

Harrison Vs. Nixon

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Appeal No. : 34 U.S. 483

Appellant : Harrison

Respondent : Nixon

Judgement :

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Harrison v. Nixon

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLLABUS

A bill was filed in the Circuit Court of the United States, for the District of Pennsylvania stating that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia on 6 December, 1791, and bequeathed all his estate

"to his heir at law," and died in April, 1829; that letters testamentary were taken out in Pennsylvania by the executor; that large sums of money were received by him; and the bill prays for a decree in favor of the complainant, who asserts himself to be the true and only heir at law of the testator, and that he is solely entitled to the bequest. The answer of the executor states, that from information and belief the testator was born in Philadelphia, which was the residence of his parents about 1756; that he continued to reside there, doing business as a merchant before he was twenty-one, and before the breaking out of the war with Great Britain in 1776; being still a minor, he went to England, under a belief that Great Britain would soon prevail in the contest; that he subsequently came back to the United States and invested large sums in government stocks. But, whether he afterwards went back to England as his home or only for the purpose of superintending his property, and whether the testator did in fact change his domicile, the executor (save and except as appears by the facts) doth not know. He believes that the testator, when in England, considered himself as an alien, and he died in King Street, Holborn, London. That letters testamentary were taken out in England, and the will was proved there, and proceedings were instituted in England by a person claiming to be the heir at law. Various proceedings took place in the Circuit Court of Pennsylvania. A reference was made to a master to examine and state the heirs and next of kin of the testator, and a report made by him, which was afterwards confirmed, and thereupon a final decree was made in favor of John Aspden, of Lancashire, in England, one of the claimants before the master, as entitled to the personal estate of the testator as "heir at law." The cause having come by appeal before this Court for argument, a question occurred whether the frame of the bill, taken by itself or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause, and make a final decision.

By the Court:

"The bill contains no averment of the actual domicile of the testator at the time of the making of his will or at the time of his death, or at any intermediate period, nor does the answer contain any averments of domicile which supply these defects in

the bill, even if it could so do, but in point of law it could not."

Every bill must contain in itself sufficient matter of fact, *per se*, to maintain the case of the plaintiff. The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation.

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This is the case of a will, and so far as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court is called upon to give a construction to the terms of the will, and in an especial manner to ascertain who is meant by the words "heirs at law," in the leading bequest in the will. The language of wills is not of universal interpretation, having the same import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them, unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs the distribution thereof unless it is manifest that the testator had the laws of some other country in view.

No one can doubt if a testator, born, and domiciled in England during his life, by his will gives his personal estate to his heir at law, that the *descriptio personae* would have reference to and be governed by the import of the terms in the sense of the laws of England. The import of them might be very different if the testator were born and domiciled in France, in Louisiana, Pennsylvania, or Massachusetts.

A will of personalty speaks according to the testator's domicile, when there are no other

circumstances to contract the application. To raise the question what the testator meant, it must first be ascertained where was his domicile, and whether he had

reference to the laws of that place or to the laws of a foreign country.

The bill in this case should allege the material facts upon which the plaintiff's title depends, and the final judgment of the court must be given, so as to put them in contestation in a proper and regular manner, and the court cannot dispose of this cause without ascertaining where the testator's domicile was at the time of his making his will and at the time of his death, and there ought to be suitable averments in the bill to put those matters in issue. The case ought to be remanded to the circuit court for the purpose of having suitable amendments made in reference to the domicile of the testator, and averments made of his domicile at the time of making the will, and at the time of his death, and at the intermediate period, if any change took place.

Upon motions made to the court, and from proceedings in the circuit court, laid before the court, it appeared that there are certain claimants of the bequest, asserting themselves to be "heirs at law," whose claims were not adjudicated upon in that court on account of their having been presented at too late a period. By the court:

"As the cause is to go back again for further proceedings, and must be opened there for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims, and they ought to be let into the cause for that purpose."

No persons but those appearing to be parties on the record can be permitted to be heard on an appeal or writ of error.

Matthias Aspden, on 6 December, 1791, made his will, with the codicils annexed thereto, as follows:

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"These are to certify that I do hereby annul and revoke all my former wills, giving and bequeathing my estate, real and personal, to my heir-at-law, first paying all my just debts and funeral expenses, and the following legacies, first, to each of the

children of my half brother, Benjamin Hartley deceased, that may be alive at my death, the sum of 100 to each Pennsylvania currency; and to my half-sister Bersheba Zane, wife of Elnathan Zane, the sum of 400 Pennsylvania currency, both the above living or did live at or near Haddonfield; and to my half brother Roger Hartley, living at present in Lancaster County the sum of 300 of the like currency. Witness my hand, this 6 December, 1791, Philadelphia."

"MATTHIAS ASPDEN"

"Lest any question should arise about the legitimacy of my birth. It is my will that my estate real and personal, should go to the party who would be my lawful heir in case there might arise any doubts on that head. It is firmly believed by, from the best information, that my birth was after marriage."

"Philadelphia, December 6, 1791"

"I do further give 100 Pennsylvania currency to each of the children of my deceased half-sister Ann Henschman that may be living at my death."

"December 6, 1791"

"Note, my property on England is as follows: 12,500 in the four percent stock; 3,000 in the five percent stock; 1,800 in the three percent stock."

"Endorsement. The last of will of Matthias Aspden. I do hereby appoint my friends Mr. George Roberts and Mr. Abraham Lidden, with the president of the old bank at the time being, to by my executors to this my last will."

"MATTHIAS ASPDEN"

At April sessions, 1821, of the Circuit Court of the Eastern District of Pennsylvania, the following bill was filed:

"Samuel Packer, a citizen of the State of New Jersey v. Henry Nixon, Esquire, a citizen of the State of Pennsylvania, executor of the last will and testament of Matthias Aspden, esquire, late a citizen of the same state. In equity."

"To the honorable the Judges of the Circuit Court of the

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United States of the Third Circuit, in and for the Eastern District of Pennsylvania."

"Humbly complaining, showeth unto your honors, your orator, Samuel Packer, a citizen of the State of New Jersey, that on 6 December in the year of our Lord 1791, one Matthias Aspden, Esquire, a citizen of the State of Pennsylvania, made and executed his last will and testament, bearing date the same day and year, wherein and whereby he gave and bequeathed all his estate, real and personal, to his heir at law, and of the said will appointed his friends, George Roberts, Abraham Lidden, and the president of the old bank at the time being, executors, as by the said will, a true copy whereof is to this bill annexed, and which your orator prays may be taken as part thereof, will more fully appear; after which, to-wit, on the ___ day of August, in the year of our Lord 1824, the said Matthias Aspden departed this life, not having altered, cancelled or revoked his said will, and the said George Roberts and Abraham Lidden being then deceased, and Henry Nixon, esquire, a citizen of the State of Pennsylvania, being then president of the Bank of North America, which bank the testator meant and intended by the description of the old bank, the said Henry Nixon caused the said will to be duly proved according to the laws of Pennsylvania, and having received letters testamentary thereon, took upon himself the burden of the execution thereof, and hath possessed himself of all the goods, chattels and other personal estate of the said testator, to a very large amount."

"And your orator expressly charges that he is the true and only heir at law of the said Matthias Aspden, and that no other person than himself is entitled to claim or receive the benefit of the said devise and bequest. And he hath repeatedly applied to the said Henry Nixon to have an account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situated, and what is the true and exact amount thereof, and to have the amount thereof paid to him, deducting therefrom the just and reasonable charges of the said executor. But now, so it is, may it please your honors, that the said Henry Nixon, combining and

confederating with others to your orator unknown, whose names, when discovered, he prays leave to insert with apt words to charge them as parties, denies that your orator is

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the heir at law of said Matthias Aspden, or that he is in any way entitled to the benefit of any of the testamentary dispositions of the said Matthias Aspden, and refuses to render him any account of the assets, and to pay him any part thereof."

"In tender consideration whereof, and forasmuch as your orator cannot have plain, adequate, and complete remedy at law, to the end thereof, that the said Henry Nixon, and his confederates, when discovered, on their oaths or affirmations, full, direct, and true answers may make to all and singular the matters and things hereinbefore set forth, as if they had been particularly interrogated thereon, and that the said Henry Nixon may render and set forth a just and true account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situate, and whether there are any and what debts due or claimed to be due therefrom, and may be decreed to pay to your orator the balance of the said moneys in his hands belonging to the said estate to which your orator is justly entitled, and your orator may have such further relief in the premises, as is consistent with equity and good conscience, and to this honorable court shall seem meet."

To this bill the executor filed an answer as follows:

"The answer of Henry Nixon, the defendant, to the bill of complaint of Samuel Packer, complainant."

"This defendant says that he believes and admits that Matthias Aspden, the testator in the said bill named, at Philadelphia, duly made and executed his last will and testament in writing, and three codicils thereto, all bearing date 6 December, 1791, and that such will and codicils are in the words and figures, or to the purport and effect in the paper annexed to the said bill set forth, but for greater certainty as to the date and contents of said will and codicils, this defendant craves

leave to refer thereto. And this defendant says that the said testator deposited his said will and codicils, for safe custody, in the cashier's vault of the Bank of North America at Philadelphia, known as the old bank, where the same were found after his decease. And the defendant believes it to be true that the said testator departed

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this life, on or about 9 August, 1824, in the City of London, without having revoked or altered his said will and codicils. And the defendant, further answering, says that George Roberts and Abraham Lidden, in the said will respectively named, both died in the lifetime of the said testator; that the defendant, at the time of the death of said testator, was the president of the Bank of North America, at Philadelphia, known as the old bank. And the defendant admits it to be true that soon after the death of the said testator, to-wit, on 19 November, 1824, this defendant duly proved the said will and codicils, in the office of the register for the probate of wills and granting letters of administration for the City and County of Philadelphia, and received letters testamentary thereon."

"And that the defendant also duly proved the said will and codicils in the Prerogative Court of Canterbury, in England, and obtained probate thereto from that court. And this defendant admits it to be true that as executor as aforesaid, he has possessed himself of all the personal estate and effects of the said testator in the United States, or of so much thereof as has come to his knowledge, a true account of which is in the schedule hereto annexed. And this defendant has paid the charges of proving the said will at Philadelphia, and other charges incident thereto, and six of the legacies, the others having not yet been claimed, bequeathed by the said will, a true account of which payments is in the schedule hereto annexed, and that as executor, other charges must be incurred in managing and settling the estate, the amount of which cannot now be ascertained, and that this defendant, as executor, will be entitled to a commission for his services. And this defendant, further answering, says that he believes it to be true that the said testator was, at the time of his death, (among other descriptions of property) possessed of property in the English funds, that is to say, 4,000 bank

stock; 10,000, three percent consolidated bank annuities; 12,500 reduced three and a half percent bank annuities; and 3,500, new four percent bank annuities, and that the said testator also was possessed of East India stock, and also of South Sea stock to a considerable amount, that is to say, 3,000 East India stock, and 5,000 South Sea stock. And this defendant believes that the said

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testator died possessed of other personal property to a considerable amount, and particularly of the sum of 790, 3 shillings, and 5 pence in the hands of his bankers, Messrs Hoare, of London, but that no part of the property of the said testator, except that in the United States of America, as before stated, has come to the hands or possession of this defendant."

"That the whole of the property of the said testator in England is claimed by John Aspden, of London, as entitled thereto, under the devise of the said testator, as his heir at law, and that the said John Aspden has filed a bill in the Court of Chancery in England against this defendant, as executor of the said testator, and has, by the injunction of the said court, restrained and prevented this defendant and his agents from obtaining possession of any part of the property in England, of which the said testator died possessed, further than that his attorneys, S. Williams and J. Sterling, received the sum of 300, being one-half year's dividend on 3,000, East India stock belonging to the testator. That the expenses of proving the will of the said testator in England, amounted to 715, 17 shillings, and 10 pence, to pay which in part the said sum of 300 was applied by Messrs Williams and Sterling, and the residue, 415, 17 shillings, and 10 pence was paid out of the sum in the hands of Messrs Hoare, the testator's bankers. The said suit in chancery by the said John Aspden is yet pending and undetermined. This defendant has annexed to this, his answer, a copy of the bill filed by said John Aspden. And this defendant, further answering, says he does not know and is unable to answer from his belief or otherwise whether the said testator left the complainant his heir at law, or whom he left his heir at law."

"But this defendant, further answering, says that the said John Aspden, of London, claims to be heir at law, and as such entitled to the residue of the said testator's property, and that there are many persons residing in the United States of America, who claim to be next of kin to the said testator, and as such to be entitled to distributive shares of the estate. That this defendant is not able, from his own knowledge, to name all the persons who so claim to be next of kin, but that he has annexed to this his answer a schedule, which he prays may be taken as part of his answer, containing

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the names of some of the persons so claiming to be next of kin and the manner in which they, or some of them, have alleged to this defendant, they are connected with the said testator. This defendant, further answering, says that three suits have been instituted against him as executor of the said testator in the District Court of the City and County of Philadelphia by persons claiming to be next of kin to the said testator, to-wit, one to December term, 1826, by Stacy Kirkbridge and Sarah, his wife, late Sarah Hammett; another to the same term by James Packer; and the third to September term, 1827, by Job Packer, which suits are still pending and undetermined."

"And this defendant, further answering, says that he can neither admit nor deny that the said testator was a citizen of Pennsylvania, as alleged in the said bill. That from information he believes that the said Matthias Aspden, the testator, was born in or about the year 1756, at Philadelphia, then being the place of residence of his parents; that he continued to reside there, and afterwards was engaged in business at Philadelphia as a merchant, with some success, before he was twenty-one years of age. Upon the breaking out of the war between Great Britain and America in the year 1776 or sometime in that year, being still a minor, he went to England, with what view this defendant, from his own knowledge, is not able to say, but he believes that he went with an impression that the power of Great Britain must soon prevail in putting down the resistance made in America. That the said testator subsequently came several times to the United States of America and invested large sums there in the public or government stock, or in other securities;

that he made his will and the codicils thereto at Philadelphia, the place of his birth, and deposited them in the bank there, but whether after so returning to the United States of America the testator went back to England as his home, or only for the purpose of superintending his property, and whether the testator did in fact change his domicile, this defendant (save and except as appears by the facts) doth not know, and is unable to answer."

"But this defendant believes that the said testator, when in England, considered himself as an alien, and as such, claimed to have returned the tax taken from his dividends while he was absent from England, according to the provisions of the

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law exempting aliens from the tax if not resident in England. That he died in King Street, Holborn, London. And this defendant says that he submits to the judgment of the court whether, upon the true construction of the said will of the said testator, the next of kin of the said testator are entitled under the same to take the residue of the personal estate and effects of the said testator, or whether the complainant, if he be the heir at law, and if not, whether any other person as heir at law of the said testator, is entitled to take the same under the said will as such heir at law. And this defendant submits to act as this honorable court shall direct, being indemnified and paid his costs, charges, and expenses therein. And this defendant denies all combination and confederacy with which he is charged in and by the said bill, without this that, &c.;"

"HENRY NIXON"

Petitions were filed in the circuit court by persons who claimed to have distribution among them of the estate of the testator, as the party contemplated by the will, each petition setting forth the relationship between the persons presenting the same and the testator and praying to be admitted as parties to the suit for the purpose of claiming the fund admitted by the executor to be in his hands, and that the court would direct inquiries to be made as to their respective claims. George Harrison and the other appellants were among those who filed petitions.

Upon the reading and filing of the petitions of George Harrison, the court made an order according to the prayer of the same. Job Packer and John Zane were, by order of the court, on their application, made defendants, and Isaac Zane was entered as one of the complainants in the case. The record contained no order or action of the court on the other petitions except an entry in reference to each petition, "read and filed," or "filed."

The circuit court ordered that it be referred to a master to examine and state the next of kin of the testator, Matthias Aspden, and commissions were ordered to take the depositions of distant witnesses.

After the coming in of the master's report, in which was

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contained a list of the heirs and kindred of the whole and half blood of Matthias Aspden the testator, and in which he reports that John Aspden was "heir at common law," the circuit court made the following decree.

"And now, this 26 December, A.D. 1833, this cause coming on to be heard on the bill, answer, petitions, exhibits, proofs and master's reports, and the several parties having been fully heard by their counsel and the court having taken time to consider of the same till this day, does order, adjudge and decree that the defendant Henry Nixon, surviving executor of Matthias Aspden deceased, do account for, pay over, transfer and deliver to John Aspden, of Lancashire, in England, one of the said parties, the heir at law of the said Matthias Aspden, the entire balance of the personal estate of the said Matthias Aspden, which has come to his hands to be administered, after paying the debts and legacies of the said Matthias Aspden, and the costs of this suit (which are hereby ordered to be paid out of the said fund). And the court does further order, adjudge, and decree that the bill and petitions, so far as they relate to the other complainants and petitions, who are claimants before the court, and all other claimants before the court, however appearing, be dismissed without costs."

"As to all parties who are claimants before the court by bill, petition, or otherwise, their complaint, petition, and proceedings are dismissed without costs."

From this decree George Harrison and Thomas H. White, Ann Emily Bronson, Elizabeth White Bronson, Hetta Atwater Bronson and William White Bronson, minors by their guardian the said Thomas H. White, Mary Harrison, a minor by her guardian Elizabeth Harrison, Esther McPherson, and Elizabeth McPherson, children of Elizabeth McPherson deceased, John Zane and Isaac Zane, prosecuted an appeal to this Court.

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MR. JUSTICE STORY delivered the opinion of the Court.

This is the case of an appeal from a decree of the Circuit Court of the District of Pennsylvania, in a suit in equity. The bill was filed by Samuel Packer, and asserts that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia, on 6 December, 1791, and thereby bequeathed all his estate, real and personal, to his heir at law, and afterwards died in August, 1824, and his will was proved and letters testamentary were taken out in Pennsylvania by the appellee, under which he has received large sums of money; and the bill then asks for a decree in favor of Packer, who asserts himself to be the true and only heir at law of Matthias Aspden, and that he is solely entitled under the bequest. The answer of the executor states, from information and belief, that the testator was born in Philadelphia, which was the residence of his parents, about 1756; that he continued to reside there, doing business as a merchant, with some success, before he was twenty-one years of age; that before the breaking out of the war between Great Britain and America in 1776, being still a minor, he went to England, with what view the executor is not from his own knowledge able to say -- but he believes that he went with an

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impression that the power of Great Britain must soon prevail in putting down resistance in America; that the testator subsequently came several times to the United States and invested large sums in government stocks and other securities, but whether after so returning to the United States the testator went back to England as his home or only for the purpose of superintending his property, and whether the testator did in fact change his domicile, the executor (save and except as appears from the facts) doth not know, and is unable to answer, but he believes that the testator, when in England, considered himself as an alien, &c.;, and he died in King Street, Holborn, London. The answer also states that the executor proved the will, and took out letters testamentary in England, and states certain proceedings had upon a bill in chancery in England, against him, by one John Aspden there, claiming to be the heir at law of the testator, and annexes to his answer a copy of the bill. He also alleges that several other persons have made claims to the same property, as next of kin of the testator, of whose names, &c.;, he annexes a schedule.

Various proceedings were had in the Circuit Court of Pennsylvania, and a reference was made to a master to examine and state who were all the heirs and next of kin of the testator. The master made a report which was afterwards confirmed, and thereupon a final decree was made by the court in favor of John Aspden of Lancashire in England, one of the persons who made claim before the master, as entitled, as heir at law to the personal estate in the hands of the executor, and the claims of the other persons claiming as heirs at law, were dismissed, and the present appeal has been taken by several of these claimants.

The cause having come before this Court for argument upon the merits, a question occurred whether the frame of the bill, taken by itself or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause and make a final decision. The bill contains no averment of the actual domicile of the testator at the time of the making of his will or at the time of his death or at any intermediate period. Nor does the answer contain any averments of domicile which supply these

defects in the bill, even if it could so do, as we are of opinion in point of law it could not. Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff so that the same may be put in issue by the answer and established by the proofs. The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision, for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet and conform to each other. The case cited at the bar of *Matthew v. Hanbury*, 1 Vern. 187, does not in any manner contradict this doctrine. The proofs there offered were founded upon allegations in the bill, and went directly to overthrow the consideration of the bonds, set up in the answer, in opposition to the allegations of the bill, the latter having asserted that the bonds were obtained by threats and undue means, and not for any real debt or other good consideration. Is, then, any averment of the actual domicile of the testator, under the circumstances of the present case, proper and necessary to be made in the bill in order to enable the court to come to a final decision upon the merits? We think that it is, for the reasons which will be presently stated.

The point was never brought before the circuit court for consideration, and consequently was not acted on by that court. It did not attract attention (at least as far as we know) on either side in the argument there made, and it was probably passed over (as we all know matters of a similar nature are every where else) from the mutual understanding that the merits were to be tried, and without any minute inquiry whether the merits were fully spread upon the record. It is undoubtedly an inconvenience that the mistake has occurred, but we do not see how the court can, on this account, dispense with what, in its judgment, the law will otherwise require.

The present is the case of a will, and so far at least as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court is called upon to give a construction to the terms of the will, and in an especial manner to ascertain who is meant by the words "heir at law" in the leading bequest in the will. The language of wills is

not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a conclusion. In regard to personalty in an especial manner, the law of the place of the testator's domicile governs in the distribution thereof, and will govern in the interpretation of wills thereof unless it is manifest that the testator had the laws of some other country in his own view.

No one can doubt, if a testator born and domiciled in England during his whole life, should, by his will, give his personal estate to his heir at law, that the *descriptio personae* would have reference to and be governed by the import of the terms in the sense of the laws of England. The import of them might be very different if the testator were born and domiciled in France, in Louisiana, in Pennsylvania, or in Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicile where there are no other circumstances to control their application, and to raise the question what the testator means, we must first ascertain what was his domicile and whether he had reference to the laws of that place, or to the laws of any foreign country. Now the very gist of the present controversy turns upon the point who were the person or persons intended to be designated by the testator under the appellation of "heir at law." If, at the time of making his will and at his death, he was domiciled in England and had a reference to its laws, the designation might indicate a very different person or persons from what might be the case (we do not say what is the case) if, at the time of making his will, and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable that the country by whose laws his will is to be interpreted should be first ascertained, and then the inquiry is naturally presented what the provisions of those laws are.

If this be the true posture of the present case, then the bill should allege all the material facts upon which the plaintiff's title depends, and the final judgment of the

court must be given, so as to put them in contestation in a proper and regular

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manner. And we do not perceive how the court can dispose of this cause without ascertaining where the testator's domicile was at the time of his making his will and at the time of his death, and if so, then there ought to be suitable averments in the bill to put these matters in issue.

In order to avoid any misconception, it is proper to state that we do not mean in this stage of the cause to express any opinion what would be the effect upon the interpretation of the will if the domicile of the testator was in one country at the time of his making his will and in another country at the time of his death. This point may well be left open for future consideration. But being of opinion that an averment of the testator's domicile is indispensable in the bill, we think the case ought to be remanded to the circuit court for the purpose of having suitable amendments made in this particular, and that it will be proper to aver the domicile at the time of making the will and at the time of the death of the testator and during the intermediate period (if there be any change), so that the elements of a full decision may be finally brought before the court. The petitions of the claimants should contain similar averments.

It appears from the motions which have been made to this Court as well as from certain proceedings in the court below which have been laid before us in support thereof that there are certain claimants of this bequest asserting themselves to be heirs at law whose claims have not been adjudicated upon in the court below on account of their having been presented at too late a period. As the cause is to go back again for further proceedings and must be again opened there for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause, and we are of opinion that they ought to be let into the cause for this purpose. In drawing up the decree remanding the cause, leave will be given to them, accordingly. The decree of the circuit court is therefore

Reversed, and the cause is remanded to the circuit court for further proceedings in conformity to this opinion.

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MR. JUSTICE BALDWIN, dissenting.

The preliminary question which has been decided by this Court is one of the deepest interest to all suitors in the inferior courts of the United States; the judges thereof, and the profession generally. The nature of the objection to hearing the cause on its merits, or to even examine the evidence or the decree, the time at which it was made, with its attendant circumstances, make this case a precedent of infinite importance as a rule for future proceedings in a court of the last resort in the exercise of a jurisdiction exclusively appellate.

A final decree of a circuit court, rendered in a long pending and zealously contested cause, after the fullest consideration, has not only been reversed but all its proceedings so completely annulled as to open the case to new parties, new bills, pleadings, issues, and evidence and to make it necessary to begin *de novo*, in the same manner as if the court had never acted on any question which could arise.

This has been done, too, on an objection not taken by counsel, either in the circuit court or assigned for error here in the printed brief of their points, presented to this Court as the ground of a reversal of the decree of which the appellants complain; nor did either of their counsel think proper to avail themselves of the suggestion after it fell from the bench until the one who opened the argument had closed his view of the first ground assigned in the brief for error. And when on the next day another of the counsel of the appellants drew the attention of the court to the objection, it was not to reverse the decree as erroneous in law or fact, but as a reason for considering it as so merely and utterly void as to make it improper to examine into the errors assigned by himself and colleagues, and proper to suspend the argument on the merits, till the consideration of the question thus raised, the decision of which leaves the law, justice, and equity of the case

untouched, while every proceeding had in it is utterly prostrated, leaving the parties, at the end of a four years' litigation, to begin anew. To them it is no consolation, that these effects have been produced by an objection of mere form, not deemed by the counsel of either party worthy of being noticed or guarded against, for the action of an appellate court on a judgment at law or a decree in equity can be of no middle character. A reversal annuls it to all intents and purposes; it can no longer be given in evidence in support of any right, or as proof of any fact in favor

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of the party in whose favor it was rendered, or against the opposite party; no one thing remains a *res adjudicata*, but every question of law and fact is as entirely open, as if the court had never given a judgment or decree. It is inconsistent with the constitution of appellate courts in England or the states of this union to modify a general reversal of a judgment or decree; it is absolute, and must be attended with all legal consequences, which no court can avert by any salvo or declaration that it is reversed only *pro forma*; the decree or judgment cannot be in any part carried into effect in the court below, or come again into an appellate court, till a new one is rendered. The same principles prevail in the courts of the United States by force of the judiciary and process acts and the seventh rule of this Court, which regulate all proceedings by those of the King's Bench and courts of equity in England, unless otherwise provided for by law, subject to such alterations and additions as this Court may prescribe to the circuit courts or as they may make not inconsistent therewith. 1 Story's Laws 67, 257. This Court has uniformly acted by the rules thus prescribed, which regulate not only its own proceedings, but its adjudication on those of inferior courts which are brought within its appellate power; they must therefore be considered as the tests of the conformity of the decision now made, with the established principles of courts of original or appellate jurisdiction, by the course of the law of equity, and rules of this Court and the acts of Congress which regulate its exercise on appeals.

In the circuit court, George Harrison and others were claimants of a fund in the hands of Mr. Nixon as executor; their petitions having been dismissed on a final

decree against them, they now on an appeal ask for its reversal for the reasons assigned in the brief of their counsel, which relate entirely to the merits of their claim, but at the same time contend that the whole proceedings in the circuit court are mere nullities because the appellants themselves, as well as the other claimants, omitted to insert in their petitions a direct averment of the domicile of the testator under whose will they all claim. As this objection is not aimed at the decree or the right of any party who claims the fund, it must be considered as applicable solely to the form and frame of the original bill and petitions,

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intended to present not a cause of reversal of the decree for error in law or fact, but the broad question of jurisdiction. First, whether it was competent for the circuit court to make any decree in the case before them, and next whether the decree rendered is such that this Court, in virtue of its appellate power, can hear and determine the matter appealed from. It must have occurred at once to the mind of the learned judge who first suggested the objection, and cannot have escaped the observation of the counsel who has availed himself of it, that if the case was within the judicial cognizance of the circuit court, no decree rendered by them could be treated as a nullity; however erroneous, it is binding on the parties till an appeal, and becomes final if none is taken within five years. It could not be declared a void act for any cause which did not affect the original jurisdiction without any reference to the decree rendered by the circuit court. To justify such a course, it must be in a case where this Court would be bound to reverse at all events, and where its affirmance would not cure the defect, but would leave the original decree without any effect upon the rights of the parties, and prevent it from being received as evidence in any court, state, federal or foreign.

An appeal upon any ground short of this must affect the decree as erroneous merely, on some matter injurious to the appellant, who has his remedy under the twenty-second section of the Judiciary Act, by an appeal from a "final decree in a suit in equity," which it declares may "be reexamined, and reversed or affirmed in the Supreme Court." It follows that there is a discretion to reverse or affirm according to the right of the case, and fairly it cannot be contended that if a decree

can be affirmed on appeal, it can be considered as a mere nullity after affirmance if the question arising on the appeal was one of merely error, not of jurisdiction. Nor can it be doubted that if the merits of the case were cognizable by the court below, they are equally so on appeal, and that a final decree of affirmance binds all parties in all courts, as to the matters decreed, which must be done on a reexamination of the final decree.

Such is the general course prescribed to this Court by the twenty-second section in all cases coming before them by appeal; the twenty-fourth is still more explicit.

"That when a judgment or decree shall be reversed in a circuit court, such

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court shall proceed to render such judgment, or pass such decree as the district court should have rendered or passed, and the Supreme Court shall do the same on reversals therein except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or the matter to be decreed are uncertain, in which case they shall remand the cause for a final decision."

The second clause of the second section of the third article of the Constitution declares,

"That in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The twenty-second and twenty-fourth sections of the Judiciary Act, are the execution by Congress of an express constitutional power, which makes these provisions as imperative on the Supreme Court, as if they had been detailed in the body of the Constitution; they form its constitution as an appellate court, defining its powers, and prescribing their exercise, in reexamining, reversing, or affirming

the final judgments and decrees of all courts which may be brought within its appellate jurisdiction.

The twenty-second limits the appellate power to the revision of final decrees in cases in equity, herein departing from the course of appellate courts in England and in New York; there, an appeal lies to the House of Lords or Court of Errors from the interlocutory orders and decrees of the Chancellor; the other regulations prescribed by the Judiciary Act are in conformity to the uniform course of all appellate courts as long settled by uniform practice, adopted by the rules, and followed in the decisions of this Court. This course cannot be better defined than in the words of Chancellor Kent.

"It is the acknowledged doctrine of courts of review to give such decree as the court below ought to have given, and when the plaintiff below brings the appeal, the court above not only reverses what is wrong but decrees what is right, and models the relief according to its own view of the ends of justice and the exigencies of the case. The court above acts, therefore, on

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appeals in the given case, with all the plenitude of a court of equity of original jurisdiction, and the special terms of the decree, whatever they may be, become to this Court the law of that case, and no other or further relief can be administered to the party."

1 J.C. 194, 195.

This doctrine, then, is the law of this Court, not only by the acknowledged principles of the law of equity, but as an injunction of the supreme law of the land, from the observance of which the Court can be absolved by no rule or practice contrary thereto. If its authority rested alone on either the recognized rules of appellate courts, or their settled practice, it might be varied at the discretion of the Court by its power to make rules respecting practice, proceedings, and process, but it can have no discretion to alter or depart from those "principles and usages of law" which Congress has adopted as regulations of and exceptions to the

appellate power of all the courts of the United States pursuant to the provisions of the Constitution.

It must therefore be taken as a rule of constitutional law, binding on this Court, that if it takes cognizance of a cause on appeal under the twenty-second section, it must be by reexamining the decree, reversing or affirming it, and by the twenty-fourth, on reversal, to give such decree as the circuit court ought to have rendered or remanding it for final decision, as the case may be. There can be no other course pursued, for as the appellate power is confined to those cases to which it has been extended by Congress, and must be exercised within the limits and by the regulations prescribed, it can have no inherent powers in virtue of which it can review or revise the decrees of the inferior courts by any general superintending authority such as appellate courts may have, whose jurisdiction has neither been conferred or regulated by a constitution or statute. No principle has been better settled or more steadily adhered to than that this is a Court of special jurisdiction, whether original or appellate, which the Constitution has defined and separated by a line which Congress cannot pass by extending that which is original to cases which are appellate or *e converso*. [5 U. S. 1](#) Cranch 164. As the present is an unquestioned case of appellate jurisdiction, it must be exercised according to the regulations prescribed by Congress; by an examination

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of the final decree on its merits if the Court takes judicial cognizance of the record. Any other course is wholly unknown in an appellate court of equity unless there is such a fatal defect in the record as affects the jurisdiction of the court below and prevents the court above from acting judicially upon it by hearing and determining the matters in controversy, in which case the decree will be reversed, the cause remanded, and the circuit court be directed to dismiss the bill or make the amendments necessary to give it jurisdiction.

It is not pretended that the circuit court has not jurisdiction of this case as one between proper parties, touching a proper subject matter of controversy, nor can it be doubted that the jurisdiction of this Court is equally clear. A final decree has

been rendered, an appeal regularly taken, by parties affected by the decree, who, having given the requisite security, have a right to be heard on all matters appealed from, to ask a reversal and a decree in their favor. The party in whose favor the decree has been rendered appears here pursuant to the citation, with an equal right to defend his interests, to demand an affirmance of the decree, with a mandate for its execution.

This Court, then, cannot refuse to hear the appeal on the ground of a want of power to hear and finally determine all matters appealed from which are properly and fully cognizable by both courts, and this objection does not profess to be founded on the want of competent parties to a controversy in the federal courts or a subject matter cognizable in equity. As it avoids these questions, the objection defeats itself, for it must necessarily apply to the course of the circuit court in the progress of the cause, and its final adjudication on the matters submitted by the parties, the revision of which is the ordinary exercise of the jurisdiction of an appellate court in conformity with the acknowledged doctrine of such courts and the positive injunctions of the Judiciary Act, which it is the direct object of this motion to prevent and which has been effected by the judgment now rendered. There being no doubt of the jurisdiction of either court, the only questions which can arise are whether any of the petitioners has, on this record, shown a right in equity to demand from the respondent Nixon the fund which he holds in his hands subject to the order of the court,

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he claiming no interest in it except his commissions and proper credits. The case is therefore one of ordinary occurrence -- a bill in equity filed by one claimant and petitions by others for the surplus of an estate in the hands of an executor who in his answer interpleads, submits to any order the court may make, and prays their protection by such a decree as will save him from future litigation.

Whether a bill in equity contains any ground for relief, or, what is called in the language of its courts "equity," is not a question of jurisdiction, but of merits; the inquiry is has the petitioner set forth a cause of action in his complaint, has he

averred any matter which, if true, entitles him to the relief prayed for, or any relief, or set it forth in the manner required by the rules of equity? If he has, the respondent must plead some new matter in avoidance or in his answer give some reason why he does not do, or ought not to be decreed to do, the thing required of him. If the complainant's petition contains no equity, or sets it out defectively, it is good cause for demurrer generally, or for cause, or the respondent may object in his answer or at the hearing to the want of equity in the bill, and it is a good ground for the reversal of a decree on appeal.

So if a question arises whether the allegations of the bill are made out by the proofs in the cause, it is a proper subject of consideration before rendering a decree in the court below, as well as review in the appellate court, not as a question of jurisdiction, but one which arises in its exercise. "It is well settled that the decree must conform to the allegations of the parties," [24 U. S. 11](#) Wheat. 120, and be sustained by them as well as by the proofs in the cause, [23 U. S. 10](#) Wheat. 189, but whether it does so conform and is so sustained is determined by the appellate court on the inspection of the whole record and proceedings before it, as was done by this Court in *Carneal v. Banks* and *Harding v. Handy*, above cited. In examining the allegations of a declaration in a court of law, a court of error examines only whether the plaintiff has set out a title or cause of action. "If," in the language of this Court,

"it is defectively or inaccurately set forth, it is cured by a verdict, because, to entitle the plaintiff to recover, all circumstances necessary to make out his cause of action, so imperfectly stated, must be proved at the trial; but when no

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cause of action is stated, none can be presumed to have been proved. The case is not to be considered as if before us on a demurrer to the declaration. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage for the want of a proper averment in the

declaration, and the evidence had notwithstanding been received, it would have presented a very different question."

[22 U. S. 9](#) Wheat. 594-595. This is the settled rule of this Court in cases at law, that they will not reverse a judgment for any defective averment in a declaration, not demurred to, if the plaintiff has substantially set out a cause of action; such too is the established principle in cases in equity. As where a bill was filed to set aside a conveyance on account of the mental incompetency of the grantor which contained no direct or positive averment of his incapacity, yet the court took cognizance of the case, examined the bill and proofs, and decided that

"although a more direct and positive allegation that C.H. was incapable of transacting business would have been more satisfactory than the detail or circumstances from which the conclusion is drawn; yet we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met the charge, and we cannot doubt that his answer is sufficiently responsive to give him all the benefit which the rules of equity allow to an answer in such cases."

[24 U. S. 11](#) Wheat. 121.

In that case, the whole gravamen of the bill, the whole equity of the case, was in the averment of the incompetency of the grantor to make a contract; yet it was held sufficient of aver the circumstances from which the conclusion could be drawn, that it was enough if the bill made it a question in the cause, that the defendant had met the charge, and his answer was sufficiently responsive. The Court proceeded to look into the proofs in the cause, inquired whether the testimony established the incompetency of C.H., and examined the immense mass of contradictory evidence which the record contained, with attention and affirmed the decree of the Circuit Court of the First Circuit annulling the contract on the ground of

incompetency. It is therefore a settled point that an objection to the sufficiency of the averments of the bill must be considered by the appellate court as one directly involving the merits of the case; it is the statement of the complainant's cause of action, to which the defendant must demur if he relies on the want of form, manner or circumstance, or he loses the benefit of the objection. If he relies on an objection to the substance of the averment or its variance from the proofs in the case, he must make it appear to the satisfaction of the court that the bill contains no equity on its face, that no cause of action is set forth, nor any circumstances from which the conclusion of an averment of one could be drawn conformably to the evidence adduced. The application of these cases to the record of the circuit court presents only this difference; by the substitution of the word domicile for usage in *Renner v. Bank of Columbia* and citizenship for incompetency in *Harding v. Handy*, the rule and principles of both are identical in point of law.

In applying these maxims of this Court to the objection made by the appellants to the reexamination of this case, the record shows that the gravamen of the original bill and all the petitions is that Matthias Aspden made a will devising his real and personal estate to his heir at law, and died leaving Henry Nixon, the respondent, his executor, who has in his hands a large surplus of personal property, to which the several parties aver themselves to be entitled by the terms of the will, but which the executor refuses to pay over, though bound in equity so to do. If these averments are true, if they are made out by the proofs and exhibits in the cause, there is certainly equity in the bill sufficient to entitle the devisee or legatee to a decree against the executor for the surplus of the estate in his hands. Had he demurred to the bill, he would have been adjudged to answer over, for there could have been no clearer case for the interposition of a court of equity; or if he had insisted on the objection at the hearing, it could not have been doubted that there was a substantial averment of a ground of relief.

The execution of the will was duly proved, the sanity of the testator was admitted, the fund was in the hands of the respondent, who admitted the trusts, submitted to the

jurisdiction of the court, ready to abide its decree, he held the money for such person as they should decree to be the person entitled under the will, which was an exhibit in the case. The only question depending was who was the person that filled the description of the devisee or legatee; when that was ascertained, the whole controversy was ended. Had the will named Samuel Packer of New Jersey, the original complainant, George Harrison of Philadelphia, or John Aspden of Lancashire, England, two of the petitioners, parties to this appeal, as the favored objects of this testator's bounty, the executor would have stood without an excuse, for not paying him the surplus of the estate. It could not be a material averment where the testator's domicile was; his executor was bound to obey the directions of his will, be his domicile where it might. This proposition admits of no doubt. But as the will names no person, it must be ascertained from its terms who was intended to be the devisee or whom the law designated as such by the legal intendment of the words used in the will. When that is done, the rights of the person or persons thus designated and the duties of the executor become the same as if he had been expressly named as the person entitled, on which the question of the domicile of the testator could have no direct bearing.

The only direct question on the construction of the will was the intention of the testator as to who should enjoy his estate after his death; all other questions were collateral to this, and the only effect of his domicile could be, as the ground of an inference of his intention being, to give it to such person as should be his heir by the local law. But this is only a circumstance from which to draw an inference of intention, and before such inference could be drawn, it must be made to appear that the law of England designated one person and the law of Pennsylvania a different one. If the law of both countries is the same in this respect, the averment of domicile in the bill would not put in issue even a circumstance from which any conclusion could be drawn, and so far from being matter of substance affecting a final decree, it would not be a ground of special demurrer. If it once becomes the established rule of this Court that the decree of a circuit court shall be annulled on a motion, without an examination of the record, because it

does not set out an averment of a collateral fact or circumstance bearing on the intention of the testator by inference merely, then every such fact or circumstance must be averred distinctly, of which domicile is but one of many. The state of a testator's family and property is always referred to to ascertain the devisee or thing devised; evidence of other collateral facts may be introduced in many cases to aid in the construction of a will or to show the intention of the testator, but no court of equity ever held it necessary to aver those matters in a bill brought to enforce the trusts of the will in favor of a devisee or legatee.

In this case, however, the original bill alleges the testator to have been a citizen of Pennsylvania at the time of his death; this is done in direct and positive terms; it is only necessary, therefore, to apply to this averment, the principle laid down by this Court in *Harding v. Handy*. Is citizenship a circumstance from which the conclusion of domicile may be drawn? Is it sufficiently explicit to make domicile a question in the cause? and has the respondent met this part of the bill? These questions are of easy solution. The domicile of a citizen of Pennsylvania is certainly not presumed by law to be in England without some proof of his residence there, but is presumed to be in Pennsylvania till the contrary is proved. The respondent has considered the averment of domicile as made, for he has answered it; the parties in the cause have deemed it a question raised, by taking testimony touching it; each of the ten counsel who argued the case in the court below made it a point, except one who did not deem it material, and the court thought proper to take it into its consideration and express an opinion upon it as a point which had been argued -- not whether the domicile had been properly averred, but where it appeared by the evidence to have been in fact, and its bearing on the will and cause. It was the most deliberate opinion of both the judges of the circuit court that the law of both countries pointed to the same person as the devisee, and that the fact of domicile had no bearing on the intention of the testator or the construction of his will. As this was a question of local law arising directly in the case, it was deemed necessary to examine it thoroughly before rendering a final decree, and if it is now one vital to the case, it would seem proper at least to consider whether the conclusion of the circuit court was so clearly wrong on the law

of Pennsylvania as to justify this Court in annulling its final decree without an argument on the point.

In this opinion the circuit court was supported by the counsel of the appellants in their printed brief, presented for the argument of the cause in this Court. Their third point is "that the law of Pennsylvania is to govern this case, and that by that law they are entitled." Their fourth point is "but that if the case is to be decided by the law of England, still the appellants are entitled." Thus most distinctly admitting the identity of the law of both countries in its application to this will, which was also asserted by the counsel of the appellees. Nor have the appellants' counsel, in their argument of this motion, even contended that there is any difference between the respective laws as to the person who is the heir at law of the testator, or who are his next of kin by the statutes of distribution. In this union of opinion between the judges of the circuit court and the counsel of all parties, thus apparent to this Court, it was not an unreasonable expectation that they would at least have looked at the record, the evidence, the law and decree, before they would authoritatively decide that there was nothing deserving an argument without the averment of domicile.

The whole case turned upon a question of local law which had long been settled by the highest judicial tribunals of Pennsylvania and sanctioned by the legislature as firmly as any one principle of her jurisprudence -- that the common law of England, as to the descent of property, had, from the charter of Pennsylvania, been adopted in all cases not specially provided for by act of assembly. It remained only to examine the legislation of the state to ascertain whether the present case was embraced within the provisions of any law, had it been a case of intestacy; if it was not, then it was an admitted rule that the common law governed it.

But as the present is not a case of intestacy, the range of inquiry is still more narrowed; it turns upon the words of the will, which is the law of the case paramount to any other. Local laws can have no other effect on its construction

than by their presumed operation on the mind of the testator when he made his will, as an indication of his intention to refer to the law of his domicile, defining its terms. Yet before such

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intention can be inferred it is a settled maxim of the law that it must stand well with the words of the will; it cannot be admitted to vary its plain words or their settled legal signification.

If these considerations afforded no ground for inducing the court to give the record an appellate inspection, there are others which may serve as some apology for the court below and the counsel there as well as here for overlooking the indispensable necessity of an averment of domicile in order to give to either court jurisdiction over the subject matter of the cause. In the first place, no such rule is laid down in any book of equity practice or any adjudged case in any court of equity in England or this country, and it forms no part of their practice as adopted by the acts of Congress and the seventh rule of this Court. In the next place, if such averment had been required by the ordinary rules of equity practice, it was necessarily dispensed with by the adjudication of this Court on the subject of domicile in a case of intestacy, which is much stronger than one under the will, for in the former case the local law applies directly to the estate of an intestate as the rule by which it shall be distributed. The law of the situs of the property, the domicile of the intestate, or of the place of administration must govern, but which should be adopted by this Court was elaborately argued in 1831 in the case of [*Smith v. Union Bank of Georgetown*](#), 5 Pet. 518, [30 U. S. 523](#) . In that case the intestate was born in Maryland, domiciled in Virginia, died in Pennsylvania, had personal property in this district, being a claim upon the government, on which administration was had here; he died insolvent. The question arose by what law his estate should be distributed among his creditors, on which this Court decided that it should be the law of the place of administration, and not of the domicile, which was the point directly adjudged, and from which only one judge dissented. The question of distribution among the next of kin was not directly before the Court, but was noticed in its opinion, from which the same judge dissented also.

In alluding to the latter question, the words of the Court are:

"With regard to the first class of cases, we expect to be understood as not intending to dispose of them directly or incidentally. Whenever a case arises upon the distribution of an

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intestate's effects exhibiting a conflict between the laws of the domicile and those of the situs, it will be time enough to give the views of this Court on the law of that case."

"That personal property has no situs seems rather a metaphysical position than a practical and legal truth."

In noticing the provisions of treaties on this subject, the Court said

"It would seem that such a provision would be wholly unnecessary if there existed any international law by which the law of the domicile could be enforced in that regard in the country of the situs, or if the fact of locality did not subject the goods to the laws of the government under which they were found at the party's death. In point of fact it cannot be questioned that goods thus found within the limits of a sovereign's jurisdiction are subject to his laws; it would be an absurdity in terms to affirm the contrary. . . . This necessity of administering where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if in any instances the rule is deviated from, it forms, *pro hac*, an exception, a voluntary relinquishment of a right countenanced by universal practice, and is of the character of the treaty stipulations already remarked upon, by which foreign nations surrender virtually a right which locality certainly puts in their power."

Against these doctrines, the dissenting judge most earnestly but in vain remonstrated, insisting that it was settled by the international law of the civilized world that personal property had no situs, that it was distributable by the law of the domicile, and that if these principles were shaken by this Court or declared to be

unsettled, irremediable and utter confusion would ensue. For it was a subject on which Congress could not legislate out of this district, nor the states of this union or foreign nations beyond their respective territorial limits, the inevitable result of which would be that the law of distribution of an intestate's estate would be different in every state and country in which he owned any *bona notabilia*. That the Court having decided that a pecuniary claim on the government of the United States was *bona notabilia* in this district, subject to distribution by the local law, it followed that if the intestate had debts due to him in different states, or owned a part of the funded debt of different governments, or of the stocks of local

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corporations, there could be no uniform rule of distribution either among creditors or distributees.

But the result of the most deliberate consideration of this Court is that which has been solemnly adjudicated and promulgated as the rule and guide for all the inferior tribunals of the United States. It would not have comported with the judicial duty of the dissenting judge, presiding in the Circuit Court of Pennsylvania, to have declared to the profession and suitors that his overruled opinion must be taken as the law of the case. Had the counsel of the parties complainants moved that court to dismiss the bill, or petitions filed by themselves, or, after a final decree, had asked that it should be declared to be an extrajudicial act because the domicile of a testator (not of an intestate) had been averred only as a conclusion to be drawn from an express averment of citizenship, the circuit court would have been bound to have decided that it was unnecessary, according to the decision in *Robinson v. Bank*, for having settled that domicile was wholly immaterial in distribution among creditors, and when they declared, that "we expect to be understood as not disposing, directly or incidentally," of the question of distribution among next of kin, the dissenting judge would have left it his duty not to have disappointed an expectation not only so reasonable, but which he would have obeyed as a mandate of paramount authority. The more especially as the whole reasoning of the court of the last resort went to negative the materiality of domicile in any case; but most emphatically was the dissenting judge bound by his every duty not to

declare the law of the domicile to be the law of the case in face of the distinct proposition of the court -- "that personal property has no situs, forms rather a metaphysical position than a practical and legal truth," and thus substitute metaphysics for law as the rule of his judicial action.

At the time of rendering its final decree, the Circuit Court for the Pennsylvania District could not have foreseen that without overruling the decision of this Court made in 1831 by the same high authority which pronounced it, when no question was presented to this Court by counsel touching the matter, or argued by them after the suggestion had fallen from the bench. It should now appear to the same judges to be a principle of law so manifest, so clearly and decisively settled, as to make the

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most solemn decree of inferior courts against executors mere nullities because the pleadings on which they were founded did not contain an express averment of the domicile of the testator. Although the bill and answer contained express averments of the citizenship of the testator, the place where he made his will, the place of his death, of administration, and the situs of the property. As these averments were in strict conformity with the decision and reasoning of this Court in *Robinson v. Bank*, it could not have been thought that there remained in the vitals of the record a disease fatal to the action of the circuit court upon the matters in issue.

Had it been objected that the situs of the property or the place of the testator's death or of administration had not been averred, the necessary amendment would have been made, though the pleadings had averred the domicile, that must have been deemed immaterial according to the then doctrine of this Court, which was that personal property had a situs without any reference to the domicile of an intestate. It follows that if an averment of the situs was indispensable, that of the domicile could not be, as the rules of distribution would be different by the local laws. And as the law of the situs was the rule, when these pleadings and issue were made up and the final decree rendered, it would most certainly have stood the test of this objection, though it must have been reversed had the situs not been

averred, notwithstanding the domicile had been, however explicitly. Yet now it seems that a record containing an averment of the situs in all its bearings on the case is mere blank paper, because the domicile is averred only by way of inference or conclusion from facts stated.

In 1831, the materiality of the situs was "a legal and practical truth," that of the domicile was "a metaphysical position," an absurdity in terms in the opinion of all the judges of this Court but one. In 1835, the materiality of the situs is the metaphysical position, and that of the domicile the legal and practical truth. This radical difference between the promulgated law of this Court on the same question arising at these periods presents a *conflictio legum* which the Circuit Court of Pennsylvania was not bound to anticipate, the consequences of which it is hard to visit upon suitors in that court by drawing a sponge over all the proceedings in this cause, to their great delay and

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injury, though they were had and conducted according to the solemn opinion of this Court as to the law of the case, when the suit began and ended. At that time, the judges of the circuit court had for their guide no better rules for their decision than those laid down in 1831 and the practice of this Court at the same term, which to one of the judges, at least, is some apology for not exercising his legal acumen in discovering a fatal defect of jurisdiction over a cause in which, it now appears, he has assumed an unwarranted power to render a decree on the merits. It is his consolation to find not only in the solemn judgment in *Robinson v. Bank* the reasons for overlooking the indispensable necessity of an averment of domicile, but the fact that in two other cases in the same term, this Court had practically decided it to be unnecessary.

The case of *Backhause v. Patton* was a bill in equity to compel an account of the personal estate of the testator and for its due distribution; the bill averred the testator to be a citizen of Virginia, but contained no averment of his domicile. [30 U. S. 5](#) Pet. 160.

The case of *Page v. Lloyd*, was on a similar bill, containing an account of the situs of Mr. Mann Page's personal property in two counties in Virginia, but no averment of either his citizenship or domicile. [30 U. S. 5](#) Pet. 304. This Court took cognizance of both cases on certificates of division from the Circuit Court of Virginia, and finally decided on all the matters so certified without a doubt at the bar or on the bench of the regularity of the record, and as the rules of its decision are the same whether a cause comes up on a certificate or on appeal, these must have been deemed records on which it could act judicially. It is not doubted that a further examination among the records of this Court, on appeals from other circuit courts in cases of equity against executors, will furnish additional proof; that if the practice of that of Pennsylvania has been in violation of all rules, it has the fullest sanction in the course of this Court through all time, and this is the first time it has annulled a decree for such cause.

It is equally unknown to the fundamental principles on which it is organized as an appellate court, which in this case has not exercised its powers as directed in its Constitution, by

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reexamining and reversing the decree and rendering such a one as ought to have been given. Its power has been exerted on a summary motion, not on an assignment of errors; the decree and all preceding acts of the circuit court have been declared null and void collaterally, not for errors in the record or decree, for this Court would not reexamine either, nor has it, in remanding the cause, directed what final decision shall be made. The only exception in the twenty-fourth section of the Judiciary Act, which authorizes any departure from the injunction to render such decree as ought to have been made, is

"where the reversal is in favor of the petitioner in the original suit and the matter to be decreed is uncertain, in which case it shall remand the cause for a final decision."

But this case does not come within the exception, for though the reversal is in favor of petitioners in the original suit, the matter decreed was certain; it was therefore no case to be remanded, though if it was, the court has not remanded "the cause for a final decision." Its mandate is a peremptory order to the circuit court to amend the pleadings from the beginning, to admit proofs of new matter and new parties -- in one word, to make a new case throughout -- and concludes with ordering, "such other proceedings are to be had in the said cause by the said court as to law, justice, and equity shall appertain."

It had heretofore been thought to be the province of a court of original jurisdiction in equity to decide on amendments in their legal discretion, or according to the act of Congress, with which this Court never interfered, that after publication and before a decree, the admission of new proofs, new matter, or new parties was discretionary with the chancellor on a petition presented; that after a decree made, but before enrollment, neither could be introduced into a cause unless by a supplemental bill in the nature of a bill of review, nor after enrollment, unless by a bill of review on newly discovered evidence, filed by parties or privies to the original suit. It was also believed that there was no distinction better established by the law of equity than the different effect of defective pleadings when demurred or excepted to in the court below and when they are unnoticed till the cause is removed for review in an appellate court. And it has hitherto remained

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equally well settled that no decree will be reversed, even on a bill of review for any new discovered evidence, unless in a case where a new trial would be awarded by a court at law.

But if the decision now made is to be hereafter considered as a precedent for the future action of this Court on appeals in equity cases, it portends a fearful change in the rules which have heretofore drawn a line between the original and appellate jurisdiction of the courts of the United States, the consequences of which cannot be foreseen. The practical effect of this judgment and mandate is an assumption of the province of the former not only as to the rules of practice, pleadings,

amendments, parties, proofs, and issues, which depend mainly on the exercise of discretion, but is giving to an appeal from a final decree the effect of a special demurrer to a bill, an exception to an answer, as well as of an original supplemental or bill of review, in all their respective operations on the case. This appellate court does not decide upon the case or decree appealed from; it orders an entirely new one to be made by an utter prostration of everything in the record, from the original bill throughout. It does not remand this cause for a final decision by the circuit court; it first divests it of all the attributes and requisites of a case for a final decree, and then commands that a case shall be made up for their original jurisdiction, as a suit in equity under positive directions which leave no discretion in the exercise of their jurisdiction over the matters referred to in the mandate.

The reasons assigned by the Court for these proceedings are worthy of the most serious consideration. They decide that an averment of domicile is indispensable because it might indicate the intention to give the property to such person as would be the heir at law by the law of one country, who would not be the heir by the law of the other, but adds, "we do not say what is the case."

"That the country by whose laws the will is to be interpreted should be first ascertained, and then the inquiry is naturally presented what the provisions of those laws are."

It also directs an averment of the domicile "at the time of the will being made," "at the testator's death," and "in the intermediate time" (a period of thirty-three years), yet declares that it does not mean to express any opinion as to the effect on the will of the domicile's being at a different place at these different times.

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Whence then arises the necessity of the averments? The natural order of inquiry would seem to be, whether there was any difference between the law of England and Pennsylvania in the interpretation of the will, and next whether the will should be construed by the law of the domicile at the death of the testator or at any other time, for the materiality of the averments depends entirely on the solution of these

two questions. If the law of both countries was the same at all times, the averments are useless. It is surely a strange ground for uprooting a cause from its foundation by an appellate court, merely because the original bill does not contain an averment of a fact which, by possibility, may be material as the evidence of intention, or the existence of that fact at a time when it could have no possible bearing on the will.

When the new case now directed to be made up shall have been decided by the circuit court and come here again on appeal, it is to be presumed that this Court will then deign to inquire by what law this will must be interpreted and what the provisions of that law are. It is also to be hoped that by that time it will feel prepared to instruct the Circuit Court of Pennsylvania whether its next final decree shall be in conformity to the law of the testator's domicile, when he made his will, when he died, or at what period of the thirty-three years which intervened, not omitting an explicit opinion upon the preliminary question whether the domicile has any bearing on the will. As the mandate now is that court is ordered to proceed "as to law, equity and justice shall appertain," but is uninstructed by what law or rule the justice or equity of the case is to be ascertained other than the law which the testator has prescribed in his will. The predicament in which that court is now placed is a most unpleasant one; its past errors have been so gross and palpable as to make its whole proceedings nullities; yet it remains in the dark as to the means of correcting them; the averment of domicile will lead to no new evidence or issue not in the present record, and no new question of law or fact can arise in that respect. When a new case shall have been presented, it will differ from the present only in this one averment, which, by the admission of this Court, cannot have the most remote effect on the decree unless on the contingency

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of a *conflictio legum*, which is now as little ascertained as before this reversal.

If the action of this Court had stopped here, the embarrassment of the circuit court would be sufficiently great in being precluded from the exercise of all discretion in the proceedings preparatory to a final decree by the peremptory orders now given

on all matters for their ultimate judgment, and as to that left without any directions how to avoid the recurrence of the same errors which have caused great and expensive delay. There is, however, another ground assumed by this Court which is infinitely interesting to all persons whose rights may be affected by its appellate powers in equity cases, as well as to all inferior courts on general principles, but most emphatically to the judges of that court whose proceedings have been thus roughly handled in the opinion delivered. After the direction to make the averments, the court remarks

"It appears from the motions which have been made to this Court, as well as from certain proceedings in the court below which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs at law, whose claims have not been adjudicated upon in the court below on account of their having been presented at a late period. . . . As the cause must go back for further proceedings and must be again opened for new allegations and proofs, these claimants will have an opportunity of presenting and proving their claims in the cause, and we are of opinion they ought to be let into the cause for this purpose."

The "motion" alluded to was to revise the whole proceedings in the case, made by the counsel of persons who were not parties or privies in the original suit, or to the appeal; the "certain proceedings in the court below" were had on a petition asking for leave to file a bill of review by those persons for newly discovered evidence and to make themselves parties. Leave was refused for the reasons given at length in the opinion delivered by the circuit court, some garbled extracts from which, the counsel who urged the objection taken to the want of the averment of domicile, not the counsel who made the "motion" referred to by the court, thought proper to read in the course of his argument. Had the whole opinion been read by the counsel or the court, they had seen the reasons of the refusal to permit

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the bill of review to be filed; it would have been most apparent not only that it was not because the petition "was presented at too late a period," but the circuit court

expressly declared that the petition was presented within due time after the final decree, had there been no other objections. The grounds of the objection to the petition were that those claimants never asked to be admitted into the cause till after the final decree, and the pendency of the suit in this Court on the present appeal; that the circuit court could not reverse their final decree in any other way than by a bill of review for error apparent or new matter. That such bill lies only in favor of parties or privies to the final decree, in neither of which characters could those persons stand; that their case was not supported by the requisite affidavits; that the matter relied on was not new or newly discovered, but had been relied on in bills in the Courts of Chancery and Exchequer, in England, years before the petition for review, and by the same parties; that even if new, it was not competent to procure a decree in their favor; that with full knowledge of the state of the fund and the pendency of this suit, they had been guilty of such gross and unaccountable negligence that no court of equity could afford them any relief on a bill of review, and if they had any remedy, it must be sought in some other mode.

The circuit court could not adjudicate on their claim before it was presented for adjudication, and when so presented, they had no longer any power of adjudication over it, but on a bill to reverse the original decree by review for error apparent or on an original bill which the petitioners had a right to file. The bill of review for new matter is a matter of favor and discretion, which, in the case presented, they could not permit without the utter disregard of the oldest and best established rules of the law of equity, whereupon the parties filed their original bill, on which there has not been time for any proceedings to be had. It is therefore a gratuitous assumption that "those claims were not adjudicated on in the court below . . . on account of their having been presented at a late period" unless this Court intended to refer to the gross delay of the parties before the final decree and the settled principles of law which forbade that court from letting the claimants into the case on a bill of review for the causes assigned. The judge who gave

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the opinion of the circuit court, feels bound to repel the imputation which would otherwise rest upon the "certain proceedings in the court below" as wholly

erroneous and unfounded, on any other construction which may be given to that part of the opinion of this Court containing the allusion to those proceedings.

It is also his right and duty to inquire by what rule of law a court of mere appellate power over final decrees of a circuit court assumes appellate jurisdiction over a subject matter not contained or referred to in the record of the cause before them on appeal? By what power this Court can review the proceedings of that court on a petition for leave to file a bill of review to reverse their own decree after an appeal; on new discovered matter, which rests exclusively in their discretion as to granting or refusing it, and especially after the parties had acquiesced in the decision and had adopted another remedy? And above all, by what warrant this Court can act on an appeal by the parties now before them in favor of persons who are utter strangers to the record and suit, who, being neither parties or privies, can be heard only by an original bill filed in a court of original equity jurisdiction?

The knowledge that these persons had desired and had been refused admission into the cause, not having been derived from the record, was wholly extrajudicial, and is so admitted by this Court, yet it is made the basis of judicial action, and its peremptory mandate to the court below to admit them as parties and hear their proofs. Thus, indirectly and collaterally but most effectually reversing the refusal to permit them to file a bill of review, and giving them not only all the benefits which they could have desired from a bill of review actually filed, but of an actual reversal -- nay, much more substantial benefits. On the hearing of a bill of review, the plaintiffs are confined to the new matter set forth in their bill, and this would have been the utmost extent of the relief which could have been given them had they appealed to this Court, obtained a reversal of the proceedings in the circuit court on their petition, and the case had been remanded with directions to permit the bill of review to be filed and its merits to be adjudicated.

Whereas they now come into the cause as original parties, with the same liberty as to proof as those who have been contending for years, they are likewise fully

absolved from every requisition, and duty enjoined by the law of equity, as the indispensable conditions of their admission as parties to a suit after a final decree, as well as from all the consequences of gross and long continued negligence. All this has been done in their favor without any appeal by them, but on information laid before this Court in support of a motion which they would not listen to and on which they could not act directly in virtue of their appellate power consistently with the acknowledged doctrines of courts of equity or the directions of the Judiciary Act that is an appeal by the party aggrieved by a final decree. In the present course, then, of this Court in relation to those persons who are no parties to this appeal, as also to those who are proper parties, it must be asked: what brings any decree or other proceeding of a circuit court in equity, within any power of this if not an appeal? What the act of reversal necessarily implies if not jurisdiction of the case and its exercise? Or what is the nature of that jurisdiction if it is not appellate, and what respect is paid to the Judiciary Act if this appellate jurisdiction is not exercised by reexamining the record and proceeding according to the directions of the law which confers the power, and is the only authority by which any proceeding of a circuit court can be reviewed, or its final decrees be reversed?

As the court has reversed and annulled every proceeding which has been had, directly or collaterally, in this suit, whether it related to the rights of parties, privies, or strangers to the record to the subject matters of appeal, or those which have come to their knowledge without judicial information, inasmuch as their whole action has been on a summary motion to reverse, solely for the want of an averment in the bill, which the court most cautiously avoids deciding to be material to the merits of the cause otherwise than in the event of an unascertained and possible conflict of laws not asserted to exist, and wholly refuses to decide any one matter put in issue by the parties as to either law or fact. The mandate of reversal must be referred to some other than its appellate power as granted by the Constitution, defined, limited and regulated by Congress, for it cannot be pretended to be within the legitimate scope of any construction which can be given to the words "appellate jurisdiction," which necessarily requires

reexamination of what had been before adjudicated in the court below. If the jurisdiction now exercised is original, it is only necessary to refer to the decision of this Court in *Marbury v. Madison*, to pronounce it unconstitutional. Be it, however, appellate or original, it is incompatible with the organized laws of this Court, with the principles and usages of law in those appellate tribunals from which we have adopted our rules, and can have no sanction from precedent unless by some silent unadjudicated practice which may have crept into our proceedings without a due consideration and which has been often decided is not binding as authority, and is never too late to correct when its errors are discovered. [21 U. S. 8](#) Wheat. 321-322.

There is no power so dangerous as that which can be traced to no definite or authoritative source or which is exercised without a reference to some fixed principles, it is in the nature of that which is assumed by any department of government, to be capable of no other limitation than such as it may choose to prescribe to itself, while that which is conferred by the Constitution or statutes is defined, limited, and regulated in its exercise to the cases specified, and in the mode prescribed. Such are the appellate powers of the circuit and Supreme Courts of the United States; they are of limited jurisdiction -- necessarily incompetent to act by any prerogative or inherent power; as the creatures of the Judiciary Act, they are not at liberty to exercise any power over the proceedings of inferior courts by any general supervisory power, such as has been assumed by the King's Bench and House of Lords. Their supervision is only by writ of error or appeal and such writs as Congress has authorized them to use, so that in whatever case they act as an appellate court, it is by special authority, and can exercise no other than what is appropriately appellate, as contradistinguished from original, jurisdiction.

In the present case, there seems to be a mixture and excess of both, whether the mandate and opinion are rested by the rules of other courts of appeal or the acts of Congress.

The House of Lords acts as an appellate court by its own authority without an act of Parliament, but has never assumed any original jurisdiction on appeals in equity

causes or reversed the decree of a chancellor, because an issue before him will not enable the Lords to make a satisfactory decree; they remand the cause for amendment; 1 Bl.P.C.N.S.

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471, 477, or give the party leave to withdraw his appeal, 2 Bligh P.C. 392; *S.P.* [25 U. S. 12](#) Wheat. 12.

Such a course would have been peculiarly proper in this case; the only irregularity complained of on this motion was by the appellants' own fault in not making an averment in their own petitions, which is admitted was amendable, and is so decided by the Court, and it cannot be denied that it was competent to them to remand the cause for this purpose, [25 U. S. 12](#) Wheat. 12, or permit the appellants to withdraw their appeal to enable them to amend their own petitions if the Court deemed it indispensable to make a final decree on its merits. But it is most confidently asserted to be against all rules and without precedent to reverse a decree and declare all previous proceedings void for such a cause; no court of original jurisdiction in equity can annul its own decrees without a bill of review even for error apparent; this has been the law from the time of Lord Bacon.

This Court has no power to revise its own decrees after the term expires unless for clerical errors; it can exercise no original jurisdiction in this case, and that which has been exercised is not appellate by any rules which define what appellate power is and its lawful course. So far from adjudicating any one matter appealed from or point of law or fact presented by counsel, they have left every right and claim of the parties wholly unnoticed, and though they have annulled every proceeding of the circuit court, have not adjudged any one order or their final decree to be erroneous in law or fact, but have done it for the ostensible purpose of inserting in the bill and petitions an averment of a fact which would have been directed of course in the circuit court on suggestions of either party, and solely to meet a contingent question of local law, which that court, in its solemn opinion, declared could not arise in the cause and which the counsel on both sides argued did not exist and would not be raised.

There is only one rule by which such a proceeding can be held to be the legitimate exercise of appellate power, "*sic volo sic jubeo stat pro ratione voluntas*;" the opinion of the court precludes any other conclusion, for if it had appellate jurisdiction, it was bound to give the record appellate inspection and consideration; not having done so, its opinion

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and mandate is its judgment that there was no case before it for its appellate action.

This presents another view of this case which is alarming as a precedent. This Court has no more power to declare and consider the proceedings of a circuit court null and void than a district, circuit, or state court has, unless they are before them by an appeal, according to the act of Congress; excepting such a case, the powers of all these courts are equal. All are bound to respect a judgment till appealed from, however erroneous, while anyone may disregard it, even as *prima facie* evidence of any fact professed to be adjudicated, if the judgment is void. If the course of this Court is consistent with the rules of law, then the final decree of the circuit court would be as much a nullity after the expiration of the five years limited for an appeal as it is now, and if a nullity in this Court, it must be so in every other. If the want of an averment of a testator's domicile in a bill of equity nullifies all subsequent proceedings against an executor for an account, there are many void decrees on the records of this Court, which state courts may declare so by the same power with which this Court has acted in this case.

This rule of action must be taken to be that the bill must contain direct averments to meet every possible contingency which may arise in the proofs as to questions of fact or law; that it is not sufficient to aver a fact from which the necessary conclusions may be drawn, though the parties have taken issue upon it in both courts, and thus admitted that there was a proper case for the exercise of their respective jurisdiction. The mandate admits of no other conclusion than that the action of the circuit court on a bill or petitions like the present is wholly without legitimate power or jurisdiction, and their whole proceedings " *coram non judice*; "

if so, it follows that their decree is not a judicial act entitled to the least respect in any court. If this Court can declare it void without appellate reexamination, it is because it is an extrajudicial act, and surely no one can contend that the extrajudicial proceedings of this Court are entitled to any more respect. As if they should award a mandamus to a Secretary of State, reverse the judgment of a state court in a case not within the twenty-fifth section of the Judiciary Act, or take cognizance of an

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original bill in equity between individuals. Let it once become a settled rule that the want of an averment like the present is fatal to jurisdiction, the proceedings of no court can stand the test of a scrutiny so severe as has been applied to these.

With the precedent now established, the judges of state courts will look with microscopic eyes at our records, as well as those from other states, and be sure to find, at least to their own satisfaction, some defect which might have been fatal on special demurrer or abatement, and in their turn declare our decrees and judgments void by the same summary power. Nor will the consequences stop here; the federal courts will exercise the same power over the judgments of state courts without appeal or writ of error; their proceedings, in cases not within their judicial cognizance, are as much nullities as those of a circuit court, and may be declared void by this Court on the same rule as is now adopted. Let the directions of the Judiciary Act be nullified by following up this precedent, the appellate power of this Court becomes absolute, arbitrary, and illimitable, and all other courts may be justified in following the high example.

There is yet another view which must be taken of the judgment now rendered. The court has ordered the averment of domicile to be made at the death of the testator in 1824, at the making the will in 1791, "and in the intermediate period (if there was any change) so that the elements of a full decision may be finally brought before the court." Each averment being then considered as equally indispensable, it must be deemed that the omission of either is equally fatal to the proceedings of the circuit court; each must therefore be considered as having a vital bearing on the

construction of the will, or there would not have been a positive order to insert them. Such an order may indeed afford "the elements of decision," but must protract it till many of the parties to the suit shall have passed away. When the fact of residence at different times during thirty-three years shall have been ascertained in the circuit court, they must then decide in what place the law adjudges the domicile to have been at the time of each change of residence; then arises the question by what law the will is to be interpreted. As the case of *Robinson's Administrator v. Bank* is now overruled, the law of the situs of the

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property of administration or making the will, which is Philadelphia, is not to be regarded, the law of the domicile must govern, but the court is left in utter darkness as to the rule by which to apply that law should the domicile appear to have been in different places at different times. As the circuit court has hitherto been so unfortunate as to have been ignorant of the effect of the domicile in relation to a will personal property, and as one of the judges has the misfortune to dissent again on the subject, it is much to be feared that as there may have been possibly three or more places of domicile in so long a period, at least one if not more final decrees may be reversed because the proper one may not have been designated in their opinion.

Hitherto the law of the domicile at the death of the testator has been deemed the rule, but this point must now be considered as unsettled, or the court would not have directed its averment at any other time as indispensable to a full decision of the cause, as it remains for this Court, at some future period, to declare the law on points so doubtful, great delay must necessarily take place before it can be known by what law the will must be construed; next, what the provisions of that law are; and lastly, what ought to have been the first inquiry -- whether the domicile of the testator is, or in any possible event can be in any way a material question in the cause.

Before the decision of this case, it was considered to be a settled principle that a final decree in chancery was of equal effect as a judgment at law till reversed. [19](#)

[U. S. 6](#) Wheat. 113. That the sufficiency of an averment in a declaration, bill, or petition was a question of merits examinable on demurrer at the hearing, on a motion in arrest of judgment or by writ of error or appeal, but in no case was a question of jurisdiction unless for the want of parties or a proper cause of action. That if there was a substantial cause of action alleged, all defects in the pleadings were cured by a verdict or decree, if not pleaded or demurred to for cause, and that no appellate court could reverse a final judgment or decree for any error in either on the ground of an insufficient averment if the plaintiff's case was one that would entitle him to a judgment on a general demurrer.

So the law was taken by the counsel for the appellants themselves, and so it would have remained had not the court

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prevented them from arguing the points in their printed brief and yielding to the suggestion of one of the judges, decided that they would examine no question in the record, nor hear any argument on any point except one, which was not stated at the bar in either court and may have no bearing on the rights of any party. This is another innovation upon the settled uniform course of all appellate courts which makes this precedent an alarming one.

It is an established rule founded on the soundest principle of justice that a party shall not be permitted to reverse a judgment or decree on an objection not made in the court below. Upon an objection's being made in the House of Lords that an account had not been taken in the Court of Chancery, and it appearing that none had been called for previously by the party making the objection, Lord Eldon observed,

"If this cause had been heard in the Court of Chancery or Exchequer in England, no client could have induced a counsel to make that a point at the bar of this house under such circumstances, because such counsel, having been previously conversant with the cause, would have known that as it was not made below, it could not be made by way of appeal. Had this cause been heard before me and

had I presided during the argument of the appeal against it under the circumstances that have occurred, I would not have allowed counsel to make the point at your I U.S. Lordships' bar."

2 Sch. & Lef. 712, 710, 718. When the opportunity of objection is passed by in the court below, it is taken to have been waived; 2 Sch. & Lefr. 713; [25 U. S. 12](#) Wheat. 18; *S.P.* [24 U. S. 11](#) Wheat. 209-211; [32 U. S. 7](#) Pet. 98; 2 Binn. 168; 12 Serg. & Rawle 103, unless the defect in the record is one which could not have been cured or amended in the court below if the objection had been made before it was removed. 4 J.R. 602; 14 J.R. 560; 16 J.R. 353; 18 J.R. 558, 559; 2 Dow.P.C. 72. The names and judicial reputation of the American jurists who have ever acted on this rule, and of lords Eldon and Redesdale, may with propriety be referred to and invoked in support of a dissenting judge, and the rules and decisions of this Court, till this time, may also be called to his aid.

Had the present appellants demurred to the bill, objected in the pleadings, or at the hearing, on the ground now taken,

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the defect, if any, would have been cured in the court below by an amendment without affecting the proceedings; but here it would seem that there can be no amendment ordered without annulling everything heretofore done in the cause. If it was so intended by the appellants, they have delayed this objection most profitably for the purposes of vexation; it has been received under circumstances which would have prevented it being listened to in any other appellate court, but which have entitled it to favor here. It is not made by the respondent, whom alone it concerned to reverse erroneous proceedings by the appellants, who were complainants, against him; if he chooses to waive defects in their petition, they could not be injured thereby, they did not ask for an amendment in theirs, or the petition of the party who obtained a decree in his favor. The appellants asked a reversal and a decree in their favor; they have obtained a reversal indeed, but it is of every step they have taken to submit their rights to the final adjudication of this Court; the cause is open to indefinite litigation by each of the three hundred

claimants to the fund in the hands of the executor, as well as those now ordered to be added to the suit, who may be not the least troublesome, at least to the appellants. A principle, too, has been established by which each claimant is permitted, during the five years allowed for appeal after a final decree, to reserve his objection to the pleadings till a convenient time and then obtain reversals on a summary motion for defects that are amendable on application in the discretion of the circuit court by the general rules of courts of equity and law and by right under the provisions of the Judiciary Act.

There can be no course so utterly subversive of equity -- nay, of common justice -- as to hear parties in an appellate court on points made under circumstances like the present; it is one to which I can never consent, and against which I shall deem it a duty to suitors to protest on all similar occasions. I will never, while sitting in this Court, reverse a decree upon objections which a court of Chancery or Exchequer, on a cause regularly before them, would not in the exercise of their original jurisdiction, or the House of Lords or the Court of Errors and Appeals in New York would not permit counsel to argue on appeal. Nor will I in any way admit that any appellate

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court can, in the legitimate exercise of its jurisdiction, render a judgment of reversal on any ground on which it would not be bound to hear an argument of counsel. It is a great hardship on parties to have their judgments set aside on technical objections raised at the bar, but the grievance will become intolerable if the course of the court should be such as to do it when they are first suggested from the bench.

Let an objection like the present, however, come whence it may, I consider it as purely technical, which I cannot sustain consistently with the respect due to the solemn and unanimous decisions of this Court in *Harding v. Handy* and *Renner v. Bank of Columbia*, with many others founded on the most immutable maxims of the law. They settle the rule that the conclusion of fact drawn from a circumstantial averment is sufficient to support a decree in equity, and forbid me from

disregarding the evidence which has been admitted without objection and now forms part of the record before me for judicial inspection merely because the subject matter of that evidence was not averred in the bill or petitions of the claimants. And when to his high and unquestioned authority is added the 32d rule of this Court, I find safe rules for my guide, which would be violated by any sanction given to any proceeding in opposition thereto. That rule is

"In all cases in equity, &c.;, no objection shall hereafter be allowed to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence unless objection was taken in the court below and entered of record, but the same shall otherwise be deemed to have been admitted by consent."

I feel bound to examine all the evidence in this record as it is found without an objection, and as counsel and parties are precluded from now making any, it is my duty to give it its full effect on the question of domicile, as well as any other which may be relevant to the cause; any other course would in my opinion annul this rule, which counsel must respect, and which I had thought the court would adhere to, by hearing an argument on a point arising on the evidence, made by the counsel of the appellants in the brief presented for our judicial action.

The order for the admission of new parties deserves some notice on account of the manner in which it was made, which

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is believed to be unprecedented. Their names were not in the record, they were in no way before the court, but had employed counsel, who were desirous of being heard as *amici curiae*, in order to point out some irregularities which, as they conceived, would authorize the reversal of the decree, so as to permit them to make an application to become parties, stating at the same time that the circuit court had very properly refused such application by a bill of review. This Court promptly and unanimously refused to hear them in support of their motion, yet have granted what they would not permit to be moved for by the counsel of the new parties, and of course without motion, for the counsel of the appellants who

signed the brief as representing three individuals and others, on being called on by the counsel for the appellees in open court to state for whom they appeared, declined an answer. In the circuit court it may not be within the line of duty to inquire, by what authority, and on whose application these parties have been ordered to be admitted as litigants in the cause; so far as respects one of the judges, he will obey the mandate. But in this Court he may and does make the inquiry respectfully, but as a matter of right, and fearlessly insists that it has been done in violation of the best established principles of the law of appellate courts. As the court would not hear the motion of the counsel of these parties, they could not be judicially informed that they desired admission into the cause; *a fortiori* they could not judicially decide whether their case was on which gave them a right to admission. Their judgment and mandate have therefore been given on extrajudicial knowledge, such as no appellate court can receive or act upon, as it was wholly dehors the record, and related to no party to the appeal, or anything appealed from.

In issuing its order founded on such knowledge as they chose to receive, the court must have taken a very partial view of the papers presented to them for their collateral inspection; had they been judicially examined or their contents known, it would have been apparent that the case deserved some deliberation at least. By their own admission, these parties had full knowledge that the fund they claimed, was in the hands of the executor in Pennsylvania, yet their first application to be admitted as parties to this suit, was ten years after the death of

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the testator, and nearly six months after the final decree. That after the failure of their petition for a bill of review, they had filed their original bill in the circuit court, having previously applied to the Orphan's Court of Philadelphia County (which is a court of equity and of record, before whom the administration account was in a course of settlement) for an order of distribution in their favor.

This Court also knew judicially, for it appeared in the answer of the executor in this case, that he had interpleaded and prayed the protection of the court, for which

purpose they had made an order (also in the record) that all claimants of the fund who did not appear by a given day and present their claims, should be barred thereafter, which order was sanctioned by the practice and rules of all courts of equity. These parties suffered the time to elapse long before they thought proper to make any claim, without in any way denying notice of the pendency of the suit, or accounting for their delay in applying to become parties before the final decree.

If any court could be justified in admitting them afterwards in a case circumstanced like this, it most assuredly could be only by the exercise of original jurisdiction, by bill of review, and not by any appellate power over this record; these parties were not and could not be appellants from a final decree to which they were not party nor privy; nor could this Court lawfully reverse the decree on new matter, or for any cause appropriate to a bill of review. As to these persons, there was no case in this Court; it could have no appellate jurisdiction to hear and determine on anything; and the proceeding was wholly *coram non judice*, unless it could exercise original jurisdiction over the parties and the subject matter, as a case originating in this Court.

Thus considered, I feel it a duty to declare that the mandate to the circuit court, ordering these persons to be made parties, is without any authority of principle or precedent, and although I shall obey it in that court as the command of a court of the last resort, yet in my best judgment, feel constrained to pronounce it inconsistent with the best established rules and usages of law, and a violation of the Constitution of an appellate court.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Pennsylvania, and was argued by counsel, on consideration whereof it is ordered, adjudged and decreed that the decree of the said circuit court in the premises be, and hereby is reversed and annulled, and that the cause be remanded to the said circuit court for further proceedings, with directions to the said court to allow the bill and the petitions of

the claimants to be amended, and the answers and pleadings also to be amended to conform thereto, and proofs to the new matter also to be taken, and with further directions to allow any other person or persons, not now parties to the proceedings, who shall claim title to the funds in controversy as heir or heirs at law or representatives of the testator, to present their claims respectively before the said court, and to make due proofs thereof, and to become parties to the proceedings, for the due establishment and adjudication thereof. But the proofs already taken in the cause are to be deemed admissible evidence in regard to all such persons, not now parties, who shall claim title as aforesaid, and become parties in the cause under this order, and such other proceedings are to be had in the said cause by the said court, as to law, equity and justice shall appertain.

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