to the marriage, it is well laid in the names of the husband and wife. The rule is well established, that where the right of entry is by virtue of the title of the wife, the demise may be laid in the name of the husband, or in the names of both husband and wife. 2 Chit. 878.

It is not perceived, how the demises as laid in this declaration, can prejudice the rights of the defendant in an action for the mesne profits. They will enable the lessor of the plaintiff to recover the profits from the time the defendant refused to pay the rent, and this he is entitled to. Upon the whole, we think there is no error in the proceedings of the circuit court, and the judgment is, therefore, affirmed, with costs.

Judgment affirmed.

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*Paulina S. Whiting and Helen B. Whiting, Heirs-at-Law of Ruggles Whiting, deceased, James Richardson, Administrator of Ruggles Whiting, and Enfield Johnson and Gabriel J. Johnson, Appellants, *v.* The Bank of the United States. [*6

Chancery practice.—Bill of review.

According to the course of practice in the courts of the United States, in chancery cases, an original decree is to be deemed recorded and enrolled, as of the term in which the final decree was passed.[1] A bill which seeks to have alleged errors revised, for want of parties, or for want of proper proceedings after the decree against his heirs, after the decease of one of the parties, is certainly a bill of review, in contradistinction to a bill in the nature of a bill of review; which lies only where there has been no enrollment of the decree.[2]

An original bill, in the nature of a bill of review, brings forward the interests affected by the decree, other than those which are founded in privity of representation.

In England, the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founds its decree: but in America, the decree does not, ordinarily, recite these, and, generally, not the facts on which the decree is founded; with us, the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record.

The bill of review must be founded on some error apparent upon the bill, answer, and other pleadings and decree; a party is not at liberty to go into the evidence at large, in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence.[3]

No party to a decree can, by the general principles of equity, claim a reversal of a decree, upon a bill of review, unless he has been aggrieved by it; whatever may have been his rights to insist on the error, at the original hearing, or on an appeal.

A decree of foreclosure of a mortgage and sale are to be considered as the final decree, in the sense of a court of equity; and the proceedings on the decree are a mode of enforcing the rights of the creditor, and for the benefit of the debtor; the original decree of foreclosure is final on the merits of the controversy.[4] If a sale is made, after such a decree, the defendant not having appealed, as he had a right to do, the rights of the purchaser would not be overthrown or invalidated, even by a reversal of the decree.

After a decree of foreclosure of a mortgage and a sale, and the death of the defendant after the decree, it is not necessary to revive the proceeedings against the heirs of the deceased party, before the a sale of the property can be made.

Whiting *v.* United States Bank, 1 McLean 249, affirmed.

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[1] Dexter *v.* Arnold, 5 Mason 303; Jenkins *v.* Eldredge, 1 W. & M. 61.

[2] Massie *v.* Graham, 3 McLean 41; Mauro *v.* Ritchie, 3 Cr. C. C. 147; Jenkins *v.* Eldredge, 3 Story 299.

[3] Dexter *v.* Arnold, 5 Mason 303; Putnam *v.* Day, 22 Wall. 60; Buffington *v.* Harvey, 95 U. S. 89; Thompson *v.* Maxwell, Id. 397.

[4] Bronson *v.* Railroad Co., 2 Black 524. Where the whole law of a case is settled by the decree, and nothing remains to be done, unless a new application shall be made at the foot of the decree, it is a final one. French *v.* Shoemaker, 12 Wall. 86.

APPEAL from the Circuit Court of Kentucky. The case, as stated in the opinion of the court, was as follows :

This was the case of a bill, purporting to be a bill of review. The substantial facts, as they appeared on the record, were as follows : Gabriel J. Johnson, being the owner in remainder of a five acre lot, No. 9, in Louisville, Kentucky, of which his mother, Enfield Johnson, was tenant for life, under the will of his father, and being also the owner in fee, by another title, of another piece of land adjoining the five acre lot, a part of the slip No. 2, on the 12th day of November, A. D. 1818, conveyed the same in mortgage to James D. Breckenridge, to secure the latter for his indorsements of three certain notes of Johnson to Ruggles Whiting, each for $4000, and for any other notes and contracts which Breckenridge should thereafter make, execute, accept or indorse for the benefit of Johnson. Afterwards, on the
*7] 9th day of August, A. D. 1820, *Johnson, and Breckenridge, as his surety, being indebted to the Bank of the United States in the sum of $9931.37, arrangements were made between them and Whiting, by which Whiting assumed the payment of the same debt, and gave his note therefor to the bank accordingly ; and as security for the due payment thereof, Johnson and his mother, Enfield Johnson, Breckenridge and Whiting, on the same day, executed a mortgage of the five acre lot and slip of land above mentioned to the Bank of the United States, reciting, among other things, the foregoing arrangement. The condition of the mortgage, among other things, stated, that it was agreed by the parties, that after the satisfaction of the said demands due by Whiting to the bank, and by Gabriel J. Johnson to Whiting, the estate, or the residue thereof, or any surplus in money, by the sale thereof, should be paid or conveyed to Enfield Johnson, or her assigns. The mortgage also contained a stipulation for the sale of the premises, to meet the payment of the debt due to the bank. In April 1823, the debt due and thus secured to the bank remaining unpaid, a bill for a foreclosure and sale was brought by the bank, in the circuit court of the United States for the district of Kentucky ; and to that bill Gabriel J. Johnson, Enfield Johnson and Whiting were made parties ; but Breckenridge was not made a party. At the November term of the circuit court, A. D. 1826, a decree of foreclosure of all the equity or right of redemption of the defendants in the mortgaged premises, was passed ; and a further decree, that the premises should be sold by commissioners. The sale took place accordingly ; the bank became the purchasers, and the sale was confirmed by the circuit court, at May term 1827. In the intermediate time between the original decree of foreclosure and the sale, viz., on the 26th of February 1827, Whiting died, in Massachusetts, leaving the plaintiffs in the present bill, Paulina Whiting and Helen B. Whiting, and one L. R. Whiting (since dead without issue), his children and heirs-at-law—who were then infants under age ; and the youngest, Helen, did not come of age until 1831.

The present bill was brought by Paulina Whiting and Helen B. Whiting, by James Richardson, administrator of Ruggles Whiting, and by Gabriel J. Johnson and Enfield Johnson, against the Bank of the United States ; and after stating the proceedings in the original suit upon the mortgage, and that the sale was made at a great sacrifice of the property, it relied on the following grounds of error in the proceeding, decree and sale

in the original suit. 1. That it was irregular and erroneous, to entertain the bill, and pronounce the decree for foreclosure and sale, without Breckenridge being made a party defendant. 2. That it was irregular and erroneous, to sell the property mortgaged, without a revival of the suit against the heirs of Whiting. 3. That it was unjust and oppressive, to sell in the manner and at the price at which the sale took place.

The answer of the bank denied all equity in the plaintiffs, and insisted, that the decree and sale were fair and just. It also denied, that *Whiting and Breckenridge had any title to the property; and [*8 insisted, that they joined in the mortgage merely to complete the arrangements made between Johnson and themselves. It also denied, that the death of Whiting was known at the time of the sale. It stated, that the property was, after the purchase by the bank, improved, and parts thereof sold to *bonâ fide* purchasers, for valuable considerations; and by reason of the improvements, and the extension of the city, parts of the grounds so sold were now among the most beautiful and densely-built parts of the city. The answer also stated, that Whiting died insolvent and deeply indebted to the bank, by certain other judgments and notes.

The case was argued by *Underwood*, at the bar, and by a printed argument submitted by *Lovering*, for the appellants; and by *Sergeant*, for the appellees.

For the *appellants*, Paulina and Helen Whiting, it was contended, they had an evident interest in the land. Being all infants at the death of their father, in February, and at the rendition of the last decree in May, they are within the exceptions of every statute of limitations operating, by direct or remote analogy, on this case; and their rights being joint, the disabilities must be removed, before the statute can run. In England, the limitation to bills of review is twenty years, and by the law of the United States, five years, on writs of error; which furnishes the criterion in this case. Act of the Legislature of Kentucky of 1816; *May* v. *Marsh*, 2 Litt. 148. The interest of Whiting in the land was also certain and evident, and material. The title to the bank was his only security for a part, at least, of his large demand, and the only consideration for his assumption of the debts of Johnson to the bank. The hopeless insolvency of Johnson rendered the security of the land the only means of indemnity for his responsibility for the debt of $10,000—the bank held the property as a trustee for his benefit.

The proceeding in the original cause was to be regulated by the laws of Kentucky; and as Breckenridge had an interest in the property, he should have been made a party. The record shows the existence of this interest, and he has been deprived of it by the decree of the court; and yet no notice of the proceedings has been given to him. By the laws of Kentucky, the assignee of a promissory note is liable to the assignor, if due diligence has not been used to collect the note; and Breckenridge was the indorser of notes given for a steamboat. Whiting had proceeded on the notes, against Johnson, and had obtained judgment against Johnson. He then made an agreement to discharge Johnson, holding Breckenridge liable on his indorsements. The mortgage was the means of indemnity to Breckenridge, and for this reason, he was a necessary party in the proceedings to foreclose. Any balance which should remain after paying the debt to the bank, would

have been applied for the relief of Breckenridge, on the notes of Johnson.
*9] *Morret* v. *Westerne*, *2 Vern. 663 ; *Haines* v. *Beach*, 3 Johns. Ch. 456 ; 4 Ch. Rep. 605 ; *Ensworth* v. *Lambert*, 6 Ibid. 450 ; 5 Wheat. 313 ; *Caldwell* v. *Taggart*, 4 Pet. 190 ; *Mayo* v. *Tompkies*, 6 Munf. 520.

The sale of the property, after the decree of foreclosure, was irregular, without reviving the proceedings against the representatives of Whiting. His death before the sale made it as necessary to make his heirs and representatives parties, as it was originally necessary to make Whiting a party. If it be said, that there was a right to sell under a levy made before the death of the defendant ; a number of authorities sustain the contrary position. The party defendant has a right to come in, after a sale, and object to it, if anything in the proceedings has been irregular or illegal. If the return to the order of sale had stated that all the parties were dead, would the court have confirmed the sale? By the laws of Kentucky, the defendant has a right to point out what part of the estate may be sold under an order of sale. The necessity of the presence of the defendant at the sale, is therefore apparent. Both Breckenridge and Whiting were dead, at the time of the sale, and yet the sale was confirmed. The decree confirming the sale should therefore be opened, and the parties now before the court should be allowed to come in and redeem. *Allen* v. *Belchers*, 2 Hen. & Munf. 595. Also, *Mackey* v. *Bell*, 2 Munf. 523 ; *Lovell* v. *Dana*, Ibid. 367 ; *Forman* v. *Hunt*, Ibid. 622.

The interest in the complainants is sufficient for a bill of review ; 4 J. J. Marsh. 500. This case shows that a bill of review will lie in such a matter as that now presented to the court. This case will be decided by the cases which have been decided in the courts of Kentucky. In Kentucky, bills of review are allowed for errors on the face of the record, and not in cases where the error is in the decree only. In Kentucky, a bill of review lies for any error in the proceedings in the case. There, the decree does not, as in England, set forth the whole matter in the cause ; and to deny a bill of review, on the principles which apply to the cases in the court of chancery in England, would be to deny it altogether. If this is the law, and it will not be denied, the record exhibits such errors as may be brought before the court by a bill of review. Breckenridge was a necessary party. He had a deep interest in the proceedings against the land.

No exception will lie to the bill, on the ground of the interference of the statute of limitations. It was filed within five years after the sale, and the termination of the minority of the children of Whiting. The law of the United States saves the rights of minors.

While it is admitted, that no case has been cited, in which a bill of review has been sustained, principally like that now before the court ; yet it is claimed, that in such a case, a writ of error would lie, if the proceedings had been at law ; and the bill of review in a chancery case is analogous to a writ of error in a case at law. The argument for the appellees is, that if,
*10] in the course of the proceedings *to sell the property, exceptions were not taken to their regularity, they cannot now be taken notice of by a bill of review. Yet writs of error are maintained in suits, on the ground of want of parties. The practice is to send back the proceedings, and allow amendments to be made which will bring the merits of the case forward. This is a similar case. 6 J. J. Marsh. 197. The heirs may come in and

show they were not parties to the sale, and may examine the manner in which it was conducted. This is essential to the proceedings in the case.

It is said, that the decree is final on the order of foreclosure of the mortgage; but this is erroneous. The proceedings in the case are not final, until the property is sold, and the proceedings of sale confirmed by the court. The equity of redemption continues, until the sale of the property and the ratification of the sale. A party who has a decree of foreclosure in his favor, in proceedings on a mortgage, cannot hold the property under the decree. By the decisions of the courts of Kentucky, a sale of the mortgaged premises must be made, and the residue of the proceeds of the sale, after payment of the debt, must be paid to the mortgagor. Suppose, part of the estate sold and the mortgage satisfied; does not the residue belong to the mortgagor? This shows a continuing interest in the property mortgaged, until the proceedings of sale are completed.

Sergeant, for the appellees.—The objections by the appellants are to the sale of the property. The first matter to be noticed is, that the interests in the land sold under the decree of foreclosure, have essentially changed. The property has been sold without warranty, and large and expensive buildings have been erected upon it. This is stated in the answer of the Bank of the United States to the complainants' bill; and in the agreed statement of facts. "It is admitted, that the bank pulled down a plain brick dwelling-house, as appears in said bill, No. 2, on said lot where Fifth Cross street, if extended, would run and extend said street to Walnut street, and they sold, as stated in the answer, to different persons, and the improvements stated of the Roman Catholic church and others, extension of the street and other improvements have been made and put upon the ground, and that the persons named are living on the lot aforesaid." All these persons have expended large sums in the improvement of the property, and the question before the court is, whether all that was done in 1827 shall be undone; and the parties be permitted to come in and redeem. This is what is asked. It is not the course of a court of equity, on a bill of review, to bring into review what has been decided. If such a bill were allowed, it would be in the nature of an answer, and bring again into controversy all that had been passed upon by the court. The *res adjudicata* is in equity as at law. The rule must be the same.

There are bills of review in the nature of original bills, as when *a person has not been made a party to the original proceedings, and [*11
may be affected by them. Mr. Breckenridge might in this case have come in, if he had been injured. There are two other descriptions of bills of review, in England. 1. A bill filed after the original bill has been enrolled, or there has been a final decree. 2. A bill filed when the decree has not been made, and before enrollment. The error must be apparent on the face of the decree, and the court cannot go into the evidence in the original proceedings. Story's Equity 334; Lord Eldon, in *Perry* v. *Phelips*, 17 Ves. 178. No persons but parties or privies can have a bill of review. Gilb. For. Rom. 186; *Slingsby* v. *Hale*, 1 Chan. Cas. 122. And none but those who have an interest in the proceedings can maintain such a bill; nor unless they suffer from the particular error assigned, or pointed out in the decree. *Webb* v. *Pell*, 3 Paige 368; Mitford (by Jeremy) 205. Other per-

sons in interest, and privies in title or estate, who are aggrieved by the decree, may have an original bill in the nature of a bill of review, so far as their own interests are concerned. Wyatt 98, 100; Mitf. 92.

Opportunities, during the proceedings on a bill in chancery, to interpose and correct errors, are always afforded, as by demurrer or by plea, when proper parties may be introduced. 16 Ves. 325; Cowp. 185; 3 Paige 222; 2 Ibid. 281. The court will then decide on the matters presented, and if necessary, there may be an amended bill, or a supplemental bill. But such a decision would not be an error in the decree, to entitle to a bill of review. This is much stronger where a party has been omitted and does not complain; as in the case before the court, in which Breckenridge is not a party.

But in addition to all these matters, Whiting had not a title to the property, nor any interest in it. It had never been his, and the proceeding to foreclose against him, divested every equitable claim he could set up. The decree of foreclosure was in the lifetime of Whiting, barring him and his heirs, and the statute of limitations began to run from the time of the decree. An execution levied does not stop by the death of the party. The sale did not require, as a pre-requisite to its proceeding and completion, that the heirs should be brought in.

Finally, the bill of review is barred by length of time. *Elmendorf* v. *Taylor*, 10 Wheat. 152. More than five years have elapsed from the decree to the filing of the bill of review. The statute, as has been said, began to run its course in the life of Whiting; and it was not stopped by disabilities occurring on his death.

Story, Justice, delivered the opinion of the court.—This is the case of a bill, purporting to be a bill of review. The substantial facts, as they appear on the record, are as follows: Gabriel J. Johnson, being the owner
*12] in remainder of a five acre lot *No. 9, in Louisville, Kentucky, of which his mother, Enfield Johnson, was tenant for life, under the will of his father, and being also the owner in fee, by another title, of another piece of land adjoining the five acre lot (a part of the slip No. 2), on the 12 day of November, A. D. 1818, conveyed the same in mortgage to James D. Breckenridge, to secure the latter for his indorsements of three certain notes of Johnson to Ruggles Whiting, each for $4000, and for any other notes and contracts which Breckenridge should thereafter make, execute, accept or indorse, for the benefit of Johnson. Afterwards, on the 9th day of August, A. D. 1820, Johnson, and Breckenridge, as his surety, being indebted to the Bank of the United States in the sum of $9941.37, arrangements were made between them and Whiting, by which Whiting assumed the payment of the same debt, and gave his note therefor to the bank accordingly; and as security for the due payment thereof, Johnson and his mother, Enfield Johnson, Breckenridge and Whiting, on the same day, executed a mortgage of the five acre lot and slip of land above mentioned, to the Bank of the United States, reciting, among other things, the foregoing arrangement.

The condition of the mortgage, among other things, stated, that it was agreed by the parties, that after the satisfaction of the said demands due by Whiting to the bank, and by Gabriel J. Johnson to Whiting, the estate,

or the residue thereof, or any surplus, if money, by the sale thereof, should be paid or conveyed to Enfield Johnson, or her assigns. The mortgage also contained a stipulation for the sale of the premises, to meet the payment of the debt due to the bank. In April 1823, the debt due and thus secured to the bank remaining unpaid, a bill for a foreclosure and sale was brought by the bank, in the circuit court of the United States for the district of Kentucky; and to that bill, Gabriel J. Johnson, Enfield Johnson, and Whiting were made parties; but Breckenridge was not made a party. At the November term of the circuit court, A. D. 1826, a decree of foreclosure of all the equity or right of redemption of the defendants in the mortgaged premises was passed; and a further decree, that the premises should be sold by commissioners. The sale took place accordingly; the bank became the purchasers; and the sale was confirmed by the circuit court, at the May term 1827. In the intermidiate time between the original decree of foreclosure and the sale, viz., on the 26th of February 1827, Whiting died, in Massachusetts, leaving the plaintiffs in the present bill, Paulina Whiting and Helen B. Whiting, and one L. R. Whiting (since dead without issue), his children and heirs-at-law; who were then infants under age; and the youngest, Helen, did not come of age until 1831.

The present bill is brought by Paulina Whiting and Helen B. Whiting, by James Richardson, administrator of Ruggles Whiting, and by Gabriel J. Johnson and Enfield Johnson, against the Bank of the United States; and after stating the proceedings in the original suit upon the mortgage, and that the sale was made at a great *sacrifice of the property, it relies on the following grounds of error in the proceedings, decree and sale in the original suit. 1. That it was irregular and erroneous, to entertain the bill and pronounce the decree for foreclosure and sale, without Breckenridge being made a party defendant. 2. That it was irregular and erroneous, to sell the property mortgaged, without a revival of the suit against the heirs of Whiting. 3. That it was unjust and oppressive, to sell in the manner and at the price when the sale took place. [*13

The answer of the bank denies all equity in the plaintiffs, and insists, that the decreee and sale were fair and just. It also denies, that Whiting or Breckenridge had any title to the property; and insists, that they joined in the mortgage merely to complete the arrangements made between Johnson and themselves. It also denies, that the death of Whiting was known at the time of the sale. It states, that the property was, after the purchase by the bank, improved, and parts thereof sold to *bonâ fide* purchasers, for valuable considerations; and by reason of the improvements and the extension of the city, parts of the grounds so sold are now among the most beautiful and densely built parts of the city. The answer also states, that Whiting died insolvent and deeply indebted to the bank, by certain other judgments and notes.

Such are the material facts and statements in the case, and upon them, so far at least as the present bill of review is concerned, there is no controversy between the parties. The prayer of the bill is, that the proceedings may be *revived* (as the word stands on the record, probably by mistake, for *reviewed*); and that the decrees and sale may be set aside; that the plaintiffs may be permitted to redeem; and for other relief.

Some suggestions have been made as to the nature and character of the

present bill—whether it is to be treated as a bill of review, or what other is its appropriate denomination. As the original decree which it seeks to review was, properly, according to our course of practice, to be deemed recorded and enrolled as of the term in which the final decree was passed, it is certainly a bill of review, in contradistinction to a bill in the nature of a bill of review; which latter bill lies only when there has been no enrollment of the decree. Being a bill brought by the original parties and their privies in representation, it is also properly a bill of review, in contradistinction to an original bill in the nature of a bill of review; which latter bill brings forward the interests affected by the decree other than those which are founded in privity of representation. The present bill seeks to revive the suit, by introducing the heirs of Whiting before the court; and so far it has the character of a bill of revivor. It seeks also to state a new fact, viz., the death of Whiting, before the sale; and so far it is supplementary. It is, therefore, a compound bill of review, of supplement, and of revivor; and it is entirely maintainable as such, if it presents facts which go to the merits of the original decree of foreclosure and sale.[1]

It has also been suggested at the bar, that no bill of review lies *14] *for errors of law, except where such errors are apparent on the face of the decree of the court. That is true, in the sense in which the language is used in the English practice. In England, the decree always recites the substance of the bill and and answer and pleadings, and also the facts on which the court founds its decree. But in America, the decree does not ordinarily recite either the bill, or answer, or pleadings; and generally, not the facts on which the decree is founded. But with us, the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record. And therefore, in truth, the rule in each country is precisely the same, in legal effect; although expressed in different language; viz., that the bill of review must be founded on some error apparent upon the bill, answer and other pleadings, and decree; and that you are not at liberty to go into the evidence at large, in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence.

Having made these explanations, which seemed proper with reference to the arguments pressed at the bar, we may now return to the consideration of the direct points presented for the consideration of the court. The third and last error relied on in the bill, has been abandoned at the argument; and therefore, it need not be examined. The other two remain to be disposed of.

And first, as to the supposed error, in not making Breckenridge a party to the original bill. Assuming that he was a proper party to that bill, still it is to be considered, that it was an objection which ought properly to have been taken by the present parties at the original hearing, or upon the appeal (if any) before the appellate court. And upon a bill of review, it cannot properly be relied on as matter of error, unless it can be shown that the non-joinder has operated as an injury or mischief to the rights of the present plaintiffs. No such injury or mischief has been shown, nor is pretended. Breckenridge is not bound by the original decree, because he was no party

[1] See Kennedy *v.* Georgia State Bank, 8 How. 586.

thereto ; and therefore, his interests cannot be prejudiced thereby. But if they were, he, and he alone, has a right to complain, and to seek redress from the court ; and not the plaintiffs, who are not his representatives, nor intrusted with the vindication of his rights. Breckenridge has made no complaint and sought no redress. We think, therefore, that this error, if any there be, not being to the prejudice of the plaintiffs, cannot furnish any ground for them to maintain the present bill ; for no party to a decree can, by the general principles of equity, claim a reversal of a decree, upon a bill of review, unless he has been aggrieved by it ; whatever may have been his rights to insist on the error, at the original hearing, or on an appeal.

In the next place, as to the sale of the mortgaged premises, after the death of Whiting, without a revival of the suit against his heirs. It is not even pretended, in the bill of review, that there was any fraud in the sale ; nor upon the argument, has any irregularity even been insisted on. What, then, is the *gravamen?* That the land was sold honestly and fairly, but for a less price than its real value. *Now, such an objection, even in the mouth of Whiting himself, if he had been living, would have constituted no valid objection to the sale, or the confirmation thereof ; but, at most, would have furnished only a motive to induce the court, in its discretion, to have ordered a resale, or to have opened the biddings. It would be no matter of error whatever. If this be a correct view of the subject, it is plain, that the heirs of Whiting cannot be entitled to be put in a better predicament than Whiting himself ; and no decree in equity ought to be reversed for matter of mere favor, and not of right. [*15

But is the objection itself, in principle, well founded ? That depends upon this—whether the decree of foreclosure and sale is to be considered as the final decree, in the sense of a court of equity, and the proceedings on that decree, a mere mode of enforcing the rights of the creditor, and for the benefit of the debtor ; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the court. We are of opinion, that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final, upon those merits, as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For, if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown or invalidated, even by a reversal of the decree ; and consequently, the title of the defendants to the lands would have been extinguished ; and their redress, upon the reversal, would have been of a different sort from that of a restitution of the land sold. In *Ray* v. *Law*, 3 Cranch 179, it was held by this court, that a decree of sale of mortgaged premises, was a final decree, in the sense of the act of congress, upon which an appeal would lie to the supreme court. This decision must have been made upon the general ground, that a decree, final upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law. If this be the true view of the present decree, and the proceedings thereon, then it is plain, that this bill of review is not maintainable for two reasons, each of which is equally conclusive. The first is, that no error is

shown in the original decree, for the only pretended error is in the sale under the decree. The second is, that this bill of review was not brought within five years after the original decree was rendered in the lifetime of Whiting; and the statute of limitations, having once begun to run, cannot be stopped by any subsequent intervening disabilities.

If, then, the original decree was unobjectionable and conclusive; if there has been no fraud in the subsequent sale, pursuant to that decree; and if there has been, in a legal sense, no prejudice to any rights of the plaintiffs in the original decree, or the sale, then, *although there was no revivor before the sale, there is no error upon which a bill of review will lie, to entitle the parties to a reversal. We do not say, whether the circuit court might, or might not, in its discretion, have required a revival of the suit before the sale was confirmed, if the fact of the death of Whiting had been distinctly brought to its knowledge. But we do mean to say, that the non-revival was not matter of error, for which the proceeding on the sale under the original decree (for that is all which the present bill seeks to redress) can or ought to be reversed.

*16]

The decree of the circuit circuit, dismissing the bill, 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 district of Kentucky, and was argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*17] John T. Van Ness and William Jones, Plaintiffs in error, *v.* The Bank of the United States, Defendant in error.

Courts of the District of Columbia.—Acknowledgment of deeds. Ejectment.

The proceedings of the courts of the state of Maryland, and the laws of that state prior to the passing of laws by congress providing for the government of the district of Columbia, were in full force and operation in that part of the district ceded by the state of Maryland until congress had legislated for the government of the district of Columbia; and the decree of the court of chancery of Maryland, affecting property in the district of Columbia, in a cause entertained in that court, operated in the district, until congress took upon itself the government of the district.

The state of Maryland, and the United States, both intended that suits pending in the courts of Maryland, should be proceeded in, until the rights of the parties should be definitively decided; and that the judgments and decrees there made, should be as valid and conclusive as if the sovereignty had not been transferred.

Congress, by the 13th section of the act of February 27th, 1801, placed judgments and decrees thereafter to be obtained in the state courts of the state of which the district of Columbia had formed a part, on the same footing with judgments and decrees rendered before.

If a guardian appointed by the court of the state of Maryland, in a cause instituted after congress had legislated for the district of Columbia, had been ordered, by a decree of the court, to make a deed of lands within the district, and had died, or had refused to make the conveyance as ordered, the court of the district would, on application, have been bound to appoint another person to execute the deed; and would not have been authorized to open again and re-examine the questions which had been decided in the Maryland court.

A deed was executed and acknowledged "W. M. Duncanson, guardian for Marcia Burnes;" and