*Charles A. Williamson and Catharine, his Wife, Plaintiffs, v. Joseph Berry.

Mary Clarke devised to Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, "all that part of my said farm at Greenwich aforesaid, called Chelsea, &c., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, &c., during his natural life, and from and after the death of Thomas B. Clarke, in further trust, to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death." Under this devise, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born, and such vested remainder became a fee simple absolute in the children living, on the death of their father.[1]

The acts of the legislature of New York passed for the relief of Thomas B. Clarke show that he was made the trustee of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor.

His obligation was to account annually for the proceeds of every sale or mortgage which might be made, and it was his right to use the interest of the principal for himself and for the education and maintenance of his children.

The acts of the legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

The acts of the legislature for the relief of Clarke are private acts. They provide that the Chancellor may act upon them summarily, upon the petition of Clarke, upon which orders are given, as contradistinguished from decrees in suits by bill filed. The last are judgments upon the matters in controversy between the parties before the court. The other are orders in conformity with a legislative act in a particular case. Whatever the Chancellor does in either case, he does as a court of chancery. It will stand when it has been done within the jurisdiction conferred by the private act, until it has been set aside upon motion, as his decrees in suits upon bill filed do, until they have been set aside by a bill of review.

In such a case the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. It cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

In these acts for the relief of Clarke, what the Chancellor can do is precisely stated. No authority was given to him, in giving his assent to Clarke's making sales of any part of the devised premises, to order that Clarke might make sales of any portion of it, in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon, between him and his respective creditors. Or that Clarke might take the money arising from the sales of the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family. This was not an exercise of jurisdiction, but an order out of and beyond it.[2]

These were private acts for the alienation of land, to be made with the assent

[1] Cited. *Doe, Lessee of Poor*, v. *Considene*, 6 Wall., 478.

[2] See *Warner* v. *Martin*, 11 How., 220.

of the Chancellor that there might be an assurance by matter of record, under his sanction, of a transfer of the property to such as might become purchasers from Clarke.

Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole in a collateral way.

But it is a well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when *the proceedings in the former are relied [*496 upon, and brought before the latter, by a party claiming the benefit of such proceedings.[3]

The rule applies to the case in hand, though it may have been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors, in payment of his debts, for though this court will recognize as a rule for its judgments the decisions of the highest courts of the states relative to real property as a part of the local law, it does not recognize as in any way binding upon them, as a part of the local law, the decisions of the state courts upon private acts of any kind, or such of them as provide for the alienation of private estates, by particular persons, with the sanction of a court or of the Chancellor. Decisions upon private acts form no part of the local law of real property. They concern only those for whose benefit they are made, and can be no rule for any other case.

This court decides that, under the acts of New York, the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse, nor his alienee Berry, can derive from the order of the Chancellor, or from the conveyance by Clarke to De Grasse, any title to the premises in dispute.[4]

Sale is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.[5]

A sale ordered, decreed, or permitted by a chancellor, subject to the approval of a master, requires the master's approval, and confirmation by the court,

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[3] CITED. *Thompson* v. *Whitman*, 18 Wall., 467; *Kilbourn* v. *Thompson*, 13 Otto, 198; s. c., 2 Morr. Tr., 80; *Moch* v. *Virginia Fire & Marine Ins. Co.*, 10 Fed. Rep., 706; s. c., 4 Hughes, 119.

The law is now settled, not only by the decisions of the Supreme Court of the United States, but by those of other courts, that the judgments of a court "are open to inquiry as to the jurisdiction of the court and notice to the defendant." *Christmas* v. *Russell*, 5 Wall., 305; *Thompson* v. *Whitman*, 18 Id., 457; s. c., 1 Cent. L. J., 308; *McElmoyle* v. *Cohen*, 13 Pet., 312; *Knowles* v. *Gas Light & Coke Co.*, 19 Wall., 58; *D'Arcy* v. *Ketchum*, 11 How., 165; *Webster* v. *Reed*, Id., 437; *Harris* v. *Hardemann*, 14 Id., 334; *Borden* v. *Fitch*, 15 Johns. (N. Y.), 141; s. c., 8 Am. Dec., 225; *Starbuck* v. *Murray*, 5 Wend. (N. Y.), 156; s. c., 21 Am. Dec., 172. See also, *Moulin* v. *Insurance Co.*, 4 Zab. (N. J.), 222; s. c., 1 Dutch. 57; *Price* v. *Ward*, 1 Dutch. (N. J.), 225; *Mackay* v. *Gordon*, 5 Vr. (N. J.), 286; *Lowe* v. *Lowe*, 40 Iowa, 220; *Webster* v. *Hunter*, 50 Id., 215.

In *Kingsbury* v. *Yniestra*, 59 Ala., 320, it is said that "a defendant sued here upon a judgment recovered against him in a court of record of another state, in which it is recited that he was served with process, or appeared by attorney, may controvert such recital and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein by attorney or otherwise." See *People* v. *Darnell*, 25 Mich., 247; s. c., 12 Am. Rep., 260; *Bowles* v. *Houston*, 30 Gratt., (Va.) 266; s. c., 32 Am. Rep., 673.

[4] DISTINGUISHED. *Farmers' Loan & Trust Co.* v. *McKinney*, 6 McLean, 8. CITED. *Talcott* v. *Township of Pine Grove*, 1 Flipp., 124.

[5] QUOTED. *Coombs* v. *Steere*, 8 Bradw. (Ill.), 150.

before a purchaser can have a legal title to the estate that he means to buy or has bid for under the decree of the court.

In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order.

If he takes under an imperfect sale, he must abide the consequence.

The sale in this instance by Clarke to De Grasse, if it were otherwise good, which it is not, would be a nullity, for it wants the approval by the master to whom the execution of the order was confided by the Chancellor.

Nor was Clarke's sale to De Grasse a judicial sale. By judicial sale is meant one made under the process of a court, having competent authority to order it, by an officer legally appointed and commissioned to sell.

In order that the sale by Clarke to De Grasse should be a judicial sale, it was requisite that the Chancellor should have had the authority to direct a sale of the premises to his creditors for their demands, and that it should have been approved by the master in the way the order directed it to be done.[6]

THIS case came up from the Circuit Court of the United States for the Southern District of New York, on a certificate of division in opinion between the judges thereof.

It was an action of ejectment for one third of eight lots of land in the city of New York. Mrs. Williamson was the daughter of Thomas B. Clarke, being one of three children who survived him, the other two being Mrs. Isabella M. Cochran and Bayard Clarke.

In the year 1802, Mary Clarke died, leaving a will, from which the following is an extract:—

"Item, I give and devise unto the said Benjamin Moore and Charity, his wife, and to Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, all that certain lot of land number eight, in the said thirteenth
*497] allotment of the said patent, containing one hundred acres; also that part of *my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line herein before directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox; also all my house and lot, with the appurtenances, known by number seven, within the limits of the prison, and now occupied by Thomas Byron; to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and the heirs of such survivor, as joint tenants, and not as tenants in common, in trust

[6] See *Suydam* v. *Williamson*, 20 How., 431; *Same* v. *Same*, 24 Id., 431· *Same* v. *Same*, 6 Wall., 729.

to receive the rents, issues, and profits thereof, and to pay the same to the said Thomas B. Clarke, natural son of my late son Clement, during his natural life, and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death in fee; and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence to convey the said hereby devised premises to my said grandson Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death prior to the death of the said Thomas B. Clarke."

On the 2d of March, 1814, Thomas B. Clarke presented a petition to the legislature of New York, stating the will; that the trustees had signed a paper agreeing to all such acts as the legislature might pass, and requesting to be discharged from the trust; that Clement C. Moore, the devisee in remainder, had also consented to such acts; and that the estate could not be so improved and made productive as to answer the benevolent purposes of the testatrix. The prayer was for general relief.

On the 1st of April, 1814, the legislature passed an act, entitled, "An act for the relief of Thomas B. Clarke." It recited the facts above mentioned, and then provided, in the first section, "that it shall and may be lawful for the Court of Chancery, on the application of the said Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified and set forth in the said in part recited will and testament, and in this act, in the place and stead of the said Benjamin Moore and Charity, his wife, and the said Elizabeth Maunsell, who are hereby discharged from the trusts in the said will mentioned. Provided, that it *shall be lawful for the said court at [*498 any time thereafter, as occasion may require, to substitute and appoint other trustee or trustees in the room of any of those appointed in this act, in like manner as is practised in the said court in cases of trustees appointed therein; and such trustee or trustees so appointed, are hereby vested with the like powers as if he or they had been named and appointed in and by this act."

The second, third, fourth, and fifth sections prescribed minutely what should be done by the trustees, and authorized them to sell and dispose of a moiety of the estate, and invest the proceeds in some productive stock, the interest, excepting a certain portion, to be paid to Mr. Clarke, and the principal to be reserved for the trusts of the will.

The sixth section was as follows:—

"VI. And be it further enacted, that in every case, not otherwise provided for by this act, the trustees appointed, or to be appointed, in virtue thereof, shall be deemed and adjudged trustees under the said will, so far as relates to the premises mentioned and described in the recital to this act, in like manner as if such trustees had been originally named and appointed in the said will; and they shall, in all respects, be liable to the power and authority of the Court of Chancery for or concerning the trusts created by this act."

It did not appear that any proceedings took place under this act.

On the 1st of March, 1815, Clarke presented another petition to the Legislature, stating that Clement C. Moore, the contingent devisee, had released all his interest in the property to Clarke and his family, whereby the petitioner and his infant children had become the only persons interested in the estate. He stated also, that he had been unable to prevail upon any suitable person to undertake the performance of the trust.

On the 24th of March, 1815, the legislature passed an act supplemental to the "Act for the relief of Thomas B. Clarke." This act being a very important part of the case, it is proper to recite it.

"An Act supplemental to the 'Act for the Relief of Thomas B. Clarke,' passed April 1, 1814.

"Whereas, since the passing of the act entitled 'An act for the relief of Thomas B. Clarke,' Clement C. Moore, in the said act named, by an indenture duly executed by him, and recorded in the office of the Secretary of this state, and bearing date the 21st day of February, in the year 1815, hath, for *499] the consideration therein expressed, and in due form of law, released and *conveyed unto the said Thomas B. Clarke, his heirs and assigns, forever, all the estate, right, title, interest, property, claim, and demand whatsoever, of the said Clement C. Moore, of, in, and to the real estate mentioned in the said act, whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children. And whereas the said Thomas B. Clarke hath prayed the Legislature to alter and amend the said act, particularly in relation to the interest of the said Clement C. Moore, and the execution of certain trusts in the said act mentioned, therefore,—

"I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, that all the beneficial

interests and estate of the said Clement C. Moore, or those under him, arising or to arise by virtue of the act to which this is a supplement, or by the will mentioned in the said act, shall be, and the same is hereby, vested in the said Thomas B. Clarke, his heirs and assigns; and so much of the act to which this is a supplement as is repugnant hereto, and so much thereof as requires the trustees to set apart and reserve a certain annual stipend out of the interest or income of the property thereby directed to be sold, for the purpose of creating and accumulating a fund at compound interest, during the life of the said Thomas B. Clarke; and so much of the said act as requires the several duties therein enumerated to be performed by trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby, repealed.

"II. And be it further enacted, that the said Thomas B. Clarke be, and is hereby, authorized and empowered to execute and perform every act, matter, and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children.

"III. And be it further enacted, that no sale of any part of the said estate shall be made by the said Thomas B. Clarke, until he shall have procured the assent of the Chancellor of this state to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee; and, further, that it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest *being to be [*500
applied by the said Thomas B. Clarke, in such manner as he may think proper, for his use and benefit, and for the maintenance and education of his children; and if, on such return, or at any other time, and in any other manner, the Chancellor shall be of opinion that the said Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove the said Thomas B. Clarke from his said trust, and appoint another in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in the said Thomas B. Clarke as trustee."

On the 28th of June, 1815, Clarke presented a petition to the Chancellor. It recited the will and the two acts of the Legislature; stated that he had a large and expensive family and no means of maintaining them except from the rents and income of the devised property, which were then and always had been insufficient for the purpose; that he had been compelled to resort to loans and incur debts; that he had borrowed, in order to meet the exigencies of his family, the sum of $4,400 in the year 1805, and $4,500 since; that a sale of a moiety of the devised property had become necessary, so much of the proceeds of which as might be required should be applied to the payment of the above debts, and the residue vested in him as trustee under the acts; and praying the Chancellor to authorize, order, and direct a sale for the above-mentioned purposes.

On the same day, the Chancellor referred this petition to one of the masters, to examine into the allegations and matters contained in it, and report thereon.

On the 30th of June, 1815, the master reported, and stated the condition of the property and the income which it produced; the debts of the petitioner; the opinion of the master, that they had been contracted for the support of his family, and that the rents and profits were insufficient for the reasonable and proper support of the petitioner and his family according to their situation in life.

On the 3d of July, 1815, the Chancellor issued an order, reciting all the circumstances of the case, and concluding thus:—

"Therefore, on motion of Mr. S. Jones, junior, of counsel for the petitioner, it is ordered that the assent of the Chancellor be, and hereby is, given to the sale, by the petitioner, of the said house and lot in the fifth ward of the city of New York, and of the eastern moiety or half part of the said premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line in the manner for that pur-
*501] pose mentioned in the said petition; and the petitioner is authorized and directed *to sell and dispose of the same, under and according to the aforesaid acts of the Legislature in that behalf, the said sales to be made under the direction of one of the masters of this court, and the petitioner to proceed in making the sales and conveyances of the said premises, so to be sold, in the manner for that purpose in and by the said acts prescribed and directed. And it is further ordered, that the purchase-moneys for the said premises so to be sold be paid by the purchasers to the said master, to be disposed of by him as hereinafter directed. And it is fur-

ther ordered and directed, and his Honor the Chancellor hereby doth authorize, order, and direct, that so much of the net proceeds, to arise from such sales, as may be necessary for the purpose, be applied, under the direction of one of the masters of this court, in and for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family, to be proved before the said master; and the costs, charges, and expenses of the petitioner, on his petition in this matter, and the proceedings had, and to be hereafter had, under or in consequence thereof; but so, however, and it is further ordered and directed, that the net proceeds of the said eastern moiety of the said premises at Greenwich aforesaid, or so much thereof as shall be necessary for that purpose, be applied in the first place, and before and in preference to any other appropriation or application thereof, to pay and satisfy to the President and Directors of the Manhattan Company aforesaid the aforesaid debt or sum of four thousand four hundred dollars, with the interest thereof up to the time of such payment, or such part and balance of the said debt, and interest, as shall not have been otherwise paid or satisfied. And it is further ordered and directed, and his Honor the Chancellor hereby doth further order and direct, that the residue of the said net moneys, and proceeds arising from such said sales, after the said debts, costs, charges, and expenses shall be discharged and paid by and out of the same, be placed out at interest, on real security, in the city of New York, in the name of the petitioner as trustee, under the direction of one of the masters of this court, upon the following trusts, to be expressed upon the face and in the body of the said securities respectively, whereon the same shall be so placed, that is to say, upon trust that the interest and income thereof, or so much of the same as may be required for that purpose, be applied, from time to time, in and for the suitable and proper maintenance and support of the petitioner, and his wife and children, already born and to be hereafter born, according to their situation in life, and for the suitable education *of the said children; [*502 and upon further trust, that the principal sum or sums, with the securities whereon the same may be vested or placed, and may stand, shall be held, and he, the petitioner, as trustee, stand and be possessed thereof in trust, for the benefit of the lawful issue of the petitioner who shall be living at the death of him, the petitioner, according to the trusts upon which the unsold moiety of the said premises at Greenwich aforesaid, in the aforesaid acts of the Legislature mentioned, are or shall be held; and so, and in such manner, that the said interest

and income of the said trust moneys, funds, and securities, or so much thereof as may be requisite thereto, shall be appropriated, applied, and secured in the first instance, and exclusively, to the suitable maintenance of the family of the petitioner, according to their situation in life, and the suitable education of his children, and shall not be subject or liable to or for the engagements, debts, or control of the petitioner, or for any other purpose whatsoever than the said purposes hereby designated and authorized; provided that any surplus of the said interest and income, that may be left and remain after the said objects and purposes, hereby designated as aforesaid, are first fully and liberally fulfilled and accomplished, according to the true meaning hereof, shall be for the use and at the disposal of him, the petitioner. And it is further ordered that the master, under whose direction the said sales should be made, and the debts paid, and surplus proceeds placed out as aforesaid, report to this court the proceedings that may be had in the premises, and the securities that may be taken therein, pursuant to this order, with all convenient speed; and that all and every person or persons who are, or is, or may become interested therein, have liberty to apply to this court, at any time or times hereafter, for any further or other orders or directions in or touching the premises."

On the 12th of March, 1816, Clarke again applied to the legislature. The petition is short, and may be inserted.

"To the Honorable the Legislature of the state of New York.

The memorial and petition of Thomas B. Clarke, of the city of New York, respectfully showeth:—

"That his Honor, the Chancellor, under the act 'for the relief of Thomas B. Clarke,' passed April 1, 1814, and the act 'supplemental to the act for the relief of Thomas B. Clarke,' passed March 24, 1815, did order and direct that the said Thomas B. Clarke should sell the eastern moiety or half part of the premises in the said act and order mentioned.

*503] "And your petitioner further shows, that, owing to the scarcity *of money, and the present low price of property, no sale can be made without a great sacrifice.

"Your petitioner therefore prays, that he may be allowed to mortgage such part of the property, in the said act mentioned, as the Chancellor may appoint, and for the purposes mentioned in the said acts and order; and that your petitioner be allowed to bring in a bill for that purpose. And he will ever pray, &c."

On the 29th of March, 1816, the legislature passed the following act:—

"An Act further supplemental to an Act entitled 'An Act for the relief of Thomas B. Clarke.'

"Be it enacted by the people of the state of New York, represented in Senate and Assembly, that the said Thomas B. Clarke be, and he is hereby, authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to mortgage or to sell the premises which the Chancellor has permitted, or hereafter may permit, him to sell, as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed for the relief of the said Thomas B. Clarke."

On the 27th of May, 1816, Clarke presented another petition to the Chancellor, again reciting all the facts in the case, and praying his assent to a mortgage.

On the 30th of May, 1816, the Chancellor passed the following order:—

"It is ordered, that the said petitioner, under the act entitled 'An act further supplemental to the act entitled "An act for the relief of Thomas B. Clarke,"' passed March 29th, 1816, be, and he is hereby, authorized, so far as the assent of this court is requisite, to mortgage, instead of selling, the lands he was authorized to sell, in and by an order of this court of the third day of July last; and that the moneys to be procured, and the debts to be extinguished by such mortgage or mortgages, be appropriated and adjusted in the same manner and under the same checks, and not otherwise than is prayed for in and by said order, and the said order is to apply to and govern the application of the moneys to be raised by mortgage, equally as if the same had been raised by a sale of all or any of the lands authorized to be sold in and by the said order.

"*May* 30*th*, 1816. J. KENT."

On the 8th of March, 1817, Clarke presented another petition *to the Chancellor, representing the propriety [*504 and expediency of dividing the estate by an eastern and western, instead of a northern and southern line, and of granting to the petitioner the power to sell or mortgage the southern, instead of the eastern moiety. This being referred to James A. Hamilton, a master in chancery, he reported that it would be expedient to divide the estate by a line running from east to west, passing through Twenty-sixth street.

On the 15th of March, 1817, the Chancellor passed the following order:—

"On reading and filing the report of James A. Hamilton, esquire, one of the masters of this court, bearing date the 11th day of March, 1817, by which it appears that no part of the northern moiety of the estate at Greenwich, mentioned in the petition of the above-named petitioner, the same being divided into two equal parts by a line running from east to west, through a street called Twenty-sixth street, has been either sold or mortgaged by the said Thomas B. Clarke, and it appearing to this court reasonable and proper that the prayer of the said petitioner should be granted, it is thereupon ordered, on motion of Mr. S. Jones, solicitor for the petitioner, that the said petitioner be, and he is hereby, authorized to sell and dispose of the southern moiety of the said estate, the same being divided by a line running east and west through the center of Twenty-sixth street aforesaid, together with the lot in Broadway, instead of the eastern moiety of the said estate, as permitted and directed by the orders heretofore made in the premises. And it is further ordered, that the said Thomas B. Clarke be, and he hereby is, authorized to mortgage all or any tract or parts of the said southern moiety of the said estate, if in his judgment it will be more beneficial to mortgage them than to sell the same. And the said Thomas B. Clarke is further authorized to convey any part or parts of the said southern moiety of the said estate, in payment and satisfaction of any debt or debts due and owing from the said Thomas B. Clarke, upon a valuation to be agreed on between him and his respective creditors; provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And it is further ordered, that the said Thomas B. Clarke shall be, and he is hereby, authorized to receive and take the moneys
*505] arising from the premises, and apply the same to the payment of his debts, and invest the surplus *in such manner as he may deem proper to yield an income for the maintenance and support of his family."

On the 9th of April, 1816, Clarke mortgaged the premises in question, with other property, being in the southern moiety of the estate, to Henry Simmons, which mortgage was discharged in 1822.

Having given this historical account of the facts of the case, let us now see what occurred upon the trial in the court below.

It has already been mentioned, that it was an ejectment

brought by Williamson and wife against a party in possession of a portion of the property included in the devise of Mary Clarke. The following case was stated for the opinion of the court:

Circuit Court, U. S., Southern District New York.

CHARLES A. WILLIAMSON AND CATHARINE H., HIS WIFE, *v.* JOSEPH BERRY.

This is an action of ejectment for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York.

The pleadings may be referred to as part of this case.

The plaintiffs claimed under the will of Mary Clarke.

The plaintiffs gave in evidence an exemplified copy of the will of Mary Clarke, proved in the Supreme Court, of which a copy is hereto annexed.

It was then admitted by the defendant's counsel, that Mary Clarke was seized of the premises described in the said will as "all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line herein before directed to be drawn from the Greenwich road to the Hudson River, twelve feet to the northward of the fence standing behind the house now occupied by John Hall; bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox." At the time of the making of the will, and thence until her death, which took place in July, 1802, that the said premises included the eight lots claimed herein; that the said trustees, Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, are all dead,—Mrs. Moore having died since 1830, the other two previously; that Thomas B. Clarke was married in 1803; that his wife died in August, 1815, and himself on the 1st of May, 1826; that he left three children surviving him, Catharine, Isabella, and Bayard; that he had four other children, all of whom died before him, without having had any *children, and unmarried; that Catharine was born on the 5th of June, 1807, and was married to Charles A. Williamson, on the 10th of May, 1827; that Isabella was born on the 11th day of June, 1809, and was married to Rupert J. Cochran on the 4th day of June, 1835; that Bayard was born on the 17th day of March, 1815; all of whom are still living. It was also admitted that the defendant was the actual occupant of the premises at the commencement of this suit, on the 6th of March, 1845; and that [*506

one third of the premises claimed was of greater value than two thousand dollars.

The plaintiffs thereupon rested.

The defendant's counsel then proved the acts of the Legislature, the deed of Clement C. Moore, the petitions to the Chancellor, the master's reports, and the orders of the Chancellor, (excepting only the order indorsed on petition,) of which copies are hereto annexed.

The defendant's counsel then offered in evidence the deed from Thomas B. Clarke to George De Grasse, of which the following is a copy:—

"This indenture, made this 2d day of August, in the year of our Lord 1821, between Thomas B. Clarke, of the city of New York, gentleman, of the first part, and George De Grasse of the second part. Whereas the said Thomas B. Clarke, by virtue of sundry conveyances, acts of the Legislature, and orders of the Court of Chancery of the state of New York, hath been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person or persons, the southern moiety of the estate at Greenwich, devised by Mary Clarke, deceased, for the benefit of the said Thomas B. Clarke and his children, or any part thereof. Now, therefore, this indenture witnesseth, that the said Thomas B. Clarke, in consideration of the premises, and of two thousand dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, convey, and confirm unto the said party of the second part, his heirs and assigns, for ever, all those lots of ground situate, lying, and being in the Ninth ward of the city of New York, known and distinguished on a certain map of the property of the said Thomas B. Clarke," &c.

(The deed then described twenty-nine lots, with a covenant of general warranty.)

James A. Hamilton joined in this deed, as a trustee for Clarke's life estate, of which he had become possessed.

*507] This deed was objected to by the plaintiffs' counsel, for two reasons:—

1. Because not approved by a master.

2. Because not shown to have been given upon a sale for cash.

The objections were overruled, and the plaintiffs' counsel excepted.

The deed was then read in evidence, as was also a deed

from George De Grasse to Margaret Van Surlay. (It is not necessary to insert this deed.)

The defendant's counsel then rested.

The plaintiffs' counsel then offered to read the petitions to the Legislature, the extracts from the journals of the two houses, and the order indorsed on petition, of which copies are hereto annexed. They were objected to by the defendant's counsel, the objection sustained, and the plaintiffs' counsel excepted.

The plaintiffs' counsel then proved the mortgage executed by Thomas B. Clarke to Henry Simmons, of which the following is a copy. (It is not necessary to insert this mortgage.)

The plaintiffs' counsel then offered evidence to show the consideration of the deed from Clarke to De Grasse. The defendant's counsel objected; the objection was overruled, and the defendant's counsel excepted.

The plaintiffs' counsel then called as a witness James A. Hamilton, who testified that he knew Thomas B. Clarke and George De Grasse; that in 1821, and for some years previous, he was a master in chancery in the city of New York; that the order of March 15, 1817, was put into his hands for execution, and that Clarke and De Grasse applied to him to approve the deed from Clarke to De Grasse above set forth; that on that occasion, which was at or about the time the deed was given, they explained to him the consideration of the deed, and that the consideration for which it was given was some wild lands in Pennsylvania or Virginia, and an account for articles previously furnished to Clarke by De Grasse, out of any oyster-house which he kept, including some items of money let. On thus ascertaining its consideration, he refused to approve the deed.

On his cross-examination, he said that he could not state the time at which the transaction occurred, except by reference to the deed; he had more than one interview with Clarke and De Grasse, he was sought by them more than once; he did not consider the execution of the life-estate deed a matter of any interest; he executed it as trustee. He did not remember at all a person by the name of James Cunningham; and on being *shown the signature of James Cunningham, as subscribing witness to the deed for the life [*508
estate, witness said that his recollection of the person was not thereby revived. He received from De Grasse no fee. It was his impression, that the account for articles furnished at the oyster-shop was exhibited. He held the life estate of Clarke in the premises as trustee for Clarke. His impression was that Clarke filled up his own deed to De Grasse, and to

obtain his sanction called upon witness; he was not certain that De Grasse was present upon that occasion. He did not recollect that De Grasse was present when the deed for life estate was executed, but he recollected that both Clarke and De Grasse came together to witness's office more than once on the subject, and he was besought by them frequently to approve the deed. In answer to a question by defendant's counsel what evidence he had of the insufficient value of the lands which formed part of the consideration, the witness stated that he had evidence enough then, though he did not recollect it now, that the lands were worthless tax lands. There might have been some money charged in De Grasse's account against Clarke; the whole account was for articles furnished previously. He did not recollect that there were any notes forming part of the consideration of the deed from Clarke.

The plaintiffs' counsel then proved that seven of the lots in suit, viz., numbers 5, 6, 7, 41, 42, 43, and 45, were reconveyed to De Grasse on the 31st of October, 1844.

The defendant's counsel then proved that lot number 44 had been conveyed to Samuel Judd.

They also proved the bond of Clarke to Simmons, referred to in the aforesaid mortgage to Simmons, and called Henry M. Western, who, being shown two indorsements on the said bond, as follows:—

"Received, New York, October 18th, 1821, from Mr. George De Grasse, one hundred dollars on account of the within bond.
$100. H. SIMMONS."

"Received of George De Grasse two hundred and fifty dollars, being in full for principal and interest, and all other claims and demands on account of the within bond, and also of the mortgage therein mentioned, for which mortgage I have this day entered satisfaction of record.

H. SIMMONS.

"*New York, March 28th*, 1822.
"Witness—
H. M. WESTERN."

*509] *testified that he was a subscribing witness to the last, which he wrote; but that he recollected nothing of the transaction but from the paper.

The plaintiffs' counsel then offered to prove,—

(1.) That the acts of the Legislature were not for the benefit of the infants, but for the benefit of Thomas B. Clarke merely.

(2.) That the orders of the Chancellor had the effect to take the proceeds of their future interest in the property, and to apply the same to the father's debts, without giving them any benefit, by support or otherwise, out of the income of the life estate in other parts of the property.

(3.) That, under the acts and orders, he actually aliened the lot on Broadway, and all of the southern moiety of the Greenwich property, excepting two lots, and that none of the children received any benefit from such alienation.

(4.) That the whole of this property was mortgaged or conveyed for old debts; that no proceeds were ever invested, or secured, or even received from the grantees or mortgagees.

(5.) That, so far from providing for the children, or protecting the estate, he suffered a large portion of the northern moiety to be sold for assessments, and was proceeding to dispose of the northern moiety for twenty-one years, when, on the 31st of March, 1826, a bill was filed against him on behalf of the children, and an injunction issued.

(6.) That the plaintiff, Mrs. Williamson, was, from the death of her mother in August, 1815, supported entirely by one of her aunts; and that after about two years from the mother's death, the other children were supported by their friends, and were entirely neglected by their father; and that this was notorious in the city of New York, and would have been immediately known to any one making inquiry.

The defendant's counsel objected; the objection was sustained, and the plaintiffs' counsel excepted.

A verdict was then taken for the plaintiffs for one undivided third part of the eight lots, subject to the opinion of the court upon the questions of law, with power to enter a verdict for defendant, if such should be the opinion of the court, and with liberty to either party to turn this case into a special verdict or bill of exceptions.

On the 18th of May, 1846, the judges of the Circuit Court pronounced their judgment upon the four following points, viz.:—

1. Under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate as they were successively born.

*2. This estate would have become a fee simple absolute in the children living on the death of T. B. Clarke, the first day of May, 1826; and it is not important now to decide whether the trustees took a fee, under the will, in trust to convey to the children after his decease, or a fee for his life, as in the latter case the estate would vest in pos- [*510

session in the children at the death of T. B. Clarke, and in the former case the law would presume an execution of this trust by the surviving trustee on the death of T. B. Clarke, or the trust would be executed in 1830, by force of the Revised Statutes.

3. The several offers of the plaintiffs to give parol evidence to the jury touching the objects and operation of the acts of the Legislature, referred to in the case, or the effect of the orders of the Chancellor therein stated upon the interests of the children of T. B. Clarke, or the failure of T. B. Clarke to apply or secure the proceeds of the devised estate, when disposed of by him, to and for the benefit of his children, or the consideration on which the devised estate was disposed of by T. B. Clarke, or his neglect to protect the estate from sacrifice for assessments, &c., or to provide for and support his children, were properly overruled by the court, with the exception of such particulars included in those offers as may be embraced in the points hereafter stated, upon which the judges are divided in opinion.

4. The acts of the Legislature of the state of New York, of April 1, 1814, March 24, 1815, and March 29, 1816, referred to in the case, are constitutional and valid.

But the judges are divided in opinion upon the following points presented by the case:—

1. Whether the acts of the Legislature, stated in the case, devested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of
*511] the estate *by the trustee, as is stated in the case, or any other consideration than for cash, paid on said conveyance.

5. Whether the deed executed by Thomas B. Clarke to George de Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid

6. Whether the said deed is valid, it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises as set forth in the case, made by George De Grasse, rendered the title of such grantee, or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs, by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified, under the seal of this court, to the Supreme Court of the United States, to be finally decided.

Upon this certificate, the case came up to this court. It was argued, in conjunction with the next two cases which will be reported in this volume, by *Mr. Field* and *Mr. Webster*, for the plaintiffs, and *Mr. Jay* and *Mr. Wood*, for the defendants. *Mr. Flanagan* also filed a brief for the defendants.

Each one of the counsel pursued his own train of argument, and filed a separate brief. The statement of these points will make the report of this case unusually long, but the importance of the principles discussed makes it necessary to place before the reader the view which each counsel took in the case. They will be stated in the following order:—*Mr. Field* for the plaintiffs, *Mr. Jay* and *Mr. Wood*, for the defendant, and *Mr. Webster* for the plaintiffs, in reply and conclusion.

Mr. Field. The plaintiffs maintain,—

1. That the acts of the Legislature stated in the case, whether they devested the estate of the trustees under the will of Mary Clarke or not, did not vest the whole estate in fee in Thomas B. Clarke.

2. That the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued.

3. That the orders set forth in the case were not authorized by, and in conformity to, the said acts of the Legislature, and are to be regarded, not as the acts of the Court of Chancery, empowered to proceed as such in that behalf, but as the doings of an officer acting under a special authority.

*4. That the Chancellor had no competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on such conveyance. [*512

5. That the deed executed by Thomas B. Clarke to George

De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is not valid.

6. That it is invalid for this reason also, that it was not approved by the Chancellor, or by a master in chancery.

7. That Mr. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had exhausted his power over the subject, and had not competent authority to sell and convey the same to De Grasse.

8. That the subsequent conveyance of a part of the premises, as set forth in the case, made by George De Grasse, did not render the title to that part, of such grantee or his assigns, valid against the plaintiffs.

In support of these positions, the plaintiffs make the following points:—

First Point.—The acts of the Legislature changed the equitable life estate of Mr. Clarke into a legal estate, but they did not give him the legal estate in remainder. His power over the remainder of the children was a statutory power, and, like all such powers, to be strictly pursued, and when once executed was exhausted.

I. Whether even the trustees appointed by the will took a fee is not certain. In *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 442, it was conceded that "the legal interest in the property under the will was in the *cestuis que trust.*"

It is a general rule in the construction of devises, that trustees take no greater estate than is necessary to support the trusts, whatever words of inheritance may have been used. *Stanley* v. *Stanley*, 16 Ves., 491; *Doe* v. *Simpson*, 5 East, 162; *Doe* v. *Nichols*, 1 Barn. & C., 336; *Doe* v. *Needs*, 2 Mees. & W., 129; *Warter* v. *Hutchinson*, 3 Dowl. & Ry., 58; Hill on Trustees, 240.

II. But if the testamentary trustees took a fee, their estate, when devested, did not pass to Mr. Clarke alone. It passed to him and his children; to him for life, and to his children in fee. The reasons are,—

1. There is no language in any of the acts expressly giving the fee to him. On the contrary, the expressions seem carefully chosen to avoid that conclusion. He is "authorized and empowered to execute and perform every act, matter, and thing, in like manner, and with like effect, that trustees duly appointed *under the said act might have done." (Sec. 2 of second act.) This is language appropriate to a power, not to a conveyance. It clothes him, not with the estate, but with a power in trust. The word "trustee," used in reference to him, has not of itself force enough to give him the fee. He was, both in popular and in legal phrase, trustee

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of a power. He was to have the proceeds invested in his name as trustee. (Sec. 3 of second act.) The expression is not so strong as that in the preamble of the second act,—"whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children."

The fee not being expressly given to Mr. Clarke, if he took it at all, he took it by implication. But a fee by implication is never allowed, except where it is necessary to the purposes of the trust; and here it was not necessary, for everything which he was to do could be done under the power as well, and far more safely to the rights of the children.

2. To give Mr. Clarke the fee for the execution of the trust, would involve this absurdity, that it would suppose a conveyance by him after his death. The testamentary trustees, if they took the legal estate, were to convey to the children at Mr. Clarke's death. That is a sufficient reason why he was not, and could not be, put in the place of those trustees.

3. If the fee was given to Mr. Clarke, at the passing of the second act, it must either have been then taken out of the children to be vested in him, or it must have been in abeyance since the passing of the first act. That discharged the trustees under the will. (Sec. 1 of first act.) If, then, the children were not vested with the fee, it remained in abeyance. But abeyances are not favored, nor are they allowed by construction or implication. Com. Dig., *Abeyance*, A. 3; *Catlin* v. *Jackson*, 8 Johns. (N. Y.), 549.

If, however, as we contend, the fee was then in the children, there was no reason for taking it out, and vesting it in the father. To do so would, besides, have been open to grave constitutional objection. It would have exposed the estate of the children to a peril, for which there was no necessity, real or supposed.

III. If Mr. Clarke was not vested with the legal estate in remainder, he was clothed with a statutory power,—a common law authority, as defined by Mr. Sugden. "A power given by a will, or by an act of Parliament, as in the instance of the land-tax redemption acts, to sell an estate, is a common law authority." 1 Sugd. on Powers, 1.

A power is to be strictly pursued. *Doe* v. *Lady Cavan*, 5 *T. R., 567; *Doe* v. *Calvert*, 2 East, 376; [*514 *Cholmeley* v. *Paxton*, 3 Bing., 207; *Cockerel* v. *Cholmeley*, 10 Barn. & C., 564; 3 Russ., 565; 1 Russ. & M., 418; 1 Cl. & F., 60; 2 Sugd. Pow., 95, 197, 198, 330, 331, 413.

And a statutory power in particular. *Rex* v. *Croke*, Cowp., 26; *Collett* v. *Hooper*, 13 Ves., 255; *Richter* v. *Hughes*, 2 Barn. & C., 499; *Proprietors of Stourbridge Canal* v. *Wheeley*, 2

Barn. & Ad., 792; *Lessee of Carlisle* v. *Longworth*, 5 Ohio, 370; *Smith* v. *Hileman*, 1 Scam. (Ill.), 324; *Sharp* v. *Spier*, 4 Hill (N. Y.), 76; *Williams* v. *Peyton's Lessee*, 4 Wheat., 77; *Thatcher* v. *Powell*, 6 Id., 119.

The leases under ecclesiastical statutes in England are instances. Bac. Abr., *Leases*, E. 2; Cro. Eliz., 207, 690.

Wherefore, not having pursued his authority, Mr. Clarke conveyed nothing by his deed.

IV. A statutory power once fully executed is exhausted. "An authority once well executed cannot be executed *de novo*." 3 Vin. Abr., p. 429, § 42; *Palk* v. *Lord Clinton*, 12 Ves., 48; *Barnet* v. *Wilson*, 2 Younge & Coll., 407; 1 Sugd. Pow., 359.

Therefore Mr. Clarke, having once fully executed his authority by a mortgage to Simmons, could not execute it again by a conveyance to De Grasse.

Second Point.—If, however, Mr. Clarke were to be deemed vested with the legal estate in remainder, he was disabled from alienation, without the consent of the Chancellor. (Sec. 3 of second act.)

If he took the fee, he took it qualified, and with a restricted power of disposition. The general rule of law, that he who has the legal estate can convey the legal estate, was modified in his case. It might have been so modified by deed at common law. *M'Williams* v. *Nisly*, 2 Serg. & R. (Pa.), 513; Burton on Real Property, 11, note; *Doe* v. *Pearson*, 6 East, 173; *Perrin* v. *Lyon*, 9 Id., 170. The private acts of the Legislature, whence he derived his right, were laws repealing to that extent the general law. *M'Laren* v. *Pennington*, 1 Paige (N. Y.), 102; *Hibblewhite* v. *M'Morine*, 6 Mees. & W., 200; *Myatt* v. *St. Helens Co.*, 1 G. & D., 663; *Earl of Lincoln* v. *Arcedeckne*, 1 Collyer, 98.

There is now a general law in New York, that a conveyance by a trustee, in contravention of the trust, is void. 1 Rev. St., 730, § 65. This is but an extension to all cases of the principle established for this case by these private acts.

Instances of restricted powers of alienation, imposed upon the fee, are not uncommon. The case of Indian lands is a familiar instance. See also *Prince's case*, 8 Co., 1.

*515] *The consent of the Chancellor was interposed as a check upon Mr. Clarke. The first act did not prescribe it for the trustees to be appointed by the Chancellor; but when, by the second statute, the tenant for life was authorized to act, the consent of the Chancellor was required, for the protection of the infant children.

Third Point.—Mr. Clarke was also disabled from alienation, except for a money consideration.

The acts give no authority to do more than to sell or to mortgage. The purpose was to raise funds for investment.

The first act provides, that the trustees shall invest the "proceeds in any public stock of the United States, or of this state, or bank stock, or shall put the same out at interest on real security." (Sec. 3 of first act.)

Section fourth of the same act provides, that the "principal sum of money arising from the said sales" shall be held, &c.

Section third of the second act provides, that the Chancellor shall "direct the manner in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee."

The third act is still more explicit. It authorizes Mr. Clarke, under the order before granted, or any subsequent one, "either to mortgage or to sell the premises, which the Chancellor has permitted, or hereafter may permit him to sell, as trustee, under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required," &c.

If "to sell and dispose of" included every kind of alienation, it included a mortgage, and the third act was unnecessary.

On a similar expression in a will, the Supreme Court and Court of Errors of New York held, that a sale must be for cash, or something which could be invested. *Waldron* v. *McComb*, 1 Hill (N. Y.), 111, and *Bloomer* v. *Waldron*, 3 Id., 361, and though the Court of Errors reversed the first judgment, they did not impugn the principle. 7 Id., 335.

So, also, in the case of *Darling* v. *Rogers*, 22 Wend. (N. Y.), 486, it was held by the Court of Errors, that the words "to sell" did not include the power to mortgage.

Answer,—but it is not so in cases where for payment of debts; then may mortgage. 5 Johns. (N. Y.), 43. No sale in fact, yet legal title passed.

Fourth Point.—The Chancellor's order of March, 1817, did not authorize any conveyance, and least of all a conveyance for such a consideration as this, unless it were approved by a master.

The language is, "Provided, nevertheless, that every sale and *mortgage and conveyance in satisfaction, that [*516 may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises."

The defendant claims, that this qualification applies only to the conveyance in satisfaction; the plaintiffs, that it applies

to every deed or mortgage that might be made. That the latter is the true construction is claimed, because,—

I. The statute declared, that no sale of any part of the estate should be made without the assent of the Chancellor to such sale, who was, at the time of giving the assent, to direct the mode in which the proceeds, or so much as he should think proper, should be vested in Mr. Clarke, as trustee. This implied that the Chancellor's consent was to be given to every sale.

The Chancellor delegated the power to a master of his court. Supposing such a delegation lawful, the power was to be exercised on every sale. To restrict it, therefore, to a conveyance in satisfaction, is not only to pervert the Chancellor's order, but to repeal the statute.

II. The language of the order itself is free from ambiguity; it being thus:—"Provided, nevertheless, that every sale and mortgage and conveyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved," &c.

This is a repetition of the words previously used to express, 1, a sale for cash, 2, a mortgage for cash, and 3, a conveyance in satisfaction. So, in the last part of the sentence, the words are repeated with added emphasis. The approval is to be indorsed on "every deed or mortgage that may be made in the premises." It does not seem a fair interpretation to construe this to mean, not "every deed or mortgage that may be made in the premises," but a particular kind of deed, namely, a conveyance in satisfaction of an antecedent debt.

III. The ruling of the state court on this point was made with great hesitation. Judge Bronson gave no reasons for his opinion. It does not appear to have been discussed at the argument in the Supreme Court. In the Court of Errors, the Chancellor said, "Upon this point, I concur, though with much hesitation;" in the conclusion, that the restriction was only intended to apply to sales and conveyances in satisfaction of debts. (20 Wend. (N. Y.), 379.) He overlooked altogether the word "mortgage," twice used in the same *517] sentence. Mr. Verplanck, who delivered the only other opinion, was clear that the restriction *applied to sales and mortgages, as well as conveyances in satisfaction. (20 Wend. (N. Y.), 386, 387.) What were the opinions of the remaining members of the court does not appear.

But the opinions of the courts of New York do not bind the courts of the United States, in the construction of a writing like this. In the case of a will, this court rejected the con-

struction given by the courts of Mississippi. *Lane* v. *Vick*, 3 How., 464.

In the present case, however, the conveyance was not for cash, but chiefly in payment and satisfaction of a debt, and therefore, within the decision of the Supreme Court and Court of Errors of New York, it should have been approved by a master.

Not having been so approved, it was void.

Fifth Point.—So far as the order sanctioned a conveyance for any other than a money consideration, it was unauthorized by the acts, and therefore beyond the Chancellor's jurisdiction. Consequently it gave no force to the title.

In acting under these private statutes, the Chancellor exercised a special and limited jurisdiction, and where he exceeded his jurisdiction his acts were void. The proceeding was not by suit between party and party, where an appeal could be had from an erroneous determination.

Cases of this kind are numerous in the books. In New York, the cases upon assessments are familiar instances. *Striker* v. *Kelly*, 7 Hill (N. Y.), 9; *Matter of Beekman Street*, 20 Johns. (N. Y.), 271; *Matter of Third Street*, 6 Cow. (N. Y.), 571.

So in cases of partition. *Deming* v. *Corwin*, 11 Wend. (N. Y.), 647.

So in cases of bankruptcy, jurisdiction to grant the discharge must be specially shown. *Sackett* v. *Andross*, 5 Hill (N. Y.), 330; *Stephens* v. *Ely*, 6 Hill (N. Y.), 607.

Other cases in the state courts:—*Yates* v. *Lansing*, 9 Johns. (N. Y.), 431; *Borden* v. *Fitch*, 15 Johns. (N. Y.), 141; *Bloom* v. *Burdick*, 1 Hill (N. Y.), 139; *Rogers* v. *Dill*, 6 Id., 415; *Wickes* v. *Caulk*, 5 Har. & J. (Md.), 42; *Pringle* v. *Carter*, 1 Hill (S. C.), 53. See also *Fisher* v. *Harnden*, 1 Paine, 55.

In the English courts:—Shelford on Lunatics, 375; *Matter of Janaway*, 7 Price, 690.

"If a conveyance were made by an infant, even under the order of the court, it would not be valid, if he were not within the act of Parliament. These things, I am sorry to observe, pass too often *sub silentio*." By the Lord Chief Justice Baron, in *The King* v. *Inhabitants of Washbrook*, 4 Barn. & C., 732.

There are many cases in this court, which go to the same point. *Griffith* v. *Frazier*, 8 Cranch, 9; *Thatcher* v. *Powell*, 6 *Wheat., 119; *Elliot* v. *Peirsol*, 1 Pet., 340; [*518 *Bank of Hamilton* v. *Dudley's Lessee*, 2 Id., 523; *Wilcox* v. *Jackson*, 13 Id., 498; *Shriver's Lessee* v. *Lynn*, 2 How., 43; *Lessee of Hickey* v. *Stewart*, 3 Id., 750.

In this case the "subject-matter" over which the Chancel

lor had jurisdiction by these private statutes was not the real estate, for then he might have authorized its alienation by another person than Mr. Clarke; nor was it every alienation by him, for then a mortgage or an exchange might have been authorized under the first act; but it was to determine whether or not the circumstances were such as to justify his assent to a sale or mortgage for cash, and upon a sale or mortgage to superintend the application of the proceeds. When he went beyond this, his act was *coram non judice*, and void.

There are two fatal errors in the Chancellor's order of the 17th of March:—

1. He could not delegate his power to a master at all. The authority was personal, and to be exercised by himself. It was not the discretion of a master, but the discretion of the Chancellor, that was trusted.

2. He could not authorize a conveyance in satisfaction of Mr. Clarke's debts. The statutes gave him no such authority; and if they had, they would have been void, for the Legislature had not power to appropriate one person's property to the debts of another.

And even if it were held, that the Chancellor could delegate the power of consenting, and the order were construed to allow a sale with the consent of a master, there would be a further and insurmountable objection to it; that the consent of the Chancellor, either directly or through a master, could not be dispensed with, according to the letter or spirit of the statutes.

The Chancellor conferred upon Mr. Clarke no portion of his authority; that came directly from the statutes. The Chancellor could neither give it, nor enlarge it. The lands, if they passed at all, passed by force of the statutes. The Chancellor had no power, except to dissent from the sale; to interpose his veto. He could not even compel Mr. Clarke to act; he could only say when he should not act, and if he acted, what should be done with the proceeds of the estate.

Sixth Point.—The subsequent conveyance of a part of the property to a purchaser, for value, and without notice of the defect in the title, did not make the title valid, as against the plaintiffs.

This is so upon general principles. If the conveyance by Mr. Clarke did not divest the plaintiffs' title, the subsequent *transfer did not. There is no principle of law which would make De Grasse give a better title than he had.

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In most of the cases, upon defective execution of authority, the property was in the hands of innocent holders. *Wilson*

v. *Sewall*, 1 Bl., 617; *Bloom* v. *Burdick*, 1 Hill (N. Y.), 130; *Rogers* v. *Dill*, 6 Id., 415.

There is no room here for an estoppel. The children were neither parties nor privies to the conveyance to De Grasse. They take as devisees under the will. See *Roe* v. *York*, 6 East, 86; *Roxburghe Feu case*, 2 Dow., 189.

Mr. John Jay, for defendant.

Defendant's Points on the Eight Questions stated in the Certificate.

I. The acts of the Legislature stated in the case divested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke, as trustee in their place and stead.

1. To determine the meaning and scope of these acts, we must discover what were then understood to be the interests and rights of the parties to be affected by them; and for this purpose we must refer to the judicial decisions which governed the courts and the Legislature at the time of their enactment, even though these decisions have been departed from by later judges; for it would be contrary to the first principles of law and justice to give to long subsequent adjudications a retroactive operation in the interpretation of ancient statutes; and such a course would lead to the worst evils of *ex post facto* legislation in regard to vested and sacred rights. 2 Inst., 292; 1 Kent. Com., 461; *Doe* v. *Allen*, 8 T. R., 504, per Ld. Kenyon.

2. The trustees under the will took the legal estate in fee in the premises in question. This is clear from the language of the devise, and from the powers given to them to lease the premises during Clarke's life, and to convey to the parties who should become entitled to the same on his decease.

3. The children, as they came *in esse*, were then supposed to take, under the will of Mary Clarke (according to the uniform ruling of all the courts, both in England and America, at that time, and for a long time previously), not a vested remainder in fee, liable to open and let in after-born children, and subject to be defeated by their death during Clarke's life, but simply a contingent remainder dependent upon their surviving their father, and that remainder (excepting so far as *their interest in the premises was enlarged by the acts of the Legislature passed with Clarke's assent) was then regarded as amounting, during their father's life, to a mere presumptive title, a naked possibility, uncoupled with any immediate beneficial interest. *Denn d. Radcliffe* v. *Bagshaw*, 6 T. R., 512, in the King's Bench, per Lord Kenyon, [*520

and all the judges, in the year 1796. *Doe* v. *Scudamore*, 2 Bos. & P., 289, per Lord Eldon, C. J., and Heath, Brooke, and Chambre, JJ., in 1800. *Roe* v. *Briggs*, 16 East, 406, per Ld. Ch. J. Ellenborough, in 1802:—"That no case had been shown where an estate depending on such a contingency had ever been held vested." *Doe* v. *Provost*, 4 Johns. (N. Y.), 61, in 1809, per Justice Van Ness; Kent, C. J., and Thompson and Yates, JJ., concurring. See this case commented upon and sustained in *Hawley* v. *James*, 16 Wend. (N. Y.), 242 *et seq.* *Dunwoodie* v. *Reed*, 3 Serg. & R. (Pa.), 435, in 1817, per Tilghman, C. J., and Gibson, J. See remarks of Savage, C. J., in *Coster* v. *Lorillard*, 14 Wend. (N. Y.), 311, on the question of remainders dependent on survivorship, showing the conflicting definitions of the statute and common law, and thus accounting for the discrepancy between the former and the later decisions. See note, 4 Kent Com., 261, on the case of *Jackson* v. *Waldron*, 13 Wend. (N. Y.), 178, affirming the judgment of the Supreme Court in *Pelletrau* v. *Jackson*, 11 Id., 121, per Nelson, J. 2 Bl. Com., 170; Fearne on Cont. Rem.; Prest. on Abs., 21; Cruise, title 16, *Remainder*, ch. 1, §§ 10 to 27; Jickling's Analogy of Legal and Equitable Estates; *Dixon et ux.* v. *Pickett*, 10 Pick. (Mass.), 517, *Blanchard* v. *Brooks*, 12 Id., 47, per Shaw, C. J. (pp. 63 and 64); *Davis* v. *Norton*, P. Wms., 392; *Duffield* v. *Duffield*, 3 Bligh, N. S., 260, 329, 355, per Best, C. J., on character of a contingent estate; *Jackson* v. *Waldron*, 13 Wend. (N. Y.), 214 *et seq.*, per Tracey, Senator.

4. Thomas B. Clarke, under the will, took an equitable life estate, and after the transfer to him, by the act of the Legislature, of the contingent estate of Clement C. Moore, the whole estate in remainder was alternate between Clarke and his children, dependent upon the like contingency of survivorship.

5. In whatever light the estate of the children be regarded, the interest of Clarke in the premises in question was larger than theirs; for the life estate was absolutely his, and the remainder was limited on the same condition to each,—to wit, survivorship; and as the case shows that one moiety of the devised premises was carefully reserved by the acts of the Legislature and the orders of the Court of Chancery, for the
*521] benefit of the children, it is clear that, in addition to the benefit they *derived from the other moiety, which was partly disposed of, they have received a larger share of the estate than they would have been entitled to, had an equitable division of their relative interests been made between

them and their father when the acts and orders were passed and made.

6. The acts having been adjudged constitutional and valid, the only question here is as to their meaning; and since they were remedial statutes, they are to receive an equitable interpretation, by which the letter of the act is sometimes enlarged and sometimes restrained, so as more effectually to meet the beneficial end in view, and to prevent a failure of the remedy. The intention of the Legislature is to be deduced from a view of the whole, and the real intention is to prevail even over the literal sense of the words. Dwarris on Statutes; 1 Kent Com., 461; *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.), 365, per Bronson, J.

7. The first act of the Legislature, April 1, 1814, discharging the trustees under the will, and providing for the appointment of new trustees by the Court of Chancery in their place and stead, and directing that such new trustees may lease all or any part of the land for a term not exceeding twenty-one years, and may sell or dispose of a moiety in their discretion, and declaring that they shall be decreed and adjudged trustees under the will, in like manner as if they had been named therein, clearly divested the trustees under the will of their legal estate in the land.

The trustees had no beneficial interests. They were liable to be removed by the Court of Chancery. There was nothing in their appointment under the will, and their acceptance of the trust, which can be construed as a contract, of which their removal was an unconstitutional violation; for the reason, among others, that the Constitution protects only such contracts and vested rights as are beneficial, and not such as are merely onerous; and in this case the objection could only be taken by the trustees themselves; and they not only assented to the act, but solicited its passage; and the change of trustees, being avowedly for the benefit of the children, was within the clearest parental authority of the legislature. Cruise, title *Private Acts; Townley* v. *Gibson*, 2 T. R., 701.

8. The first act not only divested the trustees of their estate, but provided for its transfer without diminution to new trustees, to be appointed by the Chancellor. The second act, of March 24, 1815, in the absence of such appointment, created Clarke the new trustee, clothed him with all the powers specified in the former act, and, with abundant care lest any thing should be omitted, authorized him to execute and perform *every act, matter, and thing in relation [*522 to the real estate, in like manner and with the like effect that trustees under the former act might have done; and made

him, in like manner, responsible to the Chancellor for his faithful "management of the estate thereby vested in Thomas B. Clarke." The "estate" here spoken of could only have been the land, as there were then no proceeds for investment. And the third act, passed March 29, 1816, again distinctly recognized him "as trustee under the will of Mary Clarke." He could not have been the trustee for himself; for that trust had merged in the legal estate; he was therefore trustee only of the remainder.

9. The acts cannot be fairly construed as conferring upon Clarke only a power in trust; for, apart from the express recognition of him by the second act, as vested with the estate, the intention to vest it in him may be collected from all the acts taken together. To suppose that the legal estate was intended to be left in the original trustees, after they were "discharged from the said trust," is not only unreasonable, but utterly irreconcilable with the exercise by Clarke of the rights and duties conferred and imposed upon him,—such as the leasing all or any part of the land (§ 5, Act of April 1, 1814), receiving the rents and profits, and doing other acts requiring and implying the possession of a legal estate. *Goodright d. Revell and others* v. *Parker and others*, 1 Mau. & Sel., 692; *Doe d. Gillard* v. *Gillard*, 5 Barn. & Ald., 785; *Doe d. Beezley* v. *Woodhouse and others*, 4 T. R., 89.

The words "authorize and empower," in the act, cannot have the effect of turning this into a mere power. They simply declare the trusts for which Clarke was already appointed, and for the execution of which he was vested with the estate. *Brown* v. *Higgs*, 5 Ves., 506, per Ld. Kenyon.

10. It has been judicially held, in New York, that the acts did vest the legal estate in Clarke as trustee. Per Walworth, Ch., in *Clarke* v. *Van Surlay*, 20 Wend. (N. Y.), 377.

And this court will, in accordance with their general practice, follow the ruling of the state tribunals. *Swift* v. *Tyson*, 16 Pet., 19.

II. The authority given by the said acts to the trustee to sell, was not a special power to be strictly pursued, but he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

1. By the act of April 1, 1814, the broadest powers of sale were conferred on the trustees therein provided for. By § 2 of the act of March 24, 1815, the same powers were conferred
*523] on Clarke in express terms. He was authorized and empowered *to execute and perform every act, matter, and thing in relation to the real estate, in like manner and

with like effect that trustees under the former act might have done.

2. This language is only consistent with the supposition, that Clarke held the trust estate in fee under the will. It is irreconcilable with the supposition that he was acting under a special power, to be strictly pursued.

3. The doctrine of naked power is odious, as often leading to grievous injustice; and the court will not so construe the act, if it will bear any other construction. 4 T. R.; 1 Kent Com., 461.

4. The further provision of the act directing the annual accounting before the Chancellor, that the Chancellor might see that Clarke had duly performed the trust reposed in him, was personal to Clarke, and did not abridge the powers conferred upon him as trustee.

III. and IV. The orders set forth in the case made by the Chancellor are to be regarded as the acts of the Court of Chancery of the state of New York, and not as the doings of an officer under a special authority.

The Chancellor, in a court of law, must be assumed to have had competent authority, under the acts, for every order which he made in the matter, whether such order allowed a sale for any other consideration than cash paid or not.

1. That the assent and direction of the Chancellor in this case, required and given under the acts, was a judicial proceeding, not to be assailed collaterally in a court of law, was held in the courts of New York by Mr. Justice Cowen, *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 447; Chancellor Walworth, in *Cochran* v. *Van Surlay*, 20 Id., 378; Mr. Senator Verplanck, Id., 384.

2. The accountability of Clarke to the Chancellor was a continuance of the accountability which rested upon the trustees under the will, and which was expressly intended by the first act of the Legislature (§ 6) to rest upon their successors, and which properly belonged to his position as trustee. 2 Story, Eq. Jurisp., §§ 960, 974, 978; 2 Fonb., 36, note; 3 Ves., 9.

3. The presumption of the acts of the Chancellor being judicial, even if no reference to the Court of Chancery had been made in the former act, would result from the appointment of a judicial officer having exclusive jurisdiction over matters of trust and the estates of infants; and the fact that the rights of Clarke, as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales and in the profits, required judicial adjustment, not according to the technical and unbending rules of the common law, but

at the hands of the presiding *officer of the high court of equity, having authority to take a wider range, as the interest of the parties might require. *Fisher* v. *Fields*, 10 Johns. (N. Y.), 505, per Kent Ch.; 2 Story Eq. Jur., § 331.

4. The contemporaneous action, under the acts, by the Chancellor, was judicial, and not ministerial, and that action is evidence of the true construction of the acts. The act of 1816 refers to the proceedings already had by the Chancellor, and adopts them, and thus gives a legislative exposition of the prior act, showing them to have been judicial; and being judicial, they cannot be impeached collaterally.

5. That the Chancellor regarded his acts as the acts, not of an individual, but of the High Court of Chancery, and that he regarded that court as having exclusive jurisdiction in the future of all matters connected with the sales and mortgages, is clear from the repeated permission given in the successive orders to "all parties interested, or to become interested, in the premises, to apply to the court at any time or times thereafter, for further orders or directions."

6. Of that permission the plaintiffs should have availed themselves, if Clarke had in any thing abused his powers, to enforce the trust and recover the purchase-money, instead of seeking to reveiw the orders of a Court of Chancery in eject ment suits at common law. Mitf. Pl., 133; 2 Story Eq. Jurisp., § 1127; 2 Madd. Ch., 125; *Potter* v. *Gardner*, 12 Wheat., 499, per Marshall, C. J.

V. and VI. The deed executed by Clarke to De Grasse, for the premises in question, is valid, even if it were given for a consideration other than cash paid on the purchase, (of which there is no proper evidence,) and without having a certificate indorsed thereon, that it was approved by a master in chancery, supposing Clarke to have taken only a power in trust.

1. Under the acts of the legislature Clarke had authority to sell and dispose of the land, in such manner, and upon such terms, as he might deem best for the interest of the several parties. The Chancellor had full authority under the acts to assent to a sale in satisfaction, if Clarke thought such a disposition of the land expedient, the terms being altogether in Clarke's discretion, and that assent being judicially given is not to be questioned.

The rules fixed by the Chancellor for Clarke's guidance in regard to the valuation, and approval, and certificate of a master, in certain cases, were merely directory to the trustee, and not conditions precedent to the validity of the sale, and no omission can invalidate the exercise of Clarke's power given

by *the act nor of the deed to De Grassse given under it. *Mineuse* v. *Cox*, 5 Johns. (N. Y.) Ch., 447, per Kent, Chancellor, in a closely analogous case.

2. But the legal estate being necessarily vested in Clarke, as already shown, the deed to De Grasse conveyed a title absolute in a court of law, whether the conditions of the trust had been complied with or not. The plaintiffs are estopped at law, though not in equity, from impugning a deed duly executed by the trustee, and their remedy for any supposed fraud or breach of trust is in equity alone. *Taylor* v. *King*, 6 Munf. (Va.), 366, per Roane, J.; per Cowen, J., in *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 447; per Walworth, Ch., in *Cochran* v. *Van Surlay*, 20 Id., 378, 379.

VII. The fact that Clarke had previously mortgaged the premises in fee to Henry Simmons, did not at all affect his competent authority to sell and convey the same to De Grasse.

The power given to Clarke as trustee was not one which called only for a single execution. The words "either" and "or" are not alternative, but distributive, and the beneficial intent of the act not having been satisfied by the execution of the mortgage, the power to sell survived. *Omerod* v. *Hardman*, 5 Ves., 732.

VIII. If it be assumed, (which is hardly possible,) that Clarke had only a naked power, that the rules fixed by the Chancellor were conditions to its exercise, and that the loose and random recollections of the witness who testified touching the consideration of the deed to De Grasse were admissible, and sufficient evidence on that point, still the title of a *bonâ fide* purchaser, without notice, cannot be questioned in a court of law, for the want of the master's certificate required to conveyances in satisfaction, for the reason that the deed on its face was a deed for cash, executed in legal conformity to the power, and the remedy of the plaintiff is in equity, where the payment of the purchase-money might be enforced. Sugd. on Powers, ch. 11, §§ 1 and 2; *Wood* v. *Jackson*, 8 Wend. (N. Y.), 32; *Anderson* v. *Roberts*, 10 Johns. (N. Y.); *Jackson* v. *Terry*, 13 Id., 471, per Thompson, C. J.; *Astor* v. *Wells*, 4 Wheat., 487; *Bean* v. *Smith*, 2 Mason, 273; *Fletcher* v. *Peck*, 6 Cranch, 141; *Jackson* v. *Henry*, 16 Johns. (N. Y.), 195; *Jackson* v. *Van Dolsen*, 5 Id., 43; *Franklin* v. *Osgood*, 14 Id., 527.

Further Points in favor of the Defendant.

I. By the act of March 24, 1815, it was provided that Clarke should account annually to the Chancellor, or to such person as he might appoint, for the principal of the proceeds of each

sale made by him, and if on such return, or at any other time, and in any other manner, the Chancellor should be of opinion that Clarke had not duly performed the trust by that act reposed in him, he was authorized to remove Clarke from his said trust, and appoint another in his stead.

There is no proof in the case that the Chancellor ever removed Clarke, as he was bound to do, if he thought he had not duly performed his trust, or that the Chancellor ever disapproved of the sale to De Grasse, or of the consideration thereof. On the contrary, it appears from the offers of evidence made by the plaintiffs, that on the 31st of March, 1836, Clarke was still acting as trustee and making sales, and it is therefore a sound legal presumption, that the Chancellor approved of this conveyance, and of Clarke's conduct generally; for had he disapproved of them, Clarke would have been removed or enjoined, as the plaintiffs say he was, at the instigation of the children, at a later period.

The Chancellor had been by the act "virtually made the trustee of the property," (per Jones, Ch., in *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 548, quoted and approved by Verplanck, Senator, in *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.). 387,) and the care and exactness exhibited in the orders contained in the case forbid the imputation of carelessness or neglect in his fulfilment of the important duties specially imposed upon him by the Legislature. He must be presumed to have done his duty intelligently, diligently, and faithfully, and that presumption which forbids the supposition that the premises in dispute were disposed of fraudulently or improperly is to govern in this court until overthrown by positive proof to the contrary. Best on Presumption of Law, 63, and cases cited; Co. Litt., 103 and 232, *b*; Dig. lib. 50, title 17; *Sutton* v. *Johnstone*, 1 T. R., 503; Cowen and Hill's Notes to Phill. on Ev., 205, *et seq.*

II. The conveyance to De Grasse was made 29 March, 1822; this suit was commenced in 1845. Although the marriage of Mrs. Williamson, in 1827, before the completion of her infancy, has saved her from being barred by the statutes of limitation, the singular and unexplained want of diligence and vigilance on the part of the plaintiffs in seeking to enforce their claims, if any they had, to these premises, until after the lapse of so many years of acquiescence and delay, and when the true state of the transaction has been forgotten, or become incapable of explanation, do not entitle them to the favorable consideration of the court; for they have slept upon their rights, and have thereby created a difficulty and imposed a hardship, misleading innocent parties by their silence. 2

Ball & *B., 433; *Hawley* v. *Cramer*, 4 Cow. (N. Y.), 483, per Walworth, Ch.; *Broadhurst* v. *Balguy*, 1 Younge & Col. N. R., 16, 28 to 32; 2 Story Eq., §§ 1284, 1520, and cases quoted in note *c*; *Wendell* v. *Van Rensselaer*, 1 Johns. (N. Y.) Ch. 354, per Livingston, Ch.; *Higginbotham* v. *Burnet and others*, 3 Id., 184, per Kent, Ch.; *Roberts* v. *Tunstall*, 4 Hare, 263, per Wigram, V. Ch.

III. The length of time which has elapsed since the conveyance to De Grasse, coupled with the fact that this very deed has been sustained by the court of last resort in the state of New York, after prolonged litigation, will incline this court to give to the acts of the Legislature and the order of the Chancellor, in questions of doubt, the most favorable interpretation for the maintenance of the title, and the protection of the rights of *bonâ fide* purchasers and encumbrancers. The best interests of society demand that causes of action should not be deferred an unreasonable time, and this remark is peculiarly applicable to suits in ejectment, since nothing so much retards the growth and prosperity of the country as the insecurity of titles. Per McLean, J., in *Lewis* v. *Marshall*, 5 Pet., 470. Per Marshall, C. J., in *Bell* v. *Morrison*, 1 Pet., 360.

Mr. Wood, for defendant.

I. The three trustees under the will of Mary Clarke took the legal estate in fee, in the premises in question, in part. Thomas B. Clarke took an equitable estate in said premises during his life; and his children took an equitable estate in remainder in fee; and Clement C. Moore took an alternate equitable remainder in fee, in case of failure of the issue of said Thomas B. Clarke.

II. Assuming Clarke to take a life estate with a limitation in remainder to his issue, such limitations of remainders in the alternative are lawful and valid. *Luddington* v. *Kime*, 1 Ld. Raym., 203.

III. The legal estate of the trustees was not executed by the statute of uses, by transferring it to the parties entitled to the equitable estates and interest in fee.

An important act on the part of the trustees was required to be done, viz., the conveyance to the children in fee after the death of Thomas B. Clarke, or in the alternative to Clement C. Moore. The trust was therefore active, and not executed by the statute. *Mott* v. *Buxton*, 7 Ves., 201. *Leonard* v. *Sussex*, 2 Vern., 526.

IV. The legal estate in the hands of the trustees involved *the power to lease, such power being neces- [*528

sary for the production of rents and profits of city property. *Attorney-General* v. *Owen*, 10 Ves., 560.

V. By the act of 1815, the legal estate in the three trustees named in the will was transferred to Thomas B. Clarke in trust.

1st. The language of the act shows an intention to transfer it, and not to confer upon him a mere power in trust.

2d. It is not necessary that words of grant should be found in the act. The intention to vest him with the legal estate may be collected from the context. *Euchelah* v. *Welsh*, 3 Hawks, &c., 155. It is unreasonable to suppose the legal estate was meant to be left in the original trustees under the will, after they were stripped of the trust, and when they had no beneficial interests.

3d. Under the second section of said act, all the rights and duties are conferred upon him which would have devolved upon the trustees under the act of 1814, by the fifth section of which they were to lease from time to time, receive rents and profits, and do other acts requiring a legal estate.

4th. A legal estate in trust may be implied even in private instruments, when the acts to be done are such as to render it proper and essential that the trustees should have the legal estate, and not a mere trust power. *Griffiths* v. *Smith*, Moo., 753; *Goodright* v. *Parker*, 1 Mau. & Sel., 692; *Doe* v. *Cundall*, 9 East, 400; *Doe* v. *Gillard*, 5 Barn. & Ald., 785; *Anthony* v. *Rees*, 2 Cromp. & J., 75; *Carter* v. *Barnardiston*, 1 P. Wms., 505; *Thong* v. *Bedford*, 1 Bro. C. C., 313; *Striker* v. *Mott*, 2 Paige (N. Y.), 389; *Brewster* v. *Paterson*, Court of Appeals, S. P., on this same will, in M., 5; *Doe d. Beezeley* v. *Woodhouse*, 4 T. R., 89; *Oates* v. *Cooke*, 3 Burr., 1685.

VI. The act divesting the trustees under the will of the legal estate in trust was not unconstitutional.

1st. They had no beneficial interests. Their functions were under the control of equity; they were liable at any time to be removed by the Chancellor. *Livingston* v. *Moore*, 7 Pet., 469; *Wilkinson* v. *Leland*, 2 Id., 267, 660.

2d. The Constitution protects only such contracts and vested rights as are beneficial to the party, not such as are merely onerous.

3d. The objection could only be taken by the trustees themselves, and they assented to the acts displacing their estate and their functions. 2 Pet., 411, 413; *Watson* v. *Mercer*, 8 Id., 88; *Sinclair* v. *Jackson*, 8 Cow. (N. Y.), 543; *Currie's Adm'rs* v. *Mutual Ins. Co.*, 4 Hen. & M., (Va.), 315;

*529] *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.), 387. This last-mentioned case is conclusive* of the whole question,

being the decision of the highest court of the state on a local law.

VII. The sale and conveyance by Thomas B. Clarke, (he having the legal estate,) though he may have departed from his trust, was valid to pass the legal title, and the remedy for any supposed breach of trust is in equity only, not in these suits at law. 1 Sug. on Powers, ch. 11, §§ 1, 2; *Jackson* v. *Van Dalssen*, 5 Johns. (N. Y.), 43.

VIII. Assuming that Thomas B. Clarke takes only a power in trust, his conveyance is valid.

1st. The assent and direction of the Chancellor, required under the act, is a judicial proceeding.

2d. The presumption of its being judicial results from the fact of its being conferred upon a high judicial officer, and the rights of Clarke as life tenant and contingent remainderman, and the rights of the children in the proceeds of sales, and in the profits, required judicial adjustment.

3d. The contemporaneous action under it, by the Chancellor, was judicial, and not ministerial.

4th. Such contemporaneous action is evidence of the true construction of the act.

5th. The act of 1816 refers to these judicial proceedings, adopts them, and thus gives a legislative exposition of the prior act, showing these proceedings of the Chancellor to be judicial.

6th. Being judicial, the orders of the Chancellor are final and conclusive, and cannot be impeached collaterally, though the proceeding is of a summary character. *Moody* v. *Thurston*, Str., 481; 1 Doug., 407; 1 Harg. Law Tracts, 446; 4 Greenl. (Me.), 531; *Henshaw* v. *Pleasance*, 2 Bl., 1174 (note showing the decision overruled); *Doe* v. *Brown*, 3 East, 15; *Grignon's Lessee*, 2 How., 319.

If jurisdiction, but irregular proceeding, final but on appeal. If no jurisdiction, this also decided in *Cook* v. *Van Lear;* for it is not the ordinary jurisdiction of equity, but jurisdiction under special statute.

7th. If not judicial but ministerial, the terms imposed are not conditions, but merely directory, and any omission does not invalidate the exercise of the power and the grant under it. *Mineuse* v. *Cox*, 5 Johns. (N. Y.) Ch., 447; 5 Johns. (N. Y.), 43.

IX. The sales and conveyances are valid to pass the title to the premises in question, and complete a good defence in this suit.

Mr. Webster, for plaintiffs, in reply and conclusion.

I propose to maintain four propositions, which will embrace all the eight questions, and answer them:—

*530] *I. The acts of the Legislature stated in the case, while they divested the estate of the trustees under the will of Mary Clarke, did not vest the whole estate in fee in Thomas B. Clarke.

II. The authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued.

III. That, even if it be holden that the acts vested a legal estate in fee in Thomas B. Clarke, yet that the same acts imposed conditions and restraints on his power of alienation; and that he could make no lawful or valid conveyance, without having first complied with these conditions and restraints.

IV. That the conveyance made by him, under which the defendant claims, was not made in conformity with these conditions and restraints.

(*Mr. Webster*, after arguing in support of the above propositions, said that he would now ask the attention of the court to a critical examination of the New York decisions, which he contended to be as follows:)

It has been decided in the courts of New York, that the acts of the legislature stated in this case are constitutional.

It has not been decided, that the Chancellor's orders in the case were legal, or within the jurisdiction conferred upon him by the acts; but it has been decided, that, if acting within his jurisdiction, the propriety or legality of his orders could not be examined into, collaterally, in a court of law.

It has been decided, that the Chancellor's order made in this case did not require that a sale, made by T. B. Clarke, when made for money, must have been approved by a master but all the judges who gave reasons for their judgment signified their opinions, that, when a conveyance was made in satisfaction of a debt, such approval, under the Chancellor's order, was indispensable. But no case, turning on this single point, has been adjudged in New York.

It has not been decided by the courts in New York, that, under and by force of the acts, T. B. Clarke took a fee simple estate in the whole property. That question has not directly arisen. Chancellor Walworth, *arguendo*, expressed an opinion in favor of the affirmation of that question. Chief Justice Bronson took the negative of the question as a point conceded.

It has not been decided by the courts of New York, that T. B. Clarke took, by force of the acts, any such estate as that he could make a sale or conveyance, which should be sufficient to pass any title, legal or equitable, without conforming to all the limitations and requisites prescribed in the acts themselves.

*On the contrary, all the courts, and every judge in New York, so far as appears, has proceeded on the ground that those limitations and requisites must be complied with, before any estate, legal or equitable, could be passed by any deed or conveyance which Thomas B. Clarke could make.

All the courts and all the judges in New York have affirmed that these restrictions in the acts do bind the estate, and restrain and limit, *ab initio*, the trustees' power of sale.

Therefore, *Mr. Webster* contended, the attempt now made by defendant's counsel was nothing less than an attempt to overthrow the whole substance of the New York decisions.

Mr. Justice WAYNE delivered the opinion of the court.

This cause has been brought to this court, to get its decision upon questions of law, which were raised upon a case stated in the Circuit Court, upon which the judges of that court differed in opinion.

The suit is an action of ejectment, for the undivided third part of eight lots of land, in the sixteenth ward of the city of New York. The plaintiffs claimed under the will of Mary Clarke. It was admitted by the counsel for the defendant, that Mary Clarke had been seized of the premises in dispute, when she made her will, and when she died in 1802. It was also admitted, that the defendant was the actual occupant of the premises, when the suit was commenced against him.

The premises are a portion of a tract of land, devised by Mary Clarke to "Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants and not as tenants in common," of "all that part of my said farm at Greenwich aforesaid, called Chelsea," &c., "to have and to hold the said hereby devised premises, to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same" "to Thomas B. Clarke," &c., "during his natural life; and from and after the death of the said Thomas B. Clarke, in further trust, to convey the same in fee, to the lawful issue of the said Thomas B. Clarke, living at his death. And if the said Thomas B. Clarke shall not leave any lawful issue, at the time of his death, then in the further trust and confidence, to convey the said hereby devised premises to my grandson, Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death, prior to the death of Thomas B. Clarke."

*It was also admitted, that the trustees named in the [*532

will were dead; that Thomas B. Clarke married in 1803; that his wife died in 1815; and that he died in 1826, leaving three children,—Catharine, the wife of Charles H. Williamson, plaintiffs in this suit,—Isabella, now the wife of Rupert Cochran,—and Bayard Clarke, all of whom were still living. Here the plaintiffs rested their case.

The defendant then put his case upon conveyances from Thomas B. Clarke, made, as he says, under legislative enactments of the state of New York and orders of the Chancellor of New York.

The acts and the orders of the Chancellor under them will be the subjects of our consideration only so far as may be necessary to give answers to the points certified to this court. In other words, we will not discuss the quantity of interest which the persons provided for in the devise took under it.

It is right, however, to say, that we concur with the learned judges of the Circuit Court, that, under the will of Mary Clarke, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let in his other children to the like estate, as they were successively born; and that their vested remainder became a fee simple absolute, in the children living, on the death of their father.

The points certified are as follows:—

1. Whether the acts of the Legislature, stated in the case, divested the estate of the trustees under the will of Mary Clarke, and vested the whole estate in fee in Thomas B. Clarke.

2. Whether the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity.

3. Whether the orders set forth in the case, made by the Chancellor, were authorized by and in conformity to the said acts of the Legislature, and are to be regarded as the acts of the Court of Chancery, empowered to proceed as such in that behalf, or the doings of an officer acting under a special authority.

4. Whether the Chancellor had competent authority, under the acts, to order or allow such sale or conveyance of the estate by the trustee, as is stated in the case, on any other consideration than for cash paid on said conveyance.

5. Whether the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, being upon a consideration other than for cash paid on the purchase, is valid.

6. Whether the said deed is valid, it having no certificate indorsed thereon that it was approved by a master in chancery.

7. Whether Thomas B. Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse.

8. Whether the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, rendered the title of such grantee, or his assigns, valid against the plaintiffs.

It is thereupon, on motion of the plaintiffs by their counsel, ordered that a certificate of division of opinion, upon the foregoing points, which are here stated during this same term, under the direction of the said judges, be duly certified under the seal of this court to the Supreme Court of the United States, to be finally decided.

Our first observation upon the act of April, 1814, is, that the first section of it gives to the Chancellor the power to appoint trustees, in the place of those named in the will. This is to be done upon the petition of Thomas B. Clarke, as contradistinguished from a suit by bill for such a purpose; and as occasion may require, the Chancellor may substitute and appoint other trustees, in the room of these appointed under the act, in like manner as is practiced in chancery, in cases of trustees appointed therein. By the last section of the act, the trustees are said to be liable in all respects to the power and authority of the Court of Chancery, concerning the trusts created by the act.

It will be conceded by all, that the Court of Chancery, without this act, had not the power, under its inherent or original jurisdiction, to change the trustees summarily upon petition, or except by means of a bill filed by and against all proper parties, for such causes as trustees may be removed in chancery.

The second, third, fourth, fifth, and sixth sections of the act, except the last clause in the sixth already cited, prescribe minutely what may be done by the trustees who might be appointed by the Chancellor, in relation to the land devised, leaving nothing to be done by the court, except in its supervisory power over the acts of the trustees.

Under this act, it does not appear that any application was made for the substitution of trustees in place of those named in the will. The latter continued in their testamentary relation to the land devised, until after the act of March, 1815, had been passed.

That act was passed upon the petition of Thomas B. Clarke.

He recites a release to him by Clement C. Moore of his contingent *interest in the estate devised, whereby he says himself and his infant children have become the only persons interested in the estate. And he declares that he has not been able to prevail upon any suitable person to undertake the performance of the duties enjoined by the first act. He then prays for an amendment of it.

Leave was given in the Senate of New York, that such a bill might be reported, and it was passed into an act the 24th of March, 1815.

In the preamble to this act, after reciting Clement C. Moore's release, "whereby the said real estate became exclusively vested in Thomas B. Clarke and his children," it is enacted, that all the beneficial interest and estate of Moore, or those under him, arising by virtue of the act, to which this is a supplement, is vested in Clarke, his heirs and assigns, &c. And that so much of the act as requires the several duties therein enumerated to be performed by trustees, to be appointed by the Court of Chancery, as therein mentioned, be, and the same is hereby, repealed.

The power given by the first act to the court, to appoint trustees, having been repealed, the second section of the second act is,—that Clarke is authorized and empowered to execute and perform every matter and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner, and with like effect, that trustees duly appointed under the first act might have done. And Clarke is required to apply the whole interest and income of the property to the maintenance of his family and the education of his children. Then it is enacted, in the third section, that no sale of any part of the estate shall be made by Clarke, until he shall have procured the assent of the Chancellor to such sale; who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Clarke as trustee; and further, that it shall be the duty of Clarke to render an annual account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest being to be applied by said Clarke in such manner as he may think proper, for his own use and benefit, and for the maintenance and education of his children. And if on such return, or at any other time, and in any other manner, the Chancellor shall be of the opinion, that Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove him and appoint another

trustee in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in Thomas B. Clarke as trustee.

*We have hitherto used the words of the acts. And shall do so, as occasion may require, that Clarke's character under the acts as a trustee, with power as it might be given to him by the Chancellor to sell, may not be misunderstood; and that the special power or jurisdiction given to the Chancellor in the whole matter may be more apparent, when we treat of that part of the case. [*535

The orders given by the Chancellor under the first and supplemental act, upon the petition of Clarke, shall have our attention, after the third act which was passed for Clarke's relief has been noticed.

It was passed upon the memorial of Clarke. It recites, that the Chancellor, under the act for his relief, did order that he might sell the eastern moiety of the property in the act mentioned, but that, owing to the scarcity of money, and low price, no sale could be made, without a great sacrifice. And therefore he prays to be permitted to mortgage the property, as the Chancellor may appoint, for the purposes mentioned in the preceding acts and order of the Chancellor.

The act passed upon this petition is, that he is authorized, under the order heretofore given, or under any order which the Chancellor might give, to mortgage and sell the premises, as trustee under the will of Mary Clarke, and to apply the money to be raised by mortgage or sale to the purposes required or to be required by the Chancellor, under the acts heretofore passed for Clarke's relief.

So much of Clarke's petition to the Legislature has been cited in connection with its acts, to show that the latter were coincident with, and not beyond, the relief for which he asked.

Both fix conclusively that Clarke is to be regarded as the trustee only of the property devised, to sell or mortgage a part of it, with the assent or appointment of the Chancellor. His obligation is to account annually for the principal of the proceeds of every sale or mortgage which might be made, and it is his right to use the interest of the principal for himself and for the education and maintenance of his children. He is called trustee in the acts. In that character, and in no other, is he recognized in the orders of the Chancellor. And, in the last clause of the third section of the second act, it is said another may be appointed in his stead, "subject to such rules as the Chancellor may prescribe, in the management of the estate, hereby vested in the said Thomas B. Clarke as trustee."

His relation to the devised estate was changed by the dis-

charge of the trustees named in the will, but his interest in it
*536] was the same as it had been, with the exception of Moore's assignment *of his contingent remainder, and the power given to the Chancellor to assent to the sale or mortgage of a part of it. The acts of the legislature discharged the trustees named in the devise, whatever may have been their estate in the land under it, but did not vest an estate in fee in Thomas B. Clarke.

We will now precede our inquiry into the jurisdiction given to the Chancellor by the acts, with a few remarks, which will aid in determining the extent of that jurisdiction, and what would have been its rightful exercise.

Jurisdiction in chancery is inherent and original, comprehending now almost every exigency of human disagreement, for which there is not an adequate remedy at law.

Or it is statutory, meaning a new power from legislation for the court to act upon particular subjects of a like kind, as occasions for doing so may occur. Examples of this statutory jurisdiction are the 43d of Elizabeth, called the Statute of Charities. The act known as Sir Samuel Romilly's, giving a summary remedy in cases of breach of trust for charitable uses. And another is the trustee act of Sir Edward Sugden, for amending the laws respecting conveyances and transfers of estate and funds vested in trustees and mortgagees, and for enabling the courts of equity to give effect to their decrees and orders in certain cases.

Or, the jurisdiction in equity is extraordinary, as when a statute permits persons to present petitions to the Chancellor for relief in private affairs, when the petitioner cannot get relief by the ordinary course of law, or from the inherent power of a court of chancery. Cruise, in his Title 33, c. 11, says, they are termed real estate acts, and that it is a conveyance or settlement of lands or hereditaments, made under the immediate sanction of Parliament, in cases where the parties are not capable of substantiating their agreements without the aid of the legislature, and where the carrying such agreements into effect is evidently beneficial to the parties.

In these cases, it must also be recollected that the Chancellor acts summarily, *ex parte*, upon the petition of the party seeking relief. Upon such petitions orders are given, as contradistinguished from decrees in suits by bill filed. The last are his judgments upon the matters in controversy between the parties before the court; the other being orders in conformity with whatever may be the legislative direction and intent in any particular case. Whatever, however, the Chancellor does in either case, he does as a court of chancery. It

will stand as his judgment, when it has been done within the jurisdiction conferred, until it has been set aside upon motion; as his *decrees do, until they have been set [*537 aside by a bill of review.

The acts for the relief of Thomas B. Clarke are of the last kind. They are private acts, relating to a particular estate and persons having interests in it;—one of whom, Clarke, is empowered, as a trustee, to sell a part of it, with the consent of the Chancellor. Several cases of private acts for such relief as was asked by Clarke will be found in the 33 c. of Cruise.

The acts in this case provide that the Chancellor may act upon them summarily, upon the application or petition of Clarke, and in each of them what the Chancellor can do is precisely stated. In such cases, the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. In other words, it cannot confound its original jurisdiction in a suit with the powers it may be authorized to execute by petition, either in a public act, giving statutory jurisdiction to the court, to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure.

The legislature of New York, in the exercise of its rightful power to loose a devised estate from fetters put upon it by unforeseen causes, which were defeating the objects of the testatrix, substitutes the Court of Chancery for itself, to give relief to Clarke, to the extent that it is enacted, according to the manner of proceedings in such cases in courts of Chancery. The relief wanted by Clarke was permission to sell or mortgage a part of the estate. Permission to do either, or both, is given by the acts, provided it is done with the assent of the Chancellor.

For the jurisdiction or power of the Chancellor in the matter, we must look to the third section of the act of the 24th March, 1815, and to the act of March 29th, 1816. Both shall be cited in terms. The first is, that no sale of any part of the said estate shall be made by Thomas B. Clarke, until he shall have procured the assent of the Chancellor of this state to such sale; at the time of giving such assent, the Chancellor shall also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in Thomas B. Clarke as trustee. And further, it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the

interest being to be applied by Clarke, in such manner as he
*538] may think proper for his use and benefit, and for the maintenance and education of his children. *The act of 1816 is, that Clarke "is authorized, under the order heretofore granted by the Chancellor, or under any subsequent order, either to sell or mortgage the premises, which the Chancellor has permitted or hereafter may permit him to sell, as trustee under the will of Mary Clarke, and to apply the money, so raised by mortgage or sale, to the purposes required, or to be required, by the Chancellor, under the acts heretofore passed, for the relief of the said Thomas B. Clarke."

Such is the jurisdiction of the Chancellor under these acts, in respect to sale, mortgage of the estate, and the proceeds which might be made from either. No authority is given to convey any part or parts of the southern moiety of the said estate in payment and satisfaction of any debt or debts due and owing by Clarke, upon a valuation to be agreed upon between him and his respective creditors. None, that he might receive and take the moneys, arising from the premises, and apply the same to the payment of his debts, investing the surplus only in such manner as he may deem proper to yield an income for the maintenance and support of his family.

This was not an exercise of jurisdiction, but an order out of and beyond it. The jurisdiction given by these acts to the Chancellor is suggested by Blackstone, when he says, "A private act of Parliament for the alienation of an estate is an assurance by matter of record, not depending upon the act or consent of parties themselves. But the sanction of a court of record is called in, to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another." 2 Wend., Bl. Com., 344.

It is not unworthy of remark, that the acts of New York now under consideration were initiated and passed in strict conformity with the mode of legislative proceedings in passing private acts. There were petitions, references to committees, and leave to bring in bills. Nothing was done without the consent of the parties in being capable of consent; and the acts provide for an equivalent in money to be settled upon the infants interested, who had not a capacity to act for themselves, but who were to be concluded by what was directed to be done under the acts. 2 Wend. Bl. Com., 345.

In all this may be seen, too manifestly for any denial of it, the intention of the legislature as to the office of the Chancellor, in the execution of its acts for the relief of Clarke. The Chancellor's office, in respect to the sale of the premises, was to substantiate and preserve a perpetual testimony of the

transfer of the property, as a matter of record, to whoever might be the purchaser of any part of it, in conformity with the way in which a sale of it could be made.

*The beginning and the end of this affair are not unworthy of remark, or of being remembered. The [*539 legislature is first asked to empower the Court of Chancery to appoint trustees, in the place of those named in the will of Mary Clarke, to carry out her beneficent intentions for her grandson and his children. The father, being unable to support himself and his children, asks that a sale might be made of a part of the devised premises, the rents, issues, and profits of which he was entitled to during life. An act is passed, permitting the appointment of trustees, giving a power to sell, and securing to the children an amount from the sales, thought by the legislature to be only an adequate compensation for the sale of land in which they then had a vested estate in remainder, which would become theirs in fee simple absolute upon the death of their father. The next year, the legislature is told that a trustee could not be got. A supplemental act is passed, permitting Clarke himself to do all that trustees could do. Then follows another memorial for another aiding act; to permit Clarke to mortgage the premises, on account of sales not having been made, and because they could not be made for a fair price. Permission is given. After other orders more numerous than the acts under which they were made, an order is given, permitting Clarke, upon an agreed valuation between himself and his creditors, subject to the approval of a master in chancery, to convey the premises to his creditors. Further, that he may apply the money arising from the sales in payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the support of his family. Thus importunity, beginning with an intention to obtain consummate control over a part of the devised premises, triumphs in the privilege given to the children to have any surplus invested for their use, which may remain out of the sales of their estate, after the payment of their father's debts.

The best commentary upon the whole is, that its first result was a conveyance from Clarke to De Grasse, for much of the property, without the master's approval, for worthless wild tax-lands in Pennsylvania or Virginia, for some money lent, and for articles furnished Clarke from De Grasse's oyster house. And De Grasse held on to the conveyance, in defiance of the declaration of the master, that he would not approve the deed for such a consideration.

It is under that conveyance, and another from De Grasse

to him, that the present defendant in ejectment claims title to the premises in dispute. They do not give to him any title, either legal or equitable, against the fee simple absolute which the *children of Thomas B. Clarke have had in the devised estate since the death of their father.

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Whenever the order of the Chancellor, permitting Clarke to convey the estate to creditors or to apply the money arising from it in payment of his debts, has been considered in the courts of New York, it has been intimated that the act did not give the Chancellor the power to give such an order. Judge Bronson, in *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 445, says so. The same may be gathered from the opinion of Chancellor Walworth, in *Cochran* v. *Van Surlay*, 20 Wend. (N. Y.), 384. Mr. Senator Verplanck, in the same case, sitting in the Court for the Correction of Errors, says,—"I have already intimated my strong impression, at least as at present advised, that the orders of the Chancellor were not in conformity with the acts, and that the third act still confined the Chancellor to allow no other application of the proceeds of the sale than was valid under the acts heretofore passed." "The order made under the first two acts was in contravention of the statute so far as it allowed a part of the proceeds of the sale to be applied to the payment of Clarke's former debts. Nor do I think that the words in the act of 1816 ratified the former orders, or extended the Chancellor's powers in future orders, as to the liberty of applying the principal of the funds, of which, according to the acts heretofore on this subject, the interest only was to be expended." In this point, then, this court, in the opinion it now expresses, will not differ from the courts in New York.

But we do differ with the learned judges and senator upon another point, common to the case before us and those cases in which they expressed their opinions. Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted on those cases. Indeed, our point of difference is not concerning a principle or rule in chancery; but as to the application of the rule in *Cochran* v. *Van Surlay*. It was said in that case, and it was the foundation of the judgment in it, that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. We concur, that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before

the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common *law, or whether the point ruled has [*541 arisen under the laws of nations, the practice in chancery, or the municipal laws of states.

This court applied it as early as the year 1794, in the case of *Glass et al.* v. *Sloop Betsey*, 3 Dall., 7. Again, in 1808, in the case of *Rose* v. *Himely*, 4 Cranch, 241. Afterwards, in 1828, in *Elliott* v. *Piersol*, a case of ejectment, 1 Pet., 328, 340. This is the language of the court in that case,—not stronger though, than it was in the preceding cases:—"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford county, and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, if the county court had jurisdiction, its decision would be conclusive. But we cannot yield assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought collaterally before the Circuit Court. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers."

This distinction runs through all the cases on the subject.

This court announce the same principle in *Wilcox* v. *Jackson*, 13 Pet., 499, and twice since in the second and third volumes of Howard's Supreme Court Reports. *Shriver's Lessee* v. *Lynn et al.*, 2 How., 59; *Lessee of Hickey* v. *Stewart et al.*, 3 Id., 750.

In the case in 3 Howard, the defendant in ejectment wished to protect himself by a record in a prior chancery suit between himself and the plaintiff, in which a decree had been made in favor of the former, upon which the chancery court had issued a *habere facies possessionem*, to put him in possession of the land. The record in the Circuit Court was admitted as evidence, the plaintiff objecting, and the court gave judgment for the defendant in ejectment. The case was brought here upon a writ of error. And this court said, that as the defendant claimed property on the premises in dispute under the

record from the Court of Chancery, it would inquire collaterally into the jurisdiction of that court to try the question of
*542] title. And it ruled that the court had no jurisdiction for such a purpose; *that the Circuit Court erred in permitting the record to be read to the jury as evidence in behalf of the defendant, and reversed the judgment.

The point in *Cochran* v. *Van Surlay* and in this case is, whether the Chancellor did or did not, in a case for which he had jurisdiction for certain purposes, exceed the jurisdiction given to him for the special purposes of the case. Jurisdiction may be in the court over the cause, but there may be an excess of jurisdiction asserted in its judgment. That was *Shriver's case*, in 2 How.

Then the point of inquiry now is, exactly that which the judges in the cases in 15 and 20 Wend. (N. Y.), admitted to be a very doubtful exercise of power by the Chancellor. That is, whether the order permitting Clarke to convey the property to his creditors, at a valuation to be agreed upon between them, and to apply the proceeds of sales and mortgages to the payment of his debts, was an order within the power given to him by the acts. Judge Bronson will not admit it. Chancellor Walworth puts it hypothetically,—if the Chancellor has not exceeded his jurisdiction, but has merely erred upon the question whether such a sale as he ordered would eventually be for the benefit of the infants, Justice Bronson was clearly right in supposing that the decision of the Court of Chancery could not be reviewed in this collateral way. Mr. Senator Verplanck says that the order under the first two acts was in contravention of the statutes, nor does he think that the act of 1816 extended the Chancellor's power as to the proceeds.

Upon the point of looking into the jurisdiction of a court collaterally, when a right of property is claimed under its proceedings, we must add, that it prevails in New York just as it does in the courts of England and in the courts of the United States. In *Latham* v. *Edgerton*, 9 Cow. (N. Y.), 227, it is said,—"The principle that a record cannot be impeached by pleading is not applicable when there is a want of jurisdiction. The want of it makes a record utterly void and unavailable for any purpose. The want of jurisdiction is a matter that may always be set up against a judgment when it is to be enforced, or when any benefit is claimed under it." See also, to the same point, *Fenton* v. *Garlick*, 8 Johns. (N. Y.), 194; *Kilbourne* v. *Woodworth*, 5 Id., 37; 19 Id., 39; 6 Wend. (N. Y.), 446. And in the case of *Rogers* v. *Diel*, 6 Hill (N. Y.), 415,—a case of ejectment,—the chief justice ruled that the power of a court of chancery to order the

real estate of an infant is derived entirely from the statute. Thus sustaining an objection collaterally to proceedings and a decree in chancery which were regular in *form, [*543 but void in fact, on account of the Chancellor's not having jurisdiction or authority to make such a decree.

The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defence in another court, the jurisdiction of the former may be inquired into. The rule is, that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal. *Attorney-General* v. *Lord Hotham*, Turn. & Russ., 219.

And such is the rule in New York, as has been shown by the citation of cases from the reports of that state. But it has been argued, that the rule will not apply in the cases now in hand, because it has been decided by the highest tribunal in New York, that the Chancellor had jurisdiction, under the acts for the relief of Clarke, to give the order permitting him to sell the property to his creditors in payment of his debts.

It is difficult for us to admit that the cases of *Clarke* v. *Van Surlay*, in 15 Wend., and *Cochran* v. *Van Surlay*, in 20 Id., were meant to decide that point, when each judge whose opinion has been reported in those cases expresses an opinion amounting almost to a denial that the Chancellor had jurisdiction to order or permit a sale in payment of Clarke's debts. But admit that the New York cases are otherwise, we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the states upon state statutes relative to real property as a part of local law, comprehends private statutes or statutes giving special jurisdiction to a state court for the alienation of private estates. It has never been extended to private acts relating to particular persons, for the reason, that, whatever a court in a state may do in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law of a like kind, but then the utmost extension of it would be, that there would be two

judgments in two private cases, which only show more plainly that no local law had been made by both.

The case put before us, upon several of the points certified, is this. The state of New York passes certain acts for the *544] relief of Thomas B. Clarke, in relation to a devise of land, and *directs that the acts shall be carried into execution by the Chancellor of the state. In the course of the proceedings for that purpose, he orders that the trustee, Clarke, may sell or mortgage particular portions of the land, and permits him to convey parts of it in payment of any debt or debts, upon a valuation to be agreed on between himself and his creditors; and that Clarke may apply the proceeds of sales to the payment of his debts.

The defendant in this action says he bought from De Grasse. It is proved that De Grasse was a creditor of Clarke, and that the consideration for Clarke's conveyance to him, except the wild lands, was the amount that Clarke owed to him. Then, in order to sustain Clarke's conveyance to De Grasse, he introduces the acts for the relief of Clarke, and the orders of the Chancellor upon them.

This evidence raises the question, whether or not the Chancellor had jurisdiction to give an order, permitting Clarke to convey any part of the property in payment of a debt. After the most careful perusal of the acts and orders, we have concluded that the Chancellor had not the jurisdiction to give an order, permitting Clarke to convey any part of the devised premises in satisfaction of his debts, and that neither De Grasse nor his alienee, Berry, can derive from the order, or the conveyance by Clarke to De Grasse, any title to the premises in dispute. This conclusion substantially answers the first four points certified; but answers will be given in more precise form hereafter.

We now proceed to the other points certified.

Upon the first of them, relating to the premises having been parted with by Clarke to De Grasse, upon a consideration other than cash, we remark that *sale* is a word of precise legal import, both at law and in equity. It means at all times, a contract between parties, to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Max., ch. 42; Shep. Touch., 244. No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted.

In the acts for the relief of Clarke, *sale* is the word used and frequently repeated. No other term, in reference to the power given to sell a part of the devised premises, is used.

The Chancellor's order is, that Clarke is permitted to sell. No words are used in the acts to qualify the term *sale*. There is not anything to raise a presumption, that Clarke was permitted to sell for anything else than cash. Even the debts of Clarke, *which the Chancellor thought he had [*545 the jurisdiction to order the payment of, are directed to be paid out of the proceeds of the sale.

We think, therefore, that the deed executed by Clarke to De Grasse, being upon a consideration other than for cash, is not valid to pass the premises in dispute to De Grasse, or to his alienees.

Another point certified is whether Clarke, having previously mortgaged the premises in fee to Henry Simmons, had competent authority to sell and convey the same to De Grasse. If Clarke could not convey the premises for which he was the trustee to a creditor in payment of a debt due when the order of the Chancellor was given, his having united with the master in chancery in mortgaging the premises in fee to Simmons, as a security for a debt, could not, from any transfer of it by the mortgagee, alter its character as a security for a debt, so as to permit the assignee, who by taking an assignment of the mortgage became a creditor, or any other person who became his assignee, to receive from Clarke, a conveyance of the premises in discharge of the mortgage. Simmons was a creditor of Clarke. The assignee of his claim could only be a creditor in his place, having no other right to be paid by a conveyance of the premises, than the original creditor had. But in truth the mortgage was discharged, and being so, Clarke was replaced in his trustee relation to the premises, precisely as he stood before the mortgage was made. He could not then, because the land had been mortgaged in fee to Simmons, have any authority to sell and convey the premises to De Grasse, for the consideration of the debt due by him to De Grasse. But if by the question it was meant that, because Clarke had mortgaged to Simmons, he could not mortgage or sell again after a release from the mortgagee, then we conclude that Clarke's having previously mortgaged the premises in fee to Simmons, did not prevent him, after a release from the mortgagee, from selling and mortgaging the premises again, provided the same was not done in payment of a debt, or as security for a debt.

The eighth point may be dismissed with two observations. If the conveyance from Clarke to De Grasse did not give to him a title, and we have said it did not, De Grasse could not convey a title in the premises to a third person, though value was received by him from the latter. Besides, in this case

the paper under which De Grasse claims has recitals in it, which would exclude any person buying from him from saying that he had not notice enough to put him upon an inquiry into the title of De Grasse.

*546] *We are now brought to the consideration of the point, whether the deed to De Grasse is valid, it having no certificate indorsed upon it that it was approved by a master in chancery. It involves what has been the practice in courts of equity, which, from long standing, habitual use, and uniform judicial acquiescence, has become law,—law in England, law in New York, law for the courts of equity of the United States, and law in every State of the Union, except as it may have been modified by the legislation of the states.

The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the master's approval of the sale, and is one step towards a purchaser's getting a title. Before, however, a purchaser can get a title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. That report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation *nisi* is ordered by the court,—to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it, and the confirmation by the court of the sale, in the manner that such confirmation has been ordered.[1]

We have been thus particular, for the purpose of showing the offices of the master in relation to a sale, and what is meant by subjecting a sale to the approval of a master, and to show that such a sale, until approved by the master and confirmed by the court, gives no title to a purchaser of an estate, which he may have bargained to buy. We do not mean to say, that such cautionary proceedings upon sales under decrees and orders in chancery may not be dispensed with, by a special

[1] CITED. *Smith* v. *Wert*, 64 Ala., 39.

order of the Chancellor to pretermit them; but that such are the proceedings, when no special order has been given. Nor do we mean to have it implied that a special order for the master's approval of the sale was not given in this case.

The proviso in the order of the 15th March, 1817, is,—"Provided, nevertheless, that every sale, and mortgage, and conveyance *in satisfaction, that may be made by [*547 the said Thomas B. Clarke in virtue hereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage which shall be made in the premises."

Our interpretation of the order is, that the approval of the master, and the certificate of it, are not confined to a conveyance in satisfaction of debt, but that the Chancellor meant that the approval and certificate should be given and be indorsed upon every deed of sale and mortgage, as well as upon conveyances in satisfaction of debts.

It was also argued, that the sale to De Grasse was a judicial sale. Unless a legal term of definite and unmistakable certainty in all the past application of it shall be made to comprehend a transaction which it has never included before, the sale by Clarke to De Grasse was not a judicial sale. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.[1]

The sale by Clarke to De Grasse was an attempt by both of them to evade the order of the Chancellor, that every sale, &c., made by Clarke, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And in no event could a sale by Clarke, in conformity with the order, have been a judicial sale, but simply a sale by a private individual authorized to make it under acts passed for his relief, and assented to by the Chancellor, for the purpose of ultimately substantiating and verifying by a court of record the transfer of the property. It was a sale made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them, and done by one of them, who had only in a particular way the assent of the Chancellor to sell.

Now if, in the instance of Clarke's conveyance to De Grasse, none of the usual cautions have been taken by the latter to make the conveyance complete,—which, for the sake of the present point, we are only supposing might have been done,

[1] Quoted. *Lawson* v. *De Bolt*, 78 Ind., 564.

subject to our conclusion that Clarke could not have conveyed the premises to him as a creditor,—whose fault is it that they were not taken? and how much more is De Grasse's fault aggravated from the testimony in the cause, which proves that he was told by the master, Mr. Hamilton, from the start of his buying or meaning to buy from Clarke, that he would not *548] approve the sale, and make such a certificate of it, upon the paper *given to him by Clarke, upon such a consideration for the property?

We find the answer to our inquiries in the long experience and practice in chancery. In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order. *Colclough* v. *Sterum*, 3 Bligh, 181; *Lutwiche* v. *Winford*, 2 Bro. C. C., 251. If he takes a title under an imperfect sale, he must abide the consequence.

In this instance, there was a perverse disregard by De Grasse of the order of the Chancellor and the caution of the master. His conduct puts it out of his power, or any one claiming under him, to complain, if Clarke's conveyance shall be declared to be invalid, on account of the master's disapproval of the sale and his refusal to put a certificate of approval of it upon the deed to De Grasse.

Mr. Hamilton, the master's testimony in the case is, that Clarke and De Grasse came to him to approve the deed which it is his impression had been filled up by Clarke, and that, upon ascertaining from them the consideration, he refused to do so. The deed, too, recites a consideration of two thousand dollars, and it is proved that the consideration was, in fact, wild worthless tax-lands in Virginia or Pennsylvania, an account for articles furnished to Clarke by De Grasse, and some items of money lent. The witness says, both Clarke and De Grasse came together more than once to his office on the subject, and that he was besought by them frequently to approve the deed; that he would not do so. It is the case of an anxious creditor, holding on to what he could get from an insolvent and prodigal debtor, in spite of what he knew to be the only terms upon which the debtor could convey.

We think that the sale by Clarke was a nullity without such approval by the master, to whom the execution of the order was confided by the Chancellor. "Looking merely to the parties, it is a nullity, because it wants the assent of the Chancellor, through the officer whom he substitutes for himself to give it. Looking to the conveyance, it is void for the want of

the performance of that condition precedent which was made essential, not merely to the commencement of the estate, but to the very creation of the power of sale."

It is under that conveyance, and another from De Grasse to him, that the defendant in ejectment claims title to the premises in dispute. They do not give to him any title, either legal or equitable.

*We answer, then, to the points certified to this court for its decision:— [*549

To the first point, we rule, that the act of the Legislature, stated in the case, divested the estate of the trustees under the devise in the will of Mary Clarke, but did not vest the whole estate in fee, or any part of it, in Thomas B. Clarke.

To the second point, we rule, that the authority given by the said acts to the trustee to sell, was a special power, to be strictly pursued, and that the trustee was not vested with an absolute power of alienation, but only with the power to sell with the assent of the Chancellor, subject, in all that the trustee might do, by way of sale or otherwise, concerning the premises, to re-examination and account in equity.

To the third point, we rule, that so much of the order set forth in the case, as having been made by the Chancellor, which permitted Thomas B. Clarke to convey any part or parts of the southern moiety of the estate, or any other part of the estate, in payment and satisfaction of any debt or debts due and owing from Thomas B. Clarke, upon a valuation to be agreed between himself and his respective creditors, provided, nevertheless, that every sale, and mortgage, and conveyance in satisfaction, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters of the court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises, or which authorized Thomas B. Clarke to receive and take the moneys arising from the premises and apply the same to the payment of his debts, and to invest the surplus in such manner as he may deem proper to yield an income for the maintenance and support of his family,—was not authorized or in conformity to the acts of the Legislature, as they are set forth in the record. That these orders, however, are to be regarded as the acts of a court of chancery, exercising a special jurisdiction under private acts, which did not give to the Chancellor jurisdiction to pass the orders as they have been stated in this answer to the third point.

To the fourth point, we rule, that the Chancellor had authority under the acts to assent to sales and conveyances

of the estate by the trustee; but not to any sale or conveyance, on any other consideration than for cash paid on said conveyance.

To the fifth point, we rule, that the deed executed by Thomas B. Clarke to George De Grasse, for the premises in question, is not valid, it having been made for a consideration other than for cash paid on the purchase.

To the sixth point, we rule, that, if the deed to De Grasse *had been otherwise valid, which we have said was not, it would not be valid without having a certificate endorsed thereon, that it was approved by Mr. Hamilton, the master in chancery, to whom the execution of the order was confided by the Chancellor.

*550]

To the seventh point, we rule, that the mortgage in fee of the premises by Clarke to Simmons, did not so exhaust the power as trustee, that he might not, after a release from the mortgagee, sell or mortgage the property again; but it was not in the trustee's power to sell to De Grasse for a debt.

To the eighth point, we rule, that the subsequent conveyance of the premises, as set forth in the case, made by George De Grasse, would not give to his grantee, or the grantee's assigns, a valid title against the plaintiffs in ejectment.

Mr. Chief Justice TANEY dissented from the opinion of the court in this case, and also in the subsequent cases of *Williamson and Wife* v. *The Irish Presbyterian Congregation of New York*, and of *Charles A. Williamson and Wife*, *Rupert J. Cochran and Wife*, and *Bayard Clarke*, v. *George Ball;* and concurred with Mr. Justice NELSON.

Mr. Justice CATRON also dissented in the above enumerated cases, and concurred with the opinion of Mr. Justice NELSON.

Mr. Justice NELSON.

I am unable to concur in the judgment of a majority of the court in this case, and shall, therefore, proceed to state the grounds of that dissent, with as much brevity as the nature and importance of the questions involved will admit.

I shall confine the examination to those grounds which I regard as decisive in the determination of these questions, without stopping to discuss several other points made upon the argument, and which have a more remote bearing upon the case.

The will of Mary Clarke, made and published April 6th, 1802, lies at the foundation of this controversy; and it is necessary, therefore, to recur for a moment to its provisions.

She devised to three trustees and their heirs, a part of her farm at Greenwich, called Chelsea, then situate in the vicinity of the city of New York, now a part of it, embracing some forty acres of land, together with a dwelling-house in town, in trust, to receive the rents and profits, and pay the same to Thomas B. Clarke, a grandson, during his life; and after his decease, to convey the estate to his children living at his death; and if he should leave no children, then, in trust, to convey the same to Clement C. Moore, and his heirs.

*Thomas B. Clarke, the tenant for life, was married in 1802, and in 1814 had a family of six children, the eldest eleven years of age; and on the 2d of March of that year, applied to the Legislature of New York for relief on the ground that the property devised was, in its then condition, nearly unproductive, and incapable of being improved so as to yield an adequate income for the maintenance and support of himself and family. [*551

The trustees, and C. C. Moore joined in the application.

On the 1st of April, 1814, an act was passed for his relief, authorizing the Court of Chancery to appoint trustees in the place of those named in the will, and providing for a sale of a moiety of the estate by the trustees, under the direction of the Chancellor; the proceeds to be invested in stocks or real security, upon the trusts in the will, and the income to be applied to the maintenance and support of the family of Clarke, and the education of his children. Nothing was done under this act.

On the 21st of February, 1815, Clement C. Moore, the ultimate remainder-man under the will, released and quit-claimed all his interest in the estate to Clarke; and on a second application to the Legislature for relief, a supplemental act was passed, on the 24th of March, 1815, reciting in the preamble the release, and substituting Clarke as the trustee of the estate in place of those provided for in the previous act; and authorizing a sale by the trustee of a moiety of the estate, with the assent of the Chancellor, and providing for the investment of so much of the proceeds in Clarke, as trustee, as the Chancellor should direct; the income of the investment to be applied to the maintenance and support of the family, as in the previous act.

On an application to the Chancellor, under this and the previous act, on the 28th of June, 1815, an order of reference to one of the masters in chancery was made, directing him to inquire into the debts of Clarke, distinguishing between those contracted for the maintenance of his family and the education of his children; and into the then condition of the estate

devised under the will, and the means possessed by Clarke to maintain and support his family, other than from the rents and profits of the estate; which report was made accordingly. And on the coming in and filing of the same, the Chancellor, on the 3d of July, ordered a sale of a moiety of the estate, together with the house and lot in town; and that so much of the proceeds as might be necessary for the purpose be applied, under the direction of one of the masters of the court, to the payment and discharge of the debts then owing by Clarke, and to be contracted for the necessary purposes of the family, to be proved before the said masters; and the residue to be invested and the income applied as therein provided by the order.

*552] *Nothing was done under this order except the sale of a few lots, the sales having been superseded by the master for want of bidders, at the request of the trustee, to prevent the sacrifice of the property. And on application to the Legislature, another act was passed, on the 29th of March, 1816, authorizing Clarke, as trustee, under the order already granted by the Chancellor, or any subsequent orders that might be granted, either to mortgage or sell the premises which the Chancellor had permitted, or might permit him to sell; and to apply the proceeds to the purposes required, or that might be required, by the Chancellor, under the previous acts of the legislature.

On the 15th of March, 1816, on an application, the Chancellor ordered that Clarke be authorized to mortgage or sell the moiety of the estate, as provided for in the several acts, as might be deemed most beneficial to all parties concerned; and also to convey any part of it in payment and satisfaction of any debt owing by him, upon a valuation to be agreed on between him and his creditors, provided that every sale, and mortgage, and conveyance in satisfaction, that may be made by him, shall be approved by one of the masters of the court; and that the certificate of such approval be indorsed on such deed or mortgage that may be made in the premises. And further, that he apply the proceeds to the payment of his debts, and invest the surplus in such manner as he may deem proper to yield an income for the support and maintenance of his family.

On the 2d of August, 1821, Clarke, under this order of the court, sold and conveyed the lot in question, among others, to George De Grasse, for the consideration on the face of the deed of $2,000. No approval of the master appeared to have been indorsed on the deed.

The defendant holds through intermediate conveyances from De Grasse, and is admitted to be a *bonâ fide* purchaser.

I have thus stated the material facts out of which the important questions involved in this case arise: and I have done so for the reason, that, in my judgment, the statement itself presents a history of legislative and judicial proceedings, which demonstrate that the legal title to the premises in controversy is in the defendant, upon well established principles of law,—a title derived under a judicial sale, made in pursuance of an order or judgment of one of the highest courts in a state, in the exercise of its general jurisdiction.

This plain proposition is manifest on the face of the record. Every order made by Chancellor Kent was made in his court according to the established forms of proceeding, and rules of the court.

*The Chancellor had previously determined, (*In the Matter of Bostwick*, 4 Johns. (N. Y.) Ch., 100,) that a [*553 proceeding of this character could be properly instituted by petition instead of by bill, as he found it to be in conformity with the established practice of the Court of Chancery in England.

The practice there had not been uniform, depending somewhat upon the amount of the estate; and a distinction had been made, at one time, between real and personal estate; but the later authorities had generally concurred in allowing the institution of the proceeding by petition. (2 Story Eq., § 1354, p. 582, and cases there referred to; Macpherson on Infants, ch. 22, § 1, and cases.)

In every instance, the application took the usual course of a reference to one of the masters of the court, directing him to inquire into the truth of the allegations in the petition, and report thereon; and upon the coming in and filing of the report, the order was entered.

All the powers and machinery of the court were used in conducting the proceedings: and which, while they facilitate the orderly despatch of business, at the same time enable the parties to present their case in the fullest and most authentic form, for the judgment of the court.

Even if a bill had been filed in this case,—and we have seen that it might have been, in which event, it would hardly have been pretended the order or decree of the court could have been questioned collaterally,—the forms of the proceeding could not have been more strictly observed. Indeed, the petition in the particular case is nothing more than a substitute for the bill, as affording a more speedy and economical mode of instituting the proceedings.

Originally it was supposed that a bill was indispensable, (Fonbl. Eq., Book 2, part 2, ch. 2, § 1, note *d*,) as it still is in England, where the estate of the infant is large, or it is doubtful as to the fund. (15 Ves., 445; Macpherson on Infants, p. 214, and cases.)

Any party interested in the order had a right to appeal from the decision of the Chancellor to the Court for the Correction of Errors, as appeals may be taken from interlocutory, as well as final decrees, according to the laws and practice in New York.

That an appeal might have been taken in the case is the established practice, and would be doubted by no lawyer there; and which, of itself, would seem to be decisive of the nature and character of the jurisdiction exercised by the Chancellor.

Being, therefore, a judicial sale under the judgment of one of the highest courts of the state, the principle is *554] fundamental, *that the regularity of the proceedings cannot be inquired into in this collateral way.

The general impression of all the cases on this head, says Lord Redesdale, is, that the purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of the parties, and that it has on investigation properly decreed a sale (1 Sch. & L., 597.) And says Mr. Justice Thompson, in delivering the opinion of this court, in *Thompson* v. *Tolmie*, 2 Pet., 168,—"If the purchaser was responsible for the mistakes of the court in point of fact, after it had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look farther back than the order of the court. He is not to see whether the court was mistaken in the facts."

The defendant in that case held the title under a judicial sale, ordered by the court in a case of partition, where the commissioners had reported that partition could not be made without loss. The suit was brought by the heirs, who set up, as invalidating the title of the defendant, that neither of the children of the intestate was of age at the time of the sale. The statute expressly forbade it, until the eldest became of age. The other ground was, that the sale had been confirmed only conditionally. The court held the parties concluded by the order and sale.

I shall not pursue the examination of this branch of the case farther, as the principle upon which it rests has become incorporated into the very elements of the law. I have referred to these two cases, simply to illustrate the strength

and force of the principle, in protecting the title of a *bonâ fide* purchaser, standing in the relation of the present defendant.

But it has been argued, that Chancellor Kent, while sitting in his court, administering the law under these acts of the Legislature of New York, has misconstrued or misapprehended the nature of his jurisdiction; and that, instead of sitting as a court, he was acting in the subordinate character of a commissioner, or as an individual outside of his court; that it was an extraordinary power, conferred upon him by a special statute, prescribing the course of proceeding; and that any departure therefrom, or error in the proceedings, rendered the order null and void, and of course all acts done under it.

It was even intimated, though not argued, that the statutes themselves were unconstitutional; that it was not competent for the Legislature to authorize the sale of the real estate of infants for their maintenance and support, or for their education or advancement in life.

*We suppose this power will be found to exist in every civilized government, that acknowledges a superintending and protecting power over those of its citizens or subjects who are disabled through infancy or infirmity from taking care of themselves; and that, where they possess the means of themselves, they will be applied, under the direction of the proper authority, to their support and nourishment. [*555

No one doubts the power of the government to take the property of the citizen to support the paupers of the state; and, surely, it can hardly be regarded as a very great stretch of power to provide for the application of it to the maintenance and support of the owner or proprietor himself or even to the support of the members of the same family.

But I shall not go into this question; for whatever may be the objections to the exercise of the legislative powers, we are not aware of any on the ground of repugnancy to the Constitution of the United States, or, if made, that there is any foundation for it; and as to the state of New York, where the question alone must be determined, no doubt is entertained there in respect to it, by any department of the government.

But to recur to the jurisdiction of the Chancellor.

The Court of Chancery possesses an inherent jurisdiction, which extends to the care of the persons of infants so far as is necessary for their protection and education; and also to the care of their property, real and personal, for its due management, and preservation, and proper application for their maintenance.

The court is the general guardian, and, on the institution of

proceedings therein involving rights of persons or property concerning them, they are regarded as wards of the court, and as under its special cognizance and protection; and no act can be done affecting either person or property, or the condition of infants, except under the express or implied direction of the court itself; and every act done without such direction is treated as a violation of the authority of the court, and the offending party deemed guilty of a contempt, and treated accordingly. (2 Story Eq., §§ 1341, 1352, 1353; 3 Johns. (N. Y.), Ch., 49; 4 Id., 378; 2 Id., 542; 6 Paige (N. Y.), 391, 366; 10 Ves., 52; Macpherson on the Law of Infants, p. 103, App'x, 1; *Hughes* v. *Science*, 3 Atk., 601, S. C.)

If the father is not able to maintain his children, the court will order maintenance out of their own estate; and the inability need not depend upon the insolvency, but inability, from limited means, to give the child an education suitable to the fortune possessed or expected. (*Buckworth* v. *Buckworth*, 1 Cox, *80; *Jervoise* v. *Silk*, Coop., 52.) *556] The allowance will be made, although the devise or settlement under which the property is held contains no direction for maintenance (Ib.), but even directs the income to accumulate. (5 Ves. 194, 195, *n.* 197, note; 10 Id., 44; 4 Sim., 132; Macpherson, ch. 21, § 2, p. 223.)

It is also settled, that where there are legacies to a class of children, for whom it would be beneficial that maintenance should be allowed, though the will does not authorize it, but directs an accumulation of the income, and the principal, with the accumulation, to be paid over at twenty-one, with survivorship in case any should die under age, the court will direct maintenance (11 Ves., 606; 12 Id., 204; 2 Swanst., 436); but if there is a gift over, it will not be allowed without the consent of the ultimate devisee. (14 Ves., 202; 5 Id., 195, *n.*; Ward on Legacies, 303; Macpherson, pp., 232, 233, 234.)

So the court will break in upon the principal, where the income is insufficient for maintenance and education (1 Jac. & W., 253; 1 Russ & M., 575, 499); and will break in upon it for past payments (2 Vern., 137; 2 P. Wms., 23); and where the father is unable to maintain his children, and has contracted debts for this purpose, or for their education, the court will direct a reimbursement out of the children's estate (6 Ves., 424, 454; 1 Bro. C. C., 387; Macpherson, sec. 9, p. 246); and will, if the father or mother is in narrow circumstances, in fixing the allowance, have regard to them, increasing it for the benefit of the family. (1 Ves., 160; 2 Bro. C. C., 231; 1 Beav., 202; 1 Cox, 179.)

The management and disposition of the estates of infants, which I have thus referred to and briefly stated, with the authorities, are among the mass of powers upon this subject which belong to the original and inherent jurisdiction of the Court of Chancery. They relate to their personal, and the income of their real, estate, the court having no inherent power to direct a sale of the latter for their maintenance or education; that power rests with the legislature. It will be seen, therefore, that the only additional authority conferred upon the Chancellor, by the acts of the legislature in question, was the power to direct the sale of the real estate,—to convert it into personalty for the purposes mentioned. It was but an enlargement, in this respect, of the existing jurisdiction of the court; placing the real estate, for the purpose of maintenance and education, upon the same footing as the personalty. With this exception, every power conferred or exercised under the acts in question, in the management and application of the fund, as we have seen, belonged inherently to its general jurisdiction; and its exercise in the particular case was as essential for the proper management and preservation, *and application, as in any other that might come before the court. [*557

We can hardly suppose that it was the intention of the legislature to confer authority upon the Chancellor in one capacity to sell, and in another to manage and apply the proceeds for the benefit of the children. And yet such must be the conclusion, unless we suppose it was intended that the fund itself should be administered out of court, and under the direction of the Chancellor as a commissioner.

I must be permitted, therefore, to think, that Chancellor Kent, familiar to his mind as were the powers and duties belonging to his court over the estates of infants, as well as in respect to every other branch of equity jurisprudence, did not mistake or misapprehend the nature of the powers and duties enjoined upon him under the acts in question. And that he might well conclude, that the authority to sell the real estate of the children, for their maintenance and education, was but an enlargement of his general jurisdiction in the management and disposition of their property for the purposes mentioned. Indeed, the very objects of the sale pointed directly to this jurisdiction. How apply the fund for maintenance and education,—as commissioner, or chancellor? Certainly, he could not doubt as to the intent or objects of the acts in this respect. It was a fund to be brought into the court, and the children were to become wards of the court, to be cherished, and protected by its powers.

In addition to the judgment of Chancellor Kent himself, we have also the judgments of the two highest courts in New York, in the case of *Clarke* v. *Van Surlay*, 15 Wend. (N. Y.), 436, and *Cochran* v. *The Same*, 20 Id., 365, S. C.

That was a suit involving the same title, brought by one of the heirs of Thomas B. Clarke, and depending upon the same evidence. It was first decided in the Supreme Court of that state in 1836, and in the Court for the Correction of Errors in 1838.

It was determined by both courts, that the title of the purchaser was valid, on the ground, that he held under a judicial sale directed by the Chancellor in the exercise of his general jurisdiction; and that, having jurisdiction of the subject-matters, if any error was committed, either in his construction of the acts of the legislature or in the application of the funds, it was not inquirable into in a court of law. The order was conclusive, till set aside, upon all the parties.

No member of either court that expressed an opinion entertained a doubt about the nature of the jurisdiction.
*558] The judgment *had the concurrence of Chancellor Walworth, his learned successor, who has presided in that court with distinguished ability for the last twenty years, and is familiar with its organization and powers. If it is possible, therefore, for a judicial question involving the construction of state laws to be settled by learning or authority in its own courts, it would seem that the one before us has been.

But there is another view of this branch of the case, which, in my judgment, is equally decisive of the question; and much more important, on account of the principle involved. Where are we to look, for the purpose of ascertaining the jurisdiction of the Court of Chancery of the state of New York? To the judgment of this court, or to the laws and the decisions of the courts of the state?

It should be recollected, that, in the trial of titles to real property held or claimed under the laws of the state, the Federal courts sitting in the state are administering those laws, the same as the state courts, and can administer no other. They are obliged to adopt the local law, not only because the titles are founded upon it, but because these courts have no system of jurisprudence of their own to be administered, except where the title is affected by the Constitution of the United States, or by acts of Congress.

It has been held, accordingly, that we are to look to the local laws for the rule of decision, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of statutes, or form a part of the unwritten

law of the state. The court adopts the state decisions, because they settle the law applicable to the case. Such a course is deemed indispensable in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states, and of the United States, would be productive of the greatest mischief and confusion,—a perpetual conflict of decision and of jurisdiction.

In construing the statutes of a state on which land titles depend, say the court, infinite mischief would ensue should this court observe a different rule from that which has been established in the state; and whether these rules of land titles grow out of the statutes of a state, or principles of the common law, adopted and applied to such titles, can make no difference; as there is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. This court has repeatedly said, speaking of the construction of statutes, that it would be governed by the state construction where it is settled, and can be ascertained, especially *where the title to lands is in question. (12 Wheat., 167, 168; 6 Pet., 291.) In the case of *Nesmith et al.* v. *Sheldon et al.*, 7 How., 818, decided at the last term, involving a question upon the statutes of Michigan, the court say,—"It is the established doctrine of this court, that it will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, when that construction has been settled by the decision of its highest judicial tribunal."[1] [*559

Now what can be more peculiarly a matter of local law, and to be ascertained and settled by the state tribunals, than the character and extent of the jurisdiction of their courts, and the effect to be given to their own orders and judgments.

I suppose it will not be denied but that each state has the right to prescribe the jurisdiction of her courts, either by the acts of her legislature, or as expounded by the courts themselves; and that, if that jurisdiction is settled by a long course of decision, or, in respect to the particular case, by the authority which has a right to settle it, this court, professing to administer the laws of the state as they find them, and acting upon their own principle, as well as the principle of the thirty-fourth section of the Judiciary Act, cannot disregard the jurisdiction as thus settled.

It is no answer to this view to say, that the question here is the construction of a private statute of New York. That assumes the very point in controversy. The point is, Can this court reach the question involving the construction of the

[1] APPLIED. *Van Rensselaer* v. *Kearney*, 11 How., 318.

statute? That depends upon the prior one, whether Chancellor Kent acted in the exercise of the jurisdiction of his court in expounding the statute. If he did, the question upon its construction is concluded; and whether the construction be right or wrong is a matter not inquirable into in this collateral way.

The case, therefore, comes down to a question of jurisdiction,—a question which Chancellor Kent himself settled in this very case in 1815, which settlement has since been confirmed by the highest tribunals in the state, and about which no one of them there could be brought to entertain a doubt.

I must be permitted to think, therefore, that, looking at the question as an original one, Chancellor Kent was right in the jurisdiction that he exercised in administering the acts in question; and that, whether so or not, it belonged to the courts of that state to expound and settle the limit of his jurisdiction; and that, when so settled, it becomes a rule of decision for the Federal courts sitting in the state, and administering her laws; and that therefore the order of the Chancellor in question was conclusive upon the matter before him, and is not inquirable into collaterally in a court of law.

*560] *But were we compelled to go behind the order, and to re-examine the case, as upon an appeal, we perceive no difficulty in sustaining it.

When Clarke applied to the legislature, in 1815, for relief, he was the owner of the life estate, and of the ultimate remainder in the premises, the residue belonging to the children; and for this reason, doubtless, the act which was passed at that time left it discretionary with the Chancellor to determine the portion of the proceeds that should belong to Clarke, individually, and also as trustee for the children.

And under this provision of the law, before any order was made for the disposition of the proceeds, the court ordered a reference to the master to ascertain the amount of his debts, and what portion of them had been contracted for the maintenance of the family and education of the children.

The interest of Clarke in the proceeds was properly applicable to his own debts, as well as to the debts contracted for the support of the family; and after the coming in of the report which exhibited the amount of the debts, and for what purposes contracted, the order for the application of the proceeds was made. This is the order referred to and confirmed by the act of 1816.

It, in effect, applied what was regarded by the Chancellor as the interest of Clarke in them to the payment of his own debts; the amount of that interest, as we have seen, having

been left to be ascertained by him in the exercise of his judgment in the matters. That Clarke had a considerable interest is apparent, having united in himself two portions of the estate. That the Chancellor erred, in the exercise of his judgment in dividing the proceeds of the estate between Clarke and his children, according to their respective interests, does not appear, nor can it be shown from any thing to be found in the record; much less can a want of power to act, or an excess of power in acting, be predicated of the exercise of any such discretionary authority.

Then, as to the application of a portion of the fund belonging to the children for the maintenance of the family, as well as their own education.

From the cases already referred to on that subject, we have seen that this is within the acknowledged powers of the Court of Chancery, and of which it is in the habitual exercise, in cases where the parents are in narrow circumstances, and unable to furnish the means of support. The application is made for the benefit of the children, that they may have the comforts and enjoyments of a home, with all the wholesome and endearing influences of the family association.

*Even beyond this, small annuities have been settled upon the father and the mother, in destitute circumstances, out of the estates of the infant children. [*561

It was a knowledge of these principles, which were familiar to the mind of Chancellor Kent, as was the whole system of the powers and duties of his court over the persons and estates of infants, that dictated the granting of the order in question; and, in my judgment, so far as the power and authority of the court was concerned, which is the question here, it requires but an application of these principles to the facts before him to enable us to see that it was well warranted.

Again, it is said that the children were not parties to the proceedings. The same may be said concerning the exercise of all the powers of the Court of Chancery over the estates of infants.

The answer is, the proceeding is not an adversary suit. The estate is regarded as a fund in court, and the infants as wards of the court; the Chancellor himself, as the general guardian, exerting his great power, either inherent or vested by positive law, over a class of persons specially committed to his care, for their own benefit, for the proper management of their estates, real and personal, for their maintenance and support, for their education and advancement in life.

It is a proceeding *in rem*, the property itself in *custodia legis;* and if a guardian had been appointed, it would have

been but a desecration of the power of the court, which, in the proceeding before us, was exercised by the court itself, through the agency and instrumentality of its officers.

The rule in respect to adversary suits against infants, requiring the appointment of a guardian, *pendente lite*, has no sort of application to the proceedings in question.

It has also been argued, that the order of the Chancellor, authorizing Clarke to sell and convey the premises in question, required a certificate of the approval of one of the masters of the court to be indorsed on the deed; and that no such certificate has been given or indorsed thereon.

The deed to De Grasse was executed on the 2d of August, 1821; and on the next day it appears that the master was a witness to prove the execution before the commissioner who took the acknowledgment.

It further appears, that on the same day, the master, having had the life estate of Clarke in the premises previously conveyed to him, in trust, in order to complete the title, indorsed on the back of the deed, and executed under his hand and seal, a release of this life interest to the purchaser, and duly acknowledged *the same, that it might be recorded in the register's office along with the deed. This was done, as the master recites in the release, at the request of the trustee, and for the purpose of completing the title.

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One can hardly conceive of a more effectual approval, than is to be derived from these acts of the master; for without the release of the life estate, which he held in trust, the title could not have been perfected, and the sale must have fallen through. The release enabled the trustee to complete it, and invest De Grasse, the purchaser, with the fee.

But the courts of New York in the case already referred to have held, that, upon the true construction of the order, the approval of the master was not necessary, as the direction in that respect was limited to conveyances by the trustee in satisfaction of debts Even if this construction should be regarded as doubtful, or that requiring the approval was thought to be the better one, inasmuch as this construction has been given by the highest court of a state upon this very title, in a case in which its judgment was final, the habitual deference and respect conceded by this court to the decisions of the state courts upon their own statutes and orders of their courts, would seem to render it conclusive.

This view was directly affirmed, and acted on, in the case of *The Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet., 492. That, as is the case before us, was an action of ejectment by the heir, to recover a tract of land situate in the city of Cincin-

nati. The defendant held under a deed made by administrators, upon a sale under an order of the Court of Common Pleas for the County of Hamilton, which possessed the powers of an Orphans' Court.

The title depended upon the effect to be given to the order under which the sale took place. It was made at the August term, and entered as of the May term preceding. It was alleged that, though granted at the May term, the clerk had omitted to enter it. The law conferring the powers of the Orphans' Court upon the Common Pleas had been repealed between the May and August terms; and the question was whether the order was a nullity, or valid until set aside.

The sale had taken place at an early day, and the property had become of great value. The case was most elaborately argued. The action of this court, independently of the principle decided in the case, is worthy of remark.

Chief Justice Marshall, in delivering the opinion, observed, that the case had been argued at the last term, on the validity of the deed made by the administrators; but as the question *was one of great interest, on which many [*563 titles depended, and which was to be decided upon the statutes of Ohio, and as the court was informed that the case was depending before the highest tribunal of the state, the case was held under advisement.

The state court held, that the order of the Court of Common Pleas, entered at the August term as of the preceding May term, was *coram non judice*, and void; and that the deed under which the defendant derived title was, of course, invalid.

This court held, that the judgment of the Supreme Court of Ohio should govern the case. I will give its language.

"The power of the inferior courts of a state," said the Chief Justice, "to make an order at one term as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the revising tribunal of the state, that a majority consider that judgment as authority, and we are all disposed to conform to it."

I will simply add, that the Court for the Correction of Errors in New York possessed a revising power in all cases over the orders and decrees of the Chancellor, and that that court has held, upon this very title, not only that the order in question was an order entered by him acting as a court, but, in expounding it, that the deed of conveyance given to De Grasse under it did not require the approval of a master. Further comment to show the identity of the two cases would be superfluous.

But I forbear to pursue this branch of the case farther,

The validity of the execution of the deed to De Grasse by the trustee, as it respects the alleged want of approval, stands,—

1. Upon the acts of the master in the execution of it, as a substantial approval within the meaning of the order; and,

2. Upon the decision of the highest judicial tribunal of the state, whose laws we are administering, that, upon a fair interpretation of the terms of the order, an approval was not essential.

It has also been argued, that, according to the true construction of the order, the sale should have been for cash, and that here it was otherwise.

But this is an action at law; and the deed on the face of it shows a cash consideration of $2,000. The nature of the consideration was not inquirable into, and should have been excluded at the trial. If the complainant had sought to invalidate the proceedings on that ground, he should have gone into a court of equity, where the question could have
*564] been appropriately *examined, and justice done to all the parties. That it was not examinable in a court of law is too plain for argument. The recital of the considerations can no more be varied by parol proof than any other part of the deed. (2 Phill. on Ev., 353, 354, 2 Cow. & Hill, *n.* 289, and cases there cited; 1 Id., *n.* 228, p. 384; 7 Johns. (N. Y.), 341; 8 Cow. (N. Y.), 290; 2 Den. (N. Y.), 336; 4 N. H., 229; 1 J. J. Marsh. (Ky.) 388, 390.)

I have thus gone over the several grounds relied on for the purpose of impeaching the title of the defendant to the premises in question; and, although in the minority in the judgment given, have done so, not so much on account of the magnitude of the interest depending, which is great of itself, as of the importance of the principle involved; and upon the application of which the judgment has been arrived at.

Notwithstanding several questions have been brought within the range of the discussion, there are but two, in reality, involved in the determination of the case. 1. The effect to be given to the order of Chancellor Kent made on the 15th of March, 1817; and 2. The execution of the conveyance by Clarke, the trustee, under this order.

If the order was made by the Chancellor in the exercise of his jurisdiction as a court, his judgment was conclusive in the matters before him; and there is an end of that question. It affords an authority to sell and convey, that cannot be controverted in a court of law. And the validity of the deed executed under it stands upon an equally solid foundation.

The title of the defendant, therefore, would seem to be beyond controversy, were it not for the principle against which we have been contending, and which imparts to the case its greatest importance, namely, the right claimed for this court to inquire into the nature and character of the jurisdiction exercised by the Chancellor in making the order coming before us collaterally; and as this court determines that jurisdiction to be general or special, to refuse or consent to go behind his judgment, and re-open and rejudge the merits of the case; and according to the opinion entertained upon that question, to affirm or disaffirm the validity of all acts and proceedings that have taken place under it. And this, too, in a case where the jurisdiction thus exercised by the Chancellor has been settled by himself in his own court, under the state laws, and affirmed by the judgment of the highest judicial tribunals of the state.

It is apparent that, if this principle becomes engrafted upon the powers of this court, and is to be regarded as a rule to guide its action in passing upon the judgments of the state courts coming up collaterally, a revising power is thus indirectly *acquired over them in cases where no such [*565
power exists directly, under the Constitution or laws of Congress. For, if the right exists to inquire into the kind and character of the jurisdiction, without regard to that established by the laws and decisions of the states; and to determine for itself whether the jurisdiction is general or special, and if the latter, to go behind the judgment to see whether the special authority has been strictly pursued, there is no limit to this revising power, except the discretion and judgment of the court.

The principle will be as applicable to every state judgment coming before us collaterally, as to the one in question. It denies, virtually, to the states the power, in the organization of her courts, to prescribe and settle their jurisdiction, either by the acts of her legislature, or the adjudication of her judicial tribunals.

I cannot consent to the introduction into this court of any such principle, and am, therefore, obliged to refuse a concurrence in the judgment given.