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we speak of the plaintiff in this connection, we mean the plaintiff in the court below, the now defendant in error.

After the verdict was rendered, the defendant in the court below moved for a new trial, for sundry reasons stated on the record, which was refused. The granting or refusing of new trials, rests in the sound discretion of the court below; and is not the subject of reversal in this court. Without making further citations in proof of this proposition, it will be sufficient to refer to 4 Wheat. 220, where it is said by the court, that the first error assigned is, that the court refused to grant a new trial; but it has been already decided, and is too plain for argument, that such a refusal affords no ground for a writ of error. The judgment of the court below is correct, and is, therefore, affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

*JOHN H. CLARKE, Administrator of WILLARD W. WETMORE, [*164
Appellant, v. HENRY MATHEWSON, CYRUS BUTLER, EDWARD
CARRINGTON and SAMUEL WETMORE, Appellees.

Jurisdiction.—Citizenship.—Bill of revivor.

A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of Rhode Island, in the circuit court of the United States for the district of Rhode Island; an answer was put in to the bill, and the cause was referred to a master for an account; pending these proceedings, the complainant died; and administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the circuit court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and make such administration indispensable to the prosecution and defence of any suit in the state, in right of the estate of the deceased: *Held*, that the bill of revivor was in no just sense an original suit, but was a mere continuation of the original suit; the parties to the original suit were citizens of different states; and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent proceedings; and the circuit court of Rhode Island had rightful authority to proceed to its final determination.

If, after the proper commencement of a suit, in the circuit court, the plaintiff removes into, and becomes a citizen of, the same state with the defendant, the jurisdiction of the circuit court over the cause is not affected by such change of domicile. *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Mollan v. Torrance*, 9 Ibid. 537; and *Dunn v. Clarke*, 8 Pet. 1, cited.

The death of a party, pending a suit, does not, where the cause of action survives, amount to a determination thereof; it might, at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it; but in courts of equity, an abatement of the suit, by the death of the party, has always been held to have a very different effect; for such abatement amounts to a mere suspension, and not to a determination, of the suit; it may again be put in motion, by a bill of revivor; and the proceedings being revived, the court proceeds to its determination as on an original bill.

A bill of revivor is not the commencement of a new suit, but is the mere continuance of the old suit; it is upon ground somewhat analogous, that the circuit courts are held to have jurisdiction in cases of cross-bills and injunction bills, touching suits and judgments already in those courts.

In the 31st section of the judiciary act of 1789, congress manifestly treats the revivor of a suit, by or against the representatives of the deceased party, as a matter of right, and as a mere

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continuance of the original suit ; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is depending or to another state.¹

Clarke v. Matthewson, 2 Sumn. 262, reversed.

APPEAL from the Circuit Court of Rhode Island. Willard W. *165] Wetmore, a citizen of Connecticut, filed a bill, to June term 1830, of the circuit court of the district of Rhode Island, against Henry Mathewson, Cyrus Butler, Edward Carrington and Samuel Wetmore, citizens of the state of Rhode Island ; claiming an account of certain mercantile adventures, in which he alleged himself to have been interested, together with the books, invoices and list of passengers on board of the ship Superior, in which he asserted he was interested ; and for a full settlement of all accounts between him and the defendants ; and for such other and further relief in the premises as the court might think proper.

The separate answer of Henry Mathewson to the complainant's bill was filed in September 1830 ; the answers of the other defendants having been filed in June or July of the same year. A supplemental answer was afterwards filed by Henry Mathewson ; and in November 1831, after various pleadings in the case, counsel having been heard, the cause was referred to a master to take and state an account between the parties, &c. The parties appeared before the master and his assistants, and an examination of the accounts was had and proceeded in.

In 1834, before a report was made by the master, Willard W. Wetmore died ; and administration of his estate and effects was granted by, and out of, the municipal court of the city of Providence, in the state of Rhode Island, to John H. Clarke, a citizen of that state ; who thereupon filed a bill in the circuit court to revive the suit, and prayed that the same should stand in the same situation, as at the decease of the original complainant, Willard W. Wetmore. On the 7th of July 1834, Henry Mathewson appeared in the circuit court, denied the jurisdiction of the court, and moved to dismiss the suit, on the ground, that John H. Clarke was a citizen of the state of Rhode Island, as were also the defendants. At November term 1835, the circuit court dismissed the bill, for want of jurisdiction ; and the complainant appealed to this court.

The case was argued by *Southard*, for the appellants ; and by *Tillinghast* and *Webster*, for the appellees.

Southard, for the appellants, contended :—1st. *That the court *166] had jurisdiction of the cause upon the original bill. 2d. That the jurisdiction would not have been taken away by the removal of the complainant to Rhode Island. 3d. That the death of the complainant did not abate, but suspend, the suit ; and the jurisdiction of the court was not thereby lost. 4th. That the administrator had a right, in equity, to revive and continue the suit.

The circuit court of Rhode Island had originally jurisdiction of the case ; and the parties went on, after the filing of the bill, and the answers, to the examination of the accounts, under an interlocutory decree of the court. While the cause was in this state, the complainant died, and by the laws of

¹ *Hatfield v. Bushnell*, 1 Bl. C. C. 393 ; *Trigg v. Conway*, Hempst. 711.

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Rhode Island, no administration of his affairs could be granted to any one but a citizen of that state. The act of the legislature is express on the subject ; and requires that administration of the estates of decedents shall only be given to citizens and residents of Rhode Island. If, then, this cause is to proceed, it must be by a plaintiff or complainant who is a citizen of Rhode Island ; and if not, all the litigation between the parties will have been fruitless and unproductive. If the jurisdiction of the court has ceased, a result will occur which would prevail in no other state. The parties must commence a suit in the court of the state, where he may, perhaps, be met with a plea of the statute of limitations ; and thus his remedy will be forever defeated. The case, too, is one peculiar for the jurisdiction of a court of chancery ; and the courts of the state of Rhode Island have no chancery jurisdiction.

This is a bill of revivor ; and from its nature and purpose, it seeks to restore the case to the chancery docket of the circuit court, in the same situation it was before the death of the original complainant. It does not ask to change the controversy, or to add to it ; and it will stand, when revived, in the condition it did before the occurrence of the event which made it necessary to revive it. The bill of revivor is not an original suit ; it is nothing more than the means of continuing the suit already commenced. It introduces no new matters for controversy and adjustment ; and only furnishes the means of bringing to a close those already in possession of the court. The citizenship, or residence, of the administrator has no connection with the case ; *the matters are litigated in the same manner as if [*167 the original party was yet alive. It is, then, still a controversy within the purpose of the judiciary act, which gives the circuit courts jurisdiction of matters in suit between citizens of different states ; as all the matters controverted will be those set forth in the bill of the complainant originally filed by him in the circuit court, he being then a citizen of Connecticut.

The death of a party to a suit in chancery does not abate the suit ; it is only suspended. In this the law of chancery differs from the common law : cited, Grant's Chan. 61-2 ; Cooper's Chan. 64. And this is more especially true, under the judiciary act of the United States, and in the courts of the United States. By the 31st section of the act, administrators and executors are authorized to prosecute suits in the courts of the United States. The object of this section was to carry out the principle that a suit should not abate, if the cause of action survived. Congress intended to supply a remedy, in the case of the decease of a party. It should be shown, there has been a decision on this point by a court of the United States ; and until this is done, the plain language of the section will prevail.

Authorities cited, to show, that where jurisdiction has attached, it cannot be divested by anything which does not change the great interests in the cause : Pet. C. C. 444 ; 9 Wheat. 537 ; 2 Ibid. 290.

It has not been the course of the courts of the United States, to consider their jurisdiction, after it has once attached, as taken away by the subsequent change of residence of the party. A suit properly commenced between citizens of different states, still proceeds ; although the parties may, before its termination, become citizens of the same state. This is a stronger case than where the party dies. It was the act of the party, to become a

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citizen of the same state with his opponent ; it is by the visitation of God, that the party is this case ceased to have ability to proceed in his cause. Suppose, a citizen of Rhode Island, after taking out administration to the estate of Willard W. Wetmore, had removed to Connecticut ; this, if done *bonâ fide*, would give the court jurisdiction. If, immediately afterwards, he returns to Rhode Island, the jurisdiction of the court is not disturbed. Cited, 1 Paine 594.

All the cases which have been decided, have been as to the vesting of the jurisdiction in the courts of the United States originally. *This *168] is a case in which the jurisdiction has fully and legally vested ; and the act of congress declares, that the suit shall not abate by the death of one of the parties. No matter what the form of a bill of revivor may be, it is no more than the instrument to carry into effect the act of congress which declares the suit shall survive.

As to the suggestion, that questions may arise under the bill of revivor, and that they will be questions between citizens of the same state ; the court may be aware, that these must be questions in the original suit. They will be incidents to that suit, and to the matters in controversy in it ; and no more.

Webster and Tillinghast, for the defendants.—The plaintiff alleges, that he was appointed administrator by a court of probate in Rhode Island ; and he sets forth various matters, all necessary to his title and claim, and all of which the defendant may legally controvert. The prayer of this bill, which is original as between these parties, is, that a former bill, exhibited in the lifetime of his intestate, when this plaintiff sustained no relation to that bill, its parties, or its subject-matter, may be revived for his benefit and relief, with the benefit and use of all proceedings therein ; and all against a citizen of the same state, who resists and controverts his right. This is the controversy of this bill ; and it is wholly between citizens of the same state.

The plaintiff's relation to the estate of Wetmore, deceased, was not thrown upon him by the act of God, or the operation of law ; but was formed and assumed by his own consent and contract. His title to anything claimed in the former bill, if he has any, is by purchase. If a legal administrator, he is the legal and sole owner of all the property claimed ; and the court, under this bill, cannot, it is presumed, deal with any claims to the property beyond those vested in him. But were this otherwise, still it not only does not appear in the bill, that those who may have ulterior claims on him, as creditors, surviving partners, or distributees of the property of the deceased, are citizens of another state ; but, on the contrary, the reverse appears. The courts of general jurisdiction are open to him ; and there are perfect remedies therein, for every grievance, in those courts.

It required legislative power, to enable an administrator to come into a suit, pending at the death of his intestate, to revive and continue the proceedings in a court of general jurisdiction. State legislatures, *have, *169] therefore, passed enabling statutes, applicable to state courts. Judicial power to that effect, was and is wanting, without legislative enactment ; even in courts of general jurisdiction. Congress has not attempted to invest the federal courts with the power now claimed for them by the plaintiff ;

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nor could congress give jurisdiction beyond the limitations of the constitution.

It is contended for the defendant, that the whole current of decisions runs against the jurisdiction now asserted by the plaintiff. "If there are not proper parties to the suit, as it stands on the bill of revivor, that circumstance may, it would seem, be pleaded to such bill." Beames's Pleas in Eq. 304; 11 Ves. 313. It is true, on obvious grounds, that a defendant to a bill of revivor cannot plead a plea which has been pleaded by the original defendant and overruled; nor, it is presumed, one which might have been pleaded by original defendant, but waived or omitted at its proper time. Beames, *ubi supra*; *Samuda v. Furtado*, 3 Bro. C. C. 70. Nor is a cross-bill liable to any plea which will not hold to the original bill; nor to a plea to jurisdiction, though the original might be. Beames 310. Because a cross-bill is in the nature of a defence selected by the adverse party, the *reconvectio* of the civil jurisdiction. Wood's Inst. Civ. Law, 325, &c. Such cases leave it supposed and granted, that, in the case now in question, the objection is good.

The very point of jurisdiction raised by the plea in this case, has been decided in the courts of the United States, and in favor of the view taken by the defendants. *Chappedelaine v. Dechenaux*, 4 Cranch 306. Also the case, *Potter v. Rhodes*, decided in the circuit court of the United States for Rhode Island district, November term 1806. The suit was by Potter, of Massachusetts, against Rhodes, of Rhode Island. Potter died during the pendency, and his administrators appeared, and were admitted as such to prosecute. It then appeared, that one of them was a citizen of Rhode Island; and the court decided that it had no jurisdiction for that cause. The court always looks solely to the record. There is no case in which they look out of it; for the record is always of the party's own making. It is on this ground, they always refuse to go into questions of the removal of a party, after a suit has been instituted. The only question is, does it appear on the record, that the parties are citizens of different states? and this appearing, the court go no farther.

The law might have been more advantageous to parties litigating *in the courts of the United States; but it is not so; and the law must prevail. There are other cases of great hardship, and produc- [*170 ing great embarrassment; the case of all the parties being required to be citizens of another state. This is a hardship, but it cannot be helped. The law is positive, and the courts are obliged to obey it.

The bill of revivor says the original suit has abated, and asks to revive it as a controversy between the administrator and the defendant. While the matters in dispute between the original parties may remain, there may be others which will be raised by the bill of revivor, and these will be between citizens of Rhode Island exclusively. Suppose, it shall become necessary to fill a cross-bill, it must be filed by a citizen of Rhode Island, against another citizen of that state. This seems to be conclusive of the question.

STORY, Justice, delivered the opinion of the court.—This is the case of an appeal from the circuit court of the district of Rhode Island. The original cause was a bill in equity brought by Willard W. Wetmore,

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deceased, a citizen of Connecticut, against the defendants, Henry Mathewson and others, all citizens of Rhode Island, for an account, upon certain transactions set forth in the bill, and with a prayer for general relief. After the cause was at issue, upon the hearing, it was, by agreement of the parties, ordered by the court to be referred to a master to take an account; and pending the proceedings before the master, the intestate died. Administration upon his estate was duly taken out by the present plaintiff, John H. Clarke, in the state of Rhode Island; the laws of Rhode Island requiring, that no person, not a resident of the state, should take out letters of administration; and also making such administration indispensable to the prosecution and defence of any suit in the state, in right of the estate of the intestate. Clarke filed a bill of revivor in the circuit court, in June 1834, in which he alleged himself to be a citizen of Rhode Island, and administrator of Wetmore, against the defendants; whom he alleged, also, to be citizens of the same state. So that it was apparent upon the face of the record, that the bill of revivor was between citizens of the same state. Upon motion of the defendants, at the November term of the circuit court, A. D. 1835, the court ordered the bill of revivor to be dismissed for want of jurisdiction; and from this decretal order, the present appeal has been taken by the appellant. *The case, as it was decided in the circuit *171] court, is reported in 2 Sumn. 262, 268; and the ground of dismissal was, that the bill of revivor was a suit between citizens of the same state.

The judiciary act of 1789, ch. 20, § 11, confers original jurisdiction upon the circuit courts, of all suits of a civil nature, at common law and in equity, where the matter in dispute exceeds the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party; or the suit is between a citizen of the state, where the suit is brought and a citizen of another state. If, therefore, the present had been an original bill, brought between the present parties, it is clear, that it could not have been maintained; for although the plaintiff could sue *en autre droit*, and as administrator of a citizen of another state; yet the suit would be deemed a controversy between him and the defendants, and not between his intestate and the defendants. This is the necessary result of the doctrine held by this court in *Chappedelaine v. Dechenaux*, 4 Cranch 306, and *Childress v. Emory*, 8 Wheat. 642. The circuit court treated the present case as falling within the same predicament. In this, we are of opinion, that the court erred. The bill of revivor was, in no just sense, an original suit; but, was a mere continuation of the original suit. The parties to the original bill were citizens of different states; and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events; and the court had a rightful authority to proceed to a final determination of it. If, after the commencement of the suit, the original plaintiff had removed into, and become a citizen of, Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicil. So it was held by this court, in *Morgan's Heirs v. Morgan*, 2 Wheat. 290, 297; *Mollan v. Torrance*, 9 Ibid. 537; and *Dunn v. Clarke*, 8 Pet. 1.

The death of either party, pending the suit, does not, where the cause of action survives, amount to a determination of the suit. It might, in suits at common law, upon the mere principles of that law, have produced an

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abatement of the suit, which would have destroyed it. But in courts of equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect ; for such abatement amounts to a mere suspension, and not to a determination, of the suit. It may again be put in motion, by a bill of revivor, and the proceedings being revived, the cause proceeds to its *regular determination, as an original bill. The bill of revivor is not the commencement of a new suit ; but is the mere [*172 continuation of the old suit. It is upon a ground somewhat analogous, that the circuit courts are held to have jurisdiction in cases of cross-bills, and injunction bills, touching suits and judgments already in those courts ; for such bills are treated not strictly as original bills, but as supplementary or dependent bills, and so properly within the reach of the court ; although the defendant, who was plaintiff in the original suit lives out of the jurisdiction. A very strong application of the doctrine is to be found in the case of *Dunn v. Clarke*, 8 Pet. 1 ; where an injunction-bill was sustained, although all the parties were citizens of the same state ; the original judgment, under which the defendant in the injunction-bill made title, as the representative in the realty of the deceased, having been obtained by a citizen of another state, in the same circuit court.

But if any doubt could, upon general principles, be entertained upon this subject, we think it entirely removed by the 31st section of the judiciary act of 1789, ch. 20. That section provides, that where, in any suit pending in the courts of the United States, either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment, and that the defendant shall be obliged to answer thereto accordingly ; and the court before whom the cause is depending, is empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. Other auxiliary provisions are made to carry this enactment into effect. Now, in this section, congress manifestly treat the revivor of the suit, by or against the representative of the deceased, as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same state, where the cause is depending, or to another state. Of the competency of congress to pass such an enactment, under the constitution, no doubt is entertained. The present case falls directly within its purview ; and we are, therefore, of opinion, that the decree of the circuit court, dismissing the bill of revivor, ought to be reversed ; and the cause remanded to the circuit court for further proceedings.

I take this opportunity of adding, that I fully concur in all the *reasoning of this court on this subject. After the decision had been [*173 made in the circuit court, upon more mature reflection, I changed my original opinion ; and upon my expressing it in the circuit court, and upon the suggestion of the judges of that court, the case has been brought here for a final determination. I hope, that I shall always have the candor to acknowledge my errors in a public manner, whenever I have become convinced of them.

Bradstreet v. Thomas.

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 was argued by counsel : On consideration whereof, it is now hereby ordered, adjudged and decreed by this court, that the decree of the said circuit court, dismissing the bill of revivor in the cause, ought to be, and the same is hereby reversed ; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, in conformity to the opinion of this court, and according to law.

*174] *MARTHA BRADSTREET, Plaintiff in error, v. ANSON THOMAS.

Writ of right.—Evidence.

It is error, on the trial of a writ of right, before the grand assize, to prevent the introduction of written evidence ; because, in a trial between the demandant, offering the testimony, and a defendant, claiming in opposition to the demandant, under the same title with that of the defendant, before the grand assize, the court had frequently examined the title set up by the written evidence offered, and had become fully cognisant of it ; and had, in that trial, at the suit of the demandant, in which it had been produced, decided that it in nowise tended to establish a legal title to the land in controversy in the demandant.

The demandant has a right to place before the assize all the evidence which she thinks might tend to establish her right of property, which has been ruled to be competent evidence in another suit ; and against the competency of which, nothing is objected in this suit ; and the assize have a right to have such evidence before them, that they may apply to it the instructions of the court, as the law of the case, without which they cannot do it.

There is a safer repository of the adjudication of courts, than the remembrance of judges ; and their declaration of them, is no proof of their existence.¹

ERROR to the District Court for the Northern District of New York. This was a writ of error prosecuted by the demandant in the district court of the northern district of New York, in a writ of right sued out by her.

The case was fully argued by *Meyer* and *Jones*, for the plaintiff in error ; and by *Beardsley*, for the defendant. The judgment of the district court was reversed on a single point, the rejection of certain evidence offered by the plaintiff. No opinion was given on any other question in the cause ; and the arguments on the numerous points presented to the court, and argued by the counsel for the plaintiff and defendant, are, therefore, omitted.

WAYNE, Justice, delivered the opinion of the court :—We will direct our attention to a single point in this cause, because it is the most important in principle and practice ; and is, in our opinion, conclusive of the judgment which this court must render upon this writ of error.

The tenant in the writ of right, upon the trial of the cause, having given
*175] his evidence, and rested his cause upon it, the demandant, upon *the court's deciding that the tenant had proved enough to put her on the proof of the *mise* on her part, gave certain oral testimony in support of her right, with an exemplification of a decree of the court of chancery in the state of New York, under the seal of the court. The counsel for the tenant then inquired, whether the demandant intended to offer any new or different evidence from that heretofore offered by her, in other trials had in that

¹ See *Bradstreet v. Potter*, 16 Pet. 317.