certificates, and that he refused to give them; it would have been proper to receive other evidence to establish the claim.

Other exceptions were taken to the rulings of the court in the course of the trial, but as they relate to the assigned claim set up by the defendant, it cannot be necessary to consider them.

On the grounds that the district court permitted the assigned account to be given in evidence by the defendant, as a set-off; and allowed, under the circumstances stated, other evidence than the certificates of the commanding officer to prove the transportation account; the judgment below must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

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*Joseph D. Beers, William L. Booth and Isaac R. St. John, [*329
Plaintiffs in error, *v.* Richard Haughton.

Special bail.—Insolvency of principal.

In June 1830, Beers and others brought an action of *assumpsit*, in the circuit court of Ohio, against J. Harris and C. Harris, and obtained judgment against them for $2818 and costs, at December term; Haughton became special bail in this action, by recognising, viz., that the defendants in the action should pay and satisfy the judgment recovered against them, or render themselves to the custody of the marshal of the district of Ohio; in October 1831, a writ of *capias ad satisfaciendum* was issued upon the judgment, and returned to December term 1831; that the Harris's were not found; in February 1831, C. Harris was discharged from imprisonment for all his debts, under the insolvent law of Ohio; J. Harris was in like manner discharged in February 1832. In December 1832, Beers *et al.* commenced an action of debt, on the recognisance of bail, against Haughton; the defendant pleaded the discharge of J. & C. Harris under the insolvent law of Ohio of 1831, and a rule of the circuit court, adopted at December term 1831. The rule of court was as follows: "If the defendant on a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law; but under neither mesne nor final process shall any individual be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment." The plaintiffs demurred to the plea; and upon joinder in demurrer, the circuit court gave judgment for the defendant. The judgment of the circuit court was affirmed.

The recognisance of special bail being a part of proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated.

By the rules of the circuit court of Ohio, adopted as early as January 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "*nihil*," against the bail; and this, in fact constituted a part of the law of Ohio, at the time the present recognisance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed a part of the "modes of proceeding in suits," and to have been adopted by it, so that the surrender of the principal *within the time thus pre- [*330
scribed, is not a mere matter of favor of the court, but is strictly a matter of a legal right.

It is not strictly true, that on the return of "*non est inventus*" to a *capias ad satisfaciendum* against the principal, the bail is "fixed," in courts, acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter sub-

ject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an *exoneretur* to be entered, in cases, by the indulgence of the court, by giving them time to render the principal, until the appearance day of the last *scire facias* against them, as in cases of strict right.

When bail is entitled to be discharged, *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as bar to a suit, in their defence; but when the discharge is matter of indulgence only, the application is to the discretion of the court; and an *exoneretur* cannot by insisted on, except by way of motion.

When the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance; he is, *à fortiori*, entitled to insist on it by way of defence, when he is entitled, *ex debito justitiæ*, to surrender the principal.

The doctrine is fully established, that where the principal would be clearly entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief, by entering an *exoneretur*, without any surrender. And *à fortiori*, this doctrine will apply, when the law prohibits the party from being imprisoned at all, or when, by the positive operation of law, a surrender is prevented.

There is no doubt, that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them; the right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects.

State laws cannot control the exercise of the powers of the national government, nor in any manner limit or affect the operation of the process or proceedings in the national courts; the whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence; congress may adopt such state laws, directly, by substantive enactments; or they may confide the authority to adopt them, to the courts of the United States.

Under the authority conferred on the courts of the United States, by the acts of 1789 and 1792 there would be no solid objection to the decision of the circuit court of Ohio, in this case, but it is directly within, and governed by, the process act of the 19th of May 1828.[1]

The progress act of 1798 expressly adopts the mesne process, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws; which, of course, included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment; in regard, also, to writs of execution, and other final process, and "the proceedings *thereupon;" it adopts an equally comprehensive language, and declares they shall be the same as were then used in the courts of the state.

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The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the act of 1820, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those laws of the state on the same subject. Sturges *v.* Crowninshield, 4 Wheat. 200; Mason *v.* Haile, 12 Ibid. 370; Wayman *v.* Southard, 10 Ibid. 1; United States Bank *v.* Halstead, Ibid. 51, cited,

Beers *v.* Haughton, 1 McLean 226, affirmed.

Error to the Circuit Court of Ohio. On the 14th of June 1830, the plaintiffs, citizens and residents of the state of New York, commenced their action of *assumpsit*, in the United States circuit court for the district of Ohio, against Joseph Harris and Cornelius V. Harris, of the state of Ohio, and recovered judgment against them, at the December term 1830, for $2846.56. In this action against the Harris's, the present defendant, Haughton, became their special bail. On the 12th day of October 1831, a writ of *capias ad satisfaciendum* was issued against the Harris's, and returned to the December term of that year "not found." On the 24th day of December 1832, the plaintiffs commenced their present action against Haughton,

[1] See Smith *v.* Cockerill, 6 Wall. 756.

upon his recognisance of bail, returnable to the 1st day of May, then next. A declaration was filed in the usual form, to which the defendant filed several pleas, and among others, the following, designated in the record as the 8th (the 4th, 5th, 6th and 7th being withdrawn), to wit:

"And the said defendant, for further plea in this behalf, says" (*actio non*), "because, he says, that by the tenth rule of practice of this court, established and adopted by this court, at its December term 1831, which said rule has ever since been and now is in full force and effect, it is provided, that if a defendant upon a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent *law of the state, has for such demand, been released from imprisonment. And the [*332
said defendant avers, that after the said debt became due, upon which the said judgment in the said declaration mentioned is founded, to wit, in February term, in the year 1831, the said Cornelius V. Harris being returned to the court of common pleas for Hamilton county, and state of Ohio, by the commissioner of insolvents of Hamilton county, and state of Ohio, as a resident of said county and state for more than two years next, preceding, as an applicant for the benefit of the act entitled an act for the relief of insolvent debtors, and having also returned a schedule in writing, delivered to said commissioner by said Cornelius V. Harris, of all debts by him owing, among which the said debt in the judgment in the said plaintiff's declaration mentioned is founded, is named, did, at said February term of said court, personally appear before the judges of said court, in open court, and the said court then and there having full jurisdiction of such matters and such applications for relief, did, then and there, at the term last aforesaid, order and adjudge that the said Cornelius V. Harris should for ever after be protected from arrest or imprisonment for any civil action or debt or demand in the said schedule of his debts, so delivered to the said commissioner of insolvents for Hamilton county; which said order and judgment of said court is now in full force and virtue and unreversed. (*a*) And the said defendant further avers, that afterwards, to wit, in the term of February, in the year 1832, the commissioner of insolvents in and for Hamilton county, in the state of Ohio, returned the said Joseph Harris to the court of common pleas of said county, as a petitioner for the benefit of an act passed by the legislature of the state of Ohio, entitled 'an act for the relief of insolvent debtors,' who, at the time of his application, was under arrest, and returned to said court a schedule delivered to him by the said Joseph Harris, showing the debts by him owing, and the names of his creditors, among which debts was the said judgment mentioned in the said plaintiff's *declaration, and the said Joseph Harris afterwards, in the term of [*333
February, in the year 1832, appeared in said court of common pleas, before the judges thereof, and filed his petition in said court, praying for the benefit of the act for the relief of insolvent debtors, and such other proceedings were had thereon, that the said court, at the term last aforesaid,

(*a*) The act of the legislature of Ohio referred to, will be found in the 29th volume of Ohio Statutes, 1831, p. 329, 340; there was a similar statute in existence prior to the act of 1831.

ordered and adjudged, that the said Joseph Harris be discharged from arrest on account of the debts in said schedule mentioned, in pursuance of the statute in such case made and provided ; which said order and judgment is now in full force and virtue and unreversed. All which the said defendant is ready to verify ; wherefore, he prays judgment if the said plaintiffs ought further to have and maintain their aforesaid action thereof against him," &c.

To this plea, the plaintiffs filed a general demurrer, in which the defendant joined. The circuit court overruled the demurrer, and gave judgment for the defendant, and the plaintiffs sued out this writ of error.

The case was submitted to the court on printed arguments, by *Elisha W. Chester*, *D. J. Caswell* and *Henry Starr*, for the plaintiffs in error; and by *Charles Fox*, for the defendant.

For the *plaintiffs* in error, it was argued :—The insolvent law of Ohio makes it the duty of the court of common pleas of each county to appoint an officer, denominated the commissioner of insolvents, and any person, being arrested upon civil process, either mesne or final, may require the arresting officer to take him before such commissioner, and upon making out a schedule of all the debts which he owes, and also of all his property, and assigning the same to the commissioner, for the benefit of his creditors, the commissioner gives him a certificate, which has the effect to release him from the present arrest, and from arrest for any of the debts contained in his schedule, until the same be acted upon by the court of common pleas of the county, where the arrest is made. This, discharge, however, can only be given upon his making oath that he has no other property than that contained in his schedule, &c. He may be examined under oath, touching his property *by the commissioner or any creditor. These proceed- *334] ings are to be certified into the court of common pleas of the county, where the discharge is either consummated or the application dismissed. A person not under arrest, who has resided for a certain period in the state and county, may, by a like proceeding, exempt his person from arrest. The question presented for the consideration of the court, is, whether the facts set forth in this plea constitute a good bar to the plaintiff's action. We maintain that they do not, and that upon the demurrer to the plea, the plaintiffs were entitled to judgment in the court below.

Before proceeding with the argument, it may be proper to draw the attention of the court to the facts, that, as it appears from the declaration and plea, neither of the Harris's was discharged by the court of common pleas, until after judgment was rendered against them in the circuit court ; that Joseph Harris was not discharged until after the return of the *ca. sa.*, and that the rule of court relied on in the plea, was adopted after the return of the *ca. sa.*, and of course, after the plaintiff's right of action had accrued. We hold, upon general principles, that an insolvent law of a state, providing a mode for the discharge of the persons of debtors from imprisonment, has no force, except in the courts of the state—is only a law affecting the remedy—the mere *lex fori*. It seems to us, that the very statement of this proposition is enough to secure it a ready assent.

Between a bankrupt law and an insolvent law, a distinction has not unfrequently been made, defining the former as a law, by virtue of which

the debtor is discharged, upon certain terms, from his contracts; and the latter, as a law, by which, on similar terms, the person of the debtor is exempted from imprisonment. In relation to the rights of the several states to pass bankrupt laws, thus defined (no law of congress existing upon the subject), after much ligitation, and a thorough investigation of the subject, it has been settled by the supreme court: 1. That bankrupt laws may be passed by a state, affecting all contracts subsequently made within the state, between citizens of the state. 2. *That such laws cannot affect contracts, though made within the state, with a citizen of another [*335 state. 3. That they cannot affect contracts not made, or not to be performed within the state. 3 Story's Commentaries on the Constitution, 256.

But as to the insolvent laws of the states, thus understood, we deny that they have any force in the courts of the Union. A bankrupt law reaches the contract—such an insolvent law only the person of the debtor. The one discharges the contract upon certain specified terms—the other, only the body. The one absolves the debtor from his debt—the other, leaving the debt in existence, declares that the creditor shall look only to the property of the debtor for satisfaction. The one acts upon and limits the effect of the contract—the other, the remedy for a breach of the contract. One is the *lex loci contractûs*, the other the *lex fori*. By a bankrupt law, the contract is discharged, and cannot be enforced in any court or in any place. An insolvent law of this kind extends only to the courts, and the suitors in the courts, and the remedies by the courts of the government enacting the law. The right to pass insolvent laws of this description, is incident to the power of establishing courts of justice, and as respects the federal courts, it would not be necessary to derive it from the clause in the constitution authorizing congress to pass bankrupt laws. 2 Kent's Com. 462.

The laws of the states, *vi propria*, have no other force and effect in the federal courts than the laws of a foreign country. They regulate, limit and control contracts and the titles to property, and give to the injured a right to satisfaction for wrongs done to their persons and property. The rights of parties arising out of any of these matters will be enforced in a foreign country, taking the laws of the state where the contract was made or to be performed, where the title was acquired, or the injury done, as the rule by which to ascertain the rights of parties litigant; but in the mode of redress and the remedy to be applied, the law of the country where the action is brought, the *lex fori*, must prevail. The law of the place where the right of action accrued, can in no manner control the court, nor absolve it from its own law in applying the remedy.

*The courts of the United States, in relation to the laws of the [*336 several states, stand, in these respects, in the same situation. Under the decisions of this court, a state may, as between its own citizens, provide a mode by which contracts, made after the passing of the law, and to be performed within the state, shall be discharged, without payment, provided no bankrupt law of the United States be in existence at the time. But in relation to the effect of the discharge of the person of the debtor, the debt remaining, the law, so far as state adjudications go, has been well settled. See 2 Cow. 626; 3 Mass. 84; 1 Dall. 188; 2 Johns. 198; 7 Ibid. 117; 11

Ibid. 194; 14 Ibid. 346; 2 Cow. 632; Graham's Practice 93–4; 8 Wheat. 253.

Judge JOHNSON, in delivering the opinion of the court, in *Ogden* v. *Saunders*, said: "No one has ever imagined, that a prisoner in confinement, under process from the courts ot the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that these laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in the sphere in which it is sovereign; that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves." 12 Wheat. 367; *Wayman* v. *Southard*, 10 Ibid. 1–51. Upon general principles, therefore, we consider it beyond question, that the insolvent laws of Ohio, and discharges under them, can have no effect, when urged in the courts of the United States. Has any act of congress given to them an effect which they would not have *vi propria?*

By the act of the 24th of September 1789, it is enacted, "that the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, where they apply. This is a mere recognition of the principles of universal jurisprudence as to the operation of the local law, and cannot, therefore, affect
*337] the general principle contended for. *Robinson* *v. *Campbell*, 3 Wheat. 221; *United States* v. *Howland*, 4 Ibid. 108; *Wayman* v. *Southard*, 10 Ibid. 1.

The first section of the act of the 19th of May 1828, was passed, to regulate process, &c., in the courts of the United States, held in the states admitted into the Union since the 29th of September 1789. It provides, that the forms of mesne process, and the forms and modes of proceeding in suits in such courts, shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction of the same, subject to be altered by rules of court. By the third section of the same statute it is enacted, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state; provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." This last section applies to all the courts of the United States, except those held in Louisiana, and is the only part of the act that has any reference to final process. Does it reach the present case, or in any way affect the liability of the Harris's to be arrested and imprisoned upon a *ca. sa.*, or of the defendant, their bail, in the present action? We think not.

It may be proper to observe, that in this act, the word process, throughout, is used in its limited, and not in the extended sense which has sometimes been given to it. In the first section, "mesne process" is spoken as distinct from "the forms and modes of proceeding," and in the last section, the expression, "writs of execution and other final process, and the proceedings thereon," renders it certain that, by process, the legislature intended a writ,

or something analogous, and that it is contradistinguished from the proceedings to be had by virtue of a writ.

Under this act, the plaintiff had a right to a *capias ad respondendum* against the Harris's, and thereon was entitled to bail, as given; for that was according to the forms of mesne *process, and to the forms and modes of proceeding in the court of Ohio. After judgment, he was [*338 entitled to a *capias ad satisfaciendum* against them, for this is the same writ that was, in 1828, and at the time, used in Ohio. This right of the party, and the duty of the court or its officer to issue the writ, cannot be disputed. The right and duty existed before the passage of the act of congress of 1828, and is confirmed by it, so long as such writ is used in the state courts. But the very nature of this writ requires, that the party be arrested and detained; this is its command, its object. If there be a right to issue it, it is obligatory upon the marshal to execute it, and there is but one way in which the command of the writ can be obeyed, to wit, by arresting the defendant. Subsequent proceedings—the manner in which the defendant shall afterwards be dealt with; the limits within which he shall be confined; the nature of the walls within which he shall be inclosed, whether the walls of an actual prison, or the paper walls erected by the bond of a friend, may be regulated by the statutes of the state adopted by this act of congress (had there existed no law of congress upon the subject of prison-bounds). Yet the defendant is obliged to maintain, that the proceedings which ought to be had in the case of the Harris's, if they had been arrested, are nothing more nor less than instantly discharging them. This would not be a proceeding upon a *capias ad satisfaciendum*, but an annulling of the writ and all its efficacy. If they would have been entitled to such a discharge, it must be, because the arrest was wrongful and illegal, and could be for no other reason. If the arrest by the officer would be illegal, the issuing of the writ commanding the arrest must be illegal. And if it were illegal to issue the writ, then the plaintiff had not a right to a writ of execution used in the state courts, which the statute expressly gives him.

We beg leave to present another view of this statute. If the defendant can claim any benefit from it, it is under that part of it which requires that the proceedings upon final proceedings upon final process shall be the same as used in the state courts. Does this enjoin upon the marshal, with a *capias ad satisfaciendum* in his hands, every duty, which, in the same circumstances, is enjoined upon the sheriff of the state by its laws? If so, when *he makes an arrest of an individual, who, not having taken benefit of the insolvent law of the state, is desirous of doing so; shall [*339 he carry him before the state commissioner of insolvents, as the sheriff is required to do? If so, the state commissioner takes the prisoner's bond to appear—where? In the state court. He takes this schedule and certifies all his proceedings into the state court, and there the prisoner must appear, there his discharge be consummated, or, his petition being dismissed, he may still remain liable to imprisonment upon the *capias ad satisfaciendum*. Here there would be no difficulty, in a case arising in a state court. The sheriff being of course present, would take the defendant immediately into custody, and commit him to jail. But the marshal of the United States not being present, unless by accident, his prisoner would go at large. Can a defendant, when thus arrested by the process issuing from the court of one govern-

ment, in the exercise of its legitimate jurisdiction, be thus turned over to another power, entirely disconnected with that which has the rightful jurisdiction of the case? This certainly would be something different from adopting the same mode of proceedings used in the state courts; it would be transferring its own proceedings, its process, its jurisdiction over persons, to another tribunal with which it has no connection—it would be taking from a party a right secured to him by the constitution of the United States. There could be no such transfer of a prisoner and process, from the court of one goverment to that of another. Nor can the benefit of the state insolvent law be extended to a prisoner, under federal process, in any other way. No one could, for a moment, entertain any such idea; and we only mention it, to show, that proceedings to be had under the insolvent law of the state, are not such proceedings, upon either mesne or final process, as are adopted by the act of congress. Indeed, proceedings under the insolvent law of the state cannot be regarded as proceedings upon final process; process, either mesne or final, is not necessary to exist, to entitle an applicant to the benefit of the act; though, when that benefit has been extended to him, it affects final process from the court of the state, in its operation upon him.

*340] But supposing that our reasoning is thus far unsatisfactory, there is another argument which must set this matter at rest. *In relation to the right of discharge from imprisonment, under final process from the courts of the United States, congress has left nothing to inference or implication. It has legislated directly upon the subject, has prescribed the cases in, and the mode by, which prisoners in execution may be discharged. The act referred to was passed in 1800, and is found in Gordon's Dig. pl. 2834–7. By this act, the district judge, or commissioner appointed by him, is authorized to administer an oath, prescribed in the statute, to the prisoner, and to discharge him from imprisonment; but notice must be served on the opposite party, or his attorney, at least thirty days previous, if within one hundred miles, to show cause, on a given day, against the discharge. If any sufficient cause be shown, or appear from the examination, in the opinion of the judge or commissioner, the prisoner is not to be discharged.

The legislature having thus prescribed the mode and the terms upon which prisoners, under process from the United States courts, shall be discharged, upon what principle is it contended, that they are entitled to a discharge, without complying with any of these terms—without pursuing, for a single step, that mode, and virtually by a tribunal different from that provided; and one which, in the nature of our governments, can have no control over, or power in the matter? It cannot be contended, that this act of 1800 is repealed by anything in the act of 1828. A repeal would not be inferred by this court from an act of that nature, and passed for the objects obviously aimed at by congress. Nor can it be supposed, that the legislature intended to confer upon the courts, the officer, or upon the prisoner, a power to dispense with its minute provisions, and to be governed, at pleasure, by the law of the state in preference. It is too obvious, that congress could never, in the act of 1828, have contemplated any such thing.

But even if this act of 1800 were out of existence, we think there would be in the way of the defendant another obstacle, which he could not surmount. Let it be admitted, that the federal courts are required to adopt the

mode of proceeding upon final process, prescribed by the state legislature, in all the latitude that can be claimed, still they are not required to adopt the acts of the state *tribunal in a particular case. These acts are not made binding upon them, or upon the present plaintiffs. It is [*341 not so much the law of the state, that the defendant would avail himself of, as a particular adjudication of the state court. It is the discharge by the court, which he pleads. This act—this adjudication—this discharge, is not reached—is not in any manner contemplated or affected by the act of 1828. It is the law of the state, as it regulates process and the proceedings thereon, that is adopted. The judgments and adjudications of the state courts stand in the same situation, and have neither more nor less effect in the courts of the Union, than if this act had never been passed. And to make them binding upon the plaintiffs, and conclusive upon their rights, they must have been a party in the cause in which they were made—they must have been rightfully subject to the jurisdiction of the court; the state, in legislating, and the court, in adjudicating, must have possessed a power over them, to bind them by their acts. Such was never the fact; they were citizens of another state, suing upon a contract made and to be performed in another state, and in no respect whatever bound by the laws of Ohio, or amenable to her tribunals. The act of the court of common pleas of Hamilton county, therefore, could affect none of their rights, nor deprive them of any legal remedies for the violation of those rights.

We think, then, upon general principles, and upon a review of the acts of congress supposed to bear upon the question, that an insolvent law of a state, providing a mode for the discharge of debtors from imprisonment, and discharges under such a law, do not confer upon them an exemption from any process used in the courts of any other state, or of the United States. If we have established this, the Harris's were liable to arrest and imprisonment upon a *capias ad satisfaciendum*, and not having been found, their bail, the present defendant, is liable to pay the judgment recovered against them.

Can the rights of the parties, as drawn in question in this case, be affected by any rule which it was competent for the circuit court to establish? Rules of court can never vary the mode of proceeding prescribed by statute, nor give a right of discharge in any other mode, or upon any other terms than those contained in it. *They are the only mode adopted [*342 by the court in administering the laws of the land; they can never add to, diminish, nor vary the provisions of a statute. A recognisance of bail is a contract, the form of which may be prescribed by the court; the obligation of the contract can only be discharged by law, never by the mere virtue of a rule of practice established by court; certainly, not by a rule, made after the execution of the bond or recognisance.

The tenth rule of the circuit court for the district of Ohio, relied on by the defendant in this case, is in these words: "But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has, for such demand, been released from imprisonment." One in prison only can be released from imprisonment. One who has never been imprisoned on a debt, never can have been released from imprisonment for that debt, though he may have been absolved or released from liability to imprisonment on account of it. If, in this case, the plaintiffs

had, in the state court, caused the Harris's to be arrested and imprisoned for their debt, and they had been discharged by the court, to whose jurisdiction the plaintiffs voluntarily submitted their rights, there would have been an adjudication by a competent tribunal, and the circuit court might well refuse to suffer a second arrest for the same debt. We think the rule susceptible of this construction, and thus literally understood, we do not object to it. But, if it was intended to be understood as broadly as the defendant claims, we must, with all due respect to the circuit court, deny its competency to establish such a rule.

If we are not mistaken, it has been attempted to derive the authority to establish such a rule, from the act of 1828. No such power is there given. The power given, is, so far to alter final process, by rules, as to conform it to any changes made in the state courts. If the authority existed at all, it must be derived from some other act of congress, or from the power inherent in a court. We know of no such conferred or inherent power. We think we have sufficiently shown before, that the state court or the state
*343] legislature could not confer on an individual, *by its insolvent law, an exemption from arrest in the federal courts; that they had no power to release the Harris's from the operation of any process used in the circuit court. Could such a power be granted by the circuit court? Surely not.

Perhaps, it may be said, that it is not because of any force in the discharge, of itself, by the state court, that a defendant can claim an exemption from arrest in the federal court, but because the federal court, in its comity to the state court, sees fit to take it as a reason for discharging him from its own process. This answer is certainly claiming for the federal court a very high prerogative power. A court pronounces the law; it declares, not who shall be imprisoned and who released, in civil causes, according to its own will and pleasure, but who is pronounced by the law to be a prisoner, or to be liable to imprisonment—enforces the law in its operation upon an individual, not in its arbitrary pleasure. We know not this thing, called comity, between courts, when our rights are involved and to be adjudicated. In making a rule of practice (and courts cannot create a rule of law) the first inquiry is, what is the law; and what are the rights of persons conferred or secured by the law; and this being ascertained, the province of rules of court is to fix the mode and form of enforcing the law.

But what is claimed here for a rule of court? Not that it is a form and mode of administering the law as it previously stood; but an overruling power to suspend, to vary, to annul the law. Before this rule was established, the defendant had become bail for the Harris's; had entered into a contract, the force, effect and operation of which were settled and established by the laws of the land; a *capias ad satisfaciendum* against them had been issued, and returned "not found;" the legal effect of this return was also fixed by the law in existence, and rights were thereby acquired—and then what is claimed? Nothing less, than that the court, by some high power, exercised in the shape of a rule, can provide a mode, before unknown, by which this bail should be discharged from liability—this contract vacated—these vested rights wrested from the present plaintiffs; we cannot argue against such an assumption, because the simple statement of it carries, to our mind, a stronger refutation than any argument.

*The point insisted upon by the defendant in the court below is, that, according to the law of the state, if the Harris's had been arrested upon a *capias ad satisfaciendum*, issued from a state court, after their discharge under the insolvent law of the state, it would have been the duty of the sheriff, upon the production to him of their certificates of discharge, instantly to release them—in other words, that they were not liable to arrest by the state officer; that as, by the act of the state legislature, this is the course of proceeding pointed out for the sheriff, so it must be the proper course to be adopted by the marshal, upon a similar writ from the United States court, for the proceeding on final process must be the same in the United States, as used in the state court. To this argument, we reply, as we have already said, that this would not be a proceeding upon the writ, but a forbearance to proceed upon, or execute it in any way, and that, for the reason that it does not lie against this particular person—that is not the "same" process which could be used against him in the state courts. The matter, therefore, is not governed by that part of the law which requires "the proceedings to be the same," but by that part which requires "writs of execution to be the same as used in the state courts." To our mind, it is clearly sufficient, that a *capias ad satisfaciendum* is a writ used in the state courts, and if it be such a writ, the adjudication of a state tribunal cannot restrain the use of it by the federal court against a particular person; no such efficacy is given by the act of congress of 1828, to an adjudication by a state court. The federal court and federal officer are neither authorized nor required to look into the records of the state court, to ascertain the extent of their power over a certain person. No such thing was contemplated by the act of congress. The same answer to the argument of the defendant may be given, if, as is claimed, this matter should be considered as more properly coming within that part of the act of congress, which relates to the proceedings upon the execution.

It will be recollected, too, that before any of these proceedings under the insolvent laws of Ohio, the circuit court was exercising its jurisdiction over all the parties; that the defendant had become special bail for the Harris's, and that judgment *had been rendered against them, before the discharge of either of them, and that one of them was not discharged until after a *capias ad satisfaciendum* had been issued against them, and returned not found. The recognisance was, therefore, forfeited, and the present defendant liable to an action, before the discharge of Joseph Harris. Was it intended, by the act of 1828, directly or indirectly, to give to a state court power to release a bail from his recognisance in the federal court? To release to him an action accrued against him? To discharge him from a contract, after it was broken? Could the act of the state court divest the present plaintiffs of rights thus acquired under, and cognisable by, another jurisdiction? Is there an inherent power in a state court—is there an authority conferred upon such a court, by a necessary construction of any act of congress, or by any rule of court, which it is competent for judges to establish, to take from the federal courts their prisoners, confined under their process, in a suit of which they not only have the right of jurisdiction, but in which they are actually exercising that jurisdiction, and set them at large? The principle insisted upon by our opponents goes the full extent; the courts of common pleas of Ohio can, upon this principle, extend the [*345

benefit of her insolvent laws to the actual prisoners of the United States courts, as well as to those who are liable to imprisonment under their process, by a proceeding commenced in the state courts, after the key has been actually turned upon the prisoners. If they can protect the one, they can, by the same means, release the other. It may be the law of the land; but we have not thus learned the nature of our federal and state institutions.

We have endeavored to show: 1. That an insolvent law of a state, by which an individual is relieved from imprisonment, is merely a law affecting the remedy, the mere *lex fori*, and that it can have no force except in the courts of the government enacting it; that, therefore, upon general principles, it does not govern the courts of the United States. 2. That there is no act of congress that gives to such insolvent laws any force or effect in the courts of the Union. 3. That if the act of congress of May 1828, could *346] be supposed to give any effect to the insolvent law of Ohio, yet it *does not give any new effect to the adjudications of her courts; that it does not give to them the power of exempting any individual from any process used in the courts of the United States. 4. That it is not competent for the circuit courts of the United States, by any rule, to confer such a power upon the state courts, nor in any way to alter the legal effect of the adjudications of a state court upon parties litigant in the circuit court; and especially, that the circuit court could not, by any general rules, made after a contract—whether such contract be a recognisance of bail or any other contract—has been made and broken, alter the effect of that contract, nor take away the right of the party to damages for that breach. 5. We think we have also shown in the course of our argument, and that it is manifest, that the present plaintiffs, being residents of another state, their contract with the Harris's having been made in another state—judgment having been recovered against them in the circuit court upon that contract—the present defendant having been special bail in the case—the state courts could not so interfere with the persons of any of the parties—with their contracts, or any matter relating thereto, as directly or indirectly to affect any for their rights or liabilities in the circuit court. We think that we have thus shown that the plea of the defendant to the plaintiff's action below, was insufficient, and that the demurrer thereto ought to have been sustained, and judgment rendered for the plaintiffs.

We are aware, that there have been decisions in the circuit courts of the United States, differing, in some respects, from the principles for which we have contended. Persons arrested on mesne process have sometimes been discharged on common bail, because they had been previously discharged under a state insolvent law. But even this has been refused, when the plaintiff was not at the time within the jurisdiction of the state, or where the contract sued on, was made without its jurisdiction: see Pet. C. C. 484, and cases there cited. But it is obvious, that in many cases, defendants are entitled to be discharged on common bail, who, after judgment, are not exempt from a *capias ad satisfaciendum*, and to all the effects of this writ. No at- *347] tempt, however, so far as we are aware, *has ever before been made, to nullify a final process of the United States courts, by means of such an insolvent law of a state, or by means of any adjudication by a state tribunal, under such law. Yet even if this were a question, as to a right of bail on mesne process, the plaintiffs being citizens of another state, and the

debt on which judgment was recovered having been contracted in that state, the case would come within the principle decided by Judge WASHINGTON, above referred to, of *Read* v. *Chapman.*

Fox, for the defendant.—The defendant in error thinks this judgment ought to be sustained. But whether it shall be sustained or reversed, depends upon the question, whether a discharge from imprisonment, obtained in the state courts of Ohio, under her insolvent law, can be of any validity in the United States courts. If such a discharge is valid, the question is at an end. That it is valid in the Ohio courts, is not questioned. I maintain it is valid in the federal courts.

By the act of congress of 19th May 1828, (4 U. S. Stat. 278), it is provided, "that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state; provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states in the state courts." By this statute, I understand the same executions then in use in the state courts of Ohio, and the same modes of proceeding on those executions, were adopted for the federal court in Ohio. Such appears to have been the object of congress in passing that law, and such I believe has been the practice under it, in the seventh circuit, at least. And for the purpose of enabling the circuit courts to continue to use the same executions, and the same modes of proceeding thereon, power is given to the courts to "alter final process, so as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." *In Kentucky, where imprisonment for debt is abolished, I understand, the federal courts do not pretend to issue a *capias.* [*348

If this was the object of the law in question, this court has only to ascertain the mode of proceeding to execute writs of *capias ad satisfaciendum* in the courts of Ohio; for it is that mode of proceeding which is to govern this cause. By the law of Ohio, passed 12th March 1831 (29 Ohio Statutes 329), entitled "an act for the relief of insolvent debtors," it will be found (§ 21), that on the applicant first applying to the commissioner of insolvents for the benefit of that act, he obtains a certificate which protects his person from arrest or imprisonment for any debt or demand in any civil action, at the suit of any person named in his schedule, until the second day of that term of the court of common pleas, to which the commissioner shall return copies, &c. By the 22d section, the sheriff, or any officer having custody of the defendant, is directed to discharge him out of custody, on his producing his certificate; and the officer is directed "to return a copy of such certificate, and also return, that in obedience to such certificate, he had discharged the person named therein." Provision is made for the court of common pleas of the county to receive the returns of the proceedings before the commissioner of insolvents, and for the final granting or rejection of such application, and granting to the applicant a final certificate of discharge from arrest, on account of any and all debts mentioned in his schedule, for

ever. And by the 36th section it is provided, in addition, that "if any sheriff or other officer shall arrest any person having been so discharged by the court, such officer having knowledge of such discharge, and that the person so arrested has a certificate so granted to him by the court, or shall refuse to discharge the person so arrested, out of his custody, as soon as such certificate shall be produced and shown to him, the officer so offending shall be deemed guilty of a trespass, and shall be liable to be prosecuted in the court of common pleas, in an action at the suit of the person injured," &c.

Here, then, we have the whole law which governs this case. The mode of proceeding to execute a *capias* writ in Ohio, if the defendant has not been discharged from imprisonment under the insolvent law, is to arrest him. If the defendant *has taken the benefit of that act, or has only *849] applied for it and obtained a certificate of exemption from arrest until the sitting of the next court, the officer having the execution is bound to release him from arrest. If he knows of the defendant's having been previously discharged by the court from imprisonment on account of the debt named in the writ, he is considered as a trespasser in making the arrest. The return of the defendant's having taken the benefit of the act, is a good return to such an execution; and the reason why such a return is good, is, because it is the mode of proceeding required by the statute. And by the tenth rule of practice of the circuit court of Ohio, this practice or mode of proceeding is adopted by that court, as is admitted by the demurrer. This rule of proceeding was adopted at the December term 1831, and was intended to avoid all doubt as to the course which the marshal ought to pursue on mesne and final process. There can be no question, I think, but the rule does adopt in effect the whole insolvent law of Ohio, so far as the same is connected with *capias* writs.

But there was no necessity, in fact, for the court to have adopted this rule, after the passage of the act of 19th May 1828; for by the fair construction of that act, as has been already remarked, the proceedings of the state courts are expressly adopted, and by that adoption, became the law of the federal courts in Ohio. And it will be found, that at the time the act of congress was passed, the proceedings upon execution, in the state of Ohio, were the same as in December 1831. 22 Ohio Laws 326.

It is said, the legislature intended by the term "process," a writ, or something analogous; and that it is contradistinguished from the proceedings to be had by virtue of a writ; and that mesne process is spoken of as distinct from the "forms and modes of proceeding." The distinction may exist, but affords no favorable argument for the plaintiffs. The act is to regulate the processes in the courts of the Union. How can the process be regulated, unless by directing the mode of proceeding in executing it? The form of process, whether mesne or final, is of no benefit to the plaintiffs, unless a mode is pointed out, by law or rule of court, of making that form available. To make a demand available against a debtor, a *350] *writ must be devised, and a mode of executing that writ adopted, or the debtor cannot be brought into court. For the purpose of ascertaining or fixing that form or mode of executing it, the first section of the act of 19th May 1828, was adopted. And the third section of the act adopts the same executions, and the proceedings thereupon, as were, at the passing

of the act, used in the courts of the state. Of what beneficial use could the mere blank execution have been, without a mode of executing it? The mere formal writ is of no validity, without the mode of executing it. The form and the mode of executing it constitute its real value. And it is evident, that congress intended to adopt the form and mode of proceeding also, as they have used the language of the act of 1789; which has been construed by this court to embrace the whole progress of an execution, from its formation to the time of its being fully executed. 10 Wheat. 1. Congress, therefore, have adopted the state court executions, and also the mode of proceeding upon these executions, as they existed in May 1828. And if the sheriff could not arrest a person on a *capias ad satisfaciendum* issued from a state court, neither could the marshal on an execution from the federal court.

It is not contended on the part of the defendant in error, that the state legislature could pass insolvent laws to affect the process of the federal courts. But we do contend, that congress may adopt any of the state laws as a rule for the government of the federal courts; and they have adopted the laws of Ohio in force at the passage of the act of 19th May 1828. The laws of Ohio, therefore, are the laws of congress by adoption. It is only in this view of the act of 1789, the federal courts have any known modes of practice or serving writs. The great object of the latter act was, to assimilate the process and proceedings of the federal courts to the process and proceedings of the then state courts. The object of the act of 1828 was to assimilate the process and practice of the new states and the federal courts therein.

And is it not a matter known to us all, that the federal courts did not pretend to issue writs not issued in the state courts, and that they always made their rules, practice, &c., to conform to the rules and practice of the state courts? Did *the federal courts pretend to sell land in Virginia, as they did in New York and Pennsylvania? They did not. [*351
But when Kentucky authorized land to be sold, the federal courts, under the authority given them so to alter the form of process, &c., by the act of 1789–1792, adopted the state writs of execution suitable to subject land for sale on judgments obtained in those courts.

The counsel appear to be laboring under a great mistake, in supposing they have shown the special bail-bond forfeited absolutely, by the return of the *capias ad satisfaciendum*, not found. That the bond is so far forfeited by the return, as to authorize an action to be brought on the bond, I admit; but still the bail has the right to surrender his principal, at any time before the return-day of the *scire facias* against the bail, and thus defeat the plaintiff's right of action. This right of surrender is absolute. And if the principal dies after the return of the *capias ad satisfaciendum*, and before the return of the *scire facias* against the bail, the bail is discharged by the statute law of Ohio. The bail is not fixed, until the *scire facias* is served. *Bank of Mount Pleasant* v. *Administrators of Pollock*, 1 Ohio 35. And at the time this bail-bond was given, by special rule of the seventh circuit court, it was provided, that special bail might surrender the principal, before the court, at any time, before or after judgment, or to the marshal, provided such surrender be made before a return of a *scire facias* executed, or a second *scire facias*, *nihil*. It is not true, therefore, as suggested in the plaintiff's

argument, that the rule of court relied upon, took away any vested right from plaintiff, or conferred any on defendants.

Such being the right of the principal to surrender, I take it to be a well-settled principle, that wherever the law takes the principal out of the custody of his bail, either by the operation of an insolvent or bankrupt law, or otherwise, so as to prevent his surrendering, it is tantamount to a surrender. The law having made it unlawful to arrest, excuses the surrender. 14 East 593; 1 vol. Law Library, July 1833, p. 124; 1 McCord 373; 18 Johns. 335; 5 Binn. 338; 9 Serg. & Rawle 24. This question is
*352] referred to, for the purpose of showing the *plaintiff's counsel are mistaken in supposing that the court below, by adopting the rules of December 1831, undertook to divest them of any vested right of action on the bail-bond, by the return of the *ca. sa.*; because, as before remarked, the tenth rule of the court, then existing, gave the right to surrender at any time before the *scire facias* against the bail returned executed.

Having, as is supposed, established the proposition that the act of congress of May 1828, has adopted the state court executions, and the modes of proceeding thereon, as used in 1828, I might here leave this branch of the case. But should the court differ with me in this view, it is contended, that the rules of practice adopted by the court below, at December term 1831, fully shield the defendant from all responsibility. The tenth rule, recited in the plea, refers to the insolvent law of Ohio particularly, and adopts it altogether. Under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has for such demand been released from imprisonment. Is not this a full and complete recognition of the validity of the insolvent law? Does it not recognise the effect of that law, as an excuse to the bail for not surrendering? By the 5th rule, bail may surrender their principal at any time before judgment; that is, judgment against the bail. Now, as before remarked, the principal having become protected by the law from arrest for this debt, his bail could not legally surrender him, and hence he is excused.

But it is said, the court has no power to adopt rules which take from a citizen of another state the right to imprison his debtor. This position cannot be sustained. This court have decided, that the states have the right to abolish imprisonment altogether. 12 Wheat. 378, 381; 4 Ibid. 200. The United States courts have the right to suit their process to such legislation: they have the power, therefore, to abolish, by rule of court, the use of the *capias* writ. If they can abolish it as to all the citizens of Ohio, cannot they do it in favor of that small but unfortunate class of debtors, whose necessities compel them to petition for that liberty, which ought to be the right of every American?

*353] But it is said, there is provision made by the act of congress *of 1800, by which an insolvent may be discharged; and hence, it is urged, that no other mode than the one pointed out in that act could be resorted to, for the purpose of releasing him from imprisonment. I contend that the act of the 19th of May 1828, so far as it conflicts with the act of 1800, repeals the latter act. But whether this be so or not, the act of 1800 is not an act for the general relief of insolvents, but is only intended to release an insolvent debtor from imprisonment, on the particular debt on

which he is charged in execution, while the insolvent law relieves the debtor from arrest in any debt he is owing at the time of his application. The object of the two laws, therefore, is widely different; and congress, by adopting the state laws, and the circuit court, by adopting those laws, may prevent the defendant from being arrested; and I contend that the act of 1828, and the rules aforesaid, have virtually abolished imprisonment of insolvent debtors.

But it is said, that in attempting to relieve himself from responsibility in the present case, the defendant is not availing himself of the state law, but of a particular adjudication of a state court. But suppose, the law of Ohio had declared, that no man should be arrested for debt; suppose, the legislature had extended to defendants, Harris's, an exemption from imprisonment, by a legislative act, as was done in the case of *Mason* v. *Haile*, 12 Wheat. 370, would it be contended, that in that case no exemption from imprisonment could be claimed?

Again, will it be contended, that no rights or exemption can be acquired under judicial acts of the state courts? Surely not. An application for the benefit of the insolvent act, although a judicial proceeding, is not therefore void. All creditors named in the application are parties to it, and are bound by the judgment rendered. They may appear and object to the applicant's discharge.

It is said, that if the Harris's, after being arrested, were entitled to be immediately discharged, this would be annulling the execution, not proceeding to execute it. But might not the same remark be made in all cases? Would it be considered as annulling an execution in the state courts, by the sheriff discharging a defendant from arrest, on his producing the certificate *of his discharge? The sheriff, in proceeding to execute a *capias ad satisfaciendum*, would not be considered as annulling the [*354 execution, under such circumstances. And certainly, if congress, by the act referred to, or by the rules of its own courts, have adopted the state practice, the marshal performs his duty, by returning the discharge of the defendant, by the insolvent debtor proceeding, in the same manner as the sheriff is discharging his duty on the state court execution, by a similar return.

Nor is it true, that a *capias* writ can only be obeyed by an actual arrest. If the law forbids the arrest, or if the defendant dies, or if he is imprisoned on a criminal charge, so that the officer cannot legally arrest, he may return the facts, and by so doing he obeys, in a legal sense, the command of the writ. It does not necessarily follow, that the writ unlawfully issued, merely because the defendant is privileged from being arrested. A writ is lawful, when issued against a suitor attending court; but the suitor would be privileged from arrest, and if he claimed his privilege, by suing out a *habeas corpus*, he would be discharged. So, of a member of congress, a judge, and all that class of persons whom the policy of the law has seen fit to exempt from arrest. The insolvent laws of the state are, in principle, nothing more than granting like privileges for arrest to an unfortunate class of honorable men; and the period during which that privilege shall continue, depends upon the legislature.

Again, it is said, the court could not adopt any rule, the effect of which would be to discharge the bail from liability to vacate their contract, and

wrest their vested rights from the plaintiffs. Before we discuss the proposition as to whether the court below did, by their rule, vacate the contract of the plaintiffs, we had better ascertain what that contract was. The contract is found in the declaration, in these words: the defendant, at the time mentioned, "acknowledged himself special bail for the said Joseph Harris and Cornelius V. Harris, in the sum of $4000, in the cause or suit in which judgment was rendered as aforesaid; that is to say, that they, the said Joseph Harris and Cornelius V. Harris, should pay and satisfy the said judgment, or render themselves into the custody of the marshal." Now, it
*355] is asked, what contract does this present, in and of *itself? Without the aid of the rules of court, or the statute of Ohio, it is perfectly senseless. What is meant by special bail, the rules of court tell; but without those rules, the contract is senseless jargon. If, then, the contract depends upon the rules of court; if they give it life originally; if they preserved its existence; the plaintiffs are entitled to what those rules give them, and to nothing more. When they took the recognisance, it was with a knowledge that those rules were under the entire control of the court; that they could be moulded by the court; that the state legislature could abolish imprisonment for debt, and the writ of *capias* also; and that the court were authorized to alter their writs to suit the state legislation. The plaintiffs took their recognisance, subject to all those contingencies. 12 Wheat. 370.

No contract, therefore, has been violated, nor have there been any vested rights wrested from the plaintiffs. To make the worst possible case, all that can be said, is, that the plaintiffs, by the adoption of the rule in question, were deprived of one remedy which they had when the bail was given, viz., the imprisoning the defendants. But as it is admitted, that this only affected the remedy, the plaintiffs in error cannot complain.

The counsel appear not to view the contract of bail correctly, when they attempt to liken it to other contracts. It is, in fact, nothing but a part of the process of the court. It is a mere substituting of a keeper of the defendant's own choice for one appointed by law. For the bail is said to be the keeper of the principal; he can take him wherever he pleases, and his obligation is to keep him so that the plaintiff may take him at the proper time. And the moment the creditor loses his right to take or hold the principal, the bail is discharged; for the latter cannot keep, where the former cannot take the body. It is no question, therefore, about interfering with vested rights. The simple inquiry is, had the plaintiffs a right to take the bodies, after they had taken the benefit of the insolvent act? If they had, the judgment is erroneous: if they had not, it is correct. 14 East 598; Law Library, tit. Bail.

Story, Justice, delivered the opinion of the court.—This is a writ of error
*356] to the judgment of the circuit court for the district of Ohio. *The material facts are these. In June 1830, the plaintiffs in error (who are citizens of New York) brought an action of *assumpsit* in the circuit court of Ohio, against one Joseph Harris and Cornelius V. Harris, and at the December term of the court, recovered judgment for $2818.86 and costs. In this action, the defendant in error became special bail by recognisance, viz., that the Harris's should pay and satisfy the judgment recovered against

them, or render themselves into the custody of the marshal of the district of Ohio. In October 1831, a writ of *capias ad satisfaciendum* was issued upon the same judgment, directed to the marshal; who, at the December term 1831, returned, that the Harris's were not to be found. At the same term, the circuit court adopted the following rule: "That if a defendant, upon a *capias*, does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has for such demand been released from imprisonment." In February 1831, Cornelius V. Harris was duly discharged from imprisonment for all his debts, under the insolvent law of Ohio, passed in 1831; and in February 1832, Joseph Harris was in like manner discharged. In December 1832, the plaintiffs in error commenced the present action of debt, upon the recognisance of bail, against the defendant in error, stating in the declaration, the original judgment, the defendant becoming special bail, and the return on the execution "not found." The defendant, among other pleas, pleaded the discharge of the Harris's under the insolvent law of Ohio of 1831, and the rule of the circuit court, above mentioned, in bar of the action. The plaintiffs demurred to the plea, and, upon joinder in demurrer, the circuit court gave judgment for the defendants; and the present writ of error is brought to revise that judgment.

The question now before this court is, whether the plea contains a substantial defence to the action of debt brought upon the recognisance of special bail. In order to clear the case of embarrassment from collateral matters, it may be proper to state, that the recognisance of special bail being a part of the proceedings in a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created *thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court and the principles of law applicable thereto. Whatever, in the sense of those rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. Now, by the rules of the circuit court of Ohio, adopted as early as January term 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal at any time, before or after judgment against the principal; provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias*, *nihil*, against the bail. And this in fact constituted a part of the law of Ohio, at the time when the present recognisance was given; for in the Revised Laws of 1823–24 (22d vol. of Ohio Laws 58), it is enacted, that, subsequent to the return of the *capias ad respondendum*, the defendant may render himself, or be rendered, in discharge of his bail, either before or after judgment; provided such render be made at or before the appearance day of the first *scire facias* against the bail returned *scire feci*, or of the second *scire facias* returned *nihil*, or of the *capias ad respondendum* or summons, in an action of debt against the bail on his recognisance, returned served; and not after. This act was in force at the time of the passage of the act of congress of the 19th of May 1828, ch. 68, and must, therefore, be deemed as a part of the "modes of proceeding" in suits, to have been adopted by it. So that the surrender of the principal [*357

by the special bail, within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of legal right.

And this constitutes an answer to that part of the argument at the bar, founded upon the notion, that by the return of the *capias ad satisfaciendum*, the plaintiffs had acquired a fixed and absolute right against the bail, not to be affected by any rules of the court. So far from the right being absolute, it was vested *sub modo* only, and liable to be defeated in the events prescribed by the prior rules of the court, and the statute of Ohio above referred to. It is true, that it has been said, that by a return of *non est inventus* on a *capias ad satisfaciendum*, *the bail are fixed; but this language is not strictly accurate, even in courts acting professedly under the common law, and independently of statute. Lord Ellenborough, in *Mannin* v. *Partridge*, 14 East 599, remarked, "that bail were to some purposes said to be fixed by the return of *non est inventus* upon the *capias ad satisfaciendum*; but if they have, by the indulgence of the court, time to render the principal, until the appearance day of the last *scire facias* against them, and which they have the capacity of using, they cannot be considered as completely and definitively fixed till that period." And so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an *exoneretur* to be entered, in such cases of indulgence, as well as in cases of strict right. But there is this distinction: that where the bail are entitled to be discharged *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as a bar to a suit in their defence. But where the discharge is a matter of indulgence only, the application is to the discretion of the court, and an *exoneretur* cannot be insisted on, except by way of motion.

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And this leads us to the remark, that where the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance, he is, *à fortiori*, entitled to insist on it by way of defence, where he is entitled, *ex debito justitiæ*, to surrender the principal. Now, the doctrine is clearly established, that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender. This was decided in *Mannin* v. *Partridge*, 14 East 599; *Boggs* v. *Teackle*, 5 Binn. 332; and *Olcott* v. *Lilly*, 4 Johns. 407. And, *à fortiori*, this doctrine must apply where the law prohibits the party from being imprisoned at all; or where by the positive operation of law, a surrender is prevented. So that there can be no doubt, that the present plea is a good bar to the suit, notwithstanding there has been no surrender, if by law the principal could not, upon such surrender, have been imprisoned at all.

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*This constitutes the turning point of the case, and to the consideration of it we shall now proceed. In the first place, there is no doubt, that the legislature of Ohio possessed full constitutional authority to pass laws, whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment does

not impair the obligation of the contract, but leaves it in full force against his property and effects. This was clearly settled by this court in the cases of *Sturges* v. *Crowninshield*, 4 Wheat 200; and *Mason* v. *Haile*, 12 Ibid. 370. In the next place, it is equally clear, that such state laws have no operation, *proprio vigore*, upon the process or proceedings in the courts of the United States, for the reason so forcibly stated by Mr. Justice JOHNSON, in delivering the final opinion of the court in *Ogden* v. *Saunders*, 12 Wheat. 213; and by Mr. Chief Justice MARSHALL, in delivering the opinion of the court in *Wayman* v. *Southard*, 10 Ibid. 1; and by Mr. Justice THOMPSON, in delivering the like opinion in the *Bank of the United States* v. *Halstead* 10 Ibid. 51. State laws cannot control the exercise of the national government, nor in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws directly, by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States. Examples of both sorts exist in the national legislation. The process act of 1789, ch. 21, expressly adopted the forms of writs and modes of process of the state courts, in suits at common law. The act of 1792, ch. 36, permanently continued the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, then in use in the courts of the United States, under the process act of 1789; but with this remarkable difference, that they were subject to such alterations and additions as the said *courts respectively should, in their discretion, deem expedient, or to such regulations as the supreme court of the United States should think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. The constitutional validity and extent of the power thus given to the courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this court in the cases of *Wayman* v. *Southard*, 10 Wheat. 1, and the *Bank of the United States* v. *Halstead*, 10 Ibid. 51. It was there held, that this delegation of power by congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit, embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that "a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered;" and that "this provision enables the courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially, to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September 1789." The result of this doctrine, as practically expounded or applied in the case of the *Bank of the United States* v. *Halstead*, is, that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it; so that it may reach prop- [*360

erty not liable, in 1789, by the state laws, to be taken in execution, or may exempt property, which was not then exempted, but has been exempted by subsequent state laws.

If, therefore, the present case stood upon the mere ground of the authority conferred on the courts of the United States by the acts of 1789 and 1792, there would seem to be no solid objection to the authority of the circuit court of Ohio to make the rule referred to in the pleadings. It is no more than a regulation of the modes of proceeding in a suit, in order to *conform to the state law of Ohio, passed in 1831, for the relief of insolvent debtors. A regulation of the proceedings upon bail-bonds and recognisances, and prescribing the conduct of the marshal in matters touching the same, seems to be as completely within the scope of the authority as any which could be selected.

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But in fact the present case does not depend upon the provision of the acts of 1789 or 1792, but it is directly within and governed by the process act of the 19th of May 1828, ch. 68. That act, in the first section, declares, that the forms of mesne process, and the forms and modes of proceeding in suits at common law in the courts of the United States, held in states admitted into the Union since 1789 (as the state of Ohio has been), shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction in the same; subject to such alterations and additions as the said courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same. The third section declares, that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and "the proceedings thereupon," shall be the same in each state, respectively, as are now used in the courts of such state, &c. Provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in such courts, as to conform the same to any change which may be adopted by the legislature of the respective states, for the state courts.

This act was made after the decisions in *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat. 1, 51, and was manifestly intended to confirm the construction given in those cases to the acts of 1789 and 1792, and to continue the like powers in the courts to alter and add to the processes, whether mesne or final, and to regulate the modes of proceedings in suits and upon processes, as had been held to exist under those acts. The language employed seems to have been designed to put at rest all future doubts upon the subject. But the material consideration now to be taken notice of is, *that the act of 1828 expressly adopts the mesne processes and modes of proceeding in suits at common law, then existing in the highest state courts, under the state laws; which, of course, included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment. In regard also to writs of execution and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares that they shall be the same as were then used in the courts of the state. Now, the words, "the proceedings on the writs of execution and other final process," must, from their very import,

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be construed to include all the laws which regulate the rights, duties and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution-debtor, and also all the exemptions from arrest or imprisonment under such process, created by those laws.

We are then led to the inquiry, what were the laws of Ohio in regard to insolvent debtors, at the time of the passage of the act of 1828? By the insolvent act of Ohio, of the 23d of February 1824 (Laws of Ohio, Revision of 1824, vol. 22, § 8, 9, p. 327–8), which continued in force until it was repealed and superseded by the insolvent act of 1831, it is provided, that the certificate of the commissioner of insolvents, duly obtained, shall entitle the insolvent, if in custody upon mesne or final process, in any civil action, to an immediate discharge therefrom, upon his complying with the requisites of the act. And it is further provided, that the final certificate of the court of common pleas, duly obtained, shall protect the insolvent for ever after from imprisonment for any suit or cause of action, debt or demand mentioned in the schedule given in under the insolvent proceedings; and a penalty is also inflicted upon any sheriff or other officer, who should knowingly or wilfully arrest any person contrary to this provision. The act of 1831 (Laws of Ohio, Revision of 1831, vol. 29, § 21, 36, p. 333, 336) contains a similar provision, protecting the insolvent, under like circumstances, from imprisonment and making the sheriff or other officer, who shall arrest him contrary to the act, liable to an action of trespass. Now, the repeal of the act of 1824, by the act of 1831, could have no legal effect to change the existing forms of mesne or final process, or the modes of proceeding thereon in the courts *of the United States, as adopted by congress, or to vary the [*363 powers of the same courts in relation thereto; but the same remained in full force, as if no such repeal had taken place. The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the act of 1828, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject.

Upon these grounds, without going into a more elaborate review of the principles applicable to the case, we are of opinion, that the judgment of the circuit court was right; and that it ought to be affirmed, with costs.

Thompson, Justice. (*Dissenting.*)—This is the first time this court has been called upon to give a construction to the act of congress of the 19th May 1828. (4 U. S. Stat. 478.) And the rules and principles adopted by the circuit court, and which appear to be sanctioned by this court, when carried out to their full extent, appear to me to be such an innovation, upon what has been heretofore understood to be the law by which the courts of the United States were to be governed, as could not have been intended by congress by the act of 1828. It is giving to the courts the power, by rule of court, to introduce and enforce state insolvent systems. It authorizes the courts to abolish all remedy which a creditor may have against the body of his debtor who has been discharged under a state insolvent law. And if the courts have this power, they have the same power over a *fieri facias*, and to exempt all property acquired after the discharge of the insolvent from the payment of his antecedent debts; if such be the state law.

The act is general, extending to writs of execution, and all other final process. And in addition to this, it alters the whole law of remedy against bail, in such cases. A *capias ad satisfaciendum* against the principal is an indispensable preliminary step to a prosecution against the bail; and if the court has a right to order that no *capias ad satisfaciendum* shall be issued, it is taking from the creditor all remedy against the bail. To say, that an execution may be taken out, but shall not be executed upon the party, is a mere mockery of *justice. The constitutionality of the insolvent law *364] of Ohio is not drawn in question; and whether, as a measure of policy, it is not wise to abolish imprisonment for debt, is not a question which we are called upon to decide.

As between the citizens of Ohio, and in their own courts, they have full power to adopt such course in this respect as the wisdom of their legislature may dictate. But the present is a question between the citizens of that state, and the citizens of another state. And that made the great and leading distinction adopted by this court in the case of *Ogden* v. *Saunders*, 12 Wheat. 531; and, indeed, it was the very point upon which that cause turned. And if the practical operation of the act of 1828 is to be what is now sanctioned by this court, it is certainly overruling that decision. So far as that goes, I can have no particular objection, as I was in the minority in that case. But this case involves other important considerations. It is an action brought by citizens of the state of New York, against citizens of the state of Ohio, upon a recognisance of bail. The pleadings in the cause terminated in a demurrer to the plea; and the judgment of the court sustained the validity of the plea, and defeated the plaintiff's right of recovery.

A brief statement of the facts, as disclosed by the record, will aid in a right understanding of the questions that are presented for consideration. The defendant, Richard Haughton, became special bail for Joseph Harris and Cornelius V. Harris, in a suit brought against them by the plaintiffs in this cause. On the 12th day of October 1831, a *capias ad satisfaciendum* was issued against them, on the judgment which had been recovered, for $2846.56. This *capias ad satisfaciendum* was returned "not found," at the December term 1831, of the circuit court. This execution, it is to be presumed, was returnable on the first day of the term, which is according to the ordinary course of proceedings. At the same December term 1831, the rule of court set out in the plea was adopted; which orders and directs, that no person, either under mesne or final process, shall be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment. The plea alleges, that Cornelius V. Harris, one of the defendants in the original suit, was, at the February term 1831, of the court of common *pleas for Hamilton county, in the state of Ohio, ordered *365] and adjudged to be for ever thereafter protected from arrest or imprisonment for any civil action, or debt, or demand in the schedule of his debts delivered to the commissioner of insolvents; among which was the judgment above mentioned. The plea also alleges, that a like discharge was given to the other defendant, Joseph Harris, at the February term 1832, of the same court. So that it appears, that the rule of court, and the discharge of one of the defendants, took place after the bail was fixed in law, by the return "not found," upon the *ca. sa.* against the defendants in the original suit. As against Joseph Harris, therefore, a retrospective effect

has been given to his discharge, and a vested legal right of the plaintiff thereby taken away, upon this demurrer to a special plea, founded upon a particular rule of court specified in the plea; it cannot, I should think, be claimed that other rules of court have the notoriety of public laws, which the court is bound judicially to know and notice. Was the bail, under these circumstances, discharged? and could such matters be set up by way of plea in bar to the present action against the bail? are the questions to be considered.

In the case of *Ogden* v. *Saunders*, the parties, as in the present case, were citizens of different states; and the decision of the court was, that as between parties of different states, the state insolvent laws had no application. Mr. Justice JOHNSON, who delivered the opinion of the court, uses very strong language on this point, and which cannot be misunderstood. "All this mockery of justice," says he, "and the jealousies, recriminations, and perhaps retaliations which might grow out of it, are avoided, if the power of the states over contracts, after they become the subjects exclusively of judicial cognisance, is limited to the controversies of their own citizens. And it does appear to me almost incontrovertible, that the states cannot proceed one step farther, without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states. Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to *prostrate his right; and on the subject of these rights, the constitution [*366 exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract originated. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on this subject: Act of 1800. (2 U. S. Stat. 4.) The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise. I cannot acquiesce in an incompatibility so obvious. No one has ever imagined, that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power, in that sphere in which it is sovereign; that is, between its own citizens, between suitors subject to state power exclusively, in their controversies between themselves." And in conclusion, he sums up the argument by saying, that "when, in the exercise of that power" (passing insolvent laws), "the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, then arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and of the constitution of the United States."

I have been thus particular in quoting the very language of the court,

that it may speak for itself. And that it was adopted in its fullest extent is evident, by what fell from the court in the case of *Boyle* v. *Zacharie and Turner*, 6 Pet. 643. "The ultimate opinion," say the court, "delivered by Mr. Justice JOHNSON in the case of *Ogden* v. *Saunders*, was concurred in and adopted by the three judges who were in the minority upon the general question of the constitutionality of state insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the
*367] three other *judges who concurred in the judgment. So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive." The decision, in that case, turned exclusively upon the point, that state insolvent laws did not apply to suitors in the courts of the United States. And the emphatic language is used, "no one has ever imagined, that a prisoner in confinement under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits." Apply this principle to the case now before the court. A *capias ad satisfaciendum* was in the hands of the marshal against the Harris's, the defendants in the original suit. Suppose, the marshal had arrested them (as was his duty to do, if they could be found) and put them in confinement. No one, say the court, could imagine, that they could avail themselves of the state insolvent law. But that is the very thing which the plea in this case does set up, under the authority of the rule of court, that no one shall be kept imprisoned who has been discharged under the insolvent law of the state; and it is the very thing that has proved available to deprive the plaintiffs of a recovery in this case.

The case of *Boyle* v. *Zacharie and Turner*, was decided in the year 1832; and the enacting clause of the act of congress of 1828, could not have been supposed to change the principles adopted in *Ogden* v. *Saunders*. If that act is to govern and control the case now before the court, it must be by virtue of the rule which has been adopted by the circuit court of Ohio. What is the law of 1828? It declares, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, &c., provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter the final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." A *capias ad satisfaciendum* was an execution in use in the courts of the state of Ohio, in the year 1828, when the act in question was passed. It was, therefore, adopted as a writ to be used in the courts of the United States.

*But it is said, that the act adopts also the proceedings thereupon.
*368] It does so. But what is to be understood by proceedings? Can this, in any just sense, be satisfied by prohibiting all proceedings on the execution? Proceedings, both in common parlance and in legal acceptation, imply action, procedure, prosecution. And such is the explanation given to the term proceedings, in the case of *Wayman* v. *Southard*, 10 Wheat. 1. "It is applicable," say the court, "to writs and executions, and is applic-

able to every step taken in a cause; it indicates the progressive course of the business, from its commencement to its termination." If it is a progressive course, it must be advancing, and cannot be satisfied by remaining at rest. In the cases of *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat. 1, 51, this term proceedings was applied to the mode and manner of executing the execution in the progress of obtaining satisfaction; and the power of the court under the process act of 1792, to alter and add to the execution, by extending it to lands. But no part of those cases contains an intimation, that proceedings to obtain satisfaction, implies or warrants an arrest and stopping all execution whatever of the process. If the enacting clause in this act does not forbid the execution of the *capias ad satisfaciendum*, as it certainly does not, could it be done by a rule of court, under the proviso? I think it could not. The proviso does not authorize any rule relative to the proceedings in the cause. The term is not used at all. It only authorizes the court so far to alter final process, as to conform the same to that used in the state courts.

The rule set up in this plea does not make any alteration whatever in the execution. That remains the same precisely as it was before; and it only forbids the effect and operation of it. And if the rule is to be considered a part of the execution, and to be taken as if incorporated in the body of the writ, it would present a very singular process, commanding the marshal to take the body of the defendant, but forbidding him to keep the prisoner in confinement. Such incongruity cannot be attributed to this proviso. The rule, I think, is not authorized by this statute, and specially, as it was adopted after the bail was fixed in law, by the return "not found," upon the *capias ad satisfaciendum* issued against the principals. That such a *return fixes the bail, is a settled rule of the common law. Courts have, *ex gratiâ*, extended the right to surrender, until the return of [*369 the writ or process against the bail; and perhaps, in some instances, the right to surrender has been extended to a later period. But the contingency of not being able to make the surrender, after the return of the *capias ad satisfaciendum* "not found," is at the risk of the bail. And the relief of the bail in such cases is, on motion, addressed to the favor of the court; and relief is granted, upon such terms as the circumstances of the case will warrant; and always upon payment of the cost of the suit against the bail. No stronger case upon this point can be put, than that of *Davidson* v. *Taylor*, decided in this court, 12 Wheat. 604. "This," say the court, "is a case of bail, and is to be decided by the principles of English law, which, the case finds, constitute the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal, after the return of a *capias ad satisfaciendum*, is considered as matter of favor and indulgence, and not of right; and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed by the return of the *capias ad satisfaciendum;* but the court allow the bail to surrender the principal, within a limited period after the return of the *scire facias* against them, as matter of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, when the principal was still living and capable of being surrendered, and an *exoneretur* could be entered, and the principal discharged immediately on the surrender; but the rule has never been applied to cases

where the principal dies before the return of the *scire facias*. In such a case, the bail is considered as fixed by the return of the *capias ad satisfaciendum;* and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur;* the plea, is, therefore, bad."

This case would seem to put at rest the question as to the manner in which the bail is to avail himself of any matter which entitles him to relief, when application is made after the return of the *capias ad satisfaciendum*—that it must be by motion, and not by plea in bar. But if this was pleadable, the plea now in question is defective. It does not allege a surrender of the principals, nor that an *exoneretur* has been entered. *370] *It may be admitted, that the bail would have been entitled to relief, on motion to the court for that purpose. But this will not sustain the plea, according to the doctrine of the case just referred to, of *Davidson* v. *Taylor*. But it may be questionable, whether the bail would have been relieved in this case, on motion. Such an application is seldom, if ever, granted, unless the matter upon which the motion is founded arose before the bail is fixed in law; viz., before the return of the *capias ad satisfaciendum*. 1 Caines 10. In this case, one of the principals was not discharged, until several months after the return of the *capias ad satisfaciendum;* and this appears upon the record. In the case of *Olcott* v. *Lilly*, 4 Johns. 408, Chief Justice KENT says, there is no case in which the death of the principal, after the return and filing of the *capias ad satisfaciendum*, has been allowed as ground for the relief of the bail. All the cases agree, that after the bail are fixed, *de jure*, they take the risk of the death of the principal; the attempt for relief has frequently been made, and as often denied. That the time which is allowed the bail *ex gratiâ*, is at their peril, and they must surrender. That there are many cases where the bail have been relieved on motion; but in these cases, the event upon which the bail has been relieved happened before the bail became fixed. That, in cases of insolvency, time has been allowed the bail *ex gratiâ* to surrender, to prevent circuity of action; but there is no intimation that such insolvency could be pleaded in bar. Indeed, its being allowed *ex gratiâ*, according to the language of all the cases, is conclusive to show, that it could not be pleaded as a legal discharge of the bail. In the case of *Cheetham* v. *Lewis*, 2 Johns. 104, the surrender was within eight days after the return of the writ against the bail, and the court ordered an *exoneretur;* saying, that, technically speaking, such surrender cannot be pleaded, and so is not *de jure;* the relief is on motion and not by plea, and the court always requires the costs in the suit on the recognisance to be paid. The same doctrine is fully settled in the English courts. In the case of *Donnelly* v. *Dunn*, 1 Bos. & Pul. 448, the position is laid down broadly, that bail cannot plead the bankruptcy and certificate of their principal in their own discharge. Lord ELDON, however, observed, that they did not mean to preclude any application for sum- *371] mary relief on the part of the *bail. The same case came again before the court, after leave to amend the plea, had been obtained, 2 Bos. & Pul. 45, and was very analogous in its circumstances to the one now before this court. It was an action of debt on recognisance of bail; and the defendant pleaded the bankruptcy of the principal, very circumstantially; to which there was a general demurrer and joinder. In support of the

plea, it was contended, as it has been in the case now before the court, that if the bankruptcy and certificate was a legal discharge of the principal, it was also a legal discharge of the bail, and if so, may be pleaded. To this it was answered, that the plea of bankruptcy could only be interposed by the bankrupt himself; and the bail, if entitled to any relief, must obtain it by application to the summary jurisdiction of the court; and this principle was sanctioned by the court. Lord ELDON said, we do not mean to preclude any application for summary relief on the part of the bail; but on this record, judgment must be given for the plaintiff. That the plea of bankruptcy is given to the bankrupt, to be made use of as the means of discharging himself, if he please; but there may be cases in which the bankrupt may not choose to make use of his certificate. And he cannot, through the medium of his bail, be obliged to make use of his certificate, whether he will or not. It is the duty of the bail, under their recognisance, to surrender the bankrupt; and it remains with the bankrupt himself, to determine whether any use shall be made of the certificate. And Mr. Justice BULLER observed, that it is of importance to the public and to the profession, to put an end to attempts to introduce upon the record questions of practice, which cannot be considered as legal defences; but which belong to what may be called the equity side of the court. This action is brought for a legal demand, arising upon a debt of record, and the defendant is called upon to state a legal defence upon record, and not merely to say he has equity in his favor. He must either show a legal impossibility to perform the condition of the recognisance, or state something that will discharge him; and he has done neither.

These cases are abundantly sufficient, to show that it is a well-settled rule of law, that the bail cannot set up by plea in bar, the matter contained in the plea now in question. But if *available at all, it must be by motion. It is true, as is said in *Mannin* v. *Patridge*, 14 East 599, [*372 the bail are not completely and definitively fixed, by the return of the *capias ad satisfaciendum*. They have, by the indulgence of the court, time to surrender the principal, until the appearance-day of the last *scire facias*. But this was an application for relief on motion, and addressed to the favor and indulgence of the court; and no intimation is given, that it might be pleaded as matter of right. And it is not, I believe, pretended, that any rule of court had or could authorize such matter to be pleaded. The relief of bail, by the surrender of their principal is matter of practice, and may be regulated by rules of court. And the acts of the legislature of Ohio, or the decisions of their courts on the subject, can have no binding force on the courts of the United States, or regulate their practice, any further than they have been adopted by the court. And I do not understand, that any rule of the circuit court professes to do more than extend the time for the surrender, until the return-day of a second *scire facias* against the bail. But the mode of relief, after the bail are fixed in law, must be by an application to the favor of the court; and cannot, if the cases to which I have referred be law, be pleaded in bar. The cases of *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat., establish, most clearly and explicitly, that a state legislature cannot, by virtue of any original inherent power they have, arrest or control the proceedings of the courts of the United States; or regulate the conduct of the officers of the United

States in the discharge of their duty. The doctrine of this court always has been, that executions issuing out of the courts of the United States, are not controlled or controllable, in their general operation and effect, by any collateral regulations which the state laws have imposed on the state courts to govern them. That such regulations are exclusively addressed to the state tribunals, and have no efficacy on the courts of the United States, unless adopted under the authority of the laws of the United States. And it appears to me, that by no sound and just construction of the act of congress of 1828, can the insolvent law of Ohio be considered as adopted by it; or as giving the circuit court the power to adopt it by rule of court, without overruling the case of *Ogden* v. *Saunders;* *nor without giving to the *373] term "proceedings," a meaning not warranted in common parlance, or in legal acceptation. But whatever might have been the power of the circuit court to relieve the bail in this case, on motion; if such application had been made; I feel great confidence in saying, that the bail cannot avail himself of the matters set up, by way of plea in bar to the action; and that the plaintiff was entitled to judgment upon the demurrer.

Baldwin, Justice. (*Dissenting.*)—As I fully concur in opinion with Judge Thompson, in all the views which he has taken of this case, it would be unnecessary for me to do more than express such concurrence; but the course of adjudication which has prevailed in the circuit court of Pennsylvania, on the subject of the insolvent laws of the states of the Union, since April 1831; renders it indispensable for me to do more than declare my dissent to the opinion of the court. In the case of *Woodhull and Davis* v. *Wagner*, the defendant had been discharged by the insolvent law of Pennsylvania; after which he was arrested on a *capias ad satisfaciendum* from the circuit court, on a judgment obtained there. An application was made for his discharge, which was refused by the court; and he was remanded to custody, on the ground, that the debt, being payable in New York, and the plaintiffs citizens of that state, when the debt was contracted, and when the defendant was discharged by the insolvent law of Pennsylvania, such discharge was wholly inoperative. Similar cases have since occurred, in which that court held the law to be settled, and do not suffer the question to be argued.

In coming to, and for four years adhering to, this course of adjudication, the judges of that court did not act on their own opinion; they considered the law to have been settled by the final judgment of this court in *Ogden* v. *Saunders*, 12 Wheat. 369; and the case of *Shaw* v. *Robbins*, referred to in the note to the former case; and as the rule on which we proceeded was laid down by the authority of this court, we felt bound to observe and enforce it, whatever may have been our views of it, as individual judges, or as a circuit court. But in so doing, we did not consider it as a question of *practice, the form and mode of proceeding in court, or the mere *374] execution of its final process. We examined it as one of constitutional law, directly involving the power of the states, to affect in any manner the rights of citizens of other states, in enforcing the performance of contracts in the circuit courts of the United States. And when we found that the third proposition laid down by Judge Johnson, in *Ogden* v. *Saunders*, was considered as the established rule of this court, we at once submitted to

its obligation as a guide to our judgment. The declaration of Judge STORY, in delivering the opinion of the court in *Boyle* v *Zacharie and Turner*, 6 Pet. 643, was a direct affirmance of the proposition of Judge JOHNSON; from which no member of the court dissented; nor from the concluding paragraph of the sentence—"So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive."

The third proposition of Judge JOHNSON, thus adopted as a principle of constitutional law, finally and conclusively, is this:—"But when, in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states; then arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States." A more important principle of constitutional law was never presented for the consideration of any judicial tribunal; and when, three years since, it was solemnly declared by this court, that it was to be deemed as one which had become by its decisions final and conclusive, the circuit court of Pennsylvania did not feel at liberty to depart from it, but followed it as a prescribed rule enjoined on their observance by paramount authority; deeming it their judicial duty. That court could not consider, that the effect of a discharge by the insolvent law of Pennsylvania, on a debt due to a citizen of New York, and payable there, depended on a rule of court which it could make and unmake, at its discretion, from time to time, as a matter of practice.

With the cases of *Ogden* v. *Saunders*, *Shaw* v. *Robbins*, and *Boyle* v. *Zacharie*, before them, they could not judicially *consider the question in any other respect, than that so solemnly declared by this [*375
court; presenting a conflict of sovereign power, a collision with the judicial powers of the Union, and an exercise of a state power incompatible with the rights of other states, and with the constitution of the United States. When the final and conclusive decisions of this court had declared the law obnoxious to such objections, the circuit court had but one course to pursue—to declare it inoperative, by the supreme law of the land; which is as imperative on courts, as suitors, not as a guide to their discretion, but as the standard rule to direct their judgment.

A circuit court may be holden by a judge of this court, or, in his absence, by the district judge alone; and either has the same power to make rules of court, as both together. The question is simply this: The constitution—the rights of other states—the judicial powers granted to the United States as declared by this court, are violated by a state insolvent law. Yet a circuit court adopts, by a rule of its own, that state law, as the rule of its decision, and renders a judgment according to its provisions; and this is the case before us. The plaintiffs are citizens of New York; the defendants citizens of Ohio, sued in the circuit court of that district; by whose judgment the defendant is released from the obligation of this contract, as special bail; solely by the operation of a law of Ohio adopted by a rule of court, when, in the absence of such a law, he would be absolutely bound to pay the debt demanded from him. That judgment is now affirmed by this court, on their construction of acts of congress, whose titles are, to regulate processes

in the courts of the United States; and the enacting clauses of which are confined to the "forms of mesne process," the forms and modes of "proceedings in the courts of the United States," to writs of execution "and other final processes, and the proceedings thereupon." A law which the legislative power of a state is incompetent to pass, because it is unconstitutional and void, without a rule of court, has become valid and operative, by the potency of judicial power, exercised by any judge, at his mere discretion. Thus removing all conflicts of sovereign power by the exercise of one, which becomes practically paramount to the final and conclusive decisions of this court, the rights of other states, and the constitution of the United
*376] States, as *judicially expounded. The judgment now rendered admits of no other conclusion; and as I cannot admit, for a moment, the principle, that the power of congress, if brought to bear directly, by its most explicit enactments, on this subject, is competent to cure the objections of this law, which are fastened on its vitals by the adjudications of this court, in the cases alluded to; I cannot admit, that they do it by the construction of a law which does not profess to touch the questions necessarily involved in this case; still less, that it can be done by the rule of a court subordinate to the appellate jurisdiction of this.

If a state law is incompatible with the constitution of the Union, it must be inoperative, until the constitution is amended. The legislative and judicial power combined, cannot cure a defect which the supreme law of the land declares to be fatal to a state law; and when, by the solemn judgment of this court, it is declared, that a state law, adopted by a rule of the circuit court, is the rule of both right and remedy, in a suit between a citizen of New York, plaintiff, and a citizen of Ohio; I am judicially bound to consider, that it is not open to any objections stated in the third proposition of Judge JOHNSON, in *Ogden* v. *Saunders;* or that that case, with that of *Shaw* v. *Robbins*, and *Boyle* v. *Zacharie*, are now overruled. As the case on the record does not admit of the first alternative, but is directly, on its four corners, obnoxious to those objections, the inevitable result is, that the affirmance of this judgment may be taken to be the latter. The consequence is, that the effect of state insolvent laws on the citizens of other states is, for the present, an open one in the courts of the states, and of the United States, notwithstanding any former decisions of this court in the cases referred to. So I shall consider it here, and in the circuit court, and answer to the profession and suitors for past errors, as those of adoption, not from choice, but a sense of judicial duty; and being now absolved from an authority heretofore deemed binding, shall act, for the future, on principle. That a paramount authority, prescribing a rule for my judgment, cannot leave my discretion uncontrolled; when my judgment is free, my discretion is not bound; and that what, in the exercise of my best judicial discretion, I feel bound to do, in pronouncing the judgments of a circuit court, according to my deliberate conviction on the law of the case, I cannot undo or
*377] avoid doing, by any *rule of my own, in the adoption, construction or revocation of which, my discretion is my only guide.

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 and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Bank of the United States, Plaintiffs in error, *v.* Herbert G. Waggener, George Wagley and Alexander Miller. [*378

Usury.

The office of the Bank of the United States, at Lexington, Kentucky, in February 1822, held a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value expressed on their face, as equivalent to gold and silver, and were so considered by the bank; on the amount of these notes so held, the Bank of Kentucky had agreed to pay interest, at the rate of six per centum, until the same should be redeemed; all the notes of the Bank of Kentucky, held by the Bank of the United States, were finally paid with the interest. In February 1822, when the notes of the Bank of Kentucky were at a depreciation of between thirty-three and forty per cent., Owens applied to the office of the Bank of the United States, for a loan of $5000 of the said notes, saying they would answer his purpose as well as gold or silver; after repeated refusals and re-applications, with the consent of the board of directors of the Bank of the United States, at Philadelphia, the sum of $5000, in the notes of the Bank of Kentucky, was loaned to him, on a promissory note, signed by him, and by Waggener, Miller and Wagley, payable in three years, with interest, at the rate of six per cent. per annum; the money so loaned was paid to the borrower in the notes of the Bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the Bank of Kentucky to the Bank of the United States, ceased from the date of the loan. In an action on the note given by Owens and others, the defence was set up, that the transaction was usurious, contrary to the charter of the Bank of the United States, and void: *Held*, that there was no usury in the transaction.

The statute of usury of Kentucky of 1798, declares, that all bonds, notes, &c., taken for the loan of money, where "is reserved or taken" a greater rate of interest than six per cent, shall be void. In this case, no interest at all was taken, the interest being payable at the termination of three years mentioned in the note; and if the case be brought within the statute, it must be, not as a taking, but as a reservation, of more than legal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States, declares, among other things, "that the bank shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or on its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article; according to the interpretation thereof given by this court in the case of Fleckner *v.* Bank of United States, 8 Wheat. 338, 351, to which the court deliberately adhere.

The words of the article are, that the bank shall not take (not, shall not reserve or take) more than at the rate of six per cent. In the construction of statutes of usury, this distinction between the reservation, and the *taking, of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, and the party is only liable for the excess. [*379

In the case of the Bank of the United States *v.* Owens, 2 Pet. 527, 538, it was said, that in the charter, the word "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

The case of the Bank of the United States *v.* Owens, 2 Pet. 527, turned upon considerations essentially different from those presented in the present record. The questions certified in that case, arose upon a demurrer to a plea of usury; and the demurrer, in terms, admitted that the agreement was unlawfully, usuriously and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put; the transaction was usurious