Supreme Court of the State was not a final one. And as the case must be dismissed on that ground, the other objections to the jurisdiction of this court which were taken in the argument need not be examined.

It appears from the record, that the defendants in error obtained a decree in the District Court of Louisiana for the Ninth Judicial District, for a perpetual injunction, staying all further proceedings upon an order of seizure and sale of certain lands and other property mentioned in the proceedings, which before that time had been issued by the said District Court upon the petition of the present plaintiffs in error. From this decree an appeal was taken to the Supreme Court of the State; and at the hearing in that court it was decided that the present defendants in error, in whose favor the injunction had been granted, were entitled to relief for a large portion of their claim. The decree specifies sundry items which ought to be deducted from the claim of the plaintiffs in error, amounting to a very large sum; but states that the evidence before the court did not enable it to decide finally upon the rights of the parties, and especially upon the amount which the defendants in error were bound in equity to refund to the plaintiffs. And the court, therefore, decreed that the judgment of the District Court, granting a perpetual injunction, should be avoided and reversed; and remanded the case to the District Court for further proceedings in conformity to the opinion expressed in this decree.

This is the decree brought here by the writ of error. It is evidently not a final one, and the writ of error must therefore be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, holding sessions for the Western District of Louisiana, and was argued by counsel. On consideration whereof, and it appearing to the court here that the judgment of the said Supreme Court is not a final one, it is thereupon now here ordered and adjudged by this court that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

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*MORGAN MCAFEE, PLAINTIFF IN ERROR, *v.* THOMAS C. DOREMUS, JAMES SUYDAM, CORNELIUS R. SUYDAM, AND JOHN NIXON. [*53

By the laws of Louisiana, a notary is required to record in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers, a certified copy of which record is made evidence.

Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment; a subsequent protest and notice to the drawers and indorsers respectively, is good evidence.[1]

The original protest must be recorded in a book. Its absence at the trial is therefore sufficiently accounted for.

Where a joint action against the drawers and indorser was commenced under the statute of Mississippi (which statute this court has heretofore, 16 Pet., 89, held to be repugnant to an act of Congress), the plaintiffs may discontinue the suit against the drawers and proceed against the indorser only.[2]

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

On the 8th of December, 1839, the following bill of exchange was drawn.

$4,000. *Locopolis, Miss., Dec. 8th*, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your obd't servants.

CLYMER, POLK, & CO.

Messrs. KEYS & ROBERTS, *New Orleans.*

[1] "A notary, *registrarius, actuarius, scrivenarius,* was anciently a scribe that only took *notes* or minutes, and made short drafts of writings and other instruments, both public and private. He is at this day a public officer of the civil and common law, appointed by the Archbishop of Canterbury, who, in the instrument of appointment, decrees 'that full faith be given, as well in as out of judgment to the instruments by him to be made.' [Ayliffe's Parergon, 385; Burns' Eccl. Law, 1.] This appointment is also registered and subscribed by the clerk of her majesty for faculties in Chancery." Byles on Bills, 262 (7 Am. ed.). Certified copies of the acts of notaries prove themselves, and are admissible in all courts as *primâ facie* evidence of the facts therein stated. *Anon.*, 12 Mod., 345; *Halliday* v. *McDougal*, 20 Wend. (N. Y.), 81; *Townsley* v. *Sumrall*, 2 Pet., 170; *Nicholls* v. *Webb*, 8 Wheat., p. 333; *Dewolf* v. *Murray*, 2 Sandf. (N. Y.), 166; *Townsend* v. *Lorain Bank*, 2 Ohio St., 345; *Chase* v. *Taylor*, 4 Har. & J. (Md.), 54. But such copy is not evidence of notice unless provided by statute. *Harrison* v. *Robinson*, 4 How., 336; *Walker* v. *Turner*, 2 Gratt. (Va.), p. 536; *Lloyd* v. *McGair*, 3 Pa. St., 482; *Miller* v. *Hackley*, 5 Johns. (N. Y.), 384; *Dickens* v. *Beal*, 10 Pet., 582; *Bank of Rochester* v. *Gray*, 2 Hill (N. Y.), 231; *Williams* v. *Putnam*, 14 N. H., 540; *Swayze* v. *Britten*, 17 Kan., 625; *Couch* v. *Sherrill*, Id., 624; *Rives* v. *Parmley*, 18 Ala., 256.

But the protest is only *prima facie* evidence of the facts stated therein. *Nelson* v. *Fotterall*, 7 Leigh (Va.), 180; *Union Bank* v. *Fowlker*, 2 Sneed (Tenn.), 555; *Spence* v. *Crockett*, 5 Baxt. (Tenn.), 576; *Howard Bank* v. *Carson*, 50 Md., 27; *Rickett* v. *Pendleton*, 14 Md., 320; and although the notary, when examined, has no recollection of the facts stated therein, it is still *prima facie* evidence until contradicted. *Sherer* v. *Easton Bank*, 33 Pa. St., 134.

[2] FOLLOWED. *Coffee* v. *Planters' Bank of Tennessee*, 13 How., 189.

The firm of Clymer, Polk, & Co., consisted of Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer.

McAfee indorsed it, and it came to the hands of the defendants in error, merchants and partners in New York, trading under the firm of Doremus, Suydams, and Nixon.

When the bill became due it was not paid, and was protested under the circumstances set forth in the first bill of exception.

In May, 1842, Doremus, Suydams, and Nixon brought a suit against the four makers and also against McAfee, the indorser. The action was a joint one, as required by a statute of Mississippi, passed on the 13th of May, 1837, which was as follows.

"Section 1. Be it enacted by the legislature of the State of Mississippi, that in all actions founded upon bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and indorsers living and resident in this State in a joint action; and such suit shall be commenced in the county where the drawer or drawers reside, if living in the State; and if the drawer or drawers be dead, or reside out of the State, the suit shall be brought in the county where the first indorser resides.

"Sec. 2. Be it further enacted, that in all cases where any drawer, acceptor, or indorser shall have died before the commencement of *the suit, a separate action may be brought against the representatives of such drawers, indorsers, and acceptors. [*54

"Sec. 3. Be it further enacted, that the court shall receive the plea of non-assumpsit and no other, as a defence to the merits, in all suits brought in pursuance of this act; and all matters of defence may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict againts part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall enter up the proper judgment in such verdicts against the defendants; which judgments and verdicts shall not be reversed, annulled, or set aside for want of form.

"Sec. 4. Be it further enacted, that new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against; and judgments shall be entered against all the other defendants in pursuance of the verdict.

"Sec. 5. Be it further enacted, that the clerk shall issue duplicate writs to the several counties where the various defendants may reside, and shall indorse on all executions the names of the drawers and indorsers, particularly specifying the first, second, and third indorsers.

"Sec. 6. Be it further enacted, that it shall be the duty of the sheriff, in all cases, to make the money on the executions, out of the drawer or drawers, acceptor or acceptors; and in no case shall a levy be made on the property of any security or securities, indorser or indorsers, unless an affidavit from some credible person be made and filed among the papers in the case, setting forth that the principal or principals have no property in this State, out of which the plaintiff's money and costs can be made; and in such event the plaintiff may proceed with the executions against the defendants next liable, and so on until his executions be satisfied.

"Sec. 7. Be it further enacted, that no sheriff, or other officer, shall take more than one forthcoming bond, in any case, for the same cause of action.

"Sec. 8. Be it further enacted, that any plaintiff shall have the right to discontinue his suit against any one or more of the indorsers or securities, that he may sue in any joint action, before verdict, on payment of the costs that may have accrued by joining said defendant in such suit.

"Sec. 9. Be it further enacted, that in all suits brought under the provisions of this act, the defendants shall not be allowed to sever in their pleas to the merits of the action, and no plea of abatement shall be allowed to be filed in any cause, unless affidavit be made of the truths of the facts pleaded in the plea of abatement.

"Sec. 10. Be it further enacted, that if any plaintiff or plaintiffs shall cause to be levied an execution on any security, or their indorsers or their property, when the principal has sufficient property in this State to satisfy such execu-
*55] tion, the party so offending shall *be deemed a trespasser, and shall be liable to an action from the party aggrieved, and exemplary damages shall, in all such cases, be awarded by the jury trying the same. Approved, May 13, 1837."

This Statute was, in part, adopted by a rule of court in 1839, as follows:—

"Rule XXX. The practice and proceedings in action at law, by the laws of this State, and the rules of practice for the government of the courts of law, made by the late Supreme Court, where not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this court, or with the existing rules of this court, shall be considered the rules and practice of this court: provided, however, and it is hereby expressly understood, that this rule does not adopt the whole of the act entitled 'An act to

amend the laws respecting suits to be brought against indorsers of promissory notes,' approved May 13th, 1837; but that all of said act, except the tenth section thereof, is, and it is intended to be, adopted."

At June term, 1842, McAfee pleaded the general issue.

In June, 1843, three of the four drawers of the bill having been served with process and the remaining one not, the suit was discontinued as to the drawers, and continued against McAfee alone.

In December, 1843, the cause came on for trial, when a verdict was found for the plaintiffs. During the trial, however, the two following bills of exception were taken.

First Exception.

Be it remembered, that on the trial of this cause, on this 8th day of June, 1844, the plaintiffs in this case offered in evidence a bill of exchange in these words:—

$4,000 *Locopolis, Miss., Dec. 8th*, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your ob't servants.

CLYMER, POLK, & CO.

Messrs. KEYS & ROBERTS, *New Orleans.*

Having indorsed thereon the following names, three of which were erased:—

"Pay to Doremus, Suydams & Nixon, or order. Morgan McAfee, Charleston P. O., Miss."

"A. H. Davidson, Charleston P. O., Miss.; G. Davidson, Charleston P. O., Miss.; M. L. Cooper & Co."

The plaintiff then proved that the names of A. H. Davidson and G. Davidson had been erased before the maturity of the bill. The plaintiff then offered in evidence the copy of the original *protest, accompanied by the deposition of the notary public, in these words:— [*56

United States of America, Eastern District of Louisiana, City of New Orleans, ss:—

Be it remembered, that on this thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-four, before me, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States in and for the Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled,

"An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed Feb. 20, 1842, and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts in the United States,'" passed March 1, 1817, and the act, entitled "An act to establish the judicial courts of the United States," passed Sept. 24, 1789, personally appeared H. B. Cenas, a person of sound mind and lawful age, a witness for the plaintiff in civil suit now depending in the District Court of the United States, in and for the Northern District of Mississippi, wherein Doremus, Suydams, and Nixon are plaintiffs, and Clymer, Polk, & Co. (drawers), and Morgan McAfee (indorser) are defendants; and the said H. B. Cenas being by me first carefully examined, and cautioned, and sworn to testify the whole truth and nothing but the truth, did depose and say, that he is a notary public, duly commissioned and sworn, in and for the city and parish of New Orleans, State of Louisiana; that he held said office on the tenth day of March, A. D. 1840, on which day, at the request of the Commercial Bank of New Orleans, holder of the original draft, of which the following is a copy, to wit:—

$4,000. *Locopolis, Miss., December 8th*, 1839.

Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your obedient servants.

CLYMER, POLK, & Co.

Messrs. KEYS AND ROBERTS, *New Orleans.*

Indorsed:— MORGAN MCAFEE, *Charleston P. O.*
Messrs. M. D. COOPER & Co.

He, the said notary, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in) and demanded payment thereof, and was answered that the same could not be paid; whereupon he, the said notary, did publicly and solemnly protest said draft for non-payment, and of protest did give notice to Clymer, Polk, & Co., drawers, and to Morgan McAfee, indorser, and M. D. Cooper & Co., indorsers,

*57] by letters to the *drawer and first indorser severally written and addressed, informing them of said protest, and that the holders looked to them for payment; which letters he, the said notary, did direct to the said drawers and said first indorsers, respectively, as follows:— the one for Clymer, Polk, & Co., drawers, to them at Locopolis, Mississippi, and

that for the said Morgan McAfee, the first indorser, to him at Charleston P. O., Mississippi, and by delivering that for the last indorsers to themselves. Which letters he, the said notary, did put into the post office at New Orleans aforesaid, on the day and date of said protest. All of which was done under the hand of said notary, and recorded in presence of competent witnesses and in due form of law.

The notary's fees for said protest and notices amounted to $3.50.

The document A., M. M. Cohen, United States commissioner, is sworn to by me,

H. B. Cenas, *Notary Public.*

United States of America, North Circuit and Eastern District of Louisiana, City of New Orleans, ss:—

I, M. M. Cohen, a commissioner duly appointed on the 19th of April, 1842, by the Circuit Court of the United States for the Ninth Circuit and Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the witness lives in New Orleans, State of Louisiana, more than one hundred miles from Pontotoc, State of Mississippi, the place of trial of the cause for and in which said deposition is taken and is necessary. I further certify, that no notification was made out and served on the defendants, or adverse parties, their agent or attorney, to be present at the taking of the deposition, and to put interrogatories if he or they may think fit, and that no notification of the time and place of taking the said deposition was made out and served on said defendants or adverse parties, because neither the said adverse parties, nor any attorney or agent of said adverse parties was, at the time of taking said deposition, within (100) one hundred miles of the said city of New Orleans, the place of taking the said deposition. I further certify, that, on this thirteenth day of May, A. D. 1844, I was by the witness, who is of sound mind and lawful age, and the wit-

*58] ness was by *me carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness; and after carefully reading the same to the witness, he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of sealing up, directing, and forwarding the same with my own hands to the court for which the same was taken.

I further certify, that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal, the words "are plaintiffs" being first interlined on page 1, *ante*.

M. M. COHEN, [L. S.]

U. S. Commissioner Circuit and District Court United States for the Ninth Circuit and Eastern District of Louisiana.

Commissioner's fee, $10 00 } Paid by plaintiffs.
Notary for copy annexed, 2 59 }

M. M. COHEN, *U. S. C.*

United States of America, State of Louisiana:—

By this public instrument of protest be it known that, on this tenth day of March, in the year one thousand eight hundred and forty, at the request of the Commercial Bank of New Orleans, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said draft to a clerk of the drawees at their counting-room (said drawees not being in), and demanded payment thereof, and was answered that the same could not be paid. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, reëxchange, costs, charges, and interests, suffered or to be suffered, for want of payment of the said draft. Thus done and protested in the presence of Law. Dornan and Ernest Granet, witnesses.

In testimony whereof, I grant these presents under my

signature, and the impress of my seal of office, at the city of New Orleans, on the day and year first above written. [L. S.]

H. B. CENAS, *Notary Public.*

Original signed,—LAW. DORNAN,
E. GRANET.

$4,000. *Locopolis, Miss., Dec. 8th,* 1839.

Ninety days after date, of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee *four thousand dollars, value received, and charge the same to account [of] your obedient servants. [*59

CLYMER, POLK, & CO.

Messrs. KEYS & ROBERTS, *New Orleans.*

Indorsed,—Morgan McAfee, Charleston P. O., Miss., M. D. Cooper & Co.

I, the undersigned notary, do hereby certify that the parties to the draft, whereof a true copy is embodied in the accompanying act of protest, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of said protest, and served on them respectively this day, in the manner following, viz. by depositing those for the drawers and first indorsers in the post office in this city on the same day as this protest, directed to them respectively as follows:—that for the drawers, to them at Locopolis, Miss.; and that for the first indorser, to him at Charleston P. O., Miss.; and by delivering that for the last indorsers to themselves.

In faith whereof, I hereunto sign my name, together with Law. Dornan, and Ernest Granet, witnesses, at New Orleans, this 11th day of March, 1840.

Original signed,—Law. Dornan, E. Granet.

H. B. CENAS, *Not. Pub.*

I certify the foregoing to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in my office.

In faith whereof I grant these presents, under my signature, and the impress of my seal of office, at New Orleans, on this ninth day of November, in the year of our Lord one thousand eight hundred and forty-three. [L. S.]

H. B. CENAS, *Not. Pub.*

Sworn to before me.

M. M. COHEN, *U. S. C.*

To the introduction of which copy the defendant by counsel objected, but such objection was overruled by the court, and said copy allowed to be read; to which opinion of the court the defendant excepted, and this his bill of exceptions, before the jury retired from the box, was signed and sealed by the court, and ordered to be made a part of the record.

S. J. GHOLSON. [SEAL.]

Second Exception.

The second bill of exceptions referred to the statute and rule abovementioned, and to the discontinuance of the suit against the drawers of the bill, after three of them had been served with process. A motion was made in arrest of judgment, which was overruled by the court, to which overruling the second exception was taken.

*60] *The cause was argued by *Mr. Chalmers* and *Mr. Coxe*, for the plaintiff in error, and by *Mr. Stanton* and *Mr. Z. Collins Lee*, for the defendants in error.

Mr. Chalmers and *Mr. Coxe* contended that the paper admitted in evidence by the court below, purporting to be a copy of the protest of the bill of exchange sued upon, was not duly proved to have been a copy of the protest of the bill of exchange, but a copy of an entry in the notary's book, and that it was not duly proved, even as a copy of the entry in the book.

Secondly, if proved as a copy, it was not admissible as evidence, without laying ground for it by showing the loss of the original, which was not done.

A protest is, properly speaking, a solemn declaration on behalf of the holder against any loss to be sustained by non-acceptance or non-payment (Story, Bills, § 276, p. 301), must be in writing, signed, and sealed by the notary (Chit., Bills, 490, 642), and annexed to the bill itself, if it can be obtained or otherwise a copy (Chit., Bills, 362), with all the indorsements transcribed *verbatim*, with the reasons given by the party why he does not honor the bill; and this is so indispensably necessary, by the custom of merchants, that it cannot be supplied by witnesses or oath of the party, or in any other way, and, as is said, is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer, recognized in all parts of Europe, that a due presentment and dishonor has taken place, and all countries give credit to his certificate of the facts. Chit., Bills, 490. It must be made according to the laws

of the place where the payment ought to have been made. Story, Bills, p. 105, § 278; Chit., Bills, 490. By the laws of Louisiana, where this bill was payable, it is enacted, page 41, Ball. & C. Dig., Laws of Louisiana, that

"The notaries shall keep a separate book in which they shall *transcribe* and *record*, by order of date, all the protests by them made, minutes of notices, &c., &c., made by them, which declaration, duly recorded under signature of such notary and two witnesses," &c.

This book, from which the copy admitted was obtained, is a new *transcription* of the original protest,—a copy, wholly inadmissible itself, without accounting for the non-production of the original, and yet the court admitted a copy of this copy, without showing the loss, destruction, or that the original was not within the control of the party offering the copy. See *Sebree* v. *Dorr*, 9 Wheat., 558; *Brooks* v. *Marbury*, 11 Id., 78.

Secondly, the court below erred in overruling plaintiff in error's motion to arrest the judgment. This suit in the court below was *commenced jointly against the drawers and indorsers of the bill of exchange sued upon under and [*61 by virtue of the provisions of an act of the Legislature of the State of Mississippi, and a long count of the declaration is framed upon that act, which provides, that "in all actions founded upon bills of exchange and promissory notes the plaintiff shall be compelled to sue the drawers and indorsers living and resident within the State in a joint action." Act of May 13, 1837, Laws of Mississippi, 717; and by a rule of the District Court of the United States for the State of Mississippi, this act was adopted (see Rule XXX.), and, so far as it is not inconsistent with the laws of Congress and the rules of practice prescribed by the Supreme Court of the United States, became by that rule the law of the court. This being the case unless the act of the legislature of Mississippi, in its application to this case, was incompatible with the laws of Congress, or the rules prescribed by the Supreme Court of the United States, or the existing rules of the District Court for Mississippi, the dismissal entered as to defendants below, Isaac Clymer, William C. Ivins, and Benjamin C. Polk, the makers, and taking judgment against McAfee, the plaintiff in error and indorser of the bill sued upon, was manifest error, for which the judgment should have been arrested. See *Wilkinson and Turney* v. *Tiffany, Duvall, & Co.*, 5 How. (Miss.), 411. Was the act of Mississippi, adopted by the District Court in its application to this case, a violation of the judiciary act of 1789, ch. 20? The eleventh sec-

tion of that act gives jurisdiction to the Circuit Courts of suits between a citizen of the State where the suit is brought and a citizen of another State, and excepts "any suit to recover the contents of any promissory note, or other chosen action in favor of an assignee, unless the suit might have been prosecuted in such court to recover the contents, if no assignment had been made except in cases of foreign bills of exchange." The foundation of this action was a foreign bill of exchange, and although the drawers and indorser all resided in the State of Mississippi, it came within the exception of the act of Congress, and the District Court neither enlarged or diminished the jurisdiction of the court by adopting the rule, nor is the rule in its application to this case incompatible with the laws of Congress, the rules of practice prescribed by the Supreme Court of the United States, or the existing rules of the District Court. The case of *Keary et al.* v. *The Farmers and Merchants' Bank of Memphis*, 16 Pet., 89, was founded upon a promissory note, the makers and indorser all living in Mississippi, and the attempt, under this rule, to join them in the same action was pronounced by this court a violation of the judiciary act, in giving a jurisdiction to the District Court which that act had not conferred, and that, therefore, in that case the rule was void. Not so however in this case,—the foundation of this suit being a
*62] foreign bill of exchange, the *application of the rule violates no law of Congress, nor is it incompatible with any rule prescribed by this court.

The rule established by the District Court, adopting the statute of Mississippi, is of great value to the citizens of that State; and, so far as it can be made applicable to the just jurisdiction of the District Court of the United States in that State, sound public policy, respect for her public functionaries, and the rights and interests of the parties litigant in the federal tribunals of the State, appeal strongly to this court to have the act fairly and fully executed.

Mr. Lee and *Mr. Stanton* contended that the proof offered was sufficient; that the object of a protest was accomplished in giving the indorser notice; that certified copies of a protest were generally admissible; that a notary cannot serve the original protest upon each one of the indorsers; that the absence of the original at the trial was sufficiently accounted for by its being on file in the notary's office, and cited Story, Bills, 301, 304; 20 Wend. (N. Y.), 82; 8 Wheat., 333; 4 T. R., 175; 2 Pet., 179.

As to the second exception, they contended that the plain-

tiffs living in New York had a right to sue the indorser and drawers, which right could not be taken away; that they had a right to discontinue the action as they did; that the plaintiff in error was estopped from making this objection; that this court has rejected the statute of Mississippi, and cited 1 Pet., 78; 11 Id., 83–85; 16 Id., 94; 2 How., 343.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before this court by a writ of error to the District Court of the Northern District of Mississippi.

The suit was commenced on a bill of exchange against Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polk, & Co., makers, and Morgan McAfee, indorser. The process was served on Polk and McAfee. The latter pleaded the general issue, and an *alias* summons was issued against the defendants not served. This writ was served on Isaac Clymer and William C. Ivins; and at the succeeding June term the plaintiffs, by leave of the court, discontinued the suit against Clymer, Polk, & Co., leaving McAfee, the indorser, the only defendant.

On the trial the plaintiffs offered the deposition of H. B. Cenas, a notary public at New Orleans, to prove a copy of the protest, which was objected to by the defendant; but the court admitted the evidence, and this constitutes the first exception.

By the Louisiana acts of 1821 and 1827, the notary is required to record, in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or indorsers; a certified copy of which record is made evidence.

*Under these statutes it is held, in Louisiana, that "a certified copy of a protest is sufficient without producing the original." *Whittemore* v. *Leake*, 14 La., 394. [*63

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence. *Townsley* v. *Sumrall*, 2 Pet., 179. But the rule is different, under the principles of the common law, in regard to inland bills.

The protest offered is certified, under the seal of the notary, "to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in his office." But the deposition of Cenas, the notary, was relied on as proving the protest and notice. The exception taken was not to the deposition, but to the copy of the protest.

It is insisted that the deposition does not identify the pro-

test, and if it does, that it is not competent to prove the copy without accounting for the non-production of the original.

In regard to the latter objection, it appears from the statutes above cited, that the notary records the protest and the manner in which notice was given, and this record is, in fact, the original. It is presumed that nothing more than a short memorandum of the demand and notice is taken, from which the record is made in due form; so that there is, strictly, no original except that which is of record. And a copy of this is made evidence by the statute. Now this sufficiently accounts for the non-production of the original; and a sworn or a certified copy is the only evidence of the protest which can be produced.

And we think that the copy of the protest was properly considered as a part of the deposition. It was offered in connection with it, and is referred to as "Document A.," as no other meaning can be given to that reference. The commissioner who took the deposition states, the copy was sworn to before him, and the exception was to the "copy" and not that it was no part of the deposition. And the original being a matter of record, and of course not within the power of the plaintiffs in the Circuit Court, a sworn copy was admissible as evidence.

After the verdict was rendered against McAfee, the indorser, a motion was made in arrest of judgment on the ground that it appeared from the return of the marshal, the process had been duly served on three of the partners of the firm of Clymer, Polk, & Co., who were the drawers of the bill, and that the suit had been discontinued as to them; which motion the court overruled, and to which the defendant excepted.

It appears that the district judge, by a rule of court, adopted nine of the first sections of the statute of Mississippi, entitled "An act to amend the laws respecting suits to be brought against indorsers of promissory notes," &c., approved 13th
*64] May 1837, which *required suit to be brought against the drawers and indorsers of a bill of exchange jointly. Under this statute the suit was brought against the drawers and also the indorser of the bill.

This statute as adopted by the district judge, was brought before this court in the case of *Keary and others* v. *The Farmers and Merchants' Bank of Memphis*, 16 Pet., 89, in which the court held that "the law of Mississippi is repugnant to the provisions of the act of Congress, giving jurisdiction to the courts of the United States."

We see no objection, in principle or in practice, to the dis-

continuance of the suit against the drawers of the bill. Their liability was distinct from that of the indorser. In no respect could the indorser be prejudiced by the discontinuance. As a matter of course it was permitted at the cost of the plaintiffs.

In the case of *Minor et al.* v. *The Mechanics' Bank of Alexandria*, 1 Pet., 46, the court held, that when the defendants sever in the pleadings, a *nolle prosequi* ought to be allowed against one defendant," that "it is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form not absolutely subjected to authority may well yield to the substantial purposes of practice."

The judgment of the Circuit Court is affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern 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 District Court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

ELIZABETH WALKER, DEVISEE OF ROBERT WALKER, DECEASED, PLAINTIFF IN ERROR, *v.* FRANCIS T. TAYLOR, WILLIAM ROBINSON, WILLIAM E. SABLETT, THOMAS COOK, AND JOHN M. CRESUP, TRUSTEES OF THE TOWN OF COLUMBUS, DEFENDANTS.

Where the plaintiff below claimed a ferry right under an act of the legislature of Kentucky, and the ground of defence was that the act was unconstitutional and void as impairing vested rights, and the decision of the highest State court was against the plaintiff, a writ of error, issued under the 25th section of the judiciary act, will not lie.

This court can entertain jurisdiction under that section only when the decision of the State court is in favor of the validity of such a statute. Here, the decision was against its validity.[1]

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[1] See *Scott* v. *Jones*, *post*, *375.

When the State court decides that the statute of the State, drawn in question, is not valid, no appeal lies to the Supreme Court of the United States. *Winn* v. *Jackson*, 12 Wheat., 135; *Smith* v. *Hunter*, 7 How., 738; *Withers* v. *Buckley*, 20 How., 84.

If the decision is in favor of the statute, but that decision necessarily draws in question a treaty that is claimed to conflict with it, an appeal lies. *Worcester* v. *Georgia*, 6 Pet., 515.

The jurisdiction to review does not extend to those laws passed by territorial legislatures. *Miner's Bank* v. *Iowa*, 12 How., 1.

But if the decision is in favor of the