BYERS & MCDONALD *vs.* FOWLER ET AL.(*a*)

A judgment of a Circuit Court of the United States, rendered, by default, upon a return of the marshal showing a defective service of the writ upon defendant, might be reversed, on error, but cannot be treated as a nullity when questioned in a collateral proceeding.

The Circuit Courts of the United States are endowed with such general jurisdiction as to entitle their judgments to the benefit of all legal intendments necessary to support and uphold them until reversed or annulled by a superior tribunal. *Borden et al. vs. State, use, &c.*, 6 *Eng.* 519, *cited*.

In this case, the marshal returned that he served the writ by leaving a copy with a member of the family, but did not state that he left it at defendant's usual place of abode, as required by statute; judgment was rendered on default, execution issued, and defendant's lands sold; the purchasers filed a bill to quiet their title, and it was objected that they purchased under a void judgment: HELD, As above; that the judgment might, possibly, be reversed, but was sufficient to uphold complainants' title when questioned collaterally.

The failure of a sheriff or marshal to advertise lands for sale under execution in the mode prescribed by statute, will not invalidate the title of the purchaser—such statutes are directory to the officer, and whilst a failure on his part to comply with their provisions, will make him responsible to the injured party, it cannot affect the title of the purchaser, unless it be affirmatively shown that he was cognizant of the irregularity.

In this case, the marshal did not advertise the lands in the mode, or sell at the time, prescribed by our statute, but followed a rule of the Circuit

---

NOTE (*a*).—This case was decided at the January term, 1851.

Court of the United States for the District of Arkansas, adopted 10th October, 1842, and after the passage of the act of Congress (of August 1, 1842) adopting the law of the State regulating proceedings under executions—the defendants contended that the Circuit Court of the United States had no power to make the said rule, and that the title of complainants was not valid, inasmuch as the lands were not advertised in the mode, and sold at the time, prescribed by our statute: HELD, That, even if the Circuit Court of the United States had not the power to make the rule in question, (which point is waived,) and the marshal should have followed the statute of the State, as to the mode of advertising, and time of selling the lands, still, as it was not averred in the pleadings and proven that complainants were cognizant of such irregularities, their title was valid.

A judgment of the Circuit Court of the United States for the District of Arkansas, operates as a lien upon all the lands of defendant throughout the State; and this, too, independent of the act of Congress (of August, 1842,) adopting the laws of the State in regard to judgments and executions, such lien being the result of previous legislation by Congress.

Under act of Congress, (May 7, 1800, sec. 3,) where a marshal sells lands, and goes out of office before making the purchaser a deed, the court, out of which the execution issued, on proper application setting forth the facts, may order his successor in office to make the deed, and a deed so made is valid.

A deed to lands sold by the marshal, and acknowledged by him before the Circuit Court of the United States of the District of Arkansas, may, upon the certificate of such acknowledgment, be admitted to record in the office of the Recorder of the county where the lands are situate; this is clearly the law since the adoption of our statute on the subject of executions, &c., by act of Congress (of August, 1842,) if not before.

Where a marshal is removed from office after a *fi. fa.* has come to his hands, he has, nevertheless, power to execute it, and may levy upon and sell lands under it; but after he has levied upon the lands, it is irregular for his successor in office to take charge of the process and make the sale, and a sale so made may be set aside as irregular by direct application, but will not be held void when called in question in a collateral proceeding.

In this case, after the *fi. fa.* came to the hands of Rector, as marshal of the United States of the District of Arkansas, he was removed from office: after his removal, his deputy levied the writ on lands; and a deputy of Newton, the successor of Rector, made the sale under the same *fi. fa.*: HELD, As above, that the sale was irregular, and might have been set aside on a direct application; but being questioned in a collateral proceeding, the title of purchaser was good, the sale not being absolutely void.

Where property is sold under execution, and purchased by a party for the use and benefit of the defendant in the execution; and in fraud of the rights of creditors, it remains subject to the claims of creditors, and the vendee of such party, purchasing with a knowledge of such fraud, will not be protected in his title against the judgments of such creditors, or persons purchasing under them.

But, on the contrary, a *bona fide* purchaser, for a valuable consideration, without notice of such fraud, will be protected in his title.

The answer of a party claiming to be such innocent purchaser, must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated, with a direct averment that it was *bona fide*, and truly paid, independently of the recital in the deed. Notice of the fraud must be denied previous to, and down to the time of paying the money and the delivery of the deed, &c.

A general replication to the answer in such case will not cure the defect of a failure on the part of defendant to aver notice of such fraud down to the delivery of the deed to him by his vendor; and without such averment, the party must fail to sustain his title regardless of the sufficiency of his proof that he was an innocent purchaser.

In this case, the lands of Tully were sold in August, 1841, by the marshal, and bought by Grollman, for the use and benefit of Tully, in fraud of creditors; and Grollman sold the lands to McDonald; afterwards, F. & D. purchased the lands under execution against Tully on a judgment junior to the one under which Grollman purchased, but founded on a debt existing at the time Grollman purchased. F. & D. brought this bill to quiet their title; defendant McDonald claimed to be an innocent purchaser of Grollman for a valuable consideration, without notice of the fraud between Tully and Grollman, but failing to aver want of notice of such fraud down to the time of the delivery of the deed from Grollman to him: HELD, That his defense was insufficient; that the lands in his hands were subject to the judgment under which F. & D. purchased, and they were entitled to all the equities of the plaintiffs in the judgment.

A party cannot complain that the court struck out a portion of his answer calling on complainants for discovery, when it appears, upon the whole case, that the discovery sought, if obtained, could have been of no avail.

It is the right of an innocent purchaser, for a valuable consideration, without notice, to have the value of permanent and useful improvements, made by him before suit brought by the rightful owner, set off against the rents and profits.

McDonald having failed in his defence, by not averring in his answer that he was without notice of the fraud down to the time of the delivery of the deed to him by his vendor, yet, inasmuch as it appears, from the evidence in the cause, that he was an innocent purchaser, for a valuable consideration, without notice: HELD, That, in equity and good conscience, he should not be charged with more costs than he may have incurred in defending the suit.

Appeal from the Chancery side of the Jackson Circuit Court.

On the 5th April, 1845, William F. Denton and Absalom Fowler filed a bill in the chancery side of the Jackson Circuit Court, making, in substance, the following allegations:

That John R. Neff and Peter Neff, as partners, under the firm

of Neff & Brother, on the 2d day of April, 1841, after declaration filed, and process issued and served in due form, recovered a judgment against Lewis B. Tully, in the Circuit Court of the United States for the District of Arkansas, for the sum of $3,473-.92 debt, and $296 damages, and for costs of suit. That, on the 7th day of May, 1841, Neff & Bro. sued out a *fi. fa.* upon said judgment, returnable to the 1st Monday of October then next, which, on the day it was issued, came to the hands of the marshal of said District to be executed, and was, by him, returned no property found. That, on the 4th day of February, A. D. 1843, the judgment remaining wholly unsatisfied, Neff & Bro. sued out another *fi. fa.* thereon, returnable to the then next March term of said Circuit Court of the United States, which came to the hands of the marshal of said District on the 6th day of February, 1843, to be executed, and was by him, on the 8th day of the same month, duly levied on the following lands, situate in the county of Jackson, in said District and State of Arkansas, as the property of said Lewis B. Tully: Lot number 2, of the south-west fractional quarter of section 6, in township 11 north, range 2 west; also, lot number 3, of the north-west fractional qr. of same section; also, lot number 4, of the south-west fractional quarter of same section; also the east-half of the north-east quarter of section 35, in township 12 north, of range 3 west; also, the south-west quarter of the north-west quarter of section 36, in same township and range; also, the north-west quarter of the south-west quarter of the same section; and the north-west quarter of the north-west quarter of the same section. That said marshal, after having duly advertised, in accordance with law, and the rules of said court, by giving twenty days previous notice of the time and place of sale, by at least three advertisements, put up in the most public places in said county of Jackson, that said tracts of land would be sold to satisfy said judgment, did, in conformity therewith, proceed to sell the said lands, as the property of said Lewis B. Tully, at the court-house door of said county of Jackson, on the 20th day of March, 1843, according to law; and at such sale, complainants (Denton & Fowler) purchased said

lands for the sum of *sixteen dollars and fifty cents*, in *the aggregate*—which sum they then paid to said marshal, who duly applied the same, as far as it would go, to the satisfaction of said judgment. All of which would more fully appear by a transcript of the said declaration, writ and service, judgment, *fi. fas.*, and marshal's returns thereon, exhibited with the bill, and marked *"Exhibit A."*

Complainants further allege, that, after they so purchased said lands, and before Thomas W. Newton, the marshal who made the sale, executed a deed to them therefor, he, the said Newton, was removed from office by the President of the United States, and Henry M. Rector appointed marshal in his stead; whereupon complainants applied to said Circuit Court of the United States, in the April term thereof, 1844, setting forth such facts, and said court made an order upon said Henry M. Rector, as such marshal, to execute a deed to complainants for said lands; as would appear by a transcript of said application and order exhibited and marked *"B."* That, accordingly, Rector, as such marshal, on the 3d day of April, 1844, executed and delivered to complainants, in due form of law, a deed for said lands, reciting said judgment, *alias fi. fa.*, levy and sale, the application and order for said Rector to execute the deed, and conveying to them all the interest and estate of said Lewis B. Tully in said lands, and an estate in fee therein; which deed was duly acknowledged by said Henry M. Rector, as such marshal, before the said Circuit Court of the United States, on the 24th day of April, 1844, and was afterwards, on the 25th day of June, 1844, filed, for record, in the Recorder's office of said county of Jackson, and duly recorded in Record Book "C," pages 71, 72, which would fully appear by the deed and certificate of acknowledgment and registration thereto annexed, exhibited and marked *"C."*

That said judgment was a lien upon said lands from its date until the purchase of them by complainants.

That one H. Van Grollman, who was an alien, had not declared his intention to become a citizen of the United States, and was therefore incapable of taking or holding real estate in Arkansas,

at an irregular sale by the marshal of said District, under certain executions, which were irregular and void, on or about the 14th August, 1841, became the purchaser of said lands in open fraud, and with the funds, and for the express and sole use, of the said Lewis B. Tully, the defendant in said irregular executions, and as whose lands they were then levied on and sold. That said irregular executions, as complainants were informed, were in favor of Edward Stone and William Stewart against said Tully; and John C. Wagner and Christian F. Wagner against said Tully, and were issued from the office of the clerk of said Circuit Court of the United States. That said sale was made to said Grollman by one Ephraim Frazer, who represented himself as the deputy of Elias Rector, the then marshal of said district; and that, afterwards, Thomas W. Newton, without authority of law, executed to said Grollman a deed for said lands, as marshal of said District.

Complainants expressly charge that said Grollman purchased said lands in open and palpable fraud, in trust for said Tully, and with his funds, and with the express and open understanding that he was to hold them for the sole and exclusive use and benefit of the said Tully, and to protect said lands fraudulently against and from the creditors of said Tully, and that said purchase so made by Grollman was fraudulent and void; and that, notwithstanding such purchase by him, said lands were still subject to be sold, as the lands of Tully, to satisfy the judgment of Neff & Bro., and that complainants acquired a valid title thereto by their purchase aforesaid.

That Grollman, together with Ferdinand C. Fulcher, William Byers, and Alvin McDonald, claiming title under Grollman and Tully, had taken possession of said lands, and had been, for a year past, receiving the rents and profits thereof—which were of the annual value of $300, were still (one, part, or all of them) receiving the same, and unlawfully withheld the possession of said lands from complainants.

That William Byers claimed title to said lands by virtue of a pretended and illegal purchase at a sheriff's sale, under an exe-

cution against said Tully, and a deed executed by the sheriff of said county of Jackson, in pursuance thereof.

That Tully and Grollman resided in the county of White, William Byers in Independence, and Fulcher and McDonald in the county of Jackson, all in the State of Arkansas, and were made defendants.

That complainants had, at various times, applied to defendants to deliver up to them the said lands, and the deeds or papers under which they claimed title or possession, and to account to them for the rents, issues and profits; and complainants hoped that they would have complied with such reasonable request, as in conscience and equity they ought to have done, but they had wholly refused to comply with such request

Complainants prayed that defendants be compelled to answer, &c., &c., and that each of them should particularly set forth and discover, according to the best of their knowledge, whether said Grollman was an alien, and had ever, in due form of law, declared his intention to become a citizen of the United States, and been naturalized; and, if so, that they be required to produce record evidence thereof; and whether Grollman purchased said lands, or any part thereof, as above stated: and, if not, then in what manner, and at what time, he did purchase the same, or any part thereof; and whether said Grollman purchased said lands, or any part thereof, with the money of said Tully, or for his use and benefit, or under any understanding whatever, with Tully, that said purchase was to be made, or was made, for him, or his use and benefit, at the time of such purchase, or at any time thereafter; or to protect said lands from the creditors of said Tully, for said Tully's benefit; and whether said defendants were in possession of said lands, or any part thereof, and what was the annual value of said lands, and of each and every lot thereof; and that said defendants exhibit their title papers, if they had any, and deliver them up, to be cancelled; and that they admit generally and specially each and all of the allegations in the bill; and be compelled by decree of the court to deliver up to complainants the quiet possession of said lands, and to deliver up all

their title deeds, or muniments of title, to be cancelled and vacated, and to account to complainants for the rents, issues and profits of said lands; and that all right, interest, and estate of the said defendants, in and to said lands, be divested, and passed to and absolutely vested in complainants, and their heirs and assigns forever; and that defendants be compelled to execute a deed or deeds to complainants; and that the title of complainants to said lands be settled, and quieted against said defendants by decree of the court; and for general relief.

"Exhibit A"—Shows that, on the 4th December, 1840, Neff & Bro., by Absalom Fowler, attorney filed a declaration in the Circuit Court of the United States for the District of Arkansas, against Lewis B. Tully, on two notes, dated on the 14th March, 1839, and due at six and nine months, for the aggregate sum of $3,473.92 principal. That a summons was issued, in the ordinary form, to the marshal of the District, returnable to the March term, 1841, which was returned thus: "Executed the within by delivering a copy thereof to a white member of the family of the defendant over the age of fifteen years, and informing said person of the contents. Done in Jackson county, District of Arkansas, Dec. 18, 1840. E. RECTOR, *Marshal.*
By JOHN K. TAYLOR, *Dep.*"

That, during the return term, on the 2d day of April, 1841, Neff & Bro. obtained a judgment by default against Tully for the amount of the notes sued on, with interest, &c. The judgment recites that "it appeared to the court that defendant Tully had been legally served with process in the case," &c.

That, on the 7th May, 1841, a *fi. fa.* was issued on the judgment, and returned by the marshal no property found, as alleged in complainants' bill. That on the 4th day of February, 1843, an *alias fi. fa.* was issued thereon, to the marshal of the District, returnable to the following March term. Upon this *fi. fa.* was endorsed a direction, by Absalom Fowler, Esq., attorney of Neff & Bro., to the marshal to levy on the lands described in the bill. The marshal, THOMAS W. NEWTON, by his deputy, Geo. A. Wor-

then, returned upon the *fi. fa.* that he levied on the lands in question, on the 8th day of February, 1843, "and the same I duly advertised for sale, which sale was fixed to be made on the 20th day of March, A. D. 1843, at the court-house door of Jackson county aforesaid; when and where, the same being offered for sale by me, William F. Denton and Absalom Fowler became the highest bidders and purchasers of said tracts of land, bidding for the first described of said tracts, [*the lands are described in the return as in the bill,*] the sum of $1; for the second, the sum of $2.50; for the 3d, the sum of $2.25; for the 4th, the sum of $2.75; for the 5th, the sum of $2.25; for the 6th, the sum of $2.75; and, for the 7th, the sum of $3.00; the proceeds of which, all amounting to $16.50, is applied in part payment of the marshal's costs on the within writ. The defendant has no other property upon which said writ can be levied. March 21, 1843."

"Exhibit B"—Shows that at the April term of the said Circuit Court of the United States, Denton & Fowler filed a petition, stating the recovery of the said judgment by Neff & Brother, against Tully, the issuance of the *alias fi. fa.,* the levy upon the lands aforesaid, the sale thereof, and purchase by them; that after the sale, and before the execution of a deed to them, Newton had been removed from the office of marshal of said District, and Henry M. Rector appointed in his place, by the President of the United States, and praying an order of court upon Rector to make them a deed to the lands; and that the court made the order as prayed, on the 22d April, 1844.

"Exhibit C"—Shows that on the 23d day of April, 1844, Rector executed to complainants a deed for the lands in accordance with the order of court; and duly acknowledged the same on the next day before said court, and that the deed with the certificate of acknowledgment attached, was filed in the office of the Register of Jackson county, on the 25th of June, 1844, to be recorded, and duly recorded, as alleged in the bill.

At the return term, May, 1845, process having been duly served on defendants, *Lewis B. Tully* and *Ferdinand C. Fulcher,* and they failing to appear, a decree, *pro confesso,* was entered against them.

Defendants, William Byers and Alvin McDonald, filed answers to the bill, to which complainants filed replications. During the progress of the case, McDonald filed a first and second amended answer, the latter of which will be set out hereafter.

Answer of William Byers to the original bill: He had been informed—and supposes it to be true, that Neff & Bro. recovered judgment against Tully, in the Circuit Court of the United States for the District of Arkansas, at the time, and for the amount, alleged in the bill; that executions issued thereon, said lands were levied on, sold, and purchased by complainants as stated in the bill, but he knew nothing of the regularity and legality of the obtaining of said judgment, issuance of said execution, levy and sale, &c., and demanded proof of the regularity and legality of all said proceedings in the premises.

He admitted that said Herman Van Grollman, (who, he was informed, was an alien,) at a sale made by the deputy marshal of said District, under certain executions, (as to the regularity of which he knew nothing,) about the time named in the bill became the purchaser of the lands described in the bill in open fraud, and with the funds and for the use of Tully, the defendant in the supposed irregular executions, as whose property the lands were levied upon and sold. He was informed that said executions were in favor of Stowe & Stuart vs. Tully, and Wagner & Wagner vs. Tully, and were issued from the office of the clerk of the Circuit Court of the United States for said District of Arkansas, as alleged in the bill. Respondent was informed and believed that said sale was made to Grollman, by one Henry A. Engles, as deputy marshal of said District, and not by Ephraim Frazer, as was supposed in the bill. That said Thomas W. Newton, as marshal, made a deed to said Grollman, without authority of law, to said lands, as the sale of said lands was not legally advertised.

Respondent was present at said illegal sale by said deputy marshal, Engles, to Grollman, at the town of Elizabeth, in the county of Jackson. A few moments before the sale, Tully took him aside from the people assembled, and asked him if he had

come to bid upon his (Tully's) property and lands to be sold; and respondent told him he had not. Tully then requested him not to bid, and told him that the times were hard, that judgments to a large amount had been obtained against him, there was no money in the country, and if he could not get a friend to bid in said property and lands for his use, they would be sacrified and he ruined; and further, that he (Tully) had a friend who would bid them in for his benefit, if they did not go too high; and, if they were bid up to any considerable amount, he would not be able to purchase, as he had no money except the amount of his (Tully's) quarterly salary as Register of the Land Office at Batesville. Respondent assured Tully that he did not come there to purchase the lands, and that he would not do so, as he had not the money to do so if he wished to purchase them. Tully and respondent then returned to the place where Engles was about to sell the lands, and when he proclaimed them for sale, Tully arose, and requested him to suspend for a few moments, that he wished to make a few remarks to the people present. Tully then addressed the people assembled, and requested that no one should bid upon the lands, and said that he hoped some friend of his would bid them in for him, so that he could afterwards have the use of them to pay his honest debts—that there were a few persons who wished to sacrifice him, and, if the lands should be sold so that he could not have the use of them, he would be utterly unable to pay his debts. After Tully had concluded his remarks, and Engles offered the lands for sale, Tully stepped to one side, and taking said Herman Van Grollman by the arm, brought him close to the side of Engles, and he bid off the lands for a small sum. At the time Tully made his speech, Grollman was present, and in hearing. Respondent was informed that Grollman bid in the lands for the benefit of Tully, and paid for them with his funds, and that Tully had received the consideration of such of the lands as Grollman had since sold. That Grollman purchased said lands, under an agreement with Tully, to hinder and delay the creditors of Tully from collecting their debts, and to defraud them, &c.

Byers further answered that he claimed to be the rightful owner of the lands named in the bill; he claimed under a deed from Isaac Gray, sheriff of Jackson county, who sold the same to him by virtue of an execution in favor of Peter Powel & Co. against Tully. That, on the 18th May, 1841, Powel & Co. recovered, in the Jackson Circuit Court, by confession, a judgment against said Tully for $406.94 debt, with interest at 10 per cent. from the 5th day of January, 1838, by way of damages and for costs. That, on the 5th day of January, 1842, a *fi. fa.* was issued thereon to the sheriff of Jackson county, which came to the hands of Gray, as such sheriff, to be executed; and, on the 26th of the same month, he levied upon the lands aforesaid, and advertised the same for sale according to law, at the time, place, and in the manner prescribed by law; and at the time and place advertised for the sale of said lands, said Gray, as such sheriff, sold all of said lands to respondent for $25, and, on the 17th of May, 1842, the return day of the *fi. fa.,* returned the same, with his proceedings in the premises endorsed. A transcript of said judgment, execution, and return, was exhibited, marked *"Exhibit A."* That, on the 18th of May, 1842, said sheriff made him a deed to said lands, and duly acknowledged the same before the Jackson Circuit Court, and on the next day respondent filed the same in the office of Register of said county for registration, and it was duly recorded. A copy of the deed and certificates of acknowledgment and registration, was exhibited, and marked *"Exhibit B."* That said judgment of Powel & Co. against Tully, was a lien upon said lands, and that, by virtue of said judgment, execution, sale and deed, respondent claimed to be the rightful and legal owner of said lands, &c.

That defendant McDonald was, and had been for over two years, in possession of a portion of said lands, (specifying them) and the rents and profits thereof were worth from $75 to $100 per annum. That McDonald pretended to hold under a conveyance from Grollman dated about the 7th January, 1842, but that it had never been legally acknowledged or recorded; and that respondent, at the time he purchased said lands, had no notice

of the pretended sale from Grollman to McDonald. That the open fraud between Tully and Grollman was of public notoriety at the time McDonald made said purchase, and the circumstances such as to put a prudent man on inquiry. Respondent charges that McDonald, at the time he purchased, had full knowledge that Grollman purchased the lands in fraud of Tully's creditors and held them for the use and benefit of Tully, and that McDonald had notice of the said judgment of Powel & Co. against Tully, and that it was a lien on said lands. That the consideration which McDonald gave for the lands purchased by him of Grollman, was, with his knowledge, paid over to Tully for his use and benefit.

That defendant Fulcher held a portion of the lands named in the bill, as tenant of respondent, but respondent did not know the value of the rents and profits thereof—he had received none of the rents and profits of said lands.

Respondent further alleged, that the sale of said lands, in the bill mentioned, made by the said marshal to the complainants, was not made on the first day of any term of the circuit court of Jackson county, between the hours of 9 o'clock A. M., and 3 o'clock P. M., nor whilst the said court was in session, nor in the manner prescribed by the statute regulating the sale of real property under execution.

Respondent claimed that the pretended title of complainants, and of the other defendants, should be cancelled &c., that his title to the lands should be quieted, and that McDonald &c., should account to him for rents and profits &c.

"*Exhibit A.*" to Byers' answer, shows that on 18th May, 1841, Powel & Co. obtained judgment by confession against Tully in the Jackson circuit court (Byers acting as their attorney.) That on the 5th January, 1842, a *fi. fa.* was issued thereon to the sheriff of Jackson county, levied on the lands in question, sold on the 16th May, 1842, by the sheriff, and purchased by Byers as alleged in his answer.

"*Exhibit B.*" is a deed from the sheriff to Byers for the lands,

with the certificates of acknowledgment and registration, as stated in the answer.

November term, 1845. The bill was taken for confessed against Grollman, and an interlocutory decree entered accordingly. William F. Denton's death was suggested, and his heirs made parties to the bill in his stead.

May term, 1846. No court.

November term, 1846. Defendant William Byers filed a cross-bill against complainants, and all the other defendants in the original bill; and by consent of parties leave was granted to McDonald to file an amended answer to the original bill, and his answer to the cross-bill by the next term. Fulcher entered his appearance to the cross-bill, and publication was ordered as to Tully and Grollman, it appearing that they were non-residents.

Byers' Cross-bill, after noticing the original bill, and the steps that had been taken in it, alleges, in substance, that on the 18th May, 1841, judgment was rendered, by confession, in the Jackson circuit court in favor of Powel & Co. against Lewis B. Tully; upon which a *fi. fa.* was issued on the 5th day of January, 1842, returnable the 2d day of May term following; which writ was delivered to the sheriff of Jackson county (Gray) on the 26th day of January, 1842, and was, on the same day, levied on the lands described in the original bill, as the property of said Tully; and after due and legal advertisement, the said lands were sold by said sheriff, at the door of the court house of Jackson county, on the 16th day of May, 1842, being first day of court, and purchased by him, Byers, for the sum of $25. A certified copy of the judgment, execution, and return is exhibited, marked *A.*, the same as *Exhibit A.* to his answer to the original bill. That on the 18th day of May, 1842, in pursuance of said sale, the sheriff made, and acknowledged before said court, in due form, a deed conveying to him said lands, and on the 19th day of the same month the deed was filed in the recorder's office of said county, and duly recorded: A copy of the deed and certificates of acknowledgment and registration, is exhibited, marked *B.* That the judgment of Powel & Co. from its date, to the sale aforesaid,

was a lien upon said lands, paramount to all others; and that under said judgment and execution, he, Byers, purchased the absolute title to said lands, Tully being the owner of them from the date of the judgment until the time of the sale.

That Herman Van Grollman, (now a non-resident,) who was an alien, and never had, in due form of law, declared his intention to become a citizen of the United States, and was incapable of taking or holding real estate in Arkansas, at an irregular and pretended sale by the marshal of the United States for the District of Arkansas, under certain pretended executions, which were irregular and void, on or about the 14th day of August, 1841, pretended to become the purchaser of said lands, in open fraud, and with the funds, and for the express use and benefit of Tully, the defendant in the executions. That said irregular and void executions were in favor of Stowe & Stewart vs. Tully and Wagner & Wagner vs. Tully, and were issued from the office of the clerk of the said Circuit Court of the United States for said District. Said sale was made by one Henry A. Engles, who pretended to be a deputy marshal of said District. That the lands were not levied, advertised, or sold, according to law; that the sale was not at the court-house, or on the first day of any term of the Jackson Circuit Court, and that the whole proceedings were illegal and void. That a deed was made, by Thomas W. Newton, as marshal, to Grollman, for said lands, without authority of law. That Grollman purchased with a full notice that the execution and the proceedings thereon were irregular and void; and in open and palpable fraud, in trust for Tully, and with the funds of said Tully, and with the express and open understanding that he was to hold them for the sole and exclusive use and benefit of said Tully, and to protect said lands fraudulently against the judgment of said Powel & Co., and the other creditors of said Tully.

That defendant, Fulcher, pretended to claim a portion of said lands, under a purchase from Grollman, but that he purchased with a full knowledge of the frauds aforesaid, &c.

That defendant, McDonald, pretended to set up a title to a portion of said lands by virtue of a pretended purchase from Groll-

man: that at the time of his purchase, it was a matter of general and public notoriety, in the county of Jackson. that the said sale to said Grollman was fraudulent; and that at the time McDonald made said purchase the lien of the Powel & Co. judgment was in full force; that Grollman at that time had no deed; that he never has had any; that the one he did obtain was not acknowledged or recorded according to law. That McDonald had notice of the lien of the judgment of Powel & Co. and of the fraud between Grollman and Tully; that the conveyance from Grollman to McDonald was fraudulent and void as against him, Byers; and that it was not duly executed, acknowledged and admitted to record.

That the complainants in the original bill claimed said lands under an irregular and void sale, made under irregular and void executions. That the execution issued in favor of Neff & Bro., under which they purchased, was not in the form prescribed by law—was not made returnable on any return day known to the law—and the whole proceedings upon said *fi. fa.* were irregular and void: that the marshal did not advertise said lands according to law—did not put up three written advertisements in each township in Jackson county as required by law—nor at the court house door—nor did he expose said lands for sale at the court house door of said county on the first day of any term of the circuit court held in said county of Jackson, nor did he sell the same between the hours prescribed by law; and that the pretended sale of the marshal of said lands to Fowler & Denton was irregular and void.

That the said judgment of Neff & Bro. against Tully was void, and no lien upon said lands. That the judgment of Powel & Co. was a lien on the lands from the time it was rendered until the sale to him, Byers—that he had purchased said lands, obtained a deed therefor, and caused it to be recorded before the execution issued under which Denton & Fowler purchased, and that at the time they purchased the lands, they had full knowledge of his title.

That Henry M. Rector, as marshal of said District, without

authority of law, executed a deed to Denton & Fowler for said lands, and the same had never been properly acknowledged, or proven, and admitted to record in the recorder's office of Jackson county; and that said deed could not be received in evidence against him, Byers.

That McDonald was in possession of a portion of said lands; *to wit:* Lot number 2 of the south-west fractional quarter section 6, 80 acres; also Lot number 4 of the south-west fractional quarter of section number 6, 74 2-100 acres; also Lot number 3 of the north-west fractional quarter of section number 6, 120 21-100 acres, all in township 11 north, range 2 west, in the county of Jackson; and that said lands had been in McDonald's possession for upwards of four years then past, and the rents and profits thereof were of the annual value of $100. That he, Byers, was in possession of the other lands. That McDonald, though often requested, had refused to surrender up said lands, or account to him for the rents, &c. That complainants in the original bill, by their clamor about their pretended title, had hindered him from making sale of said lands at a fair price, &c. *Prayer,* that his, Byers,' title be quieted, and all other titles cancelled, &c., and that McDonald account for rents and profits &c.

May term, 1847. Complainants in the original bill took an interlocutory decree, by default, against defendants Tully and Fulcher; and filed their answers to the cross-bill, to which replications were filed. Byers took an interlocutory decree by default against Tully, Grollman, and Fulcher, on his cross-bill. McDonald filed his answer to the cross-bill, and his second amended answer to the original bill. On motion of Byers, so much of McDonald's answer to the original bill as was in the nature of a cross-bill was stricken out as such, but permitted to remain as part of his answer, to which he excepted. Complainants in the original bill filed a replication to McDonald's second amended answer, and the cause was set down for hearing, at the next term, on bills, answers, exhibits, replications and depositions, &c.

McDonald's second amended answer to the original bill, is in

substance as follows: as to the said judgment of Neff & Bro. against Tully, the executions issued thereon, the levy and sale of said lands, the purchase by Denton & Fowler, their title therefrom derived, &c., mentioned in the original bill, defendant knows nothing, and calls for strict legal proof; but he denies that said judgment was a lien on the lands sold under it from the day of its date, until the said sale.

As to the title claimed by defendant Byers, mentioned in the bill, respondent knows nothing.

As to the said purchase made by Herman Van Grollman, at a marshal's sale of lands mentioned in the bill, and whether the said sale was irregular, and whether the execution, under which the sale was held, was void, or whether the purchase by Grollman was made in open and palpable fraud, and whether it was made with the funds, and for the use of Lewis B. Tully, all of which are charged in the bill to be facts, this respondent, of his own knowledge, knows nothing. It is true that he is in possession of Lot number 2 of fractional south-west quarter of section 6, in township 11, north, range 2 west, 80 acres; Lot number 4, of same quarter, 74 2-100 acres; and Lot number 3 of fractional north-west quarter of same section, 120 2-100 acres, part of the lands mentioned in the bill. It is also true that respondent obtained possession of said lands, and derives his title thereto from said Grollman, but respondent avers that he purchased said lands of said Grollman for a valuable consideration, *to wit*: for the sum of $1,600, which was the full value, and a high price for said lands. That he purchased and fully paid for said lands without any notice of any prior lien or incumbrance upon them, and without any notice or suspicion that the title of Grollman was tainted, or, in any way, affected with fraud betwixt him and Tully, or by fraud of Grollman alone, or Tully alone, or by fraud of any person whatever. That at the time of the said sale made by the U. S. marshal to Grollman, mentioned in the bill, he was not a resident of Jackson county, nor did he become so until sometime after that; and that during his negotiation for said lands and purchase of them, he knew nothing, and heard of no-

thing calculated to throw a doubt or suspicion upon the title of Grollman, and respondent thought that by purchasing of Grollman, he was obtaining a full, complete and perfect title to said lands and therefore gave the full value therefor. His purchase of said lands of Grollman is evidenced by a deed of conveyance from Grollman to him already on file as *"Exhibit C."* to his answer to the cross-bill of Byers, and is made part hereof. That supposing his title aforesaid to said lands to be valid, and unquestionable in law, he has proceeded to make valuable and permanent improvements thereon, in erecting a dwelling house, out houses, and in clearing and fencing the lands, which improvements are worth at least $1000.

Respondent further answering, but reserving and claiming for himself the full benefit of the protection granted and extended by courts of equity to purchasers for a valuable consideration without notice, as if he had rested his case upon that protection, says that he, as before stated, does not personally know the facts and circumstances connected with the title of Grollman to said lands, but he has been informed and believes that Grollman purchased the same at public auction, a sale made by the marshal of the U. S. for the district of Arkansas, under and by virtue of certain executions which had been issued on judgments obtained in the U. S. Circuit Court for the district of Arkansas against Lewis B. Tully: one in favor of Stowe & Stewart, rendered on the 13th March; 1841, for $820.60 debt, $218.18 damages, and one in favor of Wagner & Wagner rendered on the 30th March, 1841, for $2,113.84 debt, and $338.12 damages: which said executions properly issued on the 15th April, 1841, and the said sale had under them on or about the 14th August, 1841; and that in pursuance thereof, the marshal for said district executed a deed for the lands mentioned in the original bill, including those of which this respondent has possession, on the 2d May, 1842; which was duly acknowledged on the following day, and in good time filed for record in the recorder's office of Jackson county; which facts relative to the issuance of said executions, levy, sale and deed more fully appear by a certified copy of the deed of Thomas

W. Newton, U. S. Marshal for said district of Arkansas, conveying said lands to Grollman already exhibited in this case, as *"Exhibit B."* in this, respondent's answer to the cross-bill of Byers, and prayed to be taken as part of this answer, the original not being in possession of respondent.

Respondent has been informed, and believes, that in obtaining said judgments, issuing executions upon them, levying said lands, selling and conveying them, all the requirements of the law in relation thereto were fairly and strictly observed, and that the whole proceedings were fair, regular and legal.

As to bidding off said lands by Grollman at said sale for the use and benefit of said Tully, and as to his alleged paying for them with the funds of said Tully, and as to buying them in fraud, although this respondent personally knows nothing, yet he is informed and believes the said purchase was made by said Grollman with his own money, for his own use, and without any design to defraud any person, but if such was the case this respondent never knew any thing thereabout.

Respondent does not know whether said Grollman is an alien, but is informed and believes such to be the fact, but avers that Grollman before the date of his said purchase of said lands, in due form of law, declared his intention to become a citizen of the United States; and was in pursuance thereof admitted to full citizenship by decree of the Lawrence circuit court, at its April term, 1843; a certified copy of the record relating thereto respondent asks leave to file as a part of this answer, already proffered as *"Exhibit A."* in his answer to the cross-bill of Byers; saving to himself the right to insist as he does, and as he is advised, that it is immaterial, and has no bearing upon the rights and interests of this respondent, and of the several parties to this suit, whether said Grollman be an alien or not, or whether he had or not declared his intention to become a citizen of the United States, inasmuch as said Grollman never was, by inquisition of office, declared an alien, and incapable of taking, holding and conveying real estate.

Respondent avers that complainants, at the time of their pur-

chase, had full notice of respondents possession of, and title to, the lands above described.

Respondent having fully answered the allegations and interrogatories contained in the bill, according to the statute allowing a defendant to interpose new matter in his answer, avers and charges that the complainants, in the original bill, are not entitled to the protection of a court in equity, against this respondent, as a purchaser for a valuable consideration without notice; as the bill is not prosecuted by any creditor of Tully, or by any person for the use of such creditors, but by the complainant, Fowler, who was the attorney for Neff & Brother, for his own use and benefit, and for the use and benefit of the heirs of William F. Denton, the said Denton also being an attorney associated with said Fowler in this bill, and connected with him, as appears by the bill, in the purchase of the lands in possession of orator, and the other lands mentioned in the bill; and he charges that said complainants' taking advantage of their situation as attorneys at law, and having purchased said lands for a nominal consideration, thereby intending, and now by this suit are to obtain possession of, and title to, said lands, without value paid therefor, and against the equity of respondent.

Respondent also avers and charges that defendant, Byers, complainant in said cross-bill, also purchased said lands for a nominal sum, and was the attorney of Powel & Co., under whose judgment and execution he claims title, and that he is defending the original bill, and prosecuting said cross-bill for his own use and benefit, and not for that of Powell & Co., or for any creditor of Tully or Grollman: and respondent charges a corrupt and wicked combination betwixt defendants Tully and Grollman, and complainant Denton, to throw suspicion upon, and to affect injuriously; the title of this respondent in this, that Tully and Grollman, after having been served with process to appear and defend this suit, corruptly and illegally agreed to, and did leave the country, without answering the bill in order that the charges of fraud in said bill contained against said Tully and Grollman might be confessed to the injury of this respondent in his defence.

And this respondent charges to have been done at the corrupt, iniquitable instance of the said William F. Denton, who paid the said Grollman and said Tully a valuable consideration for so doing, who received the same, and consummated the said corrupt agreement. And respondent asks that the complainants herein be required to answer the charges contained in this answer, and particularly whether the said Tully and Grollman did not leave without answering this bill, and in pursuance of their corrupt agreement with the said Denton to that effect: and whether the said Denton did not corruptly pay, and the said Tully and Grollman both, or either of them, receive a valuable consideration for neglecting to answer, and refraining from answering the original bill herein; and particularly whether the said Denton did not pay to the said Tully and to the said Grollman, or to one of them, and whether they, or one of them, did not receive from Denton a certain *stud-horse,* called "Consul," for the consideration as above stated.

Respondent asks that this answer be made a cross-bill as to said Tully, Grollman, Fulcher and Byers, and that they be required to answer said charges and allegations, &c.

McDonald's answer to the cross-bill, is substantially the same as his answer to the original bill.

"Exhibit A." to McDonald's answers, shows that Grollman declared his intention to become a citizen of the United States in the Superior Court of the Territory of Arkansas, on the 16th of January, 1834, and took the final oath of naturalization before the Circuit Court of Lawrence county, at the April term, 1845.

"Exhibit B." to McDonald's answers, is the deed of Thomas W. Newton, as marshal of the United States for the District of Arkansas, to Grollman, for the lands in question. The deed recites that *Stowe & Stewart* recovered a judgment in the Circuit Court of the United States for said District, against Tully, on the *13th March,* 1841, &c. That *Wagner & Wagner* recovered judgment against Tully, in the same court, on the *30th March,* 1841, &c. That, on the 15th April, 1841, a *fi. fa.* was issued on the former judgment; and, on the 11th of the same month, a *fi. fa.* was

issued on the latter judgment, to the marshal of said District, both of which came to the hands of Elias Rector, then marshal, on the 23d day of April, 1841, and were levied, by Ephraim Frazer, Rector's deputy, on the lands in question, That Newton, who succeeded Rector in the office of marshal, by his deputy, Henry A. Engles, after giving due notice, according to law, sold said lands at the court-house door of Jackson county, on the 14th of August, 1841, and Herman Van Grollman became the purchaser thereof for $51.86. The deed is dated May 2d, 1842, was acknowledged by Newton, as marshal, before the Circuit Court of the United States for said District, on the next day, and filed in the office of the Recorder of Jackson county, to be recorded, on the 2d day of December, 1842, and duly recorded, as appears by the certificates attached to the deed exhibited.

"Exhibit C." to McDonald's answers, is the deed from Grollman to him, for the lands claimed by him, dated 7th day of January, 1842, stating $1,600 to be the consideration, to which Jas. Robinson and E. Blansett are subscribing witnesses. Appended to the deed, is a certificate of the Recorder of the county of Jackson, that it was filed for record in his office on the 18th day of April, 1843, and was duly recorded.

Byer's motion to strike out so much of McDonald's said second amended answer to the original bill, as set up new matter, and propounded interrogatories to the other parties, was based upon the following grounds, as stated in the motion: 1. That such matter could not be set up after the cause was set for hearing: 2. The charges made, and the information sought, were irrelevant to the matters in issue as it regarded McDonald, as the answer of one defendant could not be taken as evidence against another defendant: 3. If the said allegations were not stricken out, and defendants required to answer, and publication made, &c., it would create great delay and hardship on him, Byers.

Fowler's answer to Byers' Cross-bill is, in substance, as follows: As to the alleged judgment of Powel & Co. against Tully, the issuing of a *fi. fa.* thereon, the levy upon said lands of said Tully, and sale thereof to Byers, the execution, acknowledgment and

registration of such deed from the sheriff of Jackson county to Byers; and as to the alienage of Grollman, as alleged in the said cross-bill, defendant knows nothing of his own knowledge, or otherwise, except from the papers in the cause, as set forth by Byers, and from rumors; but defendant denies that said Byers acquired, by such deed, any title, or right, to the possession of said lands in law or equity. Defendant has been informed, believes it to be true, and so admits, that said Grollman, by a fraudulent arrangement with Tully, on or about the month of August, 1841, at a real or pretended sale, by the marshal, purchased said lands, in open fraud, and with the funds, and for the express use and benefit of Tully, as alleged in the cross-bill, but as to the particulars of such sale, as detailed in said cross-bill, defendant knows nothing.

Defendant, further answering, says that he, and the minor heirs of Denton, complainants in the original bill, to the best of his knowledge and belief, are the legal owners of said lands, by the means, in the manner, and for the consideration, set forth in the original bill and exhibits, which are made part of this answer.

Defendant positively denies that, at the time at which he and Denton purchased said lands, this defendant had full notice, or any other degree of notice, or had ever had even by rumor, of said title, real or pretended, of said Byers to said lands; nor does defendant now know, or believe, that said Byers has any title thereto; and insists and avers that the said deed of said marshal to him and Denton, the acknowledgment and registration thereof, said sale so made to them by the marshal, the levy, execution, and judgment, under which the same was made, were all regular, and in strict accordance with law, and that their title thereunder is paramount to that of said Byers, and to the titles and claims of all other persons, and is in all things a perfect legal estate.

The answer of the heirs of Denton to the Cross-bill, by their guardian, states that they, being minors, are strangers to the matters and things in the cross-bill contained—that they are infants under the age of ten years, and claim such interest in the premises

as they are entitled to, and submit their interest to the court.

May term, 1848.—The cause came on to be heard before the Hon. JOHN T. JONES, Judge, and the following final decree was rendered:

In this cause, it was agreed between complainants in the original bill, and said William Byers and Alvin McDonald, that all the depositions on file, except that of Ferdinand Fulcher, may be read on the final hearing of this cause, waiving formal objections, &c., and reserving objections to matters of substance, &c.; whereupon this cause came on to be heard, by consent of parties, and in pursuance of an order of court heretofore made (said bills having been taken as confessed against Tully, Grollman, and Fulcher) upon bills, answers, replications, exhibits, and depositions; and the scope of the original bill, cross-bill, answers, exhibits and depositions appears to be that the said Absalom Fowler and William F. Denton, then in full life, but now deceased, on the 20th day of March, 1843, purchased at a sale of the marshal of the District of Arkansas, made under an execution on a judgment rendered in the Circuit Court of the United States for said District, on the 2d day of April, 1841, in favor of Neff & Bro. against Lewis B. Tully, the following described lands, as the property of said Tully, situated in said county of Jackson, to wit: [*Here the lands are described as in the bill,*] which lands were afterwards by deed conveyed by the marshal to said Fowler and Denton. That, on the 14th of August, A. D. 1841, at a sale under certain other executions, the said Grollman, by a fraudulent bargain with the said Tully, purchased the same lands, as the property of said Tully, to hold the same in secret trust, for the use and benefit of said Tully, and took a conveyance therefor from the marshal. That the said Byers, on the 16th day of May, A. D. 1842, purchased the same lands at a sheriff's sale of said county, under an execution on a judgment in favor of Peter Powel & Co., against said Tully, rendered by the Circuit Court of said county, in May, A. D. 1841, and took a deed therefor from the sheriff, which was acknowledged and recorded, as also the said deed from the marshal to Grollman. That said McDon-

ald afterwards, with notice of the fraudulent bargain so made between said Tully and Grollman, purchased and took a deed from said Grollman therefor, the said land above described as lots number 2, of the south-west fractional quarter; lot number 3, of the north-west fractional quarter, and lot number 4, of the south-west fractional quarter of said section number 6, and had possession of the same at the time of said purchase made by said Denton & Fowler, and still holds the possession thereof against the said complainants. That the said lands so held by said McDonald are of the annual value of $75. That said Byers and Fulcher have had possession of the residue of said lands, the said Fulcher for the years 1843, 1844, 1845, and 1846, and that their annual value is $75. That said minor complainants are the heirs at law of said William F. Denton, &c. And upon the hearing of said cause, all of the depositions on file (except Fulcher's) were read as evidence, the parties respectively objecting to such portions thereof as they deemed irrelevant, incompetent, or not material to the matters in controversy, and the complainants in the original bill, and said Byers objected specially to the deposition of said John Robinson, on the grounds that, from the other evidence in the cause, it appears that he is interested and incompetent to testify. The several answers and exhibits to said bills and answers were also read in evidence, and also the original deeds from the marshal to said Fowler and Denton, and from said sheriff to said Byers, and from said Grollman to McDonald, the execution of the last being proven *viva voce* on the hearing, and also the record copy of the said deed from the marshal to Grollman, copies of all of which were also exhibited in the cause; Margaret F. Denton was admitted and proven to be guardian of said minor heirs, &c.; the complainants in the original bill also filed and read in evidence two rules of the said Circuit Court of the United States; and also read in evidence the original commission of the President to Thomas W. Newton, as marshal, a true copy of which is annexed to and made a part of Newton's deposition; and the said McDonald read in evidence a duly certified copy of certain rules of the said Circuit Court of the United

States, numbered 1, 4, 5, 6, and 10, a true copy of which is filed with the papers as evidence in this case: WHEREUPON all the matters in controversy being seen and heard by the court, here sitting in chancery, it is of the opinion that the complainants aforesaid in and to the original bill are entitled to the relief prayed therein, and that the said complainant in said cross-bill is not entitled to the relief prayed therein: It is, therefore, ordered, adjudged, and decreed, by the court here, that the said deed from the said marshal of the United States to the said Hermon Van Grollman, and the said deed from the said Hermon to the said Alvin McDonald be and the same are hereby canceled, vacated, and declared null and void to all intents and purposes; and it is further ordered, adjudged and decreed that all right, title, interest and claim of the said Lewis B. Tully; Herman Van Grollman, Ferdinand C. Fulcher, and William Byers, and each of them, legal or equitable, in and to the said lands, and each and every part and parcel thereof, and all the right, title, interest and claim, legal or equitable, of the said McDonald, in and to the said lands above particularly described, to wit: [*describing them*] be absolutely and forever divested from and out of them the said Tuily, Grollman, Fulcher, Byers and McDonald, and be and the same is hereby vested in fee simple in the said Absalom Fowler, and the said *Frances Jane Denton, Franklin D. Denton, Elviria F. Denton,* and *William F. Denton,* minor heirs of the said William F. Denton, deceased, and in their heirs and assigns forever. And it is further ordered, adjudged, and decreed, that the said Alvin McDonald deliver possession of the said three last described lots of land above stated to be, and which are now in his possession, immediately to the said complainants; and that the said William Byers and Ferdinand Fulcher forthwith deliver up to the same complainants the residue of the lands first above described, and so in their possession, and that on their refusal, or on the refusal of the said Alvin to deliver up such immediate possession to such complainants, that such complainants have the use of all process of this court proper to put them into such possession. And it is further ordered, adjudged, and decreed, that the said Alvin Mc-

Donald pay to the said complainants to the original bill the sum of $390, the amount found due by the court, on account of use and occupation, and the value of the rents, issues and profits of the said lands so held, and used, and enjoyed by him, as aforesaid; and also all the costs of the said complainants to the said original bill in and about their said original bill expended, except such costs as they have incurred in prosecuting such bill against the said Byers and Fulcher, and that the said complainants have execution thereof. And it is further ordered, adjudged, and decreed, that the said defendant, Ferdinand C. Fulcher, pay to the said complainants in said original bill the sum of $300, the amount found due from him to them on account of the use and occupation, rents, issues and profits of the said lands so used and enjoyed by him as aforesaid; and also all their costs in and about the prosecution of said original bill against the said Fulcher by them expended, and that they have execution thereof. And it is further ordered, adjudged, and decreed, that said William Byers pay to the said complainants all their costs expended in prosecuting their said original bill against him; and also that he pay to the said defendants to said cross-bill all their costs by them severally expended in the defence of the said cross-bill.

Byers' Bill of Exceptions. On the hearing of the causes, Byers took a bill of exceptions to decisions of the court on the following points:

1. He objected to the reading in evidence of *Exhibits A. and B.* to the original bill, because they did not show such valid judgment, execution, and proceedings thereon, as could warrant the marshal in selling the lands in controversy, but the court overruled the objection.

2. The court permitted the complainants in the original bill to read in evidence the following rule of the circuit court of the U. S. for the district of Arkansas, adopted *October* 10, 1842, against the objection of Byers—"Where real estate and slaves, or either, shall be taken by virtue of any execution issued from this court, it shall be the duty of the officer levying the same, to expose the same to sale, at the court house door of the county where the

real estate is situated, or the slaves are seized, at such time as to enable him to make his return in due season, having previously given twenty days notice of the time and place of sale, by at least three advertisements put up in the most public places in the said county, one of which shall be put up at the court house door of said county; and if there be a newspaper published in said county, such notice shall be given by one advertisement in said newspaper, and one advertisement put up at the court house door."

3. The complainants in the original bill offered to read in evidence the original deed from Henry M. Rector, as marshal, to them for said lands, with the certificates of acknowledgment and registration thereto attached, a certified copy of which was made *"Exhibit C."* to the original bill, to the reading of which Byers objected, unless they proved the execution thereof, he contending that said deed never had been lawfully acknowledged, or recorded; but the court overruled the objection.

4. McDonald, after proving the execution of the deed from Grollman to himself, by James Robinson, an attesting witness, offered to read it in evidence, the complainants in the original bill, and Byers objecting, but the court overruled the objection.

5. McDonald offered in evidence the record of the deed from Thomas W. Newton, as marshal, to Grollman with the acknowledgment thereof, to the reading of which complainants in the original bill, and Byers objected, on the ground that McDonald had not made a sufficient showing that he had not control of the original deed, having made no other showing than what appears in his answer, that said deed is lost, destroyed or not under his control; and because it did not appear from said record that said deed was duly and lawfully acknowledged, or properly admitted to record, but the court overruled the objection.

Depositions for complainants in the original bill:

Thomas W. Newton testified that he was appointed marshal of the U. S. for the district of Arkansas, on the 20th April, 1841, as would appear by a copy of his commission annexed. That on the 7th day of May, 1841, he received a letter from the Secre-

tary of State of the U. S., dated 22d April, 1841, notifying him of his appointment, and on the 5th day of June, 1841, he took the oath of office, and entered upon the discharge of his duties as marshal, and continued so to act from that time until sometime in the year 1843.

John Ringgold deposed that he was cashier of the branch of the Bank of the State of Arkansas at Batesville from the time it went into operation until he was succeeded by the Receiver appointed under the act of liquidation. That Grollman was not indebted to the bank as principal whilst he was cashier. That in Feb'y 1842, said McDonald, had discounted in the bank a note for $513, in which he was principal; and Alexander Robinson and James Robinson securities. That of the proceeds of the note, McDonald paid the bank $465, for Tully, which was applied upon a judgment which the bank had against Tully in Independence circuit court. McDonald never made any payment to the bank for the benefit of Grollman, whilst witness was cashier; witness continued cashier until late in the spring of 1843.

Charles B. Magruder deposed that he was appointed Executive Receiver of said branch bank about the month of February 1844, and continued an officer of the bank until January, 1846; and that during that period Grollman had no liability in bank as principal, and McDonald made no payment for him during that time to the bank. The bank held some judgments against Tully.

Charles D. Cook deposed that he was qualified as Financial Receiver of said branch bank on the 2d Feb. 1847, and had examined the books of the bank as far back as 1842. Grollman's name did not appear upon the books. In Feb. 1842, McDonald discounted a note, and applied $465 of the proceeds to the credit of Tully, as stated by Ringgold. He never paid the bank any thing for Grollman.

George A. Worthen deposed that he was deputy marshal to Thomas W. Newton, on the 6th February, 1843, and so continued until after the 20th March following. That on the 6th February, 1843, an execution in the case of *Neff & Bro. v. Tully* dated 4th

Feb., 1843, came to his hands, and on the 8th of the same month he levied upon the lands in controversy. That said lands were advertised to be sold at the court-house door in the county of Jackson on the 20th March, 1843, by notices posted up in accordance with the rules of the U. S. Courts concerning the sale of lands under execution, *to wit:* by posting up three written advertisements in the most public places in said county, one of which he put up at the court-house door, more than 20 days before the 20th day of March aforesaid, the day fixed for the sale. That on said 20th March, 1843, he offered said lands for sale, at said court-house door, to the highest bidder, and Wm. F. Denton, for himself and Absalom Fowler, became the purchaser thereof at the price stated in the return made to said execution, &c.

Andrew Jackson Greenhaw. The deposition of this witness is so awkwardly and obscurely expressed, that it is almost impossible to understand the sense of it. The substance of it seems to be that in February, 1842, he was living with Tully, at his residence, near Elizabeth, in Jackson county, and that under the direction of Tully, who pretended to be acting as the agent of Grollman, he went to the residence of McDonald, received of him, and delivered to Tully, a wagon, yoke of oxen, and *Jack-screw,* in part payment of the lands which McDonald had bought of Grollman. That said property remained in possession of Tully until the fall of 1842. That McDonald resided in the southern part of the State at the time Grollman purchased the lands at marshal's sale.

Job K. Greenhaw deposed that the property referred to by the last witness was sold under execution, in the fall of 1842, as the property of Tully, as he understood.

Iram Chadwick, deposed, in substance, that in the fall of 1842, Grollman told him that he had purchased Tully's lands and other property at marshal's sale for the benefit of Tully, and held it to keep off the creditors of Tully, so that Tully could sell it himself, and pay his debts, and that any sale Tully might make of it would be good, &c. After Grollman had purchased Tully's property in Jackson county, he took some of the cattle, horses,

&c., to White county, where he resided, and afterwards Tully moved to White county—sometimes one of them, and sometimes the other was in possession of the cattle, &c. The general understanding in the community where Grollman and Tully lived was that Grollman held the property for the benefit of Tully.

Edwin R. McGuire, deposed that he was in Jackson county in the summer of 1841, a short time before Engles, the deputy marshal, sold the lands and other property of Tully, and heard one Harris speak of buying the lands. After the sale, a few days, he heard Harris say, in a crowd, that he had intended buying the lands, but Tully requested persons present at the sale not to bid, and said he had a friend to bid the property in for him, and he, Harris, did not bid, but Grollman bought the property. That "Tully treated them, and gave a big dinner, and how could a man bid under such circumstances?" It was the general impression through the country, as far as witness knew, that Grollman bought the property for the benefit of Tully.

James Robinson, deposed, in substance, that in the summer of 1841, he was present at the sale of Tully's property, by Engles, the deputy marshal, in Elizabeth, Jackson county. About the time the sale commenced, Tully stood up and made a few remarks to the by-standers. He said, in substance, that he had shipped produce to a large amount to plaintiffs in the execution, that they exacted specie of him, which was out of his power to raise, and had not given him the credits he was entitled to. That he had not spoken to any friend to purchase the property, but if any friend should step forward and bid, it was not, and should not be to defraud plaintiffs, or any other just creditor, for he intended to pay every dollar he justly owed. The sale then went on, and Grollman bought the property—Judge Haggard bid on the property. At that time, witness was one of Tully's securities in the bank at Batesville, for over $500, and owing to what Tully said, he did not purchase, being satisfied that Tully would pay the debt; he intended to bid, but for what Tully said. Part of the lands purchased by Grollman, was the same sold by Alex. Robinson to Tully, and was at the time witness was deposing

(Nov., 1847) occupied and cultivated by Alvin McDonald, and John Robinson. On the 7th January, 1842, he witnessed a deed from Grollman to McDonald for the lands last referred to. McDonald was to pay Grollman $1,600 for the said lands. McDonald put his note in bank for about $513, which went in satisfaction of the note of Tully upon which witness and Alexander Robinson were securities. McDonald also let Grollman have, in payment for the lands, a wagon and several oxen. Grollman told McDonald to deliver the wagon and oxen to Tully, and Tully would "fetch" them to him in White county. Sometime before the sale from Grollman to McDonald, there was an execution out on the bank debt of Tully above referred to. When witness last spoke to Tully about settling this debt, Tully told him Grollman was about selling some lands, and if he effected the sale, he would get him to settle the debt. Tully referred to the sale to McDonald, and McDonald afterwards settled the debt as above. A short time after the sale by Grollman to McDonald, Tully moved from Jackson to White county. John Robinson had told witness that if McDonald's title to the land was ever settled, he would sell witness the north end of it, which joined his land. John Robinson was the father-in-law of McDonald.

When McDonald bought the land of Grollman, there was some sixty acres of it cleared. He and Robinson cleared and fenced about 20 acres more in 1846-7. It was worth about $1.50 rent per acre. When McDonald purchased the land it was in bad repair. He and John Robinson commenced building and clearing in 1842, and continued to improve. They built a good dwelling house, kitchen, negro cabins, corn cribs, and cleared some five acres during the years 1842-3-4. These improvements were worth about $600. The improvements made in 1845-6-7 were worth $300. McDonald was to pay Grollman $1,600 for the land. Had no knowledge of Tully's giving a public dinner on the day of sale. He saw and eat none, nor was he invited to eat. McDonald paid a full price for the land, and he advised McDonald to purchase it, thinking Grollman's title good. At the time Grollman bought the land, McDonald did not live in Jackson county. Wit-

ness had lived in said county since the year 1842. Recollected no rumor, about the time of the sale, as to any fraud between Grollman and Tully; if there had been he would have taken no notice of it. Tully was present when Grollman made the deed to McDonald. It was made at the house of Tully. Tully was a lawyer.

H. T. Webb, testified as to the occupancy of the lands in question by McDonald and Fulcher, the value of the rents, &c. He had lived in Jackson county for ten years, some three years of which he had been sheriff. It was the general impression, as far as his knowledge extended, that at the sale of Tully's property in August, 1841, by Engles, the deputy marshal, Grollman purchased for Tully's benefit; could not say how far his knowledge extended—had heard the matter frequently spoken of by various persons—had not heard it differently spoken of—did not know how many of the persons referred to were at the sale; did not know how many persons he had heard speak of it. Had heard a great deal of such rumors since the suit was commenced, and a great deal before. His impression was that McDonald was not in the county at the time of the sale.

William Steen, testified that shortly after the sale of Tully's property in August, 1841, it was the general report through the neighborhood that Grollman purchased the property for the benefit of Tully—"that it was not a fair thing."

John C. Pugh, testified that he was present at the sale, and heard Tully's speech, but did not recollect much about it. Tully said something about shipping corn to plaintiffs in the execution; and about wanting friends, and having none. Grollman bought the property. He took off some of the stock, a jack, and some horses. The personal property was sold at Tully's residence. Witness went there to bid for a negro, but Tully told him it was not worth his while, as Grollman was *"lousey"* with specie, and would bid over him. The property was sold for specie, which was not plentiful in Jackson county then—witness had *some himself*—did not recollect how much, but thought he had *some five dollars!*

B. H. Blount, testified that he went from Batesville, with

Engles, the deputy marshal, to the sale of Tully's property in August, 1841—Engles induced him to go by telling him that Tully's lands would sell for but little—not more than enough to pay the costs on the executions—and that he could make a speculation by purchasing them, and offered to loan him the money to buy them with. Witness went to the sale, intending to bid for the lands, but when he got there Tully took him aside and persuaded him not to bid, telling him that he had made an arrangement with Grollman to bid the property in for his benefit—that he had the money to furnish him, and would make him bid enough to pay the costs. Tully told witness that there were judgments against him to a considerable amount, and if all his property, real and personal, was sacrificed at the sale, he would be unable to pay his debts. Tully said that he had not more money than would pay the costs, and if witness bid for the property it would be sacrificed. That Grollman was a friend of his, and would buy the property for his benefit, and that he intended to appropriate it to the payment of all his honest debts. Witness then told Tully, being so appealed to, that if Grollman would bid in the property for his use and benefit, to be appropriated to his honest debts as he stated, and would bid enough to pay the costs, he, witness, would not bid. Before Engles sold the lands, Tully made a speech to the persons present requesting them not to bid, and expressing the hope that some friend of his would bid them in for him. The lands were sold, and Grollman bought them.

Rufus Stone, testified that he was present at said sale of Tully's property. There were a large number of persons present. The general understanding there, on that day, was that Grollman bought the lands for the benefit of Tully. Witness heard a great many persons speak of it. Wm. Byers was present, and when the sale was about to take place, gave public notice that he had obtained a judgment against Tully, in the Jackson Circuit Court, [in favor of Powel & Co.,] which was a lien upon the lands. Grollman afterwards told witness that he had purchased the lands for Tully's benefit, and that he made nothing by it. Some considerable time after that, Tully contracted with him, witness,

for the horse *Consul,* for which he agreed to give him $800 on McDonald and John Robinson, which sum he represented as being due him from them, as part of the consideration for the lands sold by Grollman to McDonald. Witness was to take the horse to White county, where Tully was to deliver him the claim on McDonald and Robinson for $800, and a good horse to ride home. A short time afterwards, he took the horse to Searcy, White county, where he met Grollman, and told him he was about to trade with Tully, and Grollman said that any trade witness might make with Tully about what was yet due from McDonald and Robinson upon said lands, would be right. When witness saw Tully, he offered to give him an order on McDonald and Robinson for the $800, but he would not take it, and the trade fell through. Grollman was son-in-law to Tully. Tully continued to claim the ownership of the property bought by Grollman at the marshal's sale, and was considered in possession thereof until he left Jackson county; and it was a matter of general notoriety in the county, from the time of the sale that Grollman held the property for the use and benefit of Tully.

After Byers purchased the said lands, Fulcher acknowledged that he was in possession under him. The rent of the lands in possession of McDonald and Robinson was worth $200 per annum. They had been in possession since the spring of 1842.

Phillip Holcom, deposed that a short time before said sale, Tully applied to him, as a friend, to bid in the property for him, which he declined. On the next day after the sale, Grollman told him that he had purchased the whole of Tully's property, lands, horses, cattle and other personal property for about $60. It was a matter of general notoriety from the time of the sale, in the neighborhood, and country around, that Grollman had purchased the property to befriend Tully. Tully continued in possession of the property, and exercised ownership over it until he moved to White county, in February, 1842, when he took the personal property with him, except the cattle, which he left in the care of witness until spring, and then came after them, and took them to White county: witness did not know what become of the personal

property after it was taken to White county. Sometime in January or February, 1842, Tully sold to Alvin McDonald the Robinson farm [the portions of the lands in question claimed by McDonald,] and told witness that he got Grollman to come over from White county, and make a deed to McDonald. Tully received from McDonald two yoke of oxen and one wagon in part payment for said land. Some time in the spring of 1843, and a short time after Denton had bought the lands in controversy, witness was at the farm bought by McDonald, and McDonald and John Robinson were present. McDonald asked Robinson if he had paid Tully any more towards the place, and Robinson replied that he had paid him some $12 or $15 in money. McDonald then said to Robinson not to pay any more towards the land until he saw more about it—that they might lose the land—that Grollman's title might turn out not to be good, and if they lost the land "Grollman's hide would not hold shucks unless he made them safe." Sometime after Grollman purchased the land, he offered to sell witness a part of it, and told him that if he could trade with Tully, he, Grollman, would make the deed. Tully was present at the time, and told witness if he thought proper to purchase the land, his wife would relinquish dower; but witness was afraid of the title, and did not buy. When Tully moved from Jackson county, he took with him the oxen and wagon which he had received from McDonald in part payment of the place. Witness was present when Wm. F. Denton purchased the land in question, in the spring of 1843, at marshal's sale. McDonald, Tully and Grollman were also present, and notice was given, in the presence of Denton, that the lands did not belong to Tully.

Complainants in the original bill, also read in evidence a *Rule* adopted by the Circuit Court of the United States for the District of Arkansas, on the 6th October, 1842, as follows:

"Writs of execution and other final process issued and hereafter to be issued, on judgments and decrees rendered in this court, and the proceedings thereupon, shall be the same, except their style, as are now used in the courts of the State." (See Acts of 19th May, 1828, and of August 1st, 1842.)

Complainants in the original bill also read in evidence the rule of court in relation to sale of lands and slaves under execution, adopted Oct. 10th, 1842, which is copied above in the bill of exceptions taken by Byers.

Isaac Gray, proved, that as sheriff of Jackson county, under the execution in favor of Powel & Co., against Tully, he levied upon sold, and conveyed the lands in question to Byers, as alleged by Byers in the cross-bill.

DEPOSITIONS ON THE PART OF M'DONALD.

Wm. W. Tunstall, deposed that he was present in Elizabeth, when deputy marshal, Worthen, sold the lands in controversy and Denton purchased them. Denton told witness on returning to Jacksonport, that McDonald had forbid the sale, saying he had bought the lands of Grollman. Denton said he expected he would have a law suit about them. Sale was in February or March, 1843.

Thomas T. Tunstall, also testified that he was present at said sale, and McDonald forbid the sale of the lands claimed by him.

James Robinson, deposed that he was present when Tully's property was sold by Engles—and Grollman was the purchaser. The sale took place at the house where court was usually held, in Elizabeth. Good many persons present. McDonald bought about 270 acres of said lands of Grollman in the year 1842. He agreed to give $1,600 therefor. He paid by note $513, to the Branch Bank at Batesville, in part payment of the lands. Witness knew of Grollman receiving of McDonald a wagon and several yoke of oxen in part payment. There were other bidders at the sale besides Grollman—Haggard was one. So far as witness knew, it was a fair sale.

Alexander Robinson, deposed that he was present when Tully's lands were sold by Engles. Haggard and some other persons bid for the lands—Grollman was the purchaser. So far as witness knew it was a fair sale. It was his intention to bid. McDonald purchased part of the lands of Grollman, and paid him

$1,600 for them; $500 of which he paid in Bank; he let him have one wagon, four yoke of oxen and a mule. Witness heard Grollman say he had sold the land to McDonald, and was present when the deed was made and delivered. Two judgments against Dunbar's estate were also taken as part payment by Grollman of McDonald. Tully was the attorney of Grollman, and he told witness that the whole amount was paid by McDonald; and from other information, witness believed the whole was paid.

James Waddell, deposed that McDonald purchased the lands of Grollman at about $1,600, and he, at the request of McDonald, paid Grollman $160, part of the purchase money. Grollman got of McDonald four yoke of oxen, a mule, and McDonald assumed a debt in the Bank at Batesville, in payment for the lands. McDonald lived in Pike county when Grollman purchased the lands at Tully's sale. Witness was satisfied, from circumstances, that McDonald had paid Grollman about $1,600 for the lands.

Elias B. Roddy, deposed that he got two judgments of Grollman, amounting to about $600, which he understood Grollman got of John Robinson.

John C. Pugh, deposed that he was present when Tully's property was sold by Engles, and heard Tully's speech—Tully said he had shipped some corn, and got no returns—that he needed friends, but seemed to have none, and his property was bound to go to pay his debts. The lands were sold at the court-house, and Grollman bought them. The deputy marshal then went to Tully's residence, and sold his personal property, and Grollman bought that. The property was sold for specie, and witness was under the impression that Grollman was the only man among them who had any.

William Robinson, deposed that he was present at said sale. William Byers was also there, and said afterwards that the reason he did not bid for the lands was that he did not have the money. The improvements put up by McDonald after buying the lands of Grollman were worth $1,000. McDonald was living

in Pike county at the time of the sale, and did not come to Jackson for sometime afterwards. Witness never heard of any other claim until after McDonald had bought. He thought McDonald paid a high price, but advised him to buy, believing the title to be perfectly good.

John C. Saylors, deposed that he knew the land bought by McDonald of Grollman—never heard of any other claim to the lands at the time McDonald purchased. Improvements made by McDonald worth at least $1,000, the most of which was made in the first and second years after he went on the place. Witness would not believe *Rufus Stone* on his oath.

John A. Robinson, deposed that the improvements made by McDonald upon the lands were worth $1,000 or $1,200—the improvements were made during the first and second years after McDonald went on it. Witness was present at Tully's sale, when Grollman purchased the lands in 1841. McDonald then lived in Pike county, and did not come to Jackson for a considerable time after. Witness did not hear anything of any other claim for some eighteen or twenty months after McDonald purchased the lands of Grollman, but always believed McDonald's title to be good. Witness would not believe *Rufus Stone* on his oath.

John Robinson, deposed that he was present at the sale of Tully's lands, when Grollman purchased—several persons bid. Grollman sold part of the lands to McDonald for $1,600. McDonald paid him at the time of the purchase, or a few days after, about $1,498, and some two months after $75. McDonald also did considerable blacksmith work for Grollman in payment for the lands. Witness was present when the sheriff of Jackson county sold the said lands, and William Byers purchased in the spring of 1842. He gave notice, in the name of McDonald, to persons present, and particularly Byers, that the lands belonged to McDonald. Had since heard Byers say that the reason he did not buy Tully's lands when Grollman purchased, was that he did not have the money. At the time Grollman purchased, McDonald lived in Pike county, and was not in Jackson county until

some three or four months afterwards. The improvements put upon the lands by McDonald were worth about $1,200: and witness never heard of any other claims to the land until some time after McDonald purchased, and witness believed his title to be good.

McDonald proved the execution and delivery of the deed from Grollman to him for the lands, at the time it bears date, by James Robinson, one of the subscribing witnesses.

McDonald also read in evidence the following rules adopted by the Circuit Court of the United States for the District of Arkansas:

RULE 1. *March term, March* 30, 1839. "That forms of mesne process, except the style, and forms and modes of proceedings, and the practice in suits at common law in this court, shall be the same as are now used in the Circuit Courts of this State, except so far as they have been otherwise provided for, by acts of Congress, subject however to such alterations and additions as the court shall, in its discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rules to prescribe to this court concerning the same."

IV. *March term, June* 19, 1839. "Writs of execution upon final judgments, orders or decrees in equity, rendered in this court, shall issue in the same manner, and the proceedings thereon shall be the same in all respects, except the style, as is prescribed by chapter 60, of the Revised Statutes of this State, with the exception hereinafter mentioned—and the provisions of said chapter 60, so far as applicable to this court, and except as hereinafter specially provided, are hereby adopted as the rules of governing executions from this court."

V. *March term, June* 19, 1839. "The following sections and parts of sections of said chapter 60, are declared to be excepted out of the above rule, and not to be in force as to proceedings in this court, *to wit:* Sections 6, 7, 8, 9, 10, 17, 36, 37, 38, 39, 40, 41 42, 43, 45, 46, and 47. (See rule 17.)

VI. *March term, June* 19, 1839. "Executions upon judgments or decrees of this court shall teste on the day of issuing thereof,

and shall be made returnable to the first Monday in any month, so that there be not less than four calendar months, and not more than six calendar months, between the teste and return day of such writ."

X. *March term, June* 19, 1839. This rule refers to the sale of real estate and slaves, and is the same as that copied in the bill of exceptions of Byers above.

The above is the substance of so much of the evidence in the case as is deemed material and relevant to the points decided by this court.

Byers and McDonald appealed to this court.

BYERS, appellant. The complainants in the original bill have no right to the land in controversy: 1. Because the judgment upon which they claim was absolutely void, and no valid proceeding could be had thereon—the sale under the execution issued could convey no title. 2. Because title to lands can only be acquired or lost according to the laws of the State in which they are situate, and a sale under execution, to convey title, must conform to the statute law of the State, which was not done in this case. 3. Because the judgment under which they claim was no lien upon the land; whilst the judgment under which the appellant purchased was a lien from its date.

1. The judgment was absolutely void. By rule of court adopted at March term, 1839, the forms of mesne process and practice in suits at law were conformed to those of the Circuit Courts of the State; and the mode of serving process of summons is prescribed in section 14, *ch.* 126, *Digest.* The return of the marshal does not show a service of the summons according to the mode prescribed; nor did the defendant appear. A judgment by default in such case is absolutely void, as the court had no jurisdiction of the person of the defendant. (*Smith v. Dudly,* 2 *Ark.* 65. *Webb v. Hanger et al.,* 2 *ib.* 124. *Clark v. Grayson, ib.* 149. *Woods Ex parte,* 3 *Ark.* 532. *McKnight v. Smith,* 5 *Ark.* 406. *Pool v. Loomis, ib.* 110. *Cross Ex parte,* 2 *Eng.* 44. *Gilbreath v. Kuykendall,* 1 *Ark.* 50. *Rose v. Ford,* 2 *ib.* 31. *Dawson et al.*

v. State Bank, 3 *ib.* 505. *Ringgold et al. v. Randolph,* 4 *ib.* 428. 5 *ib.* 157, *ib.* 308, *ib.* 517, *ib.* 664. *Miller v. Barkloo,* 3 *Eng.* 318. *Dixon v. Watkins et al.,* 4 *Eng.* 139. *Vaughn v. Brown, ib* 20,) and will be so held in a collateral proceeding. *Enos v. Smith, 7 Smedes & Mar.* 85, 2 *ib.* 351, 5 *ib.* 210. *Campbell et al. v. Brown & Wife,* 6 *How. (Miss.) Rep.* 230, *ib.* 106, 114. 15 *J. R.* 141, 19 *ib.* 31. 11 *Wend.* 652. 10 *Pet.* 161.

2. Title to lands can be acquired or lost only according to the laws of the State. According to the laws of Congress, approved 19th May, 1828, and 1st August, 1842, executions on judgments rendered in the United States' courts and the proceedings thereupon, were to be the same as in the State courts; and the only rule that the United States' courts could adopt upon the subject, was to make the practice therein conform to the subsequent legislation of the States respectively. By the 17th rule of court, adopted on the 6th October, 1842, at the March term of the United States' Circuit Court, in pursuance of the law of Congress, the 52, 54, 60, 62, 63, and 64th sections of chapter 67, Digest, were adopted as the law regulating executions issued upon judgments in the United States' court and the proceedings thereupon. The marshal then was bound to advertise the land, sell at the time and place and in the manner prescribed by the State law; and execute and acknowledge the deed to the purchaser before the circuit court of the county where the lands lie, before the same could be admitted to record.

That the United States' court could not make any rule relative to the sale of real property other than the statute law of the State; see *McCracken v. Hayward, 2 Howard's Rep.* 608.

The rule of property must be the same in the United States and the State courts. *Gwinn v. Breedlove,* 2 *How.* 36. *Gwinn et al. v. Barton,* 6 *Howard* 7. *United States v. Daniels, ib.* 11. *Collins v. Stanbrough, ib.* 21. 1 *Gall.* 18. 4 *Wash. C. C. R.* 349.

The law of the State is the rule of property in the United States' courts. *Hind et ux. v. Vattier,* 5 *Peters* 401. 2 *Peters* 656. *Gardner v. Collins,* 2 *Peters* 85. 3 *Peters* 127. 6 *Cond. Rep.*

63. 6 *Peters* 297. 2 *Cond. Rep.* 438. 6 *ib.* 75. 6 *Wheat* 577. 5 *Cond.* 193. *Ib.* 684.

Title to real estate can pass only according to the law of the State in which the land lies; and as the marshal did not sell the land in controversy, upon the execution under which the complainants became the purchasers, according to the mode prescribed by the State law, the sale conveyed to them no title. *Story's Con. Law,* 428 *&c.,* 708. *Darby v. Mayer,* 10 *Wheat.* 465, *ib.* 192. 2 *Ham.* 124. 4 *Cowen* 510, 527 *note.* 6 *Binn.* 359. 6 *Pick.* 286. 1 *Paige* 220. 20 *J. R.* 254. 3 *Mass.* 414. 1 *Har. & John.* 687. 9 *Wheat.* 566. 7 *Cranch* 115. 14 *Ves. jr.* 541. 6 *Paige* 627. 6 *Madd.* 16. 5 *Barn. & Cress,* 438. 9 *Bligh,* 32, 88. 2 *H. Black.* 402. 2 *P. Wms.* 290. 2 *Ves. & Beams,* 130.

3. The judgment under which the complainants claim, though rendered in the Circuit Court of the United States on the 2d day of April, 1841, was no lien upon the lands; whilst the judgment under which this appellant claims, though rendered on the 18th May, 1841, was a lien upon such lands—being rendered in the Circuit Court of Jackson county where the lands lie.

The lien of judgments of the Circuit Court of the United States is derived entirely from the State law, and when enforced as a lien it is done alone on the authority of the State law. Judgment liens are rules of property, and as such binding on the Federal courts. *Reid v. House,* 2 *Humph. Rep.* 576. *Andrews v. Wilks,* 6 *How. (Miss.) Rep.* 554. *Ross v. Duval,* 13 *Pet.* 45. 5 *ib.* 358. 1 *Kent's Com.* (5 *Ed.*) 248, *note. Tarpley v. Hamer et al.,* 9 *Smedes & Marsh.* 310. The act of the Legislature prescribing the liens of judgments (secs. 3, 4, 5, 6, *chap.* 93, *Dig.*) clearly did not intend that a judgment should be a lien on the real estate of the defendant beyond the limits of the county where the court rendering it was held. The liens of judgments of the Federal court, not being derived from act of Congress, but created solely by the State laws, cannot be more extensive than the liens provided by the law; and that is that the judgment shall be a lien on the lands situated in the county where the court is held. In New York, the judgments of the Federal court have been de-

cided to be liens throughout the State, because judgments of the court of Common Pleas when certified to the Supreme Court and docketed, become liens throughout the State; so, in Ohio, because the judgments of the court of Common Pleas are liens throughout the State: so, in Indiana, because the judgments of the Supreme Court are liens to the extent of the State. But the judgments of the Supreme Court of this State are not liens until filed in the Circuit Court. See the cases of *Show & Winter v. Jones, 2 McLean's Rep.* 78, also 6 *Paige R.* 446, 4 *Kent's Com.* (5 *Ed.*) 248. *Gantly v. Ewing,* 3 *Howard* 713. This point, in principle, was expressly and directly decided by the High Court of Errors and Appeals of Mississippi, in the case of *Tarpley v. Harmer et al.,* 9 *Smedes & Marsh.* 310.

As to McDonald's claim. The purchase by Grollman under the marshal's sale was fraudulent, and void as to the creditors of Tully; and McDonald, having notice of the fraud before he paid for and acquired title to the land, cannot protect himself as an innocent purchaser for a valuable consideration without notice.

Newton, as marshal, had no authority to sell under a writ that issued to his predecessor Rector, and was levied by him; and if he had authority to make such sale, he could only do so on the first day of the term and at the court house door.

1. A combination between the debtor and purchaser at a judicial sale, that the latter shall purchase at a depreciated price, for the benefit of the debtor, is fraudulent as to his creditors: so is every sale with intent to injure or delay the creditors; and this may be proved by circumstances or by the declarations of the parties. 1 *Story's Eq. sec.* 293. *Jones v. Caswell,* 3 *John. Cas.* 29. *Doolin v. Ward,* 6 *John.* 195. *Hawley v. Cranmer,* 4 *Cowen Rep.* 717. *Velber v. Howe,* 8 *John.* 444. *Thompson v. Davies,* 13 *John.* 112. 1 *Fond. Eq., ch.* 4, *sec.* 4 *note x. Story's Eq.* 190. *Asten v. Asten,* 1 *Ves.* 268. *Watkins v. Stocketts,* 6 *Har. & John.* 435. *Brogden v. Walker,* 2 *Har. & John.* 292. *Clayton v. Anthony,* 6 *Rand.* 285. *Major v. Deer,* 4 *J. J. Marsh.* 586. *Glenn v. Haff,* 2 *Gill. & John.* 132. *Moore v. Tracy,* 7 *Wend. Jackson v. Frost,* 6 *J. R.* 135. *Looker v. Haynes,* 11 *Mass.* 498.

Hill v. Payson, 3 *Mass.* 559. *Croft v. Arthur*, 3 *Dess. Eq. Rep.* 223. *Jackson ex dem. Bush*, 20 *J. R.* 5. *Mackey v. Cains*, 5 *Cow.* 547. 9 *Cow.* 73. *Crary v. Sprague*, 12 *Wend.* 41.

2. To constitute a *bona fide* purchase without notice, for a valuable consideration, the purchase must be made in good faith without notice of any outstanding title previous to the execution of the deed and payment of the purchase money. *Sugden on Vend., ch.* 18, *p.* 157, (*n.*) Notice before payment of the purchase and delivery of the deed is equivalent to notice before the contract. *Sugden on Vend.* 729. *Frost v. Beekman*, 1 *J. C. R.* 288, 231. *Jewell v. Palmer*, 7 *J. C. R.* 65. *Murry v. Finster*, 2 *J. C. R.* 157. 4 *Des.* Whatever is sufficient to put a purchaser upon inquiry is good notice. *Sug. on Vend.* 532. *Story's Eq. sec.* 399. *Pitney v. Leonard*, 1 *Paige* 461. *Pendleton v. Fay*, 2 *Paige* 202. If a party means to defend himself on the ground that he is a purchaser for a valuable consideration without notice, he must deny the fact of notice and of every circumstance from which it can be inferred. *Murry v. Ballon*, 1 *J. C. R.* 575. 3 *Paige* 437, and allege that his vendor was seized in fee. 3 *J. C. R.* 344. As to this defence by way of answer, see 2 *Dan. Ch. Pr.* 826, *& note.* 7 *Paige* 517. *Story Eq. Pl. sec.* 847 *note.*

3. The execution under which Grollman purchased was issued whilst Rector was marshal, and the levy was made by him, after his removal, whilst the sale was made under the same writ and levy by his successor Newton. That Newton had no legal authority to sell the land under such circumstances, see Act of Congress of 7th May, 1840. *Bower Bank v. Morris, Wallace's Rep.* 127.

FAIRCHILD, for the appellant McDonald. The marshal's sale at which Grollman became the purchaser of the lands in controversy was made in 1841, and before the passage of the Act of Congress by which the law of 1789, relative to sales under executions upon judgments in the United States' Courts was extended to the new States, and while the United States' Circuit Court had full authority to pass rules regulating the issuing executions and the proceedings under them; and the sale under which

Grollman purchased was in strict conformity to the rule upon the subject.

Though the sale to Grollman may have been fraudulent against Tully's creditors, McDonald was a purchaser for a valuable consideration without notice of the fraud, and he ought to be protected in equity. *Jerrard v. Sanders, 2 Ves. jr.* 458. *Story's Eq. sec.* 152, 153, 381, 631, 409, 410, 411, 434, 436, 108. *Com. Dig. Chancery, 4 J.* 11. *2 Fondb. Eq. B. 2, ch. 6, sec. 2 and notes; 1 ib. B. 1, ch. 1, sec. 7, note u. Frost v. Beekman, 1 J. C. R.* 300. *Sorrell v. Sorrell, 4 Ark.* 301. *Bumpass v. Palmer, 1 J. C. R.* 219. *3 J. C. R.* 147. *8 J. R.* 141. *Anderson v. Roberts, 18 J. R.* 515. *Vauck v. Briggs, 6 Paige* 329. *4 Kent* 179. *Beebe v. Bank N. Y., 1 J. R.* 573. *Jackson v. Henry, 10 J. R.* 197. *Ferrars v. Cherry, 2 Vern.* 384. *Patrick v. Chenault, 6 Ben. Munroe* 316. *Vaughn v. Haun, id.* 348. *Boyce v. Waller, 2 id.* 94. *Lemmon v. Brown, 4 Bibb* 308. *Lindsey v. Rankin, id.* 482. *Copeland v. Curry, 1 Bibb* 176. *Clay v. Smith, id.* 522. *Floyd v. Adams, 1 A. K. Marsh.* 74.

This defence may be put in by answer as well as by plea. *Story's Eq. Pl. sec.* 851, *note 3 to sec.* 846, *p.* 787, 788, *3 ed. 2 Dan'l Ch. Pr. (Perkins ed.)* 818, 819. *Jerrard v. Sanders, 2 Ves. jr.* 454. *2 Wheel. Am. Chancery Dig.* 299, (29). *2 Paige* 576. And after replication complainant cannot object to answer. *Story's Eq. Pl. sec.* 877. *2 Wheel. Am. Ch. Dig.* 298 (11).

It is clear from the answer of McDonald and the proof that he had no notice of the fraud, nor any reason to suspect fraud until after payment of all or nearly all of the purchase money; and that he paid the full value of the land; and having the legal title and the prior equity, the decree ought to have been in his favor. *Berry v. Mu. Ins. Co., 2 J. Ch. R.* 607. *Bristol v. Hungerford, 2 Vern.* 525. *Johnson v. Slagg, 2 John.* 524. *Ensign v. Colburn, 11 Paige* 503. McDonald's equity was fixed though he did not get his deed until after Byers' purchase. *Northup v. Metcalf, 11 Paige* 570.

The decree against McDonald for rents and profits without allowing as a set-off the value of permanent improvements, was

certainly against every principle of law and equity. *Porter v. Hanly*, 5 *Eng.* 194. *Green v. Biddle*, 5 *Cond. Rep.* 385. *Murray v. Gouverneur*, 2 *John. Cas.* 442. *Patrick v. Marshall*, 2 *Bibb* 45. *Hadden v. Chorn*, 8 *Ben. Mun.* 79, 80. *Clay v. Miller*, 2 *Litt.* 280. *Barlow v. Bell*, 1 *A. K. Marsh.* 246. *Patrick v. Woods*, 3 *Bibb* 29. 4 *J. J. Marsh.* 170. 1 *Vern.* 159, *and note* 1. 2 *Kent* 334, 335. *Story's Eq. Pl. sec.* 851. 2 *Wheel. Am. Ch. Dig.* 637 *Sugden on Vend.* (*Phil. Ed.* 1820) 515, 525, 526. And so was the decree against him for costs. *Patrick v. Marshall*, 2 *Bibb* 45. 8 *Ben. Mon. ub. sup.* 1 *John. Ch. Rep.* 582, *id.* 183. 11 *Paige* 638.

WATKINS & CURRAN, also for McDonald. The sale to Grollman was not void in consequence of any defects in the judgments or executions, under which he purchased, or of the acts and proceedings of the marshal in making the sale. There is no proof showing that Grollman's purchase was in fraud of Tully's creditors.

Even if fraud is established, there is no proof fixing notice upon McDonald. And as McDonald claims under judgments of the oldest date, and the judgments of the United States' Court are liens throughout the State, his title is the best.

The cases of *Wayman v. Southard*, 6 *Pet. Cond. Rep.* 1, *and The Bank of United States v. Halstead*, 1 *Pet. Cond. Rep.* 22, establish these propositions: 1st, that Congress has by the constitution exclusive authority to regulate the proceedings in the courts of the United States, and the States have no authority to control those proceedings, except so far as the State process acts are adopted by Congress, or by the courts under authority of Congress; that by the act of 1789, the proceedings on executions and other process in the Courts of the United States, in suits at common law, were to be the same in each State, respectively, as were used in the courts of the State at that time, subject to such alterations and additions as the courts might make: that the State laws have no force or effect *per se* in the United States' Courts: that the 34th section of the Judiciary act of 1789, does not apply to the process or practice of the courts: that the State laws in relation to executions and the proceedings therein are not binding

upon the national courts unless adopted by act of Congress or rule of court.

The State laws were not adopted by the United States Court for the District of Arkansas, nor was there any act of Congress upon the subject until the act of 1828, which is limited to the States then in existence, (act of Congress of 19th May, 1828, section 3, *Beers v. Haughten,* 9 *Pet.* 329. *Lessee of Walden v. Craig's heirs,* 14 *Peters* 147. *The United States v. Knight,* 14 *Pet.* 491. *Ames v. Smith,* 16 *Pet. Rep.* 303,) and the act of 1842, which was subsequent to Grollman's purchase, and the executions and proceedings thereunder being strictly in accordance with the rule of court regulating process, the sale to Grollman conveyed a good title.

That the acts of 1789 and 1828 did not apply to this State until the passage of the act of 1842, subsequent to Grollman's purchase, and that the courts until then had power to prescribe rules and regulate the form of its executions and the proceedings under them, and was not bound to conform to the State law upon the subject, see *Fullerton et al. v. Bank of United States,* 1 *Pet.* 604. *McCracken v. Hayward,* 2 *How. Rep.* 615.

These propositions being established, all of the objections taken to the forms of the writs under which McDonald claims and the proceedings of the officer in executing the same, are obviated and answered.

But even if these positions are not correct, the defects relied upon by Byers would not have the effect to render McDonald's title void. It might be voidable in a direct proceeding, but certainly is not void so as to be questioned in a collateral proceeding by a third person. A purchaser's title is not vitiated because the marshal departs from the mode of advertising pointed out by the statute, and the rule of court, (*Minor v. The Prest. and Selectmen of Natchez,* 3 *Smedes & Marsh.* 602. 5 *How. Miss. Rep.* 253, nor for an irregularity in which the purchaser did not participate, (1 *Bibb.* 155, 2 *ib.* 218, 202, 401, 3 *ib.* 216, 3 *J. J. Marsh.* 439. 6 *Mun.* 110. 4 *How.* (*Miss.*) *R.* 267. 1 *Hill's Rep.* 239, 380. 4 *Rand. Rep.* 427,) nor for an incorrect return, (1 *John.*

Case 153, 155. 1 *J. R.* 454. *Cal. & Caines Cases* 350. 1 *Har. & Gill,* 174. 6 *Gill & John.* 503,) nor on the ground that the levy was not made until after the return day, (*Jackson v. Roswell,* 13 *John. R.* 97.) And even where the judgment had been paid, (*Saunders v. Caldwell,* 1 *Cow. Rep.* 622,) and where the statute declared that the sale shall be void unless the proper notice is given. (1 *Yerg.* 469. 5 *Yerg.* 215. 7 *Yerg.* 428.) That a failure to advertise does not effect the title of a *bona fide* purchaser, see, *Lawrence v. Speed,* 2 *Bibb.* 401. 3 *J. J. Marsh.* 439. 1 *Nott & McCord* 11, *ib.* 408. *Hay. N. C. Rep.* 24. 3 *Murphy Rep.* 364. 4 *Wend.* 462.

Irregularities in an execution and the sale thereunder can only be objected by a party, and then only in a direct and not a collateral proceeding. *See* 16 *J. R.* 537. 1 *Cowen* 736. *Graham's Frac.* 363, and cases there cited.

The objection that the levy was made by Rector and the sale by his successor, Newton, is contradicted by the return of the marshal, the order of the court directing the deed to be executed and the recitals in the deed. It is true that the execution issued whilst Rector was marshal, but upon his removal it was handed over to his successor, Newton, and by him executed. 6 *Bac. Abr.* 159. *Dallman Shffs.* 15. *Allen on Shffs.* 15.

That a judgment of the United States Court is a lien on land throughout the District, see 1 *Peters S. C. Rep.* 453. 2 *McLains Rep.* 78. 5 *Ohio* 400. It is a well settled rule that a judgment, unless restricted by statute, is a lien co-extensive with the territorial jurisdiction of the court. 1 *Ohio Rep.* 261. 2 *Ohio* 65. *Ohio Rep. Cond.* 140.

It is true that where a purchaser has notice of the fraud in his vendor, before he has paid the consideration, he cannot be protected in equity. This is upon the principle that he is not injured, that he can protect himself by refusing to pay. But in a case like this, where the purchaser had been put into possession, had made valuable improvements, had paid nearly the entire consideration—the full value of the property, without any notice whatever, and without any redress upon the vendor, equity will not lend its aid to set aside his purchase. The extent of the rule is

that where a purchaser receives notice before he makes payment of the purchase money, the land in his hands becomes bound from that time by the prior equity, to the extent only of the purchase money that then remains unpaid. *Harper v. Eno et al., Freeman's Ch. Rep.* 323, and cases there cited.

FOWLER contra. One of the first questions which arise in this case, as between the original complainants and Byers, is the extent of the lien of a judgment rendered by the Circuit Court of the United States. Although there may be no express statute declaring that the judgment shall be a lien on lands, yet the courts have uniformly construed the statute, (13 *Edw. I., ch.* 18,) which gives the writ of *elegit,* as creating a lien by such power. *Scriba, &c. v. Deans et al.,* 1 *Brock. Rep.* 170. *Sellen v. Corwin et al.,* 5 *Ohio Rep.* 403. *Den v. Jones,* 2 *McLean's Rep.* 80. *Manhattan Co. v. Evertson,* 6 *Paige Rep.* 467. *Martin & Yerg. Rep.* 32. *Peck's Rep.* 31. 13 *Pet. Rep.* 479. 2 *Saund. Rep.* 69, *note* 1. *Massengill v. Downs,* 7 *How. U. S. Rep.* 765. 2 *Brock. Rep.* 253. A judgment of the United States Court is as much a lien on lands as the judgment of a State court. *Andrews v. Wilkes,* 6 *How. (Miss.) Rep.* 567. And it is well settled that the lien of a judgment, whether State or Federal, is co-extensive with the territorial jurisdiction of the court. *Roads v. Symmes et al.,* 1 *Ham. Ohio Rep.* 281. *Den, &c. v. Jones,* 2 *McLean's Rep.* 78. 6 *Paige Rep.* 467. 5 *Ohio Rep.* 408. *Bank of Cleveland v. Sturges et al.,* 2 *McLean's Rep.* 343. 7 *How. U. S. Rep.* 766. The judgment under which the complainants claim, being in full force at the rendition of the judgment under which Byers claims, created a lien upon the lands of which he was bound to take notice. 6 *How. Miss. Rep.* 563. *Cond. Rep.* 506.

The proceedings subsequent to the judgment are also valid and vest title in the original complainants as purchasers. The acts of Congress of September 29th, 1789; May 8th, 1792, May 19th, 1828; which were extended by the act of 1842, to the State of Arkansas, requiring that writs of execution and other final process on judgments in the Circuit of the United States, and the

proceedings thereupon shall be the same as in the respective State courts, merely requires such a conformity to the State laws, as the organization and powers of the United States courts would permit; and whilst the forms of proceeding must of necessity be somewhat different, effect is given to the principle. (*Lessee of Dunn's heirs v. Gaines & Gillett,* 2 *McLean's Rep.* 345.) And the rule of court directing the mode of issuing executions, the return day thereof—the place of sale of real estate, was as strict a conformity to the State law as could be adopted, and the court in adopting the rule properly rejected that portion of the law requiring the sale to take place on the first day of the State Circuit Court, as it was impossible for the marshal to attend the different courts of the State.

But admitting that there was irregularity attending the marshal's sale—that he deviated from his duty—that he did not give the notice required by law, the marshal may be responsible, but his acts are not void as to a *bona fide* purchaser at his sales—the irregularity or omission does not vitiate the sale. *Pres. & Selectmen of Natchez v. Minor,* 10 *Smedes & Mar. Rep.* 258. *Reynolds v. Rye,* 1 *Freem. Ch. Rep.* 470. 8 *Mo. Rep.* 460. 1 *Monroe* 95. 3 *Marsh. Rep.* 281. 6 *Monroe Rep.* 33. *Hamilton v. Shrewsbury,* 4 *Rand. Rep.* 431. 4 *Smedes & Marsh. Rep.* 622. 10 *Pet. Rep.* 477. 2 *Bibb. Rep.* 402. 3 *J. J. Marsh.* 439. 1 *Nott & McCord* 12. 3 *Bibb Rep* 216. 3 *How. U. S. Rep.* 714. 7 *Humph. Rep.* 60. 6 *Yerg. Rep.* 309. *Wright's Ohio Rep.* 458. 7 *Yerg. Rep.* 430.

As to the acknowledgment of the deed by the marshal, it must of necessity be done before the Circuit Court of the United States, as that court alone has the power to control the acts of its marshal, its process, its sales, or to confirm the acts of its marshal.

The validity of the judgment under which the complainants purchased is settled by the case of *Borden et al. v. State, use Robinson,* decided January term, 1851.

As to McDonald's title. The evidence shows conclusively that the purchase by Grollman at the marshal's sale was a gross fraud as to the creditors of Tully: and may be set aside in equity; that Grollman held the land as trustee for Tully and subject to

the judgments and executions of his creditors. *Bunts v. Cule,* 7 *Blackf. Rep.* 267. *Anderson et al. v. Lewis et al.,* 1 *Freem. Ch. R.* 206. *Baker v. Dolyns et al.,* 4 *Dan. Rep.* 225. 1 *Hayw. Rep.* 95. 6 *Monroe Rep.* 111. 1 *John. Ch. Rep.* 406. 1 *Ves. jr.* 120. *Roberts on Frauds,* 521. 2 *How. U. S. Rep.* 318. *Galatian v. Erwin, &c.,* 1 *Hop. Ch. Rep.* 54. 8 *Smedes & Marsh.* 313. *Sand. et al. v. Codwise et al.,* 4 *J. R.* 583. 1 *Paige Rep.* 283. 6 *J. R.* 195. 3 *Johns. Cases* 31. *Elliot v. Horn,* 10 *Ala. Rep. (N. S.)* 352. 4 *Yerg. Rep.* 550. 1 *Hill N. Y. Rep.* 144. 2 *J. R.* 5.

A purchaser under a sheriff or marshal's sale under the judgment of a creditor is entitled to the benefit of the Statute of frauds equally as the creditor himself. *Hildreth v. Jands,* 2 *J. Ch. Rep.* 35, 49. 7 *Blackf. Rep.* 68. 1 *McLean's Rep.* 39. 4 *Wash. C. C. R.* 137. 1 *Paige Rep.* 508. 4 *Rand. Rep.* 212.

McDonald having purchased with notice took the lands subject to Tully's creditors in the same manner as they would have been in Grollman's hands. *Stiver v. Stiver,* 8 *Ohio Rep.* 221. 1 *Wash. (Va.) Rep.* 41. 1 *John. Ch. Rep.* 575. 4 *Rand. Rep.* 308. 1 *Story Com. on Eq., sec.* 395. 2 *J. Ch. Rep.* 42.

The rule of equity is well settled too, that where a defendant claims to be a purchaser without notice, he must expressly deny notice in his answer, though it be not alleged in the bill. *Denning v. Smith,* 3 *John. Ch. Rep.* 345. 6 *Paige Rep.* 466. *Halsa v. Halsa,* 8 *Mo. Rep.* 308. *Woodruff v. Cook,* 2 *Edw. Ch. Rep.* 264. *Fillow's heirs v. Shannon's heirs,* 3 *Yerg. Rep.* 509. *Sug. on Vendors* 556. 1 *Freem. Ch. Rep.* 207, *ib.* 335. 1 *John. Ch. Rep.* 575. 6 *Rand. Rep.* 590. 1 *S. & Marsh. Ch. Rep.* 121. *Ib.* 343.

And such notice must be denied previous, and down to the time of paying the money and delivery of the deed, and proved. *Boon v. Chiles,* 10 *Pet. Rep.* 211. 1 *Wash. Rep.* 41. *Story v. Windsor,* 2 *Atk. Rep.* 630. 3 *Yerg. Rep.* 512. *Sug. on Ven.* 555. *Gremstone v. Carter,* 3 *Paige Rep.* 423. *Thompson v. Mason and wife,* 4 *Bibb.* 193.

Independent of the fraud, Grollman acquired no title at the marshal's sale for want of authority in the marshal to make the sale. Upon the removal of the marshal his functions terminated without notice, and a sale of lands afterwards upon which he

had previously levied is void. (*Overton and King v. Gorham and Darley, 2 McLean's Rep.* 510.) The levy by Rector, after his removal was void, and the sale by his successor, Newton, under the same writ conveyed no title to Grollman. (*See U. S. Statutes at Large,* 61, *Ch.* 45. *Gordon's Dig., (Ed. of* 1841,) *p.* 162, *Art.* 617.) And McDonald was bound to prove the authority of the officer to make the sale, (1 *Cow. Rep.* 640. 5 *Yerg. Rep.* 65. 4 *How. Miss. Rep.* 271. 1 *Monroe* 155. 4 *Smedes & Marsh.* 622. *Pet. C. C. R.* 64, 545.)

McDonald was properly decreed to pay rents and profits from the time of filing the bill (*Blackhouse, adr. v. Jett, adr.,* 1 *Brockenb. Rep.* 515. *Green v. Biddle,* 5 *Cond. Rep.* 383. *Leford's Case,* 6 *Co. R.* (*Part* 11) 52. *Rosevelt v. Post,* 1 *Edw. Ch. R.* 579.) And is not entitled to compensation for improvements, because having taken possession under color of title adversely to the right owners, he cannot be considered, by legal fiction, as a trustee or agent for them. *Winthrop v. Huntington,* 3 *Ham. Ohio Rep.* 329. 2 *Story Com. on Eq. sec.* 697. *Gillespie v. Moon, 2 John. Ch. Rep.* 602. 5 *ib.* 416. 2 *Bibb.* 44. 3 *ib.* 298.

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

The objection to the service of the original summons in the case of Neff & Brother instituted in the Circuit Court of the United States for the District of Arkansas, and under the judgment rendered in which the complainants in the original bill claim title, is well taken in fact, but is untenable in point of law. The service did fail to state that the summons was left at the usual place of abode of the defendant, as required by the statute, and might, possibly, upon a direct proceeding in an appellate court, have been reversed. Such a defect, however, cannot operate to render absolutely void the judgment rendered in that case. The Circuit Courts of the United States are not of that special and limited class, to which no presumptions are extended, but on the contrary, they are endowed with such original and general jurisdiction as to entitle them to the benefit of all legal intendments necessary to support and uphold their acts until reversed

or annulled by a superior tribunal. See *Borden et al. v. State, use of Robinson,* 6 *Eng.* 519.

The next point made relates to the power of the Circuit Court of the United States to adopt a certain rule, since the act of Congress of 1842. It is contended that, inasmuch as that act adopts the State law prescribing the form and regulating the proceedings under a writ of execution, the Federal court had no authority to adopt any rule variant from the one therein prescribed, and that therefore the complainants, having purchased under an execution enforced in obedience to such rule and not in strict conformity with the State law, their purchase is void. We deem it unnecessary to investigate the question thus presented, as in no event could it affect the rights of the parties claiming under the execution. The only result of this position, upon the assumption that it is true, would be that the sheriff had failed to observe all the requisites prescribed by the State law, and that therefore irregularities had intervened in the sale. The court of Appeals of Kentucky, in the case of *Hayden v. Dunlap,* reported in 3 *Bibb,* at page 219, said, "But were the intention of the Legislature still doubtful the highly inconvenient consequences, which would inevitably result from a construction that would vitiate the sale on the grounds now under consideration, ought, we think, to be decisive against its adoption. If the purchaser of lands under execution might, at any time within which a real action may be brought, have his title impeached by proof that the defendant in such execution had personal estate of which the demand could have been made, or that the sheriff had not advertised or given notice to the defendant according to law, it must be obvious to every one that no prudent man would bid for land exposed to sale a sum any thing like adequate to its value. Such a construction, as it would render the title insecure, would consequently tend to diminish the price of land sold under execution, and would in so much be prejudicial as well to debtors as to creditors. We must, therefore, conclude that in these respects the act is merely directory to the officer. Without doubt it is his duty to comply with its directions, and for a breach of his

duty he would be responsible to the injured party; but such a breach of duty is not in itself sufficient to avoid the sale." This is doubtless the true doctrine, and it is well sustained not only by reason but also by high authority. See *Wheaton v. Sexton,* 4 *Wheat. Rep.* 503. *Cox v. Nelson,* 1 *& 2 Mon. Rep.* 95. *Rector v. Hartt,* 8 *Misso. Rep.* 448. *Cromer v. Van Alstyne,* 9 *John. Rep.* 385. *Beeler's heirs v. Bullett's heirs,* 3 *Marsh. Rep.* 281, and *Adamson et al. v. Cummins ad.,* 5 *Eng. Rep.* 533.

But it is insisted that as the complainant Fowler was the attorney of record in the original suit and became the purchaser under the execution, he was bound to take notice of all irregularities. This proposition is too broad to square with the law. The court, in the case already referred to of *Beeler's heirs v. Bullett's heirs,* said that, "The law directing, first, chattels, then slaves, and lastly land to be taken, is directory to the sheriff. If he violates it to the injury of the debtor in an execution he may be responsible for that injury. But it does not result that the purchaser of lands so taken under execution, even if he be the creditor who has not been instrumental in causing the sheriff thus to violate the law, is to have his title affected especially after he has tried by other fruitless executions to reach other estate before he touched the land. The defendants seem to mistake the law, so far as to suppose that the plaintiff claiming under a sale by execution is bound to show that all the requisites of the law in making the sale have been complied with, instead of placing the *onus probandi* on the other side, and compelling him who opposes the sale to prove it irregular."

The High Court of Errors and Appeals of the State of Mississippi, in the case of *Doe ex dem. Starke v. Gilbert and Morris,* also said that, "The law is well settled by an unbroken chain of adjudicated cases, that a mere irregularity for which an execution would be voidable merely, does not affect the right of a purchaser under it. This doctrine was recognized by this court in the case of *Snyder v. Vancompen,* decided at the present term. The variance cannot be regarded as any thing more than an irregularity for which the execution would be voidable, and might

be set aside on application of the defendants. There was a good judgment to support it; and it was an authority to do all that the decree had authorized. That it authorized a levy on the individual property of the defendant, was evidently a clerical mistake, arising no doubt from a misconception of the decree. On the application of the plaintiff, it might have been amended to conform to the decree. 5 *J. R.* 100. 1 *Cowen,* 313. It is admitted that a sale under a voidable execution does not affect the right of the vendee, if he be a stranger to the judgment and execution, and purchase without notice of the defect; but it is said that the rule cannot apply to Starke, who was plaintiff in the execution and therefore bound to know of the defects, and in support of this position the case of *Simonds v. Catlin, 2 Caine's Rep.* 61, is relied on. In that case it was held that the plaintiff, who was the attorney in the original suit, was properly chargeable with notice of every irregularity attending the execution, but there is a material distinction between that case and the one at bar. There, a motion was made after verdict in ejectment to set it aside. "1st, Because a *fieri facias* issuing into a different county than that in which the venue is laid without a testation, is void." The court sustained the motion for this and another reason, for both of which the execution was not voidable merely but void; and was therefore improper evidence. A party to a void process could acquire no title under it, and this seems to be the reason of the case. Starke's execution was at most only voidable, and did therefore give title to the vendee under it. Even if it could have been set aside on the application of the defendants, they have not thought proper to have this done, and being only voidable, while it is permitted to remain in force, it must have the effect of a regular execution. No person can have a right to question it but the parties, and they must do it directly and not collaterally. 1 *Cowen,* 313. 16 *J. R.* 574, *Jackson v. Robbins.* The language of Chancellor KENT, in the last case cited, may with great propriety be applied in the case before us. In regard to an execution which was irregularly issued, he says, "In the first place, the better opinion is that if execution issued without *scire*

facias, the sale under it would not have been void. It might have been voidable and liable to have been set aside by the Supreme Court, upon motion, as irregular, or by this court, upon error, as erroneous, but until that was done the title would have stood. This question of irregularity or error never can be discussed collaterally in another suit. It is not a point in issue in this action of ejectment." The opinion from which this language was extracted, was delivered in the court for the correction of errors, and it may be presumed that every point was fully investigated. Let it be supposed then that Starke was a purchaser with notice, of what had he notice? Of a mere variance which he could have amended and which did not vitiate the execution, but at best only furnished a ground for setting it aside by the direct application of those who were interested. It could not be questioned collaterally. The case would have been different if it had been void. That which is void is essentially inoperative from the beginning and can have no binding quality. We therefore think that the condition of Starke was not materially different from that of a stranger, and the variance between the decree and execution did not justify the ruling of them out." The principle to be deduced from that case and those cited in it, when applied in this, is perfectly conclusive in favor of the purchase of the complainants. Admitting all the irregularities alleged to exist, they could not be brought up collaterally to affect a sale made under a valid execution, and more especially by a stranger to the original judgment. This is the settled doctrine upon the subject, and will be found to run through all the authorities. The requisites prescribed by the statute in respect to the mode of proceeding under an execution, are merely directory to the officer, and in no case can the purchaser be the sufferer by an omission to observe them, unless he can be shown to have been cognizant of the fact: There is no pretence that the complainants were cognizant of any neglect of the marshal in this particular; and in the absence of such allegation and proof to establish that fact, their purchase cannot be affected by it.

The exhibit of a rule, which purported to have been adopted

by the Federal court, and which was somewhat variant from the one prescribed by the State law, it is presumed, was offered by the complainants to meet the charge of irregularity alleged in the defendant Byers' cross-bill. The complainant in the cross-bill having wholly failed to charge a knowledge of the fraud perpetrated by the officer, if indeed such fraud was committed, no issue could be made in respect to it, and consequently the complainants in the original bill stood exonerated by the law. This being the case, all of their efforts to negative the idea of fraud on the part of the officer were a work of mere supererogation, and whether they succeeded or not; cannot affect the question of their title.

The next ground of objection relates to the extent of the lien, created by a judgment rendered in the Circuit Court of the United States. It is urged that the lien of such judgment does not extend beyond the limits of Pulaski county, in which the court is situated. In the case of *Conrad v. Atlantic Insurances Co.*, 1 *Peters* 453, the court say, the judgments in the Federal courts within the District of New York, are liens upon real property in like manner as judgments of the State courts, and to the extent of the local jurisdiction of the court. And so in every other State the judgments of the Federal courts have the same lien, to the extent of its jurisdiction as the judgments of the highest court in the State." The case of *Doe ex dem. Shrew and Winter v. J. D. Jones, 2 McLean's Rep.* 83, is directly in point. The court in that case said, "If, as contended the liens of the judgments of this court be limited to the county in which they are rendered, as in the inferior courts of the State, the judgments of this court have, in effect, no lien. The law of the State which extends the lien of a judgment of the Circuit Court of the State to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the State court. The law of Indiana regulating judgments and executions, as it stood in 1828, is the law of Congress by adoption. Effect must be given to the provisions of this law, so far, at least, as they are adapted to the organization and powers of this court. If

the rules of proceeding by the circuit courts of the State be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the State, in the exercise of the jurisdiction of this court, are as the limits of the county to the local court. The modes of judicial proceedings and rules of property are different in the different States, and in adopting those rules, Congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the State. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a State law, being framed in reference to the limited jurisdiction of the State courts, for this reason cannot constitute a rule for the Federal courts, the legislation of Congress on the subject has been in vain. Such has not been the view taken by the courts of the United States. The law of the State regulates the proceedings of a sheriff on execution. He is to advertise the property, real and personal, &c., but his duties are all limited to the county. The same rule governs the marshal, and operates throughout the State. The principles of the State law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction." The case of *Massingill et al. v. Downs, 7 Howard's U. S. Rep.,* is to the same effect. In that case the court say, "The Circuit Courts of the United States exercise jurisdiction co-extensive with their respective districts. And it has never been supposed that by the process act of 19th of February, 1828, which adopted the process and modes of proceeding of the State courts, the jurisdiction of the circuit courts was restricted. The "process and modes of proceeding" in the State were adopted by Congress in reference to the jurisdiction of the circuit courts and not with the view of limiting the jurisdiction of those courts. In those States where the judgment or the execution of a State court creates a lien only within the county in which the judgment is rendered, it has not been doubted that a similar proceeding in the Circuit Court of the United States

would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect and in some degree subvert the judicial power of the Union. It would place suitors in the State courts in a much better condition than in the Federal courts."

But if it should be supposed that, inasmuch as the laws of this State, in regard to judgments and executions, were not adopted by Congress until August, 1842, and subject to the rendition of the judgment under which the complainants in the original bill claim title, that therefore the judgment could not create a lien throughout the State, we answer that such lien does not depend alone upon the adoption of the State law, but that it existed prior to and independent of such adoption. It was said, in reference to this point, by the court in the case already referred to of *Doe ex dem. Shrew and Winter v. J. D. Jones,* (*2 McLean's Rep.* 79,) that, "as land was not liable to be sold on executions or extended at common law, it is clear that at common law the judgment created no lien on the land of the defendant. But the argument is not sustainable that a judgment cannot operate as a lien on real estate unless this effect be specially given to it by statutory provision. The statute of *2 West.,* 13 *Ed.* 1, gave the *elegit* which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 *Salk.* 212. 1 *Wils.* 39. 2 *Leigh* 268. 6 *Randolph's Rep.* 618. 4 *Peters* 124. 2 *Block.* 252. 2 *Bl. Com.* 418. 2 *Bac.* 731. 5 *Peters* 367. The same doctrine was held by the Supreme Court of this State, in a learned and able opinion in the case of *Ridge v. Prather,* 1 *Black.* 401. The court say, "We have always had a statute at least as strong as that of *West. 2,* by virtue of which judgments are liens upon real estate." But until the act of 1818, there was no statute declaring that judgments should be a lien on real estate. In the view of the court such lien arose from the various acts subjecting lands to execution. The thirteenth section of the act of 1818, entitled "an

act to prevent frauds and perjuries," gives a lien on the real estate of the defendant from the time of signing the judgment. This statute, it would seem, was introductive of no new principle, but gave effect from a specified time to a judgment lien. It is unnecessary to enquire whether, prior to this time, the lien took effect from the commencement of the term or not: it is enough to know that it existed. The lien under this statute, as well as that which existed before the statute, being general, must have extended throughout the State. The circuit courts had power to issue execution to any county in the State. And as their jurisdiction, thus to enforce their judgments, extended throughout the State, the lien must have been co-extensive with their jurisdiction." We entertain no doubt therefore that, in either state of case, the judgment under which the complainants claim, operated as a lien upon the real estate of Tully throughout the State.

The next and last objection urged by the defendant Byers to the title of the complainants, is, that the marshal's deed, under which they claim, had not been acknowledged or admitted to record according to the requisitions of our statute. The act of Congress of May 7, 1800, section 3, provides that "Whenever a marshal shall sell any lands, tenements or hereditaments, by virtue of a process from a court of the United States, and shall die or be removed from office, or the term of his commission expire before a deed shall be executed therefor, by him to the purchaser, the purchaser or plaintiff at whose suit the sale was made, may apply to the court from which the process issued, setting forth the case, and assigning the reason why the title was not perfected by such marshal: and thereupon the court may order the marshal for the time being to perfect the title and execute a deed to the purchaser, he paying the purchase money and costs remaining unpaid." The complainants alleged in the petition and established all the facts necessary to authorize Rector, the successor of Newton, to execute and acknowledge the deed. They satisfied the court out of which the execution issued, that, after Newton had sold the property, and before he had executed a deed to themselves who were the purchasers, he was removed from of-

fice, and that Rector had been appointed his successor. The court, upon the showing, ordered Rector to execute the deed which he did, and acknowledged the same before the court. But it is also contended that, although the deed shall have been properly executed and acknowledged, yet it was not a fit subject for record in the office of the clerk of the Jackson Circuit Court. If any doubt could have existed as to the propriety and legality of recording the deed before the adoption of our execution law by the act of 1842, there certainly cannot now remain the least ground for such a doubt. Our statute, after providing for the execution and acknowledgment of deeds by the sheriff before the Circuit Court of the county, then declares that any deed so executed shall be recorded as other conveyances of land, and thereafter such deed, or a copy thereof, or of the record certified by the recorder, shall be received in any court in this State without further proof of the execution thereof. The act of Congress, by adopting this statute, though necessarily permitting a departure so far as the court before whom the acknowledgment should be made, does most clearly authorize its record in the county where the land is situated when so acknowledged.

We have now carefully examined each objection urged by the defendant Byers against the claim set up by the complainants, and have not found the first one sustained by the principles of the law. We will next proceed to look into those raised to the claim of McDonald.

The first point made in respect to this branch of the case, is, that the marshal, who conducted the sale at which Van Grollman purchased, was not clothed with legal authority to make such sale, and that consequently Van Grollman did not derive any title from it. If this position be correct, it will necessarily follow that McDonald, who deduces his title from Van Grollman, will be left without any basis upon which to rest his claim. The act of Congress passed in 1800, is relied upon to sustain this position. The 3d section of that act provides "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of

commission shall expire before sale, or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired." The ground taken is, that, as the execution, under which the sale was made, was levied by Rector, and that, after his removal from office, the sale was conducted by Newton, his successor, it was void for want of authority, and that consequently no title passed to Grollman, the purchaser. It is contended, on the part of McDonald, that the ground assumed is not true in point of fact, but that, on the contrary, there is an utter failure by the record to show that any levy had been made by the predecessor of the marshal, who made the sale, or that in case it shall appear that such levy was made by him, it is then insisted that it was so made after his removal, and that, as such, it is a mere nullity. It is clear that, in case that the execution in question shall fall within the operation of the act of 1800, and the levy shall have been made by marshal Rector, or by his deputy, after his removal from office, that such levy was irregular, and could have been taken advantage of by the parties interested upon a direct application to the court for that purpose. Upon this point, we are not without authority. In the case of *Overton & King vs. Gorham & Durk,* (*2 McLean's Rep.* 510,) the court say, "The 3d section of the act of the 7th May, 1800, provides "that where a marshal shall take in execution any lands, tenements, or hereditaments, and shall die or be removed from office, or the term of his commission shall expire before or after sale or other final disposition made thereof, the like process shall issue to the succeeding marshal, and the same proceedings shall be had as if such former marshal had not died or been removed, or the term of his commission had not expired. From this provision, it is clear that the sale in this case was irregular. After his removal from office, the marshal, under the act of 1789, has power to execute all such precepts as may be in his hands; but the act of 1800 provides that his successor shall sell the lands on which he has levied but not sold before his removal. Notice to

the late marshal of his removal was not necessary. His functions were terminated by the act of his removal.

It appears, by reference to the testimony in the cause, that Newton was appointed on the 20th of April, 1841, and that the levy was made by Frazier, the deputy of Rector, on the 8th of May of the same year. The question now to be determined is, whether an execution thus circumstanced, is in full life, and clothes Newton with such authority as to enable him to pass title to the purchaser under his sale. The true test of a void process occasioned by an irregularity, is believed to be found in the rule laid down by GOULD, J., in the case of *Luddington v. Peik, 2 Cow. Rep.* 702. He said, "The irregularity must be in the process itself or in the mode of issuing it: it cannot be irregular when sued out according to the established course of practice." If the state of facts existing at the time the process issued, be such as to render it unlawful, that is sufficient. We are not to understand, by appearing irregular on the face of the process, that the irregularity is stated in the writ. It frequently appears by reference to extrinsic circumstances. Thus a writ tested and returnable out of term is irregular. When and where the terms are held by law, and how long the court was in session, is not stated in the writ, a knowledge of this is derived from other sources, and yet it may truly be said the writ is bad on the face of it. (See 1 *Cow. Rep.* 740.) We will now proceed to apply this test to the execution in question. It is not pretended that any obstacle existed in the way of its issuance at the time it first went forth; nor is it claimed that it bears any irregularity upon its face; but, on the contrary, it is conceded that it issued by authority and that it is fair and regular upon its face. But it is insisted that under the operation of the Acts of Congress it ceased to exist for all legal purposes, *eo instanti*, upon the removal of marshal Rector, in whose time it was issued, and that consequently any action under it by Newton, his successor, was irregular and void. We do not so understand the operation of the acts referred to. The levy not having been made until after the removal of Rector, it is clear that the case cannot come within

the operation of the Act of 1800, and must of necessity fall within that of 1789. The latter act provides that "Every marshal or his deputy, when removed from office, or when the term, for which the marshal is appointed, shall expire, shall have power, notwithstanding, to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office, and the marshal shall be amenable, &c. If this be the correct construction it follows that the levy by Rector's deputy was strictly legal and regular and that nothing more remains to be decided but the propriety and legality of the sale by his successor. Here we are met by the argument that as Rector possessed the power under the law to complete the execution of the writ, that therefore, Newton, his successor, could not legally do the same thing. We are free to admit that the sale made by Newton, under the circumstances, was irregular, and that upon a direct application to the court, by any of the parties interested, it would have been set aside; but it is by no means clear that the objection can be entertained in a collateral proceeding. The objection urged against the sale under which McDonald claims title, is not founded upon any defect in the execution itself; but, on the contrary, it is leveled solely at the individual who assumed to exercise the functions of an officer on that occasion. From the view which we have taken of the law as applicable to the execution in question, we are satisfied that the removal of Rector did not make the slightest impression upon it, but that it still retained all its vitality until exhausted by its full and final consummation. It is shown by the testimony that Newton was the marshal of the District at the time of the sale, regularly commissioned and qualified, and that, to say the least of it, if not *de jure,* he certainly stood in the attitude of marshal *de facto* to the writ under which he acted in making the sale. We conceive that every reason that could possibly obtain in favor of upholding sales, where mere irregularities not affecting the validity of the process itself had intervened, will apply with all their force to one situated like the one before us. The individual who conducted the sale was not only reported in the country as the marshal, but he

was in truth and in fact the lawful officer duly commissioned and qualified to act as such. If the public under such a state of case should not receive the protection of the courts in their purchases, it would necessarily destroy all confidence in such sales and tend to the great and manifest injury of all parties concerned. We are therefore clear that the execution having issued by lawful authority, and there being no legal impediment to its full and final consummation, the most that the irregularity alleged could amount to, would be to render the sale voidable and not absolutely void, and consequently not liable to be assailed in a collateral proceeding.

It is conceived unnecessary to notice the objection to McDonald's title founded upon a supposed defect in the lien of the judgment under which Van Grollman purchased, on the failure of the marshal to advertise or sell at the time and place prescribed by the State law, as all the ground in reference to those irregularities has been explored whilst answering similar objections to the title of the complainants in the original bill.

The next point taken by the complainants is that Van Grollman's purchase being fraudulent as against the creditors of Tully, and McDonald being cognizant of such fraud before he consummated his purchase, their equity is paramount and consequently must prevail. We consider that it would be a waste of time and unnecessary labor to comment in detail upon all the evidence tending to fix fraud upon Van Grollman in the purchase at the marshal's sale, as the current runs so strong in that direction as to leave no ground for a rational doubt upon that subject. The testimony is perfectly conclusive that Van Grollman purchased the property for Tully's use and benefit, and such being the state of fact, it is equally clear that in case McDonald was cognizant of the fraud before he consummated his purchase, that his claim must yield to that of the complainants. But if, on the contrary, he was a *bona fide* purchaser for a valuable consideration, without notice, the judgment under which his vendor purchased being the oldest, his equity is necessarily prior to that of the complainant's and must prevail against it.

But we are here met by the position that the answer of McDonald is insufficient in point of law, even admitting the sufficiency of his proof to entitle him to the benefit of the defence set up by him, and the case of *Boone v. Chiles,* amongst others is relied upon. We will now proceed to look into this matter, and to see how the case actually stands. In the case of *Boone v. Chiles,* 10 *Peters Rep.* 210-11, the court say: "It is a general principle in courts of equity that where both parties claim by an equitable title the one who is prior in time is deemed the better in right. 7 *Cr.* 18. 18 *J. R.* 532. 7 *Wh.* 46; and that where the equities are equal in point of merit the law prevails. This leads to the reason for protecting an innocent purchaser holding the legal title against one who has the prior equity: a court of equity can act only on the conscience of a party: if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. *Sugden on Vend.* 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it: and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief. 9 *Ves.* 30, 4, which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, encumbrance, or even a satisfied term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the *tabulo in non fragio,* if acquired before a decree. *Shower P. C.* 69. 4 *B. P. C.* 328. 1 *D. & E.* 767. *P. C.* 65. 7 *V.* 576. 10 *V.* 268, 70. 11 *V.* 619. 2 *Ch. Cas.* 135-6. 2 *Vin.* 161. 1 *Vent.* 198. Relief will not be granted against him in favor of the widow or orphan. *P. C.* 249. 2 *V. Jr.* 457-8. 5 *B. P. C.* 292, nor shall the heir see the title papers. 18 *Vin.* 115. 1 *Ch. Case* 34, 69. 2 *Freem.* 24, 43, 175: it is a bar to a bill to perpetuate testimony or for discovery. 1 *Harrison's Ch.* 261. 3 *Sugden* 723-4. 1 *Vern.* 354, and goes to the jurisdiction of the court over him: his conscience

being clear, any adversary must be left to his remedy at law. 2 *V. Jr.* 457. 3 *V. Jr.* 270, 183. 9 *V.* 30. 18 *J. R.* 532. 7 *Cr.* 18. But this will not be done on mere averment or allegation; the protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title, operating, if made out, to bar and avoid the plaintiff's equity, which must otherwise prevail 7 *V.* 33, 34. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. 14 *J. R.* 63, 74. 1 *Munf.* 396-7. 10 *J. R.* 544-8. 2 *Wh.* 383. 3 *Wh.* 527. 6 *Wh.* 464. 1 *J. C.* 461. It must be established affirmatively by the defendant independently of his oath. 6 *J. Rep.* 559. 1 *J. Rep.* 590. 17 *J. Rep.* 367. 18 *J. Rep.* 532. 2 *J. C.* 87, 90. 4 *B. C.* 75. *Amb.* 584. 4 *V.* 404, 587. 3 *J. C.* 583. In setting it up by plea or answer, it must state the deed of purchase, the date, parties and contents, that the vendor was seized in fee and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and the delivery of the deed; and if notice is especially charged, the denial must be of all the circumstances referred to from which notice can be inferred: and the answer or plea show how the grantee acquired title. *Sugden* 766-70. 1 *Atk.* 384. 3 *P. W.* 280-1, 243, 307. *Amb.* 421. 2 *Atk.* 230. 8 *Wh.* 449. 12 *Wh.* 502. 5 *Pet.* 718. 7 *J. C.* 67. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. 1 *Cr.* 100. 3 *Cr.* 138-5. 1 *Wash. C. C.* 75. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. 7 *Cr.* 48. 7 *Pet.* 271. *Sugden* 722. Such is a case which must be stated to give a defendant the benefit of

an answer or plea of an innocent purchaser without notice: the case stated must be made out, evidence will not be permitted to be given of any other matter not set out. 7 *Pet.* 271.

We will now proceed to test the answer of McDonald by the rules thus laid down. He admits in his second amended answer that he was in possession of a portion of the lands described in the original bill, but avers that he obtained possession and derived his title to the same from one Herman Van Grollman, that he purchased the same from said Grollman for a valuable consideration, that is to say, for the sum of sixteen hundred dollars, which was the full value and a high price for said lands, and that he had purchased and fully paid for said lands without any notice of any prior lien or encumbrance upon the lands, and without any notice or suspicion that the title of Grollman was tainted or in any way affected with fraud. He further states that at the time of the marshal's sale, under which Grollman purchased the property in dispute, he was not a resident of Jackson county, and that he did not become a resident till some time after, that during his negotiation for said lands and purchase of the same, he heard nothing, nor did he hear any thing calculated to throw doubt or suspicion upon the title of Van Grollman, and that he believed he was getting a full, complete and perfect title, and that his purchase of the said lands is evidenced by a deed of conveyance from said Van Grollman to him, which is already on file in this case and marked as exhibit C., in his answer to William Byers' cross-bill herein, and which he prays may be taken as a part of this answer. He further states that, supposing his title to said lands to be valid and unquestionable, he has made valuable and permanent improvements thereon by erecting a dwelling house and out houses, clearing and fencing, &c., and that said improvements are worth at least one thousand dollars. He then sets out the proceedings under which Van Grollman purchased the lands, and then concludes this branch of his answer by exhibiting a copy of the marshal's deed to him. The profert of the deed from Van Grollman to McDonald, contained in the answer of the latter to Byers' cross-bill, and to which reference is

made in his second amended answer to the original bill, is as follows, to wit: "And this respondent says that the sale made by Grollman to himself is witnessed by a deed from said Grollman to him for conveyance of said lands, which deed is herewith filed and marked exhibit C., and prayed to be taken as a part of this answer." This answer is clearly defective in failing to aver want of notice down to the delivery of the deed from Van Grollman to himself.

But it is insisted that it is now too late to raise the objection since there is a general replication filed to the answer. This position might be correct as to matters of mere form, but it cannot be admitted where matters of substance are involved. A party is not allowed to state one case in a bill or answer and make out a different one by proof; the allegata and probata must agree. 4 *Mad. R* 21, 9. 3 *Wh.* 527. 6 *Wh.* 468. 2 *Wh.* 380. 2 *Pet.* 612. 11 *Wh.* 103. 6 *J. R.* 559, 63. 7 *Pet.* 274, and also the case of *Boone v. Chiles,* already referred to at page 209. The reason is obvious, why such an averment is absolutely necessary in order that the party may fill the character of an innocent purchaser for a valuable consideration without notice. For if he had not obtained the deed, so as to become invested with the legal title, though he may have paid the last cent of the purchase money, his title was merely equitable, and as such would be subject to all the equities upon it in the hands of the vendor, and he would have no better standing in a court of equity. 7 *Cr.* 48. 7 *Pet.* 271. *Sugden* 722.

The answer falls far short of the legal standard in several other particulars. It simply avers that his claim is founded upon a deed, but wholly fails to state its date or contents; nor is it stated that the vendor was seized in fee and in possession. These defects may or may not have been cured by the replication; and upon this point we express no opinion; yet it is certain that, to say the least, it would be much safer to adhere strictly to the rule laid down in framing an answer. We are satisfied, however, that by the failure of McDonald to aver want of notice of the fraud charged in the bill against his vendor down to the time of

the delivery of his deed, his defence is incomplete, and that as such he must fail of success, and that without regard to the sufficiency of his proof. From this view of the case, it is clear that McDonald can occupy no better or higher ground than Van Grollman, his vendor, and as a necessary consequence, if the complainants could have succeeded over the latter, they must be permitted to prevail in a contest with the former.

It appears from the testimony on file in the cause that the instrument upon which the judgment of Neff & Bro. was founded, and under which the complainants in the original bill set up their title was executed in March, 1839, and payable six months after date, and that the sale to Van Grollman took place in 1841. From this it is clear that Neff & Bro. were creditors of Tully at the time of the sale to Van Grollman, and if such sale was made in fraud of their rights, it is equally clear that as to them it was void. The testimony bearing upon this point is voluminous, and would require much time to comment upon the whole of it; yet we would forego all such considerations in case it presented any conflict, but we are saved the necessity by the fact that the whole current runs the same way, and is so strong as to leave no ground for a rational doubt. The fraud charged upon Tully and Grollman may therefore be considered as a fixed fact, and therefore if the effects of such fraud are to be extended to McDonald, it is clear that he cannot be sustained in his pretensions.

The case of *Stoval v. The Farmers' & Mechanics' Bank of Memphis,* is strongly in point, to show that the sale to Van Grollman was fraudulent as to the creditors of Tully. The proof in that case was that means were resorted to which were calculated to prevent a fair competition in the sale, and that the party who actually purchased the property, was heard to say that he had done so for the benefit of the defendant in the execution. This, with the further evidence of continued possession, constituted the substance of the testimony in that case, upon which the court below found against the purchaser at the sale, and the appellate court affirmed the judgment. The suit in that case was prosecu-

ted by the creditors themselves, and in that respect there is a difference between the two cases, and the question which results is whether parties claiming under a judgment of such creditor can claim the benefit of his position. This point was expressly ruled in the case of *Hildreth v. Sands, 2 John. Ch. R.* 35, which is quoted with approbation in the case of *White v. Williams,* 1 *Paige Ch. R.* 508. It is there said, "There is no doubt the complainant is in a situation to take advantage of the statute remedy. He is a *bona fide* assignee of the judgment, and had an equitable interest in it for his own protection, as endorser of the note, even before that assignment. As a purchaser of the premises, under the judgment, he is also entitled to all the rights which the judgment creditor could have. There can be no doubt, from the view which we have taken of the whole case, that the property claimed by McDonald is liable in his hands to the judgment of Neff & Brother, and the purchasers at marshal's sale, under such judgment, being entitled to all their rights, it is equally clear that the complainants in the original bill acquired by such purchase a complete title as against McDonald. This conclusion reached, it necessarily results that the claims of both Byers and McDonald must yield to that of Fowler and the representatives of Denton, and that the decree of the court below is correct so far as it is confined to the question of title.

It is urged that the decree is erroneous for the fact that the chancellor sustained the motion of Byers, to strike out the interrogatories contained in McDonald's second amended answer. This answer charged a corrupt agreement between the defendants, Tully and Van Grollman, and Denton, one of the complainants in the original bill, the purport of which was that Denton had bribed Tully and Van Grollman to leave the country, and decline answering the bill, so that the fraud charged against them might stand confessed, and thereby injure the claim of McDonald. We do not deem it material to inquire whether the matter called for would be admissible in evidence or not, so as to aid the defence set up by McDonald, as it is clear from the testimony in the record, that an answer by both Tully and Groll-

man, positively denying every allegation in relation to fraud in the marshal's sale, would have been fully and effectually disproved and overturned. The legal effect would have been the same, and consequently there is no ground of complaint in that particular.

The next, and, as we conceive, the only remaining question important and necessary to be determined, relates to the proper disposition of the rents and profits and the improvements made upon the land; and also to the costs of suit. It is shown by the testimony that McDonald purchased on the 7th of January, 1842, and that the decree was taken against him on the 15th of June, 1848, embracing a period of more than seven years; that at the time he entered upon the lands, there were from fifty to sixty acres in cultivation, and that it was worth from one to two dollars per acre per annum, and it also appears that the improvements which he had put upon the land were worth from one thousand to twelve hundred dollars. This bill was filed on the fifth of April, A. D. 1845, and more than three years after McDonald's purchase. If it is allowable under the circumstances of this case to give to the party in possession compensation for his improvements, we most assuredly shall be inclined from our views of the testimony to do so, at least to the extent of the rents and profits claimed for the use and occupation of the land. The testimony tending to bring home a knowledge of the fraud to McDonald in the purchase of Van Grollman, is of the feeblest and most unsatisfactory character, and however obligatory we might have considered it upon the merits, from the fact of the finding of the court below, we cannot regard it as by any means conclusive when applied to the question of damages. It is clearly the right of an innocent purchaser for a valuable consideration without notice to have the value of permanent and useful improvements set off against the claim of the rightful owner to the extent of the rents and profits. This doctrine is distinctly laid down by the Supreme Court of New York in the case of *Jackson v. Loomis*, 4 *Cowen Rep.* 172. That was an action of trespass for mesne profits. The court in that case say, "There is certainly no rea-

son, in general, why the owner of lands should be compelled to pay for improvements which he neither directed nor desired as a condition on which he is to gain possession of his property. But where an occupant has taken possession under a *bona fide* purchase and made permanent improvements, it is very hard for him to lose both land and improvements. If the plaintiff is not content with acquiring possession of his property in an improved condition after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements made in good faith to the extent of the rents and profits claimed. "This view of the subject is fully supported by *Green v. Biddle,* (8 *Wheat. Rep.* 81, 82,) and the authorities there cited, especially *Coulter's Case,* (5 *Co. Rep.* 30.) Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements." The Supreme Court of the United States, in the case of *Green v. Biddle,* (5 *Cow. Rep.* 385,) when commenting upon the Kentucky statutes concerning occupying claimants of land, and declaring the common law rule in relation to damages recoverable by the rightful owner, say, "It is laid down, we admit, in *Coulter's Case,* 5 *Co.* 30, that the disseizer, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. See also *Bro. tit. Damages, Pl.* 82, who cites 24 *Edw.* 3, *C.* 50. If any common law decision has ever gone beyond the principle here laid down, we have not been fortunate enough to meet with it. The doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord KAINS considers to be the law of nature. His words are, "It is a maxim suggested by nature that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents derived by the *bonae fidei* possessor." He cites *Papinian* 1, 48, *de rei vindicatione.* Taking it for granted that the rule, as laid down in *Coulter's Case* would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of

Kentucky. That rule is, that meliorations for the property (which necessarily mean valuable and lasting improvements) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession." It is clear that the testimony in this case, under the rule thus laid down, will not warrant the decree in respect to damages. The improvements made by McDonald, consisted of dwelling houses, kitchen, negro cabins, corn-cribs, stakes, clearing land, digging well, &c. James Robinson testifies that the improvements made in 1842, 3 and 4, were worth six hundred dollars, and that those made in 1845-6 and '47, were worth three hundred dollars. It was also testified by others that all the improvements were worth from one thousand to twelve hundred dollars. The improvements specified were doubtless of a permanent and beneficial nature, and the defendant McDonald having entered in good faith, so far as the testimony shows, he is clearly entitled to have a deduction in consideration of his improvements made before suit brought, to the extent of the rents and profits claimed. McDonald purchased on the 7th of January, A. D. 1842, and according to the evidence, as found by the Chancellor, the rents and profits did not exceed the sum of seventy-five dollars per annum. The improvements made anterior to the 5th of April, 1845, the commencement of this suit, were proved to have been worth six hundred dollars, and the rents and profits down to that time at the same rate could not have exceeded two hundred and forty-three dollars and seventy-five cents, which of course would leave the sum of three hundred and fifty-six dollars and twenty-five cents, to be set off against such rents and profits as shall have accrued since that period. This suit having been commenced on the 5th of April, A. D. 1845, and a final decree having been rendered on the 15th June, A. D. 1848, embracing about three years and two months, the rents and profits during that time could not have exceeded two hundred and thirty-seven dollars and fifty cents according to the rate fixed, which would be minus the value of the improvements made before suit brought just one hundred and nineteen dollars and

seventy-five cents. This latter sum he cannot claim, as the time of the institution of the suit which operates as notice of an adverse claim to the land is his limit of recovery by way of compensation, and that recovery is strictly confined to improvements made in good faith before the institution of the suit. It was said, by KENT, Justice, who delivered the opinion of the court in the case of *Murry v. Gouverneur,* (*2 John. Case* 441, *2 in error*) that as to the sum expended, it may be left for liquidation in an action for the mesne profits, if the respondents should think proper to sue for mesne profits. The action for mesne profits is a liberal and equitable one, and will allow of every kind of equitable defence. It was also held in Pennsylvania, (*Hylton v. Brown, C. C.,* April, 1818. *Whart. Dig., Ejectment,* 1 *Pl. p.* 188. *U. S., Reports,*) that "the value of improvements made by the defendant may be set off against a claim of mesne profits, but profits before the demise laid should be first deducted from the value of the improvements. We entertain no doubt but that the defendant McDonald was entitled to compensation for improvements made before suit brought, and in case they are equal in value to the rents and profits claimed to set them off to the entire extinguishment of such rents and profits. This having been already ascertained it necessarily follows that he ought to be discharged and released from that part of the decree which awards damages against him.

The last point to be considered relates to the proper disposition of the costs. From the testimony contained in the record, we think that there can be but little pretence that McDonald was cognizant of the fraud with which the title of his vendor was tainted, at the time he made his purchase. It is in proof that he did not reside in the county of Jackson at the time of the marshal's sale to Van Grollman, and that he did not settle in that county till some time thereafter, and there is certainly no evidence of a reliable character going to establish a knowledge of such fraud after he went into Jackson, and before his purchase. We feel satisfied from the fact of his absence at the time of the marshal's sale, the dearth of the evidence to bring a knowledge of

the fraud home to him after he went into Jackson county, and from the price which he paid for the property, as well as the secret character of the defect in his title, that his purchase and entry were in good faith. This being the case, though he failed upon the merits, and perhaps more from a defect in his answer than the insufficiency of his proof, we cannot believe that it would be consonant with the principles of equity and conscience to visit upon him more costs than he may have incurred in defending this suit. We are therefore of opinion that the whole of the decree rendered in this cause, except so much as awards damages and costs against McDonald, ought to stand; but that so much as gives damages and costs against him ought to be reversed, and that the same as to costs be so entered as only to allow such costs as he may have himself incurred in his defence of this suit in the court below and also in this court; and also that the complainants in the original bill pay all their costs in both courts.

It is therefore, ordered, adjudged and decreed, that the decree rendered by the Chancellor in the court below, except so far as it relates to the damages and costs adjudged against the said McDonald, be and the same is hereby affirmed, and that said decree as to the said damages and costs be and the same is hereby reversed and held for nought, and that the said McDonald be discharged and released from the same, and further, that so much as relates to costs as against him be reversed and held for nought, and the said McDonald pay all such costs as he may have incurred in his defence against the said original bill in this court as well as in the court below, and that the complainants pay all such costs as they may have incurred in the prosecution of said original bill against the said McDonald in both courts.

A petition for reconsideration was filed by McDonald, and overruled.