JOSEPH J. KENNEDY, TRUSTEE OF HENRY SHULTZ, AN INSOLVENT DEBTOR, AND FOR THE CREDITORS OF THE SAID HENRY SHULTZ, AND HENRY SHULTZ, APPELLANTS, *v.* THE BANK OF THE STATE OF GEORGIA, THE CITY COUNCIL OF AUGUSTA, JOHN MCKINNE, AND GAZAWAY B. LAMAR.

Some of the distinctions stated between bills of review, of revivor, and supplemental and original bills in chancery.

This court, as an appellate court, has the power to allow amendments to be made to the record before it, although the general practice has been to remand the case to the Circuit Court for that purpose.[1]

When a cause is brought before this court on a division in opinion by the judges of the Circuit Court, the points certified only are before it. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.[2]

If the jurisdiction of a Circuit Court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity.

But when an amendment to the record was made by consent of counsel in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction in the Circuit Court.[3]

A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections.

Where a party interested consented to the sale of property, afterwards took the benefit of the insolvent law, and at a subsequent period counsel representing him filed a consent decree to complete the sale, the trustee having taken no steps for two years to connect himself with the proceedings in court, and then having suffered fifteen years more to elapse without moving in the business, it is too late for such trustee to object to the consent decree.

So, also, the holders of bridge bills, who had no specific lien upon a bridge, must be considered to have lost their right to impugn the sale as fraudulent, after so long a lapse of time.

*587] *THIS was an appeal from the Circuit Court of the United States for the District of Georgia, sitting as a court of equity.

As the decision of the court turned upon some collateral points, it is not necessary to state all the facts in the case, which were extremely complicated. The Reporter therefore refers the reader to the opinion of the court, which was delivered by Mr. Justice McLean, and which contains a recital of all the facts necessary to an understanding of the points decided.

It was argued in conjunction with another case between the same parties, involving the same principles of law, and

[1] QUOTED. *Udall* v. *Steamship Ohio*, 17 How., 18.

[2] FOLLOWED. *Ward et al.* v. *Chamberlain et al.*, 2 Black, 434. CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 255.

[3] CITED. *Holmes* v. *Oregon &c. R. Co.*, 9 Fed. Rep., 237; s. c., 7 Sawy., 392.

with nearly the same state of facts. The two cases were argued by *Mr. Waddy Thompson*, *Mr. Butler*, and *Mr. Webster*, for the appellants, and, upon the part of the appellees, by *Mr. Davis*, representing Lamar, *Mr. McAllister* and *Mr. Johnson* (Attorney-General), representing the bank, and *Mr. Sergeant*, representing the city of Augusta.

The arguments of the counsel continued for several days, and it is therefore impossible to give a full report of them, or to do more than merely state the points and authorities.

The points raised on behalf of the appellants were the following, as stated in the briefs of *Mr. Webster* and *Mr. Thompson*.

On the 9th day of May, 1821, one Christian Breithaupt and the said Henry Shultz filed their bill in the Circuit Court against the Bank of the State of Georgia, praying that the bridge across the Savannah River at Augusta, and other property therein named, might be decreed to be first liable to the redemption of the bills issued by the Bridge Company aforesaid, and for an injunction restraining the Bank of Georgia and other creditors of the said John and Barna McKinne, as well as the creditors of the said Bridge Company, from enforcing executions and selling the bridge and other property of the said Bridge Company.

Amongst various interlocutory orders in said cause, was one ordering the bridge aforesaid to be sold by two commissioners therein named; and it was sold accordingly, and the Bank of the State of Georgia became the purchaser. The said Henry Shultz consented to the sale in writing; but the said John McKinne refused to give such assent.

On the 6th of May, 1830, a decree, drawn up by the consent of counsel, was signed by the Hon. W. Johnson and J. Cuyler, which will be found in the record.

It is alleged by the present complainant, the assignee of Henry Shultz, that the order of sale aforesaid is not binding, in *so far as those whom he represents are concerned. [*588
First, because John McKinne, the joint tenant of the said Henry Shultz, refused his consent. And secondly, that the creditors of the Bridge Company were not parties to said suit; and that the decree of the 6th of May, 1830, presents no bar to the claim of your orator, John W. Yarborough,[1] as it purports on its face to have been made by the consent of the counsel of the said Henry Shultz, two years after he had

[1] Yarborough was the original trustee of Shultz, in whose place Kennedy was now acting.

made an assignment of all his estate, and specifically of the bridge aforesaid, to Thomas Harrison, for the benefit of his creditors, and therefore he had no power or authority in the premises, and also because the court had no jurisdiction of the cause.

The bill prays that the bridge and other property of the Bridge Company may be decreed to be first liable for the redemption of the bills issued by the said Bridge Company, and afterwards to refund the creditors of Henry Shultz the amount, with interest, which he paid for the redemption of said bills after his retirement from the Bridge Company.

To this bill of complaint John McKinne answers, admitting all the material allegations of the bill. The other defendants filed demurrers.

The complainant submits to this honorable court, that the sale of the bridge, by the interlocutory order of the court, is void as to him, and those whom he represents, the creditors of Henry Shultz, who were not parties to the suit. 2. That the said sale was made without the consent of the said John McKinne. 3d. That the court, at the time of the said order, had no jurisdiction of the case, as proper parties were not before the court.

2. That the consent decree of the 6th of May, 1830, has no binding efficacy on the complainant or those he represents, as they were not parties in said suit, and that the consent of the said Henry Shultz was without authority, as regards the claims of his creditors, as he had previously assigned all his interest in the premises, under the insolvent debtor law of South Carolina, to Thomas Harrison, Esq.; and because the court had not jurisdiction of the case.

3. That the mortgage by John and Barna McKinne to the Bank of Georgia was void, as violating a statute of Georgia, and secondly, as appropriating the assets of the partnership to the payment of the individual debts of the partners, in violation of the general law on that subject, as well as the special terms of this particular copartnership.

*589] 4. *That if the said mortgage be valid, the defendants, never having foreclosed, are to be regarded as mortgagees in possession, and chargeable with rents, issues, and profits.

5. That if the court should be of opinion that, as regards the interest of the said Henry Shultz, the sale made under the interlocutory order aforesaid be valid, it is void as to the interests of the said John McKinne, the joint owner of said bridge.

6. That the mortgage, if a valid lien, has been more than

paid off, and the residue is subject to division amongst the creditors of Henry Shultz.

7. That a release by the Bank of Georgia to John McKinne, one of the two joint owners of the bridge, and partners with the Bridge Company, is, in law, a release of the said Henry Shultz.

The following authorities will be relied on in the argument: —3 Ves., 255; 2 Kent Com., 400; 2 Story Eq., 304, §§ 446–449, 463, 1039, 1040; Jac. Law Dict., tit. *Estate;* 3 Mod. 46; 2 Story Eq., 527, §§ 1287, 240, 976; 2 Treadw., (S. C.), 674; 3 Taunt., 976; 2 Story Eq., 491, § 1244; Mill on Eq. Mort., 123; Law Lib., 47; 1 Story Eq., 383, § 395; Mill on Eq. Mort., 76, 79, 80, 81; 1 Story Eq., 625, § 675; 2 Id., 500, § 1253; 3 Kent Com., 65; 1 Story Eq., 588, § 633; 3 Laws United States, 482, § 6; 10 Wheat., 1, 20; 2 Cranch, 33; 3 Wheat., 591; 2 Marsh (Ky.), 11; 1 Bland (Md.), 20; 6 Leigh (Va.), 400; Story Eq., § 10; 13 Pet., 691, 729; 8 Cranch, 9, 22; 2 Pet., 157, 163; 10 Pet., 449, 475; 10 Wheat., 199; Gov. Deg. 974–976; 9 Pick. (Mass.), 259; Story Eq., §§ 329, 330, 349, 380, 403, 425, 354; Mitf. Eq. Pl., by Jeremy, 97, 98; 7 Paige (N. Y.), 287, 290; Story Eq., §§ 466, 499, 500, 503, 505, 507, 508, 513, 519, 521, 526; Barton Suit in Eq., 131; 1 Pet., 329; 2 T. R., 282; 4 Ves., 396; 3 Atk., 809, 811; 5 Ves., 3; 2 Stat. at L., 159 and *n.*; Story Eq. Pl., 443; 1 Ves. & B., 536; 19 Ves., 184; 2 Story Eq. Jur., 1520 and *n.*; 1 Pet., 329; 10 Id., 480; 11 Wheat., 1.

Mr. Davis contended, on behalf of Lamar, that the Bank of the state of Georgia was a purchaser at a judicial sale, under a decree of a court having jurisdiction of the cause, the parties, and the subject-matter,—the sale being unimpeached for either fraud or irregularity, and so entitled to the bridge, and to convey it to Lamar.

To this it is replied, in substance, that the decree was erroneous, considered as pronounced *in adversum.*

Lamar rejoins,—

I. That the decree of the 21st of December, 1821, [*590 was by *consent of all parties in interest,—Shultz and McKinne, joint owners and partners, the bank as mortgagee, and Breithaupt and others, creditors of said Shultz; and,—

1. That they and all claiming under them are estopped, by such consent, to insist on error in the decree. *Webb* v. *Webb*, 3 Swanst., 658; *Bradish* v. *Gee*, Amb., 229; 2 Dan. Ch. Pr., 617; *Downing* v. *Cage*, Eq. Cas. Abr., 165, § 4; *Toder* v. *Sansam*, 1 Bro. P. C., 469, 473, 476; *Harrison* v. *Rumsey*, 6 Ves., Sr., 488; *Wall* v. *Bushby*, 1 Bro. Ch., 484, 485, 489; *Norcot*

v. *Norcot*, 7 Vin. Abr., 398; *Bernal* v. *Donegal*, 3 Dow., P. C., 133; *Mole* v. *Smith*, 1 Jac. & W., 665.

2. That there is no sufficient averment that McKinne did not consent to the decree of December, 1821, but only that he never consented to, or executed any power or authority to the commissioners to make said sale, or to execute any title to the purchaser; and that, after consent to the decree, his objection could not stop the sale, nor was a power of attorney requisite. *Bradish* v. *Gee*, Amb., 229; *Webb* v. *Webb*, 3 Swanst., 658.

3. The language of the bill, on the contrary, imports an express averment that the decree was in fact made "by consent of the parties, complainants and defendants."

4. Were there a direct denial, still a party cannot controvert the consent recited in the decree,—unless, perhaps, for fraud in its insertion. *Downing* v. *Cage*, Eq. Cas. Abr., 165, § 4; *Norcot* v. *Norcot*, 7 Vin. Abr., 398; *Mole* v. *Smith*, 1 Jac. & W., 665; *Biddle* v. *Watkins*, 1 Pet., 686.

5. *A fortiori*, not as against a purchaser under the decree, such party never having objected to the decree or sale, nor moved to have the "consent" stricken out, though before the court always, after twenty-four years from the decree of sale, and fifteen from its formal ratification and final decree. *Voorhees* v. *Bank of United States*, 10 Pet., 449, 473; *McKnight* v. *Taylor*, 1 How., 161; *Lupton* v. *Janney*, 13 Pet., 385.

6. McKinne not seeking as complainant the avoidance of the decree and sale on that ground, Shultz cannot avail himself of the error, as against McKinne, to enable him to avoid his own consent and acts. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146; 6 Cond. R., 44, 47; *Whiting* v. *Bank of United States*, 13 Pet., 6.

II. If the denial be adequate and allowable in itself, and available for Shultz, still,—

1. No error, or omission, or false recital, or want of proof, or other error behind or on the face of the decree, the court having jurisdiction, can affect a purchaser under it. *Simmes* *591] & *Wise* v. *Slacum*, 3 Cranch, 300; 1 Cond. R., 539, 541; *Thompson* *v. *Tolmie*, 2 Pet., 157, 167, 168, 169; *United States* v. *Arredondo*, 6 Pet., 729; *Bank of United States* v. *Bank of Washington*, Id., 8, 16; *Voorhees* v. *Bank of United States*, 10 Id., 449, 472, 478; *Shriver's Lessee* v. *Lynn*, 2 How., 43, 58; *Grignon's Lessee* v. *Astor*, Id., 319, 340–343; 10 Wheat., 192, 199; 6 Cranch, 267.

2. The denial of the consent is such,—for consent is in lieu of evidence or law authorizing such a decree; and it is to deny a fact recited as the foundation of the decree; and if it be as recited,—a sufficient foundation for it.

3. The inference, that McKinne's refusal avoided the whole sale, impeaches the judgment of the court, ordering and confirming the sale in spite of such want of consent; i. e. the court erred in decreeing, upon consent of one, the sale of the whole, or of any part of the bridge.

4. The allegation of the invalidity of the mortgage to the bank is likewise controverting the opinion of the court, that it was valid, so far as to authorize a sale, or it is entirely irrelevant.

So none of them avail, to impeach the title of the bank or of Lamar. 2 How., 43, 58; 2 Pet., 168; 10 Id., 472, 473; *Bennett* v. *Hamill*, 2 Sch. & L., 577, 578.

The denial of the consent recited does not show the decrees to be nullities; the consent is not the decree, but only waiver of objection to it; the decree is the act of the court,—valid as a decree on the subject-matter till reversed, in spite of the want of consent. So denial of consent removes that estoppel, only against showing errors in the decree.

III. The absence of McKinne's consent would not avoid the sale of the bridge.

1. (*a*) The parties had a chattel interest, an estate for years only, in the franchise.

(*b*) It was partnership property, and therefore one partner could dispose of the whole interest, so as to bind his copartner. *Harrison* v. *Sterry*, 5 Cranch, 289; 2 Cond. R., 260–263; *Anderson* v. *Tompkins*, 1 Brock., 456; *Robinson* v. *Crowder*, 4 McCord (S. C.) L., 519.

(*c*) McKinne being party to the suit with his copartner, and having never moved to avoid the sale, has, by his acquiescence and knowledge, ratified his partner's act. *Storrs* v. *Barker*, 6 Johns. (N. Y.) Ch., 166, 169, 172; *Wendell* v. *Van Rensselaer*, 1 Id., 354.

(*d*) McKinne is barred by lapse of time from avoiding the sale for want of his consent; and so are Shultz and his assignee, when relying on McKinne's refusal.

*2. The supposed pledge of the bridge is a legal [*592 nullity; for,—

(*a*) It was, if any thing, a private understanding merely of the partners, that this fund should remain as security for the bills, which did not affect their power of disposal, as to third parties. *Hawker* v. *Bourne*, 8 Mees. & W., 710.

(*b*) If publicly notified, it gave no lien on the bridge passing with the notes into each holder's hands.

(*c*) There is no direct averment of any legal pledge creating a lien on the bridge for holders of bridge bills, before other social creditors; nor of any disposition of, or agreement

with reference to, the bridge, restraining the power of both or of either to sell it,—even were there one as to the application of its proceeds.

(*d*) If such pledge avoided Shultz's consent and sale of his interest, it must likewise avoid his assignment of his share under the South Carolina insolvent laws;—and so the trustee has no interest in the suit.

IV. The sale, being regular, passed the whole interest of Shultz in the property; and,—

1. Its confirmation binds McKinne also.

(*a*) It was virtually confirmed by payment and acceptance of the purchase-money, and possession of the bridge; all which were acquiesced in.

(*b*) By express decree.

(*c*) Both Shultz and McKinne are estopped from alleging error by consent to the decree. (See cases cited above.)

(*d*) There is no suggestion that the counsel of "defendants" assenting thereto did not then represent McKinne.

(*e*) Even as to Shultz, it is not averred that his solicitor had ceased to be such; but only that he by his consent could not bind the fund nor the interests of the creditors.

2. This decree is not shown to be void by any sufficient averment; for,—

(*a*) Being by consent, without dispute, no error can be alleged against it other than such as shall go to the jurisdiction of the court which gave it.

(*b*) This decree was rendered by the Circuit Court in which the suit was brought; and it is not averred that it had not jurisdiction.

(*c*) The denial of jurisdiction in the Supreme Court does not involve the denial of that of the Circuit Court, nor show that its decree is void; for on certificate of division, the points certified alone are before the Supreme Court; the cause remains below, and may be proceeded in there. 2 Stat. at L., p. *159, § 6; *Ogle* v. *Lee*, 2 Cranch, 33; *Harris* v. *Elliot*, 10 Pet., 25, 56; *Davis* v. *Bradin*, Id., 286, 289; *Adams & Co* v. *Jones*, 2 Id., 207, 213, 214; *White* v. *Turk*, 12 Id., 239, 240; *United States* v. *Baily*, 9 Id., 267, 273, 274; *Perkins* v. *Hart*, 11 Wheat., 237; *Wayman* v. *Southard*, 10 Id., 1; *United States* v. *Briggs*, 5 How., 208.

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Therefore, if the Supreme Court had jurisdiction, the cause was regularly remanded, and it was competent for the Circuit Court to render any decree it saw fit. If the Supreme Court had not jurisdiction, the cause remained before the Circuit Court, with like power of proceeding to decree.

(*d*) But the facts averred do not show that the Supreme

Court had not jurisdiction at January term, 1830; for though its opinion was ordered to be certified, it had not been done; and till it had been done, it was competent for counsel to ask for its reinstatement by consent.

It was also within their power to agree to, and of the court to allow, an amendment of the pleadings, not stating new points, but obviating obstacles to the decision of those certified. *Bank of Kentucky* v. *Ashley*, 2 Pet., 327, 328, 330; *Woodward* v. *Brown and Wife*, 3 How., 1, 2; *Union Bank of Georgetown* v. *Geary*, 5 Pet., 99, 111, 113; *Holker* v. *Parker*, 7 Cranch, 436, 456; *Osborn* v. *Bank of United States*, 9 Wheat., 738; *Jackson* v. *Stewart*, 6 Johns. (N. Y.), 34, 37, 296, 300; *Henck* v. *Todhunter*, 7 Har. & J. (Md.), 275, 278.

The order of January term, 1828, was predicated on "the present state of the pleadings," and contemplated an amendment; and it could as well be allowed before the Supreme as the Circuit Court. *Matheson's Adm.* v. *Grant's Adm.*, 2 How., 263, 281; *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206.

(*e*) The Supreme Court having assumed jurisdiction, allowed the reinstatement, and certified the cause below for further proceedings, it is not competent for any party or court to impeach its jurisdiction. *Voorhees* v. *Bank of United States*, 10 Pet., 474; *Martin* v. *Hunter's Lessee*, 1 Wheat., 104; *Ex parte Sibbald* v. *United States*, 12 Pet., 492; *Washington Bridge Co.* v. *Stewart et al.*, 3 How., 413, 424, 426; *Skillern's Exec.* v. *May's Exec.*, 6 Cranch, 267.

If, then, the decree of 1830 be not void, but valid as to all parties to it, then,—

1. McKinne is expressly bound by it.

2. It ratifies the sale, and thus removes all difficulty arising from McKinne's previous supposed dissent; and,

3. Thus Shultz being bound by the sale, and McKinne by *the ratification, the whole interest in the [*594
bridge is concluded by consent decrees.

V. The confirmation by final decree was not vitiated by failure to bring Shultz's assignee before the court; for

1. The decree for sale was final and conclusive on Shultz's whole interest. *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank of United States*, 13 Pet., 6, 15.

2. The sale was merely execution of the decree, and confirmation was the right of the purchaser, and of course, in the absence of cause shown.

3. No cause is shown in this record, no irregularity or fraud, nor any grievance to the complainants' assignee.

And the confirmation pending the abatement or defectiveness of the suit by reason of the assignment and the absence

of the assignee, is not error for which a bill of review will lie, unless the sale be impeached. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146; *Whiting* v. *Bank of United States*, 13 Pet., 15, 16.

4. There were always parties before the court competent to act; for by the assignment the suit was not abated but defective, and could be proceeded with if neither party required the assignee to be brought before the court and he did not come in. Story's Eq. Pl., § 328; *Sedgwick* v. *Cleaveland*, 7 Paige (N. Y.), 287, 289, 290, 291, 292; *Massey* v. *Gillelan*, 1 Id., 644.

Shultz was still a necessary and proper party, and could for his own interest consent to the reinstatement and the amendment,—especially if assignee declined or neglected to proceed with the suit. *Sedgwick* v. *Cleaveland*, 7 Paige (N. Y.), 290; Mitf. Eq. Pl. by Jer., 65, *n. t.*

This assignment being out of the state where the suit was pending, if considered as made under a tribunal and law operating *in invitum*, cannot operate on the fund in the hands of the Circuit Court extra-territorially. *Harrison* v. *Sterry*, 5 Cranch, 289; *Blane* v. *Drummond*, 1 Brock., 62.

If voluntary, the assignee is bound by all proceedings before he is made party. Story Eq. Pl., § 351; Mitf. Eq. Pl. by Jer., 73, 74.

VI. This is a bill of review to vacate a decree, and to have the benefit of the proceedings.

It is therefore barred by lapse of more than five years from the final decree, whether the decree of December, 1821, or May, 1822, or May, 1830. *Thomas* v. *Harvie's Heirs*, 10 Wheat., 146; *Whiting* v. *Bank of United States*, 13 Pet., 13, 15.

And treating the decree of December, 1821, and May, 1822, as final, by lapse of twenty years and laches and negligence.

*595] *VII. But, in fact, it appears that Lamar is not the purchaser of anything that ever was the property of complainants.

The right claimed was a franchise to have a toll-bridge over a navigable river, held by acts of the legislatures of South Carolina and Georgia, for a limited time, which had expired when Lamar purchased the bridge, which then was held under a new grant. Laws of Georgia, for 1833, p. 40, 41, tit. *Bridges;* 9 Statutes of South Carolina, 589, § 24; 471, 472, § 53; Act of Georgia, December 23, 1840.

The record of the original cause, being in the Supreme Court, under the certificate of division, and being referred to

in the bill, may be inspected. *Bank of United States* v. *White*, 8 Pet., 262, 268.

The franchise in this case was an incorporeal hereditament granted for a term of years to the grantees and their heirs, and could only exist by virtue of the acts of Assembly, and ceased on the expiration of the time limited. 2 Bl. Com., 37, 38; 2 Inst., 220; *Bank of Augusta* v. *Earle*, 13 Pet., 595; *People* v. *Thompson*, 21 Wend. (N. Y.), 235, 249, 250; 23 Id., 537, 554, 564, 569.

That this franchise and the statute creating it are public in their nature. 9 Bac. Abr., 231, 232; 21 Wend. (N. Y.), 235, 249, 250; 15 Johns. (N. Y.), 387, 389; Gresley on Eq. Ev., 293, 294; 1 Stark. on Ev., 196.

The points made by *Mr. McAllister* and *Mr. Johnson* were the following:—

1st. That the present bill of revivor and supplement has not been exhibited in accordance with the practice and usages of courts of equity, and on that ground the demurrer must be sustained. Story Eq. Pl., § 643; 1 Dan. Ch. Pr., 649; *Wortley* v. *Birkhead*, 3 Atk., 809, 811; *Fletcher* v. *Tollett*, 5 Ves., 3.

2d. That the present bill was filed without leave of the court and notice to the adverse party, on the erroneous supposition that the original suit, the revival of which is the object of the present bill, had abated, whereas, by complainants' own showing, it had only become defective, and, in such case, the court had no jurisdiction of the bill without previous leave given to file it, and due notice to the opposite party of the intention to file such bill, in compliance with the 57th Rule of Practice of the courts of equity of the United States. 1 How., xviii.; 17 Law Lib., 112; Story Eq. Pl., § 383, *n.* 3; 1 Dan. Ch. Pr., 75; *Sharp* v. *Hullett*, 2 Sim. & Stu., 496; *Pendleton* v. *Fay*, 3 Paige (N. Y.), 206; *Whitney* v. **Bank of United States*, 13 Pet., 13; 3 Dan. Ch. Pr., [*596 1733, 1737; 2 Ves., Sr., 571, 577; *Dexter* v. *Dexter*, 4 Mason, 304; Story Eq. Pl., §§ 466, 527, 528, 443; 1 Dan. Ch. Pr., 449, 625, 655; 4 Paige (N. Y.), 639.

3d. That where two complainants exhibit their bill, both must have an interest in the subject-matter of dispute, or else the demurrer will be sustained. Story Eq. Pl., §§ 232, 509, 544; 1 Dan. Ch. Pr., 347, 348, 361, 362, 617; *The King of Spain* v. *Machado*, 4 Russ., 225, 242; *Abrahams* v. *Plestoro*, 3 Wend. (N. Y.), 546.

4th. That, by their own showing, neither of the complain-

ants in this case had such an interest as would authorize the filing of the present bill.

1. As to Henry Shultz. His interest is concluded by the decree of 8th May, 1830, entered into by consent of his attorney, who was the attorney of record. *Union Bank of Georgetown* v. *Geary*, 5 Pet., 112, 113; *Bradish* v. *Gee*, Amb., 229; 5 N. H., 393; 4 Mun. (Ky.), 377; 2 N. H., 520; 1 H. Bl., 21; 17 Johns. (N. Y.), 461; 16 Mass., 396; 7 Cow. (N. Y.), 744.

2. That against this consent decree, no error can be alleged by him. *Harrison* v. *Rumsey*, 2 Ves., Sr., 488; *Monell* v. *Lawrence*, 12 Johns. (N. Y.), 534; *Webb* v. *Webb*, 3 Swanst., 658; Bro. Parl. Cas., 244; 2 Dan. Ch. Pr., 1179, 1180.

3. That he is concluded, by his acquiescence in this decree, from its date to 9th May, 1845, when present bill was filed.

4. That he is concluded, by his letters of attorney to Walker and Fitzsimmons, authorizing them to sell the Augusta Bridge, his consent to such sale, its sale under a power from him, and the subsequent confirmation of said sale by the consent decree.

5. That present bill does not allege that Shultz is not concluded by said decree, but simply affirms that all his interest in the subject-matter had passed out of him, prior to the consent given to said decree by the solicitor of him, the said Henry Shultz, and that therefore said decree could not bind his (the said Shultz's) creditors and assignees.

Thus much for Shultz.

5th. As to the other complainant, John W. Yarborough, he has no interest.

1. He was not the assignee of Shultz, under the insolvent law of South Carolina. By the allegations of the bill, it appears he was merely a trustee, appointed by a court of equity in that state to distribute the funds in that court belonging to an insolvent party. Such court did not, and could not, assign to the trustee the right to sue for money at the time in the registry of a foreign tribunal, nor could such appointment (if it *be deemed that the bridge was unsold at the time) pass real estate situate in Georgia. James's Dig. Laws S. C., 121; 2 Hill (S. C.), 468.

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2. Admitting, *ex gratia*, that Yarborough was assignee, duly appointed by an insolvent court, the assignment constituting him such assignee was *in invitum* in the state of South Carolina, and it could not on that ground operate a transfer of funds in the registry of the court of Georgia. Such assignment was not only *in invitum*, but was the creature of a local law of South Carolina, and could have no extra-territorial operation to pass property in Georgia. The general right of

a foreign assignee to sue may be admitted; but it will be contended, that right is based upon national comity, and is admitted only when neither the state in which he seeks to sue, nor her citizens, would suffer injury from the application of the foreign law; that the consent decree was in the nature of a settlement between debtor and a creditor without notice of change of interest, and the application of a foreign law, to the detriment of the latter, would be as unjust as it would were it permitted by its application to cut out a domestic creditor in favor of a foreign assignee. Story Eq. Pl., § 379; Sugd. on Vend., 460, 537; *Picquet* v. *Swan*, 5 Mason, 40; 1 Story Eq. Jur., § 406; Calvert's Eq., 102; *Bishop of Winchester* v. *Payne*, 11 Ves., 194, 197; 2 Ves. & B., 199, 205; Sugd. on Vend., 538; 3 Atk., 392; Baldw., 45, 296; 1 Wend. Bl. Com., 441, note; *Fenwick* v. *Sears*, 1 Cranch, 259; *Dixon's Ex.* v. *Ramsay*, 3 Cranch, 319; 1 Kirby (Conn.), 313; 6 Binn. (Pa.), 353; 1 Har. & M. (Md.), 236; 2 Hayw. (N. C.), 24; 20 Johns. (N. Y.), 227; 3 Wend. (N. Y.), 538; 2 Kent Com., Lec. 37, pp. 40, 46, 407, 408 (2d ed.); 1 Mill (S. C.), 283; 4 McCord (S. C.), 519, 367; 2 Hill (S. C.), 601; 5 Cranch, 302; 12 Wheat. 213, 356; 5 How., 295; 1 Brock., 203, 211; 9 Johns. (N. Y.), 64.

Thus much for the interest of Yarborough.

6th. It will be contended that John W. Yarborough must be a privy or a stranger to Henry Shultz. If the former, he is bound by the letter of attorney of Shultz to Walker and Fitzsimmons,—his consent to the sale of the bridge and all his previous acts,—in a word, if Yarborough was a privy, he comes in *pendente lite*, and must come in *pro bono et malo*. On the other hand, if Yarborough be a stranger, he is clearly not entitled to revive the proceedings of another for his own benefit.

Should it be urged again, as it was in the court below, that all that was done by Shultz, was done *coram non judice*, and void, we shall answer,—

1. If the proceedings were void, (which is by no means admitted,) *what was done by Shultz was good [*598 as matter of contract, having received his assent.

2. If the proceedings were void, how comes it complainants seek to revive a nullity?

3. We shall contend that the proceedings were not void, and that the decree cannot be impeached in the manner attempted by the present bill.

7th. We shall argue that the assignee (the only one appointed by the insolvent court) having disclaimed, Shultz, in whom the legal title was, became by implication the trustee

of his creditors, and thus all parties were before the court at the time the decree was rendered. *Tunno* v. *Edwards*, 2 Treadw. (S. C.) 674.

8th. If none of foregoing grounds be sustained by the appellate tribunal, the bill to which demurrer has been filed will be viewed in the attitude it professes on its face to hold,—that of a bill of revivor and supplement,—and it will be contended that, the object of the bill being to revive a portion of the proceedings and to set aside the decree, the demurrer must be sustained, such not being the office of a bill of revivor and supplement. Story Eq. Pl., §§ 257, 333, 344, 354, 377, 383, 386, 617; *Pendleton* v. *Fay*, 3 Paige (N. Y.), 204, 206; 3 Dan. Ch. Pr., 1739.

9th. It will be contended that the present bill is in truth a bill of revivor and supplement, in nature of a bill of review; but as such it cannot be sustained, because such bill can only be filed within five years after decree rendered, for error of law apparent on the face of the decree, or with leave of the court upon affidavit of new facts recently discovered. Story Eq. Pl., §§ 404, 405, 407, 409, 412, 417; *Webb* v. *Pell*, 3 Paige (N. Y.), 368; *Whiting* v. *Bank of United States*, 13 Pet., 6; *Dexter* v. *Arnold*, 5 Mason, 308; 10 Wheat., 146; Story Eq. Pl., § 426; *Mussell* v. *Morgan*, 3 Bro. Ch., 79; *Style* v. *Martin*, 1 Ch. Cas., 151; *Monell* v. *Lawrence*, 12 Johns (N. Y.), 535; *Kennedy* v. *Daly*, 1 Sch. & L., 355, 374.

10th. It will be argued that the demurrer must be sustained by reason of the decree of May, 1830, the whole case being *res adjudicata*. That there was no error in said decree or the proceedings on which it was founded, which could have the effect to impeach its validity.

That admitting there was error, it was merely one of pleading, which did not vacate the decree, and giving to it the fullest effect, it could only render the decree voidable, to be set aside on appeal. Story Pl., §§ 10, 638; 2 Smith Lead. Cas., 440; 1 Bibb (Ky.), 262; 2 How., 497; 1 Ill., 31; Coxe (N. J.), 31, 70; 3 *McCord (S. C.), 280; *Case of the Blaireau*, 2 Cranch, 203; *Jackson* v. *Ashton*, 10 Pet., 480; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173; *Skillen's Ex'rs* v. *May's Ex'rs*, 6 Cranch, 267; *McCormick* v. *Sullivan*, 10 Wheat., 199; *Case of Tobias Watkins*, 3 Pet., 203; *Washington Bridge Co.* v. *Stewart et al.*, 3 How., 413; *Voorhees* v. *Bank of United States*, 10 Wheat., 473; 6 How., 39; Chancellor Harper's opinion in *Yarborough, Trustee*, and *Shultz* v. *Bank of the State of Georgia and others*, MS.; *Ex parte Bradshaw*, 7 Pet., 647. That, so far from being a nullity, the decree placed the Bank of the State of Georgia, and those

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claiming under them, in the attitude of *bonâ fide* purchasers for a valuable consideration at a judicial sale, and that in favor of them the maxim of *omnia presumuntur rite acta* will apply. *Bennett* v. *Hamill*, 2 Sch. & L., 566; *Lloyd* v. *Johnes*, 9 Ves., 37; *Denning* v. *Smith*, 3 Johns. (N. Y.) Ch., 344.

Lastly, it will be argued that, upon the ground of a general want of equity on the part of complainants,—the demurrer must be sustained, and the decision of the court affirmed. *Megham* v. *Mills*, 9 Johns. (N. Y.), 64; 4 Ves., 387; 16 Id., 467; 18 Id., 425; 1 Kelly (Ga.), 193; *Ex parte Ruffin*, 6 Ves., 119; *Ex parte Williams*, 11 Ves., 3; 2 Story Eq. Jur., 736; *Elmendorf* v. *Taylor*, 10 Wheat., 168; *Foster* v. *Hodgson*, 19 Ves., 185; *Gregory* v. *Gregory*, Coop., 201.

Mr. Sergeant, for the city of Augusta, made the following points:—

I. That the decree of the Circuit Court of the United States, made in the year 1830, is final and conclusive, and cannot be appealed from, reviewed, or set aside, nor questioned; and this appears upon complainants' bill. No court of equity, therefore, can maintain such a bill.

The principle thus stated is so familiar and settled, that no authority is necessary for it. One case, however, may be referred to, because the decision was between the same parties, on the very same points, upon full hearing, by a court entitled to the peculiar respect of these parties complainants, being the highest court of the state of South Carolina, of which state both of the complainants are citizens, of whose laws it is the highest evidence. *Yarborough and others* v. *The Bank of the State of Georgia and others*, Chancellor Harper's opinion, p. 113, affirmed in the Equity Court of Appeals, at Columbia, p. 120. The grounds of the affirmance sufficiently appear in the assignment of errors, pp. 118, 119.

II. It is argued in the bill, that Yarborough was not a party. *Referring only to the statement in the complainants' bill, which is open on the demurrer, the first remark to be made upon it is, that Yarborough and Shultz are joint complainants, making a joint statement, and uniting in one prayer for relief. If Yarborough really had any equity of his own, and Shultz only the contrary of equity, by whatever name called, it would not follow, it may be admitted, that he would not have a right to sue out an original bill, according to his equity. It may be admitted, further, that he might have a right to make Shultz a party defendant. But if they unite in one right, it must be obvious that the want of equity [*600

of the one must be available against both, and is demurrable. See *Makepeace* v. *Haythorne*, 4 Russ., 244; Redesd., 283, *n.*, 2.

There is another remark to be made. In the original bill, Shultz and one Breithaupt were complainants, and they proceeded together as joint complainants, throughout all the stages of the case, including the final decree. Breithaupt acquiesces in the decree, and, no doubt, had the benefit of it. He separates from Shultz, and is not a complainant here. Thus, then, in this bill, which professes to be in the nature of a bill of revivor, and supplemental bill, one of the original complainants is laid aside or retires, and a new complainant is brought in and made a party. This is somewhat extraordinary.

But, further, in the bill there is a want of equity, in two essential particulars. The complainants nowhere deny that Yarborough knew of the pendency of the case in the Circuit Court of the United States for the state of Georgia. Shultz does not deny that Yarborough knew of it. In point of fact, it is very plain that he did know. In point of equity it was his duty to know, and in duty Shultz was bound to inform him. Nothing but a clear and positive denial could be admissible, and that would hardly be credible. Without such an averment, it becomes a fact in this case, that Yarborough did know. That Shultz did know, it is needless to say. If, with this knowledge, Yarborough stood by, and suffered Shultz to proceed with the suit, until a final decree was made, and years after, what pretence of equity can he have? They do aver, both of them, that the bridge property and rights became vested in Yarborough (which, by the by, is matter of law as to which the highest judicial authority in South Carolina has pronounced them to be wrong), and they also aver, that no act or consent of Yarborough or of Shultz, could impair the right. But they nowhere aver that there was no such act or consent, as a fact, nor that Shultz did not act under the

*601] authority and with the knowledge, consent, and approbation of Yarborough. *They attempt, also, to bring in question the authority of the solicitor who acted for the complainants; which is a question not inquirable into here. If it were, it is only necessary to say, that the decree went down to the Circuit Court, was entered there, and the money raised from the sale of the mortgage properly distributed under it, without objection then, or for fifteen years afterwards, when, for the first time, Mr. Yarborough comes in with Mr. Shultz. If Mr. Yarborough thus neglected his duty, the creditors (if there be any) have their remedy against him for his misconduct and neglect.

But is it true, that Mr. Yarborough, under the insolvent law of South Carolina, acquired such a right as is here insisted upon? What the date of the assignment to him was is not stated in the bill; but it appears in the exhibits to have been on the 18th of December, 1830. The complainants allege that it related back to the 13th of October, 1828. Whether it did so or not is for the present purpose immaterial. The operation of the assignment upon real estate and franchises within the State of Georgia, and then, at the instance of the insolvent himself, in the custody of a court in the district of Georgia, and under the actual exercise of jurisdiction by such court,—is it such in law that if the assignee be not made a party, the suit must abate or the jurisdiction be rendered inoperative? This is the question. To establish it would require that South Carolina had attempted such extra-territorial legislation, and the next, that Georgia submitted and agreed to it; but South Carolina did not, and does not so interpret her legislation, nor suffer her citizens so to interpret it. This has been distinctly decided by the highest court of South Carolina. Chancellor Harper's opinion, 116. This is conclusive authority. It is unnecessary to cite others.

The fact of the bridge being partly in each state, as to its effect upon the jurisdiction, may be considered as decided by the same case.

But supposing the last objection out of the way, would an insolvent assignment operate in such a suit? It is not meant to inquire whether the assignee, upon his own application, made in due time, might be permitted in equity to become a party, or at all events to give notice of his right in some way upon the record. At law, he may have a suit marked to his use. But bankruptcy does not abate a suit, at law or in equity. 1 Cook's Bankrupt Law, 558, 560. The suit goes on. If the complainant become a bankrupt, his assignee may come in by supplemental bill. It depends upon himself whether he will or not. In either case, the suit goes on. He cannot file *a bill of revivor. Neither was it the business of the [*602
defendant to require or compel him to come in. It was the business and duty, therefore, of Mr. Yarborough himself to come in. If he neglected it, to the prejudice of his *cestui que trusts*, they must sue him. But he was not a necessary party. Nor is it necessary that he should state the bankruptcy, (Redesd. 282, note *n*,) even in a case then pending. It is not an abatement. Cooper Eq. Pl., 76, 77, and note.

III. There is another want of equity in the bill, believed to be decisive in itself, against both the complainants. In such a bill, the complainants must state their whole equity, nega-

tively as well as affirmatively. They must deny all such things, within their own knowledge, as take away any seeming equity,—not argumentatively, or by inference, but distinctly and positively, as matters of fact. The bridge property was sold, by order of the court, and with the consent of parties, and converted into personalty. The sale itself, and its effects, will presently be considered more particularly under another head. The objection now offered is this,—that neither of these complainants denies the receipt of part or parts of the consideration,—and neither of them avers, that it did not go to the benefit of the creditors. If it did, they can have no equity.

IV. So far, the answers in law upon the demurrer apply to the whole case. There are two remaining, peculiar to the city of Augusta, which are to be considered, and each in itself decisive.

First. It appears from the present bill, that the Bank of Georgia instituted a suit upon the mortgage in the state court of Georgia, which was so proceeded in, that there was a decree of foreclosure and sale, and a sale was about to be made under it. In this state of things, the suit in the state court being finally ended, including, of course, a decision upon the validity of the mortgage, Breithaupt and Shultz filed their bill on the equity side of the Circuit Court of the United States for the District of Georgia, praying an injunction in the mortgage case, and certain other cases, and the assumption of jurisdiction in the whole matter. On the 13th day of June, 1821, an injunction was ordered "to stay the sale of said bridge, until the further order of the Circuit Court of the United States should be had thereon." This injunction was granted to the complainants, who, taking the benefit, were bound by the terms. On the 21st of December, 1821, "with the consent of the parties, complainants and defendants," the Circuit Court appointed Freeman Walker and Christopher Fitzsimmons commissioners to make a sale of the bridge and appurtenances
*603] as mortgaged *to the bank, and required the parties to execute powers of attorney to the commissioners. The complainants executed powers of attorney. Colonel McKinne, who was a defendant, refused. This being reported, the court, on the 13th of May, 1822, "by consent of complainants," ordered a sale. On the 18th of November, 1822, a sale was made, returned, the money brought into court, and the sale confirmed by the court, without exception. At this sale, the Bank of Georgia became the purchaser. The Bank of Georgia, in 1838, sold to Gazaway B. Lamar, for a full and valuable consideration; and in 1840, Lamar, for a full and

valuable consideration, sold to the city of Augusta. By the final decree, which was a consent decree, the whole of the proceeds were distributed according to the agreement of parties filed on record.

Thus, then, it appears that the title of the city of Augusta is derived directly from the sale of the 28th of November, 1822, and gives them all the right which was acquired by the Bank of Georgia, under that sale. Now, this was long before Yarborough acquired any right, even if his assignment could be shown to relate back to the alleged assignment to Harrison, which the complainants state to have been on the 13th of October, 1828. Up to the sale, and six years after, the whole interest was in Shultz alone, and there was no such being in existence as Yarborough, assignee. The sale was, therefore, good.

It has been already shown that the Circuit Court had jurisdiction, the alleged defect in the bill being no defect at all. The sale, therefore, is a sale by the order of a court of competent jurisdiction, regularly conducted, confirmed by the court without objection, and the proceeds brought into court, and afterwards distributed by a decree of the court. Can it be necessary, or would it be respectful to the court, to argue that the purchaser at such a sale is protected by the law? There was no equity of redemption remaining; the whole was sold. There was nothing to come to Yarborough, or any body else, by assignment from Shultz.

But suppose there was a want of jurisdiction. It is not necessary to remind the court that that is only error, and even a reversal for error would not affect the title of a purchaser. Neither is it necessary to say what a singular equity it would be which was founded on his own defect in his own pleadings, especially after so great a lapse of time. The law is well settled. It is a general rule, "that the purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause." Sugden (5th ed.), 46. All that the purchaser is bound to see is, that, as far as appears upon the face of the *proceedings, there is no fraud in obtaining [*604
the decree. It is not pretended here that there was any fraud. The complainants do not allege that there was. There is no pretence of that kind set up.

Secondly. If the want of jurisdiction in the Circuit Court, for the reason alleged, were made out, (as it is not,) still Shultz, and those claiming under him, would be estopped in equity from disputing the title derived from the sale. Yarborough, as has been seen, derives from Shultz, by an assign ment not claimed to be earlier that six years after the sale,

and is affected by all that was previously done precisely as Shultz was. He took, subject to whatever equity or right there was then existing.

V. The complainants attempt in their bill to say something about notice. They do not say that the Bank of Georgia had any notice. So far, they must admit the title of the Bank of Georgia to be, on this ground, unassailable. The title of the Bank, they admit, was conveyed to Mr. Lamar, and by him to the city of Augusta. The Bank of Georgia does not dispute it. One is at a loss to conceive whence and how these complainants get any right to inquire into the consideration. If there were a defect in the title of the bank, the question of consideration and notice might arise,—but not here. If the title of the bank was good, so was the title of Mr. Lamar, and so is the title of the city of Augusta. The saying about notice (for it cannot be called an averment) is altogether defective and insufficient, for want of explicitness and intelligible particularity.

VI. There is still a further want of equity, or, more precisely speaking, a negative of equity, showing that, at the time of this suit instituted, the complainants had no right at all. The right they had was derived from legislative acts of the state of Georgia, both limited in time. The time expired, and the respective Legislatures, in the year 1840, granted the property and privileges to the city of Augusta. The construction of this in equity has been determined in South Carolina, in the case before referred to. Chancellor Harper's opinion, p. 114. This appears in the complainant's bill.

VII. As to the suggestion loosely thrown out in the bill, that the two ends of the bridge were in different states, it is not easy to perceive how any equity can grow out of it. All that it would amount to would be a question of jurisdiction. But that was waived and lost. It might have been pleaded to the jurisdiction of the state court of Georgia. No such plea was put in, and the court made a decree, which has never
*605] been appealed *from, nor set aside, nor reversed. In the Circuit Court it was not objected to. All that was asked was to enjoin the sale by the state court, and take the sale and distribution of the proceeds into the hands of the Circuit Court, and this was asked, consented to, and carried through by the present complainant, Shultz. And further, the sale and conveyance were made under his power of attorney, so that the present owners hold under his own deed.

There are two points which have been touched incidentally in the preceding statement, which might be insisted upon more at large; namely, the title of the city of Augusta, as a

bonâ fide purchaser, and the length of time. The bill states that the purchase was made on the 21st day of January, 1840. This was upwards of seventeen years after the sale. It was upwards of eleven years after the final decree, which placed it beyond the reach of an appeal; beyond the reach equally of a bill of review, which has the same limit at least as an appeal; and, in truth, unassailable in any way, in the same jurisdiction; while by its own nature it was protected from being questioned collaterally. What can be meant by the alleged notice, therefore, it is impossible to conceive. Several more years elapsed, as has been seen, before the complainants themselves awakened to the consciousness that there was anything to take notice of. They slumbered on until 1845, before they commenced this suit, giving no sign but of profound acquiescence in what had been done. What notice had the city of Augusta to the contrary? This is the grossest laches, or worse. Either destroys all pretence of equity.

There might be added some points upon the form of proceeding here adopted. If they should be deemed necessary, they will be presented in a separate paper.

Mr. Justice McLEAN delivered the opinion of the court.

Henry Shultz and Lewis Cooper, in the year 1813, obtained from the state of South Carolina a charter for a bridge over the Savannah River, opposite the town of Augusta, in Georgia, for the term of twenty-one years; and in 1814 the state of Georgia granted to them a charter for the term of twenty years. In 1816, Henry Shultz and John McKinne, being the joint owners of the bridge, formed a partnership in the business of banking, under the name of the "Bridge Company of Augusta;" the bridge was valued at seventy-five thousand dollars, and it, with other property named, constituted the partnership stock. In 1818, Shultz sold and transferred his interest in the partnership to Barna McKinne. The consideration of this *purchase was the sum of sixty- [*606
three thousand dollars, which Shultz owed to the firm, and which was credited to him on their books.

In a short time, the firm became greatly embarrassed. Among other debts, they owed to the Bank of the state of Georgia the sum of forty thousand dollars; and they obtained from it a further loan of fifty thousand dollars, with the view, as was stated, to relieve the Bridge Company. To secure the payment of the sum of ninety thousand dollars to the bank, the McKinnes mortgaged the bridge, eighty negroes, and some real estate, the 10th of June, 1819. Previous to this the "Bridge Bank" stopped payment. On being informed of

this fact, Shultz resumed his place in the firm, by procuring a transfer of Barna McKinne's interest. He advanced fifteen thousand dollars of his own funds to pay deposits in the bank, and took other steps, with his partner, to sustain the credit of the bridge bills in circulation.

In 1821, a petition was filed by the Bank of Georgia, in the Superior Court for Richmond County, praying a foreclosure of the above mortgage; and at the May term of that court, a rule was entered to foreclose the mortgage, unless the principal and interest due on it should be paid; and at May term, 1822, the rule was made absolute. The sum of $69,493 was found to be due to the bank on the mortgage, and the property was directed to be sold. The sale was enjoined by Shultz, Christian Breithaupt, and others, by filing a bill against the bank in the Circuit Court of the United States for the District of Georgia, which, among other things, prayed that the property might be sold, and the proceeds applied to the payment of the creditors of the Bridge Company, and particularly to those who had obtained judgments. An order was made for the sale of the bridge, and commissioners were appointed to make the sale. The sale was made on the 28th of November, 1822, to the bank, for the sum of seventy thousand dollars. For this amount the bank issued scrip, which by the order of the court was deposited with its clerk.

In the further progress of the suit, the judges of the Circuit Court were opposed in opinion on the following points:— 1. Whether the complainants were entitled to relief. 2. What relief should be decreed to them. These points being certified to the Supreme Court, at the January term, 1828, the cause was dismissed for want of jurisdiction. The record did not show that a part of the defendants were citizens of the state of Georgia.

*607] At the January term of the Supreme Court in 1830, Messrs. *Wilde and McDuffie, being counsel for the parties, agreed in writing that the cause should be reinstated, and that the pleading should be amended by alleging, "that the stockholders of the bank were citizens of Georgia," and that the cause be argued. The court dismissed the case, on the ground that the whole cause was certified, and not questions arising in its progress. And the case was remanded to the Circuit Court, with "directions to proceed according to law."

This mandate was received by the Circuit Court at their May term, 1830, and the case was reinstated on the docket. And at the same term "the cause came on to be heard on the amended bill, answers, exhibits, and evidence, and the court

having considered the same, it was ordered and decreed, that the sale of the Augusta bridge, made by virtue of certain powers of attorney and the consent of the parties, and held and conducted under the direction of commissioners heretofore appointed under this court, be, and the same is hereby, ratified and confirmed, and the said Bank of the state of Georgia vested with a full, absolute, and perfect title to the said bridge and its appurtenances, under the said sale, freed, acquitted, released, and discharged from all manner of liens, claims, or encumbrances, at law or in equity, on the part of the said Henry Shultz, John McKinne, Barna McKinne," &c.

"And it is further ordered and decreed by the court, by and with the consent of the parties, complainants and defendants, that the scrip issued by the Bank of the State of Georgia for the sum of seventy-one thousand six hundred and eighty-six dollars and thirty-six cents," &c., "be cancelled and delivered up to the bank by the clerk," &c., "and that the bill of complaint as to the several other matters therein contained, be dismissed, with costs." Under which decree is the following agreement:—"We consent and agree that the foregoing decree be entered at the next or any succeeding term of the said Circuit Court of the United States, District of Georgia;" signed, "George McDuffie, Sol. for complainants, and R. H. Wilde, Sol. for defendants." Dated Washington, 10th April, 1830. And the court say,—"The within decree having been drawn up, agreed to, and subscribed by the solicitors, on behalf of the parties, complainants and defendants, on motion of Mr. Wilde, ordered that the same be filed and entered as the decree of this court," signed by both of the judges.

Fifteen years after the above decree was entered, the bill now before us was filed by Yarborough, as trustee of Henry Shultz, an insolvent debtor, and for the creditors of Henry Shultz, and Henry Shultz in his own right, which they say is "in the nature *of a bill of revivor and supplement," against the Bank of the state of Georgia, the City Council of Augusta, John McKinne, and Gazaway B. Lamar. In this bill the proceedings in the original suit are referred to, and many of them stated at length, and they are made a part of the present procedure. And the complainants pray that the said original bill, with all its amendments, the answers, decrees, decretal orders, and evidence, may be reinstated and revived for the causes set forth, to the extent of the several interests of the parties to this bill. [*608

By way of supplement, the complainant Shultz states, that under the insolvent debtors' act of South Carolina, he executed an assignment of all his estate, in trust for his creditors, to

Thomas Harrison, on the 13th of October, 1828. That his interest in the bridge was transferred by this assignment. Afterwards, the complainant, John W. Yarborough, was appointed trustee of Shultz for the benefit of his creditors. That the bridge and its appurtenances having been originally pledged, as copartnership property, by John McKinne and Shultz for the redemption of the bills issued by them, the lien, never having been released, still remains. And if the mortgage executed to the bank be valid, the bank and all claiming under it occupy the ground of mortgagees in possession, and are bound to account for the rents and profits of the bridge, the same never having been sold under the foreclosure of the mortgage. That the bridge and its income are first liable to the redemption of bridge bills. After these are paid, one half of the surplus in the hands of the complainant, Yarborough, as trustee, to satisfy the creditors of Shultz, &c.

On the 4th of May, 1838, the bank conveyed its interest in the bridge to G. B. Lamar, for the sum of seventy thousand dollars, by a quitclaim deed. That Lamar purchased with a full knowledge of the title, and held the same, receiving the profits, up to 21st January, 1840, when he conveyed his interest in the bridge to the City Council of Augusta, for the sum of one hundred thousand dollars. That the city corporation had full knowledge of the claims on the bridge. The Legislatures of Georgia and South Carolina extended their charter of the bridge to the bank, on the 23d of December, 1840, reserving all liens upon it. That Yarborough, as trustee, out of the sale of the property of Shultz, paid bridge bills and judgments on such bills to the amount of about seventy thousand dollars, and that the unsatisfied creditors have the equity of now requiring a like amount of the copartnership property of the bridge company to be applied in payment of their individual claims. And in addition to the above payment, Shultz avers that he has paid *out of his private means, for the redemption of bridge bills, a sum of about one hundred and fifty-three thousand two hundred and ninety-six dollars. That the total amount paid by him out of his private funds, on account of bridge bills, was four hundred thousand eight hundred and twenty-six dollars, which he insists in equity he is entitled to receive, next after the redemption of the outstanding bridge bills. There is outstanding in bridge bills about the sum of ninety-two thousand dollars.

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And the complainants allege that the decree, as entered on the original bill, is void as to all the parties except as regards the claim of Breithaupt, as the solicitor for the complainants in said bill did not represent the creditors of Shultz, and that

no act of the solicitor could impair their rights. That all the right of Shultz passed out of him by virtue of his assignment for the benefit of his creditors. That the decree was a fraud upon them. That the sale of the bridge by the commissioners was void, as John McKinne, an equal partner of Shultz, never assented to it. That the Bank of Georgia, and all those who have held and are now holding under it, are in equity bound to account. But if the sale of the bridge shall be held valid, the complainants allege that the bank is bound to account for the amount of the purchase-money and interest, and for the net sum of tolls received. And the complainants pray, that the original bill, with all the proceedings thereon, may be revived, and stand as before the decree was entered in 1830; that the said decree may be opened, reviewed, and reversed; that the mortgage to the bank may be declared null and void; and that the sale may be set aside, &c.

The defendants demurred to the bill, on the ground "that the complainants have not, by their bill, made such a case as entitles them in a court of equity to any discovery from the defendants respectively, or any or either of them, or any relief against them or either of them, as to the matters contained in the bill," &c. And afterwards John McKinne filed his answer, admitting the general allegations in the bill.

This bill has been considered by some of the defendants' counsel as a bill of review. But it has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for "error in law appearing in the body of the decree or record," without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree.[1] But if this were a bill of review, it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from *the rendition of the judgment. *Whiting et al.* v. *Bank of the United States*, 13 Pet., 15. [*610

Nor is this properly denominated a bill of revivor. When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave, and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. But this does not appear to be strictly of that character. The complainants denominate it a bill "in the nature of a bill

[1] QUOTED. *Irwin* v. *Meyrose*, 7 Fed. Rep., 535; s. c., 2 McCrary, 247.

of revivor and supplement." It must be treated as an original bill, having for its objects the prayers specifically set forth.

The proceedings on the original bill, under which the property now claimed was sold, are not before this court, in their appellate character. We cannot correct the errors which may have intervened in that procedure, nor set it aside by a reversal of the decree. That case is collateral to the issue now before us.

The complainants insist, that the proceedings in the original suit, embracing the interlocutory decree under which the property was sold, and the consent decree of the 6th of May, 1830, were void for want of jurisdiction in the Circuit Court. It is not necessary now to inquire, whether the Circuit Court had power to enjoin proceedings under the judgment in the state court. The injunction was issued at the instance of Shultz, and for his benefit, and no question of jurisdiction was raised. But as there was no allegation in the original bill of citizenship of the stockholders of the Bank of Georgia, it is supposed the proceedings were *coram non judice*.

When the points on which the opinions of the judges of the Circuit Court were opposed were brought before the Supreme Court, at their January term, 1828, the cause was dismissed for want of jurisdiction. But afterwards, at the January term, 1830, of the Supreme Court, by the agreement of counsel, the record was amended by inserting the allegation, "that the stockholders of the bank were citizens of Georgia," and the cause was reinstated on the docket, and dismissed because the whole case was certified, and not the points on which the judges differed, as required by the act of Congress. The cause was sent down to the Circuit Court by a mandate, which directed that court to proceed therein according to law.

This court, it is contended, have no power to amend a record brought before them, and consequently the above entry was void.

There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids
*611] the *granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. 1 Gall., 22. But it has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose.[1] The only exception to this rule has been, where the counsel on both sides have agreed to the amendment. This has been

[1] QUOTED. *Udall* v. *Steamship Ohio*, 17 How., 18.

often done, and it has not been supposed that there was any want of power in the court to permit it. The objection is, that consent cannot give jurisdiction. This is admitted; but the objection has no application to the case. Over the subject-matter of the suit and of the parties, the court had jurisdiction, and the amendment corrected an inadvertence, by stating the fact of citizenship truly.

When a cause is brought before this court on a division of opinion by the judges of the Circuit Court, the points certified only are before us. The cause should remain on the docket of the Circuit Court, and at their discretion may be prosecuted.[2]

But if no amendment had been made, would the orders and decrees in the case by the Circuit Court have been nullities? That they have been erroneous, and liable to be reversed, is admitted. In *Skillern's Ex'rs.* v. *May's Ex'rs.*, 6 Cranch, 267, a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to the Circuit Court, it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether in that court it could be dismissed for want of jurisdiction, after the Supreme Court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the Supreme Court for their decision. And this court held, "that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

The judgments of inferior courts, technically so called, are disregarded, unless their jurisdiction is shown. But this is not the character of the Circuit Courts of the United States. In *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185, this court say,— "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

And again in the case of *McCormick* v. *Sullivant*, 10 Wheat., 199, in answer to the argument that the proceedings were void, *where the jurisdiction of the court was [*612 not shown, the court say, the argument "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdic-

[2] FOLLOWED. *Ward et al.* v. *Chamberlain et al.*, 2 Black., 434. CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 255.

tion, but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities."

From these authorities, it is clear that the proceedings in the original case are not void for want of an allegation of citizenship of the stockholders of the bank. They were erroneous, and, had no amendment been made, might have been reversed, within five years from the final decree, by an appeal or a bill of review. But the mandate of this court which contained the amendment, as to the citizenship of the stockholders of the bank, agreed to by the counsel, was filed on the 6th of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this, the decree could not have been reversed for the want of jurisdiction. In the case of *Bradstreet* v. *Thomas*, 12 Pet., 64, the court held that an averment of citizenship in a joinder in demurrer, not being objected to at the time, was sufficient to give jurisdiction.

The sale of the bridge is alleged to be void, as it was made without the consent of John McKinne, who was an equal partner with Shultz.

The court ordered the bridge to be sold by Walker and Fitzsimmons, commissioners, and that the parties should execute powers of attorney to the commissioners authorizing the sale. All the parties concerned executed the powers except McKinne, and his refusal or neglect to do so prevented the sale. But afterwards the court, with the assent of the complainants, ordered the bridge to be sold for a sum not less than fifty thousand dollars, by the same commissioners, who were authorized to take possession of the bridge and receive the tolls until the sale was made.

McKinne does not complain of this sale, and Shultz consented to it. It was manifest from the embarrassment of the Bridge Company that the bridge must be sold, and the nature of the property seemed to require a speedy sale. All objection to that sale by the parties on the record, must be considered as having been waived by the consent decree in May, 1830. *That decree "ratified and confirmed" the previous sale of the bridge. That the counsel who consented to that decree represented the parties named on the record is not controverted. A decree thus assented to and

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sanctioned by the court must stand, free from all technical objections.

But it is urged, that the consent of Shultz to the final decree did not bind his creditors, to whom he had assigned the bridge and his other property under the insolvent act of South Carolina.

That assignment was made on the 13th of October, 1828. The bridge was sold by the commissioners, under the interlocutory decree of the court, in 1822; and the proceeds were held by the bank, subject to the order of the court. There was no abatement of the suit by the assignment of Shultz. The insolvent laws of South Carolina had no extra-territorial operation. They can only act upon the persons and the property within the state. The assignment did not affect property in Georgia, which was in the custody of the law,—property which had been sold, with the express consent of Shultz, under the authority of a court of chancery; and the proceeds of which were kept subject to the distribution of the court.

The trustee of Shultz took no step to connect himself with the proceedings in the Circuit Court, although two years elapsed after the assignment, before the final decree was entered. For about seventeen years, he seems to have been passive in this matter, and until the present bill was filed. After so great a lapse of time, without excuse, he cannot be heard to object to a decree which was entered by consent. The power of attorney given by Shultz to the commissioners, which authorized them to sell the bridge, for the purposes specified, was conclusive upon him, and all claiming under him. And the decree which was agreed to by his counsel followed as a necessary consequence of the sale.

It does not appear that the holders of bridge bills had a specific lien upon the bridge. They were creditors of the Bridge Company, and could claim the rights of creditors against a fraudulent conveyance of the bridge and of its proceeds. But such a claim must be duly asserted and diligently prosecuted. A failure in this respect for fifteen years might well be construed into an acquiescence fatal to the claim. We cannot now, under the circumstances stated, look into the decree to ascertain whether, in the distribution of the proceeds of the sale of the bridge and of the other property, the court may not have mistaken the rights of some of the creditors of Shultz.

The objection, that the mortgage to the bank under a statute *of Georgia was void, is not open for examination. If anything was settled by the decree, it was [*614 the validity of that instrument. And this remark applies to

several of the other objections made by the complainants. McKinne was a party on the record, and through his counsel assented to the final decree; but the counsel of Shultz now object to its validity, because McKinne did not assent to the sale of the bridge. And this objection is, for the first time, made in the bill before us. And it is not made by McKinne.

Within five years after the decree was entered, he might have reversed it, if erroneous, by an appeal or a bill of review. And that time having long since elapsed, the decree must stand as concluding the rights of parties and privies, unless it shall be held to be void. It cannot be so held, as we have shown, on the reasons assigned in the bill. Fraud in the obtainment of the final decree is not alleged in the bill. If this were stated and proved, it would authorize the court to set aside the decree. But even this would not affect the sale of the property, unless the purchasers should be, in some degree, connected with the fraud.

The final decree in the case, which covered and adjusted the whole subject of controversy before the court, was not only assented to by the counsel, but it was drawn up and agreed to by them. The court adopted it as their own decree, and entered it upon their record. It confirmed the sale of the bridge, and made a distribution of the proceeds. The bill was dismissed as to certain matters where relief was not given. The proceedings were not void for want of jurisdiction in the court. Nothing was left for its future action. The whole controversy was terminated. And here the matter rested for fifteen years, until the bill before us was filed. It asks the court to set aside the decree, and re-investigate the whole matter of the former suit. No fraud is alleged against the decree. The want of jurisdiction in the court, as urged, is not sustained. Errors in the procedure cannot now be examined. The decree of the Circuit Court is, therefore, affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Georgia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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