the decree of the said Superior Court in this case be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said Superior Court, with directions to dismiss the petition of the claimants.

The United States, Plaintiffs in error, *v.* Gordon D. Boyd and others, Defendants.

The act of Congress, passed on the 24th of April, 1820 (3 Stat. at L., 566), which substituted cash payments in lieu of credit sales of the public lands, made no exception in favor of the receiver. If he can purchase at all, it must be by placing his own money with the other moneys which he holds in trust for the government.

*The returns of the receiver to the Treasury Department are not conclusive evidence in an action by the government against the sureties upon the receiver's bond. If the sums of money stated in such returns were not actually in the hands of the receiver, the sureties are allowed to show how the fact was.[1] [*30

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them.[2]

An instruction given by the court below, viz., that if the jury believed that a fraudulent design existed on the part of the receiver and an agent of the government, to conceal defalcations existing prior to the date of the bond, then the bond was fraudulent and void, — was erroneous.

[1] This case is a leading case upon the effect of official reports to bind sureties on an official bond. In *Watkins* v. *United States*, 9 Wall, 759, it was held that in a suit on a marshal's bond, the introduction of duly certified transcripts of the adjustment of his accounts, by the accounting officer of the treasury, made a *primâ facie* case for the government. But the sureties, however, cannot disprove the receipt of moneys with which he has charged himself after the execution of his bond. *United States* v. *Girault*, 11 How., 22. Yet, in Nevada, it was held, on a trial against the sureties on the official bond of a State treasurer, to recover for defalcation claimed to have taken place within the period covered by the instrument, that it was competent to show that the defalcation occurred previous to the giving of the bond, and that any testimony tending to support such defence was relevant and pertinent. *State* v. *Rhoades*, 6 Nev., 352. In Missouri it is held to be only *primâ facie* evidence, even though the money was received while the bond was in force. *Nolly* v. *Calloway County Court*, 11 Mo., 447; *State* v. *Smith*, 26 Mo., 226. It would seem that the same is held in Alabama. *Townsend* v. *Everett*, 4 Ala., 607. In New York the reports are held not to be conclusive. *Bissell* v. *Sexton*, 66 N. Y., 55; *Williams* v. *United States*, 1 How., 290; *United States* v. *Eckford*, Id., 250. But in Illinois a contrary doctrine is held. *Morley* v. *Town of Metamora*, 78 Ill., 394; *Roper* v. *Trustees of Sangamon Lodge*, 91 Ill., 518 (as to default before bond given); *Baker* v. *Preston*, 1 Gilm. (Va.), 235; *Supervisors of Washington Co.* v. *Dunn*, 27 Gratt. (Va.), 608 (conclusive after a certain notice given under a statute); the entries are evidence for the sureties, but not conclusive. *Mann* v. *Yazoo City*, 31 Miss., 574. A sheriff's return of the receipt of money has been held conclusive on his sureties. *Bagot* v. *State*, 33 Ind., 262; *Price* v. *Cloud*, 6 Ala., 248; so a justice of the peace. *Modisett* v. *Governor*, 2 Blackf. (Ind.), 135.

[2] Distinguished. *United States* v. *Girault*, 11 How., 22, 30.

The condition of the bond was prospective, and fraud in respect to past transactions, not within the condition, could not render the instrument void prospectively.[3]

Nor should the acts and declarations of the agent of the government have been allowed to be given in evidence, without first establishing his agency. Secondary proof of the contents of a letter of appointment should not have been received, without first accounting for the non-production of the original.

Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, this court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder.[4]

If a judgment for costs be given against the United States by the court below, it must be reversed, as the United States are not liable for costs.[5]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi. It was formerly before the court, and reported in 15 Pet., 187.

The following statement of the case was made out by Mr. Justice Nelson, and prefixed to the opinion of the court.

The plaintiffs brought an action of debt against the defendants in the court below, upon a receiver's bond, in the district of Mississippi, for defalcation in office, and in which the latter obtained the verdict.

The declaration was in the usual form for the penalty, to which several of the defendants, after craving oyer, pleaded performance. The bond bore date the 15th June, 1837, in the penalty of $200,000, and after reciting that Boyd had been appointed receiver for the term of four years from the 27th December, 1836, the condition was, that he should faithfully execute and discharge the duties of the office.

The plaintiffs in their replication assigned for breach, that

[3] The general rule is that the bond of an officer has no retroactive effect. *United States* v. *Spencer*, 2 McLean, 405; *Myers* v. *United States*, Id., 493. But if money is paid to an officer, and he holds it at the time the bond is given to secure it, his sureties thereon will be liable for it. *Farrar* v. *United States*, 5 Pet., 373; *United States* v. *Boyd*, 15 Id., 187. Where the court had power to require additional sureties to be given whenever it saw fit, it was held that such additional sureties were liable for a default occurring after the bond was given, but before they signed it. *Commonwealth* v. *Adams*, 3 Bush (Ky.), 41. Where a surety was held liable for money received by his principal before the execution of the bond, see *Choate* v. *Arrington*, 116 Mass., 552. Where A became B's surety on a new bond, and the old one was then destroyed, A supposing there was no default under it, it was held that A was liable, in equity, on the new bond for the past default. *County of Frontenac* v. *Breden*, 17 Grant's Ch. (U. C.), 645.

[4] APPLIED. *Watkins* v. *United States*, 9 Wall., 762. CITED. *Aurora City* v. *West*, 7 Wall., 92; *Stanton* v. *Embrey*, 3 Otto, 553.

[5] CITED. *United States* v. *Thompson*, 8 Otto, 489.

That the United States are not liable for costs, see *United States* v. *Barker*, 5 Wheat., 395; *The Antelope*, 12 Wheat., 546; *United States* v. *McLemore*, 4 How., 286, and note.

The principal case is also cited in *Beall* v. *Territory*, 1 New Mex., 513; *Overland Desp. Co.* v. *Wedeles*, Id., 531.

after the 27th December, 1836, and while he was receiver, and as such, the said Boyd received divers large sums of the public moneys, amounting to the sum of $59,622.60, and which he had failed and neglected to pay over to the government.

To this replication the defendants demurred, and therefore the plaintiffs put in an amended replication; and in which a second breach was assigned, alleging that the said Boyd, after 27th December, 1836, and on divers days and times between that day and the 30th day of December, 1837, while he was receiver of the public moneys, and as such, received divers large sums of the public moneys, amounting in the whole to the sum of $59,622.60; and *further, that this sum remained in the hands of the said Boyd, as such receiver, [*31 on the 30th September, 1837, and that he then and there wholly failed and neglected to pay over the same.

To this amended replication the defendants demurred, and assigned for causes, —

1. That the breaches set forth did not state the time when the said Boyd, as such receiver, received the moneys mentioned therein; nor whether the said sum was received before or after the day of the date of the bond.

2. That the said breaches did not state that the said Boyd failed or neglected to pay over the money received by him as such receiver, at any time after the date of the bond.

The plaintiffs joined a demurrer; and the court below gave judgment for the defendants. The cause came up to this court on a writ of error, upon which the judgment was reversed, and the case remanded for further proceedings.

When the cause came back to the court below, Boyd, after craving oyer, pleaded separately performance, and to the replication assigning breaches he rejoined, setting forth a former recovery in assumpsit in bar of the action against him, — to which the plaintiffs answered, *nul tiel record*. This issue being found for the defendant, he was discharged without day.

The other defendants then put in a rejoinder to the amended replication of the plaintiffs, and alleged that the said Boyd did not, as a receiver, receive any public moneys at the time of the execution of said bond, or at any time thereafter, and before the commencement of the suit; and that no public moneys of the United States for the payment of which the defendants were chargeable by virtue of their bond remained in the hands of the said Boyd, as such receiver, at the time of the execution of the bond, or at any time thereafter and before the commencement of the suit, which the said Boyd had failed or neglected to pay over to the government.

To this rejoinder the plaintiffs demurred, and the defendants joined in the demurrer. The court below gave judgment for the plaintiffs, but allowed the defendants to amend, which was done accordingly; and in the amended rejoinder they aver, that no public moneys of the United States came to the hands of the said Boyd, as such receiver, after the execution of the said bond, nor were there any such public moneys for the payment of which the defendants were chargeable by virtue of the said bond, received by him prior to the execution of the same, remaining in the hands of said receiver in his official capacity at the time of the execution of said bond, or at any time thereafter, which had not been paid or accounted for according to law, before the commencement of the suit, upon which issue was taken.

On the trial the plaintiffs gave in evidence two treasury transcripts, one dated Feb. 27, 1838, adjusting a balance
*32] against Boyd, as *receiver, of $59,622.60, due to the government on the 30th Sept., 1837, the other dated Sept. 17, 1838, adjusting a like balance against him of that date.

The plaintiffs also gave in evidence the returns of Boyd, as such receiver, to the treasury department, containing the account current as kept by him with the government, covering a period from Dec. 31, 1836, to Sept. 25, 1837; and which agreed substantially with the balance due, as shown by the treasury transcripts. They were made monthly to the department.

Upon this the plaintiffs rested.

The defendants then proved, that no lands had been entered or sold at the office of the registers, at Columbus, or receiver's certificates issued by the receiver (Boyd), after the 29th of May, 1837. The last tract of land sold was entered on that day. This was proved by the register and confirmed by the records on file in the land-office.

It was further proved, that while the sales of the public lands were going on at Columbus, and in the month of January or February, 1837, Boyd permitted one Pearle to enter lands to the amount of some $12,000 or $15,000, without paying any money for the same, taking only his checks upon the Planters' Bank in the vicinity, which were uniformly dishonored as soon as presented for payment.

It further appeared, that Boyd himself, while such receiver, and before the execution of the bond in question, made entries in his own name, and in the name of others for his benefit, of a large quantity of the public lands at the register's office, and gave the usual certificates for that purpose, with-

out paying for the same, except by simply charging himself in his accounts with the receipt of so much money.

In the course of the trial evidence was given that a person by the name of Garesche appeared at Columbus, in May, 1837, claiming to be an agent from the land-office department authorized to examine the books and accounts of certain land-offices, of which that at Columbus was one; he produced a letter from the department of his appointment, which was recognized as genuine, and thereupon the offices of the register and receiver were examined. The defalcation of Boyd was discovered by the agent, who communicated it to the register, but enjoined secrecy.

The counsel for the plaintiffs objected to the competency of the evidence offered to prove the agency of Garesche, but the objection was overruled, and the decision of the court excepted to.

The defendants then offered Boyd, the receiver, as a witness, and with a view to remove all objections, on the ground of interest, releases were executed from them to him, discharging him from all liability in case a judgment should be rendered against them. They also produced a certificate of the clerk, stating that an amount of money had been deposited in court by Cocke, one of the *defendants, to [*33
cover all costs, and also a release by the said Cocke to the other defendants, discharging them from contribution.

The witness was still objected to, but admitted; to which decision the counsel for the plaintiffs excepted.

In the course of the examination of this witness, an objection was taken to his testimony going to prove, that he had no moneys in his hands belonging to the United States at the date of the bond, on the ground, it would be in contradiction of the statements contained in his official returns to the treasury department. The objection was overruled and the testimony admitted; to which decision the counsel excepted.

The witness testified that he had no money in his hands, as receiver, or otherwise, in court for the United States, at the date of the bond; and that he had so informed Garesche, the agent, before the execution of the same; and that after the execution he had paid over all moneys which he had received.

The testimony here closed, and the counsel for the plaintiffs prayed the court to instruct the jury,—

1. That the official returns of the receiver to the treasury department were conclusive against the sureties.

2. That there was no sufficient legal evidence before the jury of the agency of Garesche.

3. That fraud could not be imputed to the United States.

And the counsel for the defendants prayed the court to instruct the jury,—

1. That if the jury found that the balance claimed by the United States from Boyd arose from his returns, as receiver, of entries of public lands, made by him and others, prior to the execution of the bond, and that no money had been paid for the same on such entries before or after the execution of said bond, and that the entries had been made unlawfully without payment, then the sureties were not liable.

2. That the facts stated in the transcripts of the returns made by Boyd, of moneys on hand, were not conclusive against the defendants, but might be explained, contradicted, or disproved by the evidence.

3. That if the jury believed that the balance claimed by the United States arose out of moneys received by Boyd before the execution of the bond, and that the same was not held by him, as receiver, in trust for the government, at or after the execution of the bond, but had been used, wasted, or converted by him to his own use, prior to said execution, then the sureties were not liable.

The court charged the jury, that the evidence, on the part of the plaintiffs, made out a *primâ facie* case; but that if they believed, from the whole evidence, that the defalcation of Boyd arose from the entry of lands in his own name and in the name of others without payment *of money for the same, and previous to the 15th day of June, 1837, the date of the bond, the sureties were not responsible.

*34]

The court further charged the jury, that if they believed, from the evidence, that a fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of Boyd's defalcation from the sureties until they should execute the bond; and that such design was communicated to the Secretary of the Treasury, and his answer received before the actual execution of the bond, that then the bond would be fraudulent and void, and the sureties not liable.

To the instructions as given, and also to the refusal of the court to give the constructions as prayed for, the counsel for plaintiffs excepted. The jury found a verdict for the defendants.

The cause was argued at the preceding term by *Mr. Mason* (then Attorney-General), for the United States, plaintiffs in error, and by *Mr. Cocke* and *Mr. Henderson*, for the defendants in error.

Mr. Mason made the following points:—

I. The court erred in admitting testimony objected to, and in rejecting testimony offered by the United States to rebut defendants' evidence.

1. There was no legal proof of Garesche's agency, or of the extent of his powers to bind the United States. If any such agency existed, the instructions were of record in the treasury department, could be made evidence in the mode prescribed by law, and secondary evidence was inadmissible. To this general rule of evidence there are some exceptions; but this is not one, or within the principle of them. *Jacob* v. *United States*, 1 Brock., 528, a case of exception. Agency is a contract, and what constitutes it is matter of law. 1 Livermore on Agency, 25. In this case, the learned judge refused to decide whether there was proof of agency, and yet admitted secondary evidence, which was not admissible to establish it; certainly not without notice to the plaintiffs to produce papers in their possession.

As the acts of an agent bind his principal only when within the scope of his powers, it is indispensable to prove the character and extent of his powers before it can be determined whether a particular act is to have that effect. *United States* v. *Brig Burdett*, 9 Pet., 682.

2. Boyd was an incompetent witness. He was a sworn officer, and made his returns under the sanction of an oath; he was admitted as a witness to prove that these returns were not true. Public policy strongly forbids this, and the maxim of law, *nemo allegans suam turpitudinem est audiendus*, applies.

The case of *United States* v. *Leffler*, 11 Pet., 86, does not conflict with this position. In that case, the testimony of the principal obligor was not inconsistent with his official conduct.

*3. But if Garesche's acts were to be permitted to influence the jury, on the proof of agency submitted in establishing a fraudulent combination, then the bond previously executed by Boyd, and the defendants as his sureties, was admissible to rebut the inference that they were fraudulently induced to execute the bond on which this suit was instituted. Fraud is an extrinsic circumstance, which, if it exists, will vitiate the act infected; but all extrinsic circumstances are admissible to rebut such an allegation. 2 Stark. Ev., Tit. *Fraud*, 586; *Estwick* v. *Caillaud*, 5 T. R., 426. [*35

II. After the decision of this court in the cases of *Linn and the United States*, 15 Pet., 200, *Farrar & Brown* v. *United States*, 5 Id., 373, and the *United States* v. *Boyd*, 15 Id., 187, I do not feel at liberty to argue that the official

accounts of the receiver are conclusive against his securities, or that they are responsible for past defalcations, when the language of the condition is not retrospective.

On the merits, it is respectfully submitted, that, on another assignment of breach of the condition, the sureties may be held liable for so much of Boyd's default as arose from his certificates for lands taken up by himself, for which he did not pay over the money when required to do so. There is no legal disability in the receiver to enter public lands.

In *United States* v. *Boyd*, 15 Pet., 187, the court held, that "it matters not at what time the moneys had been received, if after the appointment they were held by the officer in trust for the United States, and so continued to be held at and after the date of the bond," the securities are bound. As a necessary counterpart of this proposition, if he was so indebted for lands entered by himself, while in office, and the United States chose to recognise the entry so made, and required payment at and after the date of his bond, his dereliction "*was not complete*" until his refusal to pay, or his failure to receive from himself; and for such dereliction his securities were liable. Issuing a certificate without payment to himself on his own entry is official misconduct, but that is not such a misconduct as to vacate the sale, unless the United States insists that it is no sale.

In this view, if correct, it is important that there should be another trial to enable the government to make a new assignment of breach, so as to present this inquiry.

The verdict for the defendants is general. The court below refused to instruct the jury that fraud could not be imputed to the United States, but gave the third instruction, which it is submitted was wholly erroneous. The jury were charged, if they believed, from the evidence, "that a fraudulent design existed between Boyd and Garesche to conceal the fact of Boyd's defalcation from the sureties, until they should execute the bond, and that such design was communi-
*36] cated to the Secretary of the Treasury, and his *answer received before the actual execution of the bond, that in such case the bond would be fraudulent and void, and the sureties not liable."

Fraud to have this effect is either matter of law or matter of fact. The instruction proceeds on the assumption that the fraud in this case was fraud in fact, which was left to the jury. Assuming even that the United States may be responsible for the fraudulent conduct of its agents and officers, this instruction was erroneous.

1. Because the bond, being prospective in its operation,

was not in law or in fact vitiated, if the prior defalcation was concealed from the sureties, or unknown to them.

2. Because there was no proof before the jury of Garesche's agency, or of the scope of his powers, and the court ought not to have left to the jury to frame their verdict on a state of facts which the evidence did not establish. The court having refused to charge the jury on the question, was in error to *assume*, in this instruction, that the agency existed to the extent of affecting the United States by his fraudulent acts. *Hunter* v. *United States*, 5 Pet., 173.

3. There is no intimation of what the Secretary's answer was, to have the effect of vitiating the security. All that was required was that Boyd and Garesche conspired to conceal the default; that such design was communicated to the Secretary, and his answer received, no matter what it contained; that fact, with the others, wholly insufficient of themselves, in the opinion of the court avoided the bond. It is not conceived possible that such a state of facts is to deprive the government of its resort against the sureties for the official misconduct of their principal.

By law the receiver is to execute bond, with approved security. The duty of approving cannot be delegated to an agent; and as no agency can exist but to do a lawful act, the ministerial duty of seeing the bond executed, and transmitting it to the treasury department, where it was by law to be approved, could not, in the nature of things, include power to vacate the bond by misconduct of the agent. And hence the importance in this case of showing, by proof, the scope of the supposed agent's powers.

Mr. Cocke, for defendants.

(After arguing the point of the demurrer to the rejoinder, came to the treasury transcripts.)

We are here called upon to examine whether these certified balances are evidence sufficient to sustain the action. If we shall find that they are not, then the court cannot legitimately disturb the verdict of the jury for the defendants. To the point of the admissibility of the transcripts of the accounts in gross we cite, that "the act of Congress, in making a transcript from the books and proceedings of the treasury evidence, does not mean the statement of an account in gross, but a statement of the items both of debits and *credits as they were acted upon by the accounting officers of the department. [*37

United States v. *Jones*, 8 Pet., 375.

The defendant is unquestionably entitled to a detailed

statement of the items which compose his account. Id. A certified statement of the balance due and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under the second section of the act of the 3d March, 1797. *United States* v. *Patterson*, Gilpin, 47.

In looking to the duties and liabilities of receivers of public moneys, for the sale of public lands in any land district of Mississippi, there is, perhaps, no form in which public moneys can come into their hands officially, for the payment of which sureties are chargeable, except it be for moneys received for the sale of public land sold in conformity with the requirements of law. A detailed statement of the items is then indispensibly necessary both to give information of the plaintiffs' demand, and to enable the defendants to defend themselves against any illegal or unjust charge; for example, if the item were for the sale of a certain section of land in a certain township and range, it would be competent for the defendants to show that the land was not in the land district, had never been offered for sale by the proclamation of the President, was some one of the variety of Indian or other reservations, and that the title had in no manner been affected by the supposed sale. But to allow a certified statement of a mere money balance in gross, or certified statements of money quarter-balances, to inculpate the defendants would, of necessity, work judicial oppression and injustice; we therefore repeat that the plaintiffs have not made out such a case as would enable them to recover, and that the verdict of the jury for the defendants cannot in this court be disturbed.

The case having arisen in Mississippi and tried there, if her laws are to have effect on the subject (but it is believed they have not), the same principle there prevails; thus, in an action of *indebitatus assumpsit*, the plaintiff shall file with his declaration an account stating distinctly the several items of his claim against the defendant, and in failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration as to give the defendant full notice of the character thereof. How. & H.'s Digest of the Laws of Mississippi, 590, sec. 6.

From any view we have been enabled to take of the subject, whatever may be the nature or manner of the subsequent proceedings, the verdict in this case cannot be disturbed.

The next subject that may engage the attention of the court is an *authenticated abstract of lands purchased by Gordon D. Boyd and others, previous to his being appointed receiver.

*38]

Also a certified abstract of lands purchased by Boyd in his own name *previous* to his being appointed receiver.

Also a certified abstract of lands *assigned* to Boyd *previous* to his being appointed receiver.

Also a certified abstract of lands purchased by Boyd after he was appointed receiver.

Also a certified abstract of lands purchased by Boyd in company with others after he was appointed receiver.

And also a certified abstract of lands *assigned* to Boyd after he was appointed receiver.

These several lists we have examined with care, and looked for their application to the matters in litigation in this suit with anxiety; and if they have the remotest connection with any matter here, on inquiry we confess we have not been able to discover it.

If, however, the court shall perceive their connection and importance, the judges will not fail to make the proper application and determine the weight to be given them in the evidence; we acknowledge our inability to do so.

The remaining balance of the plaintiffs' testimony is certain certified money accounts of the United States with Gordon D. Boyd, receiver of public moneys. These purport to be the quarterly statements of Boyd, of moneys remaining on hand from quarter to quarter, and stand obnoxious to the objections we have before considered. First, that they are not accompanied with transcripts from the books and proceedings of the treasury, showing the items which constitute the accounts in gross. Second, that the lands sold for which the balance is supposed to be created are not stated; and Third, that the sureties should not thereby be denied all opportunity of defending themselves, even by showing that the lands were not subject to sale, that the title thereto yet remained with the government, or to such person as they might otherwise belong. But we will ask the favor again to call the attention of the court to this subject, when we shall consider the testimony of the said Gordon D. Boyd and other witnesses for the defendants. The plaintiffs here rested their cause. The defendants, in their defence, offered the testimony of the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, Robert E. Harris, and the said Gordon D. Boyd.

To which the plaintiffs objected as incompetent, on the ground that the official returns or reports of Boyd, as receiver, could not be contradicted or explained by parol evidence; and the plaintiffs by their attorney thereupon moved the court to charge the jury that the official returns of Gordon

D. Boyd, made to the treasury department, under the sanction of his oath of office, were conclusive against his sureties. But the court permitted the testimony of the said *witnesses to be given to the jury. Before we examine that testimony, we are called upon to determine whether the matters referred to in these treasury transcripts and abstracts are, in law, conclusive upon the defendants, and fix their liability beyond all controversy, like unto a judicial sentence or other legal estoppel, or whether, allowing them to be free from the objections we have interposed to their admissibility, they are to be taken as mere *primâ facie* evidence, and like all *primâ facie* or presumptive evidence may be rebutted by other contradictory proofs, or attacked for fraud and imposition.

*39]

The act of Congress of the 3d of March, 1797, uses this language,—"shall be admitted as evidence." Its admissibility only is provided for; but nothing is said as to its effect or the amount of credence to be given to it. It is *ex parte* and in derogation of the fixed rules of evidence, and cannot be extended by implication to prohibit sureties from ascertaining the truth, or freeing themselves from the supposed liability of false reports made to the department.

In the case of the *United States* v. *Eckford's Executors*, 1 How., 262, 263, the court say,—"The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them, and this is not done on the face of the general transcript. It is necessary, therefore, to have a restatement of the account for this purpose. The restatement does not falsify the general account, but arranges the items of debts and credits, so as to exhibit the transactions of the collector during the four years in question. Whether this be done by depositions or in the form of the transcript may not be material. We think that the transcript or restatement of the account as explained by the depositions was competent evidence to the jury. This statement, as appears from deposition of Tarbutt, is deficient in not giving all the credits to which the collector was entitled, but as it relates to the matter in controversy it is evidence. The jury will determine what effect it shall have; the amount charged to the collector at the commencement of the term is only *primâ facie* evidence against the sureties.

"If they can show, by circumstance or otherwise, that the balance charged in whole or in part had been misapplied by the collector prior to the new appointment they are not liable for the sum so misapplied."

It was, in the case here referred to, contended that the duty of the treasury officers in settling these kind of accounts were in their nature judicial and conclusive, but the court did not sustain such views; on the contrary, regarded them as *primâ facie* only, and subject to be rebutted by circumstances or otherwise. But we contend that if they had been regarded in the nature of judicial sentences, being merely certified balances in gross, they were not admissible in evidence, any more than would be the minute of a final judgment of a court unsupported by any writ, pleadings, or proofs. *The instruction, therefore, of the court to the jury, that the evidence on the part of the plaintiffs made out a *primâ facie* case, was certainly as strong for them as they had any right to demand. Taking these treasury transcripts then as containing a *primâ facie* showing of the defendants' liability, we maintain that a full and complete defence is found for them on the following grounds:— [*40

1st. That all moneys that were in fact received by Boyd, as receiver, had been well and truly paid by him into the treasury before the commencement of this suit.

2d. That the balance claimed by the United States arose from returns made by him of false and illegal entries of public lands in his own name and in the names of others, prior to the execution of the bond, and that on such entries no moneys were in fact paid to said receiver or in his hands before or after the execution of the bond; that such entries were unlawful, were nullities, and passed no title out of the government.

3d. That if any balance of moneys received by Boyd was received by him before the execution of the bond, that none such was held by him in trust for the government at or after the execution of the bond, but had been used, wasted, or converted to his own use prior to the execution of the said bond, and,—

4th. That the fact of Boyd's supposed defalcation existed prior to the date of the bond, and was known to V. M. Garesche, the agent of the government, who was bound in morals and in law to have made the same known to the sureties, but who concealed such knowledge and enjoined official secrecy in fraud of the sureties. That the said bond was obtained from the sureties by fraud and no liability exists against them on the bond.

As to the first point, it will be borne in mind that the bond is prospective both in its terms and legal effect, and that it is dated on the 15th of June, 1837. It will be seen by reference to the testimony of William Dowsing, the register of

the same land-office, that the first entry that purports to have been made before Boyd, as receiver, was on the second day of December, 1836, and that the entries closed on the 29th of May, 1837; both of these periods were before the date of the bond. According then to the opinion of the court made in this case on the former adjudication, the sureties are not liable, unless such public moneys remained on hand at and after the date of the bond.

The testimony of all the witnesses, William Dowsing, John Davies, John D. Montgomery, William B. Winston, and Robert E. Harris, conduce to show that Boyd made his deposits of public moneys, as they accrued, in the office of the Planters' Bank, at Columbus, where he ought to have made them. By reference to exhibit A., part of the deposition of William B. Winston, it will be seen that the deposits were so made by him, and on comparing them with the statement of moneys paid by Boyd to the government, it is shown *41] *that he well and truly paid over to the plaintiffs all the public moneys actually received by him, and that at or after the date of the bond no such moneys remained in his hands.

The testimony of these witnesses certainly conduced to show this, and the jury having found the issue for the defendants, the court would not be authorized to disturb the verdict. This is so without regard to the testimony of Boyd, but if the testimony of Boyd be competent it is a full defence to the defendants, and is conclusive of the issue in behalf of the defendants. He testifies that at the date of said bond he had no moneys in his hands, as receiver, and did not otherwise hold any moneys at that time for the United States or in trust for them; that before the execution of said bond he had fully informed V. M. Garesche, the agent of the land-office department, that he had no such moneys in his possession; and being further interrogated, he stated that his default, as receiver, was complete and consummated before the execution of said bond, and that after the execution of said bond he did not receive any such moneys not paid over.

If his testimony be competent, its weight and credibility were alone for the province of the jury; they having believed him, and having found their verdict for the defendants, there is no rule by which this court on error would be authorized to disturb the verdict.

We entertain no doubt of the competency of his testimony. He had been previously prosecuted at the suit of the United States in a distinct and separate proceeding for the identical same cause of action, and the United States had obtained a

judgment against him on the 15th of June, 1838, for the sum of $53,722.50. These proceedings he relied upon as a bar to the plaintiffs' right to have another judgment against him for the same cause on the bond; *nul tiel record* was relied upon by the plaintiffs, but it was found that there was such record; and as it was not thought regular for the plaintiffs to have two operative judgments against the same person for the same cause at the same time, Boyd was discharged from the second action and had no further connection with it. But he was principal in the bond and the other defendants his sureties only.

Before he was allowed to testify, the defendants, on behalf of whom he did testify, were required to release him, his heirs, executors, and administrators, from all claims against him for any money or other thing which he might be liable to them or either of them by reason of any recovery or judgment that might be had against them or either of them, and also all costs incurred or to be incurred by reason of any suit upon the bond, after the discharge mentioned; by these releases the said Boyd was rendered a competent witness for the sureties, who thus released him, and was correctly permitted to testify. *United States* v. *Leffler*, 11 Wheat., 86. But whence, it may be asked, arose his supposed defalcation? We answer, by his having issued certificates for land before the date of the bond in his own name and in the name of others without having received *the purchase money therefor. See the testimony of William Dowsing, [*42 John Davies, John D. Montgomery, and Robert E. Harris, in the printed record. If this be so, allow us here, secondly, to say that whatever may be the nature of the liability of Boyd or his sureties for malfeasance in office, for and on account of these certificates, this proceeding for money received and on hand at and after the date of the bond cannot be supported. In this respect the jury having found for the defendants, this court would not be authorized to disturb the verdict.

We do not think that the United States can be deprived of any portion of the public domain by such false certificates. The act of Congress of the 24th of April, 1820, changing the mode of the disposition of the public lands from the credit to the cash system, provides that "credit shall not be allowed for the purchase money on the sale of any public lands which shall be sold after the 1st day of July, 1820. Lands remaining unsold at the close of a public sale may be sold at private sale by entry at the land-office at one dollar and twenty-five cents per acre, to be paid at the time of making such entry. No lands which have reverted or which shall

revert to the United States for failure in any manner to make payment, shall be subject to entry at private sale until they shall have been first offered to the highest bidder at public sale; no such lands shall be sold at public sale for a less price than one dollar and twenty-five cents per acre, nor on any other terms than that of cash payment." Statutes of the United States at Large, 66, 67. It would seem that the actual payment of the money forms a condition precedent both in fact and in law to the right of the receiver, register, or other officer of the executive government to part with any portion of the public lands.

If, indeed, it be competent for Gordon B. Boyd thus to appropriate $59,622.60 worth of the public domain to himself without paying for it, the task would not be difficult, on the same principle, for him thus to appropriate the balance of the land in his land district; and if he could be permitted to do so, all other receivers of public moneys could do the same in their several land districts, and thus the title of the whole public domain could pass out of the government without the payment of a dollar. The principle or practice that shall thus deprive the United States of her public lands cannot be sound or be supported by this court.

If, indeed, it be true that the supposed defalcation of Boyd arose before the date of the bond, and from his having issued certificates for the public lands in his own name and in the name of others without receiving payment of the purchase money therefor,—and it is shown by the testimony of the witnesses and the verdict of the jury that such was the manner of his defalcation,—may we not legitimately protest against the right of the executive government successfully to call on the judiciary to aid them in violating the *legislation *43] of Congress in this respect, and find security in the confidence that this court will never sanction such a disposition of any portion of the public domain. But what should be the course of the land-office department on the matter before us? We think it is easy and natural and what their duty enjoins, and about which they will have no difficulty.

By proper proceedings to ascertain what lands have thus been entered, set aside the entries and have the lands disposed of as the act of Congress provides; these entries are nullities, and even if a patent had issued it would not affect the title of the United States. For this we beg leave to refer the court to the case of *Stoddard and others* v. *Chambers*, 2 How., 318. There, it is said "no title can be valid which has been acquired against law. The patent of the defendant having been for land reserved from appropriation is void."

We may then certainly say that a false certificate made in violation of law and in fraud is void, and does not pass any title to the land out of the United States.

3d. The matters of the third point we think we have sufficiently considered of in what has been said on the first and second.

The fourth point, that V. M. Garesche was the agent of the general land-office to settle with Boyd, as receiver, that he made such settlement prior to the date of the bond, ascertained that the defalcation had thus accrued, and fraudulently enjoined secrecy on the officers and clerks in fraud of the defendants, we think we have sufficiently shown.

The fact is, he was such agent, and we think that the court below was bound to take notice that he was such without any direct proof. But William Dowsing, the register of the land-office, says,—"Some time between the 10th and 20th of May, 1837, V. M. Garesche, Esq., produced to him the letter of his appointment from the general land-office department of the United States, authorizing him to examine certain land offices, of which this was one; and from a knowledge derived from a frequent correspondence with the land-office department, I knew the letter of appointment which he produced to be genuine."

John Davies says,—"Some time in the spring or summer of 1837, the general government sent an agent, named V. M. Garesche, for the purpose of examining into the condition of the land offices." Robert E. Harris says, that,—"In the latter part of the spring or the first of the summer of 1837, a settlement took place in the land-office, between Col. Boyd, and a man by the name of Garesche, as agent of the government, in reference to such defalcation. He had no other knowledge of the agency of Garesche, or his authority as such, except that he was recognized and regarded by the register and receiver of the land-office at Columbus as such agent, and who settled with him as such." This we have thought sufficient.

*His appointment, whatever may have been its form, was not in the possession or control of the defendants. [*44
The injunction of official secrecy by Garesche as to Boyd's defalcation, see the testimony of William Dowsing, and that of John Davies. This suppression of the fact of Boyd's defalcation was a gross fraud on the sureties, who after the defalcation became sureties. It is most probable, that had the sureties been informed that Boyd had become a defaulter to the government to that large amount, they would have been sufficiently prudent never to have become responsible for him

on the bond. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a patent. 2 How., 318. It certainly ought to defeat a false certificate.

The plaintiffs further offered the copy of another and different bond, which was objected to by the defendants; and as it related to another, separate, distinct, and independent matter, the court very properly sustained the objection.

The plaintiffs also objected to some portions of the testimony, on account of the manner in which the several witnesses gave in their testimony, but as the objections were trivial, unbecoming the dignity of the investigation, and as the testimony is in other respects regarded amply sufficient to sustain the verdict, we have not thought it necessary to notice them in detail. When the court charged the jury that the plaintiffs had made out a *primâ facie* case, the plaintiffs' attorney substantially obtained all the charges he asked for; the court had already permitted the treasury transcript to be given in evidence to the jury, as being in judgment of law sufficient to establish the plaintiffs' right; the jury of necessity regarded them in that light. But the defendants were allowed to impeach the transcripts for illegality and fraud. It was equally regular to impeach them for any omission or mistakes, and thus they were compelled to yield the influence of the rebutting proofs.

In view of the whole case, we are satisfied it will be seen that the said Boyd had not any money of the United States at or after the execution of the bond, but that the same had all been paid into the treasury.

That his entire defalcation arose from his fraudulently and illegally issuing land certificates in his own name, and in the name of others, without being paid the purchase money, that they ought to be set aside, and the land considered as yet belonging to the government.

That it was a fraud in Garesche to conceal from the sureties the fact of Boyd's defalcation, and that the judgment of the court below ought not to be reversed, but the executive government left to the discharge of its duty in setting aside those illegal entries and certificates.

*45] **Synopsis of the Argument of John Henderson, for Defendants.*

The bill of exception filed in this case is of that form which has heretofore met, and we think deservedly, the reprehension of this court. It comprises, at length, all the testimony

on both sides, and extends to 161 pages, being all the record, less 17 pages. The various parts of the testimony is chiefly objected to, with a generality of exception, which presents no specific matter of law for the consideration of this court, but devolves it upon this court to sift depositions at length, to ascertain if there be any exceptionable matter to justify the general objections taken.

We should feel ourselves justified, did we think our defence made it necessary, to object that most of this extended volume of testimony is not before this court on any sufficient points of exception, as to entitle it to be reviewed by this court, under the common law rules of proceeding, as a court of error. But, waiving all such objections, we shall meet the plaintiffs' case, regardless of this deficiency.

In aggregating the general objections of the plaintiffs to the five several depositions of the defendants, that they were "incompetent" testimony, and with intimations that plaintiffs' case rested on "conclusive" proof, we can reduce these objections to no other legal position, than that the defendants were estopped from denying the plaintiffs' case by any proof whatever. For surely the defendants' testimony was pertinent to the issue, and it is not objected that the deponents were not competent and disinterested witnesses. Nor can it be doubted but the jury rightly estimated this testimony as disproving the plaintiffs' case. Reduced, then, to a legal elementary principle, the sum total of these objections is, that the defendants were concluded and estopped in law, from showing the truth against the fair-seeming, but fictitious case the plaintiffs had presented.

To this view of the case, our first answer is, that, if this position has any foundation in law, then it was peculiarly a case in which the estoppel should have been pleaded. It was not an estoppel *in pais*, coming up incidentally as evidence. The supposed matters of estoppel were the treasury transcripts presented by the plaintiffs as their ground of action, and if regarded by them as records conclusive on the defendants, they should have pleaded them specially in their replication, and not joined the defendants in an open and general issue, and then object that the defendants should not prove their issue as joined. If, then, it be a case of estoppel, it should have been so pleaded. 6 Munf. (Va.), 120; 2 A. K. Marsh. (Ky.), 143; 3 Dana (Ky.), 103; 2 Johns. (N. Y.), 382; 6 Pick. (Mass.), 364; 14 Mass., 241; 2 Blackf. (Ind.), 465; 2 Pa., 492.

But we say this is not an estoppel, because neither matter

of deed or of judicial record. 18 Johns. (N. Y.), 490; 3 Wend. (N. Y.), 27.

*46] *And is not an estoppel, because there was no mutuality of obligation between the parties to the matter of estoppel. The United States were not concluded by Boyd's returns, neither by the account as stated, nor the fictitious sales of the public lands, thereby reported to have been sold. Estoppel must be mutual. 2 Johns. (N. Y.), 382; 3 Rand. (Va.), 563.

Boyd's returns were no stronger evidence than receipts, which never work an estoppel. 12 Pick. (Mass.), 557.

But, so far from the plaintiffs' proof from the treasury department being "conclusive," a part, if not all of it, was clearly inadmissible as evidence at all.

The account showing settlement and balance struck by the treasury department against Boyd was no sort of legal proof. It resulted from no accounts and charges kept in the treasury department, and included no charge for money advanced or paid out of the department, but was only the result of certain treasury officers, in stating Boyd's account from reported returns, and data furnished by himself.

Now, the rule is settled in the case of *United States* v. *Buford*, and in other cases, that in a suit for money which came to the hands of a collecting officer *in pais*, and not received from the treasury department, a treasury statement, in such case, is no evidence of the debt. 3 Pet., 29; 6 Id., 202; 5 Id., 292; 8 Id., 375.

The papers certified from p. 17 to 22 of the record, are of this description, and should not have been admitted in evidence at all. Gilpin, 47.

The accounts certified from p. 48 to 55 as "true copies of the originals on file in said department," are perhaps, by another provision of law than that which provides for certified transcripts of accounts from the treasury books, admissible as secondary proof of the facts contained, but not necessarily of a debt due, and certainly as open to correction or disproof as accounts and receipts ever are, and having, in no sense whatever, any judicial verity. See cases cited above.

The plaintiffs' testimony shows, that the alleged balance of account due from Boyd was not of money received after execution of defendants' bond, but is carried forward, as "an amount remaining on hand *per* last return," from the months of February or March preceding.

The facts, then, which we have assumed as our right to prove are, that this reported balance was a mere fiction of figures, without any reality; and that the fiction was made

to figure as fact, by a device, palpably violative of the laws of the United States, in selling the public domain on credit, and charging up the price as cash received.

We have answered, that it was our province to show, and by our proof we have shown, to the satisfaction of a court and jury, that the balance of money on hand, as reported by Boyd, since the *execution of defendants' bond, was a fiction. 5 Pet., 373; 8 Id., 399. [*47

We have shown by our proof, too, that this balance arose from sales made of the public land on credit, and for which no money was received.

Can this court assume, for a moment, this may be lawfully done by the mere unmeaning device of a receiver, charging up his account sales, that the price was received, when in truth it was not.

The law says credit shall not be allowed for the purchase money on sale of the public lands after 1st July, 1821. Land Laws, 324. That lands subject to entry shall be paid for "at the time of making such entry." Land Laws, 324.

Is there any equitable license for the land officer, or this court, to dispense with the positive requirements of this law?

Now, we maintain, the provisions and requirements of this law rest in a superior and pervading public policy, and, as such, its high commands are in no sense directory, but mandatory and peremptory. Laws founded in public policy have no flexible equities authorizing any countenance to be given by the courts to their violation. Nor can it be tolerated, to meet any particular act of the citizen, that their known violation should be judicially covered up by an estoppel. Such are the English shipping acts, and so of ours; and of like high statutory policy is the system of our laws for the sale of public lands. 1 Story Eq., § 177.

In this case, then, the court will declare it to be the duty of the land department of our government to disregard these affected and unreal sales, consider them as void, and resume the title to the government, as unaffected by the acts now attempted to be validated; and such, in effect and principle, has been the previous decisions of this court. No title is valid if acquired against law. . . . . A patent issued against law is void. 2 How., 318; 13 Pet., 511.

Lands not subject to sale by law do not pass, without a register's certificate and payment; and the title of the United States is not diverted or affected thereby. 13 Pet., 498.

So, too, 11 Wheat., 384; 9 Cranch, 87.

The objection to Boyd as a witness is not well taken. He was exonerated by the parties for whom he deposed, for both

debt and costs, and had, therefore, no interests disqualifying him. 11 Pet., 86; 7 Cranch, 206; 7 Wheat., 356.

The objections to the charges and refusal to charge by the court below, we regard as wholly groundless. The court charged the full strength of the plaintiffs' case, and the other points vindicate themselves on reading.

But if this court should possibly find error in the trial, then we fall back upon the first error in the judgment of the court below on the pleadings, and demand the judgment of this court on the *plaintiffs' demurrer to defendants' first rejoinder, in which we think there is manifest error in the court's judgment against us.

*48]

JOHN HENDERSON,
Attorney for Defendants.

Mr. Justice NELSON, after reading the statement in the commencement of this report, proceeded to deliver the opinion of the court.

When this cause was formerly before the court, involving a question arising out of the pleadings, it was held, that the condition of the bond was prospective, and subjected the sureties to liability only in case of default or official misconduct of the principal occurring after the execution of the instrument; and that if intended to cover past dereliction of duty, it should have been made retrospective in its language; that the sureties had not undertaken for past misconduct. 15 Pet., 187.

The case is now before us, after a trial on the merits, and the question is, whether or not any breach of duty has been established, which entitled the government to recover the amount in question, or any part of it, against the sureties within the condition of the bond as already expounded.

Since the verdict rendered under the instruction given by the court below, we must assume that the whole amount of the $59,622.60, of which the receiver is in default to the government, accrued against him in consequence of the entry of public lands in his own name, and in the name of others, without the payment of any money in respect to the tracts entered in his own name, and without exacting payment of others, in respect to the tracts entered in their names; and all happening before the 15th June, 1837, the date of the bond. So the jury have found.

The fraud, thus developed, was accomplished at the time by means of false certificates of the receipt of the purchase money by the receiver, which were given by him in the usual way, as the entries for the several tracts of land were made

at the register's office, and also by entering and keeping the accounts with the government the same as if the money had been actually paid as fast as the lots were entered. The monthly or quarterly returns to the proper department would thus appear unexceptionable, and the fraud concealed until payment of the balances should be called for by the Government.

According to the finding of the jury, therefore, the whole of the money, of which the receiver is claimed to be, and no doubt is, in default, and for which the sureties are and ought to be made responsible, were not only not in his hands or custody at the time of the execution of the bond, but, in point of fact, never had been in his hands at any time before or since. No part of it was ever received by any body. The whole of the account charged was *made up by means [*49
of fabricated certificates of the receiver, and false entries in his returns to the government.

The act of Congress of the 24th of April, 1820, § 2 (3 Stat. at L., 566), provides,—"That credit shall not be allowed for the purchase money on the sale of any of the public lands which shall be sold after the first day of July next; but every purchaser of land sold at public sale thereafter shall, on the day of the purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land office a receipt from the treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase money on any tract, before he shall enter the same at the land office."

The acts of the receiver, out of which the defalcation in question arose, were in direct violation of this provision of law, and constituted a breach of official duty, which made him liable at once as a defaulter to the government, and would have subjected his sureties upon the official bond, if one had been given, covering this period. It was doubtless by some accident that the bond was omitted, as it will be seen by reference to the acts of Congress, 3d March, 1833, § 5 (4 Stat. at L., 653), and 3d of March, 1803, § 4, and 10th of May, 1800, § 6 (2 Stat. at L., 75, 230), that a bond with sufficient sureties should have been given by the receiver, before he entered upon the duties of his office.

It is clear, therefore, that the defalcation had accrued, and Boyd had become a defaulter and debtor to the government, before the present sureties had undertaken for his fidelity in office, unless we construe their obligation to be retrospective, and to cover past as well as future misconduct, which has already been otherwise determined.

Whether a receiver can purchase the public lands within his district in his own name, or in the name of others for his benefit, while in office, consistent with law and the proper discharge of his official duties, it is not now necessary to express an opinion.

The register is expressly prohibited, act of Congress, 10 May, 1800, § 10 (2 Stat. at L., 77), and it would have been as well if the prohibition had included the receiver.

One thing, however, is clear, and which is sufficient for the purpose of this decision, the act of Congress, forbidding the sale of the public lands on credit, makes no exception in favor of any officers. He must purchase, if he purchases at all, upon the terms prescribed. If this is impracticable, it only proves that the duty of the receiver is inconsistent and incompatible with the duty of the purchaser, which might amount to a virtual prohibition. But, if otherwise, and the receiver allowed to purchase, the money must be paid over, as in the case of other purchasers, and deposited at the time of the purchase with the other moneys received and held by him in trust for the government. The public moneys in his
*50] hands *constitute a fund, which it is his duty to keep, and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view, that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of Congress.

It has been contended, that the returns of the receiver to the treasury department after the execution of the bond, which admit the money to be then in his hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties; but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands, in his accounts with the government.

The sureties cannot be concluded by a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them. The principle has been asserted and applied by this court in several cases.

If the case had stood upon the first instruction of the court below, and to which we have already adverted, there

would be no difficulty in affirming the judgment. But the second instruction was erroneous.

The court charged, that if the jury believed, from the evidence, that fraudulent design existed, on the part of Boyd and Garesche, to conceal the fact of the former's defalcation from the sureties until they had executed the bond, and that such design was communicated to the Secretary of the Treasury, and his answer received before the execution, in that case the bond would be fraudulent and void, and the sureties not liable.

Now, in the first place, there is no evidence in the case, laying a foundation for the charge of fraud in the execution of the bond, in the view taken by the court as matter of fact, and therefore the construction was improperly given. And, in the second place, if there had been, inasmuch as the condition of the bond is prospective, any fraud in respect to past transactions not within the condition, which is the only fraud pretended, could not, upon any principles, have the effect of rendering the instrument null and void in its prospective operation. We may add, also, that, so far as the agency of Garesche was material in making out the allegation of fraud for the purpose of defeating the action, the proof was altogether incompetent. His acts and declarations for the purpose were admitted without previous evidence of his appointment as agent; and also secondary proof of the contents of a pretended letter of appointment, without first accounting for the non-production of the original.

*Before a party can be made responsible for the acts and declarations of another, there must be legal evidence of his authority to act in the matter. [*51

The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiffs' amended replication, overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants.

The answer to this is, that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a waiver of the judgment.

If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand.

Another ground upon which the judgment must be reversed is, that a judgment for costs was rendered against the plaintiffs. The United States are not liable for costs.

Some other points were made in the course of the trial, but it is unimportant to notice them.

Judgment of the court below reversed, with a *venire de novo*.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

JAMES PEPPER, SARAH H. EVANS, GEORGE MCCULLOUGH, AND LOUISA MCCULLOUGH, PLAINTIFFS IN ERROR, *v.* HUGH W. DUNLAP, CURATOR, &C., AND HIS WIFE.

Where a perpetual injunction was granted by a subordinate State court, and, upon appeal, the highest State court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court.[1]

The writ of error must be dismissed, on motion.[2]

THIS case was brought by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the State of Louisiana.

*52] **Mr. Crittenden* moved to dismiss the writ for want of jurisdiction in this court.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by writ of error to the Supreme Court of the State of Louisiana; and a motion is made to dismiss it for want of jurisdiction in this court.

It is unnecessary to state, at length, the proceedings in the State courts, because it is evident that the decree of the

[1] FOLLOWED. *Parcels* v. *Johnson*, 20 Wall., 654. CITED. *Moore* v. *Robbins*, 18 Wall., 588; *Bostwick* v. *Brinkerhoff*, 16 Otto, 4.

[2] See note to *McCollum* v. *Eager*, 2 How., 61.