BALDWIN, Justice, was of opinion, that in a cause of this sort, the court ought not to dispense with the regular course of proceedings, by the granting and service of a rule to show cause.

MARSHALL, Ch. J., said, that the grant of a rule to show cause and the service thereof, is a matter in the discretion of the court. The court may, in its discretion, grant an alternative *mandamus*, if it deems it more conducive to public *justice, and to prevent delays. Here, all the parties express themselves ready to proceed in the cause. The district judge waives any formal rule and notice, and wishes no delay; and states his readiness now to show cause. Under such circumstances, all the purposes of a rule to show cause and notice are accomplished, and there is no necessity for directing such a rule and notice. The court, therefore, in my opinion, may properly proceed at once to the hearing of the cause, for the purpose of ascertaining whether a *mandamus* ought or ought not to be awarded. [*572

The other judges concurred in the opinion of the chief justice; and the court directed the motion to come up on the next motion day.

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*THE LIFE AND FIRE INSURANCE COMPANY of NEW YORK *v.* CHRISTOPHER ADAMS.[1] [*573

Mandamus.

In the district court of the United States for the district of Louisiana, the district judge refused to extend a judgment previously entered in the district court, so as to cover other instalments due to the plaintiffs, which became due after it was entered; and to enter a judgment in favor of the plaintiffs, mortgagees, upon a transaction which had been entered into with the mortgagor, in relation to the debt due to the mortgagees, in which it was stipulated, that judgment should be entered for certain instalments to be paid to the plaintiffs, on the non-payment of the same; the district judge not considering the plaintiffs entitled to have the judgment entered, according to the terms of the transaction, without notice to the debtor and his syndics, into whose hands his property had passed under the insolvent law of Louisiana, after the execution of the transaction, and after a judgment for part of the debt had been entered; which was the judgment asked to be extended. The district judge was also required to receive a confession of judgment against the mortgagor and the insolvent, by an agent of the plaintiffs, and whose powers to confess the judgment, the district judge did not consider adequate and legal for the purpose; an execution had been issued for a part of the debt, upon the previous judgment in the district court, and the execution was put into the hands of the marshal of the United States; who, finding the property of the insolvent defendant, the property mortgaged to the plaintiffs in the hands of the syndics of the creditors of the mortgagor, according to the insolvent law of Louisiana, refused to proceed and sell the same, and returned the execution unexecuted. An application was made to the supreme court for a *mandamus*, to command the district judge to enter the judgment required of him, and to receive the confession of the judgment by the agent of the plaintiffs, and award execution thereon; and also to compel him to oblige the marshal to execute the execution in his hands, on the property of the defendant wherever found. The court refused to award a *mandamus*, on any of the grounds, or for any of the purposes stated in the application.

To extend a judgment to subjects not comprehended in it, is to make a new judgment. This court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinions which

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[1] For a prior proceeding in this cause, see 8 Pet. 291.

may be formed in this court, on the suggestions of one of the parties; this court is asked to decide that the merits of the cause are with the plaintiff; and to command the district judge to render judgment in his favor. It is an attempt to introduce the supervisory power of this court into a cause, while depending in an inferior court, and prematurely to decide it; in addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice.

*574] *The supreme court in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court; though the merits of the cause may have been substantially decided; while anything though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of parties; so, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree, and a judgment or decree, entered in pursuance of the *mandamus*, might be afterwards reversed; such a proceeding would subvert our whole system of jurisprudence.

The *mandamus* ordered by this court, 8 Pet. 306, directed the performance of a mere ministerial act.

It is the duty of a marshal of a court of the United States, to execute all process which may be placed in his hands; but he performs this duty at his peril, and under the guidance of law; he must, of course, exercise some judgment in the performance; but should he fail to obey the *exigit* of the writ, without a legal excuse, or should he, in its letter, violate the rights of others, he is liable to the action of the injured party.

In the particular case in which the creditor asks for a *mandamus* to the district judge, to compel the marshal to seize and sell the property mentioned in the writ, that property is no longer in the possession of the debtor against whom the process is directed; but has been transferred, by law, to other persons, who are directed by the same law, in what manner they are to dispose of it. To construe the law, or to declare the extent of its obligation, the questions must be brought before this court in proper form, and in a case in which it can take jurisdiction; the case so far as it is before any judicial tribunal, is depending in the district court of the United States, and perhaps, in a state court in Louisiana. The supreme court of the United States has no original jurisdiction over it; and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform; this court cannot, in such a condition of a case, construe judicially the laws which govern it, nor decide in whom the property is vested; in so doing, it would intrude itself into the management of a case, requiring all the discretion of the district judge, and usurp his powers.

Though the supreme court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out.

MOTION for a *Mandamus* to the District Court for the Eastern District of Louisiana. The case is fully stated in the opinion of the court.

*575] *The case was argued by *Butler*, Attorney-General, and *Jones*, for the petitioners; and by *Clay* and *Porter*, against the *mandamus*.

Butler stated, that the case was before the court upon the following order: That the Honorable Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana (who now here appears by his counsel, Henry Clay and Alexander H. Porter, Esquires, and consents to this rule), show cause, on Saturday next, why this court shall not award a writ of *mandamus*, requiring and commanding him: 1. To issue, or permit to be issued, such an execution as was, in fact, issued at the

instance of the plaintiffs, on or about the 12th of March 1834, on the judgment of the Petitioners *v.* Christopher Adams, in the petition mentioned; being an execution for the amount now due on all the notes secured in the mortgage and transaction executed by said Adams: or, 2. If the said judge shall show sufficient cause, in the opinion of this court, against the issuing of such execution, in the present condition of the said judgment, then, commanding him to amend such judgment, or to permit the same to be amended, by extending the terms thereof, so as to make the same an absolute judgment upon all the notes and sums of money enumerated in the original transaction, and thereupon to issue, or permit to be issued, such execution as above mentioned: or, 3. If, in the opinion of this court, sufficient cause shall be shown by said judge, against the consummation of said judgment, in the mode and form last above stated, commanding him then to consummate the interlocutory part of the same, by entering and signing final judgment or judgments, upon and for all the notes and sums of money mentioned in the transaction aforesaid, as not being then due; and thereupon, to issue, or permit to be issued, such execution, for the whole amount of all the notes as above mentioned; and, 4. In respect to such execution, if any, for the whole amount of the said notes, as may be so ordered to be issued by this court, commanding the said judge to compel, by due process of law, the marshal of the eastern district of Louisiana, duly to execute the same, notwithstanding the cession of the *estate of said Adams, and the appointment of a provisional syndic thereof. But if, in the opinion [*576
of this court, sufficient cause shall be shown by the said judge, against any writ of *mandamus*, requiring him to do, or permit to be done, the matters and things herein-above suggested, in regard to an execution for the whole amount of all the said notes; it is then ordered, that the said judge show cause why a writ of *mandamus* should not issue, as aforesaid, requiring him to compel, by due process of law, the marshal of the eastern district of Louisiana, duly to execute the writ of execution heretofore issued on the said judgment, for the amount of the notes of said Adams, due on the 16th of May 1826 (the date of said transaction), which said execution was dated the 30th of April 1834, and returnable the third Monday of May thereafter, notwithstanding the cession and other matters mentioned in the return of the said marshal to said execution.

Butler said, the general objects of the application for the *mandamus* were: 1. To obtain execution or executions for the whole amount of all the notes given by Christopher Adams to the Life and Fire Insurance Company; or, at all events, for the notes not due when the first judgment was entered. 2. To procure the execution of the process issued by the district court of the United States, upon the property mortgaged; notwithstanding the cession of the property of Adams, under the insolvent laws of Louisiana, and the possession of that property by the syndics, acting by the authority of those laws. These objects can only be obtained by a *mandamus* from this court. As to so much of the application as asks for a *mandamus* to compel the judge to perfect the judgment and award execution, there can be no doubt of the jurisdiction of this court to award it. It is within the principles established by the court, at the last term, in the *Life Insurance Company* v.

Heirs of Nicholas Wilson, 8 Pet. 291. Upon this part of the case, no doubt is therefore entertained of the success of the application.

*577] The rule which has been obtained in this case embraces *several points, and this cause is sustained by the case *Ex parte Bradstreet*, 6 Pet. 774. The first point is founded on the supposition, that in the present state of the record, in the court below, the petitioners are entitled to an execution for the whole amount of the debt due by Adams. The original mortgage imported a confession of judgment, because it was made according to the laws of Louisiana, before a notary. Civil Code of 1825, art. 2231–3. It, therefore, authorized the creditors to sue out an execution "*in via executiva*, without resorting to an action on the mortgage, *in via ordinaria*." Code of Practice, 733, 734 ; Digest of the Civil Code of 1808, 460, art. 40 ; Digest of 1825, 3361 ; 7 Mart. 238 ; 12 Ibid. 671. On these authorities, the petitioners were, without notice to the mortgagor, entitled to execution on the mortgage ; by simply making oath that the debt is due, in whosoever hands the property mortgaged may be. Code of Practice, 61–4. If, therefore, an application had been made by the insurance company to the district judge, for an execution, or writ of seizure and sale, it must have been given ; and if he had not granted it, this court would have compelled him by a *mandamus*. In 1826, such an application was made to Judge Robertson, and was granted by him.

But the petitioners have other securities which render their right to this judgment, and the proceedings upon it, still more certain. The "transaction" of 1826 was a confession of judgment for the whole amount of the debt. The effect of this "transaction" on it, and the seizure, was to allow and authorize the party, as the instalments became due, to take out execution for the amount thereof. All such agreements have the force of law, have the force of things adjudged ; and cannot be revoked or altered by the party who enters into them with his creditors. Civil Code, art. 3038, 3045, 2270. The decree of the district judge, entered on the 7th of March 1834, under the *mandamus* issued at the last term of this court, is in conformity to the rights of the petitioners, thus understood, and covers the whole of their claim. It became the duty of the clerk, after that decree, to enter the judgments for the instalments not due in 1826 ; and this was a mere matter of form. It was a judicial mortgage, and stood like a judgment on a bond,

*578] in a court *of common law, for a debt payable by instalments ; or like a decree in equity on a mortgage payable in like manner. This "transaction" did not extinguish the mortgage. Civil Code of 1825, art. 3374.

The second alternative presented by the petitioners, asks this court, if cause should have been shown against issuing the executions for the whole amount of the debt ; that this court command the amendment of the judgment, or permit its amendment, so as to include in it all the notes ; and issue, or permit execution to issue, for the whole amount of the judgment so amended. The objection to the entry of the judgment, under the power given by Adams, is, that having become insolvent, he has no capacity to confess a judgment. "No standing in judgment," according to the law of Louisiana. To this it is answered, that the rule as to standing in judgment in cases of insolvency, applies only to the plaintiffs. But in this case, the act of confessing judgment is not under a power given since the insolvency

of Adams. It was proposed to be entered, under a power granted in 1826, and is the legitimate exercise of the power; which Adams could not revoke, and on which the laws of Louisiana could not operate retrospectively. If such could be the operation of these laws, they would rescind and annul a solemn contract; and this they are forbidden to do by the constitution of the United States. This would be a retroactive effect upon the vested rights of the creditors of Adams; and impair a security, perfected and, according to the laws of Louisiana, existing and in force when the contract was made. The cession of the property of an insolvent is his own act; in this case, it is a voluntary act of Adams, and this is claimed as vacating his prior contract. When a transaction, such as that in this case, prohibits an appeal from the judgment upon it, or any action in a court to diminish its effects; shall it be in the power of a party who has entered into it, by an application for the benefit of the insolvent law, to defeat it?

It is also urged, that the civil code of Louisiana contains no prohibition of an insolvent defendant to confess a judgment. The allegation that such a defendant has no standing in judgment, is derived from the decision of the courts of Louisiana. *It is a deduction of a state court from the law, and has no binding effect on a court of the United States. The [*579 power of Mr. Eckford to confess the judgment was regularly transferred to Mr. Barker; and as the attorney of Adams, under the substitution held by him, no notice was required to be given to Adams. This was the objection of the district judge to the exercise of the power, and to the confession; but by the law of Louisiana, notice is not necessary. If Adams had deemed notice necessary, he should have stipulated for it in the transaction. The authority of Mr. Barker to confess the judgment, was derived under the assignment of the Life and Fire Insurance Company to the Mercantile Insurance Company. The former company had sold all this debt, and had transferred all the powers they possessed to collect it; and Mr. Barker acted under the assignment by the Life and Fire Insurance Company to him. Mr. Eckford is dead, but it was not a personal trust in him; it was held for the benefit of the insurance company of which he was the presiding officer. The power to confess the judgment was a part of the security, and passed with the transfer. A note to the president of a company for a debt due to the company, may be put in suit by the company, without the aid of the president.

It is admitted, that, on general principles, a *mandamus* ought not to issue to a judge, to act in a particular manner, in a case within his discretion. But this court, at the last term, decided, that the signing of a judgment was a ministerial act; and such only is the proceeding now required. Judge ROBERTSON, in the former case, had applied his judicial mind upon the notes due in 1826, no more than Judge HARPER has done in this. He had done nothing but a mere formal act. He was bound by the law of Louisiana to enter the judgment; and he did enter it. So, in this case, there is an obligation on Judge HARPER to act ministerially, and enter the judgment. Ought not the marshal of the United States for the eastern district of Louisiana, to be compelled, by a *mandamus* directed to the judge of the district court, to execute the process of execution, which was issued upon the judgment entered in that court?

It is the desire of all the parties in this case, to have the *question [*580

upon the duties of the marshal decided in this court. All know, that if the question is not now regularly before the court, it must ultimately come up for decision; and it would be highly beneficial and satisfactory, to have it now disposed of. It is admitted, that consent does not give jurisdiction; but this is given by the judiciary act of 1789, § 13. Congress intended, by "usages of law," the terms in the statute, such as had prevailed in England, and in the states of the Union, which had made these usages the rules of the local tribunals. Such has been the understanding of this court; and the general jurisdiction exercised by the court of king's bench is referred to, for the purpose of ascertaining "what the usages of law" are. So, where the highest tribunals of the states have exercised them, the existence and nature of the usages as proved. The general rules on this subject, are to be found in *Ex parte Bradstreet*, 7 Pet. 635. The court decided in that case, that wherever the legal rights of a party had been violated, and in a case where the discretion of the judge was not involved; this would be corrected by a *mandamus*, if it was not the subject of a writ of error. 7 Pet. 635; 3 Dall. 42; 6 Pet. 216, 223. This is also the rule in the state courts. Although there may be another remedy, the court will proceed, if there will not lie a writ of error. The courts of New York possess and exercise the same jurisdiction as the court of king's bench in England. 5 Wend. 114.

It was the duty of the marshal to execute the process. Judiciary act, § 27. (1 U. S. Stat. 87.) The action against the marshal, by suit, may be an inadequate remedy; and under any circumstances, it is one of great delay and expense. The provisions of the statute of the United States referred to, give the courts full power to enforce the execution of process. If the marshal shows no sufficient cause for disobedience, he is in contempt; and the injured party has a legal right to compulsory process; as where he does not return a writ or bring in the body. In the present case, the marshal received process, commanding him to levy on certain property, described in a petition annexed. He was desired to seize on a particular and specified tract or piece of land, and to sell it. It was not a general
*581] *execution against all the property of the defendant, but an execution *in rem*. It was his duty to proceed under the mandate of the court. If he violates this duty, if he refuses to obey the command of the writ, he may be liable to an action; but this does not exempt him from the power of the court. The marshal of the district court returned a reason for not executing the process, which the court below pronounced sufficient; but if this court shall consider it insufficient, the injured party has a right to a *mandamus*.

As to the sufficiency of the return, it is to be observed, that it contains no evidence of the insolvency of the defendant, but the word of a person who was no more than a provisional syndic. The cession of the property was made on the 9th of March, and the execution issued in April. The cession did not expressly divest the estate of the insolvent; and if this was the effect of the proceeding, it was such by implication only. But what did the cession pass? Nothing more than the interest of Adams, and this could not affect the prior liens. These liens were not to be affected or impaired by the cession. To delay the fruits of the execution, by preventing its operation, would impair it. And the lien of the petitioners was a

special mortgage, which cannot, by the laws of Louisiana, be disregarded. Civil Code, art. 3253–5, 3249, 3273–4, 3277–8, 3297, 3360.

The law of Louisiana, of 1817, did not attempt to operate on securities of this kind. The law of 1826 was passed two years subsequently to the mortgage, and could not affect it. In fact, a suit on the mortgage by the petitioners was then depending; the premises were then in the actual custody of the marshal, and his proceeding against them had been enjoined, but the injunction did not operate as a discharge.

By the application of the mortgagees, in March 1826, the circuit court obtained jurisdiction *in rem*, which has never been lost, and cannot be ousted. 2 Mart. (N. S.) 262; 2 Wheat. 290; 1 Gallis. 168; 4 Johns. Ch. 209. The judgment rendered by Judge ROBERTSON will be considered as signed, if it ought to have been signed. When a plaintiff in an execution, has a clear right to proceed against a specific thing, he may insist on the sale of it, under an execution, without giving an indemnity. It is not *the demand of indemnity which gives a right to it, but there must be a substantial cause for apprehension in the marshal, to authorize [*582 his insisting on it. It is no cause for indemnity, when an officer is asked to sell a tract of land specifically subjected to the process; all that can be sold is the right of the party defendant, in the process; and if this right is not valid, the sale injures no one.

If there is a law of Louisiana which disqualifies a party who has become insolvent from appearing in court, it can have no operation in a court of the United States. Nor can the provisions of the insolvent law of Louisiana, which transfer all proceedings against insolvents in other courts into the parish court, or the district court of the state, operate on proceedings in the courts of the United States. If this could be done, the provisions of the constitution of the United States would be subverted.

Clay, contrà.—The attempt of the petitioners, in this case, is to exonerate themselves and their agent from the general laws of the land; and to obtain for themselves peculiar privileges and advantages, to the injury of others. While the laws of Louisiana are applauded for their justice, their administration is assailed.

It should also be observed, that the counsel for the petitioners has mistaken the tribunal before which the proceedings in cases of insolvents' estates are entertained to any effective action. They commence before the parish judge, who is a notary; before him, the preliminary proceedings are instituted; but they are transferred to the district court of the place, a tribunal of high rank, and the judge of which has the highest talents and character. An inspection of the proceedings in the case of Wilson's Heirs and of Adams, will result in a conviction that they are all regular. Nothing is to be seen in them of any other character, but the attempt of the agent of the petitioners to become the syndic of the insolvent; and after being disappointed in this, he returns to the court of the United States, and endeavors to counteract and overleap all those proceedings.

A great and important general principle is to be examined in this case. What are the powers of the courts of the United *States in cases between citizens of different states. Certainly, in these cases, the [*583 law is the same for all parties. The law which is applied in the state courts, in cases between their own citizens, will be applied by the courts of the

Union, in suits brought into those courts. The local and state laws will be enforced in both; the same rules of justice will be maintained; for the establishment of courts of the United States was not to authorize the administration of different laws, but was, because it was considered, that in the national tribunals, greater confidence in their impartiality would prevail among suitors proceeding against citizens of a state to which they did not belong. If the purpose of establishing national courts had been other than these, it would not have been endured by any state in the Union. To apply a different, or a higher rate of justice, in the case of a non-resident, would not be permitted. If the law regulating the proceedings of syndics in insolvent cases, has established rights binding on the citizens of Louisiana, that law must be applied to citizens of other states, unless it shall interfere with some provision in the constitution of the United States.

The insolvent law of Louisiana is in effect a bankrupt law. Although, under the acts of 1817 and 1823, the person of the debtor is not exempt from the power of the creditor, yet, by applying to the civil court, and having the signatures of two-thirds of his creditors in favor of the purpose, he may, by an order of the court, be exempt in his person from his past debts. It is then a bankrupt system, binding on the citizens of Louisiana, and on those of the other states. Various privileges are secured in favor of creditors by the laws of Louisiana, and preferences are given which cannot be disturbed. The highest security on real estate, is for the unpaid purchase-money; that of a vendor, on an estate sold by him. 10 Mart. 448.

There are two modes of proceeding under the insolvent laws of Louisiana; one voluntary, the other compulsory. But when the cession under a voluntary subjection to the law is accepted by the judge, the cases, and proceedings in them, are afterwards the same. Adams made a voluntary application, but the judge accepted the cession, and all the provisions of the laws
*584] *were brought into full operation. It could not afterwards be withdrawn. This case, referred to (10 Mart. 448, shows), that a mortgage creditor must come in and receive payment from the syndics, notwithstanding his mortgage. All the estate of the insolvent is divested; impliedly, by the act of 1817; expressly, by act of 1823. That case shows, that a creditor having a lien cannot take the property and sell it, but must leave it to the administration of the syndics, and take payment of this lien through them.

Marshall, Ch. J., asked, if there is any law which secures the rights of mortgage-creditors.

Clay.—The syndics act to prevent a scramble among the creditors for the effects of the debtor, and to take the property of the insolvent out of their hands. They take the property, make a tableau of distribution, regarding the lien-creditors according to their respective situations, giving each his particular rights in the distribution; and an equal distribution is made of the residue only, among creditors of equal condition. No matter what the lien or preference may be, it is upheld and respected in this distribution. Cited, the 35th section of the Act of 1817. By the law, if the mortgage-creditors insist on a sale, it must be made. There is then no difference as to the rights of those creditors, under the general and insolvent laws. There is, however, a difference in the result; as, if the property

is sold by the syndics, there will often remain a balance in favor of the general creditors; if disposed of by the syndics, it is not permitted to be sold for less than its appraised value; but if sold by the marshal, no such restriction prevails. 1 Mart. (N. S.) 495. The only change, then, made in the relation of debtor and creditor, is in the remedy, or rather in the mode of using it. The security of the lien-creditor is not impaired. It is not denied, that state legislatures have powers to vary the remedy, but not to affect rights.

In the case before the court, the act of 1817 was in force, before this mortgage was given. The law in force, at the *time of a contract, is incorporated in it, and the mortgage was taken with the knowledge that, in the event of the insolvency of Adams, the property pledged would be administered according to the insolvent law of Louisiana; and notwithstanding the lien, the rights of his other creditors would be regarded. What was the decision of this court at the last term? The decision was no more than that the judgment should be signed; merely that a ministerial act should be performed. The court had no right to look at the consequences of that act, nor did it. The question is then presented, what is this judgment which was signed by Judge HARPER? Was it, or was it not, a judgment for the subsequent instalments? A slight reference to the terms of the judgment, as it stood before Judge ROBERTSON, and as, under the mandate of this court, it was perfected, before the present district judge, will satisfy this court, that it was absolute for the notes due in 1826, and prospective, as to the notes to become due, and as they became due, a judgment for the amount was to be entered, not was entered. It was not in the power of the judge to go beyond what was due. [*585

It is contended for the petitioners, that the transaction is the law between the parties; admit this, but yet it was not a judgment, it only gave a right to a judgment. It is the highest evidence of their rights; but parties cannot erect courts. The provision is, that judgment shall be given as the notes become due. If the transaction is the law of the parties, look at it. It declares, that Adams shall go into court, from time to time, and confess judgment, and in his default, his successors or attorneys shall do it. This shows that judgment was not to be given without the action of the party. From a part of the contract, it appears, that judgment was to be entered as the instalments became due. The party cannot be allowed to postpone indefinitely the entry of the judgments. Judge ROBERTSON directs, that whenever the sums become due, the judgment on each sum shall be entered; but the party has not done this; he waited five years, and then he came into court and asked for a judgment for the whole sum. This case is not like a bond with a penalty, the debt payable by instalments. In such a case, the judgment is given for the whole penalty, according to the terms of the bond. *Before the statute of William III., the party to a bond was bound for the penalty, and could only obtain relief, in equity, on the payment of the sum actually due. [*586

Could an action of debt be maintained to recover the sum, prospectively to become due, by the judgment of Judge ROBERTSON? It could not; for it was only a promise that judgment should be given, and no suit could be instituted for more than the actual amount of the judgment in 1826. The law of Louisiana is, that the party asking a judgment on a warrant of

attorney, must make an affidavit of the debt, and that it is unpaid. This regulation was not complied with, in the case before the court; the affidavit does not state that the debt is due and unpaid. Law of Louisiana respecting affidavits, Old Civil code, 460, art. 1; 10 Mart. 222, decides this.

It has been suggested, that the district judge should have amended the judgment, so as to include the additional sums. There was nothing to amend by. The party might entitle himself to the judgment for those sums, by complying with the forms required by the law, and the practice of the court. No case was made out before the district judge; and the time which had elapsed since the first application for judgment, from 1826 to 1834, was properly to be inquired into and explained. The application was to give the judgment a retroactive effect; and this was not warranted by the transaction, or by the law. If the rights of the parties are to be maintained only by the transaction, the modes of proceeding which it prescribes excludes others.

Supposing the judgment could not be amended or extended, did the representative of the petitioners, Mr. Barker, present himself before the district court, with powers authorizing him to act. The power to confess judgment could not be conferred by any warrant, on the corporation. A corporation exists by its law of creation, and there is no authority in such a body to appoint an attorney in fact. In this case, Adams gave a power to Mr. Eckford, not to the corporation; but the power under which Mr. Barker claimed to act was not derived under Mr. Eckford. It is a general power to collect debts, not given by the successors of Mr. Eckford, but derived from
*587] the Mercantile *Insurance Company, who were the transferees of the debts due by Adams to the Life and Fire Insurance Company.

It is also to be considered, that all the parties, the syndics as well as Adams, should have had notice. Adams had no existence as to this proceeding; his insolvency prevented his interference; the effect of the judgment on the rights of his creditors, represented by the syndics, was to be considered; and notice of the motion for judgment should have been given to them. This the district judge thought necessary, and he thought correctly. It has been decided in Louisiana (12 Mart. 695), that entering a judgment on a power to confess one, is a judicial action. The whole matter upon which the judgment was to be entered, was to be examined. The power of attorney, the existence of the debt, the terms of the affidavit; all these were to be looked to. The judge would be unworthy of his situation, if, without citing the parties interested, or giving them an opportunity to appear, he had proceeded, as he was asked to do by the agent of the assignees of the petitioners.

It is not necessary to decide, whether this case can be taken out of the federal court, and placed in the district court of Louisiana, for the action of that court on the claims of the petitioners. The constitutional provision is sufficiently satisfied, when suit may be brought against the syndics. By the insolvent law, the syndics might be sued; and this right to sue them was well known. Suits against syndics have been brought in the circuit court of the United States. The case of *Field and others* v. *United States*, before this court at last term, was a suit against syndics (*ante*, p. 182). It is admitted, that there is a difficulty, when a suit has been commenced in a federal court, in transferring it, in consequence of the insolvency of the defendant,

into a state court. This may be productive of differences between the state courts and those of the Union ; but it is one of those difficulties which result from our peculiar system of state and federal governments ; and it will be arrested and prevented doing evil, as many others have been, by the presiding spirit which has so often rescued the government of the United States from embarrassment.

It has been stated to be strange, that after his insolvency, *Adams could not confess a judgment. This is the law, and it is the same in [*588 England, in bankruptcy. The law of Louisiana takes away this faculty, and all the rights of the insolvent are transferred to the syndics. The petitioners were not entitled to a new judgment, nor to an extension of that already entered, for they had not brought themselves within the rules of the court or the law on the subject. Will this court substitute themselves for the inferior court, and say this is a case for a *mandamus?* A *mandamus*, properly issued, operates mechanically on a judge. It operates physically, not on the mind of the officer. In the case of *United States* v. *Lawrence*, this court refused to usurp the power of the judge to decide. Will the court transfer themselves to Louisiana, and say that they will compel the entry of the judgment? If this cannot be done, there remains the question, whether this court will undertake, in this state of things, on a petition for a *mandamus*, to set aside the laws of Louisiana, and say that a party who has placed himself under the insolvent laws of that state, shall be subjected to the process of the court of the United States? If the district judge is to compel the marshal to execute the process, by selling the estate, this will be the case.

The powers of a judge are judicial and ministerial. So are those of a marshal. These are judicial, when he summons a jury to decide whether property is liable to be seized under an execution. What is the action required from the judge, when he is asked to attach the marshal? He is asked to decide one of the most difficult questions of conflicting laws, that can be presented ; whether the law of Louisiana shall give place to the law of the United States? This is a judicial question of the highest order ; and this court is called upon to take it from the judge, and oblige him to compel the execution of the process by the marshal.

Porter, against the motion.—The power given by Adams to confess the judgment was to be exercised, in his default, but it does not appear that he was called upon to enter it. The execution of the power, without a previous demand on Adams, or notice to him, was unauthorized and void. *The second objection to the execution of the power is, that it was [*589 given to Eckford, who is dead, and the agent of the plaintiffs derives no power from him ; Adams the principal has lost his standing in judgment, by his insolvency, and no one could act as his agent. An agent, Mr. Barker, who claims to be the agent of Adams, can exercise no powers which his principal could not exercise. By the decisions of the courts of Louisiana, a party cannot send a confession of a judgment into court and have it entered. It must be submitted to the judge for his consideration, and he, after an examination, must sign it. Without his signature, it is not a judgment. He acts by his judicial functions, and is not a mere ministerial agent.

The questions involved in this case are of great importance; and their decision by this court is looked for with great anxiety.

When the execution against the property of Adams was put into the hands of the marshal, the property was in the hands of the syndics, by the cession made under the insolvent law. After discussion and examination in the district court, it was held, that the plaintiffs were to go into the state court for payment of their debt, under the proceedings of that court. This was not a transfer of the case from the court of the United States to the state court: but it was only deciding, that as the property was in the state court, there the plaintiffs should obtain payment of their lien, which was not impaired by any proceedings in the state court. If this court shall say, that the marshal shall take the property which has passed from an insolvent into the hands of syndics for distribution, it will subject the marshal to great difficulties. Cited, 2 Mart. 337.

The statute of Louisiana of 1817 regulates the cession of goods and property of an insolvent debtor, and the act of 1826 (Laws of Louisiana 136) enacted, that the cession should be made immediately on the application of the insolvent for the benefit of the laws. Shall not Louisiana be permitted to say that property within her own limits, shall by her laws pass to creditors by cession; and that the judgments of the courts of the United States shall not interfere? If, by the laws referred to, the property
*590] of insolvents cannot be *placed in the hands of the syndics, for administration, and this without affecting the prior liens of a creditor; no laws for the transfer of the property of creditors can be effectual. The proceedings in the district court of New Orleans show, that Mr Barker, representing the petitioners, endeavored to obtain the appointment of syndics; and disappointed in this purpose, he turned round, and seeks to set the law under which he was desirous of acting, aside. He thus became a party to those proceedings, and was bound by them. This point has been settled by this court in the case of *Clay* v. *Smith*, 3 Pet. 411.

Jones, in reply, contended, that the constitution and laws of the United States, had guarantied to citizens of the United States the right to resort to the courts of the United States for the recovery of debts due to them; and by no state laws, or state proceedings, could these rights be interfered with. The remedy for a wrong in the courts of the United States, is a part of the privilege secured by the constitution; and the motives which induced the introduction of the provision into the constitution, establishes the exclusive power of the federal tribunals in such cases. It was considered as securing an impartial administration of justice; and the confidence which such a provision would necessarily produce, was one of the means by which the permanency of the government would be established.

In the case before the court, the petitioners had a mortgage on the property of their debtor; and it was one which, as it was executed before a notary, entitled the creditor to proceed, without notice to the debtor, by the *via executiva*, under the laws of Louisiana, and seize and sell the property, without notice to the debtor. Upon the issuing of this process, the creditors were interfered with by an injunction; and after this, the "transaction" was entered into which has been so frequently referred to, and is fully before the court.

The entering into this transaction was not an abandonment of the rights of the petitioners ; it was no more than a suspension of their exercise, and the lien of the judgment and execution was not removed, but proceedings under it were postponed for the period stated in the transaction. When a creditor *takes a judgment in addition to his prior security, the security is not avoided. The transaction, and the judgment entered [*591 in 1826, were a judicial lien on the property of the debtor. They authorized a sale of the property, as soon as the period arrived which was fixed by the agreements of the parties, and were a grant of execution by a decree ; and this judgment, and the rights of the parties under it, cannot be disturbed. No inquiry can be made into the validity or legality of the judgment, in any other mode than by writ of error. All the process to enforce it, is given by the judgment. The transaction is equivalent to a decree of foreclosure. If the judgment upon it was interlocutory, was not the district judge bound to make it final?

Mr. Jones also contended, that there was no law of the state which deprived insolvents of their right to appear in a court of justice ; certainly, no law which prevented this in a court of the United States. The effect of such a rule would be, to take from the courts of the United States their jurisdiction over persons within reach of their process. Such a law would be against the constitution of the United States.

He also contended, that the provisional syndic (and no other syndic existed when the execution was in the hands of the marshal) is but a depositary of the property of the insolvent. The syndic has no rights in the property, he has only an equity of redemption, and may divest the rights of prior lien-creditors, only by paying off the incumbrances. In this view of the case, the action required of the district judge, when he was called upon to sign the judgment for the residue of the notes, was only to be ministerial ; the parties had previously adjusted all other questions, and the form of an entry of judgment, according to the rules of the court, was only required.

The powers held by Mr. Barker, were full and sufficient for him to confess the judgment. He acted under the authority given by Adams to Mr. Eckford, which extended to his successor, the president of the Life and Fire Insurance Company, who took his place after him. But if this was not sufficient, his authority under those who had a transfer of the debt due *by Adams, under the Mercantile Insurance Company, was com- [*592 plete, and was ample.

Marshall, Ch. J., delivered the opinion of the court.—The petition for a *mandamus* states, among other things, that Christopher Adams, of Iberville, in Louisiana, on the 16th day of January 1824, at New Orleans, executed and acknowledged before a notary-public, a mortgage of a plantation, called the Belle Plantation, in Iberville, with seventy slaves, for securing to the petitioners divers sums of money, amounting to $32,522.50; at different periods, the last payment to fall due on the 18th day of January 1829, all bearing interest at the rate of seven per cent. per annum. At the time of executing the said mortgage, sundry notes were also given for the payment of the same sums of money.

In consequence of the failure of the said Adams to pay any part of the

said debt, application was made to the honorable Thomas B. Robertson, then judge of the district court of the United States for the eastern district of Louisiana, for an order of seizure and sale, who granted the same, in the following words: "Let the mortgaged premises, set forth and stated in the plaintiff's petition, be seized and sold, as therein prayed for, and in the manner directed by law, subject to the payment of the debts of the plaintiff. Thomas B. Robertson, Judge U. S. Eastern District of Louisiana." John Nicholson, the marshal, who seized the mortgaged property, and advertised the same for sale, was stopped by a writ of injunction, on which the following return was made: "Received this writ of injunction, this 18th of March 1886, and served a copy thereof, and of plaintiff's petition, on Ripley & Conrad; on same day, released the property, at suit of Life and Fire Insurance Company of New York against Christopher Adams; and returned into court, the 20th of March, instant."

On the 2d day of May 1826, the petitioners entered into a transaction with the said Christopher Adams, before a notary-public, in which it was stipulated, that the injunction be dissolved; and in which the defendant agreed to confess judgment, and did confess judgment, on all the notes then due. *He further stipulated to confess judgment on the residue of the notes, in the deed of mortgage mentioned, as they should respectively become due, "and in default of such confession of judgment, the said Christopher Adams did, by the said transaction, constitute and appoint Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, his attorney in fact, and irrevocable, in his name and stead, to appear in said court, and cause judgment to be entered up against him, the said Adams, for each and every of said notes, with interest, as aforesaid, whenever the same shall arrive at maturity, as aforesaid." And the said Adams further gave to the said Henry Eckford, or to his successor in office for the time being, attorney as aforesaid, full power of substitution in the premises. And the said Life and Fire Insurance Company, in consideration of such confession of judgment, and preserving all their liens, mortgages and preferences in and over the mortgaged premises, agreed to stay execution until the 18th day of January 1829, when the last note would arrive at maturity. It was further agreed, that this transaction should be entered upon the records of the court of the United States for the eastern district of Louisiana, as a decree of said court, and shall have all the force and effect as though it were entered up in open court.

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In pursuance of this transaction, a judgment was recorded in the said district court, on the 18th of May 1826; which the judge died without signing. The petitioners then transferred their interest in the said debt to Josiah Barker, in trust for the Mercantile Insurance Company of New York, with power to use their names in the collection thereof. In the instrument of transfer, the said Life and Fire Insurance Company constituted Josiah Barker, his executors, administrators and assigns, their true and lawful attorney and attorneys irrevocable, in their names, but to and for the use of the said Mercantile Insurance Company of New York, to pursue and enforce in all courts and places whatever, the recovery and payment of the said money.

The honorable Samuel H. Harper, the successor of the honorable Thomas B. Robertson, having refused to complete the said judgment of his predecessor, by signing it; a **mandamus* was directed by this court,

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ordering him to do so, in compliance with which the said judgment was signed.

The judgment is in these words: "Life and Fire Insurance Company of New York *v.* Christopher Adams. In this case, the plaintiffs having filed in this court a transaction, &c., it is, therefore, ordered, adjudged and decreed, that in pursuance of said transaction, the injunction in this case shall be dissolved; and it is further ordered, adjudged and decreed, that judgment be entered up in favor of the plaintiff, in pursuance of said transaction, for all the notes therein specified, which have become due and payable, with seven per cent. interest thereon, &c., to wit, the sum of $1500, &c. It is further ordered, adjudged and decreed, in pursuance of the transaction aforesaid, that whenever any of the notes mentioned in the said transaction as not yet arrived at maturity, shall become due and payable, that the judgment shall be entered up for the plaintiffs upon all and every of the said notes, as they arrive at maturity, &c. It is further ordered, adjudged and decreed, that there shall be a stay of execution, &c., until the 18th day of January 1829; and that if the amount of the judgment in this suit is not then paid, &c., that the lands, slaves and movable property described in the mortgage mentioned in the plaintiff's petition, shall be sold according to law, to satisfy the judgment in the premises."

Application was, at the same time, made to the district court, to enter a further judgment for the notes which had become due subsequent to the 16th day of May 1826, which was refused. The petitioners insisted on their right to require a judgment for the whole sum, under the irrevocable power given to confess it; but the judge declared, that, without notice to the defendants, he would permit no further judgment to be entered.

The petition states at large the different views entertained by the judge and the petitioners on the application. At length the following rule was entered: "Life and Fire Insurance Company of New York *v.* Christopher Adams. On motion of George Eustis, counsel for the plaintiffs, on *filing all the notes referred to in the transaction on file, it is ordered, [*595 in pursuance of the *mandamus* of the supreme court of the United States, requiring the honorable judge of this court to sign the judgment rendered in the premises, and to order execution to issue, that execution do issue for the whole amount of the judgment." Under this rule, an execution was issued for the whole sum claimed on all the notes, without any direction that it should be first levied on the mortgaged property. On this account, the marshal, by order of the plaintiff's attorney, returned it unexecuted, and a new execution was demanded.

In consequence of the refusal of Judge Harper to enter judgment for the residue of the notes, Josiah Barker caused a paper to be read in open court, in which, as successor to, and as having entire control over, the said notes, and in virtue of full and irrevocable powers from the Life and Fire Insurance Company of New York, he did, in behalf of the defendant, Christopher Adams, by virtue of the compromise entered into between him and Josiah Barker, agent for the said Life and Fire Insurance Company, on the 2d of May 1826, confirmed by decree of this court, confess judgment on all the said notes; which confession he requested might be entered on the clerk's minutes. The judge refused to allow the entry, without notice to the opposite party; but offered to grant a rule requiring the defendants

to show cause why the judgment should not be entered. This rule being declined, the judge permitted the confession to be filed, subject to all legal exceptions. An execution for the whole sum was thereupon issued, which was accompanied by a letter from Josiah Barker to the marshal, requesting him to give notice to Christopher Adams and to Nathaniel Cox, the provisional syndic of the estate of the said Adams, who had become insolvent, that he, the marshal, considered himself in possession of the property in virtue of a former seizure, and should proceed to sell the same; should the marshal refuse to do this, the marshal was required to seize the property and to sell it, by virtue of the execution then in his hands. Supposing, from the proceedings of the court in a similar case, in which also he was counsel, that the execution issued in this case would be quashed, and the said marshal having refused to proceed without indemnity against the estate of
*596] *Christopher Adams, which had been surrendered under the insolvent law of Louisiana, the said Josiah Barker requested the marshal to return this second execution.

On the 30th of April 1834, a new execution was issued on the judgment of the 18th of May 1826, to be levied on the mortgaged property, in whosoever hands it might be found. The marshal refused to execute this writ, further than by giving notice thereof to Nathaniel Cox, the provisional syndic for the creditors of Christopher Adams; whereupon, a petition was presented to the honorable Samuel H. Harper, praying the interposition of the court, by commanding the marshal to sell the mortgaged premises, without requiring any bond of indemnity; or by granting a rule requiring the marshal to show cause why he should not be attached for contempt of the court, in disobeying or refusing to execute its mandate. The rule was granted before the time for returning the execution had elapsed, and was therefore discharged, whereupon the marshal made the following return:

"May 1st, 1834. Gave notice of the seizure of Nathaniel Cox, Esquire, provisional syndic of C. Adams, the defendant, the property having been previously surrendered by him to his creditors, and accepted by the court of the fourth judicial district of the state of Louisiana, and placed under the charge and control of N. Cox, Esquire, as provisional syndic thereof. The further execution of this writ could not be effected. Returned, 19th of May 1834. John Nicholson, U. S. Marshal."

On the succeeding day, a new rule was awarded against the marshal, who appeared on the return-day thereof, and showed for cause against it, his return on the writ, as recited above. After solemn argument, the judge determined the return of the marshal, that he found the property in the hands of others, was *primâ facie* evidence that it belonged to others; and that he should not require the marshal to take the responsibility of enforcing the execution, without indemnity.

*597] On the 27th of May, application was made to the judge, to *sign the confession of judgment, filed by Josiah Barker in the name of Christopher Adams, on the 10th of March, subject to all legal exceptions, due notice of the filing thereof having been served on Christopher Adams and Nathaniel Cox; but the judge refused to sign the same, saying that it was not a judgment of the court.

The petitioners, conceiving that they are entitled to have the execution, issued on the 30th of April 1834, enforced against the mortgaged premises

by the marshal of the United States, and to have a further execution for the balance of their aforesaid claim, either by the authority of the aforesaid *mandamus*, or by having the aforesaid confession of the 10th of March last signed; or by virtue of the original order of seizure and sale, or otherwise; pray a further writ of *mandamus*, directed to Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana; and if necessary, also to John Nicholson, marshal of the said court; or otherwise direct such a course of proceeding as will secure the due execution of the *mandamus* heretofore granted by this court, and afford them such other relief as they may be entitled to in the premises.

Judge Harper appeared by his counsel, and showed for cause against issuing the *mandamus* for which application was made: That in obedience to a *mandamus* issued by the supreme court of the United States, he did, on the 7th day of March 1834, sign a judgment entered in this cause by his predecessor in office, on the 18th day of May 1826, and directed that execution should issue thereon. This was a specific judgment for the amount of all the notes which had then become due, and which were enumerated in a transaction between the parties then committed to record. It was stipulated in this act of compromise, on which the judgment was entered, that the defendant, Christopher Adams, should confess judgment on each of the remaining notes as it should fall due; and in default of such confession, he consented that Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, should appear in court and cause judgment to be entered against the defendant. No confession of judgment has been entered, nor has any judgment been rendered on any one of the said notes. When the *judgment of the 18th of May 1826, [*598
was signed, Josiah Barker, agent for the plaintiffs, offered to confess judgment in the name and on behalf of Christopher Adams, for the residue of the notes. The court refused to receive this confession, for the following reasons: The plaintiffs, instead of causing judgment to be confessed, in conformity with the stipulation contained in the transaction, appear to have abandoned their original suit. No step was taken until the 13th of April 1829, after all the notes had become due, when a new suit was instituted by the Mercantile Insurance Company of New York, to whom the claim had been assigned, to recover the whole amount due, including the judgment of the 18th of May 1826. The defendant filed an answer, charging the plaintiffs, among other things, with usury; upon which they, on the 12th of January 1831, suffered a nonsuit; when, after this proceeding, the agent for the plaintiffs offered to confess judgment in the name of the defendant, no notice of this intended confession had been given to the defendant, and a rule upon him to show cause against the judgment, was declined by the plaintiffs. Had the person offering to confess judgment even been the regularly-constituted attorney of the defendant, there would have been, under all the circumstances of the case, some objection to receiving his confession, without notice. But he was not the regular attorney. In the transaction of the 2d of May 1826, Christopher Adams stipulated to confess judgment on all the notes as they should become due," and in default of such confession, he constituted and appointed Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, his attorney in fact, and irrevocable, in his name and stead, to appear in court and cause

judgment to be entered up," &c. ; and the said Adams further gave to the said Henry Eckford, president as aforesaid, or to his successor in office for the time being, attorney as aforesaid, full power of substitution in the premises, &c. Josiah Barker is not the substitute of Henry Eckford, nor his successor in office for the time being. The permission to file this paper, subject to all legal exceptions, did not convert it into a confession of judgment by the defendant, or his attorney, nor could the mere notice that such a paper was filed, add to its efficacy, there being no day fixed for contesting it. The transfer of the claim to Josiah Barker, *in trust for the Mercantile Company of New York, does not substitute him for Henry Eckford, or his successor in office for the time being. If either the mortgage acknowledged before the notary, or the transaction of the 22d May 1826, had itself the force of a judgment, no *mandamus* would be required, to order the rendition of a new judgment ; but these documents require judicial action to make them operative. It is a circumstance which ought to suggest, and which has suggested, circumspection in the proceedings to be taken in this cause, that though the judgment was recorded in May 1826, and Judge Robertson died late in 1828, and held several courts in the mean time, yet he never signed this judgment ; nor was any application made to him for judgment on the notes which afterwards fell due, during his life, though they amounted to six or seven.

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In showing cause against a *mandamus* to compel the marshal to levy an execution on the mortgaged property, wherever it may be found, Judge Harper observes, that after the emanation of the execution, Josiah Barker addressed a petition to the court, stating many facts connected with the execution, and complaining that the marshal refused to enforce it, without being indemnified, and praying for a rule requiring him to show cause why he should not be attached for contempt in disobeying the mandate of the court. The rule was granted. The marshal returned, "that he had given notice of seizure to Nathaniel Cox, provisional syndic of Christopher Adams, the defendant ; the property having been previously surrendered by him to his creditors, and accepted by the court of the fourth judicial district of the state of Louisiana, and placed under the charge and control of Nathaniel Cox, as provisional syndic thereof ; the further execution of the writ could not be effected." Accompanying this return was the following letter :

"John Nicholson, Esq., marshal. Dear sir:—As counsel for N. Cox, syndic of the creditors of Christopher Adams, I am authorized to notify you, that any attempt to seize the property in his hands, at the suit of the *Life and Fire Insurance Company, will be resisted, and that you will proceed therein at your peril. Respectfully, G. Strawbridge."

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The court was restrained from entering into any inquiry in whom the property was vested, by the considerations, that the creditors who claimed it were not before the court, and could not be brought before it, on a rule upon the marshal. The trustee for the Mercantile Company of New York contended, that the property still remained in possession of the marshal, under the order of seizure granted by Judge Robertson ; but the court was of opinion, that such presumption would be extravagant, inasmuch as the injunction continued in force for more than eight years ; for, though dissolved in terms by the judgment of 1826, that judgment, by the laws of Louisiana, had no force, until it was signed in pursuance of the *mandamus*

of the supreme court. In addition to this, it appears, from the return of the marshal, that the property was released on receiving the injunction.

The judge also conceived, that by a fair construction of the transaction of the 2d of May 1826, the plaintiffs must be understood to have agreed to discontinue their suit, in consideration of the dissolution of the injunction; as a prosecution of the suit, after the dissolution of the injunction, was not within the intention of the parties. He was also of opinion, that the property being found in possession of a third party, is *primâ facie* evidence that it belonged to that third party; but that this was a question which could not be investigated on a rule against the marshal, in the absence of the party interested. He was also of opinion, that the marshal, not being indemnified, and proceeding at his peril, ought to be governed by his own judgment; and would make himself personally liable to the creditors of Adams, if they should thereafter establish their right to the property ceded to them. This liability has been established by the supreme court of Louisiana against this very marshal, in which the court said, "that if acting in his capacity as marshal, he wrongs a citizen of a state, he is individually answerable, and in her courts." In another case, judgment was given against the same marshal, for the amount *of money made by him on an execution, issued out of the district court of the United States, [*601 under which he had seized and sold property in the hands of the syndic of the debtor. The judge added, that he had never thought it his duty to compel the officers of the court to perform acts for the benefit of others, which might work their own ruin.

Counsel have given more precision to the general application of the petitioners, by presenting five separate and alternative prayers for a *mandamus* commanding a particular thing; each application founded on the rejection of that which precedes it. The first is, for such an execution as that which was issued on the 12th of March 1834, at the instance of the plaintiffs, being an execution for the amount of all the notes secured by the mortgage and transaction in the petition mentioned; to be levied on the mortgaged property; but if not sufficient, then on the property generally of the said Christopher Adams, whereof he was owner on the 18th day of May 1826, into whose hands soever the same may have come. The applicant does not inform us, whether the execution is to be issued on the judgment entered by Judge Robertson and signed by Judge Harper; or on the confession made by Josiah Barker, in the name of Christopher Adams, on the 10th day of March 1834.

Judge Harper has shown for cause against an execution for the whole debt, on the judgment entered by Judge Robertson on the 18th day of May 1826, that the whole debt was not then due; and that the judgment, in its terms, comprehends that portion of the debt only which was actually due. He shows for cause against any execution founded on the paper delivered by Josiah Barker, on the 10th day of March 1834, that Josiah Barker exhibited no power of attorney from Christopher Adams, and showed no right to personate him. That the court did not receive his confession as the confession of Christopher Adams, nor enter any judgment upon it. Of consequence, that act cannot warrant an execution of any description. The record, we think, verifies these statements.

If the cause shown against a *mandamus* to issue such a writ of execu-

tion as is asked, or the judgment in its present state be deemed sufficient, then the petitioners ask for a *mandamus* *commanding the judge *602] to amend such judgment; by extending the terms thereof, so as to make the same absolute upon all the notes and sums of money enumerated in the original transaction, &c. To extend the judgment to subjects not comprehended within it, is to make a new judgment. This court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court, on the suggestions of one of the parties. This court is asked to decide, that the merits of the cause are with the plaintiff; and to command the district court to render judgment in his favor. It is an attempt to introduce the supervising power of this court into a cause, while depending in an inferior court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system, cannot escape notice. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court. Though the merits of the cause may have been substantially decided, while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of the parties. So, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree; and a judgment or decree entered in pursuance of a *mandamus* might be afterwards reversed. Such a procedure would subvert our whole system of jurisprudence. The *mandamus* ordered at the last term (8 Pet. 291), directed the performance of a mere ministerial act. In delivering its opinion, the court said, "on a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." To order the district court to give *judgment for the *603] plaintiffs, is "to direct in what manner its discretion shall be exercised." Sufficient cause is shown against granting this prayer.

In the event of this prayer being rejected, the court is asked to award a *mandamus* to the district judge, commanding him to consummate the interlocutory part of the said judgment, by entering and signing final judgment upon and for all the notes and sums of money mentioned in the transaction aforesaid as not being then due; and thereupon to issue such execution, &c. This prayer does not vary substantially from its predecessor. It requires the same interference of the supreme court in the proceedings of the inferior court while in progress; and the same direction how its discretion shall be exercised. It requires a direction to the district court to give judgment for one of the parties, and prescribes the party for which it shall be given. The cause shown against granting the preceding prayer applies equally to this.

Should this last prayer also be rejected, the court is next asked to award a *mandamus*, commanding the district judge to compel the marshal duly to

execute such process as may be issued ; notwithstanding the cession of the estate of the said Adams, and the appointment of a provisional syndic thereof. It is the duty of the marshal, to execute all process which may be placed in his hands ; but he performs this duty at his peril, and under the guidance of law. He must, of course, exercise some judgment in its performance. Should he fail to obey the *exigit* of the writ, without a legal excuse ; or should he, in obeying its letter, violate the rights of others, he is liable to the action of the injured party. In the particular case in which the creditor asks for a *mandamus* to the district judge, to compel the officer to seize and sell the property mentioned in the writ, that property is no longer in possession of the debtor against whom the process is directed ; but has been transferred, by law, to other persons, who are directed, by the same law, in what manner they are to dispose of it. To construe this law, or to declare the extent of its obligation, the questions must be brought before the court in proper form, and in a case in which it can take jurisdiction. This case, so far as it is before any judicial tribunal, is depending in a district court of the United States, and *perhaps, in a state court of Louisiana. The supreme court of the United States has no original [*604 jurisdiction over it, and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform. This court cannot, in the present condition of the case, construe judicially the laws which govern it, nor decide in whom the property is vested. In so doing, it would intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers. The *mandamus* cannot be granted as prayed.

The fifth prayer asks a *mandamus* requiring the judge to compel the marshal to execute the writ of execution heretofore issued, on the 30th of April 1834, on the said judgment, for the amount of the notes of the said Adams, due on the 16th of May 1826, notwithstanding the cession and other matters mentioned by the marshal in the return thereof. This prayer differs from that which preceded it only in the amount for which the execution is to issue. So far as respects the interference of the supreme court in construing laws not regularly before it, and controlling the discretion of the district court, they stand on precisely the same principle. The objections, therefore, which were stated to granting the fourth prayer, apply equally to the fifth.

The court cannot grant a *mandamus* ordering the district court to perform any one of the specific acts which have been stated in the petition ; or in the more particular application contained in the statement presented by counsel.

Though the supreme court will not order an inferior tribunal to render judgment for or against either party ; it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was depending, should, perseveringly, refuse to terminate the cause ; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment : but, to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out. In *Ex parte Bradstreet*, 8 Pet. 590, this court said : "We have only to say, that a judge must

exercise his discretion in those intermediate proceedings which take place *between the institution and trial of a suit; and if, in the performance of this duty, he acts oppressively, it is not to this court that application is to be made. A *mandamus*, or rule to show cause, is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspended, for the purpose of considering a motion which has been made for a new trial. The verdict was given at the last term; and we understand, it is not unusual, in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that Judge Conkling should take time till the next term, to decide on the motion for a new trial."

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In the case now under consideration, no application is made for a *mandamus* directing the court generally to proceed to judgment. The petitioners require a *mandamus* ordering the judge to render a specific judgment in their favor. It is not even shown, that the case is in a condition for a final judgment; nor is it shown, that the judge is unwilling to render one. The contrary may rather be inferred, from his readiness to grant a rule on the defendant, requiring him to show cause why judgment should not be rendered. In a case of such long standing, where it is more than possible, the defendant might not be in court; where judgment is asked on a confession made by the agent of the plaintiffs, professing to be the attorney of the defendant; the judge may be excused for requiring that notice should be given to the defendant. The rule is discharged.

McLean, Justice.—I concur with the opinion which has been delivered. At first, I was inclined to think, that, under the general prayer for relief, the court might award a *mandamus*, directing the district judge to enter a judgment in the case. Not that this court, on a *mandamus*, should direct the district court to enter a judgment in behalf of either party; but that, in the due exercise of its discretion, it should proceed to render a judgment in the case, in order that such judgment might be brought before this court, for revision by writ of error. *But as there is no specific prayer for a *mandamus*, on the ground, that the court has refused to give a judgment, I am content, as it involves a mere question of practice, to agree with my brother judges, that a prayer for this writ must point out specifically the ground of the application.

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Whatever effect the insolvent law of Louisiana may have, to divest the jurisdiction of a state court, where the property of a defendant is transferred to the syndic; such cannot be the effect on the jurisdiction of a court of the United States. No state law, or proceedings under a state law, can divest a court of the United States of jurisdiction. And in this case, I can entertain no doubt, that the district court, having jurisdiction, may proceed to a final judgment. Whether an execution, issued upon such judgment, may be levied upon the property in the hands of the syndic, presents a question which depends upon very different principles.

On consideration of the motion made in this case for a *mandamus* to be addressed to the honorable Samuel H. Harper, district judge of the United States for the eastern district of Louisiana, and of the arguments of counsel

thereupon had, as well in opposition to, as in support of, the motion: it is now here ordered and adjudged by this court, that the *mandamus* prayed for be and the same is hereby refused, and that the said motion be and the same is hereby overruled.

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*Charlotte Dye Owings and Frances T. D. Owings, Plaintiffs in error, *v.* James F. Hull. [*607

Evidence.—Judicial notice.—Presumption.—Agency.—Ratification.

Mrs. C. D. Van Pradelles, being in New Orleans, and about to sail for Baltimore, made her last will and testament, and appointed her sisters, residing in Baltimore, executrices of her will; at the time of her decease, she had real and personal estate, including some slaves, in New Orleans, and she left a number of children; she sailed from New Orleans, and was never heard of, after she left that place. The executrices, after some time, supposing her dead, proved the will in Baltimore; and in 1816, gave a power of attorney to John K. West, of New Orleans, to receive all the moneys due the estate of their testatrix, and particularly, to cause such proceedings to be instituted, as might be necessary to effect a sale of the estate, and to give a deed for the same, and generally to perform all acts in the premises, judicially and extra-judicially, for the effectual settlement of the estate, &c.; West obtained letters testamentary from the court of probate, in New Orleans, authorizing him to collect the estate, and to do all lawful acts as attorney in fact of the executrices; he sold the slaves belonging to the estate, to Mr. Hull, in February 1817, for $1800, by a bill of sale executed before a notary; and all the purchase-money, except $450 paid to one of the children of the testatrix, was paid to him; and he, soon after, failed, without having paid over any part of the proceeds of the sale to the executrices; this sale was communicated to Mr. Winchester, the attorney of the executrices, and by him to them. In 1826, a suit was brought in the parish court of New Orleans, by the children and heirs of Mrs. Van Pradelles, against Hull, according to the laws of Louisiana, for the delivery and possession of the slaves so sold; in which suit, carried afterwards to the supreme court of the state, the slave swere decreed to the plaintiffs, upon the ground, that the sale was absolutely void, under the laws of Louisiana; as executrices can only sell, after an order of court, and by auction; and in this case, the requisites of the law were not complied with. Hull brought this suit in the circuit court, against the executrices, to recover from them the purchase-money paid for the slaves, and his expenses attending the same; the whole proceedings in the Louisiana suit, and the evidence in the same, were read to the jury by agreement, subject to all legal exceptions.

The defendants excepted to the reading in evidence of the record in the case of the Heirs of C. D. Van Pradelles *v.* Hull, as not evidence in the present suit, except as to the judgment; that is, the pleadings and proceedings on which the judgment was founded, and to which, as matter of record, it necessarily refers. This objection was well taken; the suit was *res inter alios acta;* and the proceedings and judgment thereon, were no further evidence, than to show a recovery against Hull by a paramount title.

A copy of the bill of sale of the slaves, from West to Hull, on record in the notary's office in New Orleans, was offered in evidence; no evidence to account for the non-production of the original, was offered by the plaintiff; but, by the laws of Louisiana, copies of such notarial acts are evidence, the *original always remaining, by the law of Louisiana, in the office of the notary: *Held*, that the circuit court was bound to take judicial notice of the laws of Louisiana; and that the copy being evidence by those laws, was evidence in this case. [*608

The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws or all the states in the Union, in cases to which they respectively apply; the judicial power conferred on the general government, by the constitution, extends to many cases, arising under the different states; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judi-