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*individuals. This does not appear to us to amount to a denial of title of any of these individuals; much less an eviction in this particular case." This is the whole of the opinion of the court; from which it is apparent, that the judgment did not turn upon any question within the purview of the 25th section of the judiciary act of 1789, ch. 20; but wholly upon a collateral matter, independent of, and wholly aside from, any such question. It was merely a decision, that a public survey, under the authority of the United States, of a large tract of country, including the premises, was not, *per se*, an eviction of the plaintiff in error.

Upon the grounds, therefore, of the doctrine already stated by this court at this term, in the case of *Crowell v. Randell* (*post*, p. 368), the cause must be dismissed for want of jurisdiction.

Writ of error dismissed.

*294] *THOMAS LELAND and CYNTHIA B. LELAND, his wife, LEMUEL HASTINGS, GEORGE CARLTON and ELIZABETH WAITE CARLTON, his wife, WILLIAM JONES HASTINGS, JONATHAN JENKS HASTINGS, LAMBERT HASTINGS, JOEL HASTINGS, HUBBARD HASTINGS and HARRIET MARIA HASTINGS, Plaintiffs, *v.* DAVID WILKINSON.

Private statutes.

Cynthia Jenks, on a petition to the general assembly of Rhode Island, representing that she was the executrix of the last will and testament of Jonathan Jenks, late of Winchester, in the state of New Hampshire, deceased; and that the personal property being insufficient to pay the debts of the estate, she obtained authority from the judge of probate to make sale of so much of the real estate of the deceased as should be necessary to pay the debts; and that under this authority she sold and conveyed certain lands in the state of Rhode Island, as belonging to the estate, and received a part of the consideration-money, and the balance was to be paid when the deed executed by the petitioner should be ratified by the general assembly; the residue of the purchase-money was represented to be absolutely necessary to pay the debts of the estate, and a ratification of the deed, &c., was prayed. In the lower house, June 1792, "it was voted and resolved, that the said petition be received, and that the said deed and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in said estate, mentioned in said deed, which belonged to the said Jonathan Jenks, at the time of his decease;" and in the upper house, this resolve was read the same day, and concurred in. The purchasers, under the deed sanctioned, received all the interest in the premises which had been vested in Jonathan Jenks, and which, on his death, vested in his heirs or devisees; the act of the legislature and the deed are unconditional, and neither the heirs of Cynthia Jenks, nor any other persons can impeach the deed, by evidence of facts prior to the act of confirmation.

The power of the legislature of Rhode Island in relation to the confirmation of such sales of real estate, is greater than the strict judicial power; they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future.

CERTIFICATE of Division from the Circuit Court of Rhode Island.

The case was submitted to the court, by *Whipple*, for the defendant, on a printed argument. No counsel appeared for the plaintiff.

McLEAN, Justice, delivered the opinion of the court.—The matters in controversy in this case are contained in certain points, on which the judges of the circuit court for the district of *Rhode Island were divided; *295] and which have been certified for decision to this court, under the act of congress.

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The plaintiffs brought their action of ejectment against the defendant, to recover possession of the land in controversy ; and they claim as the heirs-at-law of Cynthia Jenks. It was proved, that Jonathan Jenks, who was seised of the premises, and who died in January 1787, devised the land to his daughter Cynthia, a few day before his decease. The defendant's counsel gave in evidence a certain deed, executed by Cynthia Jenks, executrix, to Moses Brown and Ariel Wilkinson, dated the 12th of November 1791, and a certain bond or warrant of the same date. Also the petition of Cynthia Jenks to the general assembly of Rhode Island, representing that she was executrix of the last will and testament of Jonathan Jenks, late of Winchester, in the state of New Hampshire, deceased ; and that the personal property being insufficient to pay the debts of the estate, she obtained authority from the judge of probate to make sale of so much of the real estate of the deceased as should be necessary to pay the debts. And that under this authority she sold and conveyed certain lands, in the state of Rhode Island, as belonging to the estate, and received a part of the consideration-money ; and the balance was to be paid, when the deed executed by the petitioner, should be ratified by the general assembly. The residue of the purchase-money was represented to be absolutely necessary to pay the debts of the estate, and a ratification of the deed, &c., was prayed. In the lower house, June 1792, "it was voted and resolved, that the said petition be received, and that the said deed and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in said estate, mentioned in said deed, which belonged to the said Jonathan Jenks, at the time of his decease." And in the upper house, this resolve was read the same day, and concurred in.

The questions adjourned to this court are as follows :

1. Whether the confirmatory act, above stated, is sufficient to divest the title of the plaintiffs, if the sale of Cynthia Jenks, the executrix, confirmed by that act, was not necessary to pay the debts of her testator, Jonathan Jenks ?

2. Whether the burden of proof of the existence of such debts, and the insufficiency of the personal estate, and also of the real *estate, which the said Jonathan Jenks, by his said will, authorized his executors to [*296 sell, and pay the same, or of either of said points, is on the defendant ?

3. Whether the said confirmatory act is *prima facie* evidence of the existence of such debts, and of such insufficiency of personal estate and real estate, so authorized to be sold as aforesaid ?

4. Whether the defendant is to be deemed and held to be a purchaser for a valuable consideration, *bona fide*, and without notice ; so that he can protect himself under his title aforesaid ; notwithstanding there might have been no deficiency of assets, and no debts of the testator remaining unpaid, at the time of the sale of Cynthia Jenks, executrix as aforesaid, and the passage of the confirmatory act aforesaid ?

5. Whether the description of the demanded premises in the said deed of Cynthia Jenks, taken in connection with the confirmatory act, is sufficient in law to divest the plaintiff's title to the same, and convey the same to the grantees ?

6. Whether the recital of the license of the judge of probate in New Hampshire, contained in the deed of Cynthia Jenks, dated November 12th,

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1791, and the recital of, and reference to, said license, in the petition of the said Cynthia to the legislature, and the act passed, is *prima facie* evidence of such license?

The whole of these questions, with the exception of a part of the fifth, that refers to a description of the premises, and which is not so stated as to enable the court to decide it, may be included in the simple inquiry, whether the grantees in the deed, confirmed by the legislature, took an absolute title to the premises in dispute. If this inquiry be answered in the affirmative, there is an end to all further inquiries; and if in the negative, it follows, that the title and all the proceedings referred to, could only be considered as *prima facie* evidence of the facts represented.

In 1829, this case was brought before this court by writ of error; and the court then decided, that the legislature of Rhode Island had the power to pass the above act. (2 Pet. 627.) And the only question which remains for consideration is, the effect of such legislative act. If the legislature had power to confirm the deed in question, is it not made absolute by the confirmatory act? That such is the character of a title, made by an executor, under an order of court, is admitted; and is it not clear, that the sanction *297] of the legislature must produce the same effect? *In this respect, the power of the legislature of Rhode Island is greater than the strictly judicial power; for they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future. No fraud is alleged between the purchasers and executrix; and the presumption is, that they acted in good faith. Nor does it appear, that the rights of strangers were affected by the sale.

The purchasers, then under the deed sanctioned, received all the interest in the premises which had been vested in Jonathan Jenks, and which, on his death, vested in his heirs or devisees. The act of the legislature, and the deed, are unconditional; and neither the heirs of Cynthia Jenks, nor any other persons, can impeach the deed, by evidence of facts prior to the act of confirmation. The legislature would have investigated the facts, and confirmed the deed, to but little purpose, if it is to be considered only as *prima facie* evidence of title. In this view, it would be necessary, in order to resist the title set up by the plaintiffs, to show that the administratrix proceeded regularly in her acts of administration; and that the sale of the real estate of the deceased in Rhode Island, was necessary to pay debts. But this is not the nature of the title received by the purchasers. So far as the deed, under the sanctions given to it, purports to convey all the right to the premises, of which Jonathan Jenks was seised, at the time of his decease, was conveyed absolutely.

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 Rhode Island, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the grantees in the deed confirmed by the legislature of Rhode Island, took an absolute title to the premises in dispute in this cause: which opinion answers the first, second, third, fourth and sixth questions so

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certified ; and also the fifth question, except that part of said fifth question which refers to a description of the premises, and which is not so stated as to enable this court to express an opinion ; all of which is hereby ordered and adjudged, by this court, to be certified to the said circuit court.

*BENJAMIN I. GILMAN, Plaintiff in error, v. PETER G. RIVES. [*298

Abatement.—Non-joinder of proper defendant.—Effect of judgment on plea in abatement.

Gilman obtained a judgment in an action of debt, instituted in the circuit court of Kentucky, against Rives and Lyne ; and he instituted a suit against Rives, on the judgment, in the circuit court of West Tennessee ; the declaration stated the judgment to have been joint, against Rives and Lyne ; and no reason was assigned in it, why Lyne was not a party to the suit ; the defendant, Rives, demurred, and the circuit court sustained the demurrer : the judgment of the circuit court was affirmed.

Generally speaking, all joint obligors, and other persons bound by covenants, contract or quasi contract, ought to be made parties to the suit ; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement ; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial. But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown ; if, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of, upon demurrer, or in arrest of judgment.

A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action ; the judgment is, in no just sense, a judgment upon the merits.¹

ERROR to the Circuit Court of West Tennessee. The case is stated at large in the opinion of the court.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of West Tennessee. The plaintiff in error, Gilman, brought an action of debt against the defendant in error, Rives, upon a joint judgment rendered in his favor against Rives and one Leonard H. Lyne, in the circuit court for the district of Kentucky. The declaration is in the following terms :

“For that, whereas, the said Benjamin Ives Gilman, jun., heretofore, to wit, at the November term, in the year of our Lord 1829, of the seventh circuit court of the United States, sitting in and for the district of Kentucky, at Frankford, in said state, before, &c., by the consideration and judgment of the said court, recovered against the *said Peter G. Rives and one Leonard H. Lyne, the sum of \$6860, then and there [*299 adjudged to the said B. I. Gilman, jun., for his damages, which he had sustained by reason of the non-performance of the defendant and the said Leonard H. Lyne, of certain promises and undertakings then lately made by them to the plaintiff, and also his costs and charges by him about his suit in that behalf expended, whereof the said Peter G. Rives, the present defendant, and the said Leonard H. Lyne, were convicted, as by the record,

¹ Gould v. Evansville and Crawfordsville Railroad Co., 91 U. S. 526 ; Fleming v. Insurance Co., 12 Penn. St. 391.