*George Harrison, Thomas H. White and others, Appellants, *v.* Henry Nixon, surviving Executor of Matthias Aspden, deceased.

Bill in equity.

A bill was filed in the circuit court of the United States for the district of Pennsylvania, stating that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia, on the 6th of December 1791, and bequeathed all his estate "to his heir-at-law," and died in April 1829; that letters testamentary were taken out in Pennsylvania, by the executor; that large sums of money were received by him; and the bill prayed for a decree in favor of the complainant, who asserted himself to be the true and only heir-at-law of the testator, and that he was solely entitled to the bequest. The answer of the executor stated, that from information and belief, the testator was born in Philadelphia, which was the residence of his parents, about 1756; that he continued to reside there, doing business as a merchant, before he was twenty-one, and before the breaking out of the war with Great Britain in 1776; being still a minor, he went to England, under a belief that Great Britain would soon prevail in the contest; that he subsequently come back to the United States, and invested large sums in government stocks; but, whether he afterwards went back to England as his home, or only for the purpose of superintending his property; and whether the testator did, in fact, change his domicil, the executor (save and except as appeared by the facts) did not know; he believed that the testator, when in England, considered himself as an alien, and he died in King street, Holborn, London; that letters testamentary were taken out in England, and the will was proved there, and proceedings were instituted in England, by a person claiming to be the heir-at-law. Various proceedings took place in the circuit court of Pennsylvania; a reference was made to a master, to examine and state the heirs and next of kin of the testator, and a report made by him, which was afterwards confirmed; and thereupon, a final decree was made in favor of John Apsden, of Lancashire, England, one of the claimants before the master, as entitled to the personal estate of the testator as "heir-at-law." The cause having come by appeal before this court for argument, a question occurred, whether the frame of the bill, taken by itself, or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause, and make a final decision.

The bill contains no averment of the actual domicil of the testator, at the time of the making of his will, or at the time of his death, or at any intermediate period: nor does the answer contain any averments of domicil, which supply these defects in the bill, even if it could so do; but in point of law, it could not.

Every bill must contain in itself sufficient matter of fact, *per se*, to maintain the case of the plaintiff; the proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision; for the pleadings do not put them in contestation.

*This is the case of a will, and so far as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will; and the court are called upon to [*484 give a construction to the terms of the will, and in an especial manner, to ascertain who is meant by the words "heirs-at-law," in the leading bequest in the will. The language of wills is not of universal interpretation, having the same import in all countries and under all circumstances; they are supposed to speak the sense of the testator, according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them; unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs the distribution thereof, unless it is manifest, that the testator had the laws of some other country in view.

No one can doubt, if a testator, born and domiciled in England during his life, by his will gives his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to and be governed by the import of the terms, in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, or Massachusetts.

A will of personalty speaks according to the testator's domicil, when there are no other circumstances to contract the application; to raise the question what the testator meant, it must first be ascertained where was his domicil, and whether he had reference to the laws of that place, or to the laws of a foreign country.

The bill in this case should allege the material facts upon which the plaintiff's title depends, and the final judgment of the court must be given, so as to put them in contestation in a proper and regular manner; and the court cannot dispose of this cause, without ascertaining where the testator's domicil was, at the time of his making his will, and at the time of his death; and there ought to be suitable averments in the bill to put those matters in issue. The case ought to be remanded to the circuit court for the purpose of having suitable amendments made, in reference to the domicil of the testator; and averments made of his domicil at the time of making the will, and at the time of his death, and at the intermediate period, if any change took place.

Upon motions made to the court, and from proceedings in the circuit court, laid before the court, it appeared, that there were certain claimants of the bequest, asserting themselves to be "heirs-at-law," whose claims where not adjudicated upon in that court, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings and must be opened there for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims; and they ought to be let into the cause for that purpose.

No persons but those appearing to be parties on the record, can be permitted to be heard on an appeal or writ of error.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania. Matthias Aspden, on the 6th day of December 1791, made his will, with the codicils annexed thereto, as follows:

*485] *"These are to certify, that I do hereby annul and revoke all my former wills, giving and bequeathing my estate, real and personal, to my heir-at-law, first paying all my just debts and funeral expenses, and the following legacies: first, to each of the children of my half-brother, Benjamin Hartley, deceased, that may be alive at my death, the sum of 100 pounds to each, Pennsylvania currency; and to my half-sister, Bersheba Zane, wife of Elnathan Zane, the sum of 400 pounds, Pensylvania currency, both the above, living or did live, at or near Haddonfield; and to my half-brother, Roger Hartley, living at present in Lancaster county, the sum of 300 pounds of the like currency. Witness my hand, this 6th day of December 1791, Philadelphie. MATTHIAS ASPDEN."

"Lest any question should arise about the legitimacy of my birth. It is my will, that my estate, real and personal, should go to the party who would be my lawful heir, in case there might arise any doubts on that head. It is firmly believed by, from the best information, that my birth was after marriage. Philedelphie, December 6th, 1791.

"I do further give 100 pounds, Pensylvania currency, to each of the children of my deceased half-sister, Ann Henchman, that may be living at my death. December 6th, 1791.

"Note, my property on England is as follows: 12,500 pounds in the four per cent. stock; 3000 pounds in the five per cent. stock; 1800 pounds in the three per cent. stock."

Indorsement.—"The last of will of Matthias Aspden. I do hereby appoint my friends, Mr. George Roberts and Mr. Abraham Lidden, with the president of the old bank, at the time being, to be my executors to this my last will. MATTHIAS ASPDEN."

At April sessions 1821, of the circuit court of the Eastern District of Pennsylvania, the following bill was filed:

"Samuel Packer, a citizen of the state of New Jersey v. Henry Nixon, Esquire, a citizen of the state of Pennsylvania, executor of the last will and

testament of Matthias Aspden, Esquire, late a citizen of the same state. In equity.

"To the honorable the judges of the circuit court of the *United States of the third circuit, in and for the eastern district of Pennsylvania. Humbly complaining, showeth unto your honors, your orator, Samuel Packer, a citizen of the state of New Jersey, that on the 6th day of December, in the year of our Lord 1791, one Matthias Aspden, Esquire, a citizen of the state of Pennsylvania, made and executed his last will and testament, bearing date the same day and year, wherein and whereby he gave and bequeathed all his estate, real and personal, to his heir-at-law; and of the said will, appointed his friends, George Roberts, Abraham Lidden, and the president of the old bank, at the time being, executors, as by the said will, a true copy whereof is to this bill annexed, and which your orator prays may be taken as part thereof, will more fully appear; after which, to wit, on the —— day of August, in the year of our Lord 1824, the said Matthias Aspden departed this life, not having altered, cancelled or revoked his said will; and the said George Roberts and Abraham Lidden being then deceased, and Henry Nixon, Esquire, a citizen of the state of Pennsylvania, being then president of the Bank of North America, which bank the testator meant and intended by the description of the old bank, the said Henry Nixon caused the said will to be duly proved according to the laws of Pennsylvania, and having received letters testamentary thereon, took upon himself the burden of the execution thereof, and hath possessed himself of all the goods, chattels and other personal estate of the said testator, to a very large amount. And your orator expressly charges, that he is the true and only heir-at-law of the said Matthias Aspden, and that no other person than himself is entitled to claim or receive the benefit of the said devise and bequest. And he hath repeatedly applied to the said Henry Nixon, to have an account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situated, and what is the true and exact amount thereof, and to have the amount thereof paid to him, deducting therefrom the just and reasonable charges of the said executor. But now, so it is, may it please your honors, that the said Henry Nixon, combining and confederating with others, to your orator unknown, whose names, when discovered, he prays leave to insert with apt words to charge them as parties, denies that your orator is *the heir-at-law of said Matthias Aspden, or that he is in any way entitled to the benefit of any of the testamentary dispositions of the said Matthias Aspden, and refuses to render him any account of the assets, and to pay him any part thereof. In tender consideration whereof, and forasmuch as your orator cannot have plain, adequate and complete remedy at law, to the end therefore, that the said Henry Nixon, and his confederates, when discovered, on their oaths or affirmations, full, direct and true answers may make to all and singular the matters and things herein-before set forth, as if they had been particularly interrogated thereon; and that the said Henry Nixon may render and set forth a just and true account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situate, and whether there are any and what debts due, or claimed to be due therefrom, and may be decreed to pay to your orator the balance of the said moneys in his hands belonging to the said estate, to which your orator is justly entitled, and

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your orator may have such further relief in the premises, as is consistent with equity and good conscience, and to this honorable court shall seem meet."

To this, bill the executor filed an answer as follows: "The answer of Henry Nixon, the defendant, to the bill of complaint of Samuel Packer, complainant.

"This defendant says, that he believes and admits, that Matthias Aspden, the testator in the said bill named, at Philadelphia, duly made and executed his last will and testament in writing, and three codicils thereto; all bearing date the 6th day of December 1791; and that such will and codicils are in the words and figures, or to the purport and effect in the paper annexed to the said bill set forth; but for greater certainty as to the date and contents of said will and codicils, this defendant craves leave to refer thereto. And this defendant says, that the said testator deposited his said will and codicils, for safe custody, in the cashier's vault of the Bank of North America, at Philadelphia, known as the old bank, where the same were found after his decease. And the defendant believes it to be true, that the said testator departed *this life, on or about the 9th day of August 1824, in the city of London, without having revoked or altered his said will and codicils. And the defendant further answering, says, that George Roberts and Abraham Lidden, in the said will respectively named, both died in the lifetime of the said testator; that the defendant, at the time of the death of the said testator, was the president of the Bank of North America, at Philadelphia, known as the old bank. And the defendant admits it to be true, that soon after the death of the said testator, to wit, on the 19th day of November 1824, this defendant duly proved the said will and codicils, in the office of the register for the probate of wills and granting letters of administration for the city and county of Philadelphia, and received letters testamentary thereon. And that the defendant also duly proved the said will and codicils in the Prerogative Court of Canterbury, in England, and obtained probate thereto from that court. And this defendant admits it to be true, that as executor as aforesaid, he has possessed himself of all the personal estate and effects of the said testator in the United States, or of so much thereof, as has come to his knowledge; a true account of which is in the schedule hereto annexed. And this defendant has paid the charges of proving the said will, at Philadelphia, and other charges incident thereto, and six of the legacies, the others having not yet been claimed, bequeathed by the said will, a true account of which payments is in the schedule hereto annexed, and that as executor, other charges must be incurred in managing and settling the estate; the amount of which cannot now be ascertained; and that this defendant, as executor, will be entitled to a commission for his services. And this defendant, further answering, says, that he believes it to be true, that the said testator was, at the time of his death (among other descriptions of property), possessed of property in the English funds, that is to say, four thousand pounds bank-stock; ten thousand pounds three per cent. consolidated bank annuities; twelve thousand five hundred pounds reduced three and a half per cent. bank annuities; and three thousand five hundred pounds new four per cent. bank annuities; and that the testator also was

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possessed of East India stock, and also South Sea stock to a considerable amount, that is to say, three thousand pounds East India stock, and five thousand pounds South Sea stock. And this defendant believes that the said *testator died possessed of other personal property to a consid- [*489
erable amount; and particularly of the sum of seven hundred and ninety pounds, three shillings and five pence, in the hands of his bankers, Messrs. Hoare, of London; but that no part of the property of the said testator, except that in the United States of America, as before stated, has come to the hands or possession of this defendant. That the whole of the property of the said testator, in England, is claimed by John Aspden, of London, as entitled thereto, under the devise of the said testator, as his heir-at-law; and that the said John Aspden has filed a bill in the court of chancery, in England, against this defendant, as executor of the said testator; and has, by the injunction of the said court, restrained and prevented this defendant and his agents from obtaining possession of any part of the property in England, of which the said testator died possessed, further than that his attorneys, S. Williams and J. Sterling, received the sum of three hundred pounds, being one-half year's dividend on three thousand pounds, East India stock, belonging to the testator. That the expenses of proving the will of the said testator, in England, amounted to seven hundred and fifteen pounds, seventeen shillings and ten pence, to pay which, in part, the said sum of three hundred pounds was applied by Messrs. Williams and Sterling, and the residue, four hundred and fifteen pounds, seventeen shillings and ten pence, was paid out of the sum in the hands of Messrs. Hoare, the testator's bankers. The said suit in chancery, by the said John Aspden, is yet pending and undetermined. This defendant has annexed to this, his answer, a copy of the bill filed by said John Aspden. And this defendant, further answering says, he does not know, and is unable to answer, from his belief or otherwise, whether the said testator left the complainant his heir-at-law, or whom he left his heir-at-law. But this defendant, further answering, says, that the said John Aspden, of London, claims to be heir-at-law; and as such, entitled to the residue of the said testator's property; and that there are many persons residing in the United States of America, who claim to be next of kin to the said testator, and as such, to be entitled to distributive shares of the estate. That this defendant is not able, from his own knowledge, to name all the persons who so claim to be next of kin, but that he has annexed to this his answer, a schedule, which he prays may be taken as a part of his answer, *containing the names of some of [*490
the persons so claiming to be next of kin, and the manner in which they, or some of them, have alleged to this defendant, they are connected with the said testator. This defendant, further answering, says, that three suits have been instituted against him, as executor of the said testator, in the district court of the city and county of Philadelphia, by persons claiming to be next of kin to the said testator, to wit, one to December term 1826, by Stacy Kirkbridge, and Sarah his wife, late Sarah Hammett; another to the same term, by James Packer; and the third to September term 1827, by Job Packer; which suits are still pending and undetermined.

"And this defendant, further answering, says, that he can neither admit nor deny that the said testator was a citizen of Pennsylvania, as alleged in the said bill. That from information, he believes, that the said Matthias

Aspden, the testator, was born in or about the year 1756, at Philadelphia, then being the place of residence of his parents; that he continued to reside there, and afterwards was engaged in business at Philadelphia, as a merchant, with some success, before he was twenty-one years of age. Upon the breaking out of the war between Great Britain and America, in the year 1776, or some time in that year, being still a minor, he went to England, with what view, this defendant, from his own knowledge, is not able to say; but he believes, that he went with an impression that the power of Great Britain must soon prevail in putting down the resistance made in America. That the said testator subsequently came several times to the United States of America, and invested large sums there in the public or government stock, or in other securities; that he made his will and the codicils thereto, at Philadelphia, the place of his birth, and deposited them in the bank there; but whether, after so returning to the United States of America, the testator went back to England as his home, or only for the purpose of superintending his property; and whether the testator did, in fact, change his domicil, this defendant (save and except as appears by the facts) doth not know, and is unable to answer. But this defendant believes, that the said testator, when in England, considered himself as an alien, and as such, claimed to have returned the tax taken from his dividends, while
*491] he was absent from England, according to the provisions of the *law exempting aliens from the tax, if not resident in England. That he died in King street, Holborn, London. And this defendant says, that he submits to the judgment of the court, whether, upon the true construction of the said will of the said testator, the next kin of the said testator are entitled, under the same, to take the residue of the personal estate and effects of the said testator, or whether the complainant, if he be the heir-at-law, and if not, whether any other person, as heir-at-law of the said testator, is entitled to take the same, under the said will, as such heir-at-law. And this defendant submits to act as this honorable court shall direct, being indemnified and paid his costs, charges and expenses therein. And this defendant denies all combination and confederacy with which he is charged in and by the said bill, without this, that, &c.

HENRY NIXON."

Petitions were filed in the circuit court by persons who claimed to have distribution among them of the estate of the testator, as the party contemplated by the will; each petition setting forth the relationship between the persons presenting the same, and the testator, and praying to be admitted as parties to the suit, for the purpose of claiming the fund admitted by the executor to be in his hands; and that the court would direct inquiries to be made as to their respective claims. George Harrison and the other appellants were among those who filed petitions. Upon the reading and filing of the petitions of George Harrison, the court made an order, according to the prayer of the same. Job Packer and John Zane were, by order of the court, on their application, made defendants; and Isaac Zane was entered as one of the complainants in the case. The record contained no order or action of the court on the other petitions, except an entry in reference to each petition, "read and filed," or "filed."

The circuit court ordered that it be referred to a master, to examine and

state the next of kin of the testator, Matthias Aspden; and commissions were ordered to take the depositions of distant witnesses. After the coming in of the master's report, in which was *contained a list of the heirs and kindred of the whole and half-blood of Matthias [*492 Aspden the testator; and in which he reported that John Aspden was "heir at common law," the circuit court made the following decree:

"And now, this 26th day of December, A. D. 1833, this cause coming on to be heard, on the bill, answer, petitions, exhibits, proofs and master's report, and the several parties having been fully heard by their counsel, and the court having taken time to consider of the same till this day, do order, adjudge and decree, that the defendant, Henry Nixon, surviving executor of Matthias Aspden, deceased, do account for, pay over, transfer and deliver to John Aspden, of Lancashire, in England, one of the said parties, the heir-at-law of the said Matthias Aspden, the entire balance of the personal estate of the said Matthias Aspden, which has come to his hands to be administered, after paying the debts and legacies of the said Matthias Aspden, and the costs of this suit (which are hereby ordered to be paid out of the said fund). And the court do further order, adjudge and decree, that the bill and petitions, so far as they relate to the other complainants and petitions, who are claimants before the court, and all other claimants before the court, however appearing, be dismissed, without costs. As to all parties who are claimants before the court by bill, petition or otherwise, their complaint, petition and proceedings are dismissed, without costs."

From this decree, George Harrison, and Thomas H. White, Ann Emily Bronson, Elizabeth White Bronson, Hetta Atwater Bronson, and William White Bronson, minors, by their guardian, the said Thomas H. White, Mary Harrison, a minor, by her guardian, Elizabeth Harrison, Esther McPherson, and Elizabeth McPherson, children of Elizabeth McPherson, deceased, John Zane and Isaac Zane, prosecuted an appeal to this court.

Before the argument of the case, *James S. Smith* stated to the court, that he, with Mr. *Coxe*, appeared before the court either as *amici curiæ*, or as the court would permit them to appear, in behalf of the heirs of John Aspden, late of Old street, *London, who claimed to be the heirs-at-law of Matthias Aspden, the testator; and who had no notice of the [*493 proceedings in the circuit court of Pennsylvania. It is the wish of the counsel for these claimants, to be permitted to show irregularities in the proceedings, and to have the case remanded to the circuit court, in order that they may be allowed to come in and substantiate their claims to the whole estate, as the heirs-at-law. John Aspden, whose heirs they represent, prosecuted a claim to the estate of the testator, by a bill in the court of chancery in England, which bill is referred to, and annexed to the answer of the executor, filed in the circuit court, and forms part of the record now before this court.

Sergeant, for the appellees, objected.—The heirs of John Aspden made an application to the circuit court for a bill of review, for the purpose of obtaining admission into the case. The court refused to give them the permission asked, and they then obtained a citation from the orphans' court of the county of Philadelphia, directed to Henry Nixon, as executor of Matthias Aspden, returnable on the 16th of January 1835, four days after the meeting of this court; thus seeking to maintain their claims in that court. They

have since filed an original bill in the circuit court of Pennsylvania, against the executor.

Coxe, in support of the application.—The case now before the court, is that of a bill filed by Samuel Packer, asserting himself to be the heir-at-law of the testator, *ex parte maternâ*, against the executor. These were the original parties to the proceedings; other persons came in by petition, which petitions were filed, but no amendments were made to the bill; and on the filing of some of the petitions no order was made by the circuit court, directing the petitioners to be admitted as parties. The appeal from the circuit court is not made by Samuel Packer, who was the only party who could appeal. The counsel who present this application, desire that the court will look at the record; and they trust, that the court, seeing its imperfections, will remand the case to the circuit court. The proper parties are not before the court.

*494] At the last sessions of this court, the Chesapeake and Ohio *Canal Company were permitted to appear in the case of *Mumma* v. *Potomac Company*, and take upon themselves the whole argument of the case. (8 Pet. 281.)

Story, Justice, stated, that it appeared by the charter of the Chesapeake and Ohio Canal Company, that the Potomac Company had been merged in the former company, and had vested in them all their property, and were subjected to the responsibilities of the Potomac Company.

Marshall, Chief Justice.—The only parties the court can know, are those in the record. They cannot permit counsel who represent parties who may think themselves interested, not in the record, to come in and interfere. Let the argument proceed, and if the court see that the proper parties are not before the court, they will act as may be required.

Ingersoll, representing the executor, handed to the court the proceedings of the circuit court of the district of Pennsylvania, on a bill of review filed by the heirs of John Aspden, of Old street, London; against the executor, and the citation issued to the executor at their instance, in the orphans' court of the county of Philadelphia.

At a subsequent day of the term, when the cause came on for argument upon the merits, a question was presented by *Webster*, who, with *Tilghman* and *Newbold*, was the counsel for the appellants; whether the bill, taken by itself, or in connection with the answer, contained sufficient matter upon which the court could proceed, and finally dispose of the cause. It was submitted, that the bill contained no averment of the actual domicil of the testator, at the time he made his will, or at any intermediate period, before, or at his death. The court directed this question to be argued, before the argument should proceed on the merits.(*a*)

(*a*) The following extracts from the opinion of the circuit court, delivered on the 26th December 1833, will exhibit the views of the learned judge on the effect of the domicil of Matthias Aspden, the testator, on the construction of his will.

Baldwin, Justice.—The same principle is the rule in Pennsylvania, in all cases to which the common law had been applied by adoption; and it remains the law of descent of both real and personal estate, if the provisions of an act of assembly do

Harrison v. Nixon.

*W. *Rawle, Jun.*, for John Aspden.—The motion to remand this cause is founded on a suggestion that its decision will turn upon the question of the testator's domicil; and that this fact, not being averred in the pleadings, the

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not in their words embrace the very case in controversy. This must be taken to be a point conclusively settled as the law of the state, by the authorative decisions of the high court of errors and appeals, in *Johnson* v. *Haines*, 4 Dall. 64, and of the supreme court, in *Cresoe* v. *Laidley*, 2 Binn. 279, 284, and no longer open to discussion; that there is, in this state, such a person as an heir at common law, distinct from the statutory heir, to whom the real estate of a person, dying seised and intestate, shall descend by the general course of the law, in right of blood and inheritance. That the common law of both countries is the same, designating the same person, by the same rules and courses of descent, as the heir to an ancestor, in all cases, and the heir to his estates of inheritance, unless in the particular event which has happened, an act of assembly has substituted some other person or persons to take the place of the ancestor, for its enjoyment and disposition, as a special law for the case, like to the law of custom, which breaks the course of descent, according to the general course of descent, according to the general course of the common law. This was the law of the province, from its first settlement, it was expressly declared so, by the eighth section of the act of 1705, and the heir was referred to as the heir, in the abstract, according to the meaning of the word as given by Hobart. The said lands and tenements shall descend and come to the intestate's heir-at-law, according to the course of the common law aforesaid. 3 Sm. Laws 153, 158 n.; 1 Dall. Laws app'x 45.

That heir-at-law, or heir simply, does not mean heirs by custom in England, or statutory heirs in Pennsylvania, is the evident meaning of Judge YEATES. The observation of Chief Justice MCKEAN, in the same case (2 Yeates 61; 2 Dall. 245), "Thomas could not in this case be considered as heir-at-law in Pennsylvania, where, if, at that time, a person died intestate, leaving divers children, his real estate descended to all his children equally; the eldest son having only a double portion or share, and therefore, the devise may even be considered a condition," draws us irresistibly to the same conclusion. The eldest son could not take as heir-at-law, by the course of descent, in a case to which the act of assembly applied, and by superseding the common law, established a special course of descent; but he could be, and is, by the existing law, heir-at-law, in this state, according to the opinion of the court, delivered by the Chief Justice, in *Johnson* v. *Haines*, and of Judge YEATES, in *Findley* v. *Riddle*, in a case not embraced in any act of assembly, which accords precisely with the principle they laid down in *Ruston* v. *Ruston*. Taking these three cases in conjunction with *Cresoe* v. *Laidley*, they completely negative the proposition, that there is any difference between an heir-at-law here, and in England, except such as is made by custom or act of assembly. This becomes a negative pregnant, with important consequences as to the legal meaning of the word heir-at-law, that it not only is that, which the common law gives it, but that it is not to be taken to refer to the customary or statutory heirs. "The term heir-at-law, conveys no idea, with us, they are all his co-heirs," it is thus a term of contradistinction, and of designation, denoting the person who has and can have no co-heirs, the sole inheritor of the estate of the ancestor by right, in its nature necessarily exclusive; the law of both countries recognises *heirs* as a class, or a number of persons having equal rights by special law, and the *heir* as one person entitled by common law to the whole estate, by right of blood alone. This necessarily follows, from the opinions of the judges in *Ruston* v. *Ruston*, in accordance with the rule laid down in all the cases, from *Counden* v. *Clerke*, to *Findley* v. *Riddle;* that customary or statutory heirs cannot take by a deed or devise to the heir-at-law, the heir, or right heir, of the grantor or devisor, because they are different persons, claiming in different characters and capacities, and the words are incapable of substitution as convertible terms, without uprooting the whole course of descent, and every settled rule of inheritance and construction. See Gilb. Dev. 16, 162; 3 Salk. 336.

court cannot decide it. If it can be shown, either that the fact is not material, or that it is sufficiently averred, the motion cannot be sustained. In the court below, the question of domicil, though it was made a point in the cause, was little relied upon. The argument went mainly on the ground that the law of England and that of Pennsylvania, as to the construction of the will in question, was the same ; and if this position be correct, it is manifest, that the question of domicil is wholly immaterial. The establishment of this

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In all the cases which have arisen on the construction of wills, the supreme court have given to the word *heirs*, in all the modes of expression, the same effect which they have by the common law, whether as a word of purchase or limitation, as conveying an estate for life, in fee, or in tail. Whenever it operates as a word of limitation, the estates descend to the heir at common law, or in tail, as the case may be, and not the special or statutory heirs, according to the act of assembly, the operation of which is confined to cases where an intestate is seised in his own right, both at law and in equity, of an estate of inheritance, descendible to his heirs general.

We do not deem it necessary to examine in detail the various cases which have been decided in this state, on the subject of the descent of lands; the very accurate and valuable digest of Mr. Wharton furnishes, under the appropriate heads, a host of authorities, which fully establish the position of Judge DUNCAN, in the case of *Lyle* v. *Richards* (9 S. & R. 358). It is plain, that from the date of the charter, until laws were made to alter the succession, lands descended according to the course of the common law; and not only descent, but enjoyment and purchase, including every other mode of acquisition, were governed by that law, acquired and lost by the course of the same common law."

Assuming it, then, to be the settled law of both countries, that the word heir, right heir, or heir at common law, without any qualifying or explanatory words, in a will, are to be taken as words of limitation, it remains to take a view of the cases in which they are words of purchase, or a designation of the person to take by the will, as purchasers and not by the descent. Fearne 79 *a*, 149, 158, &c. Whether, therefore, this case is to be dicided by the law of England or of this state, the result must be the same, as settling the law of the case, which we will now apply to the will in question.

Nothing is left for presumption or construction, in face of this solemn certificate, and repeated declaration of intention; it negatives all belief that he meant to leave his estate to be disposed of by the will of any one but himself, or that any one was intended to be his heir, but the one who was made so by the law in right of blood. Nor can we be convinced, that it was his intention, that while his will remained unaltered for thirty-three years, his own disposition of his estate should be subject to the changes in the law of the state, from time to time. But had this been in his mind, it would make no difference, for in 1824, he had no half-brothers and sisters alive, and the act of 1797 making no provision for such case, his heir-at-law, his lawful heir by the common law of Pennsylvania, was John Aspden, of Lancashire, England, who would have inherited his real estate, and his personal property would have been vested in the administrator appointed by the register, in trust for the next of kin, according to the law of England. The effect of his will is, to leave the real estate to descend to his devisee, as if no will had been made, and as to the surplus, to appoint an executor, with directions to pay it over to the person whom by his will he had substituted as his benficiary, in place of his next of kin; this person was designated by a well-known and understood term, which the law of both countries fastens on John Aspden, as indissolubly as if he had been especially described by name, birth, residence and occupation. From all these cases, we are abundantly satisfied, that the law of this case is definitely settled, both in England and this state, and we can have no hesitation in expressing our most decided opinion, that John Aspden, the heir-at-law of the testator, is entitled to the whole of his estate, by the fixed rules of law, which we are not at liberty to question.

position, however, belongs to the main argument. To discuss the principal question in the cause, upon a preliminary question, whether or not the cause shall come on, would derange the whole order of the argument, and place the appellee under great disadvantages. The proper course seems to be, for the court to hear the cause argued; and if the decree of the circuit court can be affirmed, without touching the question of domicil, it will be unnecessary to consider whether the pleadings raise that question or not. If, on the other hand, it be found to be material, and the record does not present it properly to the court, it will be time enough to remand the cause, in order to have the pleadings amended.

But the question of domicil, if it be material, is before the court. The rules of equity pleading, though they call for certainty and precision to a reasonable extent, are not so rigorous in their requirements, as those which govern the proceedings of courts of law. From the nature and objects of its jurisdiction, the rules of a court of chancery must possess a more liberal character. 2 Madd. Ch. 168; Coop. Eq. Pl. 340. Testing the record of this cause by the rules of pleading in equity, fairly construed, the question of domicil is distinctly raised. The proper place for the averment of such a fact is the bill; but if that be defective, the defect may be cured by the subsequent pleadings. If a material fact be not averred in the bill, it is not a good bill. To constitute a good bill, it must set forth such a case as will, upon its face, entitle the complainant to a decree in its favor. He must state his title *in such a manner as to give the court to understand the character in which he claims, and the nature and extent of his interest. Mitf. [*496
Pl. 41, 42, 156; 2 Madd. 168; Coop. 5–7. If, however, these matters be stated in general terms, it is sufficient; all the subordinate facts in the evidence intended to be given, need not be stated. Every subordinate fact is substantially averred by the averment of a general fact, which embraces them. If the bill, on its face, shows an equity in the complainant; if it exhibit him in a character possessing a right to sue, and having an interest which he has a right to claim, it is a good bill, and the defendant must plead to it, or answer it. If it be defective, a demurrer may at once be opposed to it. Mitf. Pl. 13; Coop. 109, 118. The criterion of the soundness of a bill, is its capacity to bear the test of a demurrer. By this test, let the bill in this case be tried. It sets out the will of the testator, &c., and avers, that the complainant is his heir-at-law, within the meaning of the will, and as such, entitled to the property disposed of by it. It does not set out the details of his title. It does not say, whether he is heir by the law of England, or by that of Pennsylvania, nor does it state how he is heir, so as to show under which law he claimed; and it would have been highly imprudent, if he had done so. If he had stated his title in such a manner as to show that he claimed under the law of England alone, or under that of Pennsylvania alone, he might have been confined to proof of his title as stated; but by asserting his claim as heir-at-law, generally, he may show that he is so by any law which may govern the case.

If the law of England and that of Pennsylvania be the same, it is clear, that it is of no consequence where the domicil was. If, on the other hand, he was the heir-at-law intended by the will, only because the testator's domicil was in England, then the fact of domicil was a subordinate fact—one of the constituent parts of the character of heir, the averment of which

is embraced by the averment of the general fact of his being the heir-at-law described by the testator. When he avers that he is the heir, he avers all the facts which make him so; the whole embraces all the parts. Apply-
*497] ing to this bill the test of a demurrer, does it show *title in the complainant? If it had been demurred to, what would have been the result? The will gives the estate of the testator to his heir-at-law; the plaintiff avers that he is the testator's heir-at-law; the demurrer admits that he is so; and, as a necessary consequence, the decree must be in his favor; or the defendant must plead or answer. The fact of domicil, therefore, if it be material, is substantially averred in the bill.

But if the bill be defective, it is cured by the answer; which distinctly presents to the court the question of domicil. An answer not only meets the case set forth by the bill, but may set forth new matter essential to the defendant's case, either to add to, or qualify, the case exhibited by the bill, or to make out a new and independent case for himself. If the new facts stated in the answer are denied by the plaintiff's replication, they are put in issue; if they are not denied, they are submitted to the court, by whom their legal effect is determined. Mitf. Pl. 15, 315, 314; Coop. 324; 2 Madd. 334. If, then, facts necessary to make out the plaintiff's case are not found in the bill, but the defendant introduces them into the answer, and submits the whole matter to the court, it is regularly before them. This rule has a peculiar application to a suit against a trustee, such as the defendant in this cause. Mitf. Pl. 11. In the present instance, the whole matter is presented by the answer. The defendant answers what he considers the interrogatories propounded by the bill. He does not aver that the testator's domicil was either in England or Pennsylvania, but he states distinctly all the facts within his knowledge, upon which the question of domicil depends; and being incapable of drawing the conclusion of law from the facts, he submits the decision of the question to the court, to whom it properly belongs. If he had answered otherwise, he must have done so with great latitude of conscience; for how could he undertake to swear to a conclusion of law?

The reason of the law is its life. The reason why averments are required is, that the parties may be apprised of what they are to meet, and to prevent surprise. Coop. 5, 7. If, then, the plaintiff omits to state his case in such a manner as to apprise his adversary of a material fact in dispute; and the defendant shows, not only by his answer, but by his
*498] *evidence, that he is fully aware of it; how can it be alleged, that he is taken by surprise; and how can the court be at a loss for the means of deciding the question raised by it? After such an answer, no reasonable objection could be made to any evidence on the subject of domicil, offered by the plaintiff; for the question having been raised by the answer, if not by the bill, either party was at liberty to give his proofs in relation to it; neither party could object to the evidence, for want of an averment. But the answer to the present motion derives additional force from the circumstance, that not only no objection was made to evidence offered by the plaintiff, but the real defendant in the cause, by whom the present motion is made, themselves gave the only evidence that was given on the subject of the testator's domicil. The parties went to a hearing upon that evidence, and the court passed upon it. Can it then be tolerated, that the party who raised the question, who gave all the evidence he could collect in reference

to it, who went to a hearing upon it, and had a decree against him, shall, in an appellate court, move to remand the cause for want of a technical averment in the bill? To permit him to do so, would be to sacrifice reason and justice to the merest and most unsubstantial form. It would be vain to say, that courts of equity act on the broad principles of justice, and that rules are devised as instruments for the promotion of its ends. To grant the present motion, the court must go beyond a court of law in its adherence to technicality.

Tilghman, for the appellants.—It is the wish of all the parties interested in this case, that all the questions involved in it shall be fully presented, and a full discussion of them take place, before this court shall decide upon the interests affected by these questions. To the executor, this is most important for his protection. But a decree of this court, in the present state of the pleadings, will not be a final termination of the controversy. The fact of the domicil of Matthias Aspden, does not appear in the pleadings, nor on the evidence in the case. It is not averred in the bill; nor is it brought forward in the answer. The bill alleges, that the will was made by a citizen of Pennsylvania; the answer admits this, and that the testator died in *London. Neither the assertion of citizenship, nor the admission of the place of death, sets forth the fact of domicil. [*499

The fact of the testator's domicil has always been considered as most important in the case; whether in England, or in Pennsylvania, will, as the appellants believe, have a positive and decisive influence on the rights of the claimants. If the domicil is now conceded by the appellees to have been in Pennsylvania, the appellants are ready to proceed in the argument on all the other questions in this cause. In England, proceedings to establish the claims of certain persons who live there, were instituted, for the purpose of obtaining the property of the testator in that kingdom; and the proceedings were dismissed, on the ground that the domicil of the testator was in America; and the whole of the questions in the case, and all the claims of those who made claims, were properly to be litigated in Pennsylvania.

The executor has not undertaken to represent the interest of any one, but he stands independent. He asks, that the case shall be so disposed of, that he shall be protected from all further claims. If the record shall be certified, after the case shall be decided, without containing an explicit averment of domicil, and that the fact of domicil was not inquired into, it will not appear that the fact of domicil is decided. This would expose the executor to a claim in another state, resting or asserted to rest on the domicil, and claimed to be essential to the full decision of the right of parties under the will.

It is not the purpose of the counsel for the appellants, to refer the court to the elementary rules on this point; as it is conceded by the counsel for the appellees, that the allegation of domicil must appear in the pleadings. The only question, therefore, is, does this appear? or was it so made, as that it was investigated, and decided by the circuit court?

It is known to the court, that there is another party claiming the whole of the property of the testator, and who is not in the proceedings before the circuit court. He is a formidable party, on the principles decided in the

circuit court. This party was, in the opinion of that court, on a bill for a review, which was presented to the court, admitted to be of this char-
*500] acter.(a) *It is thus shown, that the record is defective, and that there is such a party. But to the next of kin, the appellants, this party is of no importance; his claim does not affect their claims. They deny his rights as heir-at-law; although they maintain that his rights, and those of all others, shall be presented in the case before its final disposition.

Sergeant, in reply.—Is the question of domicil open, on the pleadings? Does it appear important? If the want of an essential averment is not taken notice of by the party claiming it as necessary, when he has a full opportunity to do so; his right and opportunity to do so may be lost. If the point is not sufficiently before the court, the party complaining should have moved to suppress the evidence on it. If he does not do this, and goes into the investigation, can he afterwards avail himself of it? having taken the opportunity of an examination and discussion of the case, and this, after a decree. Those who were parties in the circuit court are precluded from taking this exception. Is there not, in the pleadings, sufficient to have introduced evidence as to the domicil of the testator? And if there was not; should not those who consider an averment essential have moved to suppress all evidence on it?

Is it necessary to allege domicil? The law settles, that every man has a domicil. The answer of the executor shows, that the domicil was brought forward. But in this case, the domicil of the testator was unimportant, as the law of England and Pennsylvania, by which this case must be decided, is alike. There is enough in the case, for the decision of all the claims on the estate of the testator; and the executor will be entirely safe, under the decision of this court. He has done all that could or can be required of him. It is denied, that any persons but those in the record have any right to interpose in this court; nor should the proceedings in the circuit court, after the appeal, have been referred to. Certainly, no reference should have been
*501] made to the opinion of the *court, in a case subsequently brought before that court, by a person not a party in the case here. Nor would the opinion of the presiding judge in the circuit court sustain the reference to it, if that opinion were fully examined.

Ingersoll, counsel for the executor, offered to the court the proceedings in the circuit court of Pennsylvania, on a bill of review filed in that court against the executor. He stated, that if the court shall think proper to take those proceedings into their consideration, the counsel for the executor, and those who represent the parties to the bill of review, are prepared and ready to act as may be considered proper, and may be permitted.

Sergeant desired, that the principal question before the court shall be first decided, and after this shall be disposed of, any other matters which may properly be considered may be examined.

Story, Justice, delivered the opinion of the court.—This is the case of an appeal from a decree of the circuit court of the district of Pennsylvania,

(a) The opinion of the circuit court, denying leave to file a bill of review, will be found in the appendix to this volume.

in a suit in equity. The bill was filed by Samuel Packer, and asserts, that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia, on the 6th of December 1791 ; and thereby bequeathed all his estate, real and personal, to his heir-at-law, and afterwards died, in August 1824 ; and his will was proved and letters testamentary were taken out in Pennsylvania, by the appellee, under which he has received large sums of money ; and the bill then asks for a decree in favor of Packer, who asserts himself to be the true and only heir-at-law of Matthias Aspden, and that he is solely entitled under the bequest. The answer of the executor states, from information and belief, that the testator was born in Philadelphia, which was the residence of his parents, about 1756 ; that he continued to reside there, doing business as a merchant, with some success, before he was twenty-one years of age ; that before the breaking out of the war between Great Britain and America, in 1776, being still a minor, he went to England, with what view, the executor is not, from his own knowledge, able to say, but he believes that he went with an *impression that the power of Great Britain must soon prevail in putting down resistance in America ; that the testator subsequently came several times to the United States, and invested large sums in government stocks and other securities ; but whether, after so returning to the United States, the testator went back to England as his home, or only for the purpose of superintending his property, and whether the testator did in fact change his domicil, the executor (save and except as appears from the facts) doth not know, and is unable to answer ; but he believes, that the testator, when in England, considered himself as an alien, &c.; and he died in King street, Holborn, London. The answer also states, that the executor proved the will, and took out letters testamentary in England ; and states certain proceedings had upon a bill in chancery in England, against him, by one John Aspden, there claiming to be the heir-at-law of the testator ; and annexes to his answer a copy of the bill. He also alleges, that several other persons have made claims to the same property, as next of kin of the testator, of whose names, &c., he annexes a schedule. [*502

Various proceedings were had in the circuit court of Pennsylvania ; and a reference was made to a master to examine and state, who were all the heirs and next of kin of the testator. The master made a report, which was afterwards confirmed ; and thereupon, a final decree was made by the court, in favor of John Aspden, of Lancashire, in England, one of the persons who made claim before the master, as entitled, as heir-at-law, to the personal estate in the hands of the executor ; and the claims of the other persons claiming as heirs-at-law, were dismissed ; and the present appeal has been taken by several of these claimants.

The cause having come before this court for argument upon the merits, a question occurred, whether the frame of the bill, taken by itself, or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause, and make a final decision. The bill contains no averment of the actual domicil of the testator, at the time of the making of his will, or at the time of his death, or at any intermediate period. Nor does the answer contain any averments of domicil, which supply these *defects in the bill, even if it could do so, as we are of opinion, in point of law, it could not. Every bill must [*503

contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff; so that the same may be put in issue by the answer, and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision; for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet to conform to each other. The case cited at the bar, of *Matthew* v. *Hanbury*, 2 Vern. 187, does not in any manner contradict this doctrine. The proofs there offered were founded upon allegations in the bill, and went directly to overthrow the consideration of the bonds, set up in the answer, in opposition to the allegations of the bill, the latter having asserted, that the bonds were obtained by threats and undue means, and not for any real debt, or other good consideration. Is, then, any averment of the actual domicil of the testator, under the circumstances of the present case, proper and necessary to be made in the bill, in order to enable the court to come to a final decision upon the merits? We think that it is, for the reasons which will be presently stated.

The point was never brought before the circuit court for consideration; and, consequently, was not acted on by that court. It did not attract attention (at least as far as we know) on either side, in the argument there made; and it was probably passed over (as we all know matters of a similar nature are, everywhere else), from the mutual understanding, that the merits were to be tried, and without any minute inquiry, whether the merits were fully spread upon the record. It is undoubtedly an inconvenience, that the mistake has occurred; but we do not see, how the court can, on this account, dispense with what, in their judgment, the law will otherwise require.

The present is the case of a will; and so far, at least, as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court are called upon to give a construction to the terms of the will; and, in an especial manner, to ascertain, who is meant by the words "heir-at-law," in the leading bequest in the will. The language of
*504] wills is *not of universal interpretation, having the same precise import in all countries, and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language, which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest, that the testator had the laws of some other country in his own view.[1]

No one can doubt, if a testator born and domiciled in England during his whole life, should, by his will, give his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to, and be governed by, the import of the terms in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, in Pennsylvania or in Massachusetts. In short, a will of per-

[1] See Harrall *v.* Wallie, 29 Alb. L. J. 170; s. c. 37 N. J. Eq.

sonalty speaks according to the laws of the testator's domicil, where there are no other circumstances to control their application; and to raise the question, what the testator means, we must first ascertain, what was his domicil, and whether he had reference to the laws of that place, or to the laws of any foreign country. Now, the very gist of the present controversy turns upon the point, who were the person or persons, intended to be designated by the testator, under the appellation of "heir-at-law." If, at the time of making his will, and at his death, he was domiciled in England, and had a reference to its laws, the designation might indicate a very different person or persons, from what might be the case (we do not say what is the case), if, at the time of making his will, and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable, that the country by whose laws his will is to be interpreted, should be first ascertained; and then the inquiry is naturally presented, what the provisions of those laws are.

If this be the true posture of the present case, then the bill should allege all the material facts, upon which the plaintiff's title depends; and the final judgment of the court must be given, so as to put them in contestation in a proper and regular *manner. And we do not perceive, how the court can dispose of this cause, without ascertaining, where the testator's [*505 domicil was, at the time of his making his will, and at the time of his death; and if so, then there ought to be suitable averments in the bill to put these matters in issue.

In order to avoid any misconception, it is proper to state, that we do not mean, in this stage of the cause, to express any opinion, what would be the effect upon the interpretation of the will, if the domicil of the testator was in one country, at the time of his making his will, and in another country, at the time of his death. This point may well be left open for future consideration. But being of opinion, that an averment of the testator's domicil is indispensable in the bill, we think the case ought to be remanded to the circuit court, for the purpose of having suitable amendments made in this particular; and that it will be proper to aver the domicil, at the time of making the will, and at the time of the death of the testator, and during the intermediate period (if there be any change), so that the elements of a full decision may be finally brought before the court. The petitions of the claimants should contain similar averments.

It appears, from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs-at-law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings, and must be again opened there, for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion, that they ought to be let into the cause for this purpose. In drawing up the decree, remanding the cause, leave will be given to them accordingly. The decree of the circuit court is, therefore, reversed; and the cause is remanded to the circuit court for further proceedings, in conformity to this opinion.

*Baldwin, Justice. (*Dissenting.*)—The preliminary question which has been decided by this court, is one of the deepest interest to all suitors in the inferior courts of the United States, the judges thereof, and the profession generally. The nature of the objection to hearing the cause on its merits, or to even examine the evidence or the decree; the time at which it was made, with its attendant circumstances; make this case a precedent of infinite importance, as a rule for future proceedings in a court of the last resort, in the exercise of a jurisdiction exclusively appellate.

A final decree of a circuit court, rendered in a long-pending and zealously contested cause, after the fullest consideration, has not only been reversed, but all its proceedings so completely annulled as to open the case to new parties, new bills, pleadings, issues and evidence; and to make it necessary to begin *de novo*, in the same manner as if the court had never acted on any question which could arise. This has been done, too, on an objection not taken by counsel, either in the circuit court, or assigned for error here, in the printed brief of their points, presented to this court as the ground of a reversal of the decree of which the appellants complain; nor did either of their counsel think proper to avail themselves of the suggestion, after it fell from the bench, until the one who opened the argument had closed his view of the first ground assigned in the brief for error. And when, on the next day, another of the counsel of the appellants drew the attention of the court to the objection, it was not to reverse the decree, as erroneous in law or fact, but as a reason for considering it as so merely and utterly void, as to make it improper to examine into the errors assigned by himself and colleagues; and proper to suspend the argument on the merits, till the consideration of the question thus raised, the decision of which leaves the law, justice and equity of the case untouched, while every proceeding had in it is utterly prostrated; leaving the parties, at the end of a seven years' litigation, to begin anew. To them, it is no consolation, that these effects have been produced by an objection of mere form, not deemed by the counsel of either party worthy of being noticed or guarded against; for the action of an appellate court on a judgment at law, or a decree in equity, can be of no middle character. A reversal annuls it to all intents and purposes; it can no longer be given in evidence in support of any right, or as a proof of any
*507] fact, in favor *of the party in whose favor it was rendered, or against the opposite party; no one thing remains a *res adjudicata*, but every question of law and fact is as entirely open, as if the court had never given a judgment or decree. It is inconsistent with the constitution of appellate courts in England, or the states of this Union, to modify a general reversal of a judgment or decree; it is absolute, and must be attended with all legal consequences, which no court can avert by any salvo or declaration that it is reversed only *pro formâ;* the decree or judgment cannot be, in any part, carried into effect in the court below, or come again into an appellate court, till a new one is rendered. The same principles prevail in the courts of the United States, by force of the judiciary and process acts, and the seventh rule of this court, which regulate all proceedings by those of the king's bench and courts of equity in England, unless otherwise provided for by law, subject to such alterations and additions as this court may prescribe to the circuit courts, or as they may make, not inconsistent therewith. (1 Story's Laws 67, 257.) This court has uniformly acted by the rules thus

prescribed, which regulate not only its own proceedings, but its adjudication on those of inferior courts which are brought within its appellate power; they must, therefore, be considered as the tests of the conformity of the decision now made, with the established principles of courts of original or appellate jurisdiction by the course of the law of equity, the rules of this court, and the acts of congress which regulate its exercise on appeals.

In the circuit court, George Harrison and others were claimants of a fund in the hands of Mr. Nixon, as executor; their petitions having been dismissed, on a final decree against them, they now, on an appeal, ask for its reversal for the reasons assigned in the brief of their counsel, which relate entirely to the merits of their claim; but at the same time contend, that the whole proceedings in the circuit court are mere nullities; because the appellants themselves, as well as the other claimants, omitted to insert in their petitions a direct averment of the domicil of the testator, under whose will they all claim. As this objection is not aimed at the decree, or the right of any party who claims the fund, it must be considered as applicable solely to the form and frame of the original bill and petitions; *intended to present, not a cause of reversal of the decree for error in law or fact, but the broad question of jurisdiction. First, [*508 whether it was competent for the circuit court, to make any decree in the case before them; and next, whether the decree rendered is such, that this court, in virtue of its appellate power, can hear and determine the matter appealed from. It must have occurred at once to the mind of the learned judge who first suggested the objection, and cannot have escaped the observation of the counsel who has availed himself of it, that if the case was within the judicial cognisance of the circuit court, no decree rendered by them could be treated as a nullity; however erroneous, it is binding on the parties till an appeal, and becomes final, if none is taken within five years. It could not be declared a void act, for any cause which did not affect the original jurisdiction, without any reference to the decree rendered by the circuit court. To justify such a course, it must be in a case where this court would be bound to reverse at all events, and where its affirmance would not cure the defect; but would leave the original decree without any effect upon the rights of the parties, and prevent it from being received as evidence in any court, state, federal or foreign.

An appeal, upon any ground short of this, must affect the decree as erroneous merely, on some matter injurious to the appellant; who had his remedy under the 22d section of the judiciary act, by an appeal from a "final decree in a suit in equity," which it declares may "be re-examined, and reversed or affirmed, in the supreme court." It follows, that there is a discretion to reverse or affirm, according to the right of the case; and, surely, it cannot be contended, that if a decree can be affirmed on appeal, it can be considered as a mere nullity, after affirmance, if the question arising on the appeal was one of merely error, not of jurisdiction. Nor can it be doubted, that if the merits of the case were cognisable by the court below, they are equally so on appeal; and that a final decree of affirmance binds all parties, in all courts, as to the matters decreed, which must be done on a re-examination of the final decree.

Such is the general course prescribed to this court by the 22d section, in all cases coming before them by appeal; the 24th is still more explicit.

"That when a judgment or decree shall be reversed in a circuit court, such
*509] *court shall proceed to render such judgment, or pass such decree as the district court should have rendered or passed; and the supreme court shall do the same, on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or the matter to be decreed are uncertain, in which case they shall remand the cause for a final decision."

The second clause of the second section of the third article of the constitution declares, "that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." The 22d and 24th sections of the judiciary act, are the execution by congress of an express constitutional power, which makes these provisions as imperative on the supreme court, as if they had been detailed in the body of the constitution; they form its constitution as an appellate court, defining its powers, and prescribing their exercise, in re-examining, reversing or affirming the final judgment and decrees of all courts which may be brought within its appellate jurisdiction.

The 22d limits the appellate power to the revision of final decrees in cases in equity, herein departing from the course of appellate courts in England and in New York; there, an appeal lies to the house of lords or court of errors, from the interlocutory orders and decrees of the chancellor; the other regulations prescribed by the judiciary act are in conformity to the uniform course of all appellate courts, as long settled by uniform practice, adopted by the rules, and followed in the decisions of this court. This course cannot be better defined than in the words of Chancellor KENT. "It is the acknowledged doctrine of courts of review, to give such decree as the court below ought to have given; and when the plaintiff below brings the appeal, the court above not only reverses what is wrong, but decrees what is right; and models the relief according to its own view of the ends of justice, and the exigencies of the case. The court above acts, therefore, on
*510] *appeals, in the given case, with all the plenitude of a court of equity of original jurisdiction, and the special terms of the decree, whatever they may be, becomes to this court the law of that case, and no other or further relief can be administered to the party." 1 Johns. Ch. 194–5.

This doctrine, then, is the law of this court, not only by the acknowledged principles of the law of equity, but as an injunction of the supreme law of the land; from the observance of which, the court can be absolved by no rule or practice contrariant thereto. If its authority rested alone on either the recognised rules of appellate courts, or their settled practice, it might be varied at the discretion of the court, by their power to make rules respecting practice, proceedings and process; but they can have no discretion to alter or depart from those "principles and usages of law" which congress have adopted as regulations of, and exceptions to the appellate power of all the courts of the United States, pursuant to the provisions of the constitution.

It must, therefore, be taken as a rule of constitutional law, binding on this court, that if it takes cognisance of a cause on appeal, under the 22d

section, it must be by re-examining the decree, reversing or affirming it; and by the 24th, on reversal, to give such decree as the circuit court ought to have rendered, or remanding it for final decision, as the case may be. There can be no other course pursued; for, as the appellate power is confined to those cases to which it has been extended by congress, and must be exercised within the limits and by the regulations prescribed, it can have no inherent powers, in virtue of which it can review of revise the decrees of the inferior courts, by any general superintending authority, such as appellate courts may have, whose jurisdiction has neither been conferred nor regulated by a constitution or statute. No principle has been better settled, or more steadily adhered to, than that this is a court of special jurisdiction, whether original or appellate, which the constitution has defined and separated by a line which congress cannot pass, by extending that which is original, to cases which are appellate, or *é converso*. 1 Cranch 164, &c. As the present is an unquestioned case of appellate jurisdiction, it must be exercised according to the regulations prescribed by congress; by an examination *of the final decree on its merits, if the court takes judicial cognis- [*511
ance of the record. Any other course is wholly unknown in an appellate court of equity; unless there is such a fatal defect in the record, as affects the jurisdiction of the court below, and prevents the court above from acting judicially upon it, by hearing and determining the matters in controversy; in which case, the decree will be reversed, the cause remanded, and the circuit court be directed to dismiss the bill, or make the amendments necessary to give it jurisdiction.

It is not pretended, that the circuit court has not jurisdiction of this case, as one between proper parties, touching a proper subject-matter of controversy; nor can it be doubted, that the jurisdiction of this court is equally clear. A final decree has been rendered, an appeal regularly taken, by parties affected by the decree; who, having given the requisite security, have a right to be heard on all matters appealed from, to ask a reversal and a decree in their favor. The party in whose favor the decree has been rendered, appears here, pursuant to the citation, with an equal right to defend his interests, to demand an affirmance of the decree, with a mandate for its execution.

This court, then, cannot refuse to hear the appeal, on the ground of a want of power to hear and finally determine all matters appealed from, which are properly and fully cognisable by both courts; and this objection does not profess to be founded on the want of competent parties to a controversy in the federal courts, or a subject-matter cognisable in equity. As it avoids these questions, the objection defeats itself; for it must necessarily apply to the course of the circuit court in the progress of the cause, and their final adjudication on the matters submitted by the parties; the revision of which is the ordinary exercise of the jurisdiction of an appellate court, in conformity with the acknowledged doctrine of such courts and the positive injunctions of the judiciary act; which it is the direct object of this motion to prevent, and which has been effected by the judgment now rendered. There being no doubt of the jurisdiction of either court, the only questions which can arise are, whether any of the petitioners have, on this record, shown a right in equity to demand from the respondent, Nixon, the fund which he holds in his hands, subject to the order of the court,

*he claiming no interest in it, except his commissions and proper credits. The case is, therefore, one of ordinary occurrence; a bill in equity filed by one claimant, and petitions by others, for the surplus of an estate in the hands of an executor; who, in his answer, interpleads, submits to any order the court may make, and prays their protection by such a decree as will save him from future litigation.

Whether a bill in equity contains any ground for relief, or, what is called in the language of its courts, "equity," is not a question of jurisdiction, but of merits; the inquiry is, has the petitioner set forth a cause of action in his complaint? has he averred any matter which, if true, entitles him to the relief prayed for, or any relief? or set it forth in the manner required by the rules of equity? If he has, the respondent must plead some new matter in avoidance; or in his answer give some reason why he does not do, or ought not to be decreed to do, the thing required of him. If the complainant's petition contains no equity, or sets it out defectively, it is good cause for demurrer, generally, or for cause; or the respondent may object in his answer, or at the hearing, to the want of equity in the bill; and it is a good ground for the reversal of a decree, on appeal. So if a question arises whether the allegations of the bill are made out by the proofs in the cause, it is a proper subject of consideration, before rendering a decree in the court below, as well as review in the appellate court; not as a question of jurisdiction, but one which arises in its exercise. "It is well settled, that the decree must conform to the allegations of the parties" (11 Wheat. 120); and be sustained by them as well as by the proofs in the cause (10 Ibid. 189); but whether it does so conform, and is so sustained, is determined by the appellate court; on the inspection of the whole record and proceedings before them; as was done by this court in *Carneal* v. *Banks*, and *Harding* v. *Handy*, above cited. In examining the allegations of a declaration in a court of law, a court of error examines only whether the plaintiff has set out a title or cause of action. "If," in the language of this court, "it is defectively or inaccurately set forth, it is cured by a verdict; because, to entitle the plaintiff to recover, all circumstances necessary to make out his cause of action, so imperfectly stated, must be proved at the trial; but, *513] when no *cause of action is stated, none can be presumed to have been proved. The case is not to be considered as if before us on a demurrer to the declaration. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted, without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question." 9 Wheat. 594–5. This is the settled rule of this court, in cases at law, that they will not reverse a judgment for any defective averment in a declaration, not demurred to, if the plaintiff has substantially set out a cause of action. Such, too, is the established principle in cases in equity; as, where a bill was filed to set aside a conveyance, on account of the mental incompetency of the grantor, which contained no direct or positive averment of his incapacity; yet the court took cognisance of the case, examined the bill and proofs, and decided that, "although a more direct and positive allegation that C. H. was incapable

of transacting business, would have been more satisfactory than the detail of circumstances from which the conclusion is drawn; yet we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met the charge, and we cannot doubt, that his answer is sufficiently responsive to give him all the benefit which the rules of equity allow to an answer in such cases." 11 Wheat. 121. In that case, the whole gravamen of the bill, the whole equity of the case, was in the averment of the incompetency of the grantor to make a contract; yet it was held sufficient, to aver the circumstances from which the conclusion could be drawn, that it was enough, if the bill made it a question in the cause, that the defendant had met the charge, and his answer was sufficiently responsive. The court proceeded to look into the proofs in the cause; inquired whether the testimony established the incompetency of C. H.; and examined the immense mass of contradictory evidence which the record contained, with attention; and affirmed the decree of the circuit court of the first circuit, annulling the contract, on the ground of *incom- [*514
petency.

It is, therefore, a settled point, that an objection to the sufficiency of the averments of the bill, must be considered by the appellate court as one directly involving the merits of the case; it is the statement of the complainant's cause of action, to which the defendant must demur, if he relies on the want of form, manner or circumstance, or he loses the benefit of the objection. If he relies on an objection to the substance of the averment, or its variance from the proofs in the case, he must make it appear to the satisfaction of the court, that the bill contains no equity on its face, that no cause of action is set forth, nor any circumstances from which the conclusion of an averment of one, could be drawn conformable to the evidence adduced. The application of these cases to the record of the circuit court, presents only this difference; by the substitution of the word domicil for usage, in *Renner* v. *Bank of Columbia*, and citizenship, for incompetency, in *Harding* v. *Handy*, the rule and principles of both are identical in point of law.

In applying these maxims of this court to the objection made by the appellants to the re-examination of this case, the record shows, that the gravamen of the original bill and all the petitions is, that Matthias Aspden made a will, devising his real and personal estate to his heir-at-law, and died, leaving Henry Nixon, the respondent, his executor, who has in his hands a large surplus of personal property, to which the several parties aver themselves to be entitled by the terms of the will, but which the executor refuses to pay over, though bound in equity so to do. If these averments are true, if they are made out by the proofs and exhibits in the cause, there is certainly equity in the bill, sufficient to entitle the devisee or legatee to a decree against the executor, for the surplus of the estate in his hands. Had he demurred to the bill, he would have been adjudged to answer over, for there could have been no clearer case for the interposition of a court of equity; or if he had insisted on the objection at the hearing, it could not have been doubted, that there was a substantial averment of a ground of relief.

The execution of the will was duly proved, the sanity of the testator was admitted, the fund was in the hands of the respondent, who admitted the

trusts, submitted to the *jurisdiction of the court, ready to abide their decree; he held the money for such person as they should decree to be the person entitled under the will, which was an exhibit in the case. The only question depending was, who was the person that filled the description of the devisee or legatee; when that was ascertained, the whole controversy was ended. Had the will named Samuel Packer, of New Jersey, the original complainant, George Harrison, of Philadelphia, or John Aspden, of Lancashire, England, two of the petitioners, parties to this appeal, as the favored objects of this testator's bounty; the executor would have stood without an excuse, for not paying him the surplus of the estate. It could not be a material averment, where the testator's domicil was; his executor was bound to obey the directions of his will, be his domicil where it might. This proposition admits of no doubt. But as the will names no person, it must be ascertained, from its terms, who was intended to be the devisee, or whom the law designated as such, by the legal intendment of the words used in the will. When that is done, the rights of the person or persons thus designated, and the duties of the executor, become the same as if he had been expressly named as the person entitled, on which the question of the domicil of the testator could have no direct bearing.

The only direct question on the construction of the will, was the intention of the testator as to who should enjoy his estate after his death; all other questions were collateral to this, and the only effect of his domicil could be, as the ground of an inference of his intention being to give it to such person as should be his heir by the local law. But this is only a circumstance from which to draw an inference of intention, and before such inference could be drawn, it must be made to appear, that the law of England designated one person, and the law of Pennsylvania a different one. If the law of both countries is the same in this respect, the averment of domicil in the bill would not put in issue even a circumstance, from which any conclusion could be drawn; and so far from being matter of substance affecting a final decree, it would not be a ground of special demurrer. If it once becomes the established rule of this court, that the decree of a circuit court shall be annulled on a motion, without an examination of the record,
*516] because it *does not set out an averment of a collateral fact or circumstance, bearing on the intention of the testator, by inference merely, then every such fact or circumstance must be averred distinctly, of which domicil is but one of many. The state of a testator's family and property is always referred to, to ascertain the devisee or thing devised; evidence of other collateral facts may be introduced, in many cases, to aid in the construction of a will, or to show the intention of the testator; but no court of equity ever held it necessary to aver those matters in a bill brought to enforce the trusts of the will, in favor of a devisee or legatee. In this case, however, the original bill alleges the testator to have been a citizen of Pennsylvania, at the time of his death; this is done in direct and positive terms; it is only necessary, therefore, to apply to this averment the principle laid down by this court, in *Harding* v. *Handy*. Is citizenship a circumstance from which the conclusion of domicil may be drawn? Is it sufficiently explicit, to make domicil a question in the cause? and has the respondent met this part of the bill? These questions are of easy solution. The domicil of a citizen of Pennsylvania is certainly not presumed by law

to be in England, without some proof of his residence there, but is presumed to be in Pennsylvania, till the contrary is proved. The respondent has considered the averment of domicil as made, for he has answered it; the parties in the cause have deemed it a question raised, by taking testimony touching it; each of the ten counsel who argued the case in the court below, made it a point, except one, who did not deem it material; and the court thought it proper to take it into their consideration, and express an opinion upon it, as a point which had been argued—not whether the domicil had been properly averred, but where it appeared by the evidence to have been in fact, and its bearing on the will and cause. It was the most deliberate opinion of both the judges of the circuit court, that the law of both countries pointed to the same person as the devisee; and that the fact of domicil had no bearing on the intention of the testator, or the construction of his will. As this was a question of local law, arising directly in the case, it was deemed necessary to examine it thoroughly, before rendering a final decree; and if it is now one vital to the case, it would seem proper, at least, to consider whether the conclusion of the circuit court was so clearly wrong, on the law *of Pennsylvania, as to justify this court in annulling their final decree, without an argument on the point. [*517

In this opinion, the circuit court were supported by the counsel of the appellants, in their printed brief, presented for the argument of the cause in this court. Their third point is, "that the law of Pennsylvania is to govern this case, and that by that law they are entitled." Their fourth point is: "but that if the case is to be decided by the law of England, still the appellants are entitled." Thus, most distinctly admitting the identity of the law of both countries in its application to this will, which was also asserted by the counsel of the appellees. Nor have the appellants' counsel, in their argument of this motion, even contended, that there is any difference between the respective laws, as to the person who is the heir-at-law of the testator, or who are his next of kin, by the statutes of distribution. In this union of opinion between the judges of the circuit court, and the counsel of all parties, thus apparent to this court, it was not an unreasonable expectation, that they would, at least, have looked at the record, the evidence, the law, and decree, before they would authoritatively decide, that there was nothing deserving an argument, without the averment of domicil.

The whole case turned upon a question of local law, which had long been settled by the highest judicial tribunals of Pennsylvania, and sanctioned by the legislature, as firmly an any one principle of her jurisprudence—that the common law of England, as to the descent of property, had, from the charter of Pennsylvania, been adopted in all cases not specially provided for by act of assembly. It remained only to examine the legislation of the state, to ascertain whether the present case was embraced within the provisions of any law, had it been a case of intestacy; if it was not, then it was an admitted rule, that the common law governed it. But as the present is not a case of intestacy, the range of inquiry is still more narrowed; it turns upon the words of the will, which is the law of the case, paramount to any other. Local laws can have no other effect on its construction, than by their presumed operation on the mind of the testator, when he made his will, as an indication of his intention to refer to the law of his domicil, defining its terms. Yet, before such *in- [*518

tention can be inferred, it is a settled maxim of the law, that it must stand well with the words of the will; it cannot be admitted, to vary its plain words, or their settled legal signification.

If these considerations afforded no ground for inducing the court to give the record an appellate inspection, there are others which may serve as some apology for the court below, and the counsel there, as well as here, for overlooking the indispensable necessity of an averment of domicil, in order to give to either court jurisdiction over the subject-matter of the cause. In the first place, no such rule is laid down in any book of equity practice, or any adjudged case, in any court of equity, in England or this country, and it forms no part of their practice, as adopted by the acts of congress and the seventh rule of this court. In the next place, if such averment had been required by the ordinary rules of equity practice, it was necessarily dispensed with, by the adjudication of this court on the subject of domicil, in a case of intestacy, which is much stronger than the one under the will; for in the former case, the local law applies directly to the estate of an intestate, as the rule by which it shall be distributed. The law of the *situs* of the property, the domicil of the intestate, or of the place of administration, must govern; but which should be adopted by this court, was elaborately argued, in 1831, in the case of *Smith, Administrator of Robinson*, v. *Union Bank of Georgetown*, 5 Pet. 518, 523. In that case, the intestate was born in Maryland; domiciled in Virginia; died in Pennsylvania; had personal property in this district, being a claim upon the government, on which administration was had here; he died insolvent. The question arose, by what law his estate should be distributed among his creditors; on which this court decided, that it should be the law of the place of administration, and not of the domicil, which was the point directly adjudged, and from which only one judge dissented. The question of distribution among the next of kin, was not directly before the court, but was noticed in their opinion, from which the same judge dissented also. In alluding to the latter question, the words of the court are: "With regard to the first class of cases, we expect to be understood as not intending to dispose of them, directly or incidentally. Whenever a case arises upon the distribution of
*519] an *intestate's effects, exhibiting a conflict between the laws of the domicil and those of the *situs*, it will be time enough to give the views of this court on the law of that case. That personal property has no *situs*, seems rather a metaphysical position, than a practical and legal truth."

In noticing the provisions of treaties on this subject, the court say, "It would seem, that such a provision would be wholly unnecessary, if there existed any international law, by which the law of the domicil could be enforced in that regard, in the country of the *situs;* or if the fact of locality did not subject the goods to the laws of the government under which they were found at the party's death. In point of fact, it cannot be questioned, that goods thus found within the limits of a sovereign's jurisdiction, are subject to his laws; it would be an absurdity in terms, to affirm the contrary." "This necessity of administering, where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if, in any instances, the rule is deviated from, it forms, *pro hâc*, an exception, a voluntary relinquishment

of a right countenanced by universal practice, and is of the character of the treaty stipulations already remarked upon, by which foreign nations surrender virtually a right, which locality certainly puts in their power."

Against these doctrines, the dissenting judge most earnestly, but in vain, remonstrated, insisting, that it was settled by the international law of the civilized world, that personal property had no *situs;* that it was distributable by the law of the domical, and that if these principles were shaken by this court, or declared to be unsettled, irremediable and utter confusion would ensue. For it was a subject on which congress could not legislate out of this district; nor the states of this Union, or foreign nations, beyond their respective territorial limits; the inevitable result of which would be, that the law of distribution of an intestate's estate would be different in every state and country, in which he owned any *bona notabilia.* That the court having decided, that a pecuniary claim on the government of the United States, was *bona notabilia* in this district, subject to distribution by the local law; it followed, that if the intestate had debts due to him in different states, or owned a part of the funded debt of different governments, or of the stocks of local *corporations, there could be no uniform rule of distribution, either among creditors or distributees. [*520

But the result of the most deliberate consideration of this court, is, that which has been solemnly adjudicated and promulgated as the rule and guide for all the inferior tribunals of the United States. It would not have comported with the judicial duty of the dissenting judge, presiding in the circuit court of Pennsylvania, to have declared to the profession and suitors, that his overruled opinion must be taken as the law of the case. Had the counsel of the parties complainants moved that court to dismiss the bill, or petitions filed by themselves, or, after a final decree, had asked that it should be declared to be an extra-judicial act, because the domicil of a testator (not of an intestate) had been averred only as a conclusion to be drawn from an express averment of citizenship, the circuit court would have been bound to have decided, that it was unnecessary, according to the decision in *Robinson* v. *The Bank;* for having settled that domicil was wholly immaterial in distribution among creditors, and when they declared, that "we expect to be understood as not disposing, directly or incidentally," of the question of distribution among next of kin; the dissenting judge would have felt it his duty not to have disappointed an expectation, not only so reasonable, but which he would have obeyed as a mandate of paramount authority. The more especially, as the whole reasoning of the court of the last resort went to negative the materiality of domicil in any case; but most emphatically was the dissenting judge bound, by his every duty, not to declare the law of the domicil to be the law of the case, in face of the distinct proposition of the court; "that personal property has no *situs,* forms rather a metaphysical position, than a practical and legal truth," and thus substitute metaphysics for law, as the rule of his judicial action.

At the time of rendering their final decree, the circuit court for the Pennsylvania district could not have forseen, that without overruling the decision of this court, made in 1831, by the same high authority which pronounced it; when no question was presented to this court by counsel touching the matter, or argued by them, after the suggestion had fallen from the bench; it should now appear to the same judges, to be a principle of law

so manifest, so clearly and decisively settled, as to make the *most solemn decree of inferior courts against executors mere nullities, because the pleadings on which they were founded did not contain an express averment of the domicil of the testator; although the bill and answer contained express averments of the citizenship of the testator, the place where he made his will, the place of his death, of administration, and the *situs* of the property. As these averments were in strict conformity with the decision and reasoning of this court in *Robinson* v. *The Bank*, it could not have been thought, that there remained in the vitals of the record, a disease fatal to the action of the circuit court upon the matters in issue.

Had it been objected, that the *situs* of the property, or the place of the testator's death or of administration, had not been averred, the necessary amendment would have been made; though the pleadings had averred the domicil, that must have been deemed immaterial, according to the then doctrine of this court, which was, that personal property had a *situs*, without any reference to the domicil of an intestate. It follows, that if an averment of the *situs* was indispensable, that of the domicil could not be, as the rules of distribution would be different by the local laws. And as the law of the *situs* was the rule, when these pleadings and issue were made up, and the final decree rendered, it would most certainly have stood the test of this objection, though it must have been reversed, had the *situs* not been averred, notwithstanding the domicil had been, however explicitly. Yet now it seems, that a record containing an averment of the *situs* in all its bearings on the case, is mere blank paper, because the domicil is averred only by way of inference or conclusion from facts stated.

In 1831, the materiality of the *situs* was "a legal and practical truth," that of the domicil was "a metaphysical position," an absurdity in terms in the opinion of all the judges of this court but one. In 1835, the materiality of the *situs*, is the metaphysical position; and that of the domicil, the legal and practical truth. This radical difference between the promulgated law of this court, on the same question arising at these periods, presents a *conflictu legum* which the circuit court of Pennsylvania were not bound to anticipate; the consequences of which it is hard to visit upon suitors in that court, by drawing a sponge over all the proceedings in this cause, to
*522] their great delay and *injury; though they were had and conducted according to the solemn opinion of this court as to the law of the case, when the suit began and ended. At that time, the judges of the circuit court had for their guide no better rules for their decision, than those laid down in 1831, and the practice of this court at the same term; which, to one of the judges, at least, is some apology for not exercising his legal acumen, in discovering a fatal defect of jurisdiction over a cause, in which, it now appears, he has assumed an unwarranted power to render a decree on the merits. It is his consolation to find, not only in the solemn judgment in *Robinson* v. *The Bank*, the reasons for overlooking the indispensable necessity of an averment of domicil, but the fact, that in two other cases in the same term, this court had practically decided it to be unnecessary.

The case of *Backhause* v. *Patton, Adm. cum test. ann., de bonis non, of James Hunter*, was a bill in equity to compel an account of the personal estate of the testator, and for its due distribution; the bill averred the testator to be a citizen of Virginia, but contained no averment of his domi-

cil. 5 Pet. 160, &c. The case of *Page* v. *Lloyd, Executor of Hanbury, and Patton, Adm. cum test. ann. of Mann Page,* was on a similar bill, containing an account of the *situs* of Mr. Mann Page's personal property in two counties in Virginia; but no averment of either his citizenship or domicil. 5 Pet. 304. This court took cognisance of both cases, on certificates of division from the circuit court of Virginia, and finally decided on all the matters so certified, without a doubt at the bar, or on the bench, of the regularity of the record; and as the rules of its decision are the same, whether a cause comes up on certificate, or on appeal, these must have been deemed records on which it could act judicially. It is not doubted, that a further examination among the records of this court, on appeals from other circuit courts, in cases of equity against executors, will furnish additional proof, that if the practice of that of Pennsylvania has been in violation of all rules, it has the fullest sanction in the course of this court through all time; and this is the first time it has annulled a decree for such cause.

It is equally unknown to the fundamental principles on which it is organized as an appellate court, which in this case has not exercised its powers as directed in its constitution, by *re-examining and reversing [*523 the decree, and rendering such a one as ought to have been given. Its power has been exerted on a summary motion, not on an assignment of errors; the decree and all preceding acts of the circuit court have been declared null and void, collaterally, not for errors in the record or decree; for this court would not re-examine either, nor have they, in remanding the cause, directed what final decision shall be made. The only exception in the 24th section of the judiciary act, which authorizes any departure from the injunction to render such decree as ought to have been made, is, "where the reversal is in favor of the petitioner in the original suit, and the matter to be decreed is uncertain; in which case, they shall remand the cause for a final decision." But this case does not come within the exception, for though the reversal is in favor of the petitioners in the original suit, the matter decreed was certain; it was, therefore, no case to be remanded; though, if it was, the court has not remanded "the cause for a final decision." Its mandate is a peremptory order to the circuit court, to amend the pleadings from the beginnnig, to admit proofs of new matter and new parties; in one word, to make a new case throughout; and concludes with ordering, "such other proceedings are to be had in the said cause, by the said court, as to law, justice and equity shall appertain.

It had, heretofore, been thought to be the province of a court of original jurisdiction in equity, to decide on amendments in their legal discretion, or according to the act of congress, with which this court never interfered; that after publication, and before a decree, the admission of new proofs, new matter, or new parties, was discretionary with the chancellor, on a petition presented; that after a decree made, but before enrolment, neither could be introduced into a cause, unless by a supplemental bill, in the nature of a bill of review; nor after enrolment, unless by a bill of review, on newly-discovered evidence, filed by parties or privies to the original suit. It was also believed, that there was no distinction better established by the law of equity, than the different effect of defective pleadings, when demurred or excepted to in the court below, and when they are unnoticed till the cause

is removed for review in an appellate court. And it has hitherto remained
*524] *equally well settled, that no decree will be reversed, even on a bill of review, for any new-discovered evidence, unless in a case where a new trial would be awarded by a court at law.

But if the decision now made, is to be hereafter considered as a precedent for the future action of this court on appeals in equity cases, it portends a fearful change in the rules which have heretofore drawn a line between the original and appellate jurisdiction of the courts of the United States, the consequences of which cannot be foreseen. The practical effect of this judgment and mandate is, an assumption of the province of the former, not only as to the rules of practice, pleadings, amendments, parties, proofs and issues, which depend mainly on the exercise of discretion; but is giving to an appeal from a final decree, the effect of a special demurrer to a bill, an exception to an answer, as well as of an original, supplemental or bill of review, in all their respective operations on the case. This appellate court does not decide upon the case or decree appealed from, it orders an entirely new one to be made, by an utter prostration of everything in the record, from the original bill throughout. It does not remand this cause for a final decision by the circuit court; it first divests it of all the attributes and requisites of a case for a final decree, and then commands that a case shall be made up for their original jurisdiction, as a suit in equity, under positive directions, which leave no discretion in the exercise of their jurisdiction over the matters referred to in the mandate.

The reasons assigned by the court for these proceedings are worthy of the most serious consideration. They decide, that an averment of domicil is indispensable, because it might indicate the intention to give the property to such person as would be the heir-at-law by the law of one country, who would not be the heir, by the law of the other, but adds, "we do not say what is the case." That the country by whose laws the will is to be interpreted, should be first ascertained, and then the inquiry is naturally presented, what the provisions of those laws are." They also direct an averment of the domicil, "at the time of the will being made," "at the testator's death," and "in the intermediate time" (a period of thirty-three years); yet declare that they do not mean to express any opinion as to the effect on the will, of
*525] the domicil being at a different place at these different times. *Whence then arises the necessity of the averments? The natural order of inquiry would seem to be, whether there was any difference between the law of England and Pennsylvania, in the interpretation of the will; and next, whether the will should be construed by the law of the domicil at the death of the testator, or at any other time; for the materiality of the averments depends entirely on the solution of these two questions. If the law of both countries was the same, at all times, the averments are useless. It is surely a strange ground for uprooting a cause from its foundation, by an appellate court, merely because the original bill does not contain an averment of a fact which, by possibility, may be material as the evidence of intention, or the existence of that fact, at a time when it could have no possible bearing on the will.

When the new case now directed to be made up, shall have been decided by the circuit court, and come here again on appeal, it is to be presumed, that this court will then deign to inquire by what law this will must be

interpreted, and what the provisions of that law are. It is also to be hoped, that by that time, they will feel prepared to instruct the circuit court of Pennsylvania, whether their next final decree shall be in conformity to the law of the testator's domicil, when he made his will, when he died, or at what period of the thirty-three years which intervened, not omitting an explicit opinion upon the preliminary question, whether the domicil has any bearing on the will. As the mandate now is, that court is ordered to proceed "as to law, equity and justice shall appertain," but are uninstructed by what law or rule the justice or equity of the case is to be ascertained, other than the law which the testator has prescribed in his will. The predicament in which that court is now placed, is a most unpleasant one; their past errors have been so gross and palpable, as to make their whole proceedings nullities; yet they remain in the dark as to the means of correcting them; the averment of domicil will lead to no new evidence or issue, not in the present record, and no new question of law or fact can arise in that respect. When a new case shall have been presented, it will differ from the present only in this one averment, which, by the admission of this court, cannot have the most remote effect on the decree, unless on the contingency *of a *conflictu legum*, which is now as little ascertained as before this reversal. [*526

If the action of this court had stopped here, the embarrassment of the circuit court would be sufficiently great, in being precluded from the exercise of all discretion in the proceedings, preparatory to a final decree, by the peremptory orders now given on all matters for their ultimate judgment; and as to that, left without any directions how to avoid the recurrence of the same errors which have caused great and expensive delay. There is, however, another ground assumed by this court, which is infinitely interesting to all persons whose rights may be affected by its appellate powers in equity cases, as well as to all inferior courts, on general principles; but most emphatically to the judges of that court whose proceedings have been thus roughly handled in the opinion delivered. After the direction to make the averments, the court remark, "it appears from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs-at-law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at a late period." "As the cause must go back for further proceedings, and must be again opened for new allegations and proofs, these claimants will have an opportunity of presenting and proving their claims in the cause, and we are of opinion they ought to be let into the cause for this purpose."

The "motion" alluded to, was to revise the whole proceedings in the case, made by the counsel of persons who were not parties or privies in the original suit, or to the appeal; the "certain proceedings in the court below" were had, on a petition asking for leave to file a bill of review by those persons, for newly-discovered evidence, and to make themselves parties. Leave was refused, for the reasons given at length in the opinion delivered by the circuit court, some garbled extracts from which, the counsel who urged the objection taken to the want of the averment of domicil, not the counsel who made the "motion" referred to by the court, thought proper to read in the

course of his argument. Had the whole opinion been read by the counsel or
*527] court, had they seen the reasons of the refusal to permit *the bill of review to be filed; it would have been most apparent, not only that it was not because the petition "was presented at too late a period," but the circuit court expressly declared, that the petition was presented within due time after the final decree, had there been no other objections. The grounds of the objection to the petition were, that those claimants never asked to be admitted into the cause, till after the final decree, and the pendency of the suit in this court on the present appeal; that the circuit court could not reverse their final decree, in any other way, than by a bill of review for error apparent or new matter. That such bill lies only in favor of parties or privies to the final decree, in neither of which characters could those persons stand; that their case was not supported by the requisite affidavits; that the matter relied on was not new, or newly discovered, but had been relied on in bills in the courts of chancery and exchequer, in England, years before the petition for review, and by the same parties; that even if new, it was not competent to procure a decree in their favor; that with full knowledge of the state of the fund, and the pendency of this suit, they had been guilty of such gross and unaccountable negligence, that no court of equity could afford them any relief on a bill of review, and if they had any remedy, it must be sought in some other mode.

The circuit court could not adjudicate on their claim, before it was presented for adjudication, and when so presented, they had no longer any power of adjudication over it, but on a bill to reverse the original decree by review for error apparent, or on an original bill which the petitioners had a right to file. The bill of review for new matter, is a matter of favor and discretion, which, in the case presented, they could not permit, without the utter disregard of the oldest and best-established rules of the law of equity; whereupon, the parties filed their original bill, on which there has not been time for any proceedings to be had. It is, therefore, a gratuitous assumption, that "those claims were not adjudicated on in the court below," "on account of their having been presented at a late period;" unless this court intended to refer to the gross delay of the parties before the final decree, and the settled principles of law which forbade that court from letting the claimants into the case, on a bill of review for the cause assigned. The judge
*528] who gave *the opinion of the circuit court, feels bound to repel the imputation which would otherwise rest upon the "certain proceedings in the court below" as wholly erroneous, and unfounded on any other construction which may be given to that part of the opinion of this court containing the allusion to those proceedings. It is also his right and duty to inquire, by what rule of law, a court of mere appellate power over final decrees of a circuit court, assume appellate jurisdiction over a subject-matter not contained or referred to in the record of the cause before them on appeal? By what power this court can review the proceedings of that court, on a petition for leave to file a bill of review to reverse their own decree, after an appeal, on new-discovered matter, which rests exclusively in their discretion as to granting or refusing it, and especially, after the parties had acquiesced in the decision and had adopted another remedy? And above all, by what warrant this court can act on an appeal by the parties now before them, in favor of persons who are utter strangers to the record and

suit, who, being neither parties or privies, can be heard only by an original bill, filed in a court of original equity jurisdiction?

The knowledge that these persons had desired and had been refused admission into the cause, not having been derived from the record, was wholly extra-judicial, and is so admitted by this court; yet it is made the basis of judicial action, and its peremptory mandate to the court below to admit them as parties, and hear their proofs. Thus, indirectly and collaterally, but most effectually, reversing the refusal to permit them to file a bill of review, and giving them not only all the benefits which they could have desired from a bill of review actually filed, but of an actual reversal; nay, much more substantial benefits. On the hearing of a bill of review, the plaintiffs are confined to the new matter set forth in their bill; and this would have been the utmost extent of the relief which could have been given them, had they appealed to this court, obtained a reversal of the proceedings in the circuit court on their petition, and the case had been remanded, with directions to permit the bill of review to be filed, and its merits to be adjudicated. Whereas, they now come into the cause, as original parties, with the same liberty as to proof, as those who have been contending for years. They are likewise fully *absolved from every requisition and [*529
duty enjoined by the law of equity, as the indispensable conditions of their admission as parties to a suit, after a final decree, as well as from all the consequences of gross and long-continued negligence. All this has been done in their favor, without any appeal by them, but on information laid before this court, in support of a motion which they would not listen to, and on which they could not act directly, in virtue of their appellate power, consistently with the acknowledged doctrines of courts of equity, or the directions of the judiciary act, that is, an appeal by the party aggrieved by a final decree. In the present course, then, of this court, in relation to those persons who are no parties to this appeal, as also to those who are proper parties, it must be asked, what brings any decree or other proceedings of a circuit court in equity, within any power of this, if not an appeal? what the act of reversal necessarily implies, if not jurisdiction of the case and its exercise? or what is the nature of that jurisdiction, if it is not appellate? and what respect is paid to the judiciary act, if this appellate jurisdiction is not exercised by re-examining the record and proceeding, according to the directions of the law which confers the power, and is the only authority by which any proceeding of a circuit court can be reviewed, or its final decrees be reversed?

As the court has reversed and annulled every proceeding which has been had, directly or collaterally, in this suit; whether it related to the rights of parties, privies or strangers to the record, to the subject-matters of appeal, or those which have come to their knowledge, without judicial information; inasmuch as their whole action has been on a summary motion to reverse, solely for the want of an averment in the bill, which the court most cautiously avoid deciding to be material to the merits of the cause, otherwise than in the event of an unascertained and possible conflict of laws, not asserted to exist, and wholly refuse to decide any one matter put in issue by the parties, as to either law or fact, the mandate of reversal must be referred to some other than their appellate power, as granted by the constitution, defined, limited and regulated by congress; for it cannot be pretended to be

within the legitimate scope of any construction which can be given to the
*530] words "appellate jurisdiction," which necessarily requires *re-examination of what had been before adjudicated in the court below. If the jurisdiction now exercised is original, it is only necessary to refer to the decision of this court in *Marbury* v. *Madison*, to pronounce it unconstitutional. Be it, however, appellate or original, it is incompatible with the organic laws of this court, with the principles and usages of law in those appellate tribunals from which we have adopted our rules, and can have no sanction from precedent, unless by some silent unadjudicated practice, which may have crept into our proceedings, without a due consideration, and which has been often decided, is not binding as authority, and is never too late to correct, when its errors are discovered. 8 Wheat. 321–2.

There is no power so dangerous as that which can be traced to no definite or authoritative source, or which is exercised without a reference to some fixed principles; it is in the nature of that which is assumed by any department of government, to be capable of no other limitation than such as it may choose to prescribe to itself; while that which is conferred by the constitution or statutes, is defined, limited and regulated in its exercise to the cases specified, and in the mode prescribed. Such are the appellate powers of the circuit and supreme courts of the United States; they are of limited jurisdiction—necessarily incompetent to act by any prerogative or inherent power; as the creatures of the judiciary act, they are not at liberty to exercise any power over the proceedings of inferior courts, by any general supervisory power, such as has been assumed by the king's bench and house of lords. Their supervision is only by writ of error or appeal, and such writs as congress have authorized them to use; so that in whatever case they act as an appellate court, it is by special authority, and can exercise no other than what is appropriately appellate, as contradistinguished from original jurisdiction. In the present case, there seems to be a mixture and excess of both, whether the mandate and opinion are tested by the rules of other courts of appeal, or the acts of congress.

The house of lords act as an appellate court, by their own authority, without an act of parliament, but have never assumed any original jurisdiction on appeals in equity causes, nor reversed the decree of a chancellor, because an issue before him will not enable the lords to make a satisfactory decree; they remand the cause for amendment (1 Bligh P. C. [N. S.]
*531] *471, 477); or give the party leave to withdraw his appeal (2 Bligh P. C. 392; S. P. 12 Wheat. 12). Such a course would have been peculiarly proper in this case; the only irregularity complained of on this motion, was by the appellants' own fault, in not making an averment in their own petition, which is admitted were amendable, and is so decided by the court; and it cannot be denied, that it was competent to them to remand the cause for this purpose (12 Wheat. 12), or permit the appellants to withdraw their appeal, to enable them to amend their own petitions, if the court deemed it indispensable to make a final decree on its merits. But it is most confidently asserted, to be against all rules, and without precedent, to reverse a decree and declare all previous proceedings void for such a cause; no court of original jurisdiction in equity, can annul its own decrees, without a bill of review, even for error apparent; this has been the law from the time of Lord BACON. This court has no power to revise

its own decrees after the term expires, unless for clerical errors; it can exercise no original jurisdiction in this case; and that which has been exercised is not appellate, by any rules which define what appellate power is, and its lawful course. So far from adjudicating any one matter appealed from, or point of law or fact presented by counsel, they have left every right and claim of the parties wholly unnoticed; and though they have annulled every proceeding of the circuit court, have not adjudged any one order, or their final decree, to be erroneous in law or fact; but have done it for the ostensible purpose of inserting in the bill and petitions, an averment of a fact, which would have been directed, of course, in the circuit court, on suggestions of either party; and solely to meet a contingent question of local law, which that court, in their solemn opinion, declared could not arise in the cause, and which the counsel on both sides agreed did not exist, and would not be raised.

There is only one rule by which such a proceeding can be held to be the legitimate exercise of appellate power, "*sic volo, sic jubeo, stat pro ratione voluntas;*" the opinion of the court precludes any other conclusion; for if they had appellate jurisdiction, they were bound to give the record appellate inspection and consideration; not having done so, their opinion *and mandate is their judgment, that there was no case before them for [*532 their appellate action. This presents another view of this case, which is alarming as a precedent. This court has no more power to declare and consider the proceedings of a circuit court null and void, than a district, circuit, or state court has, unless they are before them by an appeal, according to the act of congress; excepting such a case, the powers of all these courts are equal. All are bound to respect a judgment until appealed from, however erroneous; while any one may disregard it, even as *primâ facie* evidence of any fact professed to be adjudicated, if the judgment is void. If the course of this court is consistent with the rules of law, then the final decree of the circuit court would be as much a nullity, after the expiration of the five years limited for an appeal, as it is now; and if a nullity in this court, it must be so in every other. If the want of an averment of testator's domicil, in a bill of equity, nullifies all subsequent proceedings against an executor for an account, there are many void decrees on the records of this court, which state courts may declare so, by the same power with which this court has acted in this case.

This rule of action must be taken to be, that the bill must contain direct averments to meet every possible contingency which may arise in the proofs, as to questions of fact or law; that it is not sufficient to aver a fact, from which the necessary conclusions may be drawn, though the parties have taken issue upon it in both courts, and thus admitted, that there was a proper case for the exercise of their respective jurisdiction. The mandate admits of no other conclusion, than that the action of the circuit court, on a bill or petitions like the present, is wholly without legitimate power or jurisdiction, and their whole proceedings "*coram non judice;*" if so, it follows, that their decree is not a judicial act, entitled to the least respect in any court. If this court can declare it void, without appellate re-examination, it is, because it is an extra-judicial act; and surely no one can contend, that the extra-judicial proceedings of this court are entitled to any more respect. As if they should award a *mandamus* to a secretary of state, reverse the judg-

ment of a state court in a case not within the 25th section of the judiciary act, or take cognisance of an *original bill in equity between individuals. Let it once become a settled rule, that the want of an averment like the present, is fatal to jurisdiction, the proceedings of no court can stand the test of a scrutiny so severe as has been applied to these.

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With the precedent now established, the judges of state courts will look with microscopic eyes at our records, as well as those from other states, and be sure to find, at least to their own satisfaction, some defect which might have been fatal on special demurrer or abatement, and in their turn declare our decrees and judgments void, by the same summary power. Nor will the consequences stop here; the federal courts will exercise the same power over the judgments of state courts, without appeal or writ of error; their proceedings, in cases not within their judicial cognisance, are as much nullities as those of a circuit court, and may be declared void by this court, on the same rule as is now adopted. Let the directions of the judiciary act be nullified, by following up this precedent, the appellate power of this court becomes absolute, arbitrary and illimitable; and all other courts may be justified in following the high example.

There is yet another view which must be taken of the judgment now rendered. The court has ordered the averment of domicil to be made at the death of the testator in 1824, at the making the will in 1791, "and in the intermediate period (if there was any change), so that the elements of a full decision may be finally brought before the court." Each averment being then considered as equally indispensable, it must be deemed, that the omission of either is equally fatal to the proceedings of the circuit court; each must, therefore, be considered as having a vital bearing on the construction of the will, or there would not have been a positive order to insert them. Such an order may, indeed, afford "the elements of decision," but must protract it till many of the parties to the suit shall have passed away. When the fact of residence, at different times during thirty-three years, shall have been ascertained in the circuit court, they must then decide in what place the law adjudges the domicil to have been at the time of each change of residence; then arises the question, by what law the will is to be interpreted. As the case of *Robinson's Administrator* v. *The Bank* is now overruled, the law of the *situs* of the *property of administration or making the will, which is Philadelphia, is not to be regarded, the law of the domicil must govern; but the court are left in utter darkness as to the rule by which to apply that law, should the domicil appear to have been in different places at different times. As the circuit court has hitherto been so unfortunate as to have been ignorant of the effect of the domicil, in relation to a will of personal property, and as one of the judges has the misfortune to dissent again on the subject, it is much to be feared that, as there may have been, possibly, three or more places of domicil in so long a period, at least one, if not more, final decrees may be reversed, because the proper one may not have been designated in their opinion.

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Hitherto, the law of the domicil at the death of the testator, has been deemed the rule; but this point must now be considered as unsettled, or the court would not have directed its averment at any other time, as indispensable to a full decision of the cause; as it remains for this court, at some future period, to declare the law on points so doubtful, great delay

must necessarily take place, before it can be known by what law the will must be construed ; next, what the provisions of that law are ; and lastly, what ought to have been the first inquiry—whether the domicil of the testator is, or, in any possible event, can be, in any way, a material question in the cause.

Before the decision of this case, it was considered to be a settled principle, that a final decree in chancery was of equal effect as a judgment at law, until reversed. 6 Wheat. 113. That the sufficiency of an averment in a declaration, bill or petition, was a question of merits, examinable on demurrer, at the hearing, on a motion in arrest of judgment, or by writ of error or appeal ; but in no case was a question of jurisdiction, unless for the want of parties, or a proper cause of action. That if there was a substantial cause of action alleged, all defects in the pleadings were cured by a verdict of decree, if not pleaded or demurred to for cause ; and that no appellate court could reverse a final judgment or decree, for any error in either, on the ground of an insufficient averment, if the plaintiff's case was one that would entitle him to a judgment on a general demurrer. So the law was taken by the counsel for the appellants themselves, and so it would have remained, had not the court *prevented them from arguing the points in their printed brief, and, yielding to the suggestion of one of [*535 the judges, decided, that they would examine no question in the record, nor hear any argument on any point except one, which was not stated at the bar in either court, and may have no bearing on the rights of any party. This is another innovation upon the settled, uniform course of all appellate courts, which makes this precedent an alarming one.

It is an established rule, founded on the soundest principle of justice, that a party shall not be permitted to reverse a judgment or decree, on an objection not made in the court below. Upon an objection being made in the house of lords, that an account had not been taken in the court of chancery, and it appearing that none had been called for previously, by the party making the objection, Lord Eldon observed, "If this cause had been heard in the court of chancery or exchequer in England, no client could have induced a counsel to make that a point, at the bar of this house, under such circumstances ; because such counsel, having been previously conversant with the cause, would have known that as it was not made below, it could not be made by way of appeal. Had this cause been heard before me, and had I presided during the argument of the appeal against it, under the circumstances that have occurred, I would not have allowed counsel to make the point at your lordship's bar." 2 Sch. & Lef. 712, 710, 718. When the opportunity of objection is passed by in the court below, it is taken to have been waived (Ibid. 713 ; 12 Wheat. 18 ; s. p. 11 Ibid. 209–11 ; 7 Pet. 98 ; 2 Binn. 168 ; 12 Serg. & Rawle 103); unless the defect in the record is one which could not have been cured, or amended in the court below, if the objection had been made before it was removed. 4 Johns. 602 ; 14 Ibid. 560 ; 16 Ibid. 353 ; 18 Ibid. 558–9 ; 2 Dow P. C. 72. The names and judicial reputation of the American jurists, who have ever acted on this rule, and of Lords Eldon and Redesdale, may, with propriety, be referred to, and invoked in support of a dissenting judge ; and the rules and decisions of this court, till this time, may also be called to his aid.

Had the present appellants demurred to the bill, objected in the plead-

ings, or at the hearing, on the ground now taken, *the defect, if any, would have been cured in the court below, by an amendment, without affecting the proceedings; but here, it would seem, that there can be no amendment ordered, without annulling everything heretofore done in the cause. If it was so intended by the appellants, they have delayed this objection most profitably, for the purposes of vexation; it has been received under circumstances which would have prevented it being listened to in any other appellate court, but which have entitled it to favor here. It is not made by the respondent, whom alone it concerned to reverse erroneous proceedings by the appellants, who were complainants against him; if he chooses to waive defects in their petition, they could not be injured thereby; they did not ask for an amendment in theirs, or the petition of the party who obtained a decree in his favor. The appellants asked a reversal and a decree in their favor; they have obtained a reversal indeed, but it is of every step they have taken to submit their rights to the final adjudication of this court; the cause is open to indefinite litigation, by each of the three hundred claimants to the fund in the hands of the executor, as well as those now ordered to be added to the suit, who may be not the least troublesome, at least, to the appellants. A principle, too, has been established, by which each claimant is permitted, during the five years allowed for appeal, after a final decree, to reserve his objection to the pleadings, till a convenient time, and then obtain reversals on a summary motion, for defects that are amendable on application in the discretion of the circuit court, by the general rules of courts of equity and law, and by right, under the provisions of the judiciary act.

There can be no course so utterly subversive of equity, nay of common justice, as to hear parties in an appellate court, on points made under circumstances like the present; it is one to which I can never consent, and against which I shall deem it a duty to suitors to protest, on all similar occasions. I will never, while sitting in this court, reverse a decree upon objections which a court of chancery or exchequer, on a cause regularly before them, would not, in the exercise of their original jurisdiction; or the house of lords, or court of errors and appeals in New York, would not permit counsel to argue on appeal. Nor will I, in any way, admit, that any appel-
*537] late *court can, in the legitimate exercise of their jurisdiction, render a judgment of reversal, on any ground, on which they would not be bound to hear an argument of counsel. It is a great hardship on parties, to have their judgments set aside, on technical objections raised at the bar; but the grievance will become intolerable, if the court should be such as to do it, when they are first suggested from the bench.

Let an objection like the present, however, come whence it may, I consider it as purely technical, which I cannot, sustain consistently with the respect due to the solemn and unanimous decisions of this court, in *Harding* v. *Handy*, and *Renner* v. *Bank of Columbia*, with many others founded on the most immutable maxims of the law. They settle the rule, that the conclusion of fact drawn from a circumstantial averment, is sufficient to support a decree in equity, and forbid me from disregarding the evidence which has been admitted without objection, and now forms part of the record before me for judicial inspection, merely because the subject-matter of that evidence was not averred in the bill or petitions of the claimants.

And when, to this high and unquestioned authority, is added the 32d rule of this court, I find safe rules for my guide, which would be violated by any sanction given to any proceeding in opposition thereto. That rule is, "in all cases in equity, &c., no objection shall hereafter be allowed to the admissibility of any deposition, deed, grant or other exhibit, found in the record as evidence, unless objection was taken in the court below, and entered of record, but the same shall otherwise be deemed to have been admitted by consent." I feel bound to examine all the evidence in this record, as it is found, without an objection; and as counsel and parties are precluded from now making any, it is my duty to give it its full effect on the question of domicil, as well as any other which may be relevant to the cause; any other course would, in my opinion, annul this rule, which counsel must respect, and which I had thought the court would adhere to, by hearing an argument on a point arising on the evidence, made by the counsel of the appellants in the brief presented for our judicial action.

The order for the admission of new parties deserves some notice, on account of the manner in which it was made, which *is believed to to be unprecedented. Their names were not in the record, they were [*538 in no way before the court, but had employed counsel, who were desirous of being heard as *amici curiæ*, in order to point out some irregularities which, as they conceived, would authorize the reversal of the decree, so as to permit them to make an application to become parties; stating, at the same time, that the circuit court had very properly refused such application by a bill of review. This court promptly and unanimously refused to hear them in support of their motion, yet have granted what they would not permit to be moved for by the counsel of the new parties, and of course, without motion; for the counsel of the appellants who signed the brief as representing three individuals and others, on being called on by the counsel for the appellees, in open court, to state for whom they appeared, declined an answer. In the circuit court, it may not be within the line of duty to inquire, by what authority, and on whose application, these parties have been ordered to be admitted as litigants in the cause; so far as respects one of the judges, he will obey the mandate. But in this court, he may, and does, make the inquiry, respectfully, but as a matter of right, and fearlessly insists, that it has been done in violation of the best-established principles of the law of appellate courts. As the court would not hear the motion of the counsel of these parties, they could not be judicially informed, that they desired admission into the cause; *à fortiori*, they could not judicially decide, whether their case was one which gave them a right to admission. Their judgment and mandate have, therefore, been given on extra-judicial knowledge, such as no appellate court can receive or act upon, as it was wholly *dehors* the record, and related to no party to the appeal, nor anything appealed from.

In issuing their order, founded on such knowledge as they chose to receive, the court must have taken a very partial view of the papers presented to them for their collateral inspection; had they been judicially examined, or their contents known, it would have been apparent, that the case deserved some deliberation at least. By their own admission, these parties had full knowledge, that the fund they claimed, was in the hands of the executor in Pennsylvania, yet their first application to be admitted as par-

ties to this suit, was ten years after the death of *the testator, and nearly six months after the final decree. That after the failure of their petition for a bill of review, they had filed their original bill in the circuit court, having previously applied to the orphans' court of Philadelphia county (which is a court of equity and of record, before whom the administration account was in a course of settlement), for an order of distribution in their favor.

This court also knew judicially, for it appeared in the answer of the executor in this case, that he had interpleaded and prayed the protection of the court; for which purpose they had made an order (also in the record) that all claimants of the fund who did not appear by a given day and present their claims, should be barred thereafter; which order was sanctioned by the practice and rules of all courts of equity. These parties suffered the time to elapse, long before they thought proper to make any claim, without in any way denying notice of the pendency of the suit, or accounting for their delay in applying to become parties before the final decree. If any court could be justified in admitting them, afterwards, in a case circumstanced like this, it most assuredly could be only by the exercise of original jurisdiction, by bill of review, and not by any appellate power over this record; these parties were not and could not be appellants from a final decree to which they were not party or privy; nor could this court lawfully reverse the decree on new matter, or for any cause appropriate to a bill of review. As to these persons, there was no case in this court; it could have no appellate jurisdiction to hear and determine on anything; and the proceeding was wholly *coram non judice*, unless it could exercise original jurisdiction over the parties and the subject-matter, as a case originating in this court.

Thus considered, I feel it a duty to declare, that the mandate to the circuit court, ordering these persons to be made parties, is without any authority of principle or precedent, and although I shall obey it in that court, as the command of a court of the last resort, yet, in my best judgment, feel constrained to pronounce it inconsistent with the best established rules and usages of law, and a violation of the constitution of an appellate court.

*540] *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 Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the said circuit court in the premises be and hereby is reversed and annulled, and that the cause be remanded to the said circuit court for further proceedings; with directions to the said court to allow the bill and the petitions of the claimants to be amended, and the answers and pleadings also to be amended to conform thereto, and proofs to the new matter also to be taken; and with further directions to allow any other person or persons, not now parties to the proceedings, who shall claim title to the funds in controversy as heir or heirs-at-law or representatives of the testator, to present their claims respectively before the said court, and to make due proofs thereof, and to become parties to the proceedings, for the due establishment and adjudication thereof. But the proofs already taken in the cause are to be deemed admissible evidence in regard to all such persons, not now parties, who shall claim title as

aforesaid, and become parties in the cause under this order; and such other proceedings are to be had in the said cause by the said court, as to law, equity and justice shall appertain.[1]

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*The CHESAPEAKE AND OHIO CANAL COMPANY, Plaintiffs in error, [*541
v. ABRAHAM KNAPP and others.

Assumpsit.—Bill of particulars.

An action of *indebitatus assumpsit* was instituted to recover a large sum of money, alleged to be due for the construction of certain locks, &c., on the Chesapeake and Ohio canal; the defendants pleaded the general issue, and called on the plaintiffs for a bill of particulars; the item of claim upon which the jury gave a verdict for the plaintiffs, was stated in the bill of particulars to be, "detention and damage sustained for want of cement on locks No. 5 and 6."

There is no doubt, that a bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded; this is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant rather than to enlighten him.

As the bill of particulars is filed before the trial, it is always in the power of the defendant to object to its want of precision, and the court will require it to be amended, before the commencement of the trial; and if this be not the only mode of taking advantage of any defect in the bill, it is certainly the most convenient for the parties.[2]

Although this bill of particulars does not specify, technically and fully, the grounds on which the plaintiffs claim damages, it sufficiently expresses to the defendants that the claim arises for want of cement on locks No. 5 and 6.

The ancient doctrine, that a corporation can act, in matters of contract, only under its seal, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it and subject it to an action of *assumpsit*.

There can be no doubt, that when a special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration; but if the contract has been put an end to, the action for money had and received lies to recover any payment that has been made under it.

It is a well-settled principle, that where a special contract has been performed, a plaintiff may recover on the general counts.

The court ought not to instruct, and, indeed, cannot instruct, on the sufficiency of evidence; but no instruction to the jury should be given, except upon evidence in the case. Where there is evidence on a point, the court may be called upon to instruct the jury on the law, but it is for them to determine on the effect of evidence.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. This was an action of *assumpsit*, instituted originally in the county court of Montgomery county, in the state of Maryland; and by

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[1] For the further proceedings in this case, which was finally decided by a divided court, on the question of domicil, see Packer *v.* Nixon, 10 Pet. 408; Aspden *v.* Nixon, 4 How. 467; White *v.* Brown, 1 Wall. Jr. C. C. 217; Brown *v.* Aspden, 10 How. 25; and Aspden's Estate, 2 Wall. Jr. C. C. 368, 451–2.

[2] Bills of particulars may be ordered in all cases; an application therefor is the appropriate proceeding, where a party seeks to be apprised of the particulars, or circumstances of time and place, set forth in his opponent's pleading. People *v.* Nolan, 10 Abb. N. C. 471. It may be ordered, in a criminal case, where the indictment fails to give notice to the defendant of the specific matters intended to be proved against him. Williams *v.* Commonwealth, 91 Penn. St. 493. It must be sufficiently full to disclose the gist of the plaintiffs demand. Gilpin *v.* Howell, 5 Id. 41. It is not, however, the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but merely to identify the items embraced in his claim. Seaman *v.* Low, 4 Bosw. 337. Its office is merely to limit the generality of the complaint, and prevent a surprise on the trial, not to furnish evidence. Drake *v.* Thayer, 5 Rob. 694; Fullerton *v.* Gaylord, 7 Id. 551.