*The Lessee of Samuel Smith, Plaintiff in error, *v.* Robert Trabue's Heirs, by James Trabue, their next freind.

Final judgment.

The judiciary act authorizes the supreme court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, depending in the circuit court &c.; but, a judgment awarding a writ of restitution, in an action of ejectment, where, in the execution of a writ of *habere facias possessionem*, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action; it is no more than the action of the court on its own process, which is submitted to its own discretion. This court takes no jurisdiction, in such a case.

Error to the Circuit Court of Kentucky. In the circuit court, the defendants in error filed a petition, in May 1830, setting forth that, on the demise of Richard Smith, an action of ejectment was instituted in the circuit court, against Richard Finn, with notice to Hiram Bryant and William Bryant and others; that the Bryants were tenants to the petitioners and to Robert Trabue, who appeared to the ejectment, had his tenants entered as defendants; and a judgment was rendered at May term 1828, against them. No writ of *habere facias possessionem* was issued on this judgment; and at November term 1818, a judgment was rendered against other tenants, and on that judgment, a writ of *habere facias possessionem* was issued, and the marshal of the district of Kentucky, under this last judgment and writ, turned out of possession, John Evans, who was a tenant of the petitioners, resident on the same place occupied by the Bryants, when the suit was first brought and judgment rendered, and then possessed by the petitioners. The record showed that this writ of *habere facias possessionem* issued on the 17th November 1829.

At May term of the court, in 1830, a motion was made in behalf of the petitioners, and a rule awarded on Smith, the plaintiff in error and defendant in the petition, to show cause why a writ of restitution should not be awarded to them, to restore the possession of the tenements held by their tenants, John Evans and others, taken from them by the marshal, on *the writ of possession mentioned in their petition. The marshal's return showed, that he had turned John Evans, James McGuire and [*5 William Acres, who were the tenants of the petitioners, out of possession. At May term 1831, the court ordered a writ of restitution to be awarded to the petitioners, the plaintiffs in the motion, to restore them to the possession of the land from which their tenants had been removed by the marshal. To the opinion of the circuit court in overruling objections made by the defendant's counsel to the objects of the motion, and awarding possession to the plaintiffs, the defendant, now plaintiff in error, excepted, and prosecuted this writ of error.

The case was submitted to the court by *Allan*, on a printed argument for the plaintiffs in error. No counsel appeared for the defendants in error.

Upon the point decided by the court, viz., that the award of a writ of possession was not a final judgment, from which a writ of error would lie to this court, it was said: We are aware, that this court only grants relief where the decree or judgment is final, and that mere orders to correct

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

process do not come within the description of final judgment, because such orders, from their very nature, are within the control of the court, as an order to quash an execution, or to issue one, to correct taxations of costs; all these, though final in their language, are not so in their nature: but even a judgment correcting an execution may be final, as if the court were to decide, that the execution should be returned by the sheriff, without being levied, and adjudge the judgment satisfied. This would be final, or no remedy would be left but by writ of error against such judgment, erroneously entered. But the order of the court quashing a writ, because of excessive taxation, or because there were valuers appointed, or refusing the writ for any cause in its nature temporary, as the pendency of error, is not final. But if the court refuse a *fieri facias*, because, in the opinion of the judge, the judgment does not authorize one, or because, in his opinion, he is restrained by final decree; then the judgment is final. Such have been the distinctions observed and practised upon in both Virginia and Kentucky. Indeed, in *both states, where the judgment is for realty, on which the final process may issue, or the possession be changed, the judgment or decree is held to be final. *6]

Test this case by these rules, and see whether the judgment is final or interlocutory. It is a final judgment both for the possession and the costs; one on which execution may not only issue, but on which execution is ordered, and on which a *fieri facias* for costs is also ordered. This judgment, though on motion, is more final than if it were an ordinary case of ejectment; it lasts as long as the record lasts, whereas, the other may expire with the lease; and need we call to the mind of this court the monstrous evils that must grow out of the practice of permitting ancient judgments and rights to be overturned by these *ex parte* motions, founded on parol proofs.

If this court possess no power to correct, the present case is one of the strongest instances of abuse. Twelve years and more before this motion was made, Samuel Smith had recovered judgments for his land; under this judgment, by the laws of Kentucky, he had a right to make his personal entry, to sell out, or to tenant it; yet, without process served on him, without process served on the tenant, and without process served on his agent or alienee, strangers to the record, on a tale of their own, from the mouth of one of the defendants in the record, they obtain a judgment and execution for the possession; which being knit to a former possession, may not only change the right of entry, but destroy the remedy by writ of right.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of restitution awarded by the court of the United States for the seventh circuit and district of Kentucky, whereby the tenant of the defendants in error was restored to the possession of a tract of land from which he had been improperly removed, under the process of that court.

The defendants in error filed their petition in the circuit court, stating that a declaration of ejectment had been brought by John Doe, on the demise of Samuel Smith, and notice served on Hiram and William Bryant, the tenants of the petitioners; *and a judgment was rendered against them in May term 1818, on which no writ of *habere facias possessionem* has been issued. In November term 1818, a judgment was rendered *7]

against other tenants, by virtue of which the marshal turned John Evans out of possession; who, as tenant of the petitioners, resided on the place which had been occupied by the Bryants. A rule to show cause was granted, and on its return, restitution was awarded. To this judgment of restitution, this writ of error is awarded.

The judiciary act authorizes this court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, depending in the circuit court, &c. This is not a final judgment in a civil action, nor a decree in a court of equity. It is no more than the action of a court on its own process, which is submitted to its own discretion. This court takes no jurisdiction in such a case. It is not, we think, given by the judiciary act. The writ of error is quashed and the suit dismissed, the court having no jurisdiction.

In error to the circuit court of the United States for the district of Kentucky.—This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that this is not a final judgment in a civil action, nor a decree in a court of equity, but no more than the action of a court on its own process, which is submitted to its own discretion, and that the court cannot take jurisdiction in such a case, it not being given by the judiciary act; and that the writ of error must be quashed and the suit dismissed, the court having no jurisdiction. Whereupon, it is considered, ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, for the want of jurisdiction.

---

*United States, Plaintiffs in error, *v.* Joseph Nourse. [*8

Conclusiveness of former decree.

The treasury department of the United States, on the 14th of July 1829, issued a warrant of distress, directed to the marshal of the district of Columbia, commanding him to levy and collect, by distress and sale of his goods and chattels, a sum of money alleged to be due to the United States, on a treasury transcript, by Joseph Nourse, late register of the treasury; this warrant was issued in pursuance of the 3d and 4th sections of the act of May 15th, 1820, "providing for the better organization of the treasury department." Under the provisions of the 4th section of the act, Mr. Nourse obtained an injunction from the chief justice of the district of Columbia, to stay all further proceedings on the said warrant; the bill presented by Mr. Nourse to the chief justice of the district of Columbia, asserted that the United States were indebted to him for compensation for extra services he had rendered to the United States, in a sum exceeding the amount claimed by the United States: which claim was denied in the answer filed by the district-attorney of the United States, both as to the legality and the amount of the claim.

The court determined, that Mr. Joseph Nourse was entitled to compensation for the extra services he had rendered to the government, in the agencies mentioned in the bill; and appointed auditors to ascertain the value of his services and compensation, and to report thereon without delay; the report of the auditors allowed to the complainant a commission of two and a half per cent., on the sum of $943,308.83, disbursed by him in the several agencies in which he had been employed, leaving a balance due to him from the United States; the report was confirmed, and the injunction made perpetual.

The United States then instituted their suit against Joseph Nourse, in the circuit court for the district of Columbia, in the county of Washington, on an account authenticated according to law, by the proper accounting officers, being the same account, and claiming the same amount