title which the states have the exclusive right to regulate; still the same statute that conferred the power thus to decree a conveyance, prescribed the mode of proceeding; and had the form of the remedy been rejected by the courts of the United States, the right to have such record conveyance would have fallen with it, as they could not be separated.

The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy; so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery.

The complainant's case being one coming clearly within the rules alluded to, we order that the decree of the court below be reversed, and the cause remanded to be proceeded in according to the rights of the parties.

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 Kentucky, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, with costs, 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.

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*Downes & Company *v.* Edward B. Church. [*205

Bills of exchange.

The plaintiffs in an action on the second set of a foreign bill of exchange, which was protested for non-acceptance, with the protests thereto attached, can recover, without producing the first of the same set, or accounting for its non-production.

Certificate of Division from the Circuit Court of Mississippi. This was an action of *assumpsit*, founded on the second of a foreign bill of exchange, by the indorsee against the indorser, for non-acceptance. The plaintiffs declared upon the "second" of the set of exhange, which "second of the set" was protested for non-acceptance; and the same, with the protest thereto attached, was read in evidence to the jury. Whereupon, a question arose, whether the plaintiffs could recover upon the said second of exchange, without producing the first of the same set, or accounting for its non-production; upon which the judges were opposed in opinion. Whereupon, the same was ordered to be certified to the supreme court of the United States.

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

Hoffman stated:—The only questiom that arises is, whether the plaintiff can recover upon the second of exchange, without producing the first of the same set, or accounting for its non-production. These bills are so many securities for the same debt, and so drawn, for convenience, and to avoid accident. Where one is paid, the one so paid has discharged the duty of the whole,

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and the others cease to have legal existence. They contain this very condition on their face ; and show that each has a full operation, dependent only upon the rest not having disharged their office. If one is sufficient to present, so as to authorize the holder to demand payment, it would seem to follow, as a matter of course, that that which gave the right to demand payment or acceptance would be sufficient to support an action for non-payment or non-acceptance. If the presentation of one is sufficient to create a liability, that one must be sufficient to support an action founded on such liability. Whatever gives the right, must be enough to sustain the remedy.

Not a single case has been found, where the objection has been taken or decided by the courts, although the books abound with cases where the objection would have applied. The only exception to the general rule, that neither one of the set can perform the office of all the set is, that the particular bill protested must be the one declared upon and given in evidence, in order to save the drawer or indorser from liability to the person who may have interferred, **supra* protest, for his honor. Chancellor KENT says, "If several parts, as is usual, of a bill of exchange, be drawn, they all contain a condition to be paid, provided the others remain unpaid, and they collectively amount to one bill, and a payment to the holder of either is good, and a payment of one of a set is payment of the whole. The drawer or indorser, to be charged on non-acceptance or non-payment, is entitled to call for the identical bill or No. of the set protested, before he is bound to pay, and it would be sufficient to produce it at the trial, or account for its absence, as without it, he might be exposed to claims from some *bonâ fide* holder or person who had paid it, *supra* protest, for his honor." 3 Kent's Com. 109. The same doctrine was still more strongly recognised by the court, in *Kenworthy* v. *Hopkins*, 1 Johns. Cas. 197, which case the court will find cited and commented upon in *Wells* v. *Whitehead*, 15 Wend. 527. In this latter case, the court decided, that the set actually protested must be produced, in a suit brought by indorsee against indorser, to guard against a subsequent claim by an acceptor *supra* protest. The court say, "that the identical bill protested must be presented. It is true, as a general rule, that payment of one of the set is payment of the whole ; but if the drawer or indorser is entitled to call for the identical bill dishonored, before he is obliged to pay it, the omission to do so would subject him to the charge of negligence, and make him accountable to any person who had accepted it for his honor. His security, therefore, requires, that he should be allowed to call for the bill protested, before a recovery is permitted to be had against him." There is a *dictum* in Starkie, that "in cases of foreign bills, drawn in sets, both the sets should be produced." 2 Stark. on Evid. 142. But no authorities are cited to support this, and it is in hostility to the reasoning of the authorities to which I have referred.

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STORY, Justice, delivered the opinion of the court.—This is the case of a certificate of division of the judges of the circuit court for the district of Mississippi. The action was *assumpsit*, founded on the second part of a foreign bill of exchange, by the indorsee against the indorser, for non-acceptance. The plaintiffs declared upon the second of the set of exchange, which second of the set was protested for non-acceptance, and the same, with the protest attached thereto, was read to the jury. Whereupon, a

question arose, whether the plaintiff could recover upon the said second of exchange, without producing the first of the same set, or accounting for its non-production; upon which question, the judges were opposed in opinion. And the same has been accordingly certified to this court, under the act of congress.

We are of opinion, that the plaintiffs are entitled to recover upon the second of the set, without producing the first, or accounting for its non-production. No authority has been referred to, which is *exactly in point, nor are we aware that the question has ever been judicially decided. Mr. Starkie, in his work on Evidence (part 4, p. 228, 1st edit.), has said, "In the case of a foreign bill, drawn in sets, both the sets should be produced;" but for this proposition he has cited no authority. The question, must, then, be decided upon principle. The object of drawing a foreign bill in sets, is for the convenience of the payee, or other holder, to enable him to forward the same for acceptance, by different conveyances, and thus to guard against any loss, by accident or otherwise, which might occur, if there were but a single bill. But from the very frame of the set, if one is paid or discharged by the acceptor, or other party liable on it, he is ordinarily discharged from the others; since each part contains a condition, that it shall be payable only when the others remain unpaid. Now, when one of the set is protested for non-acceptance, and due notice is given to an indorser, and on the trial of an action brought against him by the indorsee, the same bill of the set on which the protest is made, is produced, that is *primâ facie* proof of his being responsible thereon. Either of the set may be presented for acceptance, and, if not accepted, a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for it is by no means necessary, that all the parts should be presented for acceptance, before a right of action accrues to the holder. Under such circumstances, it is properly a matter of defence on the other side, to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defence exists, which displaces the *primâ facie* title made out by the plaintiff. The law will not presume, that the other bills of the set have been negotiated to other persons, merely because they are not produced. And the indorser is not put to any hazard or peril, by the non-production of them; since, like the acceptor, if he once pay the bill, without notice of any superior adverse claim, by a negotiation of another of the set, to another party, he will be completely exonerated. On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production; as he might not be able satisfactorily to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover, upon their being dishonored. Such a requirement would create

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most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be *208] greatly obstructed *in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby. We are, therefore, of opinion, that the question upon which the judges of the circuit court were opposed, ought to be anwered in the affirmative; and we shall send a certificate to the court accordingly.

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 Mississippi, and on the point and question on which the judges of the said circuit were opposed in opinion, and which was certified to this court for its opinion, agreeable to the acts 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 plaintiffs in this case could recover upon the second of a foreign bill of exchange, which was protested for non-acceptance, with the protest thereto attached, without producing the first of the same set, or accounting for its non-production. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court accordingly.

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*209] *John F. Stein, Plaintiff in error, *v.* William Bowman and others, Defendants in error.

Evidence.—Consular certificate.—Hearsay.—Pedigree.—Husband and wife as witnesses.—Depositions.

Certain German documents were offered in evidence by the plaintiff, in the district court of Louisiana, for the purpose of using such parts of them as contained depositions which related to the pedigree of the plaintiff, which were overruled by the district court, on the ground that they were not duly authenticated. In the case of Church *v.* Hubbart, 2 Cranch 187, this court held, that the certificate of a consul, under his consular seal, is not a sufficient authentication of a foreign law, to make it evidence; it not being one of his consular functions to grant such certificates; and also, that the proceedings of a foreign court, under the seal of a person who styled himself the secretary of foreign affairs in Portugal, was not evidence; on the principles of this case, the circuit court very properly rejected the depositions offered. The certificate and seal of the minister-resident for Great Britain, from Hanover, is not a proper authentication of the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions; it is not connected in any way with the functions of the minister; his certificate and seal could only authenticate those acts which are appropriate to his office.

The only mode in which depositions can be taken in a foreign country, is under a commission.

No rule is better established, than that a party cannot be a witness in his own case.

The objection to the competency of a party to a suit as a witness, does not arise so much from the small pecuniary liability to the payment of the costs, as from that strong bias which every party to a suit must naturally feel, and this influence is not the less dangerous, if the party be unconscious of its existence; every individual who prosecutes or defends a suit, is, in the nature of things, disposed to view most favorably his own side of the controversy, and, with no small prejudice, the side of his adversary. To admit a party on the record, under any circumstances, to be sworn as a witness in chief, would be attended with great danger; it would lead to perjuries, and the most injurious consequences, in the administration of justice.

From necessity, in cases of pedigree, hearsay evidence is admissible; but this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in the different branches; the declaration of these individuals, they being dead, may be given in evidence to prove predigree. And so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary with the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject.