not. Such a decision by a State court does not present a question of which this court can take jurisdiction upon a writ of error.

WRIT DISMISSED.

PUTNAM *v.* DAY.

1. On a bill of review in equity nothing can be examined but the pleadings, proceedings and decree, which, in this country, constitute what is called the record in the cause. The proofs cannot be looked into as they can on an appeal.
2. On such a bill filed by a defendant to set aside the decree, he is bound by the answer filed on his behalf by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. The answers of other defendants cannot be read in his favor.
3. Where the defendant, by his answer, admits the claim to be due, and prays contribution from other defendants, without setting up any defence to the demand, he cannot, after a decree, and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing suit.

APPEAL from the Circuit Court for the District of Indiana; the case being thus:

In January, 1868, Putnam and others, having obtained, in the Floyd County Circuit Court of the State of Indiana, a judgment against the New Albany and Sandusky City Junction Railroad Company, filed in the court below, *the Circuit Court of the United States for the District of Indiana*, a creditor's bill against the city of New Albany, Indiana, one Day, and several other defendants, for the purpose of compelling them as stockholders of the said railroad company, to pay certain amounts alleged in the bill to be due and unpaid by them on their stock subscriptions to the said company, so that the amount of the judgment due to the complainants might be paid and satisfied; it being alleged in the bill that the said company was insolvent, and that all its property had been exhausted in satisfying other claims.

The city of New Albany, in its answer, set up a defence peculiar to itself, to wit, a complete settlement and com-

promise with the railroad company in 1857, by which the bonds issued by the city in payment of its stock subscription were surrendered, upon its assuming and paying a large amount of debts due by the company; and the city insisted that this settlement was made in good faith, and was for the benefit of the railroad company and its creditors; and that the complainants had lain by and slept on their rights too long to be permitted to disturb what was alleged to be a most proper and just arrangement.

The other defendants, with the exception of Day, set up that they were not indebted on their subscriptions, for that their stock had been taken off their hands by the city of New Albany, under a provision in the original subscription, which, if the city did take their stock, relieved them.

Day did not join these other defendants in the defence set up by them, but filed a separate answer, and a cross-bill, in which he admitted that he had subscribed stock in the railroad company to the amount of $36,100, *and that* $3500 *thereof remained unpaid.* He then stated that the other defendants, including the city of New Albany, were subscribers to a large amount, which he set forth in a list; and he asserted that they had not paid as much in proportion on their subscriptions as he had paid on his; and prayed that they might be compelled to contribute until they had paid in equal proportion to himself; in which case, he alleged, there would be money due to him instead of money due from him. His cross-bill being demurred to, was dismissed.

A decree in the case was rendered in July, 1869, adjudging that there was due to the complainants on their judgment against the railroad company upwards of $70,000; and that there was due on the stock subscriptions of said company, from the city of New Albany, upwards of $100,000;* from Day, $3500; from another defendant, $3026; which sums were directed to be paid and applied *pro rata* in satisfaction of the judgment. The decree against Day was made

* On appeal to this court, by the city of New Albany, this part of the decree was reversed and the cause remanded, with directions to dismiss the bill as to the city. New Albany *v.* Burke, 11 Wallace, 96.

on the admissions of his answer, charging him with the $3500 admitted to be unpaid, with interest thereon. The bill was dismissed as to the rest of the defendants, it being found that the defence set up by them was true, and that they were not indebted on their subscriptions, as most of their stock had been taken off of their hands by the city of New Albany under provision for that purpose contained in the original subscription.*

In January, 1870, Day filed in the court below a bill of review (the present bill) to have this decree set aside as to him. In this bill, which was a bill partly original and partly in review, he stated briefly the proceedings in the former suit; admitted the filing of the answer and cross-bill before referred to, but alleged that it was filed by his attorney, and was never seen or read or sworn to by himself; and that it did not set up truly the facts or the true grounds of his defence. He further stated that the truth was, that his stock was taken by the city of New Albany in the same manner as that of the other defendants as to whom the bill had been dismissed, except certain shares which he subscribed, payable in lands; and that he was not indebted to the railroad company for any unpaid portion of stock subscribed by him. He also insisted as a ground of review that the decree in the former suit was erroneous, and should be set aside for three reasons specified in the bill of review:

First. That the Floyd County Circuit Court, in which the judgment had been rendered, had exclusive jurisdiction of the matter.

Secondly. That the original bill did not set out sufficient facts to show a debt on his part.

Thirdly. That the complainants were guilty of gross laches and negligence in seeking equitable relief, having lain by and slept on their right to equitable relief (if they had any) for more than nine years.

Putnam and the others (complainants in the original bill) answered this bill of review, insisting upon the regularity

* See Burke *v.* Smith, 16 Wallace, 390.

and conclusiveness of the proceedings, and denying that Day had any defence to the original suit, or that he ever assigned his stock to the city of New Albany.

To this answer a general replication was put in.

Day was himself examined as a witness, and testified to the transfer of his stock to the city, except as stated in his bill, and to the payment of all dues thereon. He also testified as to his employment of an attorney to represent him in the original suit, and to the manner in which his answer and cross-bill were filed. His testimony on this point was to the effect that when the suit was instituted, he employed James Collins and his own nephew, Addison Day (who were partners in the practice of the law), to represent him as his counsel; and that they advised him "to file under the bill" and ask for equitable relief, and claim a *pro rata* contribution among the stockholders; that he did not see the answer and cross-bill which they prepared, and had no knowledge of the allegations contained in them; that he was informed that the court had acted on his answer and cross-bill, and that he was out of court; that he relied principally on Collins, as Day was young and inexperienced; but that he never consulted Collins but once, though he saw him a second time; that he had no business in the case that needed any further explanation at the time; that Collins was sick much of the time and died in May, 1869, during the pendency of the suit; that he saw his attorney, Day, occasionally after the suit was brought, and consulted with him, and paid his expenses to Indianapolis when he went there to file the answer and cross-bill. This was all the material evidence in the case.

The Circuit Court set aside the decree against Day. It said, in its opinion—

"When this court can see by the answer of the association subscribers, and the *evidence* in the original case, that there was no just claim on the part of the railroad company against the Days; that they had been released from such claim, if any existed, years before the creditor's bill was filed, and even before the judgment was recovered on which it was founded, and that

the court dismissed the bill as to persons equally liable with them, does the rule which has been pressed on the court by counsel,—that the proofs cannot be examined on a bill of review,—apply? We think not."

The case was now before this court on an appeal from this decision.

Messrs. S. Burke and J. A. Garfield, for the appellants, Putnam et al.; Mr. M. C. Kerr, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The complainant in the bill filed below failed utterly, we think, to make out a case of fraud, mistake, or want of authority on the part of his solicitors and counsel in filing the pleadings in the original suit, and taking the ground they did on his behalf. Of course fraud is not charged; but the complainant relied on the fact that he never saw the answer or cross-bill, and did not know their contents. This is no ground for allowing him to repudiate them now. It is not alleged that he would have placed his defence on any different ground had the answer and cross-bill been read by him. Indeed, they were drawn in pursuance of the advice received from his counsel and acquiesced in by him. His not having sworn to his answer, or even read it, is no excuse. It was his duty to have known its contents, if not to have verified it. If his counsel failed to make as good a defence for him as they might have done, it was his misfortune and cannot be rectified after the passing of the decree. Litigation would never come to an end if parties were permitted thus to shift their entire ground of attack or defence, after finding where the pinch of the cause lay. They must be estopped by the record, unless they can show that they were the victims of fraud or mistake.

Taking the cause, then, as it stood when the original decree was rendered, does the bill of review show any error for which it can be reversed?

It is to be remembered, that on a bill of review the proofs

cannot be considered.* If the decree is contrary to these, remedy must be sought by appeal.† We are confined, then, to an examination of the pleadings, proceedings, and decree, and the pleading of Day himself is to have controlling effect so far as it contains admissions against his own interest. It is apparent that the decree of the Circuit Court on the bill of review was based on the answers and evidence adduced by the other defendants, which tended to show that the appellee's case was similar to theirs. Day's own answer in the case was entirely disregarded. But is it possible to ignore it? Day was not necessarily in the same category with the other defendants. All had an equal opportunity to surrender their subscriptions to the city, and it was claimed by the other defendants in their answers, and admitted and shown, by a stipulation filed in the cause, that they did surrender their subscriptions to the city, and that the city assumed them. But they do not state, and it would not be evidence for Day, if they did, that Day surrendered his subscription. On the contrary, in his own answer, which is evidence against him, he clearly admits that he was a large subscriber to the stock, and that there was due on his subscription the amount for which the decree was rendered against him. There is nothing in the bill, nor in the report of the master, nor in any other part of the record, unless it be the answers of the other defendants, inconsistent with this admission of Day himself. On the contrary, the charges of the bill and the report of the master are in entire conformity with it. As the record stands, no other decree could have been made than that which was made, unless the other errors assigned have some ground to stand on.

Those errors are not relied on by the court below. As to the first, namely, that the Floyd County Circuit Court had exclusive jurisdiction of the case, it is hardly necessary to remark upon it. Surely, a creditor's bill may be filed in a different court from that in which the creditor obtains his judgment; for, otherwise, none could have been filed when

* 2 Daniel's Chancery Practice, 1631, 3d ed.

† Story's Equity Pleading, § 407.

courts of law and equity were separate courts, as they still are in some of the States.

The second was clearly groundless. The bill stated the ground of the claim against Day, and the answer admitted it, and supplied the particulars if they were not sufficiently specified in the bill.

The third error assigned was that the complainants had been guilty of gross laches and negligence in preferring their claim, having waited nine years after the return of their execution unsatisfied before filing their bill. This might have been a proper defence to make to the original bill; but it was not the defence which the appellee made. He did not put himself on that ground. He admitted his liability and prayed that the other defendants might contribute their just share, which he insisted would relieve him. How could the court under such a defence as this have dismissed the bill for laches and delay? A decree has to be founded on the *allegata* as well as *probata* of the case. There is nothing in the *allegata*, which alone are before us, to justify a different decree from that which was made.

The court below evidently relied on its knowledge and estimation of the proofs in the cause. The learned judge in his opinion, in summing up his views of the case, says so, in so many words.*

In the views there expressed, we think the court erred. We think the rule to be well established, and a wholesome one, that (as before stated) the proofs cannot be looked into on a bill of review. This was so expressly held in *Whiting* v. *Bank of the United States*.† It is true that in our practice the final decree does not contain a summary of the facts as it did in the English practice—which summary was examinable on a bill of review; but to countervail this absence of statement in the decree, we have adopted the practice of looking back of the decree into the whole record of the pleadings and proceedings, including orders, master's report, &c., together constituting what is generally regarded

* See *supra*, pp. 62–63 —REP.

† 13 Peters, 6.

as the record in the cause, and necessary to be examined in order to a proper understanding of the decree itself. This makes a record similar to that of a common-law action, the decree being the judgment of the law upon the allegations of the parties, and the conclusion which the court deduces from the proofs. But the conclusions of fact deduced from the proofs are not spread upon the record *in extenso*, unless through the medium of a report made by a master or commissioner.

The eighty-sixth rule in equity, adopted by this court, has abolished the recital of the pleadings and proceedings in the decree, and has prescribed the form in which it shall be couched, as follows: "This cause came on to be heard at this term, and was argued by counsel; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed, as follows, viz.:" here inserting the decree or order. The decree, it is true, may proceed to state conclusions of fact as well as of law, and often does so for the purpose of rendering the judgment of the court more clear and specific.

The record thus made up constitutes the basis of examination on a bill of review, but it never contains the proofs adduced in the cause.

An examination of the record in this case does not, in our judgment, afford any ground for setting aside the decree made against Day in the original cause.

DECREE REVERSED, with directions to

DISMISS THE BILL.

The CHIEF JUSTICE did not sit. Mr. Justice DAVIS dissented.

RITCHIE *v.* FRANKLIN COUNTY.

1. Where a constitution of a State forbids special legislation, an act, demanded by considerations of high justice and by the fact that carelessness in the language of previous statutes has worked the necessity for the act, may be presumed to have been meant as a curative act, and as