to amend their pleadings, and if need be to take further proofs. Error was also committed by the Circuit Court in affirming the decree of the District Court, as it is plain it should have been reversed. For these reasons the decree of the Circuit Court is in all things REVERSED, and the cause remanded for further proceedings

IN CONFORMITY TO THIS OPINION.

CORNETT *v.* WILLIAMS.

1. Under the act of July 2d, 1864, providing that in civil actions in courts of the United States there shall be no exclusion of any witness, "because he is a party to or interested in the issue tried;" witnesses may, other things allowing, testify (without any order of court) by deposition. And if not satisfied with a deposition which they have given, have a right, without order of court, to give a second one.
2. What evidence so far tended to prove, on the part of a person who, during the late rebellion, removed his slaves from loyal parts of the country to parts in rebellion, a purpose to sell them in these last, and justified a charge on an assumption of possibility, that the jury might find the purpose to have existed. This matter passed upon.
3. When, under the what is known in Texas as its "Sequestration Act," a person has brought suit to recover land, and the marshal, in pursuance of the writ of sequestration, takes possession of the land, it is in the custody of the law. But when replevied (as the said act allows it to be), it passes from the possession of the law into the possession of the party replevying.
4. The rule established by this court as to the introduction of secondary evidence—that it must be the best which the party has it in his power to produce—is to be so applied as to promote the ends of justice and guard against frauds, surprise, and imposition. The court has not gone to the length of the English adjudications, that there are no degrees in secondary evidence. Hence, where the records of a court were all burnt during the rebellion, what appeared to be a copy of an officially certified copy was held properly received; the certified copy, if any existed, not being in the party's custody or plain control, and there being no positive evidence that it existed, though there was evidence tending to show that it did. There is nothing in the act of Congress of March 3d, 1871 (16 Stat. at Large, 474), providing for putting in a permanent form proof of the contents of judicial records, nor in the statute of Texas of 11th

February, 1850 (Paschall's Digest, Article 4969), on the same subject, which changes this rule.

5. Where a county court having jurisdiction to authorize a sale of a decedent's estate for his debts does authorize it, and the sale is made, the sale must be presumed in this court to have been regularly made. In the absence of fraud, the question of its propriety is not open to examination otherwise than in an appellate court in a proceeding had directly for that purpose.

6. Certain instructions quoted further on (*infra*, pp. 235–238) on the subject of fraud approved; though the case was declared hardly sufficient to require them.

ERROR to the Circuit Court for the Western District of Texas, in which court Henry Williams brought trespass to try title against one Cornett, to settle the question of ownership of a certain league of land in Bastrop County, in the said State, which had formerly belonged to Samuel Williams.* The plaintiff claimed under a sale made by an administrator of the estate of the said Samuel, through the proper court, for payment of debt; the defendant through deeds from his heirs at law. The more particular case was thus:

Samuel Williams, of the said Bastrop County, and engaged in business there, having become indebted to his brother Henry, resident in Baltimore, Maryland, the said brother brought suit against him, and on the 20th June, 1850, obtained a judgment against him in the District Court of the United States in Texas for $26,736; and on the 12th July, 1858, to keep alive the evidences of the debt, brought a second suit on this judgment so obtained, and recovered judgment on it for $43,936. These facts were testified to by W. B. Ballinger, Esq., a member of the bar of Texas of high standing; his "office registry" being produced as the evidence of the dates and amounts of the two judgments;

* These two brothers were called, in different parts of the record,—the last Samuel May Williams, S. M. Williams, Samuel M. Williams, and Samuel Williams; the other Henry H. Williams, Henry Williams, and in other ways. There being two other parties Williams (J. H. and W. H.) in the case, I have spoken in my statement of the case and in the report of the argument, of the two brothers constantly by their first names only; that is to say, as Samuel and Henry.

the judicial records, as hereafter mentioned, having themselves been destroyed.

Soon after the entry of the second judgment Samuel Williams died, leaving this league of land, and some other lands; and not long afterwards—about the year 1859—Henry being in Texas, applied to Mr. Ballinger for counsel as to what further steps, if any, he had best follow to secure his debt against the estate of his brother now lately deceased. Mr. Ballinger told him to get a certified copy of the judgment, make affidavit to it, and present it to the administrators of the estate of Samuel Williams; and supposed, as he testified, that he would do this.

This advice of Mr. Ballinger was founded apparently on what seems to be the law of Texas,* under which any claim against the estate of a deceased person, in order to be ranked as a just debt against it, must be duly sworn to and presented to the administrator for allowance, *and to the chief justice (who is the probate judge) for approval.*

It did not appear that Mr. Ballinger ever saw this *certified* copy, such as he had directed Henry Williams to get and present; but another witness (F. W. Chandler), a member of the bar, testified that *he* had had in his possession such a copy of the judgment; that J. H. Williams (the son of Henry Williams) had made several copies of it in his presence; and that the original (that is to say, the copy officially certified) had been lost in the mail in crossing Cummins's Creek. One of the copies thus made was sent to Mr. Ballinger; but Mr. Ballinger could not say that the copy was accurate, and noted that the amount found due by the clerk and that for which the judgment was given varied; Mr. Ballinger's own memorandum, as found in his office register, agreeing in amount and date with the latter. The copy thus sent to Mr. Ballinger, and which was received in evidence under objection, set forth that the clerk of the court in which the judgment was had, had assessed the damages at $43,966.34; and that it was, therefore, considered by the court that the plaintiff recover of the defendant $43,936.34.

* Act of March 20th, 1848, Paschal's Digest, Article 1311.

Statement of the case.

In 1861 the civil war broke out, lasting till the spring of 1865. In 1862 all the original records of the Federal courts in Texas were burned.

Early in the war, J. H. Williams, a son of Henry, already mentioned as of Baltimore, went to Texas, and with his cousin H. H. Williams, a son of Samuel, bought out the right of the other heirs of Samuel to this league of land, and went on it to live. Having done this the two cousins formed partnership, built a cloth factory, and made a contract with a the Confederate government to supply to it military cloth for the Confederate troops. J. H. Williams stated in testimony that he was at the time aware of the incumbrance of his father's judgment on the land, but considered the estate of his uncle so wealthy "that any idea of the land being needed to pay a debt of the estate never occurred to him but as a possibility too remote to be worth consideration."

While the cousins, J. H. and W. H. Williams, were engaged in manufacturing military cloths for the Confederate troops, under their contract, already mentioned, with the Confederate government, a certain Cornett appeared, in October, 1863, in Texas, with a large number of slaves, some mules, and a wagon. Cornett had been a resident and a slaveholder in Missouri, disaffected to the Federal government; and the testimony tended to show that in the autumn of 1861, that State being in a very disturbed condition, owing to the war, and the government troops gradually driving out those of the Confederate States, a son of Cornett said to his father that the Federal army was approaching; that if they did not remove their slaves soon they would lose them all; that thereupon Cornett got his slaves together, and handcuffing or tying with strings some who hid themselves and did not want to go, set off for the South, and after about five weeks of forced journeyings, following the Confederate troops night and day, arrived in Texas; that he hired some of his slaves out for short times, sold certain ones, and in the autumn of 1863 sold all the rest (the bulk of them), and the mules and wagon, to the cousins Williams, they having made the purchase, as one of them tes-

tified, "for the purpose of enabling us to comply with our contract with the Confederate government;" "a thing," continued the witness, "which the said Cornett knew at the time of our purchase and must have known before, it having been matter of common notoriety; and he having further known it from our own statements made to him at the time."

By way of payment for the negroes, mules and wagon, the cousins Williams executed, in February, 1864 (though the sale was in the autumn of 1863), their note to Cornett for $9600 (the $9000 having been the price of the negroes and the $600 the price of the mules and wagon), and to secure the payment of the note conveyed the league of land that they had bought from the heirs of Samuel Williams to one Wildbahn, in trust to secure their note to Cornett, and with power in the trustee to sell if the note was not paid.

In the spring of 1865 the supremacy of the Federal arms became complete; slavery was abolished, and the slaves bought by the cousins Williams of no more value to them.

Henry Williams, the father of J. H. Williams, who was still alive and had been during the war at the North, constituted, in 1865, his son, J. H. Williams, yet in Texas, his general agent there; and peace being now restored and intercourse between all parts of the country, the son (*who, as already mentioned, had with his cousin mortgaged the league to Cornett, to secure the purchase-money of the slaves*), acting as his *father's* agent, at the January Term, 1866, applied through counsel, Mr. Mott, to the County Court of Galveston, for an order that the administrator of Samuel Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel, to the amount of $40,000; *which said judgment was allowed and approved as a valid claim against said estate, in October*, 1859, with eight per cent. interest per annum," &c.

The application thus made to the court was under and in pursuance with the 1315th article of Paschal's Digest, which

declares that when an administrator shall neglect to apply for an order to sell sufficient property to pay the claims against the estate that have been allowed and approved, or established by suit, such executor shall be required by the chief justice, on the application of any creditor *whose claim has been allowed and approved*, or established by suit, to present a statement, &c.; and on proof that a necessity exists for a sale to pay debts, &c., it shall be the duty of the chief justice to order such sale to be made, having jurisdiction of the case by application made.

The administrator appeared at the same term, and, answering, admitted it to be true that the said Henry, on the 28th of June, 1850, did recover a judgment in the United States District Court at Galveston, against the decedent, for $26,736; that it was not paid at the death of the decedent; that it was presented for allowance against the estate with the usual affidavit and allowed; *that he could not say whether it was approved by the chief justice of Galveston County;* that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry in the United States District Court, on the 28th day of June, A.D. 1850, for the sum of $26,736, with interest from date of rendition; and it appearing to the court *that this claim has been duly allowed*, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," &c.

The premises in controversy (*being the same that the son had with his cousin conveyed to Cornett*) were then described, the

mode and time of advertising, and the place and terms of the sale were prescribed, and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry Williams, for the sum of $60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March Term the court confirmed the report and ordered the administrator to make a deed to the purchaser upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for $60,600, being the amount of the purchase-money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day he executed a deed of conveyance to the said Henry. It recited all the proceedings touching the sale upon which it was founded.

On the 2d of January, 1868, the administrator executed to the said Henry another deed for the same premises. It recited more fully the proceedings relative to the sale, and set out that there were certain clerical errors of dates in the former deed, and that the second deed was made to correct them.

The counsel (one Mott), who, as counsel, attended to getting this order of sale, and was examined as a witness for the plaintiff, was asked whether in getting the order he had before him "the claim" of Henry Williams, on which the order was based. He replied:

"I have not before me the claim alluded to. I presume it is among the papers in the matter of the administration of Samuel Williams, deceased, on file in the county clerk's office, in Galveston County."

He testified further, in reply to other interrogatories:

"The administrator contested my application for order of

sale, and the matter was referred to the court upon the proof. The matter was one of minor importance, as far as I was concerned, and my recollection of the facts is not clear. My impression is that the proof was mostly oral. I proved by one or two witnesses that judgment had been obtained in the United States District Court by Henry Williams against Samuel Williams, and also proved the destruction of the United States court records by fire. And upon the proof the chief justice adjudicated the matter and gave me the order of sale."

J. H. Williams—the son of Henry, and who had acted as his agent in procuring through Mr. Mott this sale—was also examined, and was asked on a cross-interrogatory:

"How did it happen that, as agent for your father, you managed to have your own homestead sold by order of the Probate Court of Galveston County? Explain particularly why you permitted its sale, when you had warranted the title of it to Cornett, and knew that the sale would injure him?"

He answered:

"My father, for the first time, in 1865, constituted me an agent for the management of his affairs in Texas. I had the interests of my mother and brother to consider as well as my own. I was an enthusiastic believer in the Confederacy, and never expected to see its fall, and I entered into the transaction with Cornett in good faith at the time. The fall of the Confederacy came, however, and with it the destruction of the value of the property I was to have held from Cornett, and a totally new set of laws, of which I had to take the evil, and felt it nothing more than right to extract from them, in return, whatever of good I could. I did not regard the trade as legally binding upon me. My uncle's estate was nearly bankrupted by the results of the war, and this league of land was the only piece of property belonging to the estate. The administrator seemed glad to avail himself of my offer and thus get rid of a large claim, the settlement of which in any stricter way would have ruined all the parties concerned in the estate, and have seriously embarrassed the payment of other debts due by it. I knew that in any event, *my* interest in the land was gone. My sympathies were of course with the rights of my father, mother, and my

brother. I knew the judgment through which, or to satisfy which, my father's title to the league of land in question was obtained was a judgment for a just and *bonâ fide* debt, while I did not feel that Cornett was morally entitled to anything more than a fair rate of hire for his negroes for the time we held them, which was offered him and refused."

In this state of things—that is to say, the trustee Wildbahn having sold the land, and the title derived from the heirs of Samuel Williams having become vested in Cornett, —Cornett, on the 7th of December, 1867, brought a suit (trespass to try title) against the cousins J. H. and W. H. Williams, still in possession; and a writ known in Texas as a writ of sequestration—by which the marshal takes possession of the land and holds it in his official capacity until one party or the other give a bond and replevy it—was issued, under which the marshal took possession of the league of land. To this suit Henry Williams did not interplead as a defendant.

The statute of Texas on the subject of a landlord's interpleading is:

"When a tenant is sued for lands of which he is in possession, the real owner or his agent MAY enter himself on the proceedings as the defendant in the suit, and SHALL be entitled to make such defence as if he had been the original defendant in the action."

On the 19th of February, 1868, Cornett replevied the land.

On the 19th of February, 1868, Henry Williams brought the present suit against Cornett, alleging in his declaration "that he was, *on the 1st day of January*, 1868, and a long time before that date and still is owner," &c., and that the defendant, "*on the 1st day of January*, 1868, with force and arms entered," &c.

On the 19th of June, that is to say, after the present suit was brought by Henry Williams against Cornett, Cornett recovered judgment against the cousins W. H. and J. H. Williams, on *his* suit against them.

Statement of the case.

In the *present* case *two depositions* of Henry Williams, the plaintiff in the case, were read under objection; one had been taken in June, 1868, the other in January, 1869. Both were taken, as respected general formalities, under the thirtieth section of the Judiciary Act of 1789, prescribing the mode of taking depositions generally in the Federal courts; and, though the depositions of the plaintiff himself, were considered by the plaintiff's counsel as coming within the provision of the act of July 2d, 1864, authorizing parties to a case to testify;* an act in these words:

"SECTION 3. The sum of $100,000 is hereby appropriated . . . for the purpose of . . . bringing to trial and punishment persons engaged in counterfeiting treasury notes, bonds, or other securities of the United States. *Provided*, That in the courts of the United States there shall be *no exclusion of any witness* on account of color, *nor in civil actions because he is a party to or interested in the issue tried.*"

One provision of the thirtieth section of the Judiciary Act of 1789, under which the depositions were taken, after prescribing the mode in which the magistrate, taking them, is to take them, says:

"And the depositions so taken shall be retained by such magistrate until he deliver the same, with his own hand, into court; or shall be . . . by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

The substance of the testimony of Henry Williams was that the deed of trust made by his son and nephew of the lands to Wildbahn for the security of Cornett, had been made wholly without his knowledge or authority, and that he had never in any way ratified what they had done.

The court charged *inter alia* thus:

"1. With regard to the trust-deed, I instruct you, that if you believe that Cornett brought the slaves from Missouri in August or September, 1861, during the war, for the purpose of disposing

* 13 Stat. at Large, 351.

of the same, being a citizen of Missouri, that it was an unlawful act on his part, contrary to his duty as a citizen of the United States and of Missouri, and that his sale of the slaves here was a transaction void in law, and cannot be enforced in the courts; and if the consideration of the trust-deed was illegal and void, the deed itself was void, and no title can be derived under it by Cornett.

"2. It is argued by the defendants that the plaintiff, Henry Williams, is concluded by the sequestration suit, because the defendants were tenants under him, and one of them was his general agent in Texas. But I instruct you that he is not concluded. He was no party to the suit, and did not undertake the defence of it. A landlord may, if he chooses, come in and defend an action brought against his tenant for the land, but he is not bound to do it. The tenant may be under such complications that the landlord's defence would be prejudiced thereby. The landlord, if he prefer, may await the event of the action, and if his tenant is ousted may then bring his own action, as has been done here, and try his title on its own merits, unembarrassed by the peculiar complications in which his tenant may have been involved.

"3. To the title of the plaintiff, it is objected by the defendant, that the judgment-debt of Henry Williams was not duly presented, allowed, and approved, and that the order of sale was, therefore, void, and that the deed executed by the administrator was also void.

"But the validity of the order of sale cannot be questioned in this collateral way. This is not a revisory proceeding for examining the regularity or legality of that order. This court cannot set it aside nor inquire into any errors committed by the Probate Court in making it, if there were any. All it can do is to ascertain whether the Probate Court had jurisdiction of the matter. Of this I have no doubt. It is conceded that the court had jurisdiction of the succession of Samuel Williams, of which matter this order of sale was a part. But if that was not sufficient to support the order, we have the fact proved that there was a subsisting judgment; that it was duly presented to the administrator for allowance, and sworn to, and admitted, and registered by him; that the plaintiff applied to the court for an order calling upon the administrator to show cause why he should not apply to have the land sold to pay the judgment,

alleging that it had been duly presented, allowed, and approved; that the administrator appeared and answered the application, and that a hearing was had thereupon, and the order made for a sale of the land; that the sale was made, reported, and confirmed, and a deed ordered to be given, which was given accordingly. . . . Having jurisdiction of the case by the application made, it was the duty of the Probate Court to ascertain whether the exigency existed which justified or required an order of sale to be made. It will be presumed, when brought up collaterally, that the court did its duty, and its judgment will be accepted and received without further question.

"4. I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which Samuel Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it.

"If the plaintiff obtained the deed for the purpose of defrauding the creditors of W. H. and J. H. Williams, and especially Cornett, then the plaintiff cannot recover. This is the principal question for you to decide, viz., whether the order of sale made by the Probate Court was procured by the plaintiff, in combination with W. H. and J. H. Williams, for the purpose of defrauding Cornett out of his debt. In deciding this question, you will assume that the judgment of the plaintiff against his brother, Samuel Williams, was a good and valid one. If they agreed to it, none but the creditors of Samuel Williams can question its validity. It cannot be assailed in this suit.

"You are also to assume that the judgment was duly presented to the administrators of Samuel Williams, and allowed by them, and approved by the proper judge of the Probate Court. These points must have been decided, and are concluded by the action of the Probate Court on the application for an order of sale.

"You are also to remember that the plaintiff, having a valid and legal claim against the estate of Samuel Williams, had a right to have any portion of the latter's estate applied to the payment of it, and whoever purchased any part thereof purchased subject to that right.

"You are also to remember the rule of law that fraud must be proved, and cannot be presumed. If, however, it be proved to your satisfaction that either the plaintiff or his agent (for he is bound by the acts of his agent), in collusion and combination

with W. H. and J. H. Williams, or with the administrator, procured the order of sale to be made in order to defraud Cornett, you will find for the defendant. If it be not so proved, you will find for the plaintiff."

Verdict and judgment having gone for the plaintiff, the defendant brought the case here, assigning for error:

1. The admission of the two depositions of Henry Williams.

2. The construction given (in the first item above quoted of the charge) to the deed of trust under which the sale of the land was made to Cornett, the defendant.

3. The effect given (in the second item above quoted of the charge) to the proceedings and judgment in the sequestration suit of *Cornett* v. *J. H. and W. H. Williams*, and not in treating it as a former recovery for the land now in controversy.

4. The permission to introduce such evidence as was introduced, to show the existence, destruction, and contents of the two judgments alleged to have been given in favor of Henry Williams against his brother Samuel.

5. In the view which the court took (in the third item above quoted of its charge) of the jurisdiction of the Probate Court, to order and confirm the sale to Henry Williams, the plaintiff, of the land in suit.

6. In that part of its charge (the fourth item of it above quoted) on the issue of fraud.

Mr. C. S. West (*a brief of Messrs. G. F. Moore and John Hancock being filed*), *for the plaintiff in error:*

1. *The court erred in permitting the two depositions of Henry Williams to be read to the jury.*

The act of July 2d, 1864, removed the disability of a party to a suit to give evidence in it, and he can now testify orally, as any other witness could at common law; but he cannot testify by deposition, because that mode of taking evidence is in derogation of the common law. The power of examining any witness by deposition is purely statutory;

and no statute has yet been made for taking the depositions of parties to suits in their own behalf.

The thirtieth section of the Judiciary Act of 1789, authorizing the taking of depositions *de bene esse*, evidently intended, by its terms, that after the taking of the deposition, it should be returned into court, and remain sealed until published in open court. After that was done, and the deposition opened in the manner required by law, no other deposition of the same witness could be taken unless for good cause shown to the court, and on its order made. The practice adopted in the case at bar enables a party, after he has had time to weigh the effects of his evidence, to amend and supply what it yet needs to carry the case. Such a practice leads to perjury, and is not conducive to the ends of justice. The statute of 1789, authorizing evidence to be taken *ex parte*, has always been rigidly construed.*

2. *The court erred in its charge as to the construction of the deed executed by the trustee to Cornett, for the land claimed.*

There was no evidence whatever "that Cornett brought the slaves from Missouri in August or September, 1861, during the war, *for the purpose of disposing of them.*" The evidence showed that Cornett's sympathies were with the Confederates, and that when their forces abandoned one portion of Missouri, and his immediate home became the theatre of active war, he moved South along with the retreating Confederate forces, and came with his property to Texas, not to sell it or "dispose of it," but to keep and preserve it, and that he did keep possession of it for several years. So far as it showed, the idea of selling the slaves to Williams did not occur to him until the contract of sale was made in September, 1863. The court, therefore, charged upon a state of facts on which there was no evidence. This is error.†

3. *The court erred in the effect which it gave in its charge to the*

* Walsh *v.* Rogers, 13 Howard, 286; Garner *v.* Cutler, 28 Texas, 182.

† Michigan Bank *v.* Eldred, 9 Wallace, 544; Ward *v.* United States, 14 Id. 28.

proceedings and judgment, in the sequestration suit of Cornett v. *J. H. and W. H. Williams.*

The proceedings in the sequestration suit were introduced in evidence for two purposes: one, to show a former recovery that was so binding and conclusive on the plaintiff, Henry Williams, as to prevent his obtaining a judgment in his favor in the present action. The other, to show that at the time this suit was brought the land in controversy was in the custody of the law, and that no action of trespass or for its recovery could be brought until it ceased to be so.

When the suit was brought, W. H. Williams was the tenant of Henry Williams, and J. H. Williams was not only his tenant but was his son and general agent in Texas, and was, as such agent, in possession of the land in suit, in conjunction with W. H. Williams, who was his brother-in-law and first cousin.

4. *The court erred in permitting the existence, destruction, and contents of the two judgments alleged to have been rendered in favor of Henry Williams against Samuel Williams, the one on the 28th of June*, 1850, *for* $26,736, *and the other on the 12th of July*, 1858, *for* $43,936.34, *to be established by the parol testimony of Messrs. Ballinger, Mott, and Chandler.*

The evidence of Mr. Ballinger, disclosing that he was consulted as to procuring a certified copy of the judgment, in 1859, to be sworn to, and presented as a claim against the estate, and the evidence of Mr. Mott, which shows that it was on that claim that Henry Williams asserted a right to be ranked as a creditor, make it apparent that if it ever was approved and ranked as a debt, there was a certified copy of the judgment unaccounted for. Mr. Mott testified that he supposed that "the claim" (by which he meant the certified copy that on the advice of Mr. Ballinger, Henry Williams was said to have obtained and filed) was among the papers of Samuel Williams's estate. Doubtless, if obtained and filed, it was so.

The statute of the United States of the 3d of March, 1871,*

* 16 Stat. at Large, 474.

being an act relating to lost records, in its first section authorizes the loss, when proved, to be supplied by a *duly certified copy*, when the same can be obtained.

The act of the State of Texas of the 11th February, 1850,* which provides for the mode and manner of proving lost records, is almost identical in its requirements with the act of Congress above cited, and provides that when "records are lost or destroyed the same may be supplied by copies *duly certified*."

As to the alleged copy of a certain certified copy of the judgment supposed to have been lost in Cummins's Creek. Even conceding that the copy shown to Mr. Ballinger and received under exception was a correct copy of the certified copy, which the witness, Chandler, had had, and which he says was lost in Cummins's Creek (a great concession for us to make), still nothing is proved. The alleged certified copy, had it been produced, contradicts itself and on its face shows its inaccuracy and untrustworthy character. It asserts in one part that the judgment was for $\$43{,}966\frac{34}{100}$, and asserts in another that it was for $\$43{,}936\frac{34}{100}$; a different sum.

If the plaintiff had shown that the certified copy of the judgment which Mr. Chandler had, and which was lost, was the same one that Mr. Ballinger in 1859 had advised him to procure (and which, from Mott's evidence, was ranked as a claim, and in satisfaction of which the land in suit was sold), and had also accounted for its being in his possession, instead of being on the files of the Probate Court of Galveston County, with the other vouchers of Samuel Williams's estate, it might then have been proper to allow the evidence to be used, loose and unsatisfactory as it was. But, under the circumstances, the objection taken below should have been sustained.

5. *The court erred in permitting the administrator's deeds of the 15th of April*, 1866, *and of the 2d of January*, 1868, *to Henry Williams, to be read in evidence; and in the charges given concerning the legal effect of those deeds.*

* Paschal's Digest, Article 4969.

Numerous reasons might be assigned in support of this view. It is enough to say that the formalities and acts required by law to give the Probate Court jurisdiction and power to order the sale were not shown; because,

1. There does not appear to have been made to the court, or brought before it, a statement or exhibit of the condition of the estate before the order was made, as required by law in cases where the administrator declines to sell, and a sale is sought to be had, on the motion or application of a creditor.

2. It affirmatively appears on the face of the record that the alleged debt of Henry Williams, if any existed, was not established in the mode required by law; the record not disclosing that such a debt was duly sworn to, *allowed by the administrator, and approved by the chief justice*, the order of sale reciting the sale to have been made "on a claim *allowed*," and not on a claim *allowed by the administrator and approved by the chief justice.*

3. The judgment debt for which the court ordered the land to be sold, was one for $26,736, with interest from the 28th of June, 1850, to date, and is a different debt from the judgment debt of $40,000, set up by the plaintiff in his application for a sale.

As to the administrator's second deed (that of the 2d of January, 1868), in addition to all the foregoing objections, it may be further urged that the same was void, and incompetent to establish any right; because,

1. No order of court was produced showing any authority in the administrator to execute such an instrument.

2. Because, having already executed a deed (that of April 15th, 1866), he was, as to this matter, *functus officio*, and had no power, without an order of court, to execute another deed for the same property.

6. *The court erred in its charge to the jury on the issue of fraud, in obtaining the order of sale in the Probate Court of Galveston County.*

There is no special objection to the legal propositions laid down in general terms in this portion of the charge. The

vice in it is, that it restricted the range of inquiry of the jury to so narrow a space as to leave practically nothing to investigate.

The fraud alleged to have been attempted was a sale of the land in suit, to defeat the previously acquired rights of Cornett, under the order of the Probate Court, obtained by fraud, on an old, obsolete debt, which, after sleeping peacefully for sixteen years without so much as an execution having issued, without being approved and ranked as a debt, by collusion between the defendant in error, acting through his son and agent, and the administrator, was revived and made the means of defrauding Cornett of his property.

In such an attitude of the case, for the court to inform the jury that neither the validity nor character of the original debt, nor the question as to whether it was a subsisting and approved claim against the estate, had anything to do with the question of fraud, was practically equivalent to forbidding inquiry at all, or at least restricting it in such a narrow compass as to defeat the object of such inquiry.

In *The Duchess of Kingston's Case*,* Chief Justice De Grey held, that extrinsic evidence could be used to show fraud, remarking—

"In civil suits all strangers may falsify for covin, either fines, or real, or feigned recoveries, and this, whether the covin is *apparent* on the record or *extrinsic*."

In *Butler* v. *Watkins*,† it is said, "that in matters of fraud, large latitude is to be given to the admission of evidence."

Messrs. A. J. Hamilton and J. A. Buchanan (*a brief of Mr. Jackson being filed*), *contra*.

Mr. Justice SWAYNE delivered the opinion of the court.

There was no error in admitting in evidence the two depositions of H. H. Williams. The objections that he was a party to the record, and interested in the event of the suit,

* 2 Smith's Leading Cases, 7th American edition, 653.

† 13 Wallace, 457.

were obviated by the third section of the act of July 2d, 1864.* He was thus placed upon a footing of equality with all other witnesses, and it was competent for him to testify in the case orally or by deposition. The depositions were taken and certified in conformity to the thirtieth section of the act of 1789.† If the deponent was not satisfied with his first deposition, he had the right to give a second one. No order of the court was necessary in either case. The only objections insisted upon are that the statute does not authorize a party to testify by deposition if he can orally, and that if he can by deposition, the right was exhausted by the first one, and that the second one was taken without authority of law. Both objections are without foundation. The statute is remedial and to be construed liberally. We are aware of no case in which it has been held that where a witness has given one deposition in an action at law, he cannot for that reason give another without the sanction of the court. Such a proposition has the support of neither principle nor authority.

The instruction given to the jury touching the trust deeds executed by W. H. and J. H. Williams to Wildbahn, the notes they were given to secure, and the sale by Cornett of the slaves, which was in part the consideration of the notes, was well warranted by the state of the evidence and was correct. It was objected to only upon the ground that the evidence did not tend to prove that the slaves were removed from Missouri to Texas for the purpose of selling them in the latter State, and that hence the instruction, even if correct as matter of law, was, with reference to the case, an abstraction, and must necessarily have had the effect of confusing and misleading the minds of the jury. An examination of the record has satisfied us that the evidence was abundantly sufficient to raise the question of intent in the removal of the slaves, and to make it the duty of the court to say to the jury what was said upon the subject. It is not objected that the rule of law was not correctly stated.

* 13 Stat. at Large, 351.

† 1 Id. 89.

What was done in the suit between Cornett and J. H. and W. H. Williams in no wise affected the rights of H. H. Williams in this action. The marshal seized the premises, and Cornett gave a replevin bond pursuant to the statute of Texas. While the property was in the hands of the marshal it was in the custody of the law. When Cornett gave the bond the premises passed from the custody of the law into his possession, and they were in his possession when this suit was instituted. The bond was given to enable him to effect that result, and it was accomplished. The bond took the place of the property and represented it. The premises were as much in his possession as if no litigation was pending and he had acquired possession in some other way. The defendant in error, having declined to become a party to that suit, everything done in it was, so far as he was concerned, *res inter alios acta.*

The secondary proof of the judgment in favor of H. H. Williams, against Samuel M. Williams, was properly admitted. The original record was destroyed by fire in the year 1862. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed the damages at "forty-three thousand nine hundred and *sixty*-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred and *thirty*-six dollars and thirty-four cents," &c. It was satisfactorily proved *aliunde* that *thirty*, instead of *sixty*, was correct, the latter being a mistake of the copyist.

The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise, and imposition.* The copy here in question was properly admitted.† This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence.‡

The act of Congress of March 3d, 1871,§ provides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes. The statute of Texas upon the subject of proof in cases of lost records,‖ has also been referred to in this connection. There is nothing in either the act of Congress or the statute in conflict with the action of the court we have been considering.

The most important question in the case relates to the proceedings of the County Court of Galveston County, touching the sale and conveyance of the premises in controversy by the administrator of Samuel M. Williams to H. H. Williams. The plaintiffs in error insist that those proceedings were *coram non judice* and void. The defendant in error maintains that they were regular and valid, and that if there be any error or defect, the court having had jurisdiction, its proceedings could not be collaterally assailed upon the trial of this cause in the court below. This renders it necessary to examine the case in this aspect. The record shows the following facts: On the 28th of June, 1850, H. H. Williams recovered in the District Court of the United States held at Galveston, against Samuel M. Williams, then living, a judgment for $26,736. And on the 12th of July, 1858, another

* Renner *v.* The Bank of Columbia, 9 Wheaton, 597; 1 Greenleaf on Evidence, § 84 and note.

† Winn *v.* Patterson, 9 Peters, 676.

‡ Doe *d.* Gilbert *v.* Ross, 7 Meeson & Welsby, 106.

§ 16 Stat. at Large, 474, ch. cxi. ‖ Paschal's Digest, Article 4969.

judgment for the sum of $43,936.34. The second judgment was founded upon the first one, and was for the principal and interest due upon the latter. At the January Term, 1866, of the Galveston County Court, H. H. Williams, by his counsel, applied for an order that the administrator of Samuel M. Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel M. Williams, to the amount of $40,000; which said judgment was allowed and approved as a valid claim against said estate, in October, 1859, with eight per cent. interest per annum," &c.

The administrator appeared at the same term, and answered that the plaintiff recovered the judgment first hereinbefore mentioned; that it was presented for allowance against the estate with the usual affidavit and allowed; that he could not say whether it was approved by the chief justice of Galveston County; that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry in the United States District Court, on the 28th day of June, A.D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition; and it appearing to the court *that this claim has been duly allowed*, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," &c.

The premises in controversy were then described, the

mode and time of advertising, and the place and terms of the sale were prescribed, and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry H. Williams, for the sum of $60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March Term the court confirmed the report and ordered the administrator to make a deed to the purchaser, upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for $60,600, being the amount of the purchase-money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day the administrator executed a deed of conveyance to the said H. H. Williams. It recites all the proceedings touching the sale upon which it was founded.

On the 2d of January, 1868, the administrator executed to Henry Williams another deed for the same premises. It recites more fully the proceedings relative to the sale, and sets out that there were certain clerical errors of dates in the former deed, and that this deed was made to correct them.

The titles adverse to the plaintiff, developed upon the trial in the court below, were all derived from heirs-at-law of Samuel Williams. The premises were liable under a paramount lien for the debts of the ancestor.* The plaintiff's claim was of that character. Hence, if the sale and conveyance to him by the administrator were valid, they were conclusive in his favor. He could recover, however, only upon the strength of his own title. The weakness of the title of his adversaries could not avail him.

* Paschal's Digest, Article 1373.

Most of the objections to the sale by the administrator taken in the brief of the plaintiffs in error, were not insisted upon in the argument at the bar, and are of such a character as to require no observations from the court. One was pressed upon our attention with earnestness and ability, and to that one our remarks will be confined.

A statute of Texas requires all claims against the estate of a decedent to be presented to his legal representative and to be *allowed* by such representative, and to be *approved* by the probate judge. Until so *allowed* and *approved* they have no legal validity and cannot be recognized as debts against the estate. If disallowed, or not approved, they must be sued upon within three months. If sued without a refusal to allow or approve, there can be no recovery. The absence of such fact is fatal to the action.*

The order of sale sets forth that the claim had been allowed by the administrator, but is silent as to its approval by the judge. The plaintiffs in error argued that this omission rendered the order a nullity.

The application of the judgment-creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased.† Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether, upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that juris-

* Paschal's Digest, Article 1309, 1311; Danzey *v.* Swinney, 7 Texas, 625; Martin *v.* Harrison, 2 Texas, 456.

† Paschal's Digest, Article 1305.

diction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The County Court had the power to make it and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt* v. *Turner*.* They are not in conflict with the adjudications of Texas upon the subject.

The statute of Texas does not require the evidence upon which the judgment of the court proceeded to be set forth in the record. Such a statement can do no good, and its omission does no harm.

As regards public officers, "acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."† "Facts presumed are as effectually established as facts proved, where no presumption is allowed." In the case of *Ward's Lessee* v. *Barrows*,‡ a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record,

* 16 Wallace, 366.

† Bank of the United States *v.* Dandridge, 12 Wheaton, 70.

‡ 2 Ohio State, 247.

pleading, will, deed, or contract, is as effectual as what is expressed.*

The proceedings touching the sale were properly admitted in evidence, and the instruction given to the jury upon the subject was correct.

The last assignment of error relates to fraud in obtaining the order of sale.

It seems to us that the evidence disclosed in the record was hardly sufficient to raise any question upon that subject. However that may be, the instruction given to the jury was unexceptionable, and the plaintiffs in error have no right to complain.

JUDGMENT AFFIRMED.

UNITED STATES v. HERRON.

1. A debt due to the United States, though it be by one who owes it as a surety only, is not barred by the debtor's discharge with certificate, under the Bankrupt Act of 1867; although the United States may prove its debt and has priority of other creditors; and though the act provides, in general terms, that the certificate shall release the bankrupt "from *all* debts, claims, liability, and demands, which were or might have been proved against his estate in bankruptcy," and that it may be pleaded "as a full and complete bar of *any* such debts, claims, liabilities, or demands."
2. No general words in a statute divest the government of its rights or remedies.

ERROR to the Circuit Court for the District of Louisiana; the case being thus:

The Bankrupt Act of 1867—which in its general outlines, as in many of its details, follows (as did prior Bankrupt Acts of the United States passed in 1800 and 1841), the British Bankrupt Acts—enacts that a discharge duly granted under the act shall, with the exceptions of debts created by the

* United States *v.* Babbit, 1 Black, 61.