LAWSON *vs.* BETTISON.

A case pending from term to term under an agreement that it is to be settled out of court—the plaintiff's attorney, before term, informs the defendant's attorney that *he must come and pay up:* at the term when the case is *called* the plaintiff and defendant's attorneys, after *some reference* to the agreement, submit the cause to the *court by consent. This is no such surprise upon the defendant, who is absent, as will entitle him to relief in a court of equity.*

When a person employs an attorney, he is concluded by his acts or omissions, where no fraud or unfairness is made to appear.

But if fraud or unfairness, affecting the trial at law, is shown, a party appealing to a court of equity must show that injury to him was the result—a general allegation of injury is not sufficient, as for instance that he had a good defence of which he was deprived—he must state what the defence was and it must appear sufficient.

A party seeking relief in equity on the ground of surprise in obtaining a judgment at law against him, must show that the surprise was not in consequence of negligence on his part.

An attorney is not authorized to receive depreciated paper, at its real value, or other property in payment of his client's judgment, unless by his express authority; and if he receives such may issue execution without regarding it as a payment.

Appeal from Chancery side Pulaski Circuit Court.

This was a Chancery appeal from Pulaski county.

On the 18th September, 1848, Lawson & Thorn filed their bill against Bettison, in which they allege:

That on the 29th September, 1841, Bettison recovered of Whitmore the sum of $225 debt, and $16.10 damages, and cost of suit. Execution issued thereon to March term, 1842, of Pulaski Circuit Court, and was placed in the hands of Lawson, then sheriff, on 30th October, 1841, to be executed: that Lawson was unable to find any property of Whitmore out of which the execution could be satisfied; but before the return day of the execution, one Resley, a friend of Whitmore, proposed to Fowler, the attorney for Bettison in said judgment, to pay him $265, in Arkansas

Bank paper, at the current rate—it being about twenty-five per cent below par: that Fowler, the attorney, acceded to this proposition, received the money and gave receipt therefor to Resley: that no part of this $265, in Arkansas money, came into the hands of Lawson as sheriff; and from that time, (March, 1842,) Fowler retained the money so received, and nothing more was said on the subject until October, 1842, when Whitmore was arrested on a charge of counterfeiting. On 17th November, 1842, Fowler caused an alias execution to issue on the judgment, returnable to March term, 1843, and directed it to be levied on a box containing some specie, notes, &c., which had been taken by the sheriff as the property of Whitmore, after his arrest—which levy was accordingly made.

After the second execution was issued as aforesaid, said Fowler brought to Borden, who was deputy to Lawson, a bundle of Arkansas Bank notes, amounting to $265, alleging they were the same received of Resley, and required the deputy to make sale of them, which he did on legal notice: on the day of sale: Fowler holding the notes in his hand while the deputy cried them off. Fowler became the purchaser of them at $117; said Lawson being wholly ignorant of the matter until after the sale. It is insisted this $265 should be held a credit on the execution at its value when received. Lawson endorsed the fact of this receipt on the execution issued in October, 1841: that the box of specie levied under last execution was paid out partly in discharge of costs of prosecutions against Whitmore, and to Ashley & Johnson, on their motion made in court, for that purpose and sustained by the court.

That on the 24th April, 1844, said Bettison sued Lawson on his official bond, and Thorn his surety, alleging breaches, *First:* Failure to sell said $265, in Arkansas paper; *Second:* Failure to pay over the moneys levied on as aforesaid—in which suit Lawson employed Albert Pike as his attorney, who put in pleas and made up the issues.

That Lawson, whether responsible or not on that basis, proposed to Bettison to settle with him the residue of said judgment,

&c., after crediting thereon the $265, Arkansas money, Bettison being at the time indebted to him in costs and for fees, as sheriff the amount of such balance, and have the last suit dismissed. To this B. assented, and stated the settlement should be made with Fowler, his attorney, who had money in hand belonging to B. and would pay Lawson any balance due him; and Lawson then made out his account against Bettison for $74.76, and handed it to Pike, his attorney, to effect the settlement and have the suit dismissed. That Pike then called on said Fowler and proposed to make the settlement, to which F. agreed; but from some cause unknown the matter was postponed from time to time and the suit continued for several terms. And Lawson, being apprised of the arrangement with Pike and Fowler, paid no further attention to the suit, supposing it would be settled without further difficulty.

In July, 1846, Pike left the State and was gone about a year. And L. having several other important suits in Court, gave Ringo & Trapnall, attorneys, a statement of the cases he wished them to attend to in Pike's absence, but entirely omitted the suit of B. for the reason that he supposed it would be settled, and no step would be taken in it, until Pike should return. But in the absence of L. and his attorney, the said F., in April, 1847, took judgment against L. on his own evidence for $190, residue of debt, with six per cent interest from date, and ten per cent damages per month on said sum of $190, until paid, with costs of suit; on which judgment execution had issued and been levied on L's. property—Fowler only crediting the original judgment with $117, instead of $198.75, the value of the Arkansas money when Fowler received it, according to the rate agreed on. And if credit had been given for the $117, when it was actually received, the balance of the debt could not have exceeded $153; and if the credit of $198.75 had been given as ought to have been done, the balance would only have been $65.

That Lawson is advised he had a valid defence to the whole action, and if Fowler had given him notice of his intention to prosecute the action in violation of the agreement, and enabled

him to exhibit his defence at the trial, he could not have got judgment for one cent. That he never knew of the rendition of the judgment until the term expired, &c.

The bill prays an injunction, general relief, &c., and is verified by his affidavit.

Exhibits are made of the various judgments, executions, &c.

On the execution against Whitmore to March term, 1842, is this endorsement by Lawson, sheriff: "Levied this execution on "two hundred and sixty-five dollars in Arkansas Bank notes, "which is to be taken at the value at this time, that is, what it "is selling for."

JAMES LAWSON, Jr., *Sheriff.*

"Came to hand 30th October, 1841.

LAWSON, Jr., *Sheriff.*"

On the execution against Whitmore to March term, 1843. Lawson returns the levy on the box of specie and Arkansas Bank paper, and its surrender on order of court, to Whitmore's attorneys; and then proceeds "I also levied on two hundred and sixty-"five dollars in Arkansas Bank notes, from which I made one hun-"dred and seventeen dollars ($117,)" balance of debt unpaid and no other property. Signed "JAMES LAWSON, Jr., *Sheriff.*

By WM. B. BORDEN."

An injunction issued. On 22d October, 1848, Bettison filed his answer.

He admits that prior, to his leaving Arkansas, he placed various claims, and among others that against Whitmore, but which was in truth a note on Whitmore and Resley both, in the hands of Fowler for collection, upon which judgment was rendered as stated in bill.

He states on information derived from his attorney, that, on the first execution, Lawson levied on the $265, Arkansas money, as the property of Whitmore, of which $200 was paid Fowler, and was then only worth $80 in specie, as was proven on the last trial, *not* by Fowler but other business men, which latter sum was credited at the time. That he is in like manner informed that Lawson never paid over the residue $65 to any one, but

converted it to his own use. On like information he denies Resley ever proposed to pay $265, Arkansas money at the current rates, or Fowler ever accepted such proposal, or that the money was ever paid to said Fowler or he ever gave a receipt thereof, or Resley ever paid a cent to said Fowler, or that Fowler ever received any other than the $200 from Lawson.

Admits on information of his attorney issuance of the alias execution against Whitmore, which was directed to be levied on box of specie, notes, &c., at suggestion of Lawson, and the same was seized accordingly which box contained $148.50 in gold; and the Bank paper to $265, which was sold as by return for $117; and alleges, on information, that Lawson *falsely* returned on said execution that said box had been by order of Court turned over to Whitmore's attorneys, and said alias writ had been returned by order of Bettison's attorney.

On information, he utterly denies the statements in the bill in regard to Fowler's presenting the Bank notes and holding them at the sale and buying them in for $117: but alleges that at the sale of the Bank notes levied on in the box, Fowler was a bidder, but denies he ever bought any portion of it, or any part of it ever was delivered to Fowler. Denies Lawson ever paid out in costs or otherwise the contents of said box, as alleged in the bill; and if he did, that it was wrongfully done, after he had been required to pay the same over to Bettison on said judgment, and had been notified he would be held responsible unless he did so.

On information, he further admits the institution of the suit on Lawson's official bond: That, at May term, 1844, said cause was not reached: That there was no November term, in that year: That, at April term, 1845, the case was continued at the earnest request of Lawson on promise to pay and settle the amount due by next term, which he did not do: That, at October term, 1845, the case was not reached: at April term, 1846, Lawson and Thorn filed ten pleas in bar, and to some replications filed demurrer, which were submitted but not decided at that term: That, October term, 1846, the demurrer was again submitted but not decided; but at April term, 1847, the demurrer was overruled; and on same

day, 22d April, 1847, the case was submitted to the court as a jury, by D. J. Baldwin, the attorney who had represented and was still representing him in the case, and said attorney was present during the progress of, and until the case was tried and judgment rendered—part of the issues being found for Lawson and Thorn a part against them: and on the trial Lawson was allowed all just and legal credits. That a writ of error was prosecuted from said judgment, and said judgment affirmed in the Supreme Court.

On like information, denies that Pike ever called on said Fowler to settle the matter, or the case was postponed to have such settlement; but Pike had stated to Fowler that Lawson would pay up the balance, and the case was delayed as above stated and not otherwise; and there never was any other agreement that the progress of the cause should be suspended until settlement, but only one continuance assented to, that the settlement might be made. Admits Pike was absent as stated in bill, but Baldwin remained and attended to the suit. Denies Lawson's attorney was absent at the trial, but was present. The case was tried on the *record* evidence and the testimony of other witnesses than said Fowler, who only proved a demand on Lawson and a credit in his favor. That no credit was given for $198.75 or $117, stated in bill, because Lawson was not entitled to either, and only to the credit above stated as having been given. On like information, denies Fowler prosecuted the suit in violation of any agreement; but on the contrary said Fowler repeatedly warned Lawson and Baldwin, his attorney, that unless immediate payment were made he should prosecute the suit, and exact every thing he could by law obtain for his client, and at the October, term, 1846, specially requested Bettison to inform Lawson of this—insists Lawson had made full defence at law—knows nothing of the account of seventy odd dollars claimed by Lawson, but if correct is willing to settle—insisting the same has no connection with said suits.

Denies that Lawson ever applied to him (Bettison) for settlement until after last judgment was rendered. That in Summer

of 1847, Lawson did complain to him of the hardship of his having to pay damages, &c., but Bettison refused to interfere and referred him to his attorney, Fowler. Lawson offering to pay principal and interest. Lawson never intimated he then had any claim on him for costs, nor does he believe he has any. He exhibits a transcript of the record in the case against Lawson and Thorn corresponding with his statements in respect to it.

On the 2d January, 1849, replication was entered, and cause set for hearing.

The cause was finally heard 16th August, 1850, upon bill, answer, exhibits, depositions, of G. N. Peay, and exhibits, C. P. Bertrand, A. Fowler, Wm. B. Borden, D. Ringo, A. Pike, D. J. Baldwin and Geo. Resley, and the admission that the order on Lawson to turn over the box of specie, &c., levied as Whitmore's, to the attorneys of Whitmore, was taken to the Supreme Court by Lawson and the decision reversed in 1843.

The Court dissolved the injunction and dismissed the bill, from which decree Lawson and Thorn appealed to this Court.

The evidence of Baldwin, Ringo, Bertrand, Peay and Fowler is fully stated in the opinion of the Court—except that Fowler deposes to the facts in regard to the seizure and sale of the Arkansas money, box, &c., and the credits due and given to Lawson substantially as they are stated in the answer.

BORDEN, a witness for Lawson deposed, that, in 1842, he was deputy to Lawson, and had in hand the execution of Bettison against Whitmore; and called on Whitmore for the money, who said it was Resley's debt, or he was some way concerned, and that the money would be paid as soon as Resley returned, Resley did return and proposed to pay in Arkansas money. Witness told Fowler of the offer, who said, if the money were paid down, he would take the Arkansas paper, as he could then use it. The money was then paid to witness, through Dr. Sprague, and was immediately handed to Fowler by witness. Some time after Fowler said witness must sell the Arkansas money, and witness did sell the $265, for $117, and Fowler bought it. Witness never had the $265 after he had handed it to Fowler—he holding

it in his hands on the day of sale, and stating if any one purchased it, he would at once deliver it up. Witness made a note in his memorandum book, at the time of the sale, of the Arkansas money, the price, &c. Fowler was the attorney for Bettison.

PIKE, a witness for Lawson deposed:

That he had been retained generally by Fowler in his cases, and among others in the case against Lawson & Thorn. On its being first called in Court, Lawson informed witness it would be settled out of court by Lawson and Fowler, and on speaking to Fowler, he told witness same thing. The case was continued several times and always by consent, and witness always understood from Lawson and Fowler that the case would be settled out of Court. Witness always understood there were only some calculations to make and no disputed facts, to effect a settlement —though he cannot say Fowler ever stated this distinctly to him, for Fowler never said a great deal about it, did not say as much about it as Lawson did. At all events, no opposition was manifested by Fowler to continue the case, and he seemed not disposed to press a trial. Witness never supposed there was to be any trial in Court. Witness went to Mexico in July, 1846, and remained absent till July, 1847. Pleas were filed without consulting Lawson under the general retainer.

RESLEY, another witness for Lawson, deposed:

That, in November, 1841, or thereabouts, he was called on by Borden, deputy to Lawson, in regard to the execution of Bettison v. Whitmore and witness; which witness had agreed to pay—the judgment being for some $265. That witness and Borden then went into the sheriff's office, where they met Fowler; and after some conversation in regard to the execution, it was agreed that Arkansas money should be received in payment of it. Witness immediately went to Dr. Sprague's house in town, got the Arkansas money, returned immediately to the sheriff's office, and counted down the Arkansas money, in payment of the execution, in presence of all said parties, and witness supposed all were satisfied. Witness remained some time in town, and supposed the money had been accepted by Fowler and the matter closed.

Witness took no receipt—as all parties were present, he deemed it unnecessary.

The proceedings had in the Common Law Court, on motion of Johnson and Ashley, attorneys for Whitmore, to compel Lawson to surrender and turn over to Whitmore or his attorneys, the box of specie, &c., are exhibited in the deposition of Peay; among other things containing the response of Lawson to the rule entered against him, to show cause against that surrender. In this, Lawson alleges Whitmore had been arrested and committed by an examining court, to answer charges for counterfeiting, &c.—that Whitmore had been indicted, and six indictments found against him, which were then pending. That by order of the examining Court $148.50 in gold and silver coin had been turned over to him as sheriff, to be safely kept subject to the lien of the State, for the payment of all fines and costs that might accrue in said prosecutions—and as further cause for retaining the money, Lawson recites the judgment of *Bettison v. Whitmore,* and, after stating the payment of the $265, in Arkansas money at its par value, on the first execution in March, 1842, as detailed by Borden, and that the balance remained unpaid, alleges that, in virtue of an alias execution issued thereon, in November, 1842, he seized said $148.50, and held the same, first to satisfy the lien of the State; second, to pay said residue of judgment, about $175, as he alleges.

The damages assessed, and judgments rendered therefor, against Lawson and Thorn, were $190, with lawful interest and costs; and damages by way of penalty on the $190, at ten per cent. per month from the first day of May, 1843, until the whole judgment should be paid.

The other material facts of the records and exhibits are sufficiently stated in the opinion of this court.

F. W. & P. TRAPNALL and WATKINS & CURRAN, for the appellant, argued this cause at length, upon the facts, to show that the judgment at law was obtained against the appellant by surprise and contrary to an express understanding and agreement be-

tween the parties that the matters in dispute should be settled out of court: that the judgment at law was contrary to equity and good conscience; that the debt for the recovery of which the suit was instituted upon the sheriff's bond had been paid to the plaintiff's attorney.

FOWLER, contra, contended that, if the appellant had any defence to the suit, he should have made it in the action at law; and, having failed to do so, he had lost the benefit of it by his own negligence; that the judgment at law was conclusive against him; that the allegations in the bill did not entitle him to relief in Equity; that no relief could be granted to him unless by allowing him to falsify his own official acts as sheriff, which the law would not tolerate; that the proof in the case showed no violation of any agreement on the part of the appellee or his counsel, and no sufficient equity to entitle the appellant to the relief sought.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The question first presented in this case is whether the appellant has been surprised by the appellee, and that too without any negligence on his part; and secondly, in case that such surprise has been shown, whether it has been productive of any injury. The whole case must turn upon the fairness or unfairness of the conduct of the appellee's counsel in procuring the judgment at law, and this can be determined alone by the testimony as it is exhibited upon the record. The bill charges in substance that in consequence of an understanding between the counsel of both parties that the case should be settled out of Court, he was thrown off his guard and that therefore it was that he failed to defend at law. The respondent on his part denies that any unfairness has been practised, but on the contrary insists that he has had the benefit of a fair and regular trial at law, and that consequently such a case does not exist as to call for the intervention of this Court. We will now proceed to look into the testimony and to ascertain if practicable how this matter really stands. David J.

Baldwin, the partner of Albert Pike, and one of the attorneys of the appellant expressly admits that Col. Fowler, (the attorney of the appellee,) notified him at a term of the Court previous to the trial, that he intended to exact the full penalty. He also stated that when the case was called, he (Baldwin) was arranging the papers for the purpose of discussing a demurrer, and that whilst thus engaged Col. Fowler spoke to him of some arrangement or understanding between himself and Major Lawson, but that if he (Baldwin) desired to go on and settle the case upon the record as shown he had no objection. He stated that he then told him (Fowler,) that Major Lawson had before told him the same thing, but that, as the case had been called for trial he supposed that he (Fowler,) intended to go on with it. He then stated that in the existing state of things and as the matters involved in the case which lay entirely within the knowledge of himself (Fowler) and Lawson, that for himself he would rather not have anything further to do with it, and finally that as Mr. Pike had previously managed the case, and as he did not understand the merits of it he would positively have nothing to do with it. Daniel Ringo also a witness for the appellant, stated that he was present at the trial in the court of law, and that he had no recollection that Mr. Baldwin appeared in the case, but that, on the contrary, his best recollection was that no person appeared on the part of Lawson. This is the substance of the testimony on the part of the appellant touching the alleged surprise. The appellant appeared before the Court at the time of the trial and the rendition of the judgment. The first piece of evidence, in order, on the part of the appellee is the record, which is as follows, to-wit: "And now at this day came the said parties by their respective attorneys, and the Court being now well and sufficiently advised of the matters of law arising on the demurrer of said defendants to the plaintiff's first and second replications, to their fifth plea in this case, doth consider and adjudge that said demurrer be overruled: whereupon the said parties waived their right to have a jury in this case expressly, and by consent, submitted the cause and the issue joined to the Court in place of a jury, &c.

Gordon N. Peay testified that he was the clerk of the Court, and present at the trial of the case at law between Bettison and Lawson and Thorn, that he distinctly recollected that on the trial of said case both parties appeared by their attorneys, Col. A. Fowler for the plaintiff (Bettison,) and David J. Baldwin for the defendants, (Lawson & Thorn,) that after the judgment was rendered on the demurrer in said case, the parties waived their right to a jury, and the cause was submitted by consent of parties to the Court, in the place of a jury, and that David J. Baldwin, as the attorney for the defendants, Lawson and Thorn, was present at the trial and submitted the case to the Court for them. Charles P. Bertrand, another witness introduced by the appellee, testified that he was present at the trial of the case between the same parties, in the Pulaski Circuit Court, that D. J. Baldwin, as attorney, represented the defendants, that according to his best recollection a jury was waived by him and the cause submitted to the Court sitting as a jury. Absalom Fowler, the last witness introduced, testified that he instituted the suit at law mentioned in the bill and answer for Bettison against Lawson & Thorn, who filed several pleas in bar thereof and thereto, signed by Pike & Baldwin, their attorneys, that said suit was continued from term to term on request of said Lawson and especially at one term on his request made through Albert Pike, one of his said attorneys, that he would settle up by the next term, and pay over whatever might be found due from him to said Bettison, which he believed to be the April term, 1845; that at the April term, 1847, a demurrer, which said Lawson & Thorn had filed to a part of the pleadings, was overruled: that Mr. Baldwin, one of said attorneys and who had argued the demurrer, being then present, and on the overruling of said demurrer, said Baldwin rested thereon, but voluntarily consented to submit, and did then and there voluntarily and freely submit the issues joined and the whole cause to the court sitting as a jury, and waived the right to a trial and assessment of damages by a jury. He further stated that said Pike never proposed to make a settlement of the matter with him for Lawson, and that he never at any time agreed that

the progress of the suit at law should be suspended until such settlement was made, and that at the term previous to the judgment he sent a message to Lawson by his said attorney, Baldwin, to come and pay up as he expected or intended to exact of him all that the law would give to Bettison, specifying ten per cent. per month and lawful interest. The current of testimony tending to show that Baldwin appeared and represented Lawson at the trial of the cause in the court of law, is wholly irresistible and consequently that fact must be regarded as fixed and unalterably established. (*See* 11, *Illinois* 91.)

It will not be necessary, under the state of case here presented, to discuss the legal effect of an appearance by an attorney at law, who is a mere volunteer and acts without the authority of the party, whom he assumes to represent. The attorney, who is proved to have represented Lawson in this case was not only authorized to practice law in the Court where the trial was had and the judgment rendered, but he was likewise the attorney of record regularly employed and retained by Lawson to represent his interests and to protect his rights in the defence of the case. This proposition being true, it would seem to be quite immaterial whether Lawson actually knew that the trial would take place at the term of the Court at which it was brought on or not. The Court of Appeals of the State of Kentucky, in the case of *Barrow v. Jones.* (10*th J. J. Marshall*, 470) said, "We are of opinion that the bill does not present a case which authorized the relief given. It was the fault of the complainant's attorney, to go into trial unprepared, or if he did, to suffer a verdict to be rendered in the absence of the complainant, or any authorized agent. For injuries resulting to clients from negligence or inattention on the part of their attorneys, Courts cannot give redress against the other party to the suit. Redress must be sought in a new action against a new party. The discovery of evidence or new testimony relevant to the point in issue, which, by reasonable diligence, could have been produced, is no cause for a new trial; going into trial unprepared should rather operate against an application for a new trial, instead of in its favor.

Where it does not clearly appear that the result of a new trial ought to be in favor of the applicant, it should be awarded with much caution if at all. The case of *Green v. Robinson* (5 *Howard Rep. Mississippi,* 105) is to the same effect. The Court in that case said, that "It is a general principle that the judgment or decree of a Court of competent jurisdiction shall be final as to the subject matter decided, and not as to that merely, but as to every other which might have been decided. The law abhors multiplicity of suits, and it is a cherished object with Courts of Justice to put an end to litigation. Some period must be prescribed to controversies of this sort, and what period can be more proper than that which affords a full and fair opportunity to examine and decide all claims of the litigants. This imposes no hardship since it only requires a reasonable degree of vigilance and attention. But a contrary course might be highly oppressive and endanger the stability of titles and the security of all our rights. Hence it has become an established rule that equity never will interfere to grant a new trial of a matter which has already been discussed in a Court of law, a matter capable of being discussed there, and one of which a Court of Law has full jurisdiction. 2 *Story's Eq.* 179. It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the Court to interfere. Equity, then, as a general rule, will not interfere where the party could have availed himself of the defence on which he seeks a new trial or injunction, and neglected to make it on the trial. Neither will he be relieved, if he was prevented from doing so by the mistake of his counsel in filing the plea which does not cover his defence. 2 *Story,* 180." "In *Bateman v. Willac,* 1 *School & Lefroy,* 201, Lord REDESDALE observed that a bill for a new trial was watched with extreme jealousy. The Courts must not only be satisfied that injustice has been done, but that it was not owing to the mere inattention of the party. In *Williams v. Lee,* 3 *Atkins* 224, Lord HARDWICK lays down the same rule, and remarks that relief will only be granted after verdict in cases where the plaintiff knew the fact to be otherwise than what the jury have found and

the defendant was ignorant of it at the trial. The case of *Young v. Donner* is also strongly in point. See 5 *Litt. p.* 10. The Court, in that case, said that "Where by fraud or any artful contrivance of one party, or by unavoidable accident, a valid defence is kept out of sight, the Chancellor may interpose. But it is not sufficient for the party applying to the Court of Equity for a new trial, to exhibit good grounds; he must also show that it was out of his power, owing to some substantial cause, to make the application to the Court of Law in due time. In this case the complainant was represented upon the trial by an attorney at law of his own selection, and of course, one in whom he had confidence to manage his defence and to guard his rights. This being the case the legal presumption is that he was duly and fully advised of every fact and circumstance which could be used in behalf of his client, and also that his client was kept duly advised as to any matter that would make either for or against him, and which had come to the knowledge of the attorney. The fact that the attorney consented to the trial and joined in the submission of the cause to the Court, and that too after having been apprised of an understanding that it was to be settled out of Court, raises a presumption, which is scarcely resistible, that he had previously apprised his client of the intention of his adversary to exact the penalty given by the statute. But the ground of surprise charged and relied upon in this case is that Fowler, the attorney of Bettison, in violation of his agreement to settle the case out of Court, brought on the trial and obtained the judgment, and that too without ever having given any notice of such his intention. This allegation is utterly unsupported by the proof. The testimony shows most clearly that no such intention ever was entertained by Fowler, until after the cause was actually called by the Court. Baldwin testifies himself that when the cause was reached upon the docket and called by the Court, that Fowler spoke to him of some arrangement or understanding between himself and Lawson, but that if he (Baldwin) wished to go on and settle upon the record as shown, he had no objection. He further stated that he then told him (Fowler) that

Lawson had before told him the same thing, but that as the case had been called for trial he supposed that he (Fowler) intended to go on with it. This is the testimony of the appellant's own witness and as a matter of course, he cannot object to abide its legal effect. It most assuredly would not be contended that here is any evidence that Fowler intended prior to the calling of the cause to urge or insist upon a trial at that term. It is perfectly apparent that so far from Fowler intending to urge a trial at the term at which the judgment was rendered, the proof is strong that such was not the case; but that, on the contrary, his expectation was to continue it over, and that he only consented to take it up and to dispose of it, when Baldwin, in rather a taunting manner, intimated his readiness to go into the trial. It will be found, upon a close scrutiny of the testimony of both Fowler and Baldwin, that Fowler did not say that unless Lawson came forward and settled that he would progress with the suit, and exact the full penalty, but that the purport of his message was that he must come and pay up, as he intended or expected to exact the full penalty. What was the necessary inference which Fowler must have drawn from the conduct of Baldwin, when he found him in the case arguing a demurrer, and after the law arising upon the same was adjudged against his client, resting upon it, and submitting the cause to the Court to be tried upon the issues joined? Was he not fully authorized to conclude that Baldwin had delivered his message and that upon a consultation between him and his client, Lawson, they had waived the privilege of a private settlement, and preferring to take the chances of a trial in Court, had resolved to do so? This is the only rational conclusion to which he could arrive, in view of all the facts and circumstances connected with this transaction. Indeed the plaintiff in the suit at law would seem to have better ground of complaint than the opposite party, for it is obvious that he did not anticipate a trial and that it was necessarily forced upon him. True it is, that Baldwin stated that after having taken up the case for the purpose of arguing a demurrer, it was suggested to him by Fowler that there was an

understanding between the parties that it should be settled out of Court, and that upon such suggestion he first expressed a desire to get out of the trial, and, that finally, he absolutely refused to go into it. This portion of his testimony is completely nullified by the record and the other proof introduced upon the trial, and consequently must be regarded as being entirely out of the view of this Court. Under this view of the evidence, it is clear that there is not the slightest ground of surprise that can fairly be predicated upon the conduct of Fowler, but on the contrary he is shown to have acted with the most perfect fairness and consistency throughout the whole transaction; at least, so far as bringing on the trial is concerned. We are therefore clear, that so far from Fowler intending to take any advantage of Lawson by bringing on the trial, at a time when he was not present and prepared to make his defense, he did every thing that could have been required of him, when he signified his willingness to continue it again, and only consented to take it up when he was invited to it by Lawson's attorney.

When a party employs an attorney at law, either to prosecute or to defend his suit in the Courts of the country, he presents him to the opposite party and to the world as his accredited agent, and as such, he must be concluded by his acts, or omissions, where no fraud or unfairness is made to appear. But upon the supposition that fraud or unfairness has been shown, so as to occasion a surprise, the point to be determined then is whether the appellant has been injured thereby. If he has failed to disclose a legal defence to the action instituted by the appellee upon his official bond, then it is that although he may have been the victim of fraud or contrivance, still he is not entitled to relief in a Court of Equity. That this is the law, is fully established by the authorities already referred to, as well as numerous others which might be cited. By his return upon the several executions exhibited, the appellant has furnished ample evidence from which the Court was fully warranted in finding the amount against him, which is specified in the judgment.

The point now to be decided is, whether the showing which he

has made in his bill, admitting that he had availed himself of its entire benefit, would have discharged him from his legal liability. It was expressly adjudged by this Court, in the case of *Randolph v. Ringgold et al.,* (5 *Eng. Rep.* 282,) that an attorney at law, who acts under his general authority as such, has no power to receive nor to give directions for the receipt of any thing but legal current money upon executions for their clients, and that in such a case the debt remained unpaid, and that the plaintiff in execution might elect to set aside the sheriff's return, and sue out an alias execution, or sue the attorney for the value of the debt collected." This doctrine is well supported by authority, and its soundness is believed not to admit of a single doubt. What then is the state of case in relation to payment as disclosed by this bill? The allegation in the bill is that Presley, a friend of Whitmore, paid Fowler, the attorney of the appellee, two hundred and sixty-five dollars in Arkansas bank paper, and that such payment entitled the judgment to a credit of one hundred and ninety-five dollars and seventy-five cents, and further that he was advised that he had a valid defence to the whole action, and that if Fowler had given him any notice of his intention to prosecute his suit, and thereby enabled to set forth his defence on the trial, that Bettison could not have obtained judgment for one cent. Admitting the payment to have been made in Arkansas paper as represented in the bill, it is clear that Bettison was not precluded by it from a recovery against Lawson, unless it has been shown that Fowler was vested with a special authority to receive such payment by Bettison. The answer of Bettison, which is the only evidence touching that matter, is that, "In the summer or fall of 1847, Lawson, in Louisville, Kentucky, stated that it was a hard case for him to pay the damages embraced in said judgment, but that he was willing to pay the principal and legal interest if he (Bettison) would compromise at that, which he refused to do, but referred him to his attorney, Fowler, as having the control of the case, and stated he did not mean to interfere at all, but would leave it entirely to said Fowler. We do not understand from what Bettison said upon that

occasion that he admitted that Fowler had authority to receive the amount actually and justly due in depreciated paper, but simply that if he should deem it unjust to exact the penalty, he might remit the same, and this would seem to be the full extent of his admission, as that was all that Lawson requested. If this be the extent of his admission, then it is, that under the authority already cited, the payment in Arkansas paper, even though it had been the whole amount of the debt, would not have amounted to an extinguishment, and as such it would have been inadmissible as evidence of payment on the trial at law. True it is that he further alleges that had he been advised of Fowler's intention to insist upon a trial, that from the advice which he had received, he believed that he could have made a complete defence. What the character of this full defence was, does not appear, and consequently it is not entitled to any consideration whatever. Upon an application of this nature, it is indispensable that the particular facts constituting the defence should be disclosed in order that the Chancellor may determine whether it could have availed the party or not on the trial at law, and consequently, whether he has suffered any injury by not being permitted to have the benefit of it. But there is yet another view of this case, which, if it stood alone upon it, would leave it a doubtful question whether the relief sought ought to be granted. The law is well settled that the complainant is required to present himself under circumstances, showing clearly that the facts which he charges as the foundation of his surprise, are unmixed with negligence on his part, (See *Town v. Sneed*, 4 *Eng. Rep.* 540, and the authorities there cited.) What then are the facts of this case as presented by the proof? In April, 1844, Bettison instituted his suit against Lawson upon his official bond, and at the April term, 1847, the judgment complained of was rendered by the Court. Here then are just three years permitted to elapse by Lawson in order to bring about a settlement of the case out of court, and that too without one scintilla of showing, that he ever, during the whole of that time, came forward and made the slightest effort to effect such settlement. It certainly cannot be that

he supposed he would be permitted to keep the cause forever pending upon a mere matter of favor and indulgence, and that extended too without any apparent motive, or the least consideration by his adversary. It cannot be reasonably contended that Fowler, by consenting to continue the case from term to term for the space of three years, was therefore under any legal obligation to continue it forever. This would be a most unreasonable and unfair construction of the understanding as disclosed by the testimony, and all that could be claimed either in law or morals, would be a reasonable time for Lawson to procure his proof and to come forward. If Fowler consented to a continuance of the cause for three years, as a matter of favor to Lawson, and solely to give him an opportunity to prepare himself for the setttlement, we consider that in all conscience he can have no just cause of complaint, and more especially when it is not made to appear that Lawson ever, during the whole time, used the least exertion to bring about the object for which he had caused so great delay. This state of fact, it seems to us, cannot be said to show that kind of diligence which the law favors, but, on the contrary, a high degree of negligence. Upon this ground, therefore, we think, to say the least of it, that Chancery would not regard his application in a very favorable light. In view of the apparent harshness of the penalty which the law visits upon the sheriff, who retains money in his hands and in order to afford all the relief which could be granted in accordance with the principles of equity, we have looked into this case in all its various phases, and after a full and thorough investigation, we have been forced to the conclusions already announced. This being the case, the decree must in all things be affirmed.