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 Smith et al. v. Kernochen.
 

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Chicago to keep said streets open. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

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JENNET SMITH, CALVIN S. POWE, AND THOMAS A. POWE,  
PLAINTIFFS IN ERROR, v. JOSEPH KERNOCHEN.

When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice.<sup>1</sup>

If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction.<sup>2</sup>

The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late.<sup>3</sup>

A former suit in chancery between the original parties to the mortgage involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee claiming to recover by virtue of the same mortgage. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it.<sup>4</sup>

There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined.<sup>5</sup>

The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State.

THE Reporter finds the following statement of the case, prepared by Mr. Justice Nelson, and prefixed to the opinion of the court.

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<sup>1</sup> CITED. *Perrine v. Town of Thompson*, 17 Blatchf., 20. *S. P. Jones v. League*, 18 How., 76; *Briggs v. French*, 2 Sumn., 252.

<sup>2</sup> DISTINGUISHED. *Manufacturing Co. v. Bradley*, 15 Otto, 180. CITED. *Deshler v. Dodge*, 16 How., 631; *Hawley v. Kepp*, 2 Flipp., 178; *Blackburn v. Selma &c. R.R. Co.*, Id., 538. *S. P. Willes v. Newberry*, 4 McLean, 226; *Starling v. Hawks*, 5 Id., 318; *Jones v. League*, 18 How., 76.

<sup>3</sup> APPLIED. *Sheppard et al. v. Graves*, 14 How., 511. FOLLOWED. *Holmes*

*v. Oregon &c. R. Co.*, 7 Sawy., 392; s. c., 9 Fed. Rep., 238. CITED. *De Sobry v. Nicholson*, 3 Wall., 423; *Williams v. Nottawa*, 14 Otto, 211; *Rae v. Grand Trunk R'y Co.*, 14 Fed. Rep., 402; *Ganse v. City of Clarksville*, 1 McCrary, 86 n. See note to *McKenna v. Fisk*, 1 How., 241.

<sup>4</sup> CITED. *New Orleans &c. R. R. Co. v. City of New Orleans*, 14 Fed. Rep., 376; *S. P. Tyler v. Hyde*, 2 Blatchf., 308.

<sup>5</sup> FOLLOWED. *Garton v. Botts*, 73 Mo., 276.

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\*This is a writ of error to the Circuit Court of the United States for the Southern District of the State of Alabama. [\*199

The plaintiff below, Kernochen, a citizen of New York, brought an action of ejectment against the defendants to recover the possession of eleven hundred and sixty acres of land, situate in that State, and to which he claimed title.

On the trial it appeared that Archibald K. Smith, being the owner in fee of the premises, executed a mortgage of the same, on the 9th of April, 1839, to the Alabama Life Insurance and Trust Company, a corporation duly incorporated by the legislature of the State of Alabama, to secure the sum of seven thousand five hundred dollars, payable in five equal annual payments, with interest. And, further, that the mortgage had been duly assigned and transferred by that company to Kernochen, the plaintiff, in consideration of the sum of one thousand dollars, on the 26th of August, 1844. Possession being admitted by the defendants, the plaintiff rested.

It appeared, on the part of the defence, that the mortgage and bond accompanying it, with other securities belonging to the Life and Trust Company, were placed in the hands of Hunt, an agent of the company, to procure a loan of money in New York; and that one thousand dollars was loaned, at his instance and request, by the plaintiff to the company, for the security of which the assignment of the above mortgage was made. That the motive of the company in making the assignment was to obtain a decision of the Federal courts upon the questions decided in the court below, but that Kernochen was not advised of the motive at the time of the advance of the money, nor was he in any way privy to it.

It further appeared, that a bill of foreclosure of the mortgage had been filed in the Court of Chancery of Wilcox county, State of Alabama, by the company, against Smith, the mortgagor, which was defended by him. In the answer he admitted the execution of the bond and mortgage, but denied their validity, setting out the consideration, which consisted of bonds and obligations of the company made and delivered to him for the like sum of seven thousand five hundred dollars, payable at a future day, with six per cent. interest. The mortgage in question bore eight per cent.

The proofs taken in the case sustained the answer, and showed that the transaction between the company and the mortgagor, consisted simply in an exchange of securities with

each other, with an advantage to the former of two per cent. profit.

The chancellor decreed that the contract was valid, and the bond and mortgage binding upon the defendant, and \*200] that, \*unless the principal and interest were paid within thirty days, the mortgage be foreclosed.

Upon an appeal to the Supreme Court of the State, this decree was reversed, and a decree entered dismissing the bill. That court held, that the charter of the Life and Trust Company conferred no authority upon it to lend its credit, or issue the bonds for which the mortgage in question was given, and that the bond and mortgage taken therefor were inoperative and void.

The charter of the company, together with several amendments of the same, were given in evidence.

When the evidence closed, the defendants prayed the court to charge the jury, that, if they believed that the transfer of the mortgage to the plaintiff was made for the purpose of giving jurisdiction to the Federal courts, and to enable the company to prosecute its claim therein, and that the plaintiff was privy to the same, the deed was void, and did not pass any title to the plaintiff which the court would enforce.

The defendants further prayed the court to charge, that the judgment and decree of the Supreme Court of Alabama between the company and Smith, the mortgagor, was conclusive upon the parties in this suit; and that neither the mortgagees, nor those claiming under them, since the rendition of the decree, could recover the lands embraced in the mortgage at law or in equity.

The court refused to charge according to the above prayers, and charged as follows:—

1. That any matters which might abate the suit should have been pleaded in abatement, and that, after the plea of the general issue, the facts proved by the defendants, as set forth in the bill of exceptions, could be of no avail, and were insufficient to abate the suit. And,

2. That the defendants, claiming title under Smith, the mortgagor, were estopped from denying the consideration of the mortgage as set forth in that instrument, and that the consideration as there stated was good, and valid, according to the charter of the company, and sufficient to sustain the validity of the mortgage and title of the plaintiff.

The jury found a verdict for the plaintiff.

A writ of error brought the case up to this court.

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It was argued by *Mr. Dargan*, for the plaintiffs in error, and *Mr. Sergeant*, for the defendant in error.

*Mr. Dargan*, for the plaintiffs in error.

The facts of this case may be thus stated. The Alabama \*Life Insurance and Trust Company held the bond and mortgage of Archibald R. Smith, executed and [\*201 delivered to said company. They filed a bill in equity in the State of Alabama to foreclose the mortgage. Smith resisted a decree and set up a defence, that the consideration of the bond and mortgage was illegal, in this, that the consideration of the company to him was the bonds of the company to an amount equal to his bond, payable in New York, which bonds of the company bore interest, payable semiannually, and were in the form described in the bill of exceptions. That said company had no power or capacity to deal by way of exchanging credits. The Supreme Court of the State of Alabama dismissed the bill of the company, declared the consideration illegal, and the bond and mortgage void.

This is shown by the record of the case, reported in 4 Ala., 558, which case, as reported, is made part of the bill of exceptions. It was also shown by the secretary of the company, that the consideration of the bond and mortgage was stated correctly in the report of said case. After this decision was rendered, the company transferred the bond and mortgage to Kernochen by an assignment on the back of the mortgage, marked exhibit B in the bill of exceptions.

Tisdale, the secretary of the company, testified, that the transfer of the bond and mortgage to Kernochen was for \$1,000. That the object of the transfer was to obtain a decision of the question in the courts of the United States. That he did not know whether Kernochen was informed of the motive of the transfer; that the company had never had any other transaction with him, and that this was done through J. Hunt, their agent.

The defendant in the court below showed, also, that Smith had resisted the mortgage in his lifetime, and denied its validity; of this the company was apprised; also, that, since the death of Smith, the land had been sold under execution, and bought by Powe, one of the defendants. The defendants requested the court to charge the jury, that if the transfer of the mortgage was for the purpose of giving jurisdiction to the Federal courts, and to enable the Alabama Life Insurance and Trust Company to prosecute its claim in this court, and that the lessor of the plaintiff was privy to this intention, that the deed was void, and could give the lessor of the

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plaintiff no title which this court would enforce. This charge was refused. The defendant also requested the court to charge the jury, that the consideration of said mortgage was illegal, and therefore the mortgage was void, and the plaintiff could not recover; which was refused.

\*202] \*Also, that the judgment and decree of the Supreme Court of Alabama, as delivered in the case of *Smith v. The Alabama Life Insurance and Trust Company*, was conclusive, and that neither the mortgagors nor those claiming under the mortgage, since the rendition of said decree, could recover the land described in the mortgage; which was refused. Also, that, if the jury believed that, at the time of the transfer to the lessor of the plaintiff, the defendants held the land, denying the validity of the mortgage, the transfer was void as to them, and that the plaintiff could not recover; which was refused.

And the court charged, that any matter in abatement should have been pleaded in abatement, and that the facts proved by the defendant on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit.

The court also charged, that the defendants and Archibald R. Smith were estopped from denying the consideration as set forth in the mortgage, and that the consideration, as expressed therein, was sufficient, according to the laws regulating the Alabama Life Insurance and Trust Company, to sustain the contract set forth in the mortgage.

Also, that the judgment and decree of the Supreme Court of Alabama was not conclusive, and could not bar the plaintiff in this suit.

It will be seen by the bill of exceptions, that the case, as reported in 4 Alabama Reports, as well as the acts of the legislature incorporating the company, and altering and amending the charter, are part of the bill of exceptions.

I intend to present the following questions:—

1st. The court erred in refusing to charge the jury, that, if they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce.

The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given.

The Constitution did not intend to confer on the Federal

tribunals jurisdiction to determine on the rights of citizens residing in the same State, unless the subject-matter was of admiralty jurisdiction, and where citizens of the same State held grants to the same land from different States.

A deed, therefore, which is merely intended to give jurisdiction to this court, and is not for the purpose of transferring the \*right to the thing to the vendee, but as [\*203 between vendor and vendee the interest and right is still with the vendor, contravenes the spirit and intention of the Constitution; shall it be effectual for this purpose? If so, it appears to me that the framers of the Constitution ought to have added, or rather that we now add to the Constitution, after the words, "between citizens of different States," "and between citizens of the same State where one of the parties has transferred his right to a citizen of another State, with the view to give jurisdiction to the Federal courts."

Justice Washington, in 1 Washington's Circuit Court Reports, 82, decided that a deed for such a purpose was void, and could not effect its object. I think that this court came to the same conclusion in the case of *McDonald v. Smalley*, 1 Pet., 558; in concluding the opinion, Chief Justice Marshall uses this language:—"The case, we think, depends on the question, whether the transaction between McArthur and McDonald was real or fictitious; but there being nothing in the record from which the court could pronounce it was fictitious, the deed was maintained. But suppose the evidence had shown that the deed was fictitious, that McDonald was suing merely for McArthur, what would have been the decision? It seems to me, from the whole case, that the deed would have been pronounced void,—a fiction merely; and, therefore, it could not have given title so as to effectuate the very fictitious design for which it was intended; that is, to coerce the adjudication of the title in the Federal courts."

The District Court seemed to think it was matter in abatement; now Kernochen was a citizen of the State of New York, the plaintiff in error, of Alabama; the Circuit Court, therefore, had jurisdiction so far as the parties on the record are concerned. And the only question was, Had the plaintiff the better title? He had the title the mortgage gave him, if the transfer was valid in law; if it was not valid in law, he had no title, and the question was therefore properly raised in bar. True it is, that, in 1 Pet., the question seems to have arisen on a question of jurisdiction to the court; but the court will perceive that the question still must have been,

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Did the deed from McArthur to McDonald give title to McDonald? If it did give title, as McDonald resided in Alabama, the jurisdiction was perfect; if it gave no title, McDonald could not recover; therefore the question was, did the transfer of the mortgage, for the purpose of prosecuting the suit for the Alabama Life Insurance and Trust Company, being intended to give fraudulent jurisdiction to the court, convey to him any title, or such a title as this court would enforce?

\*204] \*Deeds given for illegal purposes are void, and courts will not execute the purpose. This transfer was made to enable the Alabama Life Insurance and Trust Company, a corporation of Alabama, to litigate its rights with citizens of Alabama in the Federal courts.

The company was prevented by the Constitution from doing this. They try by this deed to do it, and for this purpose they make it; will the court execute the purpose, or declare the deed void? If void, no title passed, none at least that this court would enforce; for, if it did, it would be carrying out, or permitting the Alabama Life Insurance and Trust Company to carry out, their illegal purpose.

The whole testimony fully authorized the request asked. A decision had been rendered on the case in the Supreme Court of the State, pronouncing the mortgage void. The company never had had any transaction with the plaintiff. The secretary admitted that the object was to enable the company to try the question in the Federal courts; only a thousand dollars was received. It might well have been left to the jury to say, Is this not all a fiction, a design and trick between Kernochen and the company? and if so, I think this court will establish the rule, that such a transaction will not convey such a title as this court will enforce.

2d. The consideration of the mortgage is illegal. The Supreme Court of the State of Alabama has decided, on this very same mortgage, that the consideration was illegal, and not authorized by the charter of the company; and this decision was made directly, when the validity of the mortgage was put in issue, and the decision depended on the construction of the charter and its amendments.

The rule is fully recognized in this court, that the decision of the State courts, construing a statute of their own State, is conclusive on this court. That is, whether the construction be right or not, it will be adopted as a rule of decision. So strongly has this court adhered to this rule, that, in a case from Tennessee, where the Supreme Court of Tennessee had reversed a former decision on the construction of the statute

of limitations, this court adopted the last decision as conclusive, although they believed the former decision was correct. See, also, *Greever v. Neal*, 6 Pet., 291. It may be well to inquire why this court has adopted this rule of decision. The answer is, that the jurisdiction or sovereignty, as it may be called, has an unquestionable right to construe its own statutes, and that its own courts and its own people understand its own laws, and that no other people or government can or ought of right to construe those laws for them. Now, \*I would submit that, in construing an act of the legislature creating a corporation, we could not adopt a [\*205 different rule; if so, every charter granted by the States must come before this court for its final construction, and we should deny to the sovereignty that created the being the right to judge of its powers and capacities.

But, if I am wrong in this view, the decision of the Supreme Court, as delivered by Justice Ormond, will clearly show, I think, that the company had no right to issue their bonds, and thus deal in an exchange of credits. If they had the right to issue the bonds described in the bill of exceptions, their contracts to the same purport would have been valid without their seal, and their obligations could have as well been payable on demand as at a future day; as well in the shape of a bank-note, as in any form; and thus, by construction, they would have fairly been entitled to banking privileges, which was certainly never designed or contemplated by the charter. Whether, therefore, this court will construe the charter, or adopt the construction of the Supreme Court of Alabama as correct, the result will be the same, that the consideration of the mortgage is illegal.

Then comes the question, Can we show by parol proof that the consideration is illegal, when the consideration expressed in the mortgage is legal, and different from the consideration shown by the proof, which is recited to be seven thousand four hundred dollars in cash? To hold that this recital precludes proof of the illegality of consideration would set the whole law at defiance, so far as contracts are concerned, and would be saying, however immoral or vicious the consideration of a contract may be, you may preclude an inquiry into it by stating a legal consideration on its face.

The rule of evidence is, that parol evidence shall not be received to vary or contradict a deed or other written evidence. This rule, however, can only apply when the evidence seeks to contradict or vary the terms or legal effect of a deed; not seeking, however, to destroy the deed altogether as a legal instrument or contract; for the rule is well settled,

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that fraud or illegality of consideration may be given in evidence to defeat a deed, that is, to show the deed is a nullity.

This is the doctrine laid down in 4 Kent, 465, 466; Greenl. Ev., § 284; 1 Smith, Lead. Cas., 154; 2 Wils., 347; 9 East, 408; 5 Mass., 61. Indeed, a different rule would destroy all law by the form of the contract.

I therefore submit, that the language of the deed cannot preclude the plaintiffs in error from showing that the consideration was illegal; and being illegal, the mortgage is \*206] void; and \*therefore the court erred in refusing the charge asked, and in charging as it did as to the validity of the deed.

Another question is, Could the Alabama Life Insurance and Trust Company transfer a title, after Smith had denied the validity of the mortgage, and held the possession adverse to the company? Could the company make a deed that would be valid as against the adverse possessor? At common law he could not, for livery of seizin could not be given. See 2 Co. Litt. by Thomas, 409, and note (Y). And this is the rule recognized by the Supreme Court of Alabama. See *Allen and Dexter v. Nelson*, 6 Ala., 68. True it is, that the mortgagor cannot deny the title of the mortgagee, and he is considered as the tenant of the mortgagee. But the principle of this doctrine is, that where there is a valid mortgage, the mortgagor shall not set up a paramount title to the mortgage; but here the validity of the mortgage was denied.

The possession was adverse to the mortgage. Does not the rule of the common law apply?

*Mr. Sergeant*, for the defendant in error.

The facts of this case appear in the record, as fully, and at the same time as succinctly, as they could be presented here. To the record the court is respectfully referred for the general view of them, and the questions they give rise to, saving the right of stating particular facts, as they may become material in the course of the discussion of the matters of law involved in the case.

From the printed argument submitted by the learned counsel of the plaintiffs in error, it appears that they rely upon two principal objections to the judgment below, and one that is subordinate, and, seemingly, not much confided in. These are all the assigned errors, therefore, before the court, and to these answers will now be given, without further introduction.

I. "The court erred in refusing to charge the jury, that, if

they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce. The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given."

The first of these differs, in one particular, from the printed argument, namely, in requiring the judge to leave to the \*jury whether the lessor of the plaintiff was [\*207 "privity to his intention."

The second differs, it is thought, materially from the charge actually given, as will be presently seen.

To this error, thus assigned, there are several answers.

1. There was no evidence whatever of any privity of the lessor of the plaintiff. The only witness examined on the point said, "He did not know whether Kernochen was informed of the motive; that he never had any intercourse with him on the subject, nor had the company ever had any other transaction with him." As a matter of fact, it thus stood without any proof. It is respectfully submitted, that the court cannot be required to give a charge upon what is not in evidence. If a fact is important to the party, it is for him to substantiate it by proof; but where there is absolutely no proof at all, he cannot require the judge to charge the jury as to its effect, and there is no error in the judge declining to do so. The learned counsel for the plaintiffs in error seems to be of the same opinion, for in his argument, as has been seen, he omits the matter of privity altogether. By and by it will be seen whether the fact itself, if proved, would have been of any consequence. It is submitted that it would not.

2. The judge was required to charge the jury, that, upon the hypothesis presented, without any color of support from the evidence, the assignment of the mortgage was void, and could give the lessor of the plaintiff no title which the court would enforce. The grounds in law upon which the judge could be asked to declare the deed void, and to decide that it could give no title which the court could enforce, are nowhere exhibited in the argument, unless they are supposed to be somehow involved in the general question of jurisdiction, which will be considered presently. The prayer is simply that the court will charge the jury that the assignment is void, and therefore that one link is wanting in the

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derivation of title of the lessor of the plaintiff. The proper termination of the objection is not to the jurisdiction at all, but to the right to recover, equally fatal in all jurisdictions, State or Federal.

It is nowhere denied that the assignment was duly signed, sealed, and delivered, was upon a sufficient consideration, and, between the parties, a good and valid transfer, sufficient in law to pass the right of the mortgagee, whatever it was, to the transferee. How it can be said that such a deed is void is altogether inconceivable. Probably the explanation of what is meant is to be sought in the words which follow,—that it “could give no title which this court” (the Circuit Court) “would enforce.” The reasoning, then, \*208] would be, it is good \*elsewhere, but it is void here; and the ground must be, that it is so void because it was made to give this court jurisdiction. This position is answered authoritatively by one of the decisions of this high court, quoted in the printed argument of the plaintiff in error. In *McDonald v. Smalley*, 1 Pet., 620, (A. D., 1828,) Chief Justice Marshall, in page 624, declares the motive to be of no consequence. The case is very similar to the present, and what is there said is now considered to be the settled doctrine of this court. The reasons of it will be found very fully stated in an opinion of the late Judge Story, in his circuit, which will be again referred to in a later stage of the argument. (*Briggs v. French*, 2 Sumn., 251.) The motive, therefore, is not an unlawful one to entertain or to act upon, and cannot affect the validity of the deed, if in other respects valid and good. “This court” (the Circuit Court) would enforce it as fully as any other court. It would have been error to decline the jurisdiction.

3. The judge is charged with error in deciding, as alleged, that this, if true, was matter in abatement, that it ought to have been pleaded, and could have no influence after the general issue pleaded.

What the judge really did say is in the bill of exceptions, and is as follows:—“And the court charged, that any matter in abatement should have been pleaded in abatement; and that the facts proved by the defendant, on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit.”

If the facts proved by the defendant could be of no avail, either upon a plea in abatement or upon the general issue, then the decision of the judge, as imputed to him, would be wholly immaterial, and therefore it is not error to reverse the

judgment. Authority (which is abundant) need not be quoted for this obvious conclusion of common sense. If it could not be made available in either way, the case was against the defendant, and the decision must be against him, so that what was said by the judge could neither help nor hurt him. This point was thus immaterial.

But the charge of the judge must be understood with reference to all that had previously occurred in the case, and in fairness must be interpreted as intended to express, in a concise way, his opinion upon the several points the case presented upon the evidence or upon the requirement of counsel. It must be remembered, therefore, in the first place, that there was not the least pretence of evidence to affect the lessor of the plaintiff, or to impugn the integrity of his conduct. All that \*was before the court was the evidence as to the motive of the mortgagee, which, as already stated, [\*209 was of no manner of consequence. In his charge, he begins with stating the law,—“that any matter which abates the suit should have been pleaded in abatement,” which, undoubtedly, is true,—universally true, unless this be an exception. The remainder of the sentence must be understood to say, that, if so pleaded, they would be insufficient, under the circumstances proved, “to abate the suit.”

It is not worth while, however, to occupy the time and attention of the court with an effort to bring this question to the most exact precision. Interpreted in either way, the charge is right, and there is no error in it. If the court should be of opinion that the learned judge below meant to say that the matter alleged could be of no avail to the defendant, after pleading the general issue, we contend that he was right, and there was no error.

The plaintiff's argument, it will be seen, embraces two propositions in law, namely, that, upon the trial of the general issue, the evidence in the case was competent and was sufficient to oust the jurisdiction, and also that no plea in abatement was necessary to entitle the evidence to be heard, and to produce this legal effect.

To maintain these propositions, but one case is cited, namely, *Maxfield's Lessee v. Levy*, reported in 2 Dall., 381, and more at large in 4 Dall., 330. Reference is also made to two *dicta* of a later period, which will be noticed hereafter.

What *Maxfield's Lessee v. Levy* decided, it seems to have been difficult to express in legal language. In the first of the reports, the purpose of the deed, and that there was no consideration, are stated as the grounds of the decision. In the index to the second, it is thus stated:—“A fictitious convey-

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ance of land, to give jurisdiction to the Federal court, detected, and the suit dismissed." The word "fictitious" here used will be found to be adopted afterwards, but what it means is nowhere stated or defined. The word is an ambiguous one, as here applied, and the two cases where it is subsequently found did not require attention to its meaning, because the objection founded upon it was answered decisively by other matter. All that need be said is, that if the "purpose" or "motive" is held to make it "fictitious" and unlawful, it is contrary to what has been decided by this court in the case already referred to.

The decision of the Circuit Court, however, is not authority here. It is entitled to respect so far only as it is reasonable and consistent with law; and to that respect it is entitled only in cases where the facts and circumstances are the same.

\*210] \*Now they are not so, in the present case, as must be most obvious.

In *Maxfield's Lessee v. Levy* there was no question of the competency of the evidence upon the general issue, nor of its sufficiency to oust the jurisdiction. It does not appear that the general issue had been pleaded, or any other plea, nor, of course, that the defendant, by pleading, had waived his right to except to the jurisdiction. The case was decided upon a rule to show cause why the ejectment should not be dismissed from the record.

Again, in *Maxfield's Lessee v. Levy* the grantor and the grantee were both parties to the purpose which the learned judge denounced as vitiating the deed. That is not the case here. There is no evidence at all that the assignee was privy to it.

Further, there was no consideration in *Maxfield's Lessee v. Levy*. This was clearly and distinctly proved, and much stress is laid upon it by the learned judge, as may be seen in 4 Dall., 334. It was, indeed, the chief ground of his decision. In the present case, there was a valuable consideration paid.

Not admitting that, under these circumstances, the decision in *Maxfield's Lessee v. Levy* can be supported, yet there are such differences between that case and the present, as fully justify us in concluding that the learned judge who decided *Maxfield's Lessee v. Levy* would not have decided *Kernochen v. Smith* otherwise than Judge Crawford has done.

Independently of these considerations,—which, it is submitted, are sufficient here,—could *Maxfield's Lessee v. Levy* be maintained at the present day, if it were now to present itself with the same facts and circumstances, precisely, as were before the late Judge Iredell? The case occurred, it

will be remembered, as early as the year 1797, when the Constitution had been very recently made, its institutions were new and untried, and they were both regarded with jealousy, as likely to encroach upon and swallow up the States. The judiciary, of course, had its full share of the effects of this feeling. Experience has shown that it was groundless. The courts of the United States have carefully kept themselves within the narrowest limits. They have settled, in the first place, that they can occupy no more of the ground belonging to the United States by the Constitution than is assigned to them by acts of Congress. They have, in the next place, settled that their jurisdiction is limited, though they are not inferior courts. And, finally, that their jurisdiction must appear upon the record. The neglect, in this last particular, may be taken \*advantage of at any time, [ \*211 even in error. But they have never gone the length of saying that the want of jurisdiction from matters out of the record may be alleged at any time, in any form, or in total disregard of all rule. Still less have they countenanced the position, that a deed, good and real by the laws of the State, and which would be so held in any State tribunal, becomes void by being offered in evidence in a court of the United States, and is to be regarded as fictitious.

The case of *Maxfield's Lessee v. Levy* has received no countenance or support in this court. It has never been followed, as far as known, by any judge. In the two cases referred to on the other side, there is a reference merely to the subject of "fictitious conveyances," but in both the jurisdiction was supported, without any examination of the doctrine.

It is unnecessary to examine the argument in *Maxfield's Lessee v. Levy*, because this has already been done by the late Judge Story, in the case of *Briggs v. French*, 2 Sumn., 252. With the force of ability, learning, and experience, and the high judicial authority, which that eminent and lamented judge could bring to the discussion, it would be a work of supererogation, if not of presumption, especially in this court, where he was so well known as a judge and a jurist, to attempt to add a word to what he has said. This decision was in the year 1835, with the light of nearly half a century upon the law and practice of the courts of the United States.

Two things, however, irresistibly force themselves upon the mind of any one who reads that case. The one is, how it can be that a court of the United States, constituted to administer, in certain cases, the laws of the States, can declare a deed void which is good by the State law, or hold it fictitious when by the same law it is real. The other, how can a court

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constituted a court of law or equity deem itself at liberty to reject a rule of pleading of universal adoption, and conducive to order and justice, to replace it by a mode of proceeding which leads only to confusion, surprise, and wrong?

But it is believed, also, that the decisions of this court have established the contrary. One remark only will be made before referring to them. The jurisdiction in question is founded exclusively upon the character of the parties, and not at all upon the subject-matter. It is not perceived how the latter can affect the former. The one exception made by Congress, with perfect accuracy, in the act of 1789, is founded upon the subject-matter, namely, assignable instruments. No matter who sues upon them, or who is sued, if there was not jurisdiction between the original parties, there is none, in the excepted case, where the assignee is plaintiff.

\*212] This is plain and practicable. \*The purpose or motive is not regarded, and the simple fact, as to the subject-matter, is the determining test. The exception only proves the rule. In all other cases, the character of the parties decides the jurisdiction, whatever may be the subject-matter. Congress could have gone further, if they had thought fit to do so. They can do so still, if they so incline. Probably Congress and the people are by this time convinced that the jurisdiction is a beneficial one, and ought to be cavilled at or curtailed.

But now for the decisions of this court, leaving to it, without particular suggestions, to discern how they contradict and overthrow the doctrine of *Maxfield's Lessee v. Levy*.

Instances of pleas to the jurisdiction will be found in *Sere v. Pilot*, 6 Cranch, 332; *Mollan v. Torrance*, 9 Wheat., 537; *Shelton v. Tiffin*, 6 How., 163. Doubtless there are many others.

In *D'Wolf v. Rabaud*, 1 Pet., 498, (A. D., 1828,) it was decided that the question of citizenship must be pleaded in abatement. Said to have been so recently decided, on full consideration.

In *Evans v. Gee*, 11 Pet., 80,—see page 83, opinion of Judge Wayne,—(A. D., 1837,) the same point was decided. In *Sims v. Hundley*, 6 How., 1, (A. D., 1848,) that, upon the plea of *non assumpsit*, evidence cannot be received relating to the residence of the party, bearing upon the jurisdiction of the court. So, in *Bailey v. Dozier*, 6 How., 23 (same year). See, also, *Briggs v. French*, 2 Sumn., 251.

In *Bonnafée v. Williams*, 3 How., 574,—see page 577,—(A. D., 1845,) this court decided as follows:—"Where the citizenship of the parties gives jurisdiction, and the legal

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right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue, at law, in the Federal courts, without reference to the citizenship of those who may have the equitable interest."—McLean, J.

Putting these decisions together, it is most clear that the opinion of the learned judge below (Judge Crawford), even in its most extreme construction, was right, and that there is no error in it.

II. The error alleged under this head (except a subordinate matter hinted at in the conclusion of the printed argument, which will be noticed hereafter) is founded upon the second and third of the charges of the learned judge, to be considered with the instructions asked for by the defendant below.

To begin with the third. No authority has been shown to establish that a decree in chancery is a bar at law, or a \*judgment at law a bar in equity. The contrary is [\*213 well settled. *Lessee of Wright v. Deklyne*, 1 Pet., [213 C. C., 199, 202.

For the same reason, the arguments of a chancery court must be deemed inapplicable, except to the very case before the court; for, in equity, the decision itself may depend (and does so in this case) upon which party it is that applies for relief. A decree is not a bar even in chancery, when the position of the parties is changed. It is lawful and equitable for a party to use the means he has at law to force his adversary into a condition to oblige him to go into chancery, and thus free himself from obstructions which lie in the way of administering what is plain and substantial justice. What that justice here is must be very apparent.

The defence attempted is a very ungracious one. There is no denial that the company fulfilled its agreement, gave the bonds, and in due time paid them, and that the party who received converted them, in such way as seemed best to him, to his own use. The defence now is, simply, that the company were not authorized to issue the bonds. It is not said, even, that there was a prohibition by law. It was, therefore, at most, a common mistake, and one party, having obtained the full benefit of the contract, now seeks to turn the mistake to the wrong of the other party, by stripping him of the equivalent he received. No court, either of law or equity, will favor him. If he come into equity, he must do equity.

The statutes of usury, for example, declare the usurious contract void. But wherever the case is in the power of a court, either of law or equity, they require the payment of

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principal and interest. The cases are collected by counsel in *Bank of United States v. Waggener*, 9 Pet., 390. Among them is the case of one suing for a pledge or security.

The question now is, and the only one, What are the rights of this mortgagee at law against the mortgagor, and those deriving under him? What are his legal rights? This is a question which was not, and could not, be before the court of chancery, as the case was there presented. The decree of that court did not touch it, nor intend to touch it. It only refused its aid to foreclose the mortgage. But the court neither condemned the mortgage, nor enjoined the plaintiff from proceeding at law, nor meddled with or affected his legal rights. They remain exactly as they were before.

What are his rights at law? This is the only question at present. If he should attempt to use them inequitably, the mortgagor may apply to equity for relief. Difference between application by mortgagor and mortgagee, 1 Pow. on Mort., 336.

\*214] \*At law, a mortgage is a conveyance of land. The statute of Alabama executes the use, and the courts of Alabama have decided that the mortgagee is entitled to possession as soon as the deed is made. *Duval's Heirs v. McCloskey*, 1 Ala., 708. The contract is executed by force of the deed and the statute. Aik. Dig., 94, § 37; Clay's Dig., 156, §35. The contract is executed, and no longer executory. The consideration is not to be inquired into.

The doctrine of the court of Alabama above quoted is the universal doctrine. *Hughes v. Edwards*, 9 Wheat., 389. "The mortgagor, after forfeiture," (which is the case here,) "has no title at law, and none in equity, but to redeem upon terms of paying the debt and interest." (p. 499.) The mortgagee may proceed at law and in equity at the same time. A real action may be brought upon a mortgage in fee. *Dexter v. Harris*, 2 Mason, 531. See also the opinion of this court in *Conard v. The Atlantic*, 1 Pet., 441; and, still later, in *Bronson v. Kinzie*, 1 How., 318, where the nature of the estate of the mortgagee is very distinctly stated, and his rights at law. It is good against the priority of the United States. *United States v. Hooe*, 3 Cranch, 73; *Thelusson v. Smith*, 2 Wheat., 396. "In contemplation of law, the mortgagee was a perfect stranger as to any legal estate." *Cheetham v. Williamson*, 1 Smith, 278, per Lord Ellenborough.

The mortgagor cannot dispute the title of the mortgagee, because no man is permitted to dispute his own solemn deed. 1 Powell on Mortgages, 166; Coote, 347, 348. Payment is

good at law only by Stat. 7 Geo. 2, ch. 20, and that strictly taken. 1 Powell, 168, note 2.

The right at law, equity will not interfere with. *Cholmondeley v. Clinton*, 2 Mer., 359; *Williams v. Medlicott*, 6 Price, 496, note at the end of the case. They will not prevent him from assuming possession.

At law the mortgagor and those claiming to derive under him cannot dispute the right. 1 Powell, *ut sup.* It is to be observed here, that the alleged purchaser has never been in possession. The family of the mortgagor have remained in possession. See Record, p. 7, sixth paragraph from the top, the last sentence. If he had been, however, this would make no difference. They cannot at law dispute the deed. Doe d. *Roberts v. Roberts*, 2 Barn. & Ald., 367, 370; *James v. Bird's Adm'r*, 8 Leigh (Va.), 510; *Pownal v. Taylor*, 10 Id., 172; *Newman v. Chapman*, 2 Rand. (Va.), 93; *Thomaston Bank v. Stimpson*, 21 Me., 195; *Smith v. Hubbs's Adm'r*, 1 Fair. (Me.), 71; *Reed v. Moore*, 3 Ired. (N. C.), 310; *Logan v. Simmons*, 1 Dev. & B. (N. C.), 16. See, also, 7 Johns. (N. Y.), 160; 4 Mass., 355; 4 Hill, (N. Y.), 424; 3 Ves., 612; Cro. Jac., 270; 16 Johns. (N. Y.), 189.

\*All the questions in this case, however, have been deliberately considered and decided by the Supreme [\*215 Court of Ohio. They are reported in the seventh volume of Ohio Reports, *Raguet v. Roll*, and Doe dem. *Raguet v. Roll*. The first was a proceeding by *scire facias* to sell, a remedy of an equitable nature for the mortgagee; and the second, an ejectment at law. They presented, of course, the very same questions as are now before the court, and nothing need be said to recommend their reasonableness, and their conformity to law. The printed volume has not been within our reach. We are obliged to submit a manuscript copy, which is herewith.

There remains nothing further to trouble the court with, but the one subordinate point before referred to, which will be easily disposed of. This point is, that the deed of transfer was void on account of adverse possession. There was no adverse possession. In *Chapman v. Armistead*, 4 Munf. (Va.), 382, the court decided as follows:—"The possession of the mortgagor, continuing with the permission of the mortgagee, is to be considered as the possession of the mortgagee, so that when the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner."

Further references for the court.—*Elliott v. Piersoll*, 1

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Pet., 340; *Bank of U. S. v. Planters' Bank of Georgia*, 9 Wheat., 904.

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

We are of opinion, that the charge of the court below upon the question of jurisdiction was substantially correct.

It might have been placed upon ground less open to objection. The case admits that Kernochen, the plaintiff, was not chargeable with notice of the motive of the company in assigning the mortgage to a citizen of another State; he was not chargeable, therefore, with the legal consequences that might result from the existence of such knowledge. He advanced his money, and took the security in good faith, and became thereby possessed of all the title that belonged to the mortgagees; and had a right to enforce it in any court having cognizance of the same.

The most that can be claimed is, that the company intended a fraud upon the eleventh section of the Judiciary Act, in seeking to obtain a decision of the Federal courts upon the validity of the mortgage between themselves and the defendants, both parties residents and citizens of the same State, using the name of the plaintiff as a cover for that purpose. But admitting this to be so, still, upon general principles, the rights of the plaintiff under the assignment \*216] could not be affected by the \*fraud, unless notice was brought home to him. Till then, he stands on the footing of a *bonâ fide* purchaser without notice.

But the charge, we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been properly executed and founded upon a valuable consideration, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald v. Smalley*, 1 Pet., 620.

The suit would be free from objection in the State courts. And the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage.

The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plain-

tiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted.

The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. (1 Pet., 625; 2 Dall., 381; 4 Id., 330; 1 Wash. C. C., 70, 80; 2 Sumn., 251.)<sup>1</sup>

Assuming, therefore, everything imputed to the assignment of the mortgage from the company to the plaintiff, the charge of the court was correct. The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits. *D' Wolf v. Rabaud*, 1 Pet., 417; *Evans v. Gee*, 11 Id., 80; *Sims v. Hundley*, 6 How., 1.

But we are of opinion the court erred in giving the second instruction, which denied the conclusiveness of the decree in the bill of foreclosure against the right of the plaintiff to recover in this action.

The suit in chancery was between the original parties to the mortgage, and involved directly the validity of that instrument; it was the only question put in issue by the bill and answer, and the only one decided by the court. The mortgage was held to be void, on the ground that the bonds of the company which were given in exchange for it were illegal, \*and created no debt or liability for which a [\*217 mortgage security could be taken or upheld; that every part of the transaction was beyond any of the powers conferred upon the company by its charter, and therefore wholly unauthorized and void. On these grounds, the court decreed that the bill be dismissed. The present is an action of ejectment, brought by the assignee of the complainants in that suit against defendants representing the interest of the mortgagor, and in which the right to recover depends upon the force and validity of the same instrument.

A mortgagee, or any one holding under him, may recover possession of the mortgaged premises, after default, on this action, unless it appears that the debt has been paid, or is extinguished, or the mortgage security for good cause held

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ineffectual to pass the title. Here it has been shown to have been declared null and void by a court of competent jurisdiction, in a suit between parties under whom the present derive title, and in which, as we have seen, the question of its validity was put directly in issue. The case, therefore, falls within the general rule, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters, when directly in question in another court.

It is suggested on the brief submitted on the part of the plaintiff below, that a decree in equity between the same parties is not a bar to an action at law; and hence, that the decree in the bill of foreclosure in this case is no bar to the action of ejectment; and the case of the *Lessee of Wright v. Deklyne*, Pet. C. C., 199, is referred to as sustaining that position. On looking into the case, it will be seen that the decree dismissing the bill, which was set up as a bar to the action of ejectment, was placed upon the ground that the complainant had a complete remedy at law, and did not, therefore, involve the legal title to the property in question. The court say, that, if a complainant seeks in a court of equity to enforce a strictly legal title, when his remedy at law is plain and adequate, the dismissal of his bill amounts to a declaration that he has no equity, and the court no jurisdiction; but it casts no reflection whatever upon his legal title; it decides nothing in relation to it, and consequently can conclude nothing against it. It was admitted that the decision of a court of competent jurisdiction directly upon the point was conclusive where it came again in controversy.

The case of *Hopkins v. Lee*, 6 Wheat., 109, illustrates and applies the principle which governs this case. There Hopkins purchased of Lee an estate, for which he agreed to pay \*\$18,000; \$10,000 in military lands at fixed prices, \*218] and to give his bond for the residue. The estate was mortgaged for a large sum, which encumbrance Lee agreed to raise. The whole agreement rested in contract. Hopkins filed a bill against Lee, charging that he had been obliged to remove the encumbrance, and claiming the repayment of the money, or, in default thereof, that he be permitted to sell the military lands which he considered as a pledge remaining in his hands for the money. Lee put in an answer denying the allegations in the bill, whereupon the cause was referred to a master, who reported that the funds with which Hopkins had lifted the mortgage belonged to Lee, upon which report a decree was entered accordingly. The suit in 6 Wheaton,

was an action of covenant brought by Lee against Hopkins, to recover damages for not conveying the military lands which he had agreed to convey upon the aforesaid encumbrance being removed. The defence was, that the encumbrance had not been removed. And upon the trial Lee relied upon the suit and the decree in chancery as conclusive evidence of the fact that he had complied with the condition, which was admitted by the court below, and the decision sustained here on error.

The court, after referring to the general rule, observed, that a verdict and judgment of a court of record, or a decree in chancery, although not binding upon strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise.

If any further illustration of the principle were necessary, we might refer to the case of *Adams v. Barnes*, 17 Mass., 365, where it appeared that a mortgagee had brought an action to recover possession of the mortgaged premises, in which the mortgagor had defended on the ground of usury, but, failing in the defence, the mortgagee had judgment. The mortgagor afterwards conveyed his interest to a third person, who brought a writ of entry against the mortgagee to recover the possession, relying upon the usury in the mortgage as invalidating that instrument, and rendering it null and void. But the court held the parties concluded by the previous judgment, the same point having been there raised and decided in favor of the mortgagee.

The same principle will be found in *Betts v. Starr*, 5 Conn., 550, where it was held, that a judgment recovered upon a \*note secured by the mortgage, notwithstanding the [\*219 plea of usury, precluded the mortgagor from setting up that defence again, in an action of ejectment by the mortgagee to recover the possession of the mortgaged premises.

Further illustrations of the principle will be found by referring to Cowen & Hill's Notes to Phillips on Ev., p. 804, note 558; and 2 Greenl. on Ev., §§ 528-531.

The case of *Henry Raguet v. Peter Roll*, 7 Ohio, 76, has been referred to as maintaining a different doctrine. That was a *scire facias* on a mortgage to charge the lands in execution. The defence set up was, that the mortgage had been given to secure the payment of a note of five hundred dol-

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lars, which was made to the mortgagee to compound a felony. There had been a suit between the same parties on the note, in which the same defence was set up and prevailed. The case is reported in 4 Ohio, 400. But this former suit was not interposed or relied on in the *scire facias* on the mortgage, and the question here, therefore, was not involved in that case, and, probably, could not have been. For, on looking into the report of the suit upon the note, it appears to have been brought, originally, in the Common Pleas, where the plaintiff recovered. This judgment was afterwards reversed by the Supreme Court on error, without any further order in the case. This left the parties and the note as they stood before the judgment in the Common Pleas. Cowen & Hill's Notes, p. 826, note 587.

There is another principle that would, probably, be decisive of this case, over and above the ground here stated, upon a second trial, arising out of the thirty-fourth section of the Judiciary Act, which provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

The highest court of the State of Alabama has given a construction to the act of the legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the State courts to expound their own statutes; and when thus expounded the decision is the rule of this court in all cases depending upon the local laws of the State. 7 Wheat., 361; 6 Pet., 291.

It is unnecessary, however, to pursue this inquiry, as the grounds already mentioned are, in our judgment, conclusive upon the rights of the parties.

In every view we have been able to take of the case, we think the court erred in the second instruction given to the jury, and that the judgment below must be reversed.

#### ORDER.

\*220] 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 Alabama, 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, with costs, 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*.