defendant, in his answer. It can affect in no wise the right of Bronson & Soutter to foreclose their mortgage, and has no bearing on the legitimate questions presented for the consideration of the Court in the bill filed by them for that purpose. Such must have been the view entertained by the Judge of the District Court, for we cannot suppose that he intended to embarrass the parties to the original suit, after it was ended, by allowing the defendants to that suit to litigate their own claims to the injury of the original complainants. It is proper to say, that we do not approve of the practice of filing a cross bill after the original suit has been heard and its merits passed on. If any of the defendants in this suit wished to have the equities between themselves settled without instituting an original suit for that purpose, they should have applied to the Court at an earlier stage of the litigation, and not waited until the pleadings were perfected, proofs taken, and the cause, after two years of delay ready for hearing.

The motion is overruled.

SUMNER ET ALS. *vs.* HICKS ET ALS.

1. An assignment by an indebted party for the benefit of creditors in trust that the assignee shall sell the property, "on such terms and conditions, as in his judgment may appear best and most for the interest of the parties concerned," has been held by the Supreme Court of Wisconsin to be fraudulent and void.
2. In cases involving the construction of a State statute, this Court is bound to follow the judgment of the highest judicial authority of the State.
3. If a debtor makes an assignment, which is void, and afterwards —but before any creditor has acquired a lien—makes another which is free from objection, the latter assignment is valid.

Appeal from the District Court of the United States for the District of Wisconsin.

Mr. Smith, of Wisconsin, for Appellants.

No counsel appeared for Appellees.

Mr. Justice SWAYNE. This is a suit in equity, having for its object, to set aside two assignments made by the defendants, Henry Hicks and Asa Hicks, to their co-defendant, Forbes.

The appellants are the complainants in the bill. They have recovered judgments at law against Henry and Asa Hicks, upon which executions have been returned unsatisfied.

The first assignment was executed on the 4th of January, 1858. The conveyance of the property is followed in the instrument by this provision: "In trust nevertheless, and to and for the following uses, interests and purposes, that is to say, That the said party of the second part shall take possession of all and singular the lands, tenements and hereditaments, property and effects hereby assigned, and *sell and dispose of the same upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned*, and convert the same into money.

The second assignment bears date on the 6th of May, 1858. It is declared "to be made and entered into for the express purpose of correcting and explaining the true intent and meaning of a like indenture made and executed between the same parties, on the 4th day of January, A. D. 1858, and which said last described instrument as corrected shall read as follows:"

Then follows the body of the instrument, which is the same with that of the prior assignment, except that in the clause authorising the assignee to sell and dispose of the assigned property, the words "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned" are omitted.

The first assignment was executed only by the assignors. The second recites that it is between Henry Hicks and Asa Hicks, of the first part, and Forbes, of the second part; and it is executed by all the parties.

The Statute of Wisconsin upon the subject of fraudulent con-

veyance is substantially the same with that of the 13th of Elizabeth, chapter 5.

The Supreme Court of the State has held that such a provision as that referred to in the first assignment renders the instrument fraudulent and void as against creditors. *Keep* vs. *Sanderson*, 12 Wis., 362.

In cases like this, involving the construction of a State statute, this Court is governed by the judgment of the highest judicial authority of the State. (*Leffingwell* vs. *Warren*, decided at this term.) This ruling of the Supreme Court of Wisconsin is sustained by numerous adjudications in other States. 2 Seld., 510. 6 Seld. 691; 17 New York, 21; 21 New York, 168; 2 Duer, 533; 24 Illinois, 257; 11 Md., 173.

There are conflicting authorities upon the subject of great weight. 6 O. S., 620; 7 Paige, 272; 11 Barb., 198; 4 Sandf., S. C., 252. See also the dissenting opinion of Brown, Justice, in *Benedick* vs. *Post, et al.*, (12 Barb., 168.) The question, as an original one, is not before, us and we express no opinion upon it.

The Statute of Elizabeth was declaratory of the common law. In the absence of such legislation the common law would have accomplished the same results. Twyne's case, (3 Coke, 80. S. C., 1.) Smith's L. C., 1. *Codagan* vs. *Kennet*, (Cowp., 434.) *Wheaton* vs. *Sexton*, 1 Amer. L. C., 68; 1 Cranch, 316; 1 Binney, 514, 523; 4 McCord, 295.

It is not claimed that when the second assignment was executed any creditor had acquired a lien upon the property covered by it.

That assignment is free from the vice which was fatal to its predecessor, and is valid. 11 Illinois, 503; 16 Pick, 247; 28 Vermont, 150; 2 Ed. C. R., 289. This proposition is so clear, upon reason and authority, that it would be a waste of time to discuss it.

None of the authorities relied upon by the counsel for the appellant are in conflict with this decision.

In one of them the assignee did not join in the execution of the second instrument, and it did not appear that he had ever

assented to it. In the others, creditors had interposed and intervening rights had attached to the property.

"It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*." 4 Kent's Com., 559; 1 John. C. R., 136; 15 John. R., 571; 2 Edwards C. R., 289; 1 Sid., 133; Amer. L. C., 82.

The Court below dismissed the bill. We think there is no error in the decree, and it is affirmed with costs.

WRIGHT *vs.* BALES.

The statutory enactments of the States of the Union, in respect to evidence in cases at common law, are obligatory upon Judges of the Courts of the United States, who are bound to apply them as rules of decision.

Error to the Circuit Court of the United States for the Southern District of Ohio.

On the 31st of May, 1859, Matthias B. Wright and John Conner brought trespass on the case in the Circuit Court of the United States for the Southern District of Ohio, against Moses Bales, alleging in their declaration an infringement by defendant of a certain patent right to make and vend a draining plow of their invention. The defendant pleaded not guilty. Verdict for defendant, with costs. Plaintiff, in his exceptions, assigned, among other grounds of error, the refusal of the Court to allow Wright, one of the plaintiffs, to testify in the cause. Writ of error issued April 2d, 1860.

Mr. Lee and *Mr. Fisher*, of Ohio, for Plaintiff in Error.

By the law of Ohio, the parties to a cause are competent witnesses in it. State laws of evidence are rules of decision in civil trials at the common law before Courts of the United States. Civil Code of Ohio, § 310; Act of April 12, 1858, amending