

*MAYOR, etc. of NEW YORK *v.* GEORGE MILN.

GEORGE BRISCOE and others *v.* THE COMMONWEALTH BANK of the STATE of KENTUCKY.

Practice.

The court refused to take up cases involving constitutional questions, when the court was not full.

MAYOR, etc., of NEW YORK *v.* GEORGE MILN.

ERROR to the Circuit Court for the Eastern District of New York.

GEORGE BRISCOE and others *v.* COMMONWEALTH BANK of the STATE of KENTUCKY.

ERROR to the Circuit Court of Kentucky.

Ogden, for the Mayor, &c., of New York; and *Wilde*, for George Briscoe and others, inquired, if the court had come to a final decision as to the argument of the cases involving constitutional questions at the present term.

MARSHALL, C. J.—The court cannot know whether there will be a full court during the term; but as the court is now composed, the constitutional cases will not be taken up. (a)

12th February 1835.

*WILLIAM CALDWELL, ISAAC CALDWELL and SAMUEL BRENTS, [*86
APPELLANTS, *v.* SARAH and GEORGE CARRINGTON'S HEIRS.

Statute of frauds.—State judgments.

A bill was filed in the circuit court of the United States for the district of Kentucky, claiming certain lands in Kentucky, under an agreement by parol, by Carrington with Williams, for an exchange of lands, and in which exchange, C., the husband and deviser of the claimant, agreed to give certain lands, then owned by him, in Virginia, to W., and of which W. took possession, and part of which he sold, and for which W. was to convey certain military lands in Kentucky to C. The bill prayed that the heir of W. should be decreed to convey the lands; and that certain persons who, knowing of the agreement between C. and W., had purchased from the heir of W., and who had obtained from the heirs of W., the legal title to a part of the same lands, should be decreed to convey the same to the complainant.

The court held, that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case, by Carrington, by conveying to Williams the land he agreed to give to Williams in exchange, prevented the operation of the statute, in this case.

This was, undoubtedly, supposed in Virginia to be the sound construction of the statute, when this contract was made; and as the lands then lay in Virginia, Kentucky being then a part of that state, this construction forms the law of contract.

The evidence in the cause showed, that the persons who had purchased part of the lands to which, by the agreement with Williams, Carrington was entitled, had notice of that agreement; they could derive no title from such a purchase, against those who held under C.

According to the constitution and laws of the United States, and the decisions of this court, the

(a) The court was, at the time this motion was made, and during the whole term, composed of six justices; the vacancy occasioned by the resignation of Mr. Justice DUVALL, not having been filled.