The appeals were all dismissed for want of jurisdiction in this court.
*218] No objection was made to the *vivâ voce* examination of the witness as to the value. *On the next day—

Rodney, Attorney-General, moved the court for a continuance of these causes, and leave to take affidavits respecting the value of the property, so as to sustain the jurisdiction. This court has only decided that its jurisdiction does not appear upon the record. It is like the case of *Course* v. *Stead's Executors*, 4 Dall. 25, where the court continued the cause, and suffered affidavits to be taken, to show the value of the matter in dispute. If the court should be of opinion, that the decision of yesterday, upon the weight of testimony, differs this case from that of *Course* v. *Stead's Executors*, they will reject the motion.

Broom, contrà.—If this motion had been made yesterday, before the decision of the court upon the weight of testimony, perhaps, it might have been proper, but after the parties have put themselves on trial, upon the evidence then before the court, and the decision has been made, it is not usual to open the case, and grant a new trial, unless new evidence is suggested to have been discovered since the trial, not known to the party at the time of trial.

Marshall, Ch. J.—Cannot the United States sue out a new writ of error, and take new affidavits to show the cause to be within our jurisdiction? If so, perhaps, the court would not put the United States to that expense.

Rodney apprehended it would be final, it being an appeal, and not a writ of error.

The Court overruled the motion.

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*219] *Pawling and others *v.* United States.

Demurrer to evidence.—Delivery in escrow.

Upon a demurrer to evidence, the testimony is to be taken most strongly against him who demurs, and such conclusions as a jury might justifiably draw, the court ought to draw.[1]

A bond may be delivered as an escrow, by the surety, to the principal obligor.[2]

If one of the obligors, at the time of executing the bond, in the presence of some of the other obligors, say, "we acknowledge this instrument, but others are to sign it," this is evidence, from which the jury may infer a delivery as an escrow, by all the obligors who were then present.[3]

Error to the District Court for the district of Kentucky, in an action of debt, upon an official bond given by Ballinger, as collector of the revenue, and signed and sealed by Pawling, Todd, Adair and Kennedy, as his suretief, who pleaded that they delivered the same as an escrow to one Joseph

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[1] United States Bank *v.* Smith, 11 Wheat. 171; Fowle *v.* Alexandria, Id. 320; Thornton *v.* Bank of Washington, 3 Pet. 36; Chenowith *v.* Haskell, Id. 92; Johnson *v.* United States, 5 Mason 425; Jacob *v.* United States, 1 Brock. 521; Jones *v.* Vanzandt, 2 McLean 596; Patty *v.* Eddin, 1 Cr. C. C. 60.

[2] See Moss *v.* Riddle, 5 Cr. 351; Deindorff *v.* Foresman, 24 Ind. 481.

[3] See Dair *v.* United States, 16 Wall. 1; State *v.* Peck, 53 Maine 284; State *v.* Pepper, 31 Ind. 76; Millett *v.* Parker, 2 Met. (Ky.) 618.

Ballinger, to be safely kept; upon condition, that if Simon Ingleman and William Patton, named on the face of the bond, should execute the same as co-sureties, then the bond should be delivered to James Morrison, supervisor, on behalf of the United States, as their deed, and not otherwise; and that the same never was executed by Ingleman and Patton; yet Ballinger delivered it to Morrison, on behalf of the United States, and so not their deed.

The delivery as an escrow being traversed by the United States, issue was thereupon joined; on the trial of which, the United States demurred to the evidence produced on the part of the defendants, which consisted of the deposition of T. T. Davis, W. G. Bryant, one of the subscribing witnesses, Elijah Stapp, another subscribing witness, John P. Wagnon, another subscribing witness, and a letter from Morrison, the supervisor, to Ballinger. The depositions of Davis stated a conversation between Ballinger and Pawling, some time before the signing of the bond, in which the former told the latter, that Todd, Kennedy, Shelby, Knox, Ingleman, Logan, Lewis and Adair had agreed to be security for him; upon which, Pawling also agreed to become his security, but upon the express condition, that the other persons also should join in the bond. It also stated a subsequent conversation between the deponent and Todd, before signing the bond, in which the latter denied, that he had agreed to become Ballinger's surety, but said, that he should not be apprehensive of danger, if all the men whom Davis had named would join in the bond. The deposition of Bryant stated, that he saw Pawling, in the presence of Ballinger, sign the bond, on condition *that Kennedy, Todd, Adair, Davis and others, whom the witness did not recollect, should also sign the bond; and he understood that Pawling was to be exonerated, if they did not. The deposition of Elijah Stapp stated, that he saw Pawling, in the hearing of Ballinger, acknowledge the bond as his act and deed, upon condition that others mentioned should also sign it. The deposition of Wagnon stated, that when Todd, Adair and Kennedy signed the bond, Todd, in the presence of the other two, after inserting in the bond the names of other persons who he said were to sign it, called upon the witness to take notice, that others were to sign it, and said, "We acknowledge this instrument of writing, but others are to sign it." The letter from Morrison to Ballinger said, "I have received your favor by Mr. Davidson, who carries back your bond; not that I require more securities, but that you appeared anxious to have more; those who have already signed, are very sufficient." It was admitted by the attorney for the United States, that the names of Thomas Kennedy, John Adair, Simon Ingleman and William Patton, inserted in the body of the bond, as obligors, were in the handwriting of the defendant Todd. [*220

This evidence, upon the demurrer, was, by the court below, adjudged insufficient. The defendants, the sureties, took a bill of exceptions to the refusal of the court to suffer Ballinger, the principal obligor, to be examined as a witness for them, they having severed in their pleas. But as that question was not decided by this court, it is deemed unnecessary to state the arguments of counsel on that point.

Pope, for the plaintiffs in error.—Upon a demurrer to evidence, it is a general rule of law, that the evidence must be taken most strongly against

the party demurring; and that the court ought to infer everything, which a jury could reasonably have inferred from the testimony. *Cocksedge* v. *Fanshaw*, 1 Doug. 134 (3d ed.); *Stephens* v. *White*, 2 Wash. 210-11. In the present case, there can be no question as to the defendants, Pawling and
*221] Todd; the only possible doubt *which can be raised is, whether the testimony of Wagnon supports the pleas of Adair and Kennedy.

Rodney (Attorney-General), for the United States, contended, that the delivery as an escrow ought to have been to a third person, and not to Ballinger, the principal obligor.

Pope, in reply.—The law of the plea is admitted by the joining of issue upon the fact. No exception can be taken to the legality of the defence, if the facts of the plea are found to be true. Courts ought to lean against demurrers to evidence, because they take the cause from the jury, which is the proper tribunal to decide the facts of the case, and throw that burden upon the court, whose only duty it is to decide the law. Demurrers to evidence are also extremely inconvenient in practice, especially, demurrers to parol testimony, which consume a vast deal of time.

February 27th, 1808. MARSHALL, Ch. J., delivered the opinion of the court as follows:—In this case, two points are made for the consideration of the court. It is contended by the plaintiffs in error, 1st. That judgment on the demurrers to evidence should have been rendered for the defendants in the court below. 2d. That Joseph Ballinger ought to have been admitted as a witness.

The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which
*222] he demurs, *and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw.

The point in issue between the parties was the delivery of the instrument on which the suit was instituted. The plaintiffs below contending that it was delivered, absolutely; the defendants, that it was delivered as an escrow. The bond, upon its face, purports to be delivered absolutely; and it is not to be doubted, that obligees would be much more secure against fraud, if the evidence that the writing was delivered as an escrow, appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed by this court.

The subscribing witnesses to the bond were examined to prove its delivery. Henry Pawling executed it, at one time; the other defendants, Kennedy, Todd and Adair, at a different time. With respect to Pawling, the testimony is as complete as can be required. William G. Bryant deposes that Pawling signed the bond, on condition that other persons, whom he named, should also sign it. The witness understood, that if those other persons should not sign it, Pawling should be exonerated. Elijah Stapp, the other subscribing witness to the signature of Pawling, deposed that "he saw Pawling acknowledge it as his act and deed, upon condition that others, whom he mentioned, should also sign it." These are the subscribing witnesses to the bond, and certainly a jury believing them could not have

avoided declaring, by their verdict, that the bond was delivered on condition. That condition not having been performed, the bond, as to Pawling, remains an escrow.

The testimony, with respect to the other defendants, is less positive. The witness, John P. Wagnon, was *called in to attest the bond. [*223
Thomas Todd, one of the defendants, then sat down and inserted in the body of the bond the names of other persons who, he said, were also to execute the instrument which he then held in his hand. Some distinction was taken at the bar between the case of Todd and that of the other defendants. But the court is of opinion, that no such distinction exists. The other defendants said nothing. They did not even acknowledge their signatures. Todd holding the instrument in his hands, called upon the witness to take notice that "we" (in the plural) "acknowledge this instrument, but others are to sign it." The two other obligors being present, and making no other acknowledgment, are clearly to be considered as speaking through Todd, and executing the bond on the terms on which he executed it. Their condition, then, is the same. It is either an escrow, or a writing obligatory, with respect to all of them.

A jury might certainly have found the issue in favor of the plaintiffs below, and a court would have been well satisfied with their verdict. But might they not, without going against evidence, have found the issue in favor of the defendants below?

When words are to be proved by witnesses, who depend on their memory alone, the precise terms employed by the parties will seldom be recollected, and courts and juries must form their opinions upon the substance and upon all the circumstances. Now, to what purpose did the defendants call upon the subscribing witness to take notice that others, as well as themselves, were to execute the writing? To what purpose did they qualify their acknowledgment with this declaration? It could not be, in order to show that they depended on Ballinger to procure additional securities, for that was an affair between him and them, of which it was perfectly unnecessary to call on the witness to take notice, if it was to have no influence on the particular fact he was required to attest. There is certainly strong reason for believing that the obligors considered that declaration as [*224
*explaining and effecting the act with which they connected it.

It is also of some importance, that the defendant Todd had previously declared, that he should not be apprehensive of becoming a security for Ballinger, provided others, whom he named, should also become securities, and that he inserted the names of others in the bond, in the presence of the witness.

Although the judges who compose this court might not, perhaps, as jurors, be perfectly satisfied with this testimony, they cannot say, that a verdict would not be received, or ought not to be received, which should find the issue in favor of the defendants below. They cannot say, that such a verdict would be against evidence. Thinking so, the court is of opinion, that the judgment on the demurrer ought to have been in favor of the defendants below.

It is unnecessary to give any opinion on the second point. The judgment of the court for the district of Kentucky is to be reversed.

Judgment reversed.