets came to the hands of the defendants as executors; and yet, in another part, having stated that the rents of the lands in controversy had come to the hands of Robert Boyce, under an agreement between the plaintiff and Robert Boyce, without stating that they had come to his hands as assets, and were now to be

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deemed assets of James Boyce. If, under the agreement, these rents were received by Robert Boyce, as agent of the plaintiff, and not as executor, it is very clear, that in the present suit, no decree could be had against him therefor; since he is sued only in his representative capacity, as administrator, and therefore, no decree could be rendered against him in his personal capacity. But if the rents, under the agreement, upon the rescission of the contract stated in the bill, and finally decreed thereon, became virtually the money of James Boyce, then they might be properly deemed assets in the hands of the administrator, and as such, liable to the execution of the plaintiff. And we are of opinion, that under all the circumstances, the latter is the predicament in which they are to be viewed; and that the master ought to have reported the sum of \$2100, so received, to be assets. And to this extent, there is no objection to the decree of the circuit court.

A more important objection is, that the decree is not rendered against the administrator, as such, payable out of the assets in his hands to be administered, or payable out of the said sum of \$2100 (the rents above stated), and if these assets are not sufficient, then out of the assets of his testator *quando acciderint*; but the decree is personally against Robert Boyce, for the said sum of \$2100, to be levied out of his own proper goods and chattels, &c., although no *devastavit* is either suggested or proved.¹ We are of opinion, that the decree is erroneous in this respect, and that it ought to have been for the amount, against the administrator in his representative character, to be levied of the assets of the testator in his hands; and as to the \$2100, if no such assets should be found, then (as upon a *devastavit*) against the proper goods of the administrator, to the same amount, with costs. In no other way can the defendant, Robert Boyce be protected by the payment, in the course of his administration, of the assets of the testator; for it will not otherwise judicially appear, that the *rents were treated as assets. And besides, the decree will not otherwise conform to the capacities and rights of the parties, according to the frame of the bill, and the original decree.

Another objection is to that part of the decree, which creates a lien upon the land in controversy, lying in another state, and decrees a sale for the discharge of the lien. We are of opinion, that the decree is erroneous in this respect. In the first place, the court had no jurisdiction to decree a sale to be made of land lying in another state, by a master acting under its own authority. In the next place, the original decree, affirmed by the supreme court, which alone the circuit court was called upon to execute, created no such lien, and authorized no such sale. The decree was, therefore, in both respects, not in execution of the former decree, but a new and enlarged decree. In the next place, the proper parties, the heirs-at-law or devisees, were not properly before the court; for though the master, in his report, states, that Richard Boyce was, under the will, devisee of the lands in controversy, this was a matter extra-official, and not confided to the master by the reference to him; and if it had been, the bill itself was not framed so as to charge the devisee, or seek relief against him personally, but only as representative of the deceased.

Another objection to the decree is, that it decrees the sum of \$496.46,

¹ See *Smith v. Chapman*, 93 U. S. 41.

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intended, as is understood (though not so stated in the decree), as interest upon the original sum decreed in the circuit court, viz., \$2065.28, in 1826, from the time of the rendition thereof to the affirmance in the supreme court, in January term 1830. We are of opinion, that there is error also in this part of the decree. By the judiciary act of 1789, ch. 20, § 23, the supreme court is authorized, in cases of affirmance of any judgment or decree, to award the respondent just damages for his delay. And by the rules of the supreme court, made in February term 1803, and February term 1807, in cases where the suit is for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment, to the time of the affirmance thereof. And in cases where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases, the interest is to be computed as part of the damages. It is, therefore, solely for the decision *of the supreme court, whether any damages or interest (as a part thereof) are to be [*290 allowed, or not, in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the circuit court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed; but is limited to the mere execution of the decree, in the terms in which it is expressed. A decree of the circuit court, allowing interest in such a case, is, to all intents and purposes, *quoad hoc*, a new decree, extending the former decree. In *Rose v. Himely*, 5 Cranch 313, it was said, that upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate; and the court refused to allow interest in that case, which was given by the circuit court, in executing the mandate, because it was not awarded by the supreme court upon the first appeal. The same point was fully examined in the case of *The Santa Maria*, 10 Wheat. 431, 442, where the court held, that interest or damages could not be given by the circuit court in the execution of a mandate, where the same had not been decreed by the supreme court upon the original appeal.

For these reasons, the decree of the circuit court must be reversed; and a new decree will be entered by this court, upon the principles stated in this opinion.

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 West Tennessee, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court, rendered upon the mandate aforesaid, be and hereby is reversed and annulled. And this court, proceeding to render such decree as the circuit court ought to have rendered in the premises, do further order, adjudge and decree as follows: That the said sum of \$2100, reported by the master as received for rents by the said Robert Boyce, under the agreement therein mentioned, ought, under all the circumstances of the case, to be deemed assets of the said James Boyce, deceased, in his, the said Robert's hands, to be administered according to law; and that the same ought to be *applied, in a due course of [*291 administration, to the payment of the debt of \$2065.28, in the original decree of the circuit court, awarded to the plaintiff, and to the payment of the costs of the present suit; and it is, therefore, ordered, adjudged

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and decreed, that the same be so applied and paid by the said Robert, as administrator with the will annexed of the said James Boyce, accordingly. And it is further ordered, adjudged and decreed, that execution do issue against the said Robert Boyce, administrator as aforesaid, for the said debt of \$2065.28, and the costs of the present suit, to be levied of the goods and chattels, &c., of the said James Boyce, in the hands of the said Robert, administrator as aforesaid, and if none such shall be found, then to be levied out of the proper goods and chattels, &c., of him, the said Robert.

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Court and jury.

Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing what effect the evidence shall have. An instruction to the jury, founded on part of the evidence only, is error.¹

ERROR to the Circuit Court of the District of Columbia, in the county of Washington.

This case was argued by *Coxe* and *Jones*, for the plaintiff in error; and by *Swann* and *Key*, for the defendant. The case is fully stated in the opinion of the court, delivered by—

MCLEAN, Justice.—This case is brought before this court by a writ of error to the circuit court of the district of Columbia. The plaintiff commenced an action of ejectment against the defendant, and on the trial, showed a legal title to the premises in dispute, deduced from the patentee, by mesne conveyances, down to the 13th of May 1796. This title was not controverted by the defendant, as he claimed under it; but he read in evidence the following deeds and documents, to show that the title to the premises in controversy, was out of the plaintiff and in himself.

1. Articles of agreement, dated the 10th of July 1795, between the plaintiff, Robert Morris and John Nicholson, in which the plaintiff sold all his title to a great number of lots, in the city of Washington, for the consideration specified, reserving all lots which had not been sold previously, supposed to be nine hundred and ninety, and also certain other lots designated.

2. A deed of conveyance by the plaintiff to Morris and Nicholson, in pursuance of the above articles of agreement, dated the 13th of May 1796. In this deed, there is the following clause, “excepting nevertheless, out of the lots, squares, lands and tenements above mentioned, all that square, *293] marked and *distinguished on the plat of the said city of Washington, by the number five hundred, all that other square lying next to and south of the said number, five hundred and six, &c.; and excepting also all such squares, lots, lands or tenements, as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, John Nicholson and Robert Morris, or any of their agents or attorneys, to any person or persons whatsoever, at any time prior to the 10th of July 1795.”

¹ For prior decisions in this case, see 5 Pet. 132, and 6 Id. 302.