12/421. Distgd. in Watkins v. Wassell, 15/88, & Bettison v. Budd, 17/553, & Tapnall v. Richardson, 13/544-8-55, & Ovrld. in Blakeney v. Ferguson, 14/641-61.

WHITING & SLARK *vs.* BEEBE ET AL.

This court has repeatedly held *original* writs void for want of the signature of the clerk, and like defects, but the courts have generally held such defects in *judicial* process to be amendable.

Adhering to the former decisions of this court as to such defects in *original* writs, yet in view of the enlarged powers of courts in amending *judicial* process, the court holds that although such writ, without the signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from which it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require.

Some of the former decisions of this court have been made under an erroneous impression with regard to the effect which the constitution had upon the validity of process—that as the constitution required the signing, &c., it could not be dispensed with, and where a constitutional defect existed, the writ was void.

But a directory enactment of the constitution is of no more validity as a law, than a like enactment by statute—both are laws, though emanating from different law-making powers.

Instead, therefore, of looking to these, the true inquiry is, is the writ so totally defective as not to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties?

Where a writ is defective in a matter that is amendable, it will be considered as amended when collaterally questioned.

In this case, a *fi. fa.* was issued in the usual form, but *wanting* the *signature* of the *clerk,* and levied on lands, but returned without sale; under an alias *ven. ex.* issued thereon, complainants purchased, and seek confirmation of title, and it is objected that the original *fi. fa.* was void: HELD, That said *fi. fa.* being valid and formal, in all other respects, was not void but amendable, and being called in question collaterally, would be considered as amended.

By the common law, there are but two writs given the creditor to enforce satisfaction of his judgment, that of *fi. fa.* against the goods, and *levare facias* against the goods, and also issues and profits of lands. By statute, he was allowed also the writ of *ca. sa.* against the body of the debtor; and the writ of *elegit* against his lands; and the levy on goods, the arrest of the body of the debtor, and the delivery of a moity of the land, were each held an unqualified satisfaction of the judgment.

The above rule as to the effect of a levy upon goods, (as laid down in *Clerk v. Withers,* 2 *Ld. Ray.* 1072), was recognized by most of the American courts, until a change in the rule was announced in the *People v. Hopson,*

1 *Denio* 574, which change in the rule has generally been acquiesced in by the courts of the United States.

The rule so modified is, that a mere levy on sufficient personal property, without any thing more, never amounts to a satisfaction of the judgment. But so long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, &c.; and this rule may be regarded as settled by authority.

And after a full review of decisions, this rule is held to apply to a levy upon lands, and the case of *Anderson v. Fowler*, 3 *Eng. R.* 388, is adhered to and confirmed.

The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capriciously.

He may prefer to take his debtor into custody on *ca. sa.* [*in cases provided by statute*,] and whilst so held, all other satisfaction is denied him. But if the debtor escape, the creditor may resort to other process for satisfaction.

So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so, the satisfaction is precisely the same in principle as if he had taken the body of defendant—whilst he holds them in execution, the law gives him no other indemnity. But should they, by acts not the fault of the creditor, be lost to the debtor or appropriated according to law, and found insufficient, then, on the same principle that the escape of the debtor entitles the creditor to further process, he may sue out an *alias fi. fa.*; yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor, or his accredited agent, the satisfaction would become complete, at least to the amount of the value of the goods so wasted.

So, also, where a levy is made and a delivery bond (which, by statute, has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged, and the bond so forfeited held to be a satisfaction of the former judgment. Yet should the bond be quashed, the effect thereof would be to revive the former judgment.

The law gives but one satisfaction, and where the party takes it, he must abide by it if sufficient—it must however be sufficient—if partial, it is not a good bar. The law presumes the debtor able to pay his debts, and commands the officer to take property of sufficient value to make him a full satisfaction. The court will presume that he has done this, and therefore until the levy is legally discharged, it must be considered and held as such. The creditor, until it is shown to be otherwise, *can make no step backward.*

Such being the effect of a levy upon lands, as well as upon goods, it necessarily follows, that where a *fi. fa.* has been levied upon lands, and returned without sale, a *ven. ex.* with a *fi. fa.* clause cannot properly issue thereon. A simple *ven. ex.* directing the sale of the property, which, by the return of the sheriff upon the original fi. fa. appears to be in his lands unsold, is the appropriate writ.

The Court is not of the opinion, however, that such writs of *ven. ex.* with fi. fa. clause are absolutely void, or that a sale made of property levied

upon under the fi. fa. clause thereof, whilst the first levy remains in force, should, in all cases, be set aside. The satisfaction by such original levy is contingent, and not like an actual payment and satisfaction of the judgment.

Such writ of *ven. ex.* with fi. fa. clause is analogous to the execution that issued in *Dixon v. Watkins et al.*, 4 *Eng. R.* 139, after stay by recognizance on appeal, which this Court held to be *voidable* because it issued against a legal prohibition, but not absolutely *void.*

So a levy upon sufficient property to satisfy the judgment, imposes a legal prohibition upon the creditor to forego all further process of satisfaction until, upon appropriation of the property levied, it is found to be insufficient in value to satisfy the judgment. Hence such writs of *ven. ex.* with *fi. fa.* clauses, though not absolutely void, being issued whilst a legal prohibition rests on the creditor from pursuing his remedy upon the judgment, are voidable, and should be, on proper application for that purpose, set aside.

But where such writs are not set aside, but property is levied on and sold under such fi. fa. clause, and the purchaser is cognizant of such legal prohibition, and irregularity of the process, Chancery will not decree to him a confirmation of title under the purchase, though it might be otherwise with an innocent purchaser, purchasing in good faith without knowledge of such prohibition and irregularity in the process.

It has been held, upon high authority, that the only questions which can arise between an individual claiming a right under the acts done, and one denying their validity, are power in the officer, and fraud in the party.

The sheriff derives his power to sell lands not from the statute, but from the judgment and execution. The judgment is evidence of the liability of the property, and the execution is evidence of the sheriff's general power.

The sheriff cannot sell by virtue of the lien of the judgment, without an execution.

A sheriff does not acquire such an interest in land as to enable him to sell without a writ after the return day thereof, though this may be the rule as to goods.

The office of the writ of *ven. ex.* is not, in case of the sale of lands, a mere command to hasten the action of the sheriff, to require him to do that which he had the power to do independent of the writ of *ven. ex.*, but it confers upon him the power to sell, as well as commands him to proceed to do so.

The fi. fa. when levied and returned is *punctus officio.* The *ven. ex.* relates back to the fi. fa. and the levy and return upon it, and the power of the officer commences under the *ven. ex.* just where the sheriff under the fi. fa. stopped. He had levied whilst the fi. fa. was in force, but the power was revoked by limitation before sale. The *ven. ex.* does not therefore confer power to levy, but to sell. Those two writs are in fact but one writ, the latter being designed to complete what has been commenced.

In this case, a fi. fa. was levied on lands, and returned without sale; a *ven. ex.* with a fi. fa. clause issued, which was levied upon additional property. and returned without sale. An alias *ven. ex.* issued, commanding the sheriff to sell the property originally levied on under the fi. fa.: HELD, That the sheriff could neither levy on, nor sell under this writ, any other

property than that which was originally levied on, and which he was commanded by the writ to sell.

A levy or sale of other property than that described in his writ, were acts beyond his authority—not an erroneous exercise of power granted, but an assumption of power not granted; and is for that reason void: and a purchaser under such sale could acquire no title.

Beach having a judgment against De Baun & Thorn, the following entry of satisfaction was made of record, by the attorneys of Beach: "The said defendant, Thorn, having arranged and secured to the satisfaction of the attorneys of said plaintiff, (Trapnall & Cocke) the judgment in this case, they do hereby, and with the consent and agreement of the said De Baun, acknowledge full satisfaction of the said judgment so far as the said Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said De Baun"—Signed by said attorneys. To which, De Baun added:—"I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided."—Signed by De Baun: HELD, That if this discharge had been made by the plaintiff in person, it would, beyond doubt, have been, in law, a full satisfaction and discharge as to both defendants, upon the principle that as the creditor is entitled to but one satisfaction, though made by one, it enures to the benefit of all. That even where it is expressly understood, and is made part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all.

HELD, further, that it was a matter of doubt whether the attorneys, for the consideration expressed in the face of the above entry, could make a release which would bind their client; but as it appears that Beebe, who succeeded to the rights of the plaintiff in the judgment by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer that it is a full and complete satisfaction as to Thorn, it follows, that being a satisfaction as to him, it is, by operation of law, a satisfaction also, as to De Baun. That De Baun had probably estopped himself from setting up this satisfaction. Yet the satisfaction was not the less complete: estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it.

HELD, further, that the said judgment. so far as third persons, lien creditors, were concerned, should be considered as satisfied, and its lien upon lands of defendants discharged, and that a person purchasing under an execution upon said judgment could acquire no valid title.

As a general rule, the answer of one defendant to a bill cannot be used against another; but to this rule there are exceptions, one of which is, (2 *Dan. Ch. Plead. & Prac.* 982.) That in case where the rights of the plaintiff, as against one defendant are only prevented from being complete by some question between the plaintiff and a second defendant, the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first.

In this case, Gray & Bouton and Beach held judgments against De Baun which were a lien on all his lands; Whiting & Slark held a mortgage subsequent to the said judgments on part of said lands; executions being

sued out upon said judgments (which had been assigned to Beebe), Whiting & Slark filed a bill to compel the judgment creditors to resort for satisfaction first to the lands not embraced in their mortgage, to foreclose, &c. The lands were all sold, under the executions, and Whiting & Slark purchased the mortgaged premises—the sales were set aside, other executions issued on said judgments, the lands again sold, and Beebe purchased the mortgaged premises. Whiting & Slark filed a supplemental bill, setting out their purchase, and the subsequent purchase of Beebe, alleging that the lien of said judgments was discharged by payment of the judgments, &c., making said judgment creditors, Trapnall, their attorneys, and Beebe, defendants: HELD, That the answer of Trapnall, who was cognizant of all the facts, had control of the judgment, &c., as to payments upon the judgment of Gray & Bouton, was evidence against his co-defendant Beebe, under the rule above stated.

HELD, further. that the answer of Trapnall was evidence against his co-defendant Beebe, on the grounds that Beebe was a purchaser *pendente lite*, and was bound by evidence taken against his vendor, &c.

The authorities establish the following positions: *First*, that the institution of the suit (particularly where it relates to the title or disposition of property,) is constructive notice to all purchasers after suit commenced: *Second*, that a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him, upon the determination of the suit, to succeed to the rights of such vendor, or perhaps if a party to the suit, to enable the court, after determining the rights of his vendor favorably, to decree them to him.

HELD: That Beebe was not the less a purchaser *pendente lite*, under the circumstances, because he purchased the judgment of Gray & Bouton before the filing of the original bill of Whiting & Slark—that Beebe could not occupy a stronger position than Gray & Bouton would have done had they been the purchasers under their own judgment—that before the sale, the original bill having been filed, alleging that the Gray & Bouton judgment had been satisfied by a prior levy, which was undisposed of, that there was also other sufficient estate out of which to satisfy their senior judgment lien without coming upon the property embraced in the complainants' mortgage, and that a large portion of their judgment had been paid, but not credited, &c., they could not have caused the mortgaged premises to be sold under their judgment, and purchased them, pending the original bill, without being subject to the rules applicable to purchasers *pendente lite;* and that Beebe, as their assignee, could acquire no greater rights than they possessed.

That Gray & Bouton having failed to answer, but Trapnall, their attorney, who had control of the judgment, and was cognizant of the payments, &c., having answered, his answer was in effect their answer, and was, under the circumstances, evidence against Beebe.

Where payments have been made on a senior judgment, a junior creditor has a right to demand that the payments be credited, before sale of the property under the senior judgment, because he has a right to pay off

the senior incumbrance, and thereby disencumber his junior lien, which he could not do, nor could he be prepared to elect whether he would or not, until the credits were entered.

In this case, it appearing that a large portion of the Gray & Bouton judgment had been paid, that Beebe, the assignee of the judgment, and also T. the attorney of G. & B., knew of such payment, but, failing to enter the credit upon the judgment, proceeded to sue out execution and sell property as though the whole face of the judgment were due: HELD, That such procedure was unjust to junior creditors, if not grossly fraudulent.

A judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or incumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by statute.)

It is also a right springing out of, and dependent upon the judgment for its existence, and follows the condition of the judgment.

If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction, and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it; and should the levy prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor; so, also, does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created; and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien.

The lien is not an intrinsic quality of the judgment itself, but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment, and follows it as a shadow does a substance; hence if it is cut off from it, either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles, it is lost, for there ceases to be any thing to which it can be attached.

A lien being a mere contingency, or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon a presumption, or one contingency upon another, or a shadow exist without a substance.

The lien on the Gray & Bouton judgment expired on the 23d March, 1843: on the 20th March, three days before the lien expired, a *sci. fa.* issued to revive the lien, and it was revived on the 16th January, 1846. In June, 1843, the property in dispute (upon which Whiting & Slark held a junior mortgage) was levied on, sold at the November term, 1843, and purchased by Beebe (assignee of the judgment) by virtue of an execution issued upon said judgment, the levy and sale both being after the issuance of the *sci. fa.* but before the revival of the judgment: HELD, That the revival of the judgment did not relate back to Beebe's purchase,

so as to constitute him a purchaser under a senior lien, and thereby cut off the "intervening equities of junior lien creditors."

The statute makes the judgment, from its date, a lien on all the lands of the debtor situate in the county, in which it is rendered, for the term of three years from its date. It also confers a right upon the creditor to revive his judgment lien by suing out *sci. fa.* at any time before the lien expires; and then in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued, &c. HELD, That when the legislature declared that the judgment lien, when revived, should relate back to the date of the *sci. fa.*, it was intended, that the lien, when revived, should act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor; subject, however, to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these might have accrued to him even under the first lien.

In addition to Beebe's purchase under the Gray & Bouton judgment, he claims that De Baun & Thorn were joint owners of the premises in dispute, prior to the mortgage of Whiting & Slark; that Thorn sold his interest to De Baun in the premises, for which De Baun paid so much money, and agreed to pay the debts of a partnership which had existed between them; and Thorn executed a bond to De Baun binding himself to make title to his half of the premises on payment of all such debts, which was duly recorded, but which did not specify the debts. That Ringo held a note on said partnership, afterwards obtained judgment thereon, under which Beebe (who bought the judgment) purchased Thorn's interest in the premises, and insists that the debt of Ringo constituted a specific lien upon Thorn's interest in the property, paramount to the mortgage of Whiting & Slark, which was executed by De Baun upon the whole property after said sale from Thorn to De Baun. A transcript of the record of the suit of *Ringo v. De Baun & Thorn* is exhibited by Beebe, into which is copied the firm note on which the judgment purports to have been founded, but it is not made part of the record by oyer or otherwise. Whiting & Slark deny that the judgment of Ringo was founded on such firm debt: HELD, That the Court erred in permitting Beebe to produce, on the hearing the original note, prove, *viva voce*, its execution, that it was marked filed among the papers of the suit of *Ringo v. De Baun & Thorn*, and read it in evidence, inasmuch as it was not an exhibit in the case. That unless a paper is made an exhibit, *viva voce* evidence is not admissible to prove its execution on the hearing—that even when exhibits are thus proven on the trial, the evidence is, in most instances, limited to the mere execution of the instrument—that when any additional fact is to be established in order to make the exhibit evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible, &c.

HELD, further, that whether the interest of Thorn in the premises, reserved by his said bond to De Baun, was a trust or mortgage interest (and it could not extend beyond that) it was questionable whether it was subject to sale by execution or not, under our statute, which sub-

jects the real estate of the defendant, whether held by patent, or by a third person for his use, of which he is seized in law or equity, to sale.

HELD, further, that in an equitable point of view, the security afforded in a deed of trust or mortgage, only extends to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. That in order to effect the rights of Whiting & Slark as junior lien creditors, it was necessary to have brought notice home to them, not alone of the existence of the transfer of Thorn to De Baun, and reservation in favor of creditors, (of which the registry of the bond was notice) but it was necessary to have set forth the identical debt upon which this prior equity was to be founded, so that the junior purchaser might take notice at his peril what he purchased—that such not having been the case in the bond of Thorn, the prior equity of Beebe, who held under Ringo, must fail.

Beebe entered the premises, *pendente lite*, under the claims in litigation, and held subject to the final disposition of the suit. In that position, having purchased the premises at tax sale: HELD, That he necessarily purchased in trust, and that the purchase enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. Taxes paid under such circumstances, are a charge upon the rents, &c.

Where an answer admits the receipt of money at one time, and sets up that at another time, and in another adjustment, it was repaid, the repayment is the affirmance of a new act, and must be proved.

De Baun filed a cross bill against all his mortgage and judgment creditors and purchasers of his property at execution and trust sales, setting out all incumbrances upon his property, his indebtedness, &c., alleging that owing to impending circumstances, and the acts of some of his creditors in their contest with each other for priority of right to the proceeds of the sale of his property, &c., &c., a most shameful sacrifice and waste of the property was made, &c., &c., alike prejudicial to the interest of other creditors and to himself, &c., and praying that all the sales be set aside, that the property and securities be marshaled, the property resold and proceeds applied according to equity, &c.: HELD, That he was not entitled to the relief prayed, because, *1st*, it appeared that he not only acquiesced in, but was an active agent in producing the very acts of which he complained, and *2d*, because he fraudulently removed a large portion of his property upon which some of his creditors held a trust deed, and did not, like an honest debtor, surrender up his property for the benefit of his creditors, &c., &c.

Appeal from the Chancery side of Pulaski Circuit Court.

On the 29th May, 1843, Augustus Whiting and Robert Slark, of New Orleans, filed a bill in Pulaski Circuit Court against James De Baun, and others, to foreclose a mortgage, &c., containing substantially the following allegations:

That on the 14th December, 1840, James De Baun was indebted to complainants in the sum of $5,836, for which he executed to them three notes, of that date; one for $1,936, due at eighteen months; another for $1,950, due at twenty-four months, and the third for $1,950, due at thirty months, each to bear interest at ten per cent. after due. Copies of the first and second notes were made *exhibits A.* and *B.*, the third was alleged to be in New Orleans, but a copy would be subsequently filed as *exhibit C.*

That to secure the payment of said notes, De Baun executed to Whiting & Slark, on the 13th February, 1841, a mortgage upon the following lots situate in the City of Little Rock, to wit: beginning at the south-west corner of block number one, as designated in the plat of said city at the intersection of East Main and Markham streets, thence east on said Markham street, fifty-two feet and nine inches, fronting on the north side of said Markham street, running back at right angles from said Markham street eighty feet, of the same breadth of fifty-two feet nine inches, containing 4,220 square feet of land. Also a lot, beginning at a point on the north side of Markham street fifty-two feet and nine inches east from the south-west corner of said block number one, thence east on the north side of Markham street and fronting thereon twenty-five feet, and extending back at right angles the same breadth of twenty-five feet, to the alley running through said block one hundred and forty feet more or less: together with all the buildings, improvements &c., &c., thereon &c., which deed of mortgage was duly acknowledged by De Baun, and recorded according to law on the said 13th of February, 1841. A copy of the mortgage and certificates of acknowledgment and registration is made *exhibit D.* That no part of the mortgage debt, or interest, had been paid to complainants, the mortgaged property had been forfeited in law, and the mortgage was subject to foreclosure.

That John Brown, H. N. Aldrich, Jacob Mitchell, J. D. Fitzgerald, Eli Colby and James Nelson (made defendants) were, and had been for some time in possession, severally or jointly,

of said mortgaged property, and a large amount of rents was then due from them, and daily increasing, which rents belonged to complainants by virtue of the mortgage, and were withheld from them.

That prior to the execution of said mortgage, John Gray and Charles Bouton (made defendants) by Trapnall & Cocke, their attorneys, recovered a judgment, in Pulaski Circuit Court, against James De Baun for $1,811.89 debt, and $326 damages and costs; and that Lewis Beach (made defendant) by the same attorneys, recovered, in the same Court, a judgment against said De Baun and Thomas Thorn (made defendants) for $1,988.50, and costs, upon which judgments executions were issued, and levied on lots *eight* and *nine,* in Block 38, in said City of Little Rock, and the *north-west fractional quarter of section* 20, *township* 2 *north, range* 11 *west,* half of mine hill, 50 56-100 acres, and *also fifty-three acres* of land in *township* 1 *north, range* 11 *west,* which property, so levied on, was appraised to the sum of $4,862-.50, a sum sufficient to satisfy both of said judgments, but which had not been sold. Transcripts of said judgments, and proceedings thereon are made *exhibits E.* and *F.* That, in addition to said levies, complainants were informed and believed that De Baun had paid on said judgments about $2,800, but that no entry thereof had been made of record.

That at the time of the execution of said mortgage, there were no encumbrances on said mortgaged property but the judgments aforesaid, and that said judgments were also a lien upon all the real estate of De Baun, which consisted of a large quantity of lands and city lots, described in the bill; all of which real estate was subject to said judgments, and complainants alleged, should be sold to satisfy them before the mortgaged property.

That notwithstanding such lien upon all of said real estate, and such levy of said execution, complainants were informed and had reason to believe, that Gray & Bouton and Beach had issued other executions on said judgments, and placed them in the hands of James Lawson, sheriff of said county, with orders to sell first said mortgaged property to satisfy said judgments, to

the great injury and oppression of complainants, and for the purpose of depriving them of the benefit of their mortgage; and that De Baun, confederating with them to effect the same end, had also required the sheriff to sell the mortgaged property first, all of which was contrary to equity, &c.

The bill prayed discovery of the amount paid on said judgments, the amount of rents due from the tenants in possession of the mortgaged property; that De Baun, Beach, and Gray & Bouton might be compelled to sell, and make the balance due on said judgments, out of said real estate, leaving the mortgaged property to the satisfaction of complainants' debt; that defendants account, &c.; that said mortgage be foreclosed, the property sold, and the proceeds thereof, rents, &c., be applied to the payment of complainants' debt, and for general relief: also injunction to restrain the sale of the mortgaged property under said judgments until after the other real estate of De Baun was sold in satisfaction thereof.

Exhibits A. B. and *C.* are copies of the notes of De Baun to Whiting & Slark referred to in the bill, secured by the mortgage, and agree in date, amounts, &c., with the allegations in the bill.

Exhibit D. is a copy of the mortgage and certificates of acknowledgment and registration, corresponding with the allegations of the bill.

Exhibit E. shows that on the 23d March, 1840, Gray & Bouton recovered judgment, *nil decit,* against De Baun, in Pulaski Circuit Court, on a promissory note due 19th March, 1837, for $1,811.89, debt, $326 damages, with interest at six per cent. &c., and costs. On the 19th February, 1841, an execution was issued thereon, in the usual form, *but wanting the signature of the Clerk,* to the sheriff of Pulaski county, returnable 7th September, 1841, upon which sheriff Lawson, returned that he had levied on the lots and lands described in the bill as having been levied on under this execution, and one in favor of Beach; that the property was appraised at $4,862.50, and failing to sell at two-thirds of its appraised value, was reserved from sale. On the 31st December, 1842, a *vend. ex.* with a *fi. fa.* clause was issued

on said judgment, reciting the former levy, &c., commanding the sheriff to sell the property, and in case the debt, &c., were not made of the said property, that he make a further levy, &c., returnable 2d March, 1843. On which *vend. ex.*, the sheriff, Lawson, made the following return:—"Levied on the three lots known as the Alhambra, in the City of Little Rock, 31st Dec., 1842."——"Returned unsatisfied, by order of plaintiffs atto., the 25th March, 1843."

Exhibit F. shows that Lewis Beach, by Trapnall & Cocke, attorneys, brought assumpsit against De Baun and Thomas Thorn, in Pulaski Circuit Court, for goods, wares, &c., &c., and that on the 27th March, 1840, judgment was rendered by consent of parties, in favor of Beach for $1,988.50. That on the 19th February, 1841, a *fi. fa.* was issued thereon to the sheriff of said county, returnable 7th September, 1841; upon which, sheriff Lawson made the same levy and return as on the execution in favor of Gray & Bouton. On this writ is also endorsed a note by the Clerk as follows:—"This execution is satisfied as to Thomas Thorn, and the whole amount is to be collected from James De Baun, by order of the plaintiff."

On the 31st December, 1842, a *vend. ex.* with a *fi. fa.* clause was issued, reciting the former levy, &c., commanding the sheriff to sell the property levied on, and in default of satisfaction to make a further levy of the goods, &c., of De Baun, returnable to March term, 1843; upon which the sheriff, Lawson, returned:—"Returned unsatisfied by order of pl'ffs atts., this 25th March, 1843."

On the day the bill was filed (29th May, 1843,) on application of complainants' solicitor, the Court ordered that, on their giving approved security in the sum of $3,000 to Beach, and Gray & Bouton, an order issue to the sheriff, requiring him to reserve from sale the mortgaged property, until the other property of De Baun levied on, was sold by him, and the bond of the solicitor, A. Fowler, Esq., was filed and approved as sufficient.

On the 12th June, defendants field a motion to set aside this order, and all the sales made by the sheriff in conformity there-

with, on the grounds that the order was improperly made, and the sales void.

On the 3d of July, the Court set aside said order, and the sales.

On the 22d December, 1843, *John Brown* filed his answer to the bill. He states that on the 22d December, 1840, he leased of James De Baun, for five years, that portion of the mortgaged premises known as the *Alhambra,* at a stipulated price. That under this lease he had occupied the property, and paid the rent to De Baun, until 21st April, 1843. That on the 22d April, 1843, he was notified by Roswell Beebe that he had purchased the premises at a trust sale, made under a deed of trust executed by De Baun and wife to Reardon, Woodruff and Watkins, on the 4th September, 1841, and that he claimed the rents from the date of said notice forward. That being advised that Beebe's purchase was legal and valid, he occupied under him to the 27th November, 1843, and paid him rent at the rate of $600 per annum in Arkansas bank notes, and from thence to the time of answering, had continued to hold under him at the rate of $360 per annum in good money. That on the 27th November, 1843, the premises were sold by the sheriff, under executions against De Baun, and purchased by, and duly conveyed to Beebe, and that. under an order of Court, the sheriff put Beebe into possession, and that respondent had thenceforward occupied the premises as his lessee. That defendants Nelson and Colby had occupied a part of the premises under respondent, &c.

On the 3d January, 1843, complainants entered their replication to the answer of Brown.

Supplemental bill of Whiting & Slark—On the 26th January, 1844, Whiting & Slark obtained leave to file an amended or supplemental bill, &c., &c., in vacation; which they filed on the 27th February following, and in which, after reciting the allegations of the original bill, they make the following averments, in substance:

That after the execution of said mortgage to them, and on the 26th February, 1841, James De Baun executed to Beirne & Burn-

side, of New Orleans, a mortgage upon the same property, to secure a debt of about $6,000. That on the 4th day of September, 1841, DeBaun and wife executed upon the same, and other property, a deed of trust to Wm. E. Woodruff, Lambert Reardon and Geo. C. Watkins, to secure the payment of debts, &c., therein specified.

That on the 25th May, 1842, in the Circuit Court of the United States for the district of Arkansas, Louis Chittenden recovered judgment against De Baun for about $1,000.

In Pulaski Circuit Court, on the 24th September, 1842, Wm. H. Witherill recovered judgment against DeBaun for about $900.

In the same Court, on the 7th March, 1841, Isaac K. Jessup and Henry J. Beers recovered judgment against De Baun for about $2,900.

In the same Court, on 19th September, 1842, Edward Gottschalk recovered judgment against De Baun for about $450.

In same Court, 12th November, 1841, the Real Estate Bank of the State of Arkansas recovered against De Baun, Woodruff and Ben. Johnson, a judgment for about $3,100.

In same Court, 26th September, 1842, Wm. Gasquett, James Gasquett, and Peter Conway recovered judgment against De Baun for about $500.

In same Court, the Real Estate Bank, on 28th September, 1842, recovered a judgment against De Baun, Watkins, Roswell Beebe, James Irwin and Julian Imbeau for $630.

In same Court, on 23d June, 1843, Daniel Ringo recovered a judgment against De Baun and Thomas Thorn, for about $1,900.

In same Court, 26th June, 1843, Beverly Chew, for the use of Trustees of the Real Estate Bank, (naming them) recovered judgment against De Baun for about $2,600.

In same Court, 12th November, 1841, Ralph Marsh and John D. Marsh recovered judgment against De Baun for $580 debt, and $47.82 damages and costs of suit, upon which an execution was issued on the 23d December, 1841, returnable to March term. 1842, which was levied on the property mortgaged to complain-

ants; the property appraised at $25,000, and not sold because no person bid two-thirds of said appraised value, and said execution so returned. Whereupon, on the 1st May, 1843, a *vend. exponas* was duly issued, directed to the sheriff of Pulaski county, commanding him to sell said lots, which writ came to the hands of said sheriff immediately. A transcript of said judgment, execution, *vend. ex.* returns, &c., is made, *Exhibit G.*

In same Court, 28th September, 1841, the Real Estate Bank recovered against De Baun, Bender and Beebe, a judgment for $3,500, with interest, &c. &c., upon which an execution was issued on the 30th October, 1841, returnable to March term, 1842, came to the hands of Lawson, sheriff, on same day, and was levied on the mortgaged premises, which were appraised at $25,000, and failing to sell for two-thirds of that sum, the execution was returned accordingly. Whereupon, on the 17th April, 1843, a *vend. ex.* was issued to said sheriff, returnable to the May term, 1843, commanding him to sell said property, which came to his hands on the same day. A transcript whereof is made, *Exhibit H.*

That in the same Court, on the 12th November, 1841, Tunis Waldron, Fred. S. Thomas, Charles L. Day and Fred. T. Mygatt recovered a judgment against De Baun for debt $1,465.27, and $186.80 damages, &c., upon which an execution issued on 23d December, 1841, returnable to the following March term, was levied by Lawson, sheriff, on the mortgaged premises, which were appraised at $25,000, and failing to sell for two-thirds of this amount, were not sold, and the execution returned accordingly. On the 1st May, 1843, a *vend. ex.* was issued thereon, returnable to May term, following, which came to the hands of said sheriff, &c. A transcript whereof is made *Exhibit I.*

That on the 31st December, 1842, Gray & Bouton sued out upon the judgment and execution referred to in the original bill, and made *Exhibit E.*, a *ven. ex.*, with a *fi. fa.* clause, returnable to the March term, 1843, commanding the sheriff to sell property previously levied on, and in default of satisfaction, to make an additional levy, &c., and said property being insufficient, the

sheriff levied on the mortgaged premises, and returned the writ unsatisfied by order of the plaintiff's attorney. That on the 2d day of May, 1843, an alias *ven. ex.* was issued thereon, returnable to the May term, 1843, which came to the hands of Lawson, sheriff, on the day it issued, &c. A transcript whereof is made *Exhibit K.*

That upon the judgment and execution of Lewis Beach, referred to in the original bill, a *ven. ex.* with a *fi. fa.* clause was issued on the 30th December, 1842, returnable to the March term, following, commanding the sheriff to sell the property previously levied on, and in default of satisfaction, to make a further levy, &c., and the property being deemed insufficient, the sheriff levied on the mortgaged premises, and returned the writ without sale. On the 2d May, 1843, an alias *ven. ex.* was issued, returnable to the May term, 1843, commanding the sheriff to sell the property levied on under the original execution, and in default of satisfaction, to make a further levy, &c. A transcript whereof is made *Exhibit L.*

That the two writs of *ven. ex.* issued 2d May, 1843, and described in *Exhibits K.* and *L.* were levied by Lawson, sheriff, upon the mortgaged premises, besides other property, immediately after they came to his hands, &c.

That in pursuance of said levies above described, and in obedience to said writs so made returnable to March and May terms, 1843, said Lawson, sheriff, duly advertised all the lots and lands so levied on to be sold on the first day of the May term, 1843, at the Court House door of said county, &c., which would appear by the return of said sheriff upon said writs as shown in *Exhibits G., H., J., K., L.,* a copy of which advertisement is made *Exhibit M., &c.* That on the 29th May, 1843, being first day of the May term, in pursuance of said advertisement, &c., Lawson sold the lands, &c., so levied on, which lands, and the names of purchasers, &c., are as follows: 1,000 acres, being lands mortgaged to Real Estate Bank, *to wit:* South-east quarter, and north-half of south-west quarter, section 13, township 1 north range 13 west; and north-half of north-west quarter, section 17, township 1 north, range 12

west; north-east-half of the south-east quarter; the north-east quarter and south-west quarter of section 18, same township and range; the north-east quarter, south-west quarter and north-west quarter section 19, same township and range; the east-half of the north-east quarter, section 24, township 1 north, range, 13 west, sold to *Frederick W. Trapnall*, the attorney of Beach, and Gray & Bouton, for $903. A tract of land containing 6 91-100 acres, and another of 9 56-100 acres to *C. P. Bertrand* for $18. The west-half of the north-east quarter; the north-east and south-east quarters, and the north-west and south-west quarters of section 24, in township 1 north, range 13 west, the south-west quarter of section 33, and west-half section 34, in township 4 north, range 14 west; the east half of the south-west quarter of section 13, township 3 north, range 10 west; the north-east fractional quarter of section 2, township 4 north, range 15 west; the north-west and north-east quarters of section 9, south-west quarter of section 10, in township 2 north, range 13 west—sold to said *Trapnall* for $190. The south-east quarter and north-east quarter of section 10, the south-west and south-east quarters of section 3, the south-west and south-east quarters of section 10, in township 3 north, range 14 west—sold to *Samuel D. Blackburn* for $15. The south-west quarter of section 21, in township 3 north, range 15 west—sold to *Jacob Faulkner* for $60. The west fractional half of section 2, township 3 north, range 11 west—sold to *L. R. Lincoln* at $4. Lot number five in block number 1, east Quapaw line in the city of Little Rock, to said *Trapnall* at $225. Lots 7 and 8 in block number 38, in same city to *F. W. Desha* at $100. Lots number 4 and 6 in block number 161, to *Joseph Fenno* at $35. Lot number 9 in block number 38 to said *Trapnall* at $220, and lots number 7 and 8 in block number 1 in Little Rock, known as *"De Baun's corner,"* being the mortgaged premises, to complainants, *Whiting & Slark,* by their attorney *A. Fowler, Esq.,* at $903.56, making in all as stated by the said sheriff $2,890; all of which would appear by reference to *Exhibit D.* and the returns of the sheriff upon the several writs contained in *Exhibits G., H., K., L., Exhibit O.* hereafter mentioned, and by the original re-

turn made by the said sheriff of said sale on the said *ven. ex.* last issued in said case of *Beach v. De Baun & Thorn,* "which said original return was afterwards surreptitiously torn off by said sheriff, and was delivered to complainant's attorney, by one of his deputies, mutilated, which, or a part of it is in the hand-writing of said sheriff, and was originally signed by him as such, and is now held by complainants subject to inspection," &c., and a copy thereof made *Exhibit N.*; and which would also in part appear by a book of sales kept by such sheriff, the production of which was prayed. That said sheriff made a similar return at said May term on said *ven. ex.* returnable to that term, in the case of *Gray & Bouton v. De Baun* above mentioned, which return was true in fact, and after the adjournment of said May term, and without leave of said court, "said sheriff surreptitiously withdrew from the files of the office of the clerk of said Court, the said writs of *vend. ex.,* which he had returned to that term, and which were returnable thereto, in the said cases of *Beach v. De Baun & Thorn,* and *Gray & Bouton v. De Baun,* and tore off the returns which he had made thereon, one of which is set forth in said *Exhibit N.,* and made out new returns thereon, as now appear in said *Exhibits K.* and *L.*, which pretended returns so made as they now appear thereon, complainants aver to be in part absolutely false, especially as to the re-payment of the said sum of $903.56 to them, through their said agent and attorney, and that they are in other respects defective, garbled, and in law no returns at all; and that said returns torn off by said sheriff are the true legal returns, and binding upon said sheriff and other parties," one of which is alleged to be in possession of Lawson, and complainants pray that he may be compelled to produce it; and admit them as the legal returns.

That Trapnall purchased the lands struck off to him at said sale for the use and benefit of his clients, Beach, Gray and Bouton. That after the sale of all of said lands except the mortgaged premises, complainants' attorney made public proclamation forbidding the sale thereof, alleging that they held them by virtue of said mortgage, but the attorney of Beach, Gray & Bouton insisted

upon the sale, and directed the sheriff to proceed, declaring at the time that the judgments of Beach, Gray & Bouton had been in part satisfied, and that but $2,400 was due upon them together, at the time the sale commenced. That the sheriff thereupon offered the mortgaged premises for sale, despite of the remonstrance of complainants, and they, by their said attorney, to protect their rights were compelled to bid therefor, and did bid, with others, among whom were said Trapnall and Beebe, and complainants being the highest bidder became the purchasers at the price above named. That when the said property was struck off, said Fowler informed the sheriff that it was purchased for the use and benefit of complainants. That on the next day complainants, by Fowler, paid to the sheriff, Lawson, the purchase money ($903.56¼) informing him that the purchase was made for complainants; that the money so paid him was theirs, and the payment made for them, and Lawson received it as such; and afterwards, on the 6th June, 1843, executed to Fowler the following receipt therefor:—"June 6th 1843. Received of A. Fowler, one thousand dollars, on account of purchases made at sheriff's sale on the 29th of May, 1843, under executions of Beach v. De Baun & Thorn, and Gray & Bouton v. De Baun, and Danner v. Gibson, for Whiting & Slark, for yourself, and for F. A. Desha, 7th June, 1843."

"JAMES LAWSON, Jr. Shff."

A copy of which receipt is made *exhibit O.* and the original held subject to inspection, &c.

That the whole of said $1,000, was the money of complainants, of which Lawson was specially informed at the time of its payment, and was a certificate of deposit for that sum, made by complainants in specie in their own names, in the bank of Louisiana, and endorsed by them to Fowler to be used by him, and was endorsed by him, in blank, and delivered to Lawson, and applied at the time of its payment specially to their own purchase made as aforesaid first, and the residue to be applied to said other purchases; and Lawson received it as specie, and in full payment of the said mortgaged premises so purchased by

complainants. That Lawson applied the same to the payment of the said judgments of Beach, Gray & Bouton, or improperly applied it to his own use, as he immediately transmitted said certificate to said bank, or caused it to be done, and drew the specie thereon.

That Fowler, soon after, drew up a deed of conveyance under such purchase, with proper recitals, to be executed by said Lawson as such sheriff, to complainants for said mortgaged premises, and presented it to Lawson to be by him executed, and acknowledged, &c., but Lawson refused so to do &c.

That some time, either before or after said sale, said Beebe and Trapnall entered into a contract in writing, by which Beebe was given control of said judgments of said Beach and Gray & Bouton as if they were his own, in consideration of which, he assumed to pay the amount thereof to Trapnall, or his said clients at a future day, and thereupon Beebe assumed control of said judgments, and continued to control them; which writing complainants allege to be in possession of Beebe or Trapnall, and pray its production &c., or the discovery of any such contract, &c.

That after said sales so made by said sheriff, for a sum more than sufficient to satisfy said judgments of Beach and Gray & Bouton, and after they had been by such sale so legally satisfied, Beebe, or some one for his benefit, caused other writs of *ven. ex.* to be issued on said judgments, and in other cases against De Baun and others, for the purpose of practising a fraud on complainants, for the benefit of Beebe, and caused the mortgaged premises to be again seized in execution and sold at the November term of said Court, 1843, when they were purchased by Beebe, and the sheriff conveyed them to him in palpable fraud of complainants' rights, Beebe well knowing that the property belonged to complainants. That early in the year 1843, Beebe, obtained by fraud, the possession of said premises, and had received, and was receiving the rents, &c.

Prayer that Lawson, as such sheriff, be compelled to execute a deed to complainants for the mortgaged premises so purchased

by them at said sale, conveying to them all the interest of De Baun, Thorn, Beebe and Reardon therein; and that Lawson, if he had not done so, be compelled to pay over the purchase money to the proper judgment creditors, and in default of their re-receiving it of him, that he deposit it in Court subject to its order; or that said defendants who had liens on the mortgaged premises prior to the lien of complainants, be compelled to receive of them the amount due on such prior liens, (which complainants offer to pay,) and that they be compelled to allow to complainants the full benefit of such prior liens.

That Beebe and other defendants account with complainants for rents and profits, &c., of the mortgaged premises, &c.; that the title of Beebe, and of the other defendants, legal or equitable to the mortgaged premises, be divested, and vested in complainants; and that Beebe be restrained from collecting further rents, &c. Complainants pray also as in the original bill. The persons named in the original and supplemental bills are made defendants, &c.

Exhibit G., to Supplemental bill, shows that on the 12th November, 1841, Ralph Marsh & Co., recovered judgment against De Baun, in Pulaski Circuit Court, for $580 debt, and $47.82 damages, &c. On 23d day of December, 1842, a *fi. fa.* was issued thereon to the sheriff of said county, returnable 8th March, 1843, which came to the hands of Lawson, sheriff, 4th January, 1843, and was by him, as shown by his return, levied on the premises mortgaged to Whiting & Slark, (described in the levy as three lots in block one;) that De Baun claimed the benefit of the appraisement act, the property was appraised at $25,000, and failing to sell for two-thirds of its appraised value, was not sold. On the 1st May, 1843, a *ven. ex.* was issued thereon, returnable to the term to commence in the same month; upon which Lawson, by his deputy Thomasson, returned that after duly advertising said property, he offered it for sale on the 29th May, 1843, being the first day of said term, at the Court House door, &c., and that Absalom Fowler became the purchaser thereof at $903.56, which was

applied to the satisfaction of executions in the hands of the sheriff issued on judgments against De Baun of a prior date, &c.

Exhibit H., to Supplemental bill, shows that on the 28th September, 1841, the Real Estate Bank recovered judgment, in Pulaski Circuit Court, against said De Baun and Lambert Reardon for $3,500 debt, with interest, &c. On the 13th day of October, 1841, a *fi. fa.* was issued thereon to the sheriff of said county, returnable to March term, 1842, upon which Lawson made the same return as upon the *fi. fa.* in favor of Ralph Marsh & Co., above mentioned. On the 17th April, 1843, a *ven. ex.* was issued thereon, returnable to May term following, which recited the former levy (describing the property as the south parts of lots 7 and 8 in block one, &c.,) and commanded the sheriff to sell, &c., upon which the sheriff, Lawson, by his deputy Thomasson, made the same return as upon the *ven. ex.*, in favor of Ralph Marsh & Co., above mentioned, with an additional return, in substance as follows: But previous to said sale, on the 29th May, 1843, application was made by Fowler, counsel of Whiting & Slark, to the judge of said Court, who, upon the showing made, ordered said sheriff to expose to sale all the other property of De Baun levied on, before selling the mortgaged premises, which order he obeyed, in contravention of the written direction of De Baun, given under section 35, chapter 60, Revised Statutes. That subsequently to said sales, said order, and the sales made in conformity therewith were set aside by said Court, and that thereafter said Fowler applied to said sheriff, and received back the said sum of money bid by him for said property, &c. Wherefore said sheriff could not have the same in Court, &c.

Exhibit I., to Supplemental bill, shows that on the 12th November, 1841, Waldron, Thomas, Day, and Mygatt, partners, &c., under the style of Waldron, Thomas & Co., recovered, in Pulaski Circuit Court, a judgment against De Baun for $1,465.27 debt, and $106.80 damages, &c. That on the 23d Dec., 1841, a *fi. fa.* was issued thereon to the sheriff of said county, returnable 8th March, 1842, upon which Lawson, sheriff, made the same levy and return as upon the execution in favor Ralph Marsh & Co., above mentioned. That on the 1st May, 1843, a *ven. ex.* was

issued thereon, returnable to the term to commence in that month, upon which the same return was made as upon the *ven. ex.* in favor of Ralph Marsh & Co., described above in *Exhibit G.*

Exhibit K., to the Supplemental bill, is *first,* the *ven. ex.* issued on the judgment in favor of Gray & Bouton against De Baun, 31st Dec., 1841, to the sheriff of Pulaski county, with a *fi. fa.* clause, which is described in *Exhibit E.* to the original bill, upon which Lawson returned that he had levied upon "3 lots known as the Alhambra, in the city of Little Rock," and that the writ was returned unsatisfied by order of plaintiff's attorney. *Second,* an alias *fi. fa.* issued thereon 2d May, 1843, returnable to the term to be held in that month, reciting the judgment, the issuance of the original execution thereon, 19th Feb., 1841, that it was levied upon lots 8 and 9, in block 38, and north-west fractional quarter of section 20, township 2 north, range 11 west; half of mine hill, 50 56-100 acres; part of town. 1 north, range 11 west, 53 acres, as the property of De Baun," the appraisement, failure to sell, &c., and (*taking no notice of the first ven. ex.,*) commands the sheriff: "that you expose to sale, and do sell the property above specified and levied upon, as aforesaid, and that you cause to be made the debt, damages, and interest, together with the sum of $65.05 costs, and you cause to be made the debt, damages, interest and costs aforesaid, and have the same before said Court," &c. Upon which Lawson, sheriff, made the following return, in substance: "By virtue of the within writ, &c. I have caused the lands and tenements therein mentioned and described, together with other property levied upon as defendant's sufficient to satisfy said writ, to be advertised, and to be sold according to law on the 29th May, 1843, it being first day of Pulaski Circuit Court; upon which day, on the application of A. Fowler, Esq., as counsel for Whiting & Slark, the judge of said Court, upon showing, &c., ordered me, as such sheriff, to expose to sale all the property of said De Baun levied on as the property not mortgaged to said Whiting & Slark, before I exposed to sale the property mortgaged, and which is the lots upon which the Alhambra is situated in Little Rock. That, in obedience to said order, I

did sell the property levied upon and advertised as the defendant's, in compliance with said order, in contravention to the written direction of said De Baun, as provided for by 35th section, chapter 60, Rev. Stat. That, subsequent to said sale, said Court set aside said restraining order, and the sales made in conformity therewith. That the lands and tenements levied on as the property of De Baun, situate at the corner of Markham and East Main st., in block one, Little Rock, and upon which the judgment upon which the within writ issued was a lien, were regularly offered for sale on the 29th May, 1843, as ordered by said Court, and Absalom Fowler became the purchaser thereof at $903, which was duly paid to me. That after the court set aside said order and sales, said Fowler applied to me and received back the said sum of $903; wherefore I cannot have the money before the Court," &c.

Exhibit L., to the Supplemental bill, is *first,* a *ven. ex.* with a *fi. fa.* clause issued to the sheriff of Pulaski on the judgment of Beach against De Baun and Thorn, which is made part of *Exhibit F.* to the original bill. For the substance of this writ, and the sheriff's return thereon, see allegations in the original bill, and said *Exhibit F.* as stated above. *Second,* an *alias ven. ex.* issued upon said judgment on the 2d May, 1843, with a *fi. fa.* clause, reciting the judgment, original execution, levy and return, commanding the sheriff to sell the property levied on, and in default of satisfaction, to make a further levy of the goods and chattels, lands and tenements of defendants, and returnable to the May term, 1843—upon which Lawson made the same return as upon the alias *ven. ex.* in favor of Gray & Bouton, above set out as part of *Exhibit K.*

Exhibit M., to the Supplemental bill, is a copy of the notice of the sale of De Baun's property given by Lawson, and referred to in the above returns.

Exhibit N., to the Supplemental bill, is a paper purporting to be a return on an execution, to which there is no signature, in substance as follows: "Levied the within and annexed execution on the following described property, as the property of James De

Baun; 1000 acres of land more or less, it being the lands mortgaged to the Real Estate Bank, lying as follows, [*here follows a list of lands corresponding with those described above in the supplemental bill,*] which were advertised to be sold on the 29th day of May, 1843, when Fred. W. Trapnall became the last and highest bidder at the sum of $903. Also tracts of land [*describing them*] to C. P. Bertrand for $18. Also [*describing further list of lands*] bought by Fred. W. Trapnall for $190. [*Further list*] to Samuel D. Blackburn at the sum of $15. [*Further list*] to Jacob Faulkner at $60. [*One tract describing it*] to L. R. Lincoln at $4. Also lot [*describing it*] to Fred. W. Trapnall at $225. Also lots 7 and 8 in block one, E. Quapaw line, in Little Rock, as De Baun's corner, to A. Fowler at $903.56. Also lots [*describing them*] to F. W. Desha at $100. Also interest in block 101, lots [*describing them*] to Joseph Fenno at $35. Also lot [*describing it*] to Fred. W. Trapnall at $220, making in all the sum of $2,890. That under and by virtue of a restraining order from the judge of the Circuit Court, I was unable to comply with the requisitions of defendant in the sale of the property, which order of defendant is herewith enclosed"—————

Lawson's answer to original and supplemental bill.—On the 3d June, 1844, Lawson filed his answer. He had no personal knowledge of the indebtedness of De Baun to complainants, the execution of said mortgage upon the *Alhambra* property to secure the payment thereof, nor did he know of whom, or on what terms, the tenants of the mortgaged premises held. Admits that Gray & Bouton recovered judgment against De Baun, and Beach obtained judgment against De Baun and Thorn, and that executions were issued thereon, and levied, as alleged in the bill. Has no distinct knowledge or recollection of the alleged payments upon said judgments by De Baun, nor does he know whether they constituted the only liens upon the mortgaged premises prior to the said mortgage. Admits that said judgments were a lien upon all the real estate of De Baun situate in Pulaski county, and that his lands, in ordinary times of prosperity, would have brought more than sufficient to satisfy said judgments. That writs of

ven. ex. were issued thereon to respondent, as such sheriff, commanding him to sell property levied on, and to make the money to satisfy said judgments, but denies that he was instructed by the plaintiffs therein to sell the *Alhambra* property first, but alleges that he was so instructed by De Baun, in writing, more than three-days before the time of sale. Admits that an injunction was issued restraining him from selling the mortgaged premises until after the sale of all other property of De Baun, but this was contrary to the said instructions given by De Baun. Admits that Trapnall, Bertrand, Blackburn and Faulkner bid off property at said sale on the 29th May, 1843, but expressly denies that complainants bid off any of De Baun's property; and alleges that Fowler, their solicitor, bid off the *Alhambra* property, as appeared from the sale's book kept by respondent, referred to in the supplemental bill—that Fowler declared at the time, in presence of the multitude assembled, that he bid off said property for himself, and not for any other person. Was not positive that Fowler made this declaration, as he was standing at a little distance from him, and there was great *"noise and confusion,"* but he so understood him. That Fowler did not state to him at the time that he was buying for complainants, nor does he believe that he so stated in the hearing of any other person at the sale. That at the time of the sale, and since, it was notorious that he made the declaration above referred to, and respondent never heard any other pretence until Fowler presented to him, for execution, as such sheriff, a deed to said property in favor of complainants several days subsequent to said sale.

That during the May term, 1843, respondent made return of said writs of *ven. ex.* mentioned in the supplemental bill, "and never did make but one return thereon, and the insinuation in said supplemental bill that there was another "original" return to said writs is wholly false, and the charge that a supposed original return to said writs was surreptitiously torn off and mutilated is equally false, and the alleged copy of such supposed return made *Exhibit N.* is not, nor ever was the return of respondent, as such sheriff, to either of said writs, said writs now being on

file, &c., with the only returns ever made thereon by respondent."

That from the large amount of property sold by respondent on said sale day, the urgency of purchasers for deeds, and the great number of executions to be returned with long and particular returns, it was impossible for him to perfect his returns by the second day of the term—the return day—and his habit was to make notes or memorandums of the facts in each case, and after deeds were made out, to draw up formal returns, and append them to the executions; and this course was pursued by him in regard to sales made on the day aforesaid. His memorandums did not always show all the facts proper to be noticed in a return, but only such as would enable him to make out deeds. It was such a memorandum that complainants obtained from a deputy of respondent, "and with so much parade and misapprehension of the truth, seek to charge him with fraud in the discharge of official duties." The memorandum book referred to in the supplemental bill was strictly private, but subject to the inspection of any person desiring it, and which he would produce in court when required. He repeats his denial of tearing returns from said writs, and substituting others, as charged. Alleges that *Exhibits K. and L.* to the supplemental bill show the true and only returns made upon said writs, and that the charge that parts of said returns were false, was knowingly and falsely made, being wholly a fabrication without foundation. "That the attorney of complainants, in whose handwriting the bill appears, at the time of making said charge, knew that the return made by respondent upon said writs, stating the return to him of the money by him paid for property bid off at said sale was true, every word of it."

Fowler bid off at said sale of property amounting to $1,058-56¼, of which he paid respondent but $1,000, which he received under the belief that it was paid by Fowler on his own account, being a payment on his bids generally, and not upon any particular one. He did not apply said money to the satisfaction of the executions in favor of Beach and Gray & Bouton, nor convert it to his own use, but returned it to Fowler. Upon the re-

ceipt of the said certificate of deposit, respondent cashed it at par. On the same day, Trapnall & Cocke forbade his crediting the judgments of Beach and Gray & Bouton with said money, alleging that the sales were void, and would be set aside, which was afterwards done, on their motion. That as soon as said sales were set aside, Fowler, in open court, and in the hearing of many members of the bar, publicly requested respondent, as such sheriff, to return said $1,000, to which respondent replied that he would do so, but preferred an order of court therefor; upon which the judge remarked that the sales having been set aside, the money could be refunded without such order; to which Fowler assented, but remarked that if the money was not refunded, the rule would go on application, &c. Whereupon, respondent immediately, in the presence of the court and bar, returned to Fowler a U. S. Post office draft for $756.14, as part of said $1,000, a copy of which draft, with endorsements, respondent had in his possession, and would produce it if required. Not having in his pocket the balance of the money at the time, respondent requested Fowler to call at his office on his way home, and receive the residue, to which Fowler assented. Respondent went at once to his office and put the residue, $243.86 in specie, into a bag, and directed one of his deputies to hand it to Fowler when he should call for it, and take his receipt therefor, as also for said $756.14, whereupon respondent left town for his residence in the country, where he was taken sick, and so remained for several weeks. Believing the transaction closed according to agreement, respondent gave himself no further trouble about it, until long afterwards, when suit was instituted in the U. S. Circuit Court for the District of Arkansas, by complainants against respondent, and others, upon the same grounds, substantially, charged in the bill and supplement.

Respondent found on his recovery from his said illness that Fowler did not call for the residue of said money, according to agreement, but kept the amount paid him as aforesaid, without receipting therefor, leaving respondent with no evidence of payment but the recollection of persons present. That with a full

knowledge of these facts, Fowler fabricated the charges contained in complainant's bill, &c., impeaching the official integrity of respondent, &c.

Admits that Fowler presented to him for execution a deed for said property in favor of complainants, but being advised of the application to set aside said sales, he declined executing it. Whereupon, on the 22d June, 1843, Fowler filed, in the name of complainants a motion for a rule upon respondent to show cause why he should not execute said deed; but upon the response of respondent, the rule was discharged. A certified transcript of said motion, and proceedings, is made *Exhibit No.* I. Copies of two executions issued upon the judgments of Beach and Gray & Bouton, to November term, 1843, with Lawson's return thereon, are also exhibited.

That said sales being set aside, the executions in favor of Beach and Gray & Bouton remained unsatisfied, as though no sale had taken place.

Knows nothing, of his own knowledge, as to said agreement between Beebe and Trapnall.

Admits that after May term, 1843, executions were issued upon said judgments, came to his hands, and were duly executed by respondent—the mortgaged premises were sold under them first day of November term, 1843, and Beebe became the purchaser. All of which things were done by respondent without fraud or collusion. He knew of no fraud in the issuance of said executions by Trapnall, or in the purchase of the property by Beebe, and believed there was none, &c.

Prayed leave to deposit said sum of $243.86, so that his said deputy might be released from the further trouble and responsibility of its custody.

Exhibit No. I *to Lawson's answer,* shows that complainants filed a motion for a rule upon him to show cause why he should not execute said deed, alleging their purchase at said sale, &c.; that Lawson responded to said motion, alleging that the sale was made in accordance with the restraining order above referred to, but contrary to De Baun's instructions (exhibiting De Baun's di-

rections as to the order of sale,) that his understanding was that Fowler purchased for himself, &c., and the pendency of the motion to set aside the sales, &c. That the Court heard the motion, and refused the rule.

Roswell Beebe's Answer.—On the 4th June, 1844, Beebe filed his answer to the original and supplemental bills. He denies that complainants were entitled to the rents, &c., of the mortgaged premises, because the mortgage had not been foreclosed, nor judgment obtained against the mortgagor, &c. Admits that Gray & Bouton recovered judgment against De Baun, and that Beach recovered judgment against De Baun & Thorn as alleged in the bill, and shown by *exhibits E. and F.* thereto. That executions were issued thereon, returnable to September term, 1841, levied and returned as shown by said exhibits. That the judgment in favor of Beach had been satisfied as to Thorn, and the execution was so endorsed. Avers that the appraisers who valued the property levied on under said writs, were not sworn, and that they appraised it above its value. Admits that writs of *ven. ex.* issued on said judgments, returnable to March term, 1843, as shown by said exhibits. That they were returned on the 25th March, 1843, unsatisfied, by order of plaintiffs' attorney, in consequence of the passage of an act 1st February, 1843, changing the March term of said Court to the last Monday in May; and that other writs of *ven. ex.* were issued to the May term, 1843. That by virtue of the appraisement act of 23d December, 1840, and the said act of 1st February, 1843, the property levied on under the original *fi. fas.* could not have been sold earlier than at May term, 1843. Avers that the said writs of *ven. ex.* issued to May term, 1843, were illegal and void. That the one in favor of Beach, being a *ven. ex.*, could only authorize the sale of property previously levied on; and that the *fi. fa.* clause therein ran against the property of both De Baun and Thorn, when the judgment had been satisfied as to Thorn, and was so endorsed on the several executions issued thereon. That the *ven. ex.* in favor of Gray & Bouton only authorized the sale of property previously levied on, and that no property was or could have

been legally sold under either of said writs, on the first day of May term, 1843, except the property levied on, and appraised under the original *fi. fas.* which did not include the mortgaged premises.

Admits that payments had been made on said judgments, but whether prior or subsequent to the mortgage of complainants, he was not informed: and avers, upon information, that there was due thereon, on the 29th May, 1843, about $2,600 or $2,700. Denies that said judgments were the only incumbrances upon the Alhambra property, at the time said mortgage was executed. Avers that there was an incumbrance long prior to the mortgage, amounting to between $2,000 and $2,500, being a debt of the mercantile firm of De Baun & Thorn, which was a specific lien upon said property, and other property in the city of Little Rock, and which remained unpaid at the time of the dissolution of said firm—that Thorn sold to De Baun his undivided half interest in said property, and as part of the consideration therefor, De Baun agreed to pay said debt, as would appear by an authenticated copy of the contract between them, bearing date 4th April, 1838, and made *exhibit No.* 1.

Admits that said judgments of Beach and Gray & Bouton were a lien upon all the other unincumbered real estate of De Baun situate in Pulaski county, but denies that it was as great in quantity, value, &c., as alleged in the bill. Avers that the most valuable of his city property was incumbered, &c., that the lands were wild, and in detached tracts, and that the whole of De Baun's real estate situate in said county, other than that mortgaged to complainants, free of incumbrances, could not have been sold by the sheriff for a sum sufficient to satisfy said judgments.

Denies that the plaintiffs in said judgments instructed the sheriff, Lawson, to sell the mortgaged premises first; but avers that De Baun, on the 12th May, 1843, gave the sheriff written directions, under the statute, specifying the order in which he desired his property to be sold on the 29th of said month, a copy of which is made *exhibit No.* 2, which directions Beebe avers to

have been binding on the sheriff. That afterward, on the 25th May, 1843, De Baun and counsel, changed said directions in many particulars, a copy of which directions so changed, was incorporated in the proceedings of complainants to compel Lawson to make them a deed to the mortgaged premises, a transcript of which is made *exhibit No.* 3. Alleges that all sales made contrary to said directions were illegal and void, and that the sheriff made said sales contrary thereto, but in conformity with the restraining order mentioned below.

That upon application of Fowler, as attorney for complainants, after the hour of nine o'clock A. M., and after the sales had commenced, on the first day of May term, 1843, the Judge of Pulaski Circuit Court, on an *ex parte* showing, ordered, adjudged and decreed, that on complainants giving approved security in the sum of $3,000, payable to Gray & Bouton and Beach, an order issue requiring the sheriff to expose to sale all the property of De Baun levied on, other than the mortgaged premises, before he exposed to sale said mortgaged property. A transcript whereof is made *exhibit No.* 4; which order was served upon the sheriff during the hurry and bustle incident to the selling of a large amount of property within legal sale hours, &c. Respondent alleges that said order was illegal, void, and that the sales made in obedience thereto were void, and conferred no title upon purchasers.

Admits the recovery of the judgments against De Baun and De Baun & Thorn, and the execution of the mortgage and deed of trust by De Baun, &c., as alleged and enumerated in the supplemental bill, and sets them out *to wit:* the mortgage by De-Baun and wife to Beirne & Burneside; the deed of trust by the same to Reardon, Woodruff and Watkins, to secure debts amounting to $25,000. The judgments of Chittenden, Witherell, Jesup & Beers, Real Estate Bank, Gottchalk, William & James Gasquett and Conway, Real Estate Bank, Ringo, Chew use, &c., and Ralph Marsh & Co., describing them substantially as in the supplemental bill, as to dates, &c., as well as those mentioned below. The issuance of a *fi. fa.* on the last named judgment, levy

on the property mortgaged to complainants, appraisement thereof, failure to sell, and the issuance of a *ven. ex.* thereon, 1st May, 1843, as alleged in the supplemental bill, and shown by *exhibit G.* thereto. The judgment of Waldron, Thomas & Co., *fi. fa.* thereon, return, and *ven. ex.* as alleged in the supplemental bill, and shown by *exhibit I.* thereto. Judgment of Real Estate Bank against De Baun, Reardon et al., the *fi. fa.* and *ven. ex.* thereon, &c.

That the returns upon the said executions in favor of Ralph Marsh & Co., and Waldron, Thomas & Co., returnable to May term, 1843, were made out, as shown by *exhibits H. and G.* to the supplemental bill, by Lawson's deputy, Thomasson, immediately after the closing the said sale on the 29th May, as was usual, and did not state all the facts in relation to the sale—did not set out said restraining order, and the subsequent decree of the Court setting aside said sales, which are embraced in said *exhibit No.* 4. That under the same circumstances, Thomasson endorsed a similar return upon the execution in favor of the Real Estate Bank against De Baun, Reardon et al., before the sales were set aside, but it was not returned with the two above referred to. That it was produced with said other two, and the executions in favor of Beach and Gray & Bouton, on the hearing of the motion to set aside the sales, but was afterwards lost or mislaid, and not found until after the adjournment of Court, and so the sheriff was unable to make the same returns thereon as were made upon the executions in favor of Beach and Gray & Bouton, which were the only true returns, stating all the facts, &c.; and so respondent alleges that the returns upon said executions in favor of Ralph Marsh & Co., and Waldron, Thomas & Co., as they appear in said *exhibits G. and I.,* were erroneous and void, not exhibiting all the facts in relation to the sales, the setting of them aside, &c. That a short time before the adjournment of said Court, at November term, 1843, it accidentally came to the knowledge of respondent, and the sheriff, through Fowler, that said execution in favor of the Real Estate Bank was on file in the Clerk's office, and thereupon, on application to the Court,

the sheriff was permitted to amend his return thereon, stating the same facts returned upon the executions in favor of Beach and Gray & Bouton.

Admits (again) the issuance of the *ven. ex.* on the Gray & Bouton judgment, returnable to March term, 1843, the levy upon the Alhambra, and its return unsatisfied, in consequence of the act changing the time of holding the Court, above referred to, and the issuing of an *alias ven. ex.* to the May term, 1843, thereon. The issuance of the first *ven. ex.* on the Beach judgment, its return unsatisfied for the same cause, and the issuance of the second *ven. ex.* thereon, returnable to May term, 1843, but avers that the plaintiff's attorney, with the assent of De Baun, on the 27th May, 1840, entered of record a full release and satisfaction of the judgment as to Thorn (a copy of which is made *exhibit No.* 5) which was endorsed upon each of the executions issued thereon, and therefore the *fi. fa.* clause in said *ven. ex.* was illegal and void, and that by virtue thereof no property was or could be legally sold except that originally levied on as the property of De Baun, which did not embrace the Alhambra, &c.

Denies that the *ven. ex.* issued on the Gray & Bouton judgment to May term, 1843, was legally levied upon the Alhambra property, &c., because it only authorized the sheriff to sell the property originally levied on. Denies also that the said *ven. ex.* on the Beach judgment was legally levied on said property, because the judgment had been satisfied and released as to Thorn, and yet the writ ran against the property of both him and De Baun, as above, &c.; and for the same reason all the said executions issued on the Beach judgment, respondent alleges to be void, and conferred no authority to levy upon and sell said property, &c.

Admits that *exhibit M.* to the supplemental bill is a correct copy of the sheriff's advertisement of the sale, but denies that the lots and lands therein described were legally sold by the sheriff on the 29th May, 1843; and particularly denies the legality of the sale of "De Baun's Corner" (the mortgaged premises) to complainants as alleged in the bill, &c.

Beebe further denies that *exhibit N.* to the supplemental bill, was the original return, or intended to be, of the alleged sales under the Beach *ven. ex.* &c., or that it was fraudulently torn off by the sheriff as alleged by complainants, and, without means of knowing, denies that said *exhibit* is truly copied from the original paper.

Was informed and believed that Fowler purchased the property known as "De Baun's Corner" (the mortgaged premises) at said sale in his own name, and the sheriff so entered it at the time in his book of sales, a copy of which entry is made *exhibit No.* 6. That Fowler declared publicly at said sale, in the presence of many credible persons, that he was bidding upon said property for himself, and the sheriff did not know that he purchased for complainants until he afterwards presented him a deed for execution, &c. Admits that the sheriff made a similar memorandum at May term, 1843, on the *ven. ex.* in favor of Gray & Bouton but denies that it was a true return of all the facts in relation to said sale, or that it was ever made out and appended to said writ for that purpose, or for any other than as information to the Court, to show how he had executed said writs of *ven. ex.* under said restraining order.

Denies that Lawson, sheriff, fraudulently withdrew from the files of the Clerk's office the said writs of *ven. ex.* in favor of Beach and Gray & Bouton; but avers that at the adjournment of the May term of said Court, 1843, said writs had been returned to the Clerk in accordance with usage in such cases, that during the pendency of the motion to set aside said restraining order and said sales, the sheriff was required to produce said writs, &c., and done so; and appended to them a memorandum, hastily written out, for the purpose of exhibiting to the Court and parties interested, what had been done in the premises, but in so doing, did not intend, or consider said executions as regularly returned, but merely in possession of the Court as his papers, and thereafter subject to his control, to be officially returned, with proper returns, showing all the facts, &c., after the final action of the Court thereon.

Denies that the returns made upon said writs as shown by complainants' *exhibits H.* and *L.*, are either false, garbled, or defective as alleged, but avers the same to be substantially true in all respects, and that they exhibit all the important and material facts, &c.

Respondent denies that he bid upon the mortgaged premises as alleged; and denies, and does not believe it to be true, that when Fowler bid off said property, he informed the sheriff that he purchased for complainants, and not for himself.

Admits that Fowler paid the sheriff said certificate of deposit for $1,000 in the purchases of himself and Desha at said sale, which purchases amounted to $1,050.66, as shown by the bill, and respondent's *exhibit No.* 6.

That said certificate of deposit belonged to complainants, and was sent by them, with other certificates of deposit, to Fowler, for the purpose of discharging liens upon said mortgaged premises, prior in date to their mortgage. That the sheriff signed said receipt for said $1,000, presented to him by Fowler, on the 6th June, 1843, being about ten days after said sale, without noticing its contents, further than to see that it was a receipt for that sum. Denies that Lawson applied said money to the satisfaction of the judgments of Beach and Gray & Bouton, or to his own use, as charged in the bill. Avers that the sheriff in good faith, converted said certificate of deposit into specie, or its equivalent, for convenience of distribution, but was soon advised that the money could not be received in satisfaction of said judgments, and that application would be made immediately to set aside said sales. That afterwards, at the request of Emzy Wilson, to oblige a friend, and collect $200, he advanced a portion of the money obtained for said certificate of deposit, and took in exchange a warrant drawn by the Postoffice Department upon the Treasurer of the United States, in favor of Wilson, for $756.14, bearing date June 14th, 1843, upon the back of which, an order was drawn by the Treasurer, Selden, on the Bank of Louisiana, at New Orleans, of the same date of the warrant, which

was endorsed by Wilson, &c, A copy of the warrant is made *exhibit No. 7.*

That afterwards, on the 6th July, 1843, said restraining order and said sales were set aside, as shown by *exhibit No. 4.* This was done on the eve of the adjournment of Court, at which time Fowler requested that said money be re-paid to him: the sheriff immediately assented, and gave him at the moment, in the presence of the Court and Bar, said Postoffice warrant, and, by an agreement of parties, Fowler was to call at the sheriff's office, at four o'clock P. M. of that day, and receive the residue of the $1,000, but never called for it. Fowler placed said warrant in the hands of Hyman Mitchell, of Little Rock, who, about 26th July, 1843, transmitted it to Walton & Sheaf of New Orleans, to whom it was paid by said bank 18th August, 1843, as appeared by their endorsement, and the original warrant transmitted to the General Postoffice where it remained on file.

Admits that Fowler prepared, and tendered to Lawson for execution, a deed for said mortgaged premises in favor of complainants, which Lawson declined to execute; and avers that thereupon Fowler moved for a rule upon Lawson to compel him to execute said deed, which, on the response of Lawson, was refused by the Court, as shown by *exhibit No. 3.*

Avers again that the mortgaged premises were struck off to Fowler, in his own name at said sale, and not for complainants, and that neither of them had a right to a deed thereto, the sale being illegal in consequence of being made, contrary to De Baun's directions, under the statute, &c.; and for the further reasons that the *ven. ex.* in favor of Gray & Bouton only authorized the sheriff to sell the property previously levied on, which did not include said premises; and that the judgment against De Baun & Thorn "had been fully and legally paid and satisfied by a regular written release of satisfaction as to one of the parties aforesaid, as shown by *exhibit No. 5*; and therefore a full discharge as to the whole judgment and the defendants."

Beebe further answers, that on the 20th March, 1843, he purchased the said judgments of Gray & Bouton and Beach, and they

were assigned to him by Trapnall & Cocke, the attorneys of said parties, they being empowered so to do; for which he gave his bond, secured by mortgage on real estate; and afterwards, in December, 1843, paid the purchase money, which was the balance due on said judgments, (except costs) amounting to about $2,400; at which time the said bond and mortgage were cancelled, and he had no written evidence of said contract except said assignment. At the same time he paid the costs due on said judgments, amounting to about $200, which, with interest on said sums to the time of answering, and additional costs in said cases, amounted to about $2,700. That he was induced topurchase said judgments, on information that complainants would not advance the money to pay them off, and release the mortgaged premises therefrom, with the view, by what means, of placing himself in a position, if a contingency happened, of saving himself from entire loss, on account of liabilities which he had incurred as one of De Baun's securities, which he was bound to pay, had actually assumed, and afterwards paid, amounting at the time to about $4,000—being De Baun's indebtedness to the State and Real Estate Banks, interest, costs, &c.

That long before he purchased said judgments he was convinced that the means of De Baun were daily diminishing, from various causes, thereby rendering him unable to pay his debts; and on looking into the condition of the property embraced in the deed of trust above referred to, and the incumbrances upon it, he was satisfied that it would not indemnify the securities, wherefore he decided to take the best method he could to save himself, without prejudicing the rights of others.

Respondent also purchased of Daniel Ringo a judgment obtained by him against De Baun, in Pulaski Circuit Court—against De Baun & Thorn, which, with interest and costs, at the time of answering, amounted to the sum of $2,200, making the aggregate of said three judgments about $4,900. That all his acts and intentions in relation to the purchase of said judgments were regular and fair, and not done with any intention to hinder complainants in the collection of their claims in any just and lawful way they

might think proper: and that he had done nothing in reference thereto, which could not be fully sustained by those just and equitable rules which govern individuals in usual and ordinary business transactions. He had paid all claims against him as De Baun's security, amounting to about $4,000, which, with the purchases made by respondent at the sale under the deed of trust, and properly chargeable to the premises in question, would amount in the aggregate to about $10,750, including charges and incidental expenses, and which is the true amount the premises in question cost him.

That if complainants had in due season fairly and honestly come forward and paid off the prior liens upon said mortgaged premises, which were considerably less than their claims, it would have left their mortgage free of incumbrances and fully indemnified them. That all the proceedings of complainants in procuring said restraining order, &c., having been declared illegal, and set aside, and the Court having refused to compel Lawson to make them a deed, as aforesaid, other writs of execution were regularly issued upon said judgments in favor of Beach and Gray & Bouton, and which still remained unsatisfied with the exception as to the said release of Thorn; and also upon a judgment in favor of the Real Estate Bank against De Baun, Reardon and Beebe, commanding the sheriff to sell the property levied upon to satisfy the same, and that for want of sufficiency of the property levied on, he was commanded that of the goods and chattels, lands and tenements of said defendants, he cause to be made the debts, &c. That said executions in favor of Beach and Gray & Bouton were levied on the premises and improvements in question, regularly advertised and exposed for sale at the Court house, &c., in Little Rock, on the 27th day of November, 1843, being first day of November term of said Court, and respondent, Beebe, became the purchaser of De Baun's right, title and interest therein, for the sum of $325. That Fowler was present at said sale, and made no objection thereto within the knowledge of Beebe. That said several executions having

been so legally executed, were returned, &c., copies of which are made *exhibits No.* 8, 9, 10.

That previous to said sale, De Baun gave the sheriff written directions as to the order in which he desired said property as well as all other of his property levied on, to be sold, which were complied with, as far as could be—a copy of which instructions is made *exhibit No.* 11. That afterwards, the said sheriff executed to respondent, a deed for the property so purchased by him in due form, a copy of which is made *exhibit No.* 12

That on the 20th March, 1843, a writ of *sci. fa.* to revive said judgment of Beach and of Gray & Bouton, and continue them as a lien upon the real estate of De Baun, was regularly issued, &c., returnable to the May term, 1843, which was duly executed by the sheriff, upon De Baun and Thorn, a transcript of the proceedings on which is made *exhibit No.* 13.

Respondent avers that by virtue of the sale, purchase and deed aforesaid, he acquired a valid title, in law and equity, to all the interest possessed by De Baun in the said property.

That on the 23d June, 1843, in Pulaski Circuit Court, Daniel Ringo recovered a judgment against De Baun & Thorn, late partners, &c., under the style of James De Baun & Co., for $1,-500 debt, $484.50 damages, with interest on debt and damages, at the rate of ten per cent. from the date of the judgment, and for $7.35 costs; which debt was contracted by said firm before its dissolution, as evidenced by a note bearing date 20th March, 1837, a transcript whereof is made *exhibit No.* 14. That a *fi. fa.* was issued thereon, 8th September, 1843, returnable to November term, following, which was levied by said sheriff, among other property, upon the undivided one half interest of said Thorn in and to said premises and improvements in question, including a similar interest of his in other lots. That the same was regularly advertised and exposed to sale at the Court house, &c., on the first day of November term, 1843, and purchased by respondent for $50, that is, the interest of Thorn in the premises in question. That Fowler was also present at said sale, and made no public objection thereto, within respondent's knowledge. A

copy of which writ and return is made *exhibit No.* 15. That the sheriff afterwards executed and acknowledged, in due form, a deed to respondent for Thorn's interest in the premises under said sale and purchase, a copy of which is made *exhibit No.* 16.

That by virtue of deeds from Byrd and wife, and Ashley and wife to De Baun & Thorn, one undivided half of said mortgaged premises was legally vested in said Thorn, certified copies of which deeds are made *exhibit No.* 17. That upon the dissolution of said firm of De Baun & Thorn, Thorn sold to De Baun, among other property, his said interest in said property, for divers good and valuable considerations, and amongst which was, that De Baun should pay the debts, &c., of the firm then outstanding, so as to absolve Thorn from all liability on account thereof, and then Thorn was to make him a deed in fee, with relinquishments of dower, &c., to his said half of said lots and improvements, which would more fully appear by the covenant of Thorn, bearing date 4th August, 1838, which was duly recorded, &c., a certified copy of which is made *exhibit No.* 1. That the note of James De Baun & Co., to Ringo, upon which the judgment above referred to was obtained, was one of the debts due by, and outstanding against said firm, and therefore said judgment constituted a specific lien upon said premises at the time of its rendition, paramount to all other liens created subsequent to said covenant of Thorn. Wherefore respondent alleges that by virtue of his said last purchase, and said sheriff's deed, the said half interest of Thorn vested in him, without reference to other titles, &c.

Denies that he obtained title to said property by any fraud, or unfair or illegal means. Avers that he obtained possession of so much thereof as he was in the possession of, without any such means. That on the 2d day of April, 1843, he became the purchaser thereof, among other property of De Baun, at a public auction, held at the residence of said De Baun, in said county, by and under the direction of Reardon, Woodruff and Watkins, trustees of De Baun, by virtue of a certain deed of trust, executed, acknowledged, and recorded by De Baun and wife, for the purpose of securing them, this respondent, and others as securi-

ties of said De Baun, which deed bore date September 4th, 1841, a certified copy of which is made *exhibit No.* 18. That in pursuance thereof, said trustees duly executed to respondent a deed of conveyance for the property so purchased by him at said trust sale, a certified copy of which is made *exhibit No.* 19.

That immediately after said purchase, he caused the sheriff to serve a notice upon the persons occupying the premises, that the accruing rents belonged, and must be paid to respondent, a copy of which is made *exhibit No.* 20. The occupants at the time, were H. N. Aldrich, J. D. Fitzgerald, Eli Colby, Thomas J. Reynolds, John Brown and Charles Galloway. Subsequently, about the 11th October, 1843, Wm. B. Wait came in possession of the portion of the premises occupied by Aldrich, and respondent caused a similar notice to be served on him, a copy of which is made *exhibit No.* 21. That he had received a portion of the rents from the occupants, and was continuing to receive rents from all of them except Fitzgerald, who refused to pay. Respondent had regularly instituted suits against said occupants at the expiration of each month, (excepting a portion of the time next succeeding the 22d April, 1843,) before a Justice of the Peace, for the rents, and obtained judgment therefor in every instance, which included nearly all the rents due from said 22d of April, to the time of answering; an account of which would be furnished the Court, though respondent denies complainants' right to such account, as they had no interest in the matter.

That upon the execution to respondent of the sheriff's deeds made *Exhibits No.* 12 *&* 16, he caused a rule to be entered in Pulaski Circuit Court against the occupants, and those supposed to be in possession of the premises, *to wit:* De Baun, Fitzgerald, Wait, Brown, Colby, John P. Smith and George Waring, who severally, after being served with legal notice, failed to appear except Fitzgerald, whereupon the Court ordered that the sheriff put respondent, as an executive purchaser, into possession of the premises and tenements thereon, and the sheriff, on the 13th December, 1843, did put him into possession thereof, except that part occupied by Fitzgerald, without opposition to the order. A

copy of the order and sheriff's return is made *Exhibit No.* 22—by means whereof he alleges that his possession of the premises was lawful, &c.

That complainants were not entitled to a deed to the said property—that they never purchased it. That the property having been sold under judgments constituting liens upon it prior to complainants' mortgage, the mortgage was cancelled, and its foreclosure barred. That by their own negligence and fraud, they had been mainly instrumental in defeating any claim they might have had under the mortgage—that they caused the premises to be levied on and sold under the prior liens, when they might have advanced the means to discharge them, and had the full benefit of their mortgage—that they possessed large means, and credit, and were well able to make such advances, and the property was of sufficient value to justify them in so doing—that before the sale on the 29th May, 1843, they were advised to make such advances by attorneys of this State, in New Orleans, that they did send money to Fowler for that purpose, but it was not so applied, but on the contrary, they, by said attorney, on the morning of the day of sale, procured said restraining order, requiring the sheriff to sell De Baun's property in a particular manner, &c., which was illegal, as afterwards decided by the Judge on more mature reflection, &c.

That in addition to the titles to said property, acquired by respondent as aforesaid, the same was exposed to sale, at the Court house, in Little Rock, on the 3d December, 1842, by Thomas W. Newton, United States Marshal, under an execution issued on the 8th June, 1842, upon a judgment obtained in the United States Circuit Court, for the District of Arkansas, in favor of Lewis Chittenden against said De Baun, on the 23d May, 1842, and purchased by Trapnall & Cocke, who afterwards conveyed it to him. That by virtue thereof, respondent became from thence forward entitled to the possession, rents, &c., of the premises.

That although De Baun had parted with his interest in the property, yet as defendant in execution, he had the right under the statute, to direct the sheriff what portion of it to sell first, and

so on, until the executions were satisfied, and that respondent approved the directions given by De Baun to the sheriff, &c.

Denies the right of complainants to injunction, restraining order, &c., as prayed, alleging respondents responsibility for any sum that might be decreed to them, &c.

Exhibit No. 1, *to Beebe's answer*—is the bond of Thomas Thorn to James De Baun, dated on the 4th August, 1838, in the penal sum of $15,000, conditioned, after reciting that Thorn being the owner of one undivided half of certain lands, &c., including the *Alhambra* or *corner* property, in consideration of $10,000 to him paid by De Baun, had sold to De Baun, his heirs, &c., all his right, title, interest, &c., in and to his undivided half of said lands, that whenever after it should appear that De Baun had fully paid, adjusted and arranged the debts due by, and outstanding against the mercantile firm theretofore existing between De Baun & Thorn, in such manner as to relieve Thorn from all liabilities or damage on account of said co-partnership, upon the reasonable demand of De Baun, his heirs or assigns, said Thorn should execute a good and sufficient warrantee deed of conveyance of an estate in fee simple, in and to one undivided half part of said lands &c., with the appurtenances, &c., with relinquishment of dower, unto De Baun—then said bond to be void—else to remain in force. Which bond was duly acknowledged and recorded on the 18th August, 1838.

Exhibit No. 2, *to Beebe's answer,* is the written directions of De Baun to Lawson, dated 12th May, 1843, specifying the order in which he desired his property levied on to be sold, and requiring the sheriff to sell the mortgaged premises first, &c.

Exhibit No. 3, *to Beebe's answer,* is a transcript of the proceedings on the motion of complainants against Lawson to compel him to execute a deed to them for the mortgaged premises, under their alleged purchase on the 29th May, 1843. The motion was made 22d June, and determined against them, on the response of Lawson, &c., on the 7th July, 1843. Appended to Lawson's response, is the modified directions of De Baun to Lawson in reference to the sale of his property, bearing date 25th May, 1843,

referred to in the answer of Beebe, in which Lawson is required to sell the *corner* property first.

Exhibit No. 4, *to Beebe's answer,* is a transcript of the proceedings in this case at the May term, 1843, showing that on the 29th of May, on an *ex parte* application of Fowler, as solicitor of complainants, the restraining order so often above referred to was made. That on the 12th June, 1843, Trapnall & Cocke, filed a motion to set aside said restraining order, and the sales made on the 29th May, in conformity therewith—the motion seems to have been made in behalf of Gray & Bouton, Beach and De Baun. That on the 3d July, 1843, (as appears from a *nunc pro tunc* entry of 6th July,) said motion was sustained by the Court, and said order and sales set aside and held for naught.

Exhibit No. 5, *to Beebe's answer,* is a certified copy of a record entry, as follows:

"PULASKI CIRCUIT COURT, IN VACATION, JUNE, A. D. 1840.

Lewis Beech, *Plaintiff,*
vs.
James De Baun & Thomas Thorn, *Defendants.* } *Debt.*

Judgment 27th March, 1840, *for* 1,988.50, *residue of debt and costs—book K. page* 449.

The said defendant Thomas Thorn, having arranged and secured to the satisfaction of the attorneys of the plaintiff, Trapnall & Cocke, the judgment recovered in this case, they do hereby, and with the consent and agreement of the said James De Baun, acknowledge full satisfaction of the said judgment so far as the said Thomas Thorn is concerned, without prejudice to the rights of the said plaintiff to sue out executions and recover the said judgment and costs of the said James De Baun.

TRAPNALL & COCKE,
Attorneys for Plaintiff.

May 27th, 1840.

I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided, May 27th, 1840.

J. DE BAUN."

Exhibit No. 6, *to Beebe's answer,* is a copy of an entry made

in Lawson's sales book in reference to the sale on 29th May, 1843, certified by him, which is as follows:

"P'ts 7 & 8, B. one, west Quapaw line, De Baun's corner—apprst. run out.

A. FOWLER, $903.56¼.

P'ts 7 and 8 B. 38, apprst. run out as in lots 8 and 9. Lot 8, value $400.

F. W. DESHA, $100."

Exhibit No. 7, to Beebe's answer, is a copy of the Post Office warrant, and endorsements, described in the answer as having been paid to Fowler by Lawson, certified by the Auditor for the Treasury of the Post Office Department.

Exhibit No. 8, to Beebe's answer, is a *ven. ex.* with a *fi. fa.* clause issued on the Gray & Bouton judgment, 14th July, 1843, returnable to the November term, following, commanding the sheriff to sell the property levied on under the first execution, and in default of satisfaction, to make a further levy, &c. From the return of the sheriff on this writ, it appears that by virtue of the *fi. fa.* clause therein, he levied on the *Alhambra* property, and the other lots and lands of De Baun described above; that he duly advertised, and sold the same on the 27th November, 1843, and Beebe purchased the Alhambra property, at $325. Trapnall purchased most of the lands—(see De Baun's cross-bill for particulars of this sale) amount of sales $1,875.

Exhibit No. 9, to Beebe's answer, is a *fi. fa.* issued on the judgment of Ringo against De Baun & Thorn, 8th September, 1843, returnable to the following November term; which the sheriff levied on the property above referred to, including the *Alhambra,* advertised and sold the same on 27th November, 1843, and Beebe purchased Thorn's interest in the *Alhambra* property at $50.

Exhibit No. 10, to Beebe's answer, is a *ven. ex.* with a *fi. fa.* clause, issued on the judgment in favor of the Real Estate Bank against De Baun, Reardon and Beebe, 13th July, 1843, and returnable to November term following, reciting the original levy on the *Alhambra, &c.,* upon which the sheriff made the same return as on the execution in favor of Gray & Bouton, above, (*Ex-*

hibit No. 8), showing a sale of the *Alhambra* to Beebe at $325, on the 27th November, 1843.

Exhibit No. 11, *to Beebe's answer,* is a copy of directions given by De Baun to the sheriff in reference to the order in which he required his property to be sold under the above writs, but protesting against the legality of the sale—the *Alhambra* is put last, except some other city lots.

Exhibit No. 12, *to Beebe's answer,* is a deed from Lawson, sheriff, to Beebe, for the *Alhambra* property, executed, acknowledged &c., on the 28th November, 1843, reciting a sale under a *ven ex.,* with a *fi. fa.* clause on the Beech judgment, and also the sale, and purchase by Beebe, under the above writs of *ven. ex.* in favor of Gray & Bouton and the Real Estate Bank (*Exhibits No.* 8 and 10), conveying to him all the interest, &c., of De Baun therein, &c.

Exhibit No. 13, *to Beebe's answer,* is a *sci. fa.* to revive the judgment of Beech against De Baun and Thorn, issued 20th March, 1843, and returnable to the May term, following, which was executed on De Baun, 21st and on Thorn 24th March, 1843. Also a *sci. fa.* to revive the judgment of Gray & Bouton, against De Baun, issued same day, returnable same term, and executed 21st March, 1843. The *sci. fa.* on the Beach judgment, recites that the judgment remains unsatisfied as to *De Baun,* and commands the sheriff to summon him to show cause &c., but the writ was served on Thorn also.

Exhibit No. 14, *to Beebe's answer,* shows that on the 27th September, 1842, Daniel Ringo commenced suit against De Baun & Thorn, late partners, &c., in Pulaski Circuit Court, on a note for $1,500, &c., made by said firm to him 29th March, 1837, and obtained judgment thereon 23d June, 1843, for debt, interest, &c., [see opinion of Court for further particulars of this exhibit.]

Exhibit No. 15, is a *fi. fa.* upon said judgment, issued 8th September, 1843, returnable to November term, 1843, under which Beebe purchased the interest of Thorn in the *Alhambra* as shown by *Exhibit No.* 9, above.

Exhibit No. 16, is a deed from Lawson, sheriff, to Beebe for Thorn's interest in the *Alhambra* property, purchased by Beebe

under the said judgment and execution in favor of Ringo, executed &c., 28th November, 1843.

Exhibit No. 17, *to Beebe's answer,* is *first,* a deed from Richard Byrd and wife to De Baun & Thorn, for that part of the Alhambra, or mortgaged premises, described first above in the mortgage of Whiting & Slark, executed 26th January, 1836, acknowledged and filed for registration 28th same month. 2d. A deed from Chester Ashley and wife to De Baun & Thorn for the remainder of said mortgaged premises, executed 16th November, 1836, acknowledged and filed for registration next day. 3d. A deed from Ashley and wife to De Baun for same property, executed 2d, acknowledged on the 4th, and filed for registration on the 20th November, 1839.

Exhibit No. 18, *to Beebe's answer,* is a deed of trust, with power of sale, executed by De Baun and wife, on the 4th September, 1841, to Woodruff, Reardon and Watkins, upon the *Alhambra* property, and a large amount of other real and personal property, to secure them, Beebe and others as securities of De Baun in various debts [see De Baun's *cross*-bill for particulars.]

Exhibit No. 19, is a deed from said trustees to Beebe, of the *Alhambra,* and other property, executed by them, on the 24th day of April, 1843, in pursuance of a sale of said property made by them, under said deed, on the 22d April, 1843, and purchased by Beebe.

Exhibit No. 20, is the notice given by Beebe, on 22d April, 1842, to Aldrich, Fitzgerald, Colby, Reynolds, Brown and Galloway, tenants, of his purchase of said property at said sale, and that he should claim future rents, &c.

Exhibit No. 21, is a similar notice to Wait, given 19th October, 1843.

Exhibit No. 22, is a transcript of the order of Court, made 4th December, 1843, directing the sheriff to put Beebe into possession of the premises (except that portion occupied by Fitzgerald) as an execution purchaser, and the sheriff's return that he executed the same 13th December, 1843.

May term, 1841—Complainants except to the answer of Law-

son, 1st, That he neither admits nor denies the execution of the receipt for $1,000, copied in the bill; 2d. That he did not produce said sales book, nor a copy thereof, &c.

Answer of De Baun to original and Supplemental bills.—On the 18th June, 1844, De Baun filed his answer. Admits his indebtedness to Whiting & Slark; the execution of said mortgage; tenants named in possession; the recovery of said judgments by Gray & Bouton, and Beach; the issuance of the original *fi. fas.* thereon, levy on property described in the returns, its appraisement at $4,862.50, alleging that it was worth that sum; that a writ of *ven. ex.* with *fi. fa.* clause was issued on each of said judgments, returnable to March term, 1843, and returned unsatisfied in consequence of the act changing the time of holding said Court. That on the 2d May, 1843, other writs of *ex. ven.* issued on said judgments, with a *fi. fa.* clause in the one in favor of Beach, but not in the other.

That there was no lien on said mortgaged property prior to said mortgage except as follows: That he and Thorn owned that, and other property jointly—on the 4th August, 1838, he purchased Thorn's interest, agreeing to pay the debts of the firm, &c., and Thorn executed to him the bond set out in *Exhibit No.* 1, to Beebe's answer; whereby the debt due Ringo, by said firm, referred to in Beebe's answer, became a lien on said undivided half interest of Thorn, upon which debt judgment was obtained by Ringo against De Baun & Thorn, 23d June, 1843.

That the said judgments of Gray & Bouton and Beach were a lien on all his real estate situate in said county of Pulaski, consisting of city lots and lands which are described in the answer, a large portion of which were mortgaged to the Real Estate Bank, to secure stock and stock loan, &c.

That said executions, and others, being levied on most of said property, he required Lawson to sell it in a particular order (mortgaged premises first) as shown by *Exhibit No.* 2, to answer of Beebe, and *Exhibit* 6, to Lawson's answer.

Admits the execution of said mortgage to Beirne & Burnside,

the trust deed to Woodruff et al., and the recovery of the several judgments, as alleged in the supplemental bill.

Admits the issuing of the executions in favor of said Real Estate Bank, Waldron and others, and Marsh and Marsh, the levy and appraisement under each, and the issuance of the *ven. ex.* in each as alleged.

Admits that levies were made upon the several executions aforesaid, sheriff sold the property on 29th May, 1843, in conformity with said order of Court, and purchases by the persons, and at the prices alleged.

Knows nothing as to the alleged fraud of the sheriff in making returns on said writs.

Does not know whether Trapnall purchased at said sale for himself or clients, but presumes he purchased for his clients, as he could not, in equity, hold property so purchased without their consent.

Fowler forbid the sale on the 29th May, 1843, and Trapnall urged it, as alleged, but does not remember whether Beebe or Trapnall bid on the mortgaged premises.

Does not know that Fowler informed the sheriff that he purchased for himself, when the premises were knocked off, but has conflicting information in regard thereto.

Knows nothing of the payment of said money by Fowler to Lawson, the receipt therefor, its appropriation, refusal to make the deed, &c., &c.

Believes that Beebe had before then bought said judgments of Gray & Bouton, and Beach—had the control thereof, and had bound himself to resort only to said mortgaged property, and to the property originally levied on by the original executions on said judgments, for satisfaction thereof, but did not know when the contract was.

Admits that Beebe caused writs of *ven. ex.* to issue to November term, 1843, on the judgments of Gray & Bouton and Beach, and that other executions also issued to the same term; but whether this was done to practice a fraud on complainants, he does not know, but presumes it was done because said first sales were

cancelled by the court. Admits that said mortgage property was seized by virtue of some of said executions, and sold, and the interest therein of respondent and Thorn purchased by Beebe, and a deed executed to him therefor by the sheriff.

That said second sale of the mortgaged premises was a nullity, for various reasons apparent on the face of the writs, &c., and for the same reasons, and others, the first sale was likewise a nullity. Admits that Beebe had obtained possession of said property under orders of court, and had received the rents, &c., to what amount he did not know, but denies that the rents, &c., belong to complainants.

Admits correctness of all the exhibits to the original and supplemental bill, except *Exhibit N.*, as to which knows nothing.

There had been paid on the claim of Gray & Bouton, before judgment, on the 28th January, 1839, $1,025.14; and on said judgment of Beach, on the 10th September, 1840, $1,125.

Cross-Bill of De Baun.—On the 18th June, 1844, De Baun filed a cross-bill against all his mortgage and judgment creditors, and all persons who had purchased any of his property &c., to wit: Whiting & Slark, the trustees of Real Estate Bank, Beebe, Ringo, Thorn, Gray & Bouton, Beach, Beirne & Burnside, Jessup, Beers, Woodruff, Reardon, Watkins, Pendleton, Whitmore, Sabin, R. W. and Ben. Johnson, Marsh & Marsh, Waldron, Thomas, Day, Mygatt, Chittenden, Gottschalk, Witherell, Wm. & Jas. Gasquit, Conway, Keeler, Robins, Fowler, Desha, Trapnall, Fenno, Bertrand, Blackburn, Faulkner, Lincoln, Le Baron, Drew and Jose Maria Medrano; alleging that before and at the time of the inception of the liens and incumbrances hereinafter specified he was seized and possessed of a large amount of real estate in said county of Pulaski, or of certain interest and rights in the different portions thereof, hereinafter stated: *to wit:* (*No.* 1 and 2), lots 7 and 8 in block one (*same mortgage to Whiting & Slark*). (*No.* 3), lots No. 4, 5 and 6, block No. 38, west Quapaw line, Little Rock. (*No.* 4), lots 8 and 9, same block. (*No.* 5), lot 7, same block; of which lots he and Thorn were joint and equal owners on the 4th August, 1838, on which day he, De Baun, pur-

chased Thorn's interest therein, for $10,000, paid Thorn and an agreement to pay the debts of the firm, and Thorn thereupon executed to him the bond for title made *Exhibit No. 1 to Beebe's answer*. Submits that said instrument operated, in equity, as a conveyance of said property to him, with reservation therein of a lien, or equitable mortgage, in favor of Thorn, to which any creditor of the firm would be entitled in equity, to be substituted.

That whatever interest he had in said lots marked *Nos.* 1, 2 and 4, by virtue of his original ownership, and said bond of Thorn, he still retained when the liens, &c., hereinafter mentioned accrued.

That before any of said liens or incumbrances commenced, on the 13th November, 1839, he sold to Pendleton for $2,000, evidenced by note, said lots 4, 5 and 6 in block 38, marked above as (*No.* 3,) and executed to Pendleton his bond for title on payment of the note, which was duly acknowledged on the day of its date, and filed for record on 13th May, 1843. On the 6th April, 1843, by deed duly acknowledged, and filed for record 1st May, 1843, he and wife conveyed said three lots to Pendleton. Said bond is made *exhibit A. A.* and the deed *B. B.*

Before the inception of any of said liens, &c., on the 28th November, 1839, he sold to Whitmore, and contracted to convey to him on payment, for $1,500, said lot 7, in block 38, by instrument of that date not now in his possession. On the 3d February, 1840, by direction of Whitmore, he and wife conveyed said lot to Sabin, by deed of that date, acknowledged and recorded in April, 1841, and made *exhibit A. C.*

Submits that, under the circumstances, said lots, 4, 5, 6 and 7 were not, as would thereafter appear, subject to liens hereinafter mentioned.

(*No.* 6). Lots number 4, 5 and 6, in block 101, in said city, west Quapaw line, whereon a frame house stands—whereto he never had any title; Ashley contracted to convey them to Bingham upon payment of $1,800, to whose contract orator succeeded, built a house thereon, and then being unable to comply with said

contract forfeited the same, Robins took his place, and likewise forfeited the same.

(*No. 7*). Lot 5, in block one, in new town of Little Rock, east Quapaw line—which orator and wife, on 22d October, 1840, for $5,500 to him paid, conveyed to Le Baron, by deed duly executed and acknowledged, and on 12th June, 1841, recorded: made *exhibit C. C.*

Orator was at the same time first aforesaid seized and possessed of the following lands in said county: west-half north-west quarter section 17; east-half section 18; south-half of west-half of south-west quarter section 18; north-east quarter of south-west quarter section 18; north-east quarter section 19; south-west quarter of north-west quarter of section 19, all in township one north, range 12 west; north-half of south-west quarter, section 13; south-east quarter section 13; east-half of north-east quarter, section 24, all in township one north, range 13 west—which lands he, on 17th August, 1839, by deed of that date acknowledged and recorded, mortgaged to the Real Estate Bank to secure ninety-seven shares of stock, and $4,850, borrowed of the Bank, on stock credit, 18th January, 1840, payable by equal annual instalments running to 25th October, 1856, with interest, &c., which sum remained wholly unpaid. On 28th April, 1843, the trustees of said Bank filed a bill to foreclose said mortgage, making judgment creditors, &c., parties, which bill was pending in said Court, and would be made *exhibit D. D.*, if required, &c.

He was at the same time seized and possessed of the following other lands in said county: (13) north-west quarter of south-west quarter of section 17, in township one north, range 12 west: (14) north-west quarter of north-east quarter section 23: (15) north-west quarter of south-east quarter section 24: (16) north-east quarter of south-west quarter section 24: (17) south-west quarter of north-east quarter section 24, all in township one north, range 13 west: (18) north-west quarter (part) of north-east quarter of section 5, township 2 north, range 11 west: (19) 52 acres purchased of Amors, in township 1 north, range 11 west: (20) undivided half of north-west fractional quarter of section 20,

known as Mine Hill, township 2 north, range 12 west: (21) two small tracts purchased of Collins amounting respectively 6 9-100 and 9 56-100 acres, in north-west quarter section 10, township 1 north, range 12 west: (22) north-east quarter section 9: (23) south-west quarter section 10, in township 2 north, range 13 west: (24) north-east fractional quarter of section 6, township 3 north, range 9 west: (25) west fractional half of section 2, township 3 north, range 11 west: (26) south-west quarter of south-east quarter section 10: (27) north-west quarter of north-east quarter section 10: (29) east fractional-half of south-west quarter section 13: (31) south-east quarter of north-east quarter, section 10: (32) north-west quarter of north-east quarter, section 10: (33) south-west quarter of south-east quarter section 3, in township 3 north, range 14 west: (34) north-west quarter of south-west quarter, section 21: (35) east-half of south-west quarter, section 21: (36) south-west quarter of south-west quarter of section 21, township 3 north, range 13 west: (37) south-west quarter of south-west quarter of section 33: (38) west fractional-half of section 34, township 4 north, range 14 west: (39) north-west quarter section 8, township 3 north range 13 west: (40) west fractional half section 2, township 4 north, range 14 west.

The earliest lien, charge or encumbrance on any part of which lands was created by said bond to said Thorn, and the next, said mortgage to said Bank, and the liens subsequent thereto, were the following *to wit:* [The amounts of most of these judgments, &c., being stated before in the supplemental bill, the Reporter omits them here.]

March 23d, 1840, judgment in favor of Gray & Bouton.

March 27th, 1840, judgment of Beach against De Baun & Thorn, on a firm debt.

Fi. fa. sued out to revive lien of each of said judgments March 20th, 1843, duly executed.

Feb'y 13th, 1841, mortgage to Whiting & Slark on (*Nos.* 1 *and* 2.)

February 26th, 1841, mortgage to Beirne & Burnside on same property to secure $6,290.22, with interest, made *exhibit E. E.*

March 27th, 1841, judgment of Jessup & Beers.

September 28th, 1841, judgment of Real Estate Bank against De Baun, Woodruff, Reardon and Beebe.

September 4th, 1841, deed of trust to Reardon, Woodruff and Watkins, on said lands mortgaged to said Bank, and also said lands numbered 14, 15, 16, 17, lots numbers 1 and 2, divers negroes and large quantity of personal property to secure R. W. Johnson, Woodruff and Thorn, as securities of orator on bill of exchange, held by Real Estate Bank for $3,000, dated 18th March, 1840, due at 18 months, subject to a credit of $9,990.71, paid July 23d, 1841: Beebe and Reardon as his securities on note to said Bank, dated 8th June, 1840, due at 125 days, for $3,500; Imbeau, Erwin, Watkins and Beebe, his securities on note to said Bank, dated 20th July, 1840, due at 125 days for $630; Woodruff and Ben. Johnson, his securities on a note to said Bank, dated 20th September, 1840, due 6th February, 1841, for $3,100; Woodruff and Watkins his securities, on a note to State Bank, dated 15th August, 1841, due at 6 months, for $600; Woodruff and Stevenson, securities, on a note to said Bank, dated 19th May, 1840, due at 6 months, for $6,500; Beebe and Ashley his securities in a bill held by said Bank, drawn by Beebe and accepted by orator for $1,600, dated November 2d, 1840, due at five months; with power of public or private sale, to discharge said liabilities without preference or priority *pro rata.*

On 12th November, 1841, judgment of Real Estate Bank against De Baun, Woodruff and Ben. Johnson, judgment of Ralph Marsh & Co., and judgment of Waldron, Thomas & Co.

May 24th, 1842, judgment of Chittenden.

September 19th, 1842, judgment of Gottschalk.

September 24th, 1842, judgment of Witherill.

September 26th, 1842, judgment of William and James Gasquett and Peter Conway.

September 28th, 1842, judgment of Real Estate Bank against Watkins, Beebe, Erwin and Imbeau for $630 (secured by said deed of trust).

December 3d, 1842, judgment in favor of Real Estate Bank against De Baun, Mitchell and Thorn for $2,800, &c.

June 23d, 1843, judgment of Ringo against De Baun & Thorn for firm debt.

June 23d, 1843, Beirne & Burnside obtained judgment against De Baun for part of their said mortgage debt, $2,096.74 debt, $175 damages, &c.

June 26th, 1843, judgment of Chew, use trustees Real Estate Bank. Same day said trustees recovered against orator and Mark Izard in same Court.

April 6th, 1843, George G. Keeler established a mechanic's lien for $644, on west-half of north-west quarter of south-west quarter of section 18, township 1 north, range 12 west.

June 26th, 1843, judgment of Robins for $1,596.72, to be satisfied out of lots 4, 5, 6 in block 101, being mechanic's lien, relating back to 29th March, 1843. The above are all the liens ever created or existing on said lands, &c.

The earliest liens upon any portion of said property were the debts of De Baun & Thorn, due to Beach and Ringo, which were equitable liens on the undivided half of the said premises in blocks 1 and 38, as aforesaid. The next oldest lien was said mortgage to the Real Estate Bank, which would be foreclosed during the then term of the Court, the amount of the debt secured whereby was $4,850, with interest, &c., payable in the paper of the Bank, then worth forty cents on the dollar. The next oldest liens were the judgments of Gray & Bouton and Beach.

Sets out the release of Thorn from the Beach judgment, 27th May, 1840, as shown by *exhibit No.* 5, to Beebe's answer, and submits that though he, De Baun, was not thereby released, yet it was a consequence of said agreement that no lien thereafter remained on said undivided half of the premises in block number one, by virtue of said bond of said Thorn as to said Beach, but said lien was extinguished, and lost to him; and it was another consequence that as to other creditors of orator, said release of Thorn operated a release of orator, to this extent, that the lien of said judgment on all property of orator was thereby relinquished and utterly lost as against all other liens.

That previous to May, 1843, Beebe purchased said judgments

of Gray & Bouton and Beach, and bound himself, in the contract of purchase to resort exclusively to said numbers 1, 2, 4, 19 and 20, for satisfaction thereof, whereby both said judgments then ceased to be liens upon all other property of orator.

That no execution issued on either of said judgments of Gray & Bouton and Beach, until 19th February, 1841, nor on that of Jessup & Beers until 7th May, 1841, on which days respectively *fi. fa.* was issued on each, returnable to September term, 1841, and levied on numbers 4, 19 and 20, (the latter described in the levy as township 2 north, range 11 west,) which property was appraised to the sum of $4,862.50, and no person bidding two-thirds thereof, it was reserved from sale.

On 31st December, 1842, writ of *ven. ex.* with *fi. fa.* clause was issued on each of said last named judgments, returnable to March term, 1843, which were returned unsatisfied by order of attorneys of plaintiff's in consequence of an act changing the time of holding the then next term of the Court.

Whereupon, in the case of Jessup & Beers on the 17th April, 1843, and in the cases of Gray & Bouton and Beach, on 2d May, 1843, writs of *ven. ex.* were issued, the first and last of which contained a *fi. fa.* clause, but the one on the judgment of Gray & Bouton contained no such clause as would appear by *exhibits K. & L.*, to the supplemental bill, and a copy of the writ of Jessup & Beers, made *exhibit F. F.*

That on said judgments obtained respectively by the Real Estate Bank, on the 28th September, 1841, by said Waldron and others, and Marsh & Marsh, writs of *fi. fa.* issued; on the first, 13th October, 1841, and on the other two, 23d December, 1841, each of which was levied on said numbers 1 and 2, being premises in block number 1, which were appraised at $25,000, and no one bidding two-thirds thereof, were not sold; and that writs of *ven. ex.* issued in each of said cases: on said judgment of said Bank 17th April, 1843, and on said two other judgments 1st May, 1843, simply commanding the sale of said premises.

That said sheriff levied said writs in the cases of Gray & Bouton and Beach, on all the lands and premises aforesaid except

said lots 4, 5, 6 and 9 in block 38, and except number 27 as above designated. He also levied the same on the following lands, none of which ever belonged to orator: north-east fractional quarter section 2, township 2 north, range 13 west; north-west quarter of north-east quarter of section 24, township 1 north, range 13 west; north-east quarter of south-east quarter of section 24, township 1 north, range 13 west; east-half of north-west quarter of section 18, township 1 north, range 12 west—said writ of Jessup & Beers was also levied on personal property of orator.

Said writs of Gray & Bouton, Beach, Jessup & Beers, R. E. Bank, Waldron and others, and Marsh & Marsh, were the only executions issued against orator to the May term, 1843: that, on said levies being made, he, protesting against them as illegal, on the 12th and again on the 25th May, 1843, in writing notified the sheriff to sell said lands in certain order therein stated, *to wit:* first, all said premises in said city, in the order following:

First, lots 7 and 8 in block 1 [*Nos.* 1 *&* 2.]

Second, lots 4, 5 and 6 in block 101 (*No.* 6.)

Third, lots 7 and 8 in block 38 (*No.* 5 and part *No.* 4.)

Fourth, lot 5 in block 1 east Q. Line (*No.* 7.)

And to sell said lands in a certain order therein prescribed, all of which would more fully appear by *Exhibit No.* 2 to Beebe's answer, and *Exhibit C.* to Lawson's answer to original and supplemental bill. He also thereby required said sheriff, as by law he had the right to do, to sell a large portion of said lands, at and upon the lands themselves, instead of selling them at the Court-house door, as by said *Exhibits* will also appear.

States the filing of the original bill by Whiting & Slark, on the 29th May, 1843, the day of sale, the parties, its prayer, the restraining order made by the Court in reference to said sales, the subsequent rescinding of said order and sales, the second sale and Beebe's purchase, the filing of the supplemental bill, parties, and prayer, &c.—that the sale was made in conformity with said order on the 29th May, 1843, and submits, *first:* that upon the presentation of the bill no such order could legitimately be granted, but that the application should have been to suspend and delay all

sales until the whole matter could be heard and determined, because the preliminary order prayed by the bill was only matter for a final decree; and because the prior incumbrancers had the right to offer to substitute Whiting & Slark to their liens, on their prior debts being paid, which prior debts Whiting & Slark must have paid, or their bill thereupon have been dismissed; and therefore such order, and the succession in which such sales were made, being contrary to the directions of orator, such sales were at his option voidable; but whether, as the whole property was exposed to sale, said creditors could, or could not avoid said sale, orator was not advised.

Second: That after said bill was filed, Gray & Bouton and Beach appeared thereto, and thereby the whole matter was transferred into this forum [*Pulaski Circuit Court in Chancery*], and said property could be sold only under a decree in equity adjusting all conflicting rights and interests.

Third: That as there was no mandate for a further levy in said writ of Gray & Bouton; as such mandate in said writ of Beach was void; as by agreement made by Beebe, the owner and assignee of said judgments, they were to be satisfied only out of said Nos. 1, 2, 4, 19, and 20; and as said *fi. fa.* clause in said writ of Jessup & Beers was void, so that said premises in block No. 1, were not levied on by one, and could not be levied on by either; therefore no sale could legally be made, or was in law made, under either of said writs of said premises in block No. 1; nor could said judgment of Beach, in equity interfere with any other claim, owing to said release of said Thorn.

Fourth: That under said writs of said R. E. Bank, Waldron and others, and Marsh & Marsh, no other property than the premises in block No. 1, could be levied on or sold, there being in them no mandate for further levy.

Fifth: That as before either of these last mentioned judgments was obtained, said deed of trust had been on a good and valid consideration, executed, and was good in law, orator had parted with all his interest in said premises in block No. 1, the original

levy on said premises by the writs of those judgments was a nullity, and said judgments never constituted any lien thereon.

That tract No. 16 was, before orator became the owner thereof, forfeited to the State for taxes, afterwards sold by the State, and was held by Medrano, as to the validity of whose title orator knew nothing.

So far as orator had been able to ascertain from the imperfect and conflicting memoranda of said sheriff, the following purchases were made at the sale in May, 1843:

Fowler purchased Nos. 1 and 2, for $903.56.

Desha purchased lots 7 and 8, in block 38, (being No. 5 and part of No. 4,) for $100.

Trapnall purchased No. 7 for $225—and lot 9, in block 38, (part of No. 4,) for $220.

Fenno purchased No. 6, for $35.

Trapnall purchased all the lands mortgaged to said bank for $903.

Bertrand purchased No. 21, for $18.

Trapnall purchased Nos. 16, 37, 38, 22, 23, and west-half of north-east quarter, and north-west quarter of south-west quarter of section 24, township 1 north, range 13 west; and east-half of south-west quarter section 13, township 3 north, range 13 west; and north-east fractional quarter of section 2, in township 4 north, range 15 west; and north-west quarter of section 9, in township 2 north, range 13 west, (none of which belonged to orator) for $190.

Blackburn purchased Nos. 31, 33 and 26, for $15.

Faulkner purchased Nos. 35 and 36, for $60.

Lincoln purchased No. 25 at $4.

Also appeared from a memorandum of the sheriff in Exhibit C. of Lawson's answer, that Trapnall also purchased Nos. 17, 29, 34—Lincoln No. 18—Blackburn No. 27, and Bertrand No. 16.

Submits that as to the lands mortgaged to said bank, the sale being made after the bill filed to foreclose, the purchaser took nothing by said sale; obtained no right to redeem—that the or-

der of Court setting aside said sales could not operate to give the judgment creditors of orator the right to interfere with the course of proceedings of said Court upon said bill, by suing out executions at law, and selling and sacrificing said property, but only to draw the whole matter into said forum there to be determined by decree—that the whole matter in regard to said levies, being by the said bill and proceedings transferred into said Court, it would not permit a common law tribunal to interfere with the progress of this suit by causing sale of the property over which this Court had obtained equitable jurisdiction.

Yet, after said rescinding and annulling order was obtained, and said original bill still pending and unanswered, writs of execution were caused to issue from the common law side of said Court as follows:

On judgment of Gray & Bouton, a *ven. ex.* to sell property originally levied on by their *fi. fa., to wit:* Nos. 4, 19, 20, with alleged *fi. fa.* clause; dated July 14, 1843.

On judgment of Beach, a like writ to sell same property, with *fi. fa.* clause; dated July 14, 1843.

On said judgment of Real Estate Bank, obtained 28th September, 1841, a like writ to sell same property originally levied on by execution on same judgment, *to wit:* Nos. 1 and 2, being premises in block No. 1, with a *fi. fa.* clause; dated July 13th, 1843.

On said judgment of Ringo, a *fi. fa.,* dated September 8th, 1843.

On the judgment of Jessup & Beers, a *ven. ex.* to sell the property originally levied on by the execution on that judgment, being Nos. 4, 19, and 20, with a *fi. fa.* clause; dated October 3d, 1843.

On judgment of Marsh & Marsh, a *ven. ex.* to sell Nos. 1 and 2, with a *fi. fa.* clause; dated October 1st, 1843.

On judgment of Waldron et al., a like writ to sell Nos. 1 and 2, with *fi. fa.* clause; dated October 1st, 1843.

On judgment of Gottschalk, Wm. H. Witherill, and Gasquett

and others, writs of *fi. fa.,* dated September 29th, and others September 30th, 1843.

On judgment of Beirne & Burnside, a *fi. fa.,* dated 9th September, 1843.

On judgment of Chew, a like writ, dated September 13th, 1843.

On judgment of Robins, a special execution against said pro-
$50—and in No. 7, $425.

No other executions were issued against him to November term, 1843, and on none of them were levies made, except on those of Gray & Bouton and Beach, Real Estate Bank, Jessup & Beers, and Ringo: all of which were levied on part of the lands above mentioned, *to wit:* on Nos. 19, 20, 22, 23, 25, 26, 34, 35, 36; on all said lands mortgaged to the Real Estate Bank; and on Nos. 1, 2, 3, 4, 5, 6, 7 and 39, and on a tract never owned by orator, *to wit:* north-east quarter of section 2, township 4 north, range 15 west.

All which were offered for sale on the 27th November, 1843, at which sale the following purchases were made:—*Beebe* purchased Thorn's interest in Nos. 1 and 2, for $50—in No. 3, for $551—in No. 4, for $56—in No. 5, for $11. The interest of orator in Nos. 1 and 2, for $325—in No. 4, for $435—in No. 5, for $50—and in No. 7, for $425.

Trapnall purchased all the lands mortgaged to said Bank for $330—No. 26, for $5—No. 22, for $30—No. 23, for $15—No. 19, for $110—said tract not owned by orator, for $10—No. 39, for $5—and the west fractional half of section 2, in township 2 north, range 11 west, for $11.

Faulkner purchased Nos. 34, 35 and 36, for $80—*Lincoln* No. 20, for $45—*Fenno* No. 21, or the Archer place, for $12—and *Robins* No. 6, for $5.

All which would appear more fully by *Exhibits* 8, 9, 10, and 15, of the answer of Beebe, and by *Exhibits* from *F. F.* to *R. R.* inclusive, hereto.

As to all which proceedings, he submits that the *fi. fa.* clause in all said writs of *ven. ex.* was illegal and conferred no power

on the sheriff; that at the utmost, no property except No. 4, 19 and 20, could legally be sold under the executions either of Gray & Bouton or Beach; that said writs in favor of said Bank and Ringo were illegally levied on such of said property as was included in said deed of trust, among which were Nos. 1, 2, 14, 15, 16 and 17, and said lands mortgaged to said Bank, except the east-half of the west-half of the south-west quarter of section 18, in township 1 north, of range 12 west, because said judgments were no liens thereon. That whatever lien said Ringo had, or could be substituted to, under said bond of Thorn, he could only enforce in equity; that the judicial sales previously made could legally be cancelled only by judicial proceedings, whereto the purchasers should have been parties; and, consequently, that a subsequent sale of the same property was void.

That if any portion of said property was legally sold under said execution in favor of Ringo, it was held by the purchaser subject to all liens prior to Ringo's judgment, and orator was entitled to have the same made available in satisfaction thereof.

Before said sales under executions, or either of them had been made, *to wit:* on the 22d April, 1843, Reardon, Woodruff and Watkins, under and by virtue of said deed of trust, did sell, and on the 24th. of same month, convey to Beebe, all the land and negroes mentioned in said deed of trust, for $426; under which sale, if valid, Beebe held said property, subject to, and charged with all prior liens, *to wit:* said judgments of Gray & Bouton, Beach, Jessup & Beers, said mortgages to Whiting & Slark, Beirne & Burnside; and, moreover, all the levies made on said property after said sale, were mere nullities.

On the 18th March, 1844, another writ issued on said judgment of Jessup & Beers, which, reciting said several executions theretofore issued on said judgment, the original levy, appraisement, reservation from sale, and the subsequent levy on the writ to November term, 1843, and that the whole property so levied on had been sold, except Nos. 3 and 4; commanded said sheriff to sell the residue of said property, &c., with a *fi. fa.* clause, upon which, said sheriff advertised and sold Nos. 3, 34, 37, 38, 29, 31, 33 and

40, which lands were sold as follows: No. 3, to *Jessup* for $10—No. 18, to same for $1—No. 37, No. 38 and No. 40, to same for $7—No. 29, to same for $7—No. 31 and 33, to same for $30—No. 24, to *Drew*, for $18—as would appear by said writ and return made *Exhibit R. R.*

Submits that the whole of said sales were void for the several reasons before stated—that there were no other executions issued against him to May term, 1844, and no sales had been made of any of his lands except as above.

That no legal sale had been made of any of said lands; but, if any legal sale had been made of any of them, still no legal sale had been made of any of the land mentioned in said deed of trust, and especially Nos. 1 and 2.

That no legal sale had been made of No. 3, either of the interest of orator or Thorn therein.

That if any legal sale had been made of lots 4, 19 and 20, such sale was made under the executions of Gray & Bouton, Beach, Jessup & Beers and the purchasers hold said lands subject to the lien of the said debt of Ringo.

That whatever other lands had been sold, had been sold under said execution of Ringo, and still stood charged in the purchaser's hands with all previous liens.

That whatever interest Thorn had in any of said lands, neither had been, nor ever could be legally sold on any of said executions.

That said sale under said deed of trust was advertised for the 4th March, but postponed to the 22d April, 1843, by the trustees; that owing to various circumstances, and especially to the general belief that the trustees could make no title to the property, no bidders were present, so that Beebe bought at what price he chose; said sale being made at orator's residence, in the country, and not in Little Rock; in consequence whereof, said property sold for nothing, and the sale ought in equity to be set aside.

That said bill for $1,600 due the Bank of the State [one of the debts secured by the deed of trust] was in part paid by orator, but Beebe settled the residue, being $1,600, on 29th April, 1842, by

paying in the paper of said bank, worth 50 cents on the dollar, $153.38, and executing his note for $1,500 due at six months.

That Woodruff settled said notes to said bank, one for $6,500, and one for $600, [debts secured by said trust deed,] on the 27th December, 1842, by paying $864.40, in paper of the bank, worth 50 cents on the dollar, and giving his note for $7,100, which note, and said note given by Beebe, were payable by ten annual instalments in the paper of the bank.

Said bill for $3,000, held by the Real Estate Bank, [one of the debts secured by the trust deed,] had not been paid or settled, but judgment had been obtained against orator, which was the said judgment in favor of Beverly Chew, and suits were pending against Johnson and Thorn thereon; and there had been paid on said bill, besides $990.71 in said deed of trust mentioned, the further sum of $38.86, October 14th, 1840, and $113.18 paid November 21, 1840.

That said note (named in said deed of trust) to said bank for $3,100, on which the judgment above mentioned, rendered 12th November, 1841, was obtained, was settled by Woodruff and Ben. Johnson, on 1st May, 1844, by note for $4,107.50, being amount then due in the paper of that bank.

That said note (named in said deed of trust) for $630, to said Real Estate Bank, was settled by Beebe 25th May, 1843, (being same note on which judgment was obtained on 28th September, 1842,) by his note dated 1st January, 1843, for $795.37, the amount then due on it in the paper of said bank.

That before said judgment on the 28th September, 1841, was obtained, *to wit:* on 14th October, 1840, the note for $3,500 to said Real Estate Bank, on which said judgment was obtained, was renewed by Reardon and Beebe, by their giving said note for $3,000 in said deed mentioned, executed by orator as principal, and them as securities, orator paying all the curtail and interest; so that said judgment never was any lien on any of said lands, and all proceedings under it were void; and said note for $3,000 was settled as of the 1st January, 1843, on the 25th May, 1843, said Beebe paying paper of that bank, and by his note

$1,366.60, and said Reardon $2,204; all which notes so executed by said securities to said bank were payable by eight annual instalments from 1st January, 1843, in paper of said bank, and all payments were made in such paper worth fifty cents on the dollar.

That the whole amount of sales under said deed of trust was $1,270.62 in good funds, deducting wherefrom the sum of $426. the amount paid by Beebe for the lands and negroes, (inasmuch as he never obtained possession of said negroes,) there remains $844.62, which is equal to $1,689.24, in Arkansas paper. Besides which, Reardon had received in Arkansas money, from the sale of goods placed in his hands by orator $2,230.85; and orator placed in the hands of Woodruff, assets, such as notes and accounts, to about the amount of $18,000, to be collected by him, in consideration whereof he agreed to assume in the bank, the amounts settled by him as aforesaid, and to refund to orator any balance received by him after re-paying to himself the amount of his said assumption; all which assets were due and payable in good funds, and a large part of them, how much orator does not know, have been collected, a list of which assets would be made *Exhibit V. V.*

The only amounts which had been paid on any of said judgments (excepting always the amounts received by said sales under execution) are as follows: on the claim of Gray & Bouton, orator paid before judgment, on the 28th January, 1839, $1,025.14, with which amount said judgment should have been, and was agreed to be credited as of that date. On the judgment of Beach, he paid, on the 10th September, 1840, $1,125.

That the property aforesaid, owned by him when the original bill was filed, was amply sufficient in amount and value to have paid every debt he owed in the world, and would have done so if it could have been fairly sold and properly disposed of; but that in consequence of the filing of said bill and the doubt thereupon created as to the validity of said first sale, and of the order and manner in which said property was sold; and in consequence of the conflict between said two first sales, the uncertainty

of any title to be obtained, and the certainty of buying litigation; the amount of each of said three sales respectively, was not one twentieth part of the value of said property, as was apparent from the prices themselves; inasmuch as said Nos. 1 and 2, then were, and still are worth at least $20,000, and the whole of said property at least $50,000, at a very moderate and reasonable estimate in good money; so that not only had nearly the whole of orator's property been sacrificed, if said sales or any of them were valid, for less than $2,000, a few only of his debts were paid, and he was utterly ruined, but innocent persons to whom he sold in good faith had been robbed of property honestly acquired, faithfully paid for, and hardly earned.

Prayer—that all of said sales be cancelled and held for nought; all deeds and pretended titles thereunder obtained, cancelled and avoided; that said trustees, and each of them, under said deed of trust, render a full account of all moneys and assets received by them as aforesaid; that said Beebe render a full account of all rents of any of said property received, or which ought to have been received by him; that said property and the securities and assets aforesaid be marshaled, and said lands sold by a commissioner, to be appointed by the Court, after said liens have been paid according to priority, as far as personal assets will extend, and the proceeds thereof faithfully appropriated according to equity, so that, if possible, said property sold by orator to Le Baron, might be saved to him as a *bona fide* purchaser, and likewise said property sold to said Pendleton and to said Whitmore, and that if necessary, a receiver be appointed to receive and collect said assets in the hands of Woodruff.

Or, that if the whole of said sales cannot be cancelled, then that the lands, if any, which had been legally sold, and whereon prior liens still rested and were charged, be sold by such commissioner to satisfy said liens, after and with the like marshaling of securities; and that all moneys paid for and on account of said illegal sales, be returned to the persons properly entitled thereto; and all moneys illegally appropriated or paid, rightly and properly appropriated; and that all the property of orator

be faithfully, and to the best advantage applied to pay and satisfy his just debts—for general relief—and that no decree be rendered in said original suit until this cross-bill was heard and determined.

The Exhibits to the cross-bill are, substantially, as stated therein.

July 3d, 1844—Decree *pro confesso* on original bill as to Aldrich, Thorn, Ben. Johnson and Erwin. Disclaimer by Fowler to cross-bill—most of defendants to cross-bill enter their appearance, and cause continued.

April term, 1845—Ben. Johnson answered—admits execution of the trust deed, for the benefit of himself and others, and that the Real Estate Bank recovered judgment against De Baun, Woodruff and himself, 12th November, 1841, for about $3,100—no knowledge as to truth of the other allegations in the bill, and denies generally.

Lincoln answered cross-bill. He purchased number 20 at both execution sales, and claims one or the other to be valid. Did not purchase number 25 and 18, as alleged.

Blackburn answered cross-bill, disclaiming title, except as to Nos. 27, 29, 31 and 33, which he alleges he purchased at Marshal's sale, 3d December, 1842, under execution on the Chittenden judgment, for $13, which he offers to surrender on repayment of purchase money, &c. He paid nothing and claimed nothing on his other purchases at said sales

Replication to Ben. Johnson's answer by Whiting & Slark.

Trapnall answered original and supplemental bill (May 29th, 1845.) He states that the late firm of Trapnall & Cocke, as attorneys at law, obtained judgments against De Baun on the claims of Beach, Gray & Bouton, and afterwards in the cases of Jessup & Beers, Chittenden, Witherill, Gottschalk, Gasquet & Co., Waldron, Thomas & Co., and Ralph Marsh & Co. That the judgments of Beach and Gray & Bouton were obtained before the mortgage of Whiting & Slark, and were a lien on the mortgaged premises. That long after said judgments were rendered, and before any sale of said property, Beebe represented to him

that he, having been De Baun's security, for a large amount, had been deceived, and defrauded by him and greatly damaged thereby, and thought if he could get control of said judgments, with a prior lien on said property, he might extricate himself without much loss, and proposed to pay to respondent, on the day of the sale of property under executions on said judgments, or shortly after, what might be due on said judgments, and confine said judgments and executions thereon exclusively to the property embraced in said mortgage, commonly called De Baun's corner, and have the proceeds of all other property sold under said judgments applied to the other judgments against De Baun.

Respondent, confiding in Beebe's representations, and finding that he might by said agreement open the way for making all, or part of said prior judgments, out of the residue of De Baun's property, consented to the proposition, and an agreement was drawn up to the effect as stated above, and assignment made of said judgments to Beebe, and Beebe gave a mortgage to secure the payment of what might be due on said judgments. On the day of sale, complainants exhibited their original bill, obtained said restraining order, under which a sale was made by the sheriff; and property purchased by different persons as stated in supplemental bill, and amongst the rest the mortgaged premises (De Baun's *corner*) was struck off to Fowler. Respondent was under the impression that Fowler declared at the time that he was bidding for himself; and he certainly did not, so far as respondent knew, intimate that he was purchasing for complainants.

Said sale was afterwards set aside, &c. Afterwards, other executions were issued on said judgments, and the property again sold at the succeeding term of the Court, and purchased as stated in said supplemental bill. Shortly after which, Beebe paid Trapnall & Cocke about $2,400, being in full of the residue of said judgments and interest, exclusive of costs, remaining after deducting all payments by De Baun previous to said assignment: upon which respondent surrendered to said Beebe said mortgage, and he believes the agreement aforesaid, is lost, as he could not, after diligent search, find it.

Respondent, as to said lands so purchased by him as aforesaid, objects to any re-sale or marshaling to that extent of the property of De Baun, because, *first:* said sale, his purchase, the sheriff's deed (made exhibit A.) were all valid in law, and equity, and gave respondent full title, &c.

Second: All of said lands so purchased by him, were on the 28th May, 1844, sold by the sheriff, for taxes, &c., due thereon, according to law, purchased by Beebe, who took the sheriff's deed therefor, and on the 14th September, 1844, Beebe and wife conveyed said lands to respondent, which deeds were duly recorded, &c., and gave him a valid title, &c.

Third: Because by the transfer of said judgments made as aforesaid to Beebe, before said sales, and lien by virtue of said judgments on any of the lands and property of De Baun was released by Beebe, and he bound himself to confine said judgments and executions thereon exclusively to *De Baun's corner,* the property embraced in said mortgage as aforesaid.

Admits the execution of the mortgage to complainants, deed of trust to Beirne & Burnside, judgments on said claims, executions on judgments of Beach, Gray & Bouton, filing of the original bill, order of Court thereon, sale by the sheriff at May term, 1843; but as to the returns of the sheriff, the payment of the money, &c., tendering of a deed, &c., as alleged, he does not recollect any thing with certainty. Heard a discussion in court about it, but remembers none of the particulars.

Admits that the second sale was made as alleged, which was forbidden by Fowler, and respondent thinks he made a counter proclamation as alleged. Admits purchase made at second sale as alleged—that Beebe purchased the Alhambra property, got into possession of part of it at least, had been receiving rents, &c., and that a deed was made to him by the sheriff therefor.

At said sales, he did not bid for, or purchase, said property as attorney for Beach and Gray & Bouton.

On the judgment of Beach, $1,125 was paid 10th September, 1840, and on the claim of Gray & Bouton $1,025.14 was paid to them on the 25th June, 1841, which ought to have been credited

on said judgment, and of which Beebe was aware, and the assignment, was only for the residue of the judgment, and this was the only payment of which respondent was aware.

Trapnall (on same day) filed his answer to the cross-bill of De Baun. Admits that De Baun owned property as alleged—his purchase of Thorn—conveyance to Pendleton—the execution of mortgages, deeds of trust, recovery of judgments, issuance of executions, sales and purchases, &c., as alleged. States the same facts in reference to the transfer of the judgments of Beach and Gray & Bouton, &c., to Beebe, as stated in his answer to the original bill. Claims title as in said answer—also states that at the sale under the trust deed, Beebe purchased the homestead, embraced in the mortgage to the Real Estate Bank, and afterwards conveyed the same to him.

Pendleton answered the cross-bill, (June 7th, 1845,) admitting all the allegations therein to be true—states that he purchased of De Baun, supposing him to be the legal owner thereof, on the 13th November, 1839, said lots 4, 5 and 6 in block 38, at $2,000, gave his note therefor, took bond for title, and afterwards paid the note, and obtained a deed therefor—bond and deed were both recorded as alleged in the cross-bill. Submits that said lots were not subject to any of said liens, as said bond was recorded before any sale thereof under said executions. That after purchasing, he erected a house, &c., thereon, at an expense of $8,000, before said sales, and he submits that if any execution purchaser had obtained title to Thorn's interest thereon, they ought to be divided so as to leave the house on defendant's portion.

Le Baron answered cross-bill of De Baun same day, admitting the truth of the allegations thereof. He purchased 22d October, 1840, of De Baun said lot 5 in block one, paid him therefor $5,-500, and obtained therefor a deed as alleged in the said cross-bill, and prays the protection of his rights as an innocent purchaser.

Sabin answered the cross-bill, (June 9th, 1845,) admitting as true all the allegations therein—states Whitmore's purchase of De Baun, lot No. 7 in block 38, his purchase of Whitmore, and

De Baun's deed to him as alleged in the cross-bill, exhibiting De Baun's bond for title to Whitmore.

Ringo answered the original, supplemental, and cross-bills (June 10th, 1845.) He admits the recovery by him of judgment against De Baun & Thorn, on a firm debt, as alleged in the bills; that on the 25th November, 1843, he sold and assigned the same absolutely to Beebe, for a valuable consideration, without recourse; and disclaims any interest in the matters in controversy.

June 12th, 1845—Replication to answers of *Blackburn* and *Lincoln* to cross-bill. Suits abated as to *Whitmore,* in consequence of his having been sentenced to the Penitentiary. *Imbeau's* death suggested, and abatement as to him. Decree *pro confesso* on original bill as to *Mitchell, Fitzgerald, Colby's administrator, Nelson, Gray, Bouton, Beach, Woodruff, Reardon, Chittenden, Witherill, Jessup, Beers, Gottschalk, Wm. and James Gasquet, Conway, Chew, Ralph and John Marsh, Waldron, Thomas, Day, Mygatt and Trustees of Real Estate Bank,* to become final, unless they showed cause on or before 3d day next term.

Drew filed a disclaimer to cross-bill, June 13th, 1845.

Reardon, Woodruff and Watkins filed a joint and several answer to De Baun's cross-bill (June 14th, 1845.) They admit the execution of the deed of trust to them, by De Baun and wife, on 4th September, 1841, for the purposes therein stated, and above shown. State that before and at the time said deed was executed, the lands enumerated therein were heavily encumbered by mortgages and liens of judgments, as set forth in said cross-bill, which rendered the security of the deed of trust, so far as the lands were concerned, practically of little or no avail.

On 22d April, 1843, respondents having been before then duly notified and required to make sale under said deed, and in like manner on 25th June, 1843, and both of said days, having given the notices thereof contemplated in the deed, fixing time and place in accordance with the wishes of De Baun, they sold all the lands embraced in said deed of trust, and the right and title under and by virtue of the same to the slaves embraced therein, which slaves De Baun had removed beyond the reach of respon-

dents, and failed and refused to deliver up to them, and also all the other property, &c., embraced in said deed which could be found, or which they were unable to obtain possession of; a correct account whereof, together with expenses, &c., showing the amount of money which came to the hands of each trustee, the amount of expenses paid by, and compensation due to each trustee, and the nett balance of proceeds due to, or in the hands of each of said trustees, respectively, subject to be appropriated towards debts of De Baun, as enumerated in said deed, was made *Exhibit A.*

On 25th May, 1843, and afterwards, sundry judgment creditors of De Baun, alleging said deed of trust to be void, under the bankrupt act of 19th August, 1841, caused writs of garnishment to be sued out, and served upon respondents; as supposed debtors, &c., of De Baun, whereby they were greatly hindered in the execution of said trust, pending the same, and the same remained pending until after the exhibition of the cross-bill.

Reardon for himself states that, on the 1st January, 1843, he purchased of Imbeau part of a lot of goods which De Baun had sold to him during the previous summer, and held his paper therefor, for which goods respondent arranged with Imbeau & De Baun to pay in Arkansas money $2,230.85, equivalent to $800 or $1,000 par funds, which De Baun and Imbeau agreed that he might apply upon a judgment in favor of the Real Estate Bank against De Baun as principal and respondent and others as securities, obtained 27th September, 1841, for $3,500, with interest at ten per cent. from 14th October, 1840, and De Baun cancelled the paper of Imbeau to the amount of the value of the goods so purchased of Imbeau by respondent; and respondent took Imbeau's invoice and bill of sale for said goods, and soon after paid for the same to the amount, and in the manner so as aforesaid stipulated. Further states that not more than from one-half to two-thirds of the amount or value given by him for said goods had been or was likely to be realized from them—denies that there is in his hands any part of the amount agreed to be paid, and paid

by him, as aforesaid for or on account of said goods subject to be marshaled, as contemplated by said cross-bill.

Has in his hands $201, of said trust fund, as shown by *Exhibit A.,* subject to appropriation under the deed, &c.

Woodruff, for himself, states that on the 26th December, 1842, he purchased of De Baun certain notes, accounts, claims, and judgments, and took De Baun's assignment thereof, supposed to amount to about $15,000, for which he assumed and paid certain debts of De Baun to the State and Real Estate Banks, amounting to $10,000, and relinquished to that extent the interest of respondent under said deed of trust. About one-half of the claims, &c., so transferred to him, were worthless, a large portion of the residue doubtful, and only collectable by compromise, &c., subject to off-sets, &c. He had only been able to realize nominally of the whole amount about $1,513, and had not actually realized, above expenses, &c., more than $1,000. That said assignment was absolute, unconditional, and in good faith, &c. Denies all right of complainant to call on him for an account thereof, or to have the same marshaled, &c. Prays leave to file a copy of said assignment, release, assumption, and statement of amount collected, &c., marked *Exhibit B. C.* Has in his hands, as one of the trustees under said deed, as shown by *exhibit A.,* $1,191, including amount bid by Beebe for lands and negroes at the trust sale, *to wit:* for lands $232, for negroes $191, making $426, subject to appropriation under the deed, &c.

Watkins answered for himself that no part of the trust funds had come into his hands as trustee. He was entitled to $118.88, for expenses, &c.

Exhibit A., referred to in the above answer, shows amount of sales on 22d April, 1843, under the trust deed $898.25. May 25th, 1843, $635.25: total $1,533, which is reduced by expenses and compensation to trustees to $1,270.62. Also a statement of the part thereof held by each trustee, &c., &c.

Replication to said answer, *June 18th,* 1845. Same day said trustees filed a disclaimer to the original and supplemental bills,

stating the making of said trust deed, and the execution of the trust by them before the filing of said bill or supplement.

Replication to Trapnall's answer to original bill *June 18th,* 1845; also to answer of De Baun.

Desha answered the cross-bill of De Baun, (18th June, 1845,) stating that by his agent, Fowler, he purchased, at the sale on 29th May, 1843, lots 7 and 8 in block 38, at $100, and paid the money to the sheriff, but ascertaining that he could not get a title without litigation, he instructed Fowler to get his money back, if he could; and Fowler did, on the last day of said May term, receive back from Lawson said $100, and afterwards paid it to him. He therefore disclaims an interest, &c. Said answer is sworn to by Fowler.

June 18th, 1845: First exception to Lawson's answer to original bill sustained, and second overruled—complainants ordered to produce for inspection *exhibit O.,* before Lawson was required to answer further.

Replication filed to Beebe's answer to original bill, (exceptions having been previously filed thereto, and now withdrawn.) Beebe moved to strike out the said replication because it was not in time, the court overruled the motion, and he excepted.

Lawson filed an amendment to his answer to the original bill (23d June, 1845,) stating, in substance, that Fowler presented to him for his signature the receipt for $1,000, which, in the hurry of business, he signed, without looking at it further than to see that it was for the proper amount. It was in the hand-writing of Fowler, except the date, and Fowler informed him it was for the money paid by him on his purchases at the sale on the 29th May, 1843. *O.* was a correct exhibit of it. Replication to Lawson's answer.

Whiting & Slark filed their answer to De Baun's cross-bill 25th October, 1845. They admit that De Baun owned the real estate described in the bill, and that Thorn executed to him said bond. Admit the recovery of the judgments of said Beach and Gray & Bouton; deny the legality of said writs of *sci. fa.* to revive them. aver that neither of them had been revived, and that in the case

of Beach, the writ had been adjudged bad at the then present term of Pulaski Circuit Court, and judgment rendered thereon against Beach. Aver that both of said judgments had been fully paid and satisfied, in part before, and in part since the filing of the original bill, and that they constitute no lien on any of said real estate. State the execution of their mortgage; admit the recovery of the other judgments mentioned in the cross-bill, but deny that the Ringo judgment was upon a debt contracted by said firm mentioned in said bond from Thorn to De Baun. Allege that, on the 26th June, 1843, they recovered a judgment against De Baun, in Pulaski Circuit Court, on part of their mortgage debt, for debt $3,886, and damages $303, with interest, &c., made *Exhibit P.*, which, they aver, constituted a lien upon all the real estate of De Baun in said county from its rendition, and pray that said lien may be enforced, if the Court should decree a re-sale of the property.

Deny that the lien of the Ringo judgment was precedent to their mortgage, and insist that the release of Thorn from the Beach judgment, 27th May, 1840, operated as an extinguishment of the lien of said judgment on the property mortgaged to them, as also upon the other real estate of De Baun.

Admit that they, by their agent, Fowler, purchased the premises mortgaged to them, at the sale in May, 1843, as alleged in their supplemental bill, and that they paid the sheriff therefor as therein stated. They submit that the action of the Court setting aside the restraining order, and said sales, was illegal and void, and that the sale so made to them was in full force, valid, &c. That the restraining order was legitimately granted, and that De Baun had no legal or equitable right, under the circumstances of the case, to direct what property should be first sold, when such direction was to operate to the prejudice of the lien of respondents under their mortgage.

They deny, on information from Fowler, that he made any purchase in his own name, or for himself, at said sale on the 29th May, 1843, but aver that he purchased for them, as in their supplemental bill alleged.

Exhibit P. shows the recovery of judgment against De Baun by respondents, as above alleged.

Beirne & Burnside filed their answer to original and cross-bills, *Oct. 27th,* 1845—they know nothing of the allegations contained in said bills except what follows—on the 17th February, 1841, De Baun was indebted to them in the aggregate sum of $6,290.20, payable by several instalments, evidenced by three notes of that date for $2,096.75 each, at 18, 24 and 30 months, to bear interest 10 per cent. after due, made *Exhibit Q. R. S.;* to secure the payment of which De Baun executed to them a mortgage on the same premises mortgaged to Whiting & Slark, on the 26th February, 1841, which was duly acknowledged and recorded, and is made *Exhibit T.*—at which time, they aver, on information, that there was no incumbrance or lien upon said premises but said mortgage of Whiting & Slark, and deny that said judgments of Beach, Gray & Bouton and Ringo were prior liens thereon—that if said judgments of Gray & Bouton and Beach ever were liens on said premises, they had expired by lapse of three years, had not been revived by *sci. fa.* and could not be—also that said judgments had been fully paid and satisfied.

That they obtained judgment in Pulaski Circuit against De Baun on said note first due as above, for the amount thereof, on 22d June, 1843, which is made part of *Exhibit T.,* and which judgment remained in full force, &c.—they pray that all said sales under execution, be set aside as illegal and void, that all the real estate of De Baun mentioned in the bills, be sold, under decree of court, and their said debts paid out of the proceeds of sale—the *Exhibits* to this answer are as stated therein.

Replication to answers of Whiting & Slark and Beirne & Burnside to cross-bill, 29th Oct., 1845—also to answer of Beirne & Burnside to original bill.

Dec. 16, 1845—Suits abated as to Real Estate Bank in consequence of forfeiture of its charter. Decree *pro confesso* against John Brown on supplemental bill.

BEEBE filed his *answer* to the *cross-bill* of De Baun, 23d Jan'y, 1846. He admits that De Baun & Thorn were the owners of the

property described, and De Baun the owner of the other property named in the cross-bill; that Thorn sold his interest to De Baun as alleged, which vested in him a valid title subject to the conditions specified in the conveyance. Admits that De Baun made the mortgages and several conveyances set forth in *Exhibits AA, BB, CC, AC,* and *EE,* but denies their validity as against his purchases of said property, and insists that the property was subject to the judgments of Gray & Bouton, Beach and Ringo.

Admits the execution of the other mortgages, &c., and the recovery of judgments against De Baun, &c., as alleged. That the debts of De Baun & Thorn to Beach and Ringo were the earliest liens upon the property owned by them jointly; prior to other firm debts; and that the debt of Gray & Bouton was the next oldest lien upon the property of De Baun, except the mortgage to the Real Estate Bank, which was prior upon the property therein specified.

Admits his purchase of the Gray & Bouton and Beach judgments of Trapnall, and his agreement to resort for satisfaction thereof to no other property, except the corner, on which judgments controlled by Trapnall & Cocke were a lien, but denies that he agreed to resort exclusively to Nos. 1, 2, 4, 19, and 20 for satisfaction as alleged in the cross-bill. After said transfer, Trapnall & Cocke continued to give directions in their names as to process upon said judgments, &c.

Does not know whether all the executions named in cross-bill issued to May term, 1843, or not—admits De Baun's directions to the sheriff as to order of sale. Admits the filing of the original bill 29th May, 1843, prayer, restraining order, and the setting of it, and the sales, aside as alleged. States the issuance of said executions to November Term, 1843, sale on the 27th of that month, his purchases, sheriff's deeds, &c., as stated in his answer to original bill, and alleges that he acquired valid titles thereunder. Avers that the *fi. fa.* clause in said writs of *ven. ex.* was legal, and authorized the levies and sales made under them: that the sale on 29th May, 1843, was illegal and void, and properly set aside. Avers that inasmuch as De Baun was hope-

lessly bankrupt, and his property would not pay a fourth of his debts, and all his real estate was (except a small portion) levied on and sold, at said November term, 1843, and did not sell for enough to satisfy but one of said judgments, that said levies under *fi. fa.* clause was not only a reasonable but necessary consequence, and therefore no injury was done De Baun thereby. Denies that De Baun's property was unnecessarily sacrificed through his acts or agency. Avers that all the property sold on the 27th November, 1843, was regularly levied on, advertised, and sold according to De Baun's directions, and all parties interested, notified of the sale; yet owing to the general depression of the times, the acts of De Baun, and his advisers in trying to defeat the sale, want of money, &c., competition at the sale was left to the judgment creditors. That De Baun, and his creditors, or attorneys, were present at said sale, took no steps to arrest it, and therefore virtually assented thereto.

Admits the sale under the deed of trust 22d April, 1843, and purchase by him of all the property, at the prices alleged. Avers the legality of said sale, and also of the sale made 27th November, 1843, under executions in favor of Beach, Gray & Bouton and Ringo, and the validity of his titles thereunder. The trust sale was advertised for 9th February, 1843, by consent of De Baun, and all others interested, except Whiting & Slark and Beirne & Burnside, who protested against it by newspaper publication; but afterwards, by agreement of parties, it was postponed to 25th of said month, but on said day but two of the trustees attending, and the personal property having been removed from the premises, or concealed by De Baun, the sale was defeated. It was again advertised, by consent of parties, for the 22d April, 1843, at which time De Baun promised to have the property present; but failed to do so, and in consequence of the said public protestation of said mortgage creditors, and the fact that it was known that De Baun had removed, or concealed the slaves and other personal property, and refused to produce them, but few persons attended: attributes all suspicions thrown upon

the validity of the sale to the conduct of De Baun, &c., and denies blame on his part or that of the trustees.

Alleges that one Nicolay was present at the sale, and bid upon nearly all the property for De Baun. Alleges that the property sold for its full value, considering the incumbrances on the land, the absence of the slaves, &c. The sale was made at the residence of De Baun by his request. Sales amounted to $1,270—Respondent never obtained possession of any of said slaves, (thirteen in number). Afterwards learned that De Baun had removed the slaves to Louisiana, made a pretended conveyance of them to one Merrill, and caused him to convey them to one Taylor, his friend and agent, of Jefferson county, Arkansas, a copy of which last conveyance is made *Exhibit A. No. 23.*

In consequence of bad faith of De Baun in reference to goods turned over to Reardon, respondent was compelled to pay $1,400 of the $3,500 debt to the Real Estate Bank. Avers that De Baun went to Louisiana or Texas in the summer of 1843, sold said slaves, and converted the proceeds to his own use; and was doing an extensive mercantile business thereon in Pine Bluff. Denies that De Baun had property of sufficient value to pay all his debts, if fairly sold, at the time of filing of the original bill, as alleged—attributes all the doubt thrown over the validity of said sales, and the small amounts the property sold for, to the conduct of De Baun. He had endeavored to prevent his creditors from collecting their debts, concealed the condition of his affairs, made a fraudulent transfer of his goods to his brother-in-law, Imbeau—permitted nearly all his real estate to be sold on the 9th December, 1842, by the Marshal of the United States, under execution in favor of Chittenden, and purchased by Trapnall & Cocke for less than $100; all which tended to destroy his credit, &c., &c. His property would not at any time, within the period aforesaid, have sold for enough to pay one fourth of his debts, &c. Denies that the *corner* property was worth $20,000, and avers that it could not have been sold at any time within three years then past for more than $10,000 cash—denies that the property mentioned in the cross-bill was worth $50,000 as alleged,

and avers that it could not have been sold for over one-third of that amount—denies that De Baun was robbed, &c., by any act of his. Avers that De Baun's liabilities, at the sale in May, 1843, amounted to between $62,000 and $65,000, to discharge which, with interest, &c., he was possessed of the real estate described in the cross-bill which was not worth more than $15,000, and could not have been sold for more than two-thirds of that sum in cash. The larger portion of his lands, were wild, detached, unfit for agricultural purposes, &c., a diagram of which is made *Exhibit C. No.* 25.

Represents the deeply involved and failing circumstances of De Baun from 1840, onward, his extravagance, incumbrances upon his property, &c., &c., and alleges that in procuring the assignment of said judgments to him, his purchases at said sales, &c., he acted in good faith, to save himself as one of De Baun's securities, &c., and not with any design to injure him or others.

Sets up the purchase of Trapnall & Cocke at said Marshal's sale, and their conveyance to him of lots No. 8 and 9 in block 38, and the *corner* property, and makes the Marshal's deed to them *Exhibit D. No.* 26, and their deed to him *Exhibit E. No.* 27.

That De Baun neglected and refused to pay the taxes on his lands, &c., and that in September, 1843, the collector of taxes for the city of Little Rock sold lots 7 and 8 in block one, and lots 8 and 9 in block 38 for taxes, &c., due thereon for the year 1843, and respondent purchased the same at $28, as would appear by the collector's certificates made *Exhibit F. No.* 28.

That on the 28th May, 1844, the sheriff sold said lots, as well as all De Baun's other property situate in said county of Pulaski, for the taxes due and unpaid thereon for the years 1842 and 1843, and respondent purchased the whole of it, except a few tracts of land and said lots 7 and 8 in block one, which lots were purchased by Goodrich, and conveyed to respondent by him—the sheriff's deed to Goodrich, Goodrich's deed to respondent, and the sheriff's deed to respondent made under said tax sales, are made *Exhibit G. No.* 29 and *H. No.* 30. That he conveyed all of said lands so purchased by him at tax sales as aforesaid, ex-

cept lots No. 8 and 9 in block 38, to Trapnall (numbering 28 tracts) for the same consideration he paid for them.

Charges a co-operation between De Baun and Whiting & Slark in exhibiting the cross-bill to defraud him, &c.

That on the 16th day of January, 1846, the judgment of Gray & Bouton was revived on said *sci. fa.*, a transcript whereof is made *Exhibit I No.* 31.

The above is the substance of what is deemed material in Beebe's answer—the exhibits are substantially as stated therein.

BEEBE, on 23d January, 1846, filed amendment to his answer to the original bill, showing that on the 16th January, 1846, the judgment of Gray & Bouton was revived, on the writ of *sci. fa.* above referred to. Also setting up the purchase of lots 7 and 8, in block one, (the corner or Alhambra property), at tax sale, by Goodrich on the 28th May, 1844, and the conveyance thereof by Goodrich to him.

Replication to Trapnall's answer to cross-bill of De Baun, 24th January, 1846. Decree *pro confesso* against trustees Real Estate Bank on said cross-bill.

DE BAUN, on 26th January, 1846, filed *an amendment* to *his cross-bill*, showing the sale of the larger portion of his real property, by the Marshal of the United States, on the 3d December, 1842, under an execution on the Chittenden judgment, the purchase thereof by Trapnall & Cocke and Blackburn, and the conveyance of Nos. 1, 2 and 4, by Trapnall & Cocke to Beebe; alleging that Beebe pretended to claim title thereunder, notwithstanding the many older liens thereon, &c. Also setting out the sale of said Nos. 1, 2 and 4, for city taxes, in September, 1843, and purchase by Beebe; and alleging the illegality of said sale on the grounds that the property had been before then sold under the trust deed, as well as under the Chittenden judgment, and purchased by Beebe, and he claiming title under such sales, should have paid the taxes, &c. Also alleging irregularity in the sale.

Alleges that Reardon had received a sufficient sum from sale of goods placed in his hands to pay off the said note of $3,500;

and that Woodruff had realized from assets in his hands sufficient to pay said notes for $3,100, for $600 and $6,500.

States that though said negroes conveyed by said trust deed, were afterwards removed out of the State and sold by him, it was done with the consent, and by the advice of Beebe, who aided and encouraged him. De Baun, therein, was fully cognizant thereof, and had selected and pointed out the persons to whom, in the State of Louisiana, they were to be delivered for sale, his (De Baun's) intention being to sell them for the benefit of his securities; but Beebe, having a private design to seize all the proceeds, and retain them, pay himself in good money for payments made for him (De Baun) in Arkansas paper, and so defraud all the other securities of him, De Baun.

DE BAUN, also, on the same day, filed a *supplement* to his *cross-bill,* setting out the sales of his property for taxes, on the 28th May, 1844, the purchases and conveyances thereunder, as above stated by Beebe in his answer—alleging various irregularities in the sales, and that the trustees in the trust deed and Beebe should have paid the taxes for which the property was sold, &c., &c., denying that Beebe derived any title thereby, &c.

That Beebe sued out an execution on the Ringo judgment, under which the *corner* property was levied on and sold, at the then term of the court, and purchased by Lawson at $127, Beebe standing by, bidding, and giving no notice of title in himself, &c.

The *Trustees of the Real Estate Bank,* answered *De Baun's Cross-bill* 22d April, 1846, admitting all the allegations therein as to said bank and its trustees, the mortgages executed to said bank by De Baun, the debts due the bank by him, and the suit to foreclose, &c. That they obtained a decree of foreclosure in said suit, 9th June, 1845, against De Baun, Beebe, Keeler, Gray & Bouton, Beach, Jessup & Beers, Ralph Marsh & Co., Waldron, Thomas & Co., Day, Mygatt, Gottschalk, Witherill, William & James Gasquett, Conway and Chittenden: that under said decree, the property embraced in the mortgage was sold, and purchased by them, on 27th October, 1845.

FAULKNER answered the *cross-bill* of De Baun, 11th May, 1846,

stating that at the sale of De Baun's property in May, 1843, he purchased Nos. 35 and 36, and at the second sale he purchased Nos. 34, 35 and 36. He alleges both sales to have been valid.

Replication to Beebe's answer to cross-bill, 20th May, 1846. Also to answer of Faulkner. Decree *pro confesso* against De Baun on cross-bill. Abatement as to Medrano, he having died. Answer of Reardon to original cross-bill, taken as answer to the amended or supplemental cross-bill, by consent.

June 15th, 1846. Beebe filed his answer to amended and supplemental cross-bill. Replications to answer of Beebe. Whiting & Slark filed, as part of their answer to cross-bill, *Exhibit Z.* Woodruff granted leave to file answer to supplemental cross-bill by next term.

Beebe's answer to amendment to cross-bill. Avers that said property was listed for the taxes for which it was sold, before he purchased—that said sales were regular, &c. Positively denies, and avers to be false, the allegations in reference to the removal of said negroes by his consent, &c., and gives a full account of his connection with the matter, which it is not deemed material to state.

Avers that his purchases of De Baun's property were not for speculation but to indemnify himself as De Baun's security; and proposes, that if De Baun, or any of his creditors, will refund to him what he had paid as security for De Baun, what he had paid for said judgments, the amount he paid at the trust sale, the taxes he had paid, with interest, and expenses of litigation, in cluding counsel's fees, he would at once freely release all his interest in said property.

Beebe's answer to De Baun's supplement to cross-bill. Avers the regularity and legality of the tax sales on the 28th May, 1844—that the property was listed in the name of De Baun, for the taxes of 1842-3, and that at the time of the sale, De Baun or his tenants, were in possession of the larger portion of it. That no person bid at said sale under execution on the Ringo judgment, but himself and Lawson, and Lawson being well advised of his titles, it was unnecessary to notify him thereof, &c.

Exhibit Z. to the answer of Whiting & Slark to *De Baun's*

cross-bill, is a transcript of the proceedings on the *sci. fa.* to revive the Beach judgment, showing, that on the 22d May, 1845, the writ was quashed on plea in abatement.

Woodruff's answer to amendment to cross-bill. Avers an absolute transfer to him by De Baun of said assets, as in his original answer. Exhibits a copy of the assignment, and list of claims, a copy of his agreement to pay certain debts of De Baun, and a statement of amount collected by him. The assignment and agreement to pay debts, &c., correspond with the allegations in the original answer. The statement shows that he had collected to the time of filing this answer $2,384.73 of said assets; subject to a deduction of $300 or $400 for expenses, &c.

June 29th, 1847. De Baun's death suggested, and his widow, heirs, administrator, &c., made parties.

Beirne & Burnside filed a *cross-bill,* setting out their mortgage, and praying foreclosure, sale of property, and application of proceeds, rents, &c., to the satisfaction of their debt, after payment of the mortgage debt of Whiting & Slark.

Beebe answered the cross-bill of Beirne & Burnside, 10th December, 1847, admitting the existence of their mortgage, but setting up title to the property under prior liens, as in his answers to the other bills. Other parties entered a general denial thereto in short of record.

Trapnall filed a supplemental answer to De Baun's cross-bill, 27th December, 1847, showing a revival on *sci. fa.* named therein, of the judgment of Jessup & Beers, 31st May, 1845. That *sci. fas.* issued on the judgments of said Witherill, Ralph Marsh & Co., and Waldron, Thomas & Co., 18th July, 1845, which being duly executed, said judgments were revived 3d December, 1845. And averring a purchase of lots 4, 5 and 6, in block 38, by himself under a *fi. fa.* upon a judgment obtained by Key against Taylor, Pendleton and Robins, 4th January, 1844, in Pulaski Circuit Court, and sheriff's deed therefor.

Exhibit I., No. 31, to Beebe's answer, to De Baun's cross-bill, shows that on the *sci. fa.* issued in the case of Gray & Bouton against De Baun, 20th March, 1843, the judgment was revived

16th January, 1846, for balance of debt $941, and $327.76 interest.

Decree.—The cause came on to be heard, 13th January, 1848, upon bills, answers, exhibits and replications, aforesaid: the depositions of Henry F. Samuel, Absalom Fowler, Charles Rapley and Gordon N. Peay, on behalf of Whiting & Slark and Beirne & Burnside; the record of the settlement of Lawson, sheriff, with the County Court, at November term, 1842 and 1843, in behalf of De Baun; all and singular the originals of said exhibits, (not being certified transcripts of record) being produced and the execution thereof proven at the hearing; and the Court *decreed,* that all sales made of the *corner* or *Alhambra* property under executions, after the filing of the original bill, be set aside and considered as null and void; that Beebe, and Whiting & Slark, each account for the rents and profits of the tenements situate on said premises during the times they respectively had possession of the same, and be charged therewith, less the amount expended by them for repairs thereon; that Beebe be charged with the amount realized from the sales of the property of De Baun under executions at November term, 1843, less the amount of sales of said *Alhambra* or *Corner,* and the property sold to Whitmore by De Baun, and that he have credit for the amount remaining due and unpaid upon the judgments of Gray & Bouton and Beach, and for all taxes and repairs paid by him on said *Alhambra* property. That Lawson refund to Whiting & Slark the money received by him on account of their purchase at the sales of De Baun's property, at the May term, 1843. A commissioner is appointed to sell the Alhambra property, on the first day of next term, on a credit of nine and eighteen months, with approved security, with ten per cent. interest, &c., and that he apply the proceeds, 1st, to pay costs and expenses of sale; 2d, the amount ascertained to be due Beebe upon the judgments of Gray & Bouton and Beach; 3d, to pay the amount ascertained to be due Whiting & Slark upon their mortgage on the *Alhambra* property; and 4th, to pay the amount ascertained to be due Beirne & Burnside upon their mortgage on said property, so far

as the same will extend in the order above named—directs the notice to be given of the sale, &c., that the commissioner report at next term, &c. That the cross-bill of De Baun be dismissed at the cost of his heirs, &c. That the supplemental bill of Whiting & Slark be dismissed, and the prayer thereof denied, except as against Beebe and Lawson, and Beirne & Burnside, and that complainants pay the costs, except as to said parties.

"And because after the hearing and submission of this cause, the Court not being sufficiently informed of and concerning certain matters of account touching the premises, did order and direct Gordon N. Peay, Master in Chancery, to take an account and ascertain from the evidence to be adduced before him, and make report of the same to this court, *first,* the amount due and unpaid upon said judgments of Gray & Bouton and Beach, after deducting therefrom the amount realized from said sales at said November term, 1843, excepting therefrom the sales of said *Alhambra,* and said Whitmore and De Baun property: *second,* the value of the rents, issues and profits of said *Alhambra* property, while the same has been in possession of said Whiting & Slark and Beebe respectively, after deducting therefrom the amounts expended by them respectively for improvements, repairs, and for taxes thereon; and *third,* the amount, if any, due from said *Lawson* to said Whiting & Slark upon the sales of the property of De Baun, made at said May term, 1843, and not refunded to them."

"And such account having been taken by said Master, his report is now made and returned before the Court, and is in the words and figures following:

"The Master in Chancery, to whom was referred certain matters of account, &c., in this cause, reports:

"That there is due Beebe, on the judgment of Gray & Bouton, after giving all credits, including interest and costs of suit, as shown by statement herewith filed, marked A., the sum of $324.81.

"That there is due Beebe, on the judgment of Beach, after giv-

ing all credits, including interest and costs, as shown by statement A., &c., $1,562.20.

"That Beebe has been in possession of three of the brick tenements known as the *"Alhambra,"* situated on lots 7 and 8, in block No. 1, &c., since the 1st December, 1843, and that the rents thereof amount to $3,654.72.

"Said Beebe has expended in taxes, repairs, improvements, &c., upon said tenements $685.30.

"That after deducting $324.81, the balance due on the judgment of Gray & Bouton; the sum of $1,562.20, the balance due on the judgment of Beach, and also said sum of $685.30, for taxes, repairs and improvements made on said tenements by said Beebe, from said sum of $3,654.72, the amount of the value of the rents aforesaid, there remains against Beebe a balance for rents of said tenements of $1,082.41.

"That Whiting & Slark have been in possession of one of the brick tenements, situate on lots 7 and 8 in block No. 1, &c., since 1st September, 1843; that they have received the sum of $138.88 in rents, and that the total value of the rents of said tenement from the 1st September, 1843, to this date is $872.22.

"That Whiting & Slark have expended in repairs upon said property, the sum of $19.40, which amount, deducted from the said sum of $872.22, the total value of such rents, leaves a balance against them for rents, of $852.82.

"That upon examination of the papers and testimony in this case, and upon the testimony taken by me, according to the instructions of the Court, in relation to the refunding by James Lawson, Jr., late sheriff of Pulaski county, to A. Fowler, as the attorney of Whiting & Slark, of the sum of $1,000, which said Fowler, as such attorney, had paid to said Lawson upon the sales of De Baun's property, under executions to May term, 1843, of this Court, in favor of Gray & Bouton and Lewis Beach, against James De Baun, the Master finds, and so reports, that on the day on which the sales under said executions were set aside by this Court, to wit: on the 3d day of July, 1843, said Lawson paid and refunded to said Fowler, as the attorney of

said Whiting & Slark, the sum of $756, and that the residue him, on the grounds that the complainants' remedy against him, Lawson."

Lawson now moved to dismiss the supplemental bill as to him, on the ground that the complainants' remedy against him, if any, was purely legal, &c.

January 15th, 1848. And now, on this day the Court here, from the evidence in this cause, having computed and ascertained the amount due to said Whiting & Slark for the principal debt, upon their three notes and mortgage, to be $5,836, and the interest thereon, to be $2,965.93, with interest hereafter, from this date accruing on said debt, at the rate of ten per cent. per annum; and the amount due to Beirne & Burnside, for principal upon their said three notes and mortgage, to be $6,290.22, and interest thereon to be $3,087.30, with interest hereafter accruing on said principal debt, at the rate of ten per cent. per annum; from which said amount so found due to Whiting & Slark the said amount of $852.82 charged against them by the report of the said Master is to be deducted, leaving said principal debt still due to them, and accruing interest thereon, at the rate aforesaid, and a residue of $2,113.11 of said interest found to be now due to them; and it is ordered and adjudged and decreed by this Court, that upon the said widow and heirs and administrator of De Baun, deceased, or any of the other said defendants, or any other person for them, paying to Whiting & Slark and to said Beirne & Burnside, the amounts so found due them, respectively, with all accruing interest thereon, and all the costs of this suit, by the first day of the next term of this Court, then said Whiting & Slark and Beirne & Burnside, do execute and deliver to the said legal representatives of said De Baun, deceased, proper instruments of conveyance of the said mortgaged premises, to be approved by the said commissioner, and do respectively cancel and satisfy said mortgages if thereto required; but in default thereof, it is ordered, adjudged, and decreed by this Court, that said widow, heirs at law, and administrator of said De Baun, deceased, and said Beebe, Thorn, Beach, Gray & Bouton, and the

said tenants in possession, made defendants to said original bill of Whiting & Slark, do stand absolutely debarred and foreclosed of, and from all equity of redemption of, in and to the said mortgaged premises: further decreed, that said Beebe do pay over forthwith to Whiting & Slark, the said sum of $1,082.41, so found due from him, by the said Master, for the residue of rents and profits received by him on account of said mortgaged premises, and that they have execution therefor; and that when the same shall have been paid to them, they immediately apply it, as a further extinguishment of so much of their said debt, interest and costs, commencing first with the accruing, and then the accrued interest; and that said Beebe do pay to said Whiting & Slark and Beirne & Burnside, all the costs by them sustained, by reason of the contestation by him of their bills of complaint in this cause.

Further decreed, that said Beebe immediately deliver up possession of the said three brick tenements now in his possession, and the said Whiting & Slark immediately deliver up possession of the brick tenement now in their possession, of and in said mortgaged premises, to said commissioner—that said commissioner, (C. P. Bertrand,) rent them out to the best advantage, to respectable and responsible tenants, for the best rent attainable, holding the rents and profits subject to the order of this Court, and that out of such rents, he expend what may be necessary, in good substantial repairs, in order to the preservation of said property, and report to this Court on the 4th day of the next term thereof, and whenever thereunto required; and in the event of a suspension or reversal of this decree, that he immediately restore the possession of such tenements or tenement to the party from whom he received it.

And the Court being sufficiently advised, on the motion of James Lawson, Jr., to dismiss the supplemental bill of said Whiting & Slark as to him, doth consider that said motion be overruled, and doth order, adjudge and decree, that said Lawson do forthwith pay over to said Whiting & Slark the sum of $244, the amount so found by the Master to be due from him to them,

with interest thereon, at the rate of six per cent. per annum, from the 3d day of July, 1843, until paid; and that they have execution therefor; and that said Lawson do pay to said Whiting & Slark all the costs by them sustained, by reason of the contestation by him of their said bill of complaint.

On the coming of the Master's report, Whiting & Slark, Beirne & Burnside and Beebe, filed exceptions thereto, which were overruled, and they excepted.

Whiting & Slark, Beirne & Burnside, Beebe, and the widow, heirs and administrator of De Baun, appealed from the decree.

At the hearing, Beebe excepted to the opinion of the Court, allowing the settlement of Lawson referred to in the decree, to be read in behalf of complainants in De Baun's cross-bill.

Whiting & Slark also excepted to the opinion of the Court in permitting Beebe to prove, *viva voce,* the execution of the note of De Baun & Co., on which the Ringo judgment was founded; that it was filed among the papers of the suit, and read the same in evidence. [See opinion of Court.]

DEPOSITIONS referred to in the decree, as read on the hearing, were read on the part of Whiting & Slark, and are as follows:

A. Fowler, Esq., deposed in substance, that he was the attorney of Whiting & Slark, but had no interest in the event of the suit, other than as an attorney, and that his fee was not contingent. That he attended the sale of De Baun's property on the 29th May, 1843, under the directions of his clients, and when the sheriff offered for sale the *corner* or *Alhambra* property, he forbid the sale in a loud voice, which could have been, and he had no doubt was heard by every person present, stating that his clients had a mortgage thereon, and had a right to have it satisfied out of said property, in preference to all other creditors of De Baun. That Trapnall made a counter proclamation, urging the sale, and the sheriff determined to sell; and under the instructions of his clients, and to protect their rights, he bid off said *corner* property for them at $903.50, Trapnall and others also bidding thereon. He informed the sheriff at the time, to the best of his recollection and belief, that he was bidding for his

clients, and not for himself. At the same sale, he had previously purchased one or two other lots in the name of Desha, at $100.

He also purchased of said sheriff, on same day, at said sale, a tract of land at $55, under an execution in favor of Danner against Gibson, and another tract at $500, under an execution in favor of McLain & Badgett, against Hardy Jones, both of which last named purchases he made in his own name. That on the next day, he paid Lawson a certificate of deposit for $1,000, sent him by his clients, which he informed him was the money of his clients, and which he received as such, in payment of said purchase of the Alhambra, so made for them, and was to apply the residue to the purchases made for himself and Desha. That he then distinctly informed Lawson that he purchased the Alhambra for his said clients, and not for himself. That on the 6th June, 1843, he went to Lawson, at his office, and again informed him that his said purchase was for his clients, &c., and Lawson then, after carefully reading it over, and adding the date in his own hand writing, "7th June, 1843," signed the receipt exhibited with the supplemental bill.

That on the 19th June, 1843, he paid Lawson $58.56¼, the residue of the purchase money for the lots purchased for Desha, and took his receipt therefor, which is annexed to the deposition as *Exhibit No.* 1.

That on the 6th or 7th of June, 1843, he paid Lawson said $500, so bid by him for the Jones' land, and Lawson gave him a receipt therefor, which is made *Exhibit No.* 2.

He afterwards drew up a deed for the *corner* property in the name of Whiting & Slark, and presented it to Lawson for execution, &c., but he refused to execute it, &c.

That having informed Desha about the difficulty of getting title, &c., he directed him to get back his money—the $100, so paid the sheriff, if he could, as he did not wish to be involved in litigation.

That during the same term of said Court, (May term, 1843,) the Court quashed the execution under which deponent purcha-

sed Jones' land, set aside the sale, and ordered Lawson, sheriff, to refund to him the said $500, the purchase money, as would appear by an authenticated copy from the records of said Court, made *Exhibit No.* 3.

That Lawson, afterwards, and during said term, returned the executions in favor of Beach, and Gray & Bouton, annexed to each of which was a return of said sales made thereunder, on the first day of said term, entirely different from his pretended returns, which now appear as annexed to, or on said executions; and that said first returns were afterwards torn off from said executions without legal authority—one of which returns is made *Exhibit No.* 4, a copy of which is made part of said supplemental bill. The return annexed, is, in part, written by Lawson, and part by his deputy, Thomasson, and was originally signed by Lawson, in his own hand-writing. Said Thomasson handed it to deponent, as such original return, at his request, after the end of said term of said Court, and then said it had been attached to one of said executions, and that a like return had been annexed to the other, but they had both been taken off, and other returns attached to said executions, and said Thomasson, as he handed this original return to deponent, tore off the signature of Lawson, as such sheriff, except a payment thereof, which still appears.

On the last day of the term of said Court, and as it was about to adjourn, after said Court had ordered Lawson to refund to deponent said $500, he asked Lawson, in presence of said Court and bar, if he would pay it to him without any further process against him of attachment or otherwise; and also, if deponent wished to take back any of his other bids (meaning the said bid of $100 for Desha, though perhaps, not then expressed,) if he would pay to deponent without calling on the Court to compel him, and he pledged his word to do so; and the Court thereupon adjourned without making any other order against him. Immediately after it had adjourned, and when all had left the court room, as well as deponent recollects, except Lawson and Thompson, a deputy clerk, and deponent, and deponent was remain-

ing to get back said $500, said Lawson asked deponent if he desired to receive back said bid so made for Whiting & Slark, and deponent told him, that even if he had authority from them to do it, he would receive nothing but the said certificate for $1,000, which deponent had paid to him as aforesaid, and he replied that he could not let deponent have it, for that he had sent it to New Orleans and received the cash on it. Lawson then let deponent have a postoffice draft, on New Orleans, for about $750, as well as deponent recollects, in re-payment of deponent's said bid of $500, which the Court had ordered him to refund as aforesaid, and in repayment of said sum of $100 paid to him for Desha—and deponent was to call at his office that evening and make a settlement with him of some mutual accounts and demands between them about their own business, and then account to him for the residue of about $156, on said draft in such settlement; and deponent called at his office the same evening accordingly, and not knowing how they stood, carried down there with him the said residue of about $156, in order to be fully prepared to settle with him, but he was not there, and deponent was informed that he had gone to his residence in the country, and they had never yet settled their private accounts. Deponent afterwards paid Desha said $100 received back from Lawson, and let Hyman Mitchell, of Little Rock, have said postoffice draft for funds of equal value—and the said James Lawson, as sheriff, or otherwise, never refunded or re-paid to deponent, the said sum of $903.56¼, so paid to him as above stated, for said Whiting & Slark, or any part of the same, in any shape, manner or form, and deponent has never considered himself authorized to receive the same, or any part thereof, nor has he ever tendered the same, or any part thereof, to deponent in any manner, shape or form.

Exhibit No. 1 and 2, are receipts, as stated in the deposition: *Exhibit No.* 3, shows that on the 7th July, 1843, the Court quashed the execution of McLain & Badgett, referred to in the deposition, set aside the sale, and ordered Lawson to refund to Fowler $500

paid for the land of Jones. *Exhibit No.* 4, is the same as ***Exhibit*** *N.* to the supplemental bill.

The depositions of Samuel, Rapley and Peay, are exclusively in reference to the occupancy and rents, &c., of the Alhambra tenements, and it is not material to state them.

The case was determined before the Hon. WM. H. FEILD, Chancellor.

FOWLER, for Whiting & Slark and Beirne & Burnside. On the ground of *marshaling* of assets, Whiting & Slark had a right to compel Beach and others, who had prior claims, to go upon the estate which the former could not reach. Where two persons have a lien upon the same piece of property, which is not sufficient to satisfy both, and one of them has a lien on another piece of property which the other has not, he must exhaust such property before he can resort to that which is common to both; and a court of equity will compel him to do so. *Everton v. Booth,* 19 *John. Rep.* 492. *White v. Dougherty et al., Mar. & Yerg. Rep.* 319. *Alston v. Munford,* 1 *Brockenb. Rep.* 279. *Aldrich v. Cooper,* 8 *Ves. jr.* 388. *Dorr v. Shaw,* 4 *John. Ch. Rep.* 17. 1 *Story Com. on Eq., ch.* 13, *sec.* 643, *p.* 596; *sec.* 633, *p.* 588. *Wiggin v. Dorr,* 3 *Sumn. C. C. R.* 414. *Laney v. The Duke of Athol,* 2 *Atk. Rep.* 446. *Drake et al. v. Collins,* 5 *How. (Miss.) Rep.* 256. 1 *Hopk. Ch. Rep.* 469. *Hayes v. Ward,* 4 *John. Ch. Rep.* 132. 2 *McLean's Rep.* 56. 1 *Mad. Ch.* 250. And so a subsequent purchaser has a right in equity to require an execution creditor to exhaust the unsold property of his debtor, before he resorts to that which is sold. *Baine v. Williams,* 10 *Smedes & Marsh. R.* 119.

The purchase made by Whiting & Slark at sheriff's sale was forced upon them by Beach, Gray & Bouton, Beebe, &c., and is valid, and ought to stand unless the executions and the sale are void. The sale to them was complete except the execution, &c., of the deed, as the sheriff is the agent of both parties, the entry of the sale is sufficient within the statute of frauds. *Bleecker v. Graham,* 2 *Edw. Ch. Rep.* 648. *Story on Agency, sec.* 27, 107. 1 *Greenl. Ev. sec.* 269. 1 *Sug. on Vend.* 173, 188. *Cooper's Lessee*

v. Galbraith, 3 *Wash. C. C. R.* 550. *Secrest v. Twitty,* 1 *McMullan's* (*S. Car.*) *Rep.* 255, 521. *McComb v. Wright,* 4 *John. Rep.* 659. *Evans v. Ashley,* 8 *Mo. Rep.* 187. *Sims v. Campbell,* 1 *McCord's Ch. Rep.* 53.

Whiting & Slark were innocent and bona fide purchasers, knew nothing of the errors or irregularity of the process, &c., and being strangers thereto, are not affected by them, nor by the irregularities of the sheriff or parties to the proceedings. *Weaver v. Cryer,* 1 *N. Car. Rep.* 340. *Heister's Lessee v. Fortner,* 2 *Bin. R.* 46. *McConnell v. Brown,* 5 *Mon. Rep.* 479. *Jackson v. Rossevelt,* 13 *John. Rep.* 102. *Jackson v. De Laney, ib.* 550. *Voorhees v. U. S. Bank,* 10 *Pet. Rep.* 475. 4 *Smedes & Marsh.* 622. *Woodcock v. Bennett,* 1 *Cow. Rep.* 734. *Taylor v. Thompson,* 5 *Pet. Rep.* 370. *Woodnull v. Osborne,* 2 *Edw. Ch. Rep.* 617. *Brown v. Miller,* 3 *J. J. Marsh. R.* 437. *McNair v. Biddle,* 8 *Mo. Rep.* 264. 1 *Nott & McCord* 12. *Barkley v. Scraven, ib.* 408. 8 *John. Rep.* 365. *Atkinson et al. v. Rhea,* 7 *Humph. R.* 60. And their purchase is valid, though the levy may have been made under the *fieri facias* clause in the writs of *ven. ex.* and the sale under the second, or after the return day of the writ, or though the writ had never been returned. 10 *Pet.* 477. 4 *S. & M. Rep.* 624. 3 *Co. Rep., part* 5, *p.* 90. 6 *Yerg.* 309. 4 *Cond. Rep.* 521. 1 *Baldw. C. C. R.* 267. *Cox v. Joiner,* 4 *Bibb Rep.* 95. 3 *ib.* 344.

Their purchase is not affected by the order of court purporting to set aside the sheriff's sale, because, the court having no jurisdiction to base such order upon, it is a nullity. There being no notice to the parties interested, no authority to act, no showing of fraud, the order is void. *Bell et al. v. The Tombigbee Rail Road Co.,* 4 *Smedes & Marsh. Rep.* 563. *State Bank v. Marsh,* 7 *Ark. Rep.* *Bentley v. Cummins' ad.,* 8 *ib..* 490. *State Bank v. Marsh,* 10 *ib.* 130. *Woods v. Monell,* 1 *John. Ch. Rep.* 505. *Wood & Null v. Osborne,* 2 *Edw. Ch. Rep.* 617.

Beebe did not take any title by his purchase at the sheriff's sale, after Whiting & Slark had purchased. He was a party to the judgments of Beach, and Gray & Bouton by assignment, and was bound to know that the proceedings were irregular.

The execution in the case of Gray & Bouton was not signed by the clerk, and therefore void. *Const., Art.* 6, *sec.* 14. *Rev. Stat. p.* 777, *sec.* 2, 3. *Gilbraith v. Kuykendall,* 1 *Ark. Rep.* 53. *Woolford v. Dugan,* 2 *Ark. Rep.* 131. 6 *Ark. Rep.* 453. *Powers v. Swigart,* 8 *Ark. Rep.* 365.

The judgment of Beach v. De Baun & Thorn, was satisfied as to Thorn; and therefore satisfied as to De Baun also. 2 *Saund. Pl. & Ev.* 759. 4 *Bac. Abr. "Release," G., p.* 281. *Co. Litt.* 232, *a. Bozeman v. State Bank,* 7 *Ark. Rep.* 333. 1 *Selw. N. P.* 43. *United States v. Thompson, Gilpin's Rep.* 621. *Hawkins & Davis v. Thompson,* 2 *McLean's Rep.* 112. 2 *Ham. Ohio Rep.* 89. *Winn v. Wilson's Ex'r.,* 2 *Bay.* (*S. C.*) *Rep.* 578. *Flagg v. Mann et al.,* 2 *Sumn. Rep.* 520.

Both executions were levied on lands, other than the mortgaged premises, more than sufficient to satisfy the judgments, which levies were never disposed of; and that a levy on land is a satisfaction of the judgment, see *Anderson v. Fowler, Anthony v. Humphries, &c., decided at — term.* 2 *Bac. Abr.* 353, 354, *Execution, D. Hopkins v. Chambers,* 7 *Mon.* 262. *McClellan v. Whitney,* 15 *Mass.* 137. *Lasalle v. Moore,* 1 *Blackf.* 227. *Miller v. Ashton,* 7 *Blackf.* 30. *Ib.* 350. *Arnold v. Fuller's heirs,* 1 *Ham. Ohio Rep.* 458. *Cass v. Adams et al.* 3 *ib.* 223. *Martin & Yerg.* 374. 8 *Serg. & Rawle* 378. 8 *Yerger* 460. 13 *Serg. & Rawle* 146. 2 *Bin.* 218. 1 *Freem. Ch. Rep.* 571. 4 *Ark.* 231.

Beebe was a purchaser *pendente lite.* Such a purchaser is bound by the decree without being made a party to the suit, and takes the property subject to the plaintiff's claim and the decree to be made. *Osborne v. United States Bank,* 5 *Cond. Rep.* 754. 1 *Story's Com. on Eq., sec.* 405 *to* 409. *Story's Eq. Pl., sec.* 156, 194, 351. *Murray v. Ballow,* 1 *John. C. R.* 576. *Edmunds et al. v. Crenshaw et al.* 1 *McCord Ch. R.* 264. *Sug. on Vend.,* 537, 535-6. *Lessee of Ludlow v. Kidd et al.,* 3 *Ham. Ohio Rep.* 541. 2 *Mad. Ch. Pr.* 189. *Bennett's Lessee v. Williams,* 5 *Ohio Rep.* 462. *Scott v. McMillen,* 1 *Litt* 303. *Stoddard's Lessee v. Myers,* 8 *Ohio R.* 209. *Green et al. v. White,* 7 *Blackf.* 244. *Finch v. Newnham,* 2 *Vern.* 216. *The Bank of Utica v.*

Finch, 1 *Barbour's Ch. Rep.* 75. *Thompson v. Hammond*, 1 *Edw. Ch. Rep.* 506. *Scott v. Coleman*, 5 *Monroe* 74. *Morton v. Long et al.*, 3 *A. K. Marsh.* 415. *Garland v. Rives*, 4 *Rand.* 316.

If Thorn, in his sale to De Baun, retained any lien, it was a mere equitable interest which cannot be sold under execution on a judgment at law, and therefore Beebe takes no title by his purchase of Thorn's interest. 2 *Tidd's Pr.* 1003. *Scott v. Schaley*, 8 *East* 467. *Thomas v. Marshall, Hard.* 19. *Jackson v. Chapin*, 5 *How.* 487. *Hanck &c., v. Brincker*, 3 *Bibb* 250. *Jackson v. Willard*, 4 *John.* 43. *Piatt v. Oliver et al.*, 2 *McLean* 298. 4 *Yerg.* 229. *Hendricks v. Robinson*, 2 *John. Ch. Rep.* 12. *Baird et al. v. Kirtland et al.*, 8 *Ohio Rep.* 23. 1 *John. Ch. Rep.* 56. *Thompson v. McGill & Conn*, 1 *Freem. Ch. Rep.* 405. *Bogert v. Perry*, 17 *John.* 354. 7 *Smedes & Marsh.* 640. *Norris v. Ellis*, 7 *Hump.* 463. *Dig. of Ark., p.* 243, *sec.* 130; *p.* 498, *sec.* 25; *p.* 623, *sec.* 3. *Hanley v. Hunt et al.*, 1 *Ham. Ohio Rep.* 256.

The true rule distinguishing between a party to the judgment and a stranger, purchasing under irregular process, will be found to be, that for the errors in the judgment and of the sheriff, which the plaintiff could not have controlled, he is not responsible, and takes title, but for his own acts he is responsible, such as the suing out irregular execution, which justifies the officer, but not the plaintiff. *Woodcock v. Bennett*, 1 *Cowen* 734. *Parsons v. Loyd*, 3 *Wils. Rep.* 345. *Rae v. Milton*, 2 *ib.* 385. 2 *Tidd's Pr.* 936. *Read v. Markle*, 3 *John.* 523. 8 *Humph.* 409. *Weaver v. Crier & Wood, N. Car. Rep.* 340. *Glover v. Horton*, 7 *Blackf.* 296. *Adams v. Freeman*, 9 *Johnson* 118. *Clay et al. v. Caperton*, 1 *Monroe* 10. *Young v. Taylor*, 2 *Bin. Rep.* 231.

A levy upon sufficient property is a satisfaction of the judgment, of which joint debtors and third persons may avail themselves as well as he whose property is actually seized. *Taylor v. Dundas*, 1 *Wash.* (*Va.*) 95. *Davis v. Mikell et al.*, 1 *Freem. Ch.* 571. *Baird v. Rice*, 1 *Call.* 22. *Clark & Nance v. Bell*, 8 *Humph.* 28. *Sneed's Ex. v. White*, 3 *J. J. Marsh.* 528. *Bullitt's Ex'r. v. Winstons*, 1 *Munf.* 282. *Young v. Read*, 3 *Yerg.* 298. *Ford v.*

Geauga Co., &c., 7 *Ham. Ohio* 482. 3 *Bibb* 468. 4 *New Hamp. Rep.* 174.

If the *fieri facias* issued on the judgment of Gray & Bouton is void, then the *ven. ex.,* under which Beebe purchased, is also void; and cannot be considered as an original *fi. fa.* by rejecting the recitals therein.

Beebe's tax titles can avail him nothing whatever, because they were purchases made *pendente lite;* and if he was legally in possession at the time, or under pretence of legal right, he occupied in the attitude of a trustee for De Baun and his creditors, and the title acquired must in law and equity enure to the benefit of the *cestui que trust,* and not of his own. 2 *St. Ev.* 95. *Haley et al. v. Bennett,* 5 *Porter Ala. Rep.* 472. 5 *Yerg. Rep.* 398. 1 *Cowen Rep.* 575. 4 *Mon. Rep.* 400. 2 *Sum. C. C. R.* 558. 5 *Litt. Rep.* 185. And he was bound to pay the taxes himself. *Barr v. McEwen et al.,* 1 *Bald. C. C. R.* 162.

Whiting & Slark are entitled to the rents and profits of the mortgaged property from the time that the money became due. *Clue et al. v. Woods,* 5 *Serg. & Rawle* 283. *Waters et al. v. Stewart,* 1 *Caine's Cas. in Er.* 68. *Fitzgerald v. Beebe,* 7 *Ark. Rep.* 319. *Chit. on Cont.* 333, 335, 340. *Astor v. Turnet,* 11 *Paige Rep.* 337. *Greene v. Biddle,* 5 *Cond. Rep.* 383. *Estabrook v. Moulton,* 9 *Mass. Rep.* 258. *Trustees, &c. v. Dickson et al.,* 1 *Freem. Ch. Rep.* 483. *Watson v. Spencer,* 20 *Wend. Rep.* 262. *Lansing v. Capron,* 1 *John. Ch. Rep.* 617. *Moss v. Gallimore, Doug. Rep.* 270. *Stone v. Patterson,* 19 *Pick. Rep.* 476. *Burden v. Thayer,* 3 *Met. Rep.* 76. And Beebe's purchase being void, he must account for rent at a reasonable rate. *Williamson et ux. v. Williamson et al.,* 3 *Smedes & Marsh. Rep.* 749.

Whiting & Slark are entitled to a decree against John Brown, the lessee of Beebe, for rent from the day the writ was served on him, and also for rent then due and not paid over. *Stone et al. v. Patterson,* 19 *Pick.* 476. *Fitzgerald v. Beebe,* 7 *Ark. Rep.* 320. *Magill v. Hinsdale,* 6 *Connect. Rep.* (1 *Vol.* 2 *Series*). 3 *Metc. Rep.* 77. *Gibbons v. Dillingham et al.,* 10 *Ark. Rep.* 15. *Story Com. on Eq. Pl. sec.* 200. *Greene v. Biddle,* 5 *Cond. Rep.* 382. *Wil-*

liamson's adm'r v. The Richardson, 6 *Monroe Rep.* 603. *Berch v. Wright*, 1 *Term Rep.* 383. 4 *Kent's Com.* (4 *Ed.*) 158, 164, 165. 3 *Stark. Ev.* 1,516, 1,518. *Smith v. Shepard*, 15 *Pick. Rep.* 149. *Welch v. Adams*, 1 *Metcalf Rep.* 495. *Lumley v. Hodgson*, 16 *East Rep.* 104. *Powell on Mort.* 227, 228, 232. *Hart's heirs v. Baylor, Hard. Rep.* 599. *Moss v. Gallimore, Doug. Rep.* 268.

That Lawson, sheriff, was properly made a party, and that he was bound to refund to Whiting & Slark the purchase money, with interest, upon the sale to them being set aside. *Blight's heirs v. Tabin*, 7 *Mon.* 615. *Moore's Ex'r v. Allen*, 4 *Bibb Rep.* 41. *Thompson v. Phillips*, 1 *Bald. C. R.* 27. 7 *Ark.* 427. *Halland v. Craft*, 20 *Pick. Rep.* 337. *Martin v. Broadus et al.*, 1 *Freem. Ch. Rep.* 38. 2 *Story's Com. on Eq.* 694 *to* 696. Lawson's return as sheriff is no evidence that the money was refunded, not being responsive to the mandate of the writ. *Duprey v. Johnson*, 1 *Bibb Rep.* 567. *Fiest v. Miller*, 4 *Bibb Rep.* 311. Nor is the answer evidence—the fact of payment being new matter set up in avoidance, and not directly responsive to the allegations of the bill. *The Planter's Bank v. Stockman*, 1 *Freem. Ch. Rep.* 503. *Vance, &c. v. Vance, &c.*, 5 *Mon. Rep.* 523. 1 *Newel. Ch. Pr.* 329. *Clark v. Spears*, 7 *Blackf. Rep.* 98. 2 *Mad. Ch. Pr.* 446. *Simpson v. Hart*, 14 *John. Rep.* 63, 74. *Green v. Vardiman*, 2 *Blackf. Rep.* 329. *U. S. Bank v. Beverly et al.*, 1 *How. U. S. Rep.* 151. *Atwater v. Fowler*, 1 *Edw. Ch. Rep.* 420. 1 *Bibb* 196. 4 *Hayw. Rep.* 92. *Flagg v. Mann*, 2 *Sumn. C. C. R.* 507. *Jolly v. Carter*, 2 *Edw. Ch. Rep.* 210. *Cathcart et al. v. Robinson*, 5 *Pet. Rep.* 267.

The Circuit Court erred in dismissing the supplemental bill, &c., of Whiting & Slark against the subsequent encumbrancers of the mortgaged estate; for as a general rule, a court of equity will not decree a sale of mortgaged premises until all the encumbrancers are brought before it so that the estate itself may be sold and assured to the purchaser. *Cooper's Equity* 33. 2 *Mad. Ch. Pr.* 179, 182, 188. *Christie v. Herrick*, 1 *Barbour's Ch. Rep.* 260. *Porter et al. v. Clements*, 3 *Ark. Rep.* 381. *Story's Eq. Pl., sec.* 193, 185, 197. *Ensworth v. Lambert*, 4 *John. Ch. Rep.* 606.

Haines v. Beach, 3 *ib.* 461. 1 *Sumn. C. C. R.* 177. 5 *Porter Rep.* 472. *Piatt v. Oliver et al.,* 2 *McLean's Rep.* 306.

A decree for a sale on credit is erroneous without the consent of the parties. *Sedgwick v. Fisk,* 1 *Hopkins Ch. Rep.* 594.

There was error in permitting proof by parol at the hearing that the note for $1,500 and the signature were in the handwriting of De Baun, and that it was the same note paid and filed in Ringo's suit at law; for the note was not made an Exhibit in the cause, and no paper can be proved *viva voce* unless it be made an exhibit and on a previous order and notice to the party. *Crist et al. v. Brashiers,* 3 *A. K. Marsh.* 171. *Pardee v. De Carla,* 7 *Paige* 134. *Chandler's Ex'r v. Neal's Ex'r,* 2 *Hen. & Munf.* 129. *Gresley's Eq. Ev.* (*Ed. of* 1837.) 126. 2 *Daniel Ch. Pl. & Pr.* 1,027, 1,028. *Barrow v. Rhinelander,* 1 *John. Ch. Rep.* 560. *Lube's Eq. Pl.* 87.

The evidence adduced on the hearing was full, clear and conclusive as to the amounts to be decreed, and the court should have found the amount without reference to a Master. *McKay v. Carrington,* 1 *McLean's Rep.* 65. *Le Guen v. Gouverneur et al.,* 1 *John. Cas.* 520. *Field et al. v. Hatland et al.,* 2 *Cond. Rep.* 389.

There was no color or pretence of evidence that Whiting & Slark had been in possession of any part of the premises or had received any of the rents: and if there had been, the Court should not have ordered an account against them, as there was no foundation therefor by an allegation in the pleadings. *The Planter's Bank v. Stockman et al.,* 1 *Freem. Ch. Rep.* 503. *Gresley's Eq. Ev.* 161. *Edmonson v. Baxter et al.,* 4 *Hayw. Rep.* 14. *James v. McKernon,* 6 *John. Rep. Irnham v. Child,* 1 *Bro. Ch. Rep.* 94. 1 *Bibb Rep.* 175. *White v. Lewis,* 2 *Marsh. Rep.* 125. *Woodcock v. Bennett,* 1 *Cow. Rep.* 734.

The Master's report should have been set aside for his failure to pursue the statute (*Rev. Stat. p.* 166, *sec.*76, 78,) and return the evidence to sustain the report. *Peers v. Carter's heirs,* 4 *Litt. R.* 270. *Hammond and wife v. Pearl, &c.,* 6 *Monroe Rep.* 413. *Green's heirs v. Breckenridge's heirs,* 4 *ib.* 544.

As Beebe entered under color of title, he ought not to be allowed for taxes and repairs made as owner: nor would even a trustee be allowed for improvements unless they were necessary, valuable and permanent. *Winthrop v. Huntington and wife,* 3 *Ham. Ohio Rep.* 327. *Van Horne v. Fonda,* 5 *John. Ch. Rep.* 416. 2 *Story Com. on Eq., sec.* 697. *Green v. Winter,* 1 *John. Ch. Rep.* 39. *Morre v. Cable, ib.* 388. *Van Buren v. Olmstead,* 5 *Paige Rep.* 12. 3 *Smedes & Marsh. Rep.* 749.

Beebe is not entitled to a decree under the Gray & Bouton and Beach judgments; because, the lien of the Beach judgment had expired before the suit of Whiting & Slark was instituted and was never revived, and the Gray & Bouton judgment, though revived, was fully satisfied; and the liens of both judgments were waived by the negligence of the plaintiffs and postponed to the junior mortgage. *Porter's lessee v. Cocke, Peck's Rep.* 36. *Mower and wife v. Kip et al.,* 2 *Edw. Ch. Rep.* 166. 1 *Baldw. C. C. R.* 273. 6 *Paige Rep.* 91. The revival by *scire facias* does not extend the lien beyond the revival as against purchasers or encumbrancers whose rights accrued after the original judgment and before the revival. 6 *Paige Rep.* 91.

The entering satisfaction as to Thorn on the Beach judgment and the agreement of Beebe with Beach & Bouton, to confine the lien to the mortgaged property, forfeited both liens—that a judgment lien may be lost by negligence, or giving time destroys the lien as to other creditors. *Robinson et al. v. Green et al.,* 6 *How. (Miss.) Rep.* 228. 4 *ib.* 140. *Baird v. Rice,* 1 *Call. Rep.* 23. *Kellogg v. Griffin,* 17 *John. Rep.* 276. *Doty v. Turner,* 8 *ib.* 22. *Peck's Rep.* 36. That Beebe did agree to relinquish the judgment lien upon all the property except the mortgaged premises, is proved by the answer of Trapnall, the agent of Beach and of Gray & Bouton, who assigned the judgments to Beebe and whose answer is evidence against him. *Osborn v. U. S. Bank,* 5 *Cond. Rep.* 754. *Fitch et al. v. Stamps,* 6 *How. (Miss.) Rep.* 496. *The Earl of Sussex v. Temple et al.,* 1 *Lord Raym. Rep.* 311. 1 *Greenl. Ev. sec.* 178. *Field et al. v. Holland et al.,* 2 *Pet. Cond. Rep.* 290. *Barraque and wife v. Siter et al.,* 9 *Ark.* 547.

The equitable lien attempted to be set up by Beebe as assignee of Ringo, if valid, could only be asserted, so as to obtain relief, by way of cross-bill. *Troup v. Haight,* 1 *Hop. Rep.* 270. There is no proof of the claim, nor was there a valid registry of it as a lien. The contract between Thorn and Beebe, upon which the lien is alleged to rest, does not specify the note, and could not affect subsequent purchasers and encumbrancers without actual notice proved upon them; for the registry of a trust or mortgage is notice only to the extent of the sum specified in the registry. *Frost v. Beekman,* 1 *John. Ch. Rep.* 299, 300. 4 *Kent's Com.* (4 *Ed.*) 176. *Beekman v. Frost,* 18 *John. Rep.* 564. *Day v. Dunham,* 2 *John. Ch. Rep.* 190. *Bridgen v. Carhartt et ux.,* 1 *Hop. Ch. Rep.* 235. But if the claim be considered as a vendor's lien for residue of purchase money, it is in that case a secret trust, which must be postponed to creditors who are *bona fide* mortgagees. *Bayley v. Greenleaf,* 5 *Cond. Rep.* 235. *Garner v. Chester,* 5 *Yerg. Rep.* 208. 4 *Kent. Com.* 147; and which cannot be assigned. *Jackson v. Hallock et al.,* 1 *Ham. Ohio Rep.* 318. 7 *Yerg. Rep.* 13. 6 *How.* (*Miss.*) *Rep.* 365. 1 *Paige Rep.* 506.

The statute of limitations, which may be pleaded in equity as well as at law, had fully run against Ringo and Beebe both upon the note and upon the agreement upon which the lien is predicated, before any proceedings were instituted on the note or steps taken to enforce the lien, and as no plea or counter answer was admissible to Beebe's answer setting up the lien, the objection of *lapse of time* may be suggested for the first time at the hearing. *Baker v. Biddle,* 1 *Baldw.* 418. *Heray v. Dinwoody,* 2 *Ves. jr.* 87. *Waggoner v. Gray,* 2 *Hen. & Munf.* 609. *Story's Eq. Pl., section* 757. 1 *Mad. Ch. Pr.* 99. 4 *Bro. Ch. R.* 269. 7 *Yerg.* 233. 1 *Edw. Ch. R.* 422. 2 *ib.* 333. 17 *Ves. jr.* 95. *Piatt v. Vathier et al.,* 1 *McLean* 160. *Coulson v. Walton,* 9 *Pet.* 82. *Cooper Eq.* 251. 6 *Pet.* 65. 1 *McLean* 17, 538.

An appeal from a final decree necessarily opens for the consideration of the appellate court all prior orders or decrees in any way connected with such final decree. *Atkinson v. Manks,* 1 *Cow.* 702. *Le Guen v. Gouverneur & Kemble,* 1 *John. Cas.* 498. *Gels-*

ton v. Codewise, 1 *John. Ch. R.* 194; and upon the reversal of the decree, this Court ought to render a final decree between the parties. *Const. Art.* 6, *sec.* 2. *Rev. Stat. p.* 175, *sec.* 141, 142. 1 *John. Cas.* 498.

The bill of Whiting & Slark distinctly alleges everything necessary or material to sustain their application to foreclose; they state a valid mortgage proper for foreclosure, the facts necessary for marshaling securities, to establish their own purchase at sheriff's sale, to set aside Beebe's for irregularity, fraud, &c., for an account, that the defendants are in possession and had encumbrances, with a proper prayer for relief; and if Beebe has prior liens or better titles they are matters of defence for him to set up and need not be set out specially in the bill. (*Lytle et al. v. Breckenridge,* 3 *J. J. Marsh.* 671.) The rule that the *allegata et probata* must correspond, applies to an attempt to introduce facts in evidence totally distinct from those relied upon in the bill: but all the minute circumstances constituting the charge may be admitted under the general allegations; thus, a general allegation of fraud, &c., is sufficient to admit in evidence the minute circumstances tending to establish the charge of fraud, &c. *Gresley's Eq. Ev.* 161. *Ib.* (2 *Am. Ed.*) 232, 233, *&c. Story's Eq. Pl. sec.* 28, 36, 37. *Woodbury & Minot Rep.* 44. 8 *Ark.* 276. 2 *Ves. Sen.* 318. 7 *Yerg.* 563. 8 *Wend.* 339. And under a prayer for general relief, a party may have any relief consistent with the facts stated in the bill. *McNair et al. v. Biddle et al.,* 8 *Mo. Rep.* 267. 5 *Porter Ala.* 26. 2 *ib.* 612. *Bailey v. Benton,* 8 *Wend.* 344. *Allen et ux. v. Coffman,* 1 *Bibb* 472. 2 *Cond.* 361. *Cooper Eq. Pl.* 14; or where the allegations in the bill are defective, and such defects are supplied by the answer. *Rose v. Wyatt & Veal,* 7 *Yerg.* 36. *Mathew v. Hanbury, &c.,* 2 *Vern.* 187. *Gratz v. Redd,* 4 *B. Mon.* 198. *Gresley's Eq. Ev.* 236. 2 *Atk.* 337, 3 *ib.* 132. *Rankin v. Maxwell, &c.,* 2 *Marsh.* 490. *Gaston's heirs v. Bates,* 4 *B. Mon.* 367.

Whiting & Slark are entitled, under their purchase at sheriff's sale, to a decree of absolute title, to possession and for the rents and profits against Beebe for the whole and against John Brown

for such as were due from him and unpaid at the service of the writ upon him, and such as accrued afterwards under his lease from De Baun, as collateral to the primary decree against Beebe.

If neither De Baun nor Thorn had such an interest in the property as could be sold under execution, or the purchase so made by Whiting & Slark was *pendente lite,* then they take nothing by their purchase. But if either De Baun or Thorn had such an interest as might be sold under execution and the purchase was not *pendente lite,* then Whiting & Slark by their purchase acquired such undivided interest and are entitled to a decree therefor, and to have the other half sold under their decree of foreclosure, with a like decree for all the rents and profits, until their mortgage debt shall be satisfied with all interests and costs.

If the three liens or any one of them asserted by Beebe be still in force, then Whiting & Slark are entitled to have the securities marshaled and all the lands subject to such liens respectively which they cannot reach, first sold for the satisfaction of such liens.

If Whiting & Slark take no title by their purchase at sheriff's sale, then, as all of Beebe's asserted liens have been fully extinguished, Whiting & Slark are entitled to a decree:

First: That Lawson refund to them their purchase money with interest.

Secondly: Foreclosure and sale of the mortgaged premises.

Thirdly: An account and decree for all the rents and profits against Beebe from April, 1843, until possession be surrendered.

Fourthly: Decree against John Brown for rents and profits as above stated.

Fifthly: That rents and profits, as far as they will go, be applied to the extinguishment of interest, and then principal of Whiting & Slark's mortgage debt; and then the proceeds of the sales until it is satisfied.

Next, Beirne & Burnside's mortgage debt to be fully satisfied out of the proceeds of the sale if sufficient: and surplus, if any, decreed to whomsoever it may belong.

WATKINS & CURRAN, for Beebe. The only question presented by the pleadings is, whether Whiting & Slark obtained and have title by virtue of their purchase from the sheriff at the May term, 1843. We insist, 1st, that their purchase was void: and 2d, if not void, it was erroneous and properly set aside by the court. If the sale was not set aside, or not legally set aside, they acquired no title under the Beach judgment. 1st, Because the judgment had been satisfied and the lien waived by a release of Thorn. 2d, Because more than three years had elapsed at the time of their purchase, and the judgment was never revived. 3d, Because, even if the judgment had not been satisfied and had been regularly revived, the purchaser could not take title as against the prior judgment of Gray & Bouton.

Whiting & Slark could not have purchased the "corner" property under the execution issued upon the Gray & Bouton judgment to the May term, 1843, because that execution was simply a *ven. ex.* without any *fi. fa.* clause or any authority to the sheriff to levy upon or sell other property than that mentioned in the writ. The writ of *fi. fa.* was not levied upon the property in dispute, and the writ under which Whiting & Slark purchased merely commanded that the sheriff expose to sale the property originally levied upon, and under that writ the sheriff could not sell nor they purchase any other than the property so directed to be exposed to sale. The question then, is, can the sheriff levy upon and sell land without any writ of execution? That the sheriff cannot levy upon or sell lands without a writ of execution in his hands in full force authorizing him to do so. 7 *Ala.* 645. 4 *Hawks* (*N. C.*) 279. 3 *Devereux* (*N. C.*) 279. 2 *Bay's* (*S. C.*) 524. 1 *Dev.* 30. *Ib.* 295. 2 *Dev. & Batt.* 87, and cases cited by GASTON, J., 3 *Smedes & Marsh.* 471.

The restraining order was erroneously granted, and was properly set aside. 1st, Because it was made in direct violation of De Baun's instruction as to the order of sale: 2d, It was made without proper parties—neither the subsequent incumbrancers, nor De Baun's nor Beebe's prior vendees were parties: 3d, It was in effect a final decree, granting the prayer of the bill to

marshal the securities: 4th, It was made without notice to the parties interested: 5th, It was directed to the sheriff, and not to the parties to be affected by it. For these reasons the court had the power and acted properly in vacating the order and setting aside the sales made pursuant to it.

Whiting & Slark, then, have no title by virtue of their purchase under execution, and are not entitled to relief upon that ground as against Beebe, for these reasons: 1st, Because their purchase was void: 2d, Because, even if it was not void, it was properly avoided: and 3d, Because, even if it was not properly avoided, they have not made such a case by their pleadings, as to question, review or put in issue the propriety of the proceedings by which the sale and the order under which it was made, were avoided.

We will proceed to notice the objections to Beebe's title.

In the first place, we contend that Beebe has a valid title to the "corner" property discharged from all incumbrances by virtue of his purchase under the Gray & Bouton execution, at November term, 1843.

But before, noticing the objections, it may be well to examine what questions are put in issue by the pleadings, for the claim of Whiting & Slark to relief against Beebe must depend upon their allegations.

Beebe was not made a party to the original bill, and in the supplemental bill they charge that before the filing of the original bill, he became the owner of the prior judgments, that he bid at the first sale, when Whiting & Slark purchased, and after their purchase, having full knowledge of it, he caused other executions to be issued, had the "corner" property sold, became the purchaser and obtained a deed from the sheriff, and claim to have his title cancelled. The only reason assigned why Beebe's title ought to be cancelled is, that *they had previously purchased and had title under the same judgments;* and this is the only question at issue, and as they fail to show title under the judgments, they are not entitled to relief against Beebe. If there are any extrinsic facts showing that Beebe's title was acquired under cir-

cumstances which legally vitiate it, no relief can be granted against him in consequence of such facts, unless they are put in issue by the pleading. If the defendant sets up and proves a fact which destroys the complainant's title, the latter cannot impeach it on a ground not taken in his bill and not arising from the issue between the parties. *Story's Eq. Pl.* 219. *Gresley's Eq. Ev.* 23. *Lube's Eq. Pl.* 18. 3 *Bligh* 211. 6 *J. R.* 543. 11 *Pet. Rep.* 229. 3 *Paige* 606. 5 *ib.* 29. 7 *ib.* 573. *Lit. Sel. cases* 200. 3 *Ham.* (*Ohio*) *Rep.* 62. 2 *Bibb Rep.* 4, 26.

I. It is objected that an equitable title is not subject to sale under execution. That an equitable as well as a legal estate in land is subject to sale under execution by our statute. *Dig., ch.* 67, *sections* 25, 79; *ch.* 93, *section* 36; but the legal as well as equitable title was in the defendants in the execution under which Beebe purchased.

II. It is objected that the original *fi. fa.* was not signed by the clerk: If not, it was not void, but amendable, and the court will consider it as amended, whenever the question arises collaterally. 5 *N. Car.* 24. 1 *Serg. & Rawle* 97. 5 *Yerg.* 443. 3 *Murphy* 128. 3 *Dev.* 284. *Ib.* 151. 5 *N. Car.* 421. *Coleman's cases* 55. 5 *Wend.* 503. Courts favor judicial and final process. 9 *Mass.* 217. 10 *Ib.* 221. 11 *Ib.* 89. 13 *Pick.* 90. 14 *Ib.* 212.

III. The next objection is that the *fi. fa.* clausein the writ under which Beebe made his purchase, was void; in other words, that a *ven. ex.* cannot be issued with a *fi. fa.* clause: as the legal effect and consequences of a levy on lands are the same as a seizure of goods, and therefore the *fi. fa.* clause is void. We reply: 1st, the legal effect of a levy on land and a levy on goods is different: 2d, if the effect is the same, it does not follow that the sale under the *fi. fa.* clause is void; and 3d, even if the *fi. fa.* clause was improper, the objection cannot be taken by a third person.

The legal consequences of a levy on land and a seizure of goods are not the same. A levy upon land is not in any sense of the term a satisfaction: the debtor is not deprived of the possession of the property seized, as is the case when goods are

taken. 14 *Wend.* 160. 5 *Ohio Rep.* 163. 1 *Penn. Rep.* 426. 9 *Serg. & Rawle Rep.* 16. 2 *Ark.* 578. 5 *Gill. & John.* 102. 10 *Smedes & Marshall,* 584. 5 *Yerg. R.* 227. 4 *Mass. R.* 403. 23 *Wend. Rep.* 490. 4 *Hill (N. Y.) Rep.* 621. 1 *Scam.* 612. 1 *Dev. Eq. R.* 525. 2 *Mich. Rep.* 150. *Ib.* 379. We respectfully submit that the case of *Anderson v. Fowler* (3 *Eng. R.* 388) is not law, and is not sustained by the Courts of any State except of Kentucky, in 7 *Monroe Rep.* 262; and of Indiana, where the adjudications are based on 1 *Black. Rep.* 226, which was a levy on goods, and decided in the case of *Clark v. Withers,* whilst it is directly opposed by the decisions of New York, Ohio, Pennsylvania, Maryland, Mississippi, Tennessee, Massachusetts, Illinois and North Carolina. The case in 3 *Ham.* (*Ohio*) *Rep.* 223, was a levy on goods, and the dictum in that case as to a levy on land was repudiated in the case of 5 *Ham.* (*Ohio*) *Rep.* 173; that the case of *Shepard v. Rowe,* (14 *Wend. R.* 260,) was not overruled by *Green v. Burke,* 23 Wend. 499, clearly appears in 4 *Hill Rep.* 621, citing and affirming the principle decided in 14 *Wend.*

But if a levy be satisfaction, the property levied upon must belong to the debtor, and must be sufficient to bring money enough at sheriff's sale to satisfy the debt; which was not the case here. And at best, a levy is but a mere temporary bar or suspension of further execution—a ground for setting it aside on motion.

Irregularity in an execution or sale can be objected to only by the party and in a direct proceeding. 16 *J. R.* 537. 1 *Cow. R.* 736. *Graham P.* 363.

If goods are not taken to the value of the whole, the plaintiff may have a *ven. ex.* for part and a *fi. fa.* for the residue in the same writ. 2 *Saund. Rep.* 47. 1 *Bos. & Pull. R.* 359. 2 *Tidd's Pr.* 934. 2 *Chitt. Rep.* 390. 7 *Law Lib.* 144. 7 *Ala. Rep.* 650. And after a levy upon sufficient goods, an alias *fi. fa.* is only erroneous and voidable, and the proceedings are valid until set aside by the party in a direct proceeding. *Woodcock v. Bennet,* 1 *Cow.* 734. *Mitchell v. Evans,* 5 *How.* (*Miss.*) *Rep.* 551. *Scull v. Goodbolt,* 4 *Ala. R.* 324. *Patrick v. Johnson,* 3 *Lev.* 404. *Sher-*

ley v. Wright, 1 *Salk.* 379. 2 *Ld. Raym.* 775. *Spafford v. Beach,* 2 *Doug. Mich. Rep.* 150.

But Whiting & Slark cannot object that the execution was satisfied by the levy, or that, in consequence of the levy, no further execution could be had. This defence is confined to the debtor alone whose goods are seized, and cannot be made by others as in the case of actual satisfaction. *Bradley v. Walker,* 2 *Ark. Rep.* 578. *McGinnis v. Lillard,* 2 *Bibb. R.* 490. *Ontario Bank v. Hallett,* 8 *Cow.* 194. *Green v. Burk.* 23 *Wend.* 500. 3 *Cro. Car.* 75. 2 *Show.* 394. 2 *Saund. R.* 47, *n.* (*a.*) 6 *Vt. Rep.* 237. 2 *N. Hamp.* 298. 18 *Eng. C. L. R.* 273. 24 *Pick. Rep.* 259.

IV. The next objection to Beebe's title is based upon the supposed agreement made by him with Trapnall. To this we reply: 1st. This agreement is not alleged in the bills of Whiting & Slark, and they can have relief only upon the facts charged in their pleadings. 2d. There is no proof of this agreement, except the answer of Trapnall, Beebe's co-defendant. It is a strict rule that the answer of one defendant cannot be read in evidence against another; the reason being that there is no issue between the parties and no opportunity for cross examination. *Gresley's Eq. Ev.* 29. 1 *Gallis R.* 630. 3 *Cond. R.* 319. 4 *Cond. R.* 170. 1 *Greenl. Ev. sec.* 178. 2 *Danl. Ch. P.* 981, *note* (1). *Christie v. Bishop,* 1 *Bar. Rep.* 105. *Grant v. U. S. Bank,* 1 *Caine's cas. in Er.* 112. *Phenix v. Assignees of Ingraham,* 5 *J. R.* 412. *Hunt & Blanton v. Stevenson,* 1 *A. K. Marsh.* 570. *Mosely v. Armstrong,* 3 *Mon. Rep.* 288. *Graham v. Sublett,* 6 *J. J. Marsh.* 44. *Collier v. Chapman,* 2 *Stew. R.* 168. *Singleton v. Gayle,* 8 *Port. Rep.* 270. *Haywood v. Conall,* 4 *Har. & John.* 518. *Jones v. Hardesty,* 10 *Gill & John.* 405. 1 *Stark. Ev.* 284. 1 *Bibb.* 200. 2 *ib.* 470. 9 *Cranch* 156. 1 *Russ. & Myl. Rep.* 200. The case of *Field v. Holland* (2 *Cond. R.* 290) is only that the answer of a defendant may be used by his co-defendant, claiming through him, as to matters which both were called on to answer, in relation to transactions before the sale. The case

of *Osbourn v. U. S. Bank* (5 *Cond. Rep.* 754) was that of a *pendente lite* purchase, and might have been applicable if Trapnall had been the owner of the judgment instead of a mere agent or attorney, and the transfer had been made after the answer. That the statement of a vendor after the sale cannot affect the title of the vendee. *Gullett et ux. v. Lamberton,* 1 *Eng.* 10. *Humphries v. McCraw,* 4 *Eng.* 91. 3d. But if the agreement had been alleged and established, it formed no ground for relief against Beebe. The effect of the agreement was not to waive any lien, nor to confine the lien to the "corner" property; but if other property was sold under the judgment, as might have been the case, Beebe would lose the proceeds of the judgment: and if any injury should result to Whiting & Slark by a sale of the corner property, when there was other sufficient property, they might, by injunction, have compelled Beebe to resort to the other property for the satisfaction of the judgments, as in the case of *Screesbrough v. Willard,* 1 *John. Ch. R.* 409.

V. The next ground taken by Whiting & Slark is, that they are still entitled to have the securities marshaled. If the junior creditor fails to take proper steps to have the sale enjoined, and permits the property to be sold, he cannot afterwards have the securities marshaled—he can avail himself of this remedy only before the sale under the prior liens. *Drake et al. v. Collins,* 5 *How. R.* 252. But even if the securities could be marshaled after a sale under a prior lien, they could not have been under the present bill, because De Baun's vendees, Pendleton, Sabin and Le Baron, each of whom had a prior lien and equity to Whiting & Slark, were not made parties to the bill. If Whiting & Slark had enjoined the sales, they could not have had a decree marshaling the assets, because the property was sold under the order of De Baun, in the manner most conducive to their interest, and in the manner prayed by them. Whiting & Slark could not have had the securities marshaled in a manner injurious to the alienees of De Baun, whose rights were acquired prior to their interest. The rule in relation to marshaling assets, proceeds upon the principle that full justice may be done to all the

parties without prejudice to any. *Briggs, Gacostor & Co. v. The Planters Bank, Freeman* (*Mis.*) *Ch. Rep.* 574. *Woodcock v. Hart,* 1 *Paige Rep.* 185. *Brickenhoff v. Marvin,* 5 *J. Ch. R.* 320. *Everstone v. Booth,* 19 *J. R.* 485.

VI. It is contended that Beebe's purchase was void in consequence of the *lis pendens* created by the filing of the original bill of Whiting & Slark. But Beebe was no party to the bill until long after his purchase: and the effect of a purchase *pendente lite* is not to render the contract void, but merely that the purchaser is chargeable with notice and is bound by the decree against the person from whom he derives title without being made a party. *Story Eq.* 394. 2 *Mad. Ch.* 189. *Bennett v. Williams,* 5 *Ham.* (*Ohio*) *Rep.* 460. And the rule applies only to voluntary alienations. *Story Eq. Pl.* 284.

VII. It is objected that the lien of the Gray & Bouton judgment was waived by the delay, and by ordering the execution to March term, 1843, to be returned. That the lien of the judgment is not waived by delay in issuing executions, see *Ranken v. Scott,* 12 *Wheat.* 177, *S. C.* 6 *Cond. Rep.* 504. *Green v. Allen,* 2 *Wash. C. C. R.* 280.

VIII. It is contended by Whiting & Slark, that the rule that mere errors in a sheriff's sale will not vitiate it, is confined to cases where the purchaser is a third person, who purchases without notice, and does not apply where the plaintiff is the purchaser, and that as Beebe was the owner of the judgments, any irregularity or defect in the proceedings is sufficient to vacate his purchase. None of the proceedings are shown to have been erroneous. Notice of defects can have no effect upon the sale. Notice only applies to cases where a party makes a purchase with knowledge of a fact which renders it fraudulent; for example, where a party purchases with notice that the judgment has been paid. That the general rule which protects sales unless the proceedings are absolutely void, applies as well to the plaintiff in the execution, as a person having notice, as to a stranger without notice, *vide Drake v. Collins,* 5 *How.* (*Mis.*) *Rep.* 253. *Matthews v. Thompson,* 3 *Ham.* (*O.*) *Rep.* 272. *Spafford v. Beach,* 2

Doug. (*Mich.*) *Rep.* 150. 4 *Mon. Rep.* 465-474. *Ontario Bank v. Hallett,* 8 *Cow. Rep.* 548. *Reynolds v. Cross & Douglass,* 3 *Caine's Rep.* 267. Where process and proceedings are merely erroneous and voidable, the same can only be avoided by the party, and he cannot make the objection collaterally. 16 *J. R.* 537. 1 *Cow.* 736. 3 *Lev.* 403. 2 *Sutw.* 925. *Cro. Eliz.* 188. 1 *Salk.* 273. 8 *J. R.* 361. 5 *How.* 253. 2 *Ala.* (*N. S.*) 670.

IX. It is objected that the revival of the judgment of Gray & Bouton did not continue the lien, notwithstanding the *sci. fa.* was issued and served before the expiration of the lien. The case of *Mowers v. Kip,* (2 *Edw. Ch. Rep.* 166), was decided upon a statute wherein there is no provision, as in ours, for a continuance of the lien beyond the time limited. Our statute, *Dig. ch.* 93, enacts that "if a *scire facias* be sued out before the termination of the lien of the judgment or decree, the lien of the judgment shall have relation to the day on which the *scire facias* issued," and the lien *continued* for another period of three years, and so on from time to time as often as may be necessary." *Secs.* 13, 12: and the construction of the statute is settled in the case of *Hubbard v. Balls et al.,* 2 *Eng. R.* 442.

As to combination between Beebe and De Baun, the record clearly shows that if there was any combination, it was between De Baun and Whiting & Slark to defeat Beebe.

As to uncertainty in the return of the sheriff on the execution; the defect, if any, could be supplied by parol, and at all events the description in the deed is sufficient. See 4 *Wend.* 462. 2 *Marsh. Rep.* 256. 3 *Ohio* 272. 9 *Porter* 205. 5 *Ohio* 524.

Independent of all his other claims, Beebe is entitled to hold the land under his tax titles. The conveyances are regular; and if any facts exist which would avoid these conveyances, they are not put in issue.

This cause was further argued at length by PIKE, on the cross-bill of De Baun; and by WATKINS & CURRAN, contra.

Mr. Justice WALKER delivered the opinion of the Court.

In the investigation of the numerous questions which arise in this complicated case, we find it most convenient to dispose of them in the order in which they are presented on the record, referring to the facts as they stand in connexion with the particular points raised.

De Baun, a resident of the county of Pulaski, was, in the year 1840, the owner of a large amount of real estate, situate in said county, and was indebted to numerous creditors, who then, and subsequent to that time, obtained judgments against him, or secured the payment of their debts by mortgages and deeds of trust, thereby creating liens on his real estate, according to date of record. Prior in date was the judgment of Gray & Bouton, rendered the 23d March, 1840; that of Lewis Beach next, rendered the 27th March, 1840; and next in order was the mortgage of Whiting & Slark, (the complainants,) filed the 13th February, 1841.

As the first and most important question grows out of the contest between Whiting & Slark and Beebe, for the property embraced in the mortgage, and upon which there existed prior judgment liens in the above cases, it is not important at this time to enumerate the other claims. They will be referred to as they incidentally arise. Whiting & Slark claim under their mortgage, and as purchasers under senior judgment liens of Gray & Bouton and Beach, at the May term, 1843. Beebe, on the other hand, contends that the sales at the May term were void, and that he, at the November term, 1843, acquired a valid title by purchase under these, and other liens, senior in right to the claim under the mortgage.

Our first inquiry is, did Whiting & Slark acquire such title under their purchase at May term, 1843?

Writs of *fieri facias* issued on the Gray & Bouton and Beach judgments, on the 19th of February, 1841, which were levied on real estate and returned without sale; subsequently writs of *venditioni exponas* issued with clauses of *fi. fa.*, which were levied on

the mortgaged property. These writs were also returned without sale; and in the case of Gray & Bouton a writ of *ven. ex.* issued, directing the sale of the property first levied upon alone. In the case of Beach, a writ of *ven. ex.*, directing a sale of the property first levied upon, with a clause of *fi. fa.*, which was levied on the mortgaged property. Under these writs, Whiting & Slark purchased and claim title.

To the validity of this title, it is objected, first: That the original *fi. fa.* issued in favor of Gray & Bouton was void, because it was not signed by the Clerk. The writ was valid, endorsed and perfect in every other respect.

We have repeatedly held original writs void for this and like defects. The question comes up for the first time as to the effect of like omissions in judicial process, with regard to which there is said to be a marked difference. The first is connected with the inception of the suit. It is that by which the defendant is brought into court. It is the ministerial act of the Clerk, before the Court has gained jurisdiction of the party or the case. The latter is an act after the Court has acquired full jurisdiction of the whole case and the parties, who are presumed to be present and privy to what transpires. In the latter class of cases, such defects as this have almost invariably been amended. *Campbell v. Styles,* 9 *Mass. Rep.* 218. *Young v. Hesmer,* 11 *id.* 90. *Brummell v. Rush,* 10 *id.* 222. 2 *Brock.* 14.

In the case of *The People v. Sherborn,* 5 *Wend.* 103, where a wrong seal had been affixed to a writ of certiorari, an amendment was permitted by affixing the proper seal. So where a writ of *scire facias* had no seal one was affixed. *Chamberlain v. Skinner,* 4 *Cow. Rep.* 550. And where a *fieri facias* issued without a seal, it was amended by affixing the proper seal. 3 *Green.* 29, *Sanger v. Baker.* And this even after levy and sale of property. 1 *Iredell* 34.

And in a very late case, *Brewer v. Sibley,* 13 *Met.* 176, DEWEY, Judge, held that, although a seal was one of the requisites of a proper writ, yet the want of it furnished no cause for a motion in arrest of judgment, and said, "It is a mere defect in form which

if relied upon, must be taken in due season, and if not thus taken, the exception is waived." And the teste of writs, whether original or judicial, have almost invariably been held amendable. *Bronson v. Alpin,* 1 *Cow.* 203. *Ross v. Luther,* 4 *Cow.* 158. *Barber v. Smith,* 4 *Yeates* 185. *United States v. Camp,* 5 *How.* (*Miss.*) 516. *Shumaker v. Knorr,* 1 *Dallas* 197.

And in the case of *Nash v. Brophy & Truler,* 13 *Met.* 478, SHAW, Chief Justice, said, "The allowance of the amendment of the writ, so as to make it bear teste of Daniel Wells instead of John M. Williams as Chief Justice, was right and fully authorized by the Revised Statutes." "The teste is a mere matter of form." *Ripley v. Warren,* 2 *Pick.* 592. It is worthy of remark in these latter cases, that the constitution of Massachusetts requires that writs shall bear teste in the name of the Chief Justice.

And in the case of *Davis v. Wood,* 7 *Misso. Rep.* 164, where their constitution, like ours, required that "all writs and other process should run in the name of the State, bear teste and be signed by the clerk of the court from whence it issues," the question was whether an execution, which did not run in the name of the State, could be read in evidence. The court in that case said, "It may well be questioned whether that clause which directs that all writs and other process shall run in the name of the State, as it also requires all writs to be tested by the clerk, is not applicable alone to writs issued from the higher courts and courts having a clerk. But however this may be, the statute concerning writs directs that those emanating from justices' courts, shall run in the name of the State. In our government, jurisdiction is conferred by the constitution on the superior and inferior courts, and writs are only part of the machinery employed by the courts for the exercise of the jurisdiction with which they are invested. It is not perceived how a writ wanting a constitutional requisite is more defective than a writ wanting a statutory one. The constitution, as well as the statute, is merely directory, and neither the one nor the other expressly makes void a writ not in conformity to its provisions."

And in a case like the one under consideration, where the writ

only lacked the signature of the clerk to make it perfect and formal, it was held by the Supreme Court of Indiana amendable. *Woolbright v. Wise, 4 Blackf.* 137.

These various instances of amendment will suffice to show the opinions entertained by most of the American Courts.

We are fully aware of the close connection in principle between this case and some of our former decisions upon the question involved. And whether, if this court was now for the first time called upon to construe the constitution and the statute prescribing the requisites of a writ, and to decide how far and under what circumstances writs would be declared void or amendable, it would adopt a more liberal rule of construction than that heretofore established, we are not called upon in this case to declare. But in the case before us, where judicial process is the subject of consideration, in view of the enlarged powers of courts in amending such process (and no statute confers more ample authority for that purpose than ours does) we are of opinion that although a writ without a signature of the clerk, as required by the constitution, is erroneous, yet it is not necessarily void, and the court from whence it issued, upon application for that purpose, might either quash or amend it as the circumstances of the case might require.

There can be no doubt but that some of the former decisions of this court were made under an erroneous impression with regard to the effect which the constitution had upon the validity of the process, that as the constitution required the signing, &c., it could not be dispensed with, and being a constitutional defect is void. Now, upon a moment's reflection, it will at once be perceived that a directory enactment of the constitution is of no more validity as a law than a like enactment by statute. Both are laws, though emanating from different law making powers. The only difference between the two is that the legislature cannot pass a law dispensing with the requisites prescribed by the constitution, whilst it could repeal that made by its own body. In other respects, they are equal. Instead therefore of looking to these, the true inquiry is, is the writ so totally defective as not

to perform the offices of a writ, and what will be the effect of the amendment upon the rights of the parties? The writ in this case being amendable, when collaterally questioned, as this is, will be considered as amended. *Stevens v. White, 2 Wash. Rep.* 203.

The next question presented for consideration is, as to the effect of an undischarged, subsisting levy on land. It is contended on the one side that a subsisting undischarged levy, whether upon goods or land, is a satisfaction of the judgment until discharged according to law and found insufficient. On the other side, it is said that such is not the effect of a levy, or if such should be its effect when made on personal property, that the rule does not apply to a levy on land.

There are but two writs given the creditor by the common law for enforcing satisfaction of his judgment; that of *fi. fa.,* by which he levied on the goods of the debtor, and *levare facias,* by which he not only took the goods, but also the issues and profits of the land. By statute, he was allowed also the writ of *ca. sa.* against the body of the debtor, and the writ of *Elegit* against his lands: (*Plow.* 441;) and the levy on goods. (*Clerk v. Withers,* 2 *Ld. Raym.* 1072;) the arrest of the body of the debtor, (*Foster v. Jackson, Hob.* 124;)and the delivery of a moiety of the land. (*Bri. Err.* 257,) were each held an unqualified satisfaction of the judgment. And the rule as laid down in the case of *Clerk v. Withers,* was recognized by most of the American courts for a long while. Thus in New York, KENT, Chief Justice, in the case of *Denton v. Livingston,* as early as 1812, recognized and approved the decision in that case, after which for 27 years, in a series of uniform decisions, it was adhered to, until, in the case of *Green v. Burk,* 23 *Wend.* 490, COWAN, J., for the first time in that State, questioned the propriety of the rule in its unqualified sense, after which BRONSON, C. J., in the case of *The People v. Hopson,* 1 *Denio,* distinctly announced a change in the rule, which has since been generally acquiesced in by most, indeed all of the courts of the United States, so far as we are advised. In that case, he said, "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy on sufficient personal property,

without any thing more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor."

It would be a useless consumption of time to refer at length to the numerous decisions which substantially affirm this decision. *Kershaw v. Merchant's Bank New York, 7 How. (Miss.) Rep.* 386. *Walker v. McDonald, 4 S. & M. (Miss.) R.* 133. *Laslie v. Moore,* 1 *Blackf.* 226. *McIntosh et al. v. Chew et al., id.* 286. *Murry v. Ashton,* 7 *Blackf.* 289. *May v. Hollingsworth, id.* 350. *Merchants Bank v. Kempley,* 2 *Doug. R.* 279. *Reynolds et al. v. Executors of Rogers et al.,* 5 *Ohio* 174. *Miller v. Estel,* 8 *Yerg.* 450. *Hopkins v. Chambers,* 7 *Mon.* 260, are all cases in point. So that we may say, so far as a levy on personal property is concerned, that the question is settled. Indeed the counsel seem to have virtually conceded the rule to this extent, but argue strenuously, that it does not apply to a levy on land. Because, they say, the reason upon which the rule rests in regard to levies on goods, does not apply to levies on land.

Is this true? The officer acts under the same authority. The property whether lands or goods is alike liable to be levied on; every act necessary to constitute a valid levy in the one instance is also necessary in the other. In either, the officer in making his levy identifies, sets apart and estimates the value of the property taken. When this is done, the levy is complete. It is not necessary to the validity of the levy that the sheriff should take actual possession of the goods. *Ray v. Herbert,* 19 *Wend.* 495. It is all sufficient, if he has the goods within his power at the time. The officer by virtue of his levy, acquires a special interest in the goods arising out of his obligation to protect them and hold them subject to sale. This interest is common to bailees, yet they have no title for any other purpose than that of protection. The property is in the custody of the law. The sheriff is its officer. The title is not changed but remains in the debtor until it is sold,

just as the title to land does. Can it be said then that, because the officer exercises this right, which it is unnecessary for him to exercise, when the levy is on land, the whole legal effect of the levy is changed. The old rule was not based on a change of possession but of title. The modified rule abandoned the reason and the rule together, and left them on the same footing. Thus in the same opinion, in which the rule is changed, the court denies to a levy the effect before then given to it. It is there said, "the mere levy neither gives any thing to the creditor nor takes any thing from the debtor. It does not divest a title. It only creates a lien on the property."

The old rule that a levy was an absolute satisfaction, was established by this process of reasoning. That a levy divested the owner of the possession of his goods, and that possession under the levy was in law a change of title to the property. and as the debtor had lost his title to the property, that the debt was satisfied. The modern decisions, we have seen, hold that a levy and possession under it produce no such effect, and are not an absolute but a *prima facie* satisfaction. Possession then was only relied upon under the old rule in connexion with the levy as effecting a change of title. Beyond that, it was a mere matter of convenience or inconvenience to the holder, for the law, as now settled, is that a "levy neither gives any thing to the creditor nor takes any thing from the debtor." It does not divest a title but merely confers a right to sell; and this right to sell is alike conferred in all cases whether made on goods or land; and as lands and goods are placed on an equal footing as to the effect of the levy, they must be equally so as a satisfaction; and to concede the rule of *prima facie* satisfaction in regard to goods, is, in principle, to concede it also in regard to lands, for as the possession does not confer any quality upon the levy which makes it a change of title to the property and thereby a satisfaction, possession ceases to be more than a mere question of convenience with the debtor, with which the creditor has nothing to do.

So, under the English and American practice, where lands were taken by *eligit* or *levare facias,* as in the case of *Ladd v. Blunt,*

they were held to be a complete and unqualified satisfaction, and upon the same grounds which a levy on goods was so held, the change of title to the property. And this was the case with regard to a levy on lands by *fi. fa.* until the case of *Shepperd v. Rowe,* 14 *Wend.,* where for the first time the distinction was made between the effect of a levy on land and goods. That case is entitled to particular attention as the earliest and leading case for the distinction contended for. Let it be borne in mind that up to that date and in that case and long after, the courts of New York held a levy on goods an absolute satisfaction and extinguishment of the judgment. And in that case admitted such to be the effect of a levy on goods. They denied, however, that a levy on lands went to that extent. The court in that case said, "by the levy on goods, the debtor is deprived of his property; it is not so in the case of a levy on real estate, the debtor notwithstanding the levy holds the title and the possession, and is in the enjoyment of the profits of the land." And again the court says, "The defendant is not without a remedy, for the court on application would stay the suit on the judgment until the sale and return of the execution. We cannot allow, however, a seizure and levy of execution on land to be *per se* an extinguishment of the judgment." Thus, it is distinctly announced that the Court would have stayed the proceeding on the judgment until the sale and return of execution, but would not allow it the effect to extinguish the judgment, as they would had it been a levy on goods instead of land, but they gave it all the effect which was allowed to a levy on goods according to the rule as subsequently settled in the case of *Green v. Burk,* and *The People v. Hopson.* It materially weakens the force of the decisions after this case, which deny that a levy on land is even *prima facie* a satisfaction of the judgment, when it is seen that in almost every instance they quote this case as authority for their decisions, and assign as a reason for the distinction the temporary possession of the property by the officer, between the levy and the sale, the mere exercise of a right resulting from the levy.

An attempt is made in argument to weaken the force of a levy

on land because the judgment lien existed at the time it was made. It is true that there is a general lien thereby created on all lands of the debtor, and it is equally true that, from the delivery of the writ, there is a general lien on all the goods of the debtor: these general liens must in either case necessarily exist at the time the levy is made. But the necessity of the levy is just as great in the one case as in the other. In order to effect a sale of either, it is necessary to select, identify and set apart the particular property taken in satisfaction of the judgment. The creditor is not permitted to take all the property, because it is all bound for his debt, but in the language of his writ, "sufficient to satisfy the debt," and it is, we apprehend, this setting apart and taking in satisfaction which constitute it a satisfaction. The claims or demands of the law on the debtor are then satisfied. To illustrate this point: Suppose A. should covenant with B. that out of his whole estate of land and negroes, B. should select and set apart enough to satisfy his demand of $1,000, to be sold at the expiration of thirty days, unless before that time A. should pay the $1,000, A. reserving to himself the right to say whether land or negroes should be set apart, and also what particular slaves or tracts of land should be taken, provided it should be sufficient in value to satisfy the debt. Upon this covenant, B. in the first instance, would hold a general lien or right to select out of the whole estate of A. This the covenant gives; it is no satisfaction; but when A., in the exercise of his reserved right, points out the property to be set apart and taken, B. is bound to take that alone if of sufficient value, and when taken, the covenant is satisfied, and he cannot come back on A. for other property until it is ascertained by sale that that given up is not sufficient. Nor does it at all change the result that land is given up which B. could not take into actual possession or slaves which he could. Should B. after this, return and take other property of A. before disposing of the first, he would certainly be a trespasser, and if so in the case stated, why not in the case of a levy? The execution was in the first instance a lien on the whole estate of the debtor; the law gave to the creditor a right to have out of his whole estate,

whether of land or goods, sufficient taken and set apart to satisfy his debt and constitutes the officer his agent to do this, but at the same time gives to the debtor the right to say which particular piece of property shall be taken, whether real or personal, and if of sufficient value denies to the officer the right to take any other. Can it be less a satisfaction of the demands of the law because it is land which cannot be removed into possession of the officer? If the creditor may abandon this land, after he has accepted it as satisfaction, and come upon the debtor's property again, is it not evident that he could in the first instance have refused to accept it as satisfaction, for then he had not accepted, yet the law says he shall take it if of sufficient value, and that alone.

We must believe it a violation of law and the rights of the debtor to return upon him for a further satisfaction until the first is found to be insufficient, in due course of law, and if this right to abandon a levy and return upon the debtor be conceded in one instance, where is it to stop? Upon the same grounds, the creditor might return upon the debtor until his whole estate would be either encumbered or withdrawn from him. The statute has expressly provided against this, and this course of reasoning would result in its virtual appeal.

We have been referred to an array of decisions which, it is said, uphold the distinction between the effect of a levy on goods and land. Upon reviewing them, it is found that 14 *Wend.*, 4 *Hill*, 5 *Ohio*, 10 *S. & M.* (*Miss.*), 4 *Mass.*, 9 *Serg. & Rawle* 16, are the only cases in which the question of a levy on lands was presented. The other cases turn upon other points. Thus, in 2 *Ark. Rep.*, the question was whether a levy on the goods of one defendant which were subsequently re-delivered to him without sale, could be pleaded in satisfaction of the judgment by a co-defendant. 5 *Gill & John.* was not a case of levy on land; so far as may be learned from the record, nothing whatever is said about land, or the effect of a levy upon it. 23 *Wend.* was a case of a supposed levy on personal property, it turned out, however, that there was no valid levy made. The case of *Miller v. Estill,*

8 *Yerger* 460, since decided in Tennessee, holds a different doctrine from that contended for by counsel in 5 *Yerger;* 2 *Dev.* was a case of a levy on a lot and slaves; 2 *Douglass* was a case of a levy on goods; 9 *Serg. & Rawle* was a case under the Pennsylvania statute where recognizance was entered into which operated as a stay on the judgment. After the stay had expired, execution issued and was levied on land, and returned without sale, suit was brought on the recognizance; the court held that the creditor has his election to proceed on the judgment or the recognizance, and if on the latter the levy was no satisfaction and could not be so plead, and also that such would have been the effect as between the parties to the original judgment. The same court, in the case of *The Bank of Pennsylvania v. Lalshaw,* 9 *Serg. & Rawle* 9, held that a levy on land could not be abandoned whilst in force, so as to permit a *ca. sa.* and arrest of the person of the defendant. It is true that importance is given to the statute in regard to issuing writs of *ca. sa.,* yet in spirit that statute is not more stringent than ours, which denies any other satisfaction than the property selected by the debtor, if of esteemed sufficient value. So that, taken all together, the decision in this case is of doubtful authority. The case of *Shepperd v. Rowe,* 14 *Wend.,* has already been examined. It went no further when fairly considered than to place a levy on land just where the subsequent decisions placed a levy on goods. The case in 4 *Hill* was decided upon the authority of this case alone, and doubtless without a close examination of it. The case in 5 *Ohio,* clearly makes the distinction contended for, but is placed distinctly upon the ground of a change of possession of the goods in the one instance and not in the other, and quotes as authority the English authorities, the early New York authorities and the case of *Ladd v. Blunt,* 4 *Mass.,* all of which cases upheld and sustained the doctrine of absolute satisfaction, and were made before the rule had been modified as it was in the case of *Green v. Burk,* 23 *Wend.,* and all the after decisions. This change of possession in all these cases was closely associated with an idea of change of property, indeed supposed to have that effect. So far as the

case of *Ladd v. Blunt,* could be held as authority in regard to a levy on land, it will be seen that that case was governed by a statutory proceeding in the nature of *Elegit,* the writ of *Extendi Facias* by which the property was delivered up to the creditor without sale; but even that too was considered and upheld on the ground of change of property. 10 *S. & M.* (*Miss.*) *Rep.,* is a case fully in point. It was made without reference to authority, and fully sustains the position assumed by counsel.

After reviewing these authorities then, we find the Courts of New York, upon the credit of *Shepherd v. Rowe,* 14 *Wend.;* of *Ohio,* upon the authorities of the old cases which rested the rule upon a supposed change of property effected by a levy; the Mississippi and perhaps the Maryland courts may be said to sustain the distinction between the effect of a levy on goods and land. And opposed to these decisions, are the courts of Kentucky and Indiana, Michigan and Tennessee, as will be found by reference to the cases of *Hopkins v. Chambers,* 7 *Mon. R.* 262. *Lessell v. Moore,* 1 *Blackf. R.* 226. *McIntosh et al. v. Chew et al., id.* 289. *Miller v. Ashton,* 7 *Blackf.* 30. *Marcy v. Hollingsworth, id.* 350. *Safford v. Beach,* 2 *Day* *153. *Miller v. Estill,* 8 *Yerger* 460.

Thus, in the case of *Hopkins v. Chambers,* it is said, "The first execution on the bond was levied upon a tract of land which does not appear ever to have been sold or released from the execution, and of course no other execution could regularly thereafter issue to take other estate of the defendant, whilst the land seized under the first remained undisposed of and subject to that execution." In *Lessell v. Moore* it was held "that where real estate of the defendant was held by a *ven. ex.,* the plaintiff could not take out an execution of *fi. fa.* and levy on other property, and if done the Court would set it aside as illegal." In *McIntosh v. Chew* it is held "that a levy on goods or lands is a satisfaction of the judgment, and may be pleaded in bar of any other action until the insufficiency of the levy appear by sale and return." And so in *Miller v. Ashton;* and in *Marcy v. Hollinsworth,* it was held "that after *fi. fa.* levied on land and before the levy is disposed of, if a second *fi. fa.* issue, it is irregular and void." In the case

of *Safford v. Beach,* although the court denies to the levy the same effect as if made on goods, yet it still treats a second levy as an irregularity, for which even a sale under it might have been set aside upon motion for that purpose in due time, but that a motion after five years was too late. In *Miller v. Estill,* the Court deny to the levy on land the same effect as if made on goods, but hold it to be the inception to a right of satisfaction. From this hasty review of these decisions, it will be seen that the courts of Kentucky and Indiana, in full and unqualified terms, sustain the former decisions of this Court in *Anderson v. Fowler,* and *Anthony v. Humphries,* whilst the later cases in Michigan and Tennessee in qualified terms, but in each case the qualification grows out of an effort to discriminate between absolute and qualified satisfaction, which they concede to be the effect of a levy on goods but deny to a levy on lands the same effect; just as in the case of *Shepherd v. Rowe.*

Upon a review, therefore, of all the authorities on both sides, to which we have had access, it is evident that, if resting upon the number of decisions by the several State courts the preponderance might be in favor of the distinction, the strength of the argument and reason for a different conclusion is however against the distinction; but even if otherwise, unless clearly so, we would not feel at liberty to change the rule as laid down in *Anderson v. Fowler,* and we are far less inclined to do so, when we come to consider the effect which a different rule would have upon the rights of the debtor secured to him by statute, as well as the inroad which it would make upon a general principle which seems to pervade our whole system, that the creditor is entitled to but one satisfaction, and that when he elects which he will take, he shall be bound by such election.

Our statute gives to the debtor the privilege of selecting the property to be surrendered in satisfaction, and if of sufficient value it denies to the creditor the right to take any other. This may be and often is an important privilege to the debtor, a shield thrown around him to protect him from oppression and wrong, and at the same time does no injustice whatever to the creditor,

for it is of no consequence to him what particular property is taken, so that it is of value sufficient to pay his debt. Lands and personal property are alike liable to be taken. The debtor has a right to give up either, and when selected and accepted they alike satisfy the demand of the law, and there is no way by which to preserve unimpaired the provision of the statute, without so considering them. Rid this question of satisfaction of the mistification which is thrown around it by attempting to connect with it reasons and considerations which were alone applicable to the rule of absolute satisfaction, and it amounts to this, that as the law recognizes but on satisfaction, when the creditor comes upon his debtor for the amount of his debt in money, or property, sufficient, when sold, to bring the money, and takes at his discretion in value property sufficient for that purpose, the property in effect stands until it is sold and the money made, in the place and stead of that much money, and must be presumed to be enough—the creditor has accepted it as such—and it has fully satisfied the demands of the creditor upon the debtor (until upon sale it otherwise appears) as payment would, and where this property is in the mean time, whether in the hands of the officer or immoveable as lands are, has nothing whatever to do with satisfaction; if lands, it is if any thing the more satisfaction, because not subject to waste or total destruction as goods are, and as to this matter of inconvenience in taking from the debtor his property and special property in the officer and change of title, however they might have served as reasons for the old rule of satisfaction in the absence of statute such as ours, yet surely when we consider that the debtor has his election to give up whatever property he chooses and does so, being his own voluntary act whether the one or the other, is matter of choice and convenience to him.

Thus considered, the rule for which we contend harmonizes with a train of decisions upon other branches of the same subject.

The law gives to the creditor the right to select which of the several means of enforcing satisfaction he will avail himself of, but when he has made such selection, will never permit him to abandon it capriciously. He may prefer to take his debtor into

custody on *ca. sa.,* and whilst so held all other satisfaction is denied him. But if the debtor should escape, the creditor may resort to other process for his satisfaction. *Taylor v. Thompson,* 5 *Peters* 358. So the creditor may elect to take goods by *fi. fa.* in satisfaction, and when he has done so, the satisfaction is precisely the same in principle as if he had taken the body of the defendant in custody, whilst he holds them in execution the law gives him no other indemnity. But should they by acts not the fault of the creditor be lost to the debtor or appropriated according to law, and found insufficient, then on the same principle that the escape of the debtor from prison entitles the creditor to further process, he may sue out an alias *fi. fa.,* yet like a voluntary discharge of the debtor from custody, if the goods are appropriated or wasted by the acts of the creditor, or his accredited agent, the satisfaction would become complete, at least to the amount of the value of the goods so wasted. *People v. Hopson,* 1 *Denio* 578. So, also, where a levy is made and a delivery bond (which by statute has the force of a judgment when forfeited) is taken and forfeited, the levy is discharged and the bond so forfeited held to be a satisfaction of the former judgment. *Taylor v. Dundass,* 1 *Wash.* 94. *Cook v. Pills,* 2 *Munf.* 153. *Lusky v. Ramsey,* 3 *Munf.* 433. *United States v. Graves,* 2 *Brock.* 385. *Joyce v. Ferguar,* 1 *A. K. Mar.* 20. *Justices of Mason County v. Lee, id.* 248. *Chitty v. Glenn,* 3 *Mon.* 425. *Young v. Reed,* 3 *Yerger* 298. *Davis v. Dickinson,* 1 *How.* (*Miss.*) *Rep.* 68. *McNutt et al. v. Wilcox & Fearn,* 3 *How.* (*Miss.*) *Rep.* 419. *Sanders v. McDowell's ad'm.,* 1 *How.* (*Miss.*) *Rep.* 9. *Minor v. Lancashire,* 4 *How. Miss.* 350. *Wanger v. Baker, id.* 369. *United States v. Patton,* 5 *How. Miss. R.* 280. *Barker v. Planter's Bank,* 5 *How. Miss. Rep.* 566. *Field v. Moss & Harrod,* 1 *S. & M. Rep.* 349. *Barns Ex. v. Stanton et al.,* 2 *S. & M. Rep.* 461. *Clark v. Anderson,* 2 *How.* 852. *Stewart v. Fergua, Walk. R.* 175. *Connell v. Lewis, id.* 251. *Annis v. Smith,* 16 *Peters Rep.* 304. 4 *How. U. S. S. C. Rep.* 12. Yet should the bond be quashed, the effect thereof would be to revive the former judgment just as setting aside the first judgment would revive

the original cause of action which had been merged in it, and which remained so, so long as the judgment was in force.

And so effectual is this satisfaction that after a delivery bond has been taken and forfeited, it has been held that a second execution, levy and bond on the original judgment are void. *Witherspoon v. Spring,* 3 *How.* 60. In *McNutt v. Wilcox & Farne,* 3 *How.* 419, the court said, "The forfeiture of a forthcoming bond extinguishes or satisfies, as it is said, the original judgment, because it is a proceeding arising on it and has in itself the force and effect, and is of equal dignity with a judgment, and a plaintiff is not entitled to two subsisting judgments on the same cause of action against the same individuals. It is like a second judgment obtained by an action on the first; the plaintiff cannot proceed to enforce the first, but must rely upon the second." Chief Justice SHARKEY has here assigned the reason which extends not alone to judgments but to contracts and the process, to final payment, which upon one cause of action looks to one satisfaction, and in each step closes up the avenues to retroaction to final payment. Thus the account is merged in the bond, the bond in the judgment, the judgment in the further judgment, the levy, *prima facie,* satisfied the judgment; and the payment which is the end of the law discharges them all. These various references however are not to be held as settling the rule in either of them, but to illustrate a general principle.

And in precise analogy to this, do we find the same principles pervading our beautiful system of pleading, the prominent features of which are progressiveness, singleness of issue by confession and avoidance, by which, there is secured to the defendant the full benefit of his defence, and yet compels him to abandon his former ground before he shall rely upon another. The law truly "makes no step backward." So satisfaction is a defence—a plea in bar of a recovery. The law gives but one satisfaction, and when the party takes it, he must abide by it if sufficient. It must, however, be sufficient; if partial, it is not a good bar, and as the debtor could not plead it in bar, so the creditor is not bound by it. The law presumes the debtor able to

pay his debts, and commands the officer to take property of sufficient value to make him a full satisfaction. We must presume that he has done this; and therefore, until the levy is legally discharged, it must be considered and held as such. The creditor, until it is shown to be otherwise, can *make no step backwards.*

Such being our views of the effect of the first levy, it necessarily follows that the writs of *ven. ex.* with *fi. fa.* clauses were improperly issued; a simple *ven. ex.,* directing the sale of the property, which, by the return of the sheriff upon the original *fi. fas.* appeared to be in his hands unsold, was the appropriate writ.

We are not of opinion, however, that these writs were absolutely void, or that a sale made of property levied upon under the *fi. fa.* clause of the writ, whilst the first levy remained in force, should in all cases be set aside. Had there been an actual payment and satisfaction of the judgment, there would have been much reason for holding the subsequent writs and sale void, this would have been at least equivalent to a perpetual supersedeas or injunction. Such was not the nature of the satisfaction in this case: it was dependent upon a contingency which might or might not happen. The decision of this Court in the case of *Dixon v. Watkins et al.,* 4 *Eng.* 139, is in principle the same as the one under present consideration. There, an appeal was prayed, and recognizance entered into, the legal effect of which was to stay all further proceedings on the judgment, after which, and before the final determination of the case in the appellate court, the appellee sued out a writ of *retorno habendo.* The question presented under this state of facts was whether a writ thus issued was void or voidable, and this involved the further inquiry as to whether the judgment was annulled by the grant of appeal and recognizance or merely stayed. It was held (and we think correctly,) that the judgment was stayed, that a legal prohibition rested on the Circuit Court from executing the judgment appealed from, until by the action of the Supreme Court it should be removed by an affirmance or perpetuated by a reversal, and consequently, that process issued whilst this pro-

hibition existed was erroneous and voidable but not absolutely void, as it would have been had the judgment been annulled or reversed. So, in the case before us, the levy upon sufficient property to satisfy the judgment, imposes a legal prohibition upon the creditor to forego all further process of satisfaction until upon appropriation of the property levied, it is found to be insufficient in value to satisfy the judgment. The cases are strictly analogous in principle, and the rule laid down in *Dixon v. Watkins* decisive of this point. The writs of *ven ex.* with *fi. fa.* clauses, though not absolutely void, were issued whilst a legal prohibition rested on the creditor from pursuing his remedy upon the judgments, and they will be held voidable, and should, on proper application for that purpose, have been set aside. This was not done, however, and we are brought, in the next place, to consider the effect of these errors upon the titles set up by virtue of the sheriff's sale under them.

And, first, of the title of Whiting & Slark, who have filed their bill for a specific execution of their contract of purchase at sheriff's sale. They say, that through their attorney and agent, they bought the property in dispute, being the highest and last bidders for the same; that it was knocked off to them as such, and so entered by the sheriff in his book of sales kept for that purpose, and so also returned by the sheriff on his executions; that the purchase money was in good faith paid, but that the sheriff, subsequently, upon an order of the Chancery Court (which they allege to be void,) setting aside the sales, refused to make to them a deed; that the sheriff still retains the money so paid.

Bills for specific performance are addressed to the sound discretion of the Chancellor, to be exercised of course under general well recognized principles, and will be granted or refused according to the circumstances of the case presented, when tested by such principles. The first and most important of which is that the contract shall be so certain and definite that it may be clearly understood, capable of being executed, and just and fair in all its parts. And it is said upon high authority (*Story Com. Eq.* 53) that "Courts of Equity will not interfere to decree a spe-

cific performance except in cases where it would be strictly equitable to make such decree." It is not a matter of right then, but of discretion; and it is said by the same author that it requires a much less strength of case "to resist a bill to perform than to enforce a specific performance." This rule harmonizes with another, which is, that the court will not, in many instances, disturb a right acquired, even though it would not have lent its aid for the purpose of enabling the party to acquire it; because at the very point where fraud, illegality and wrong enters, it may cease to be just and fair in all its parts, and for that reason the Chancellor will stop and refuse to lend his aid in the consummation of that which, perhaps, he would not lend his aid to set aside. It is upon this principle that when a purchaser who has acquired title, and seeks to protect himself against the effect of illegal or fraudulent acts connected with his title, must not only deny all notice at the time of making his contract, but also that he had no such notice at the time he paid the purchase money and accepted the deed, for if he should discover the fraud or illegality before his contract is fully consummated, it becomes his duty to desist at once from all further ratification of the contract, for if he persists in doing so, he becomes a *particeps criminis* in the fraud or wrong, and his plea of innocence and want of knowledge a falsehood.

Turning to the facts of the case on this point, and testing the equitable rights of Whiting & Slark to specific performance, by the rules to which we have adverted, can it be said that they are innocent purchasers, without notice of the legal prohibition which rested on the execution of the process under which they purchased? It is very clear that they cannot, for they not only aver the facts in their bill and make it a ground of equity, but exhibit the writs as part of the bill, and evidence to sustain such allegation. It is moreover shown that their agent, who purchased for them, was well advised of the whole proceeding. They, however, attempt to evade the force of this rule of notice, by setting up the necessity of the act on their part, that they were forced to buy in protection of their rights. It seems, however, from the evi-

dence, that the sale was made in the order dictated by themselves, and at the remonstrance of other parties; nor were they, as they allege, compelled to act for fear of the consequences arising out of the purchase at this sale under the senior liens, for the irregularity of the sale was well known to them, and they are required to take notice of the legal consequences which would flow from such irregularity, and could, by communicating their knowledge to others, have prevented a sale, which could have defeated their junior lien.

Whilst therefore innocent purchasers who buy in good faith without notice, are favorites of Courts of Chancery, and are by them covered with a broad mantle of protection founded in public policy, which is designed to give assurance to purchasers at judicial sales as well as to do justice to the innocent purchaser, yet, this is upon the supposition that in good faith they are such, for at the instant that knowledge is brought home to them, should they still persist in purchasing, public policy not only does not require that they should be protected, but, on the contrary, that their effort at fraud, oppression, or wrong should be rebuked.

Under all the circumstances of the case, the complainants, in the further examination of the case, will be held as purchasers with notice, and thereby connected with the other actors, participants in enforcing the execution of a judgment known to rest under legal prohibition.

There are other grounds of objection to the validity of the sale under those writs, which we will next proceed to notice. The writ in the case of Gray & Bouton, under which the sale is claimed to have been made, was a *ven. ex.* directing the sheriff to expose to sale the property levied upon by virtue of the first *fi. fa.* without any reference to the corner property in dispute and which complainants claim to have purchased by virtue of this and other writs. The question is, (aside from all other considerations,) could the sheriff sell other property under this writ than that set forth in it, and which he was therein commanded to sell.

It has been held upon high authority that the only questions which can arise between an individual claiming a right under the acts done and one denying their validity, are, power in the officer and fraud in the party. *United States v. Arredondo,* 6 *Peters* 729. *Vorhees v. The Bank of the United States,* 10 *Pet.* 478. In the case which we are considering, had the sheriff power to sell the property in dispute? This involves an inquiry into the source and extent of his power. Chief Justice SHARKEY, in the case of *Minor v. The Select men of Natchez,* 4 *S. & M.* 631, investigated this point with much care and concludes his opinion by saying, "The judgment is evidence of the liability of the property, and the execution is evidence of the sheriff's general authority;" and in an earlier part of his opinion he expressly denies that the officer derives his authority from the statute, but limits it to the judgment and execution. He says, "The truth is, the sheriff derives his power not from the statute but from the judgment and execution." And such also was our decision in the case of *Adamson et al. v. Cummins' ad'r.,* reported in 5 *Eng.* 545. Assuming it to be true, then, that the sheriff's power to sell is thus derived, and looking to the evidences of that authority, we find him commanded to expose certain lands to sale, which had been before that time taken in execution. No power is given to levy on other property or to sell property previously levied upon and not embraced in his writ. But it is contended by counsel that, as the judgment created a lien upon the whole of the defendant's lands, there was no necessity for a levy. We have already dissented from the truth of this proposition. But if this be true, for what purpose does the writ of *fi. fa.* issue? Not to place the property in custody of the law if the lien has effected this purpose, nor to ascertain the amount of the debt, the same judgment that gives the lien furnishes the highest evidence of this; nor to confer power to advertise the property, for the law requires this to be done, nor to ascertain what is "sufficient property" to satisfy the debt, for all of the lands are alike bound, and if any part of it is in custody of the law, it is all equally so. In short, there can be, under the doctrine contended for, no pos-

sible use for the writ of *fi. fa.*, and all the statutory provisions in regard to a levy and sale of land under judicial process, is a mere dead letter, for the same law, which places the property in legal custody, upon principle may also be said to confer power on the officer to sell. The sale then would be under the authority of law, and not of judicial process, which would be alike contrary to the statute, the rights of the defendant under its provisions allowing him to select and point out property at his pleasure if of sufficient value, and the opinion of Chief Justice Sharkey and the array of authorities he presented in the case of *Minor v. The President and Select men of Natchez,* as well as our own opinion in the case of *Adamson v. Cummins' ad'r.* In each of which, after full investigation, it was held that the sheriff derived his power to levy and sell property not from the statute but from his writ. The lien therefore, in our opinion, neither supplies the necessity for, nor office of a writ, to which we must look for power in the officer to sell.

It is argued again, if the judgment lien is not of itself sufficient for this purpose, that when a levy is once made the sheriff acquires such an interest in the property as to enable him to sell without a writ after the return day thereof. It is true that there is a rule to that effect in regard to the sale of goods, which was founded on the supposed change of title in the goods by virtue of the levy, and in the fact that they were presumed to be in the sheriff's possession, and the title to which after sale passed by delivery. Yet even this rule when applied to goods (and we will not say that it does not apply to them), was founded upon principles and grounds which no longer exist. The old rule that a levy divested the owner of title to the property, fell with the doctrine of absolute satisfaction. The reasons for the distinction are, that the purchaser of lands at judicial sale derives title from the judgment, the writ and the proceedings under it; and the law requires that such proceedings shall be returned upon the writ and filed as part of the records under which title is derived. Not so in a sale of goods under a levy; they pass by delivery, not by written record evidence. This point, however, is settled by nu-

merous decisions, amongst which are the cases of *Falkington v. Alexander,* 2 *Dev. & Bat.* 87. *Smith v. Spencer,* 3 *Iredell* 265, *Badham v. Cox,* 11 *N. C. Rep.* 458.

And it is equally clear that the office of the writ of *ven. ex.* is not, in the case of the sale of lands, a mere command to hasten the action of the sheriff, to require him to do that which he had power to do independent of the writ of *ven. ex.;* but it confers upon him the power to sell as well as commands him to proceed to do so. The levy was made under the first writ, which, when returned, was *functus officio.* The *ven. ex.* relates back to the *fi. fa.* and the levy and return upon it, and the power of the officer commences under the *ven. ex.* just where the sheriff under the *fi. fa.* stopped. He had levied whilst the *fi. fa.* was in force, but his power was revoked by limitation before sale; the *ven. ex.* therefore does not confer power to levy; that had already been done; but it does confer power to sell, because the power under the *fi. fa.* had not been executed in that particular. These two writs are in fact but one writ, the latter being designed to complete what had been commenced. Hence the recital of the proceeding on the *fi. fa.* in the *ven. ex.,* and following it the command not to levy, but to expose to sale the property heretofore levied upon.

If any doubt could arise from the nature of the trust or the language of the writ, there are many adjudications sustaining the view which we have taken. In the case of *Lessees of Bowl v. King,* 6 *Ohio Rep.* 3, the question arose just as it does in the case before us, as to whether a levy under a void *fi. fa.* could be executed under a valid *ven. ex.* The court said "The valid *vendi.* does not supply the defect of the original *fi. fa.* The prelude of the *vendi.* is a previous valid writ of *fi. fa.* and a valid levy upon it: there must have been a seizure in execution upon authority to seize. This the *vendi.* could not confer. The direction to sell is not an authority to take." 11 *N. C. Rep.* 458. 4 *Bibb* 344. 4 *Yeates* 108.

We think it evident, therefore, that the sheriff derived his power to sell from the writ and not by force of a previous levy, admitting such levy to have been made under valid process: and that

the writ of *ven. ex.* conferred upon him no power to levy, but simply to sell the lands described in his writ as having been previously levied upon and remaining unsold. It follows therefore that either a levy or sale of other property than that described in his writ, were acts beyond his authority; not an erroneous exercise of power granted, but an assumption of power not granted; and is for that reason void. *Pitman v. Wiscolt,* 19 *John. Rep.* 76. Whiting & Slark therefore could acquire no title under this process.

We will next enquire whether they acquired title under the judgment lien of Beach. The only difference between the writs in this and the Gray & Bouton case was, that the last writ contained also a *fi. fa.* clause authorizing a further levy and sale, if the first should prove insufficient. Several of the questions which might arise on this writ, we have already disposed of whilst considering the like condition of the writs in the case of Gray & Bouton. We will therefore turn our attention directly to the consideration of a point raised with regard to the sufficiency of this writ which may of itself determine its validity and the effect of a sale under it independent of any other consideration.

It is contended that a written release and acknowledgment of satisfaction was entered of record by the plaintiffs by which Thorn, the joint judgment debtor with De Baun, was discharged and that this discharge as to one was in law a discharge and satisfaction as to both.

The record entry is as follows:

James De Baun & Thomas Thorn, *Defendants.*
vs.
Lewis Beach, *Plaintiff,*

Judgment entered 27th March, 1840, for $1,988.50 debt, and costs.

The said defendant Thomas Thorn having arranged and secured to the satisfaction of the attorney of said plaintiffs (Trapnall & Cocke) the judgment in this case, they do hereby and with the consent and agreement of said James De Baun, acknowledge full satisfaction of the said judgment so far as the said Thomas Thorn is concerned, without prejudice to the rights of the said

plaintiff to sue out executions and recover the said judgment and costs of the said James De Baun.

TRAPNALL & COCKE, *Att'ys for Plaintiff.*

May 27, 1840.

TEST: LEMUEL R. LINCOLN, *Clerk.*

I, James De Baun, do consent to the above satisfaction in the manner and form as therein provided.

May 27, 1840. JAMES DE BAUN.

This entry is in accordance with the provisions of the statute, *Dig. p.* 625, which authorizes the entry of satisfaction of judgments by the plaintiff or his attorney of record, the 26th section of which provides that a satisfaction entered in accordance with the provisions of the act shall forever discharge and release the judgment. If the discharge had been made by the plaintiffs in person, there is no doubt but that it would have been in law a full satisfaction and discharge as to both defendants; upon the principle that as the creditor is entitled to but one satisfaction, though made by one it enures to the benefit of both. *Coke Litt.* 232, *a. note* 164. *Rowley v. Stewart,* 8 *John.* 209. *Ferguson v. State Bank,* 6 *Eng.* 514. *Bruton v. Gregory,* 3 *Eng.* 180. *Bozeman v. State Bank,* 2 *Eng.* 333. And even where it is expressly understood and is made a part of the terms of release and satisfaction, that such shall not be its effect as against other defendants, it has been held to extend to all. 2 *Ham. Ohio Rep.* 263.

In the case before us, the satisfaction was not entered by the plaintiffs but by the attorneys of record; and it is a matter of doubt whether they, for the consideration expressed, could make a release which would bind their clients. We have repeatedly held that any attorney under his general retainer as such could not accept in satisfaction of a money demand, property or depreciated paper. *Jackson v. Bartlett,* 8 *John.* 361. *Nenaus & January v. Lindsey,* 1 *How.* (*Miss.*) 577. *Keller, use, &c. v. Scott,* 2 *S. & M.* (*Miss.*) 82. *Kellogg & Co. v. Norris,* 5 *Eng.* 18. *Norris v. Kellogg & Co.,* 2 *Eng.* 112. *Griffin v. Thompson,* 2 *How.* (*U. S.*) 257. *Codwin v. Field,* 9 *John.* 263. *Johnson v. Cunningham,* 1 *Ala. R.* 258. *Wickliff v. Davis,* 2 *J. J. Marsh.* 71. *Randolph v. Ring-

gold et al., 5 *Eng.* 281. And if the consideration was expressed in the instrument executed by the attorney, it might readily be seen whether in this respect objectionable or not; but the language, whilst full and unqualified as to the discharge of Thorn and the sufficiency of satisfaction, leaves it a matter of doubt whether they were paid in money or property, or whether other security had been given. They say, "Thomas Thorn having arranged and secured to the satisfaction of the attorneys." We may readily infer from the language used that something besides money was received, and this may be met by the presumption that the attorneys would not act without authority, and that they were specially empowered to receive other satisfaction than money; or that they would not have received it. If left without other considerations than such as are to be drawn from the instrument itself, we would very much question the sufficiency of the satisfaction. It appears, however, Beebe, who has succeeded to the rights of the plaintiff by assignment, fully recognizes and affirms this act of the attorneys, and asserts and sets up in his answer, that it is a full and complete satisfaction as to Thorn, and if so as to Thorn then also by operation of law as to De Baun. It is true that De Baun might and in this instance probably has estopped himself from setting up this satisfaction; yet it is not the less true that the satisfaction is complete. Estoppel is not the denial of the existence of a fact, but a denial of the right to interpose it.

It is unnecessary to press this enquiry further. The plaintiff had an undoubted right to recognize and affirm the acts of their attorneys, whether they had at the time power to have thus acted or not; and that they have done so to the fullest extent, is beyond all doubt. And therefore in the further consideration of this case, the judgment, so far as third persons, lien creditors, are concerned, will be considered as satisfied and the lien discharged. Whiting & Slark therefore could acquire no title to the property in dispute under a judicial sale based upon the judgment and execution in this case. There was no valid judgment in force, and of course no valid sale could be predicated upon it.

Having thus disposed of the judgments and the process which

issued upon them, it is apparent that a consideration of the acts of the chancellor or the parties in conducting the sale could in no respect change the result, and would be a useless consumption of time. We will therefore pass them. There was evidently no valid levy and sale of the property in dispute, and of course no specific execution of the contract of purchase should be decreed.

The next question for consideration is, as to whether adverse title to the mortgaged property has been acquired by purchase under senior judgment liens. If so, there is an end to the matter, so far as complainants' title to the property is concerned.

The bill as originally framed was intended to control the order of sales under judicial process, so as to protect the junior lien of the complainants, whose mortgage embraced only a portion of the mortgagor's real estate, and to foreclose the mortgage and subject the lots of land to sale for the payment of their debts. Subsequently, the complainants themselves bought under the senior judgment liens, and subsequent to their purchase, defendant Beebe also bought under the same senior liens: whereupon, on leave previously given, complainants filed their supplemental bill reciting in substance the material allegations in their former bill and setting out their purchase under the senior lien and the sale thereafter made to Beebe, which they allege to be fraudulent. They repeat the prayer for the relief asked in the original bill, and that the title so acquired by defendants be set aside, that defendants account for rents and profits, and that the sheriff be compelled to execute a deed to them, or that the court will decree them a title to the property in dispute.

The bill, and the supplemental or amended bill, are to be considered one complaint, setting forth two grounds of equity; the one arising under the claim as purchasers at judicial sale; the other as creditors under a mortgage, junior to several other claimants. Upon the first ground, we have already decided. Our consideration is now to be directed to the rights of the complainants under the mortgage. If there existed a senior lien under which Beebe purchased, then there can be no doubt (unless the proceedings were void,) that he acquired a legal title to the

property, which can only be overturned by the complainants' superior equity. If, however, there was no such lien, then of course the complainants would become the senior in time, and hold without showing other equities.

Conceding such senior lien on the part of the defendants to exist, (which they deny), complainants say that the lien of Gray & Bouton was discharged by payment of the judgment; and if not by payment, it was suspended by a prior subsisting levy: that the purchase was *pendente lite* and void; and that it was also discharged by the fraudulent conduct of the defendant.

These several grounds of equity we will proceed to examine. Preliminary to this, however, arises a question of the admissibility of evidence. It is contended that Trapnall's answer cannot be used as evidence against Beebe; and upon this point we are referred to authorities. As a general rule, it is true, that the answer of one defendant cannot be used against another. To this rule there are exceptions; one of which is thus laid down in *Daniel's Chancery Pleading and Practice, Vol. 2, page* 982: "In case, however, where the rights of the plaintiffs, as against one defendant, are only prevented from being complete by some question between the plaintiff and a second defendant, it seems that the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first."

In *Morse v. Royal,* 12 *Vesy* 355, the answer of an executor was offered as evidence against the residuary legatee who had been made a party to the suit, was received to show that funds came to the hands of the executors, what debts there were and the value of the estate. And in a case where the question arose under circumstances very similar to those in the case before us, Chief Justice MARSHALL held, that where one defendant was called upon to discover facts designed to be used by the complainants, to fix a liability on, or defeat the title of a co-defendant, that such co-defendant may use the answer of his co-defendant as evidence against the complainant; and, of course, if the answer had been favorable to the complainant, he might have used

it against the other defendant. As this is the first time the question has been presented for the consideration of this court, it may not be amiss here, to present the precise state of case before Judge Marshall at the time he delivered his opinion, together with a brief extract from it, that its weight, as an authority, may be more clearly felt. Holland, in 1793, obtained judgment against Cox, which, from that date became a lien upon his real estate. On the 3d of September, 1794, Shepperd bought certain lands of Cox, and took from him a deed, by which he acquired a legal title, subject however, to the prior lien of Holland. In 1799, executions issued, and the lands so sold to Shepperd were levied on and bought at sheriff's sale by Chilton—Gibbons, the agent of the plaintiffs, objecting to the sale. The bill was filed by Shepperd against Holland and Cox, Chilton and others, to set aside the sale made by the sheriff, and the deed under it, on the ground, that before the sale so made, the judgment had been fully satisfied. Holland, Cox, Milton, plaintiff, defendant and purchaser, are in the case before us represented by Gray & Bouton, De Baun and Beebe. And Whiting & Slark, that of Shepperd, with this difference, that they held by deed of mortgage, whilst Shepperd held by deed in fee simple. In that case, the question was, whether Holland's answer could be used as evidence for Milton, and in this, whether Trapnall's answer, the representative and agent who transacted the business for the plaintiffs can be used as evidence against Beebe, the purchaser. Under this state of case, Chief Justice Marshall said: "The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely, to a suit instituted for this purpose, Holland and Cox are not only necessary, but proper parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission, by showing that it was not in their power to make them parties. Not only are they essential to a settlement, but in a possible state of things, a decree might have been rendered against one or both of them. Nor is it to be admitted, that the answer of Holland is

not testimony against plaintiff. He is the party against whom the fact that the judgments were discharged is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but affects them consequentially, and through him. It affects them as representing him. Consequently, where the fact is established for or against him, it binds them." *Field et al. v. Holland et al.*, 2 *U. S. Con. Rep. page* 290.

And in the case of *Osborn et al. v. The Bank of the United States*, 9 *Wheaton's Rep.* 733, the same court said: "It is generally but not universally true, that the answer of one defendant cannot be read against another. Where one defendant succeeds to another, so that the right of one devolves upon the other, the rule does not apply. Thus, if a defendant die pending a suit and the proceedings be revived against his heir, or against his executor or administrator, the answer of the deceased person, or any other evidence establishing the fact against him, may be read against his representatives. So, a *pendente lite* purchaser is bound by the decree without being made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor."

Looking to the issue formed, and the relative position of the parties in interest, we think it very clear that the answer does come within several of the exceptions stated: First, as under the exception stated in 2 *Daniel.* The rights of Whiting & Slark as against Beebe, are only prevented from being complete by the question of satisfaction, between complainants and Gray & Bouton and their agent: and in the second instance, as in the case in 12 *Vesy*, 355. The object of the evidence is to show the amount of credit to which the judgment was entitled."

In the case in 2 *Cond. Rep.*, the counsel for Beebe contend that the answer of Holland was to be used against the complainant, not the defendant; and, therefore, it is not an authority in point, although the reporter so considered it, and placed it in his head note of the report. We think in this the reporter was not mistaken. Chief Justice Marshall placed it on the ground of a discovery sought by the complainant upon a point which would

affect the defendant answering, directly, and the purchaser, consequentially. The right to the discovery is expressly recognized by Judge Marshall as well as its effect upon the defendant. Can any one believe that the complainant would have a right to a discovery, but not a right to use it when made? Certainly not. Why was it that the co-defendant had a right to use it against the plaintiff? Surely for the very reason that if it had established facts against such defendant, it would have been evidence against him, and this is what the judge meant when he said, "This fact when established, it is true, affects the purchaser also, but it affects him consequentially, and through him it affects them as representing him. Consequently, where the fact is established against or for him it binds them."

The case in 9 *Wheaton* still presents another, and, if possible, a still stronger ground of exception than either of the others. It is "that a purchaser *pendente lite* is bound by the decree, and if by the decree, he is bound by the testimony when against the vendor, even though he be not made party to the suit. And here, before we further proceed to investigate the admissibility of the answer as evidence, we are met by another preliminary question: Was Beebe a purchaser *pendente lite?* If so, in what attitude does it place him in the investigation of the merits of this case.

A purchaser *pendente lite* is one who, by purchase, acquires an interest in the matter in litigation pending the suit. The reason of the rule is, that if a transfer of interest pending the suit was to be allowed to affect the proceedings, there would be no end to litigation; for as soon as the new party was brought in he might transfer it to another, and render it necessary to bring that other before the court: so that if this interferer be allowed a suit might be interminable. And the rule, it would seem, applies with increased force to suits *in rem,* or where the title to the property purchased *pendente* is in litigation. Some decisions go so far as to declare all such titles absolutely void.

The rule, says GREEN, Judge, in the case of *Newman v. Chapman, 2 Rand. R.* 100, as to the effect of *lis pendens* is founded on the necessity of such rule to give effect to the proceedings of a

court of justice; without which every judgment and decree for specific property might be rendered abortive by successive alienations." This rule is particularly applicable to proceedings *in rem* and in contests for the title to property, where the decree or judgment of the court is to affect the title to such property. For the reasons above given, the title acquired by a purchaser pending such litigation has, by some of the courts, been held absolutely void, *Gordon v. Payne,* 9 *Dana* 190. *Briscoe v. Bronaugh,* 1 *Texas Rep.* 333. *Worsley v. Scarborough,* 3 *Atk.* 392.

These decisions, if restricted to the effect of the title thus acquired upon the rights of the parties to the subject matter at issue at the time of the purchase, are sustained upon high authority. Thus, in the case of *Murry v. Lyburn,* 2 *John. Ch. Rep.* 445, Chancellor KENT said: "There is no principle better established, nor one founded on more indispensable necessity, than that the purchaser of the subject matter in controversy *pendente lite* does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation." In the case of *Gordon v. Payne,* it was said, "The sale made by him was clearly invalid upon two grounds: First, it was made *pendente lite* and after the jurisdiction of the Chancellor had attached; consequently, no sale or other act of the executor afterwards, could change the attitude of the party or the right of the parties." *Gordon v. Payne,* 9 *Dana* 190. "He who purchases during the pendency of a suit, is bound," says Sir WILLIAM GRANT, "by the decree that may be made against the person from whom he derives title. The litigating parties are exempt from the necessity of taking notice of a title so acquired. As to them, it is as if no such title existed; otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be terminated. The rule may sometimes operate with hardship, but general convenience requires it." The *Bishop of Winchester v. Payne,* 11 *Ves.* 194.

In the case of *Scott v. McMellen,* 1 *Littell* 307, the court took a distinction between suits for mere preliminary demands, and a suit where the court was investigating rights to property by pro-

ceedings *in rem.* After considering the first class of cases the court proceeds: "Here the complainant was compelled to resort for relief to a court possessing no jurisdiction over the person of the debtor, but possessing competent power over the property. Here the property gives jurisdiction to the court; the right of property is in the court, and during the pendency of such a contest no transfer of the property by the debtor can be admitted to produce any prejudicial effect on the complainants' demand. In this case we attach no consequence to the circumstances of an injunction having been granted by the court to restrain the defendant from conveying the property. But we go upon the broad and general principle, that after the commencement of Scott's suit, and a *lis pendens* created as to the property, no conveyance of the property by Sam. McMillen can prevail. This principle was adopted at an early period in the history of chancery jurisprudence, has been followed and acted on ever since, by various successive Chancellors, and finally is admitted by all elementary writers on the subject to be the established doctrine of the court."

These authorities, we think, clearly establish the following positions: First, That the institution of the suit (particularly where it relates to the title or disposition of property) is constructive notice to all purchasers after suit commenced. Second, that a purchaser *pendente lite* acquires no title by his purchase, which he can set up or assert to the prejudice of the rights of the parties litigant, and that the suit will be heard and determined upon the merits as it stood between the parties litigant, perfectly irrespective of any rights which he may have acquired by such purchase, which, if valid for any purpose, can only be so as between himself and his vendor, to enable him upon the determination of the suit to succeed to the rights of such vendor, or, perhaps if a party to the suit, to enable the court after determining the rights of his vendor favorably, to decree them to him.

The counsel for Beebe, for the purpose of avoiding the force of these authorities contend, first. That although Beebe, if a third person, would have been subject to the rule governing the rights of purchasers *pendente lite,* yet, as he was the purchaser of the

judgment before the institution of suit by Whiting & Slark, that he succeeded to the equitable rights of Gray & Bouton, who were senior judgment creditors, and that as such he had a right to pursue his remedy as fully and to the same extent as they could have done. Conceding this to be true, or even put it on a stronger ground, and say that Gray & Bouton had themselves been the purchasers under their own senior lien, the question recurs as to whether (after the institution of a suit contesting their right to sell, claiming that their judgment had been satisfied by a prior levy, which was undisposed of, that there was also other sufficient estate out of which to satisfy the senior judgment lien, without coming upon the property embraced in the complainants' mortgage; that $2,800 had been paid on said judgments, but which had not been credited thereon: all of which was distinctly averred in the original bill filed against them,) they could until these rights were settled and determined, sell the property, the title to which was thus fairly put at issue between the senior and junior lien creditors, and acquire, under such purchase a title superior to that which they held under their judgment lien, or which could aid or strengthen it. If so, then it amounts to an infringement of a rule, a maxim founded in reason, that the vendee can, by his purchase acquire no greater title than his vendor possessed. It would be, in effect, offering a title derived solely under his equitable right then at issue, in defence of those rights. Such could never be the case. On the contrary, the rights of this property were fairly put at issue, turning upon the fact as to whether there was other property belonging to De Baun, sufficient to satisfy the senior lien which covered his whole real estate, and the junior mortgage lien which extended only to a small portion of it: and the further independent fact as to whether the judgment had been discharged by payment. And upon the soundest principles of equity, we feel fully warranted in going further, and saying even if all of the judgment had not been discharged by payment, if a considerable amount of it had been paid, but which from carelessness or design, the plaintiffs in the senior judgment had failed to enter as a credit, that the junior

creditor would have a right to demand that these credits be made out and entered before sale; because he would have the right to pay off the senior encumbrances, and thereby disencumber his junior lien, which he could not do, nor could he be prepared to elect whether he would or not, until the credits were entered. That Gray & Bouton could not have acquired a title under such purchase, which would have in any wise aided their equitable defence, we think very evident. And if they could not do so, Beebe, who claims under them and assumes to cover himself from the effects of the rule as purchaser *pendente lite*, cannot. But then the counsel have assumed another ground, which, though not at all reconcilable with their first position, we will for a moment consider. They say that Beebe purchased of Gray & Bouton, before the commencement of the suit. That is true. They took the judgment by assignment. By that we apprehend they only purchased the right to the judgment, that is, took the place and stead of Gray & Bouton, but not the property in dispute. After the most attentive examination of the grounds assumed by the counsel of Beebe, we find nothing which will relieve him from the necessity of relying solely upon the equitable right at issue between Gray & Bouton on the one hand, and Whiting & Slark on the other, so far as his title rests upon the equity growing out of their prior lien.

When therefore the complainants call upon Gray & Bouton and their agent to answer as to whether this judgment has in fact been paid, what right has Beebe to object and say you are not entitled to use their answer, because I am a co-defendant, and it may cause them to lose their suit, and then I shall get no title under my deed from them? Viewed as a third person he need not even have been made a party. His rights are wholly dependant on the merits of the issue between the original parties. It is their suit, not his; or if viewed in the stead of Gray & Bouton their answer is his answer, their defence his. Thus considered there is no doubt but that this is a clear exception to the general rule, for it is only in a limited sense that Beebe can be called a party to this suit. Whiting & Slark then call on Gray & Bouton, and

Trapnall, their agent, to answer and say whether this judgment was or not paid. Gray & Bouton entered their appearance but failed to answer, and the allegations, if they alone had been called to answer touching their interests, would have been taken as true; but in this case, the complainants have also made their attorney and agent, Trapnall, a party, who transacted the whole business and whose answer must be considered as in effect their answer. It will be received then, as evidence for and against the complainants and defendant as fully and to the same extent as if made by them.

Upon the question of payment, the records and the answers of Trapnall and of Beebe (for that like the answer of Trapnall has been called out by the bill and so far as it is responsive to the issue between the parties, upon the merits of the respective claims of Gray & Bouton, and Whiting & Slark to the property in dispute, will be received with like effect as the answer of the party in original interest would) comprise the whole of the evidence. Turning first to the record, we find the original debt by note to be $1,811.89 due 19th March, 1837, at 6 per cent. interest after due. Beebe admits that he was apprised at the time of his purchase that credits for payments before that time made, should have been but were not entered upon the judgments; but does not remember whether before or after the complainants' mortgage was executed, nor does he give the amount, but states that excluding costs he paid in December, 1843, to Trapnall, $2,400, or thereabouts for both judgments. Trapnall's statement is definite and gives precise dates by which we may arrive at the sum due on this judgment. He says that there was paid on the note $1,025.14, on the 25th of January, 1839, which should have been credited on it. It will be seen by calculating the interest up to the payment and crediting the note by the $1,025.14, as should have been done, that there was at the time judgment was rendered, only due about $996.15 instead of $2,137.89, besides costs, and on the day that Beebe purchased the property in dispute at the November term, 1843, there was due, debt, interest and costs, about $1,301.53. It further appears from the return on the writ of *ven. ex.* with *fi. fa.* clause that there was sold under the Gray & Bouton judgments property to the amount

of $1,875, of which the property in dispute sold for $325, and that after deducting this amount and the whole costs of sales left a balance of $1,528.82, being $227.29 more than sufficient to satisfy the whole balance of the Gray & Bouton judgment; and that other property of De Baun on the same day, was sold on other process to the amount of $685.

Suppose these facts had been presented to the chancellor, can there be any doubt what his decision would have been? Surely no one will contend but that the senior lien creditor, when he had sold enough to satisfy his demand, should have stopped and left the junior creditor to the benefit of his lien; but if not, it was clearly the privilege of the junior lien creditor to have paid up the senior lien debt and have protected himself from the utter loss of his debt when the property, from data abundant in this record, was worth more than twenty times what it sold for, and which has rented for more every year since (as far as reports of rents are before us) than it sold for, and the withholding proper credits, whereby there was presented a demand of $2,346, or about that sum, instead of $1,301.53, the amount really due, was a gross violation of the rights of creditors, thus saying to them, my demand is $2,346, which you must pay in order to avail yourself of the benefit of your lien. Beebe and Trapnall both knew of these credits: they were claimed and relied upon in the bill of complaint in this suit and a failure to enter them, whether intentional or not, cannot be viewed otherwise than unjust and oppressive, if not grossly fraudulent.

Turning from this to another ground of objection to the validity of this sale, we will proceed to inquire whether in point fact, there was any existing lien at the time of the levy and .

A lien is a right by law, says Chief Justice SHARKEY, to a debt satisfied out of a particular thing. It may originat on-tract, or by operation of law. In either case the effect ame. It is a right given by law to have the debt satisfied ou all or any of the defendant's property. *Anderson v. Doe ex den. Wilkins,* 6 *How.* 562. Chancellor KENT, in his commentar s, vol. 4, page 437, when referring to judgment liens, says "th lien, after all, amounts to but a security against purchasers a encumbran-

cers, for as the Master of the Rolls said, in *Bruce v. The Duchess of Marlborough*, it is neither *jus in re* nor *jus in rem.* The judgment creditor gets no estate in the land, and although he might release all his right to the land, he might afterwards extend it by execution." A judgment creditor has no *jus in re* but a mere power to make his general lien effectual by following up the steps of the law. A failure to do this releases the charge on the property." *Massengill et al. v. Down, 7 How. U. S. Rep.* 767.

From these authorities it may be said that a judgment lien is a security against subsequent purchasers and incumbrancers, which denies to the debtor the right to alien or encumber his property, to the prejudice of the rights of the judgment creditor for a given period (in most instances fixed by the statute.) It is also a right springing out of, and dependent upon, the judgment for its existence and follows the condition of the judgment. If the judgment is reversed or set aside, the lien is *eo instanti* discharged; if paid, it is merged in the payment; if suspended by injunction or supersedeas, the lien is also suspended; and therefore as a levy operates as a *prima facie* satisfaction and whilst undischarged satisfies and suspends the judgment, the lien must also be suspended with it, and should the lien prove insufficient to satisfy the judgment, as by the discharge of the levy, the judgment is restored to its full effect upon the estate of the debtor, so also does the lien, unless in the mean time it has expired by limitation, or has been discharged by the act of the creditor, upon the return of the creditor for further satisfaction, maintain its grasp upon the whole estate of the debtor to the full extent that it did when first created, (*Estill v. Mitchell*, 8 *Yerger* 452), and intermediate sales of property by junior lien creditors, or by the debtor between the first levy and the discharge thereof, if such discharge takes place before the statute limitation, will be held subject to such lien. 2 *S. & M.* (*Miss.*) *Rep.* 436, *Perkins v. Marlow.*

This brief review of the definition of a lien and of its dependencies, is designed to illustrate more clearly our views of its nature and the foundation upon which it rests, which, we have said, is a right, a security given by law to the creditor upon the

property of the debtor, which is not an intrinsic quality of the judgment itself but is a quality added to it—an effect of the mere existence of the judgment, which can have no independent existence, but is dependent upon the judgment and follows it as a shadow does a substance; hence if it is cut off from it either by the act of the party, the satisfaction or extinguishment of the judgment, or by limitation of time, upon general principles it is lost, for then there ceases to be any thing to which it can be attached. This rule will be found in perfect harmony with the common law rule in relation to liens on personal property. Liens at common law only attach to property in actual possession; remove the property and the lien is lost. *Bouvier's Law Dictionary, vol. 2, page* 54. In fine a lien being a mere contingency or right dependent upon a subsisting thing, of course cannot rest upon a contingency, no more than a presumption can rest upon another presumption, or one contingency upon another or a shadow exist without a substance.

Having premised this much in regard to the nature and effect of a lien we will proceed to apply these rules to the facts of the case before us.

The lien on the Gray & Bouton judgment expired on the 23d of March, 1843. On the 20th of March, three days before the lien expired *scire facias* issues to revive the lien, and it was revived on the 16th Jan'y, 1846. In June, 1843, after the lien had expired and before it was revived, the property in dispute was levied upon, and sold at the November term, 1843, by virtue of the judicial process so levied. Under a purchase at this sale Beebe claims to hold the senior lien of Gray & Bouton. It will be seen that both the levy and the sale were made after the lien had expired by limitation and before it was revived by *sci. fa.* The question is, did the revival of the judgment in 1846, relate back to his purchase so as to constitute him a purchaser under a senior lien. If so, it must be by force of the statute alone, to which we will presently revert. At the time of the levy and sale no lien attached to the judgment, because the lien had ceased to exist by limitation, and if it did not exist in the judgment, to what else could it attach?

Not in the *sci. fa.*, that was the mere process of the court to bring the debtor before it. Under this state of case it could, at best, be said to rest upon a contingency, which might or not happen; and we have seen that from its very nature it cannot thus exist, or it must have lain dormant at the time of the levy and sale dependent still upon the same contingency. Concede however, that it could rest upon a contingency and that a sale might be effected under such lien: let us for a moment glance at the practical operation of such a proceeding, and a more apt illustration of disastrous consequences and confusion which would follow could scarcely be presented than the case before us. Here we have some ten or twenty judgment creditors with liens in force, deeds of trust and a mortgage, all except the two last covering the whole of the real estate of a debtor consisting of numerous lots and tracts of land brought up to be sold. The senior lien has expired but a writ has been sued out to revive it. Whether it ever is revived or not must depend upon the chances of future legal determination and the mere will of the plaintiffs in that suit. If they buy the property they may prosecute their *sci. fa.* to judgment; if they do not, it is a matter of no concern to them: they pocket the money which should or not be theirs, dependent upon the same contingency. Other creditors are told to pay off this debt and admit them to be the senior lien creditors, when they certainly are not then and may never be such. They must do this or stand by as was done in the present case and see property admitted to be worth from ten to twenty thousand dollars sold for three hundred and twenty-five. Should it be said that this proceeding is likened to the purchase under a junior lien, that it is held subject to the claims of the senior, the response is, that there is an existing right upon which such contingency may rest, but here there is none. As we have before remarked, it is a contingency upon a contingency.

But how long shall these creditors wait to ascertain the happening of the contingency which overshadows their rights? How long shall the debtor himself be perplexed with such encumbrances? It must be apparent that this doctrine if allowed, gains no

credit for its equity and overshadows a pervading principle in our administration of the law, which encourages bidders at judicial sales by giving them assurance of a good title and also relieves the oppressed debtor from the utter sacrifice of his property. We repeat therefore, that if such is the case it must be by force of the statute and not from any of the known principles or rules applicable to liens.

The statute makes the judgment, from its date, a lien on the lands of the debtor situate in the county in which it is rendered, for the term of three years from its date. It also confers a right on the creditor to revive his judgment lien by suing out a *scire facias* at any time before the lien expires: and then, in the 13th section, provides, that if the *sci. fa.* be sued out before the lien expires, the lien of the judgment revived shall have relation to the day on which the *sci. fa.* issued; or if it issued after the lien has expired, then from the date of the judgment of revival. The only important question arising under the statute is as to the effect which the judgment lien when revived is to have upon the property of the debtor at the date when the *scire facias* issued. Shall we give it effect over all the debtor's property which the former lien had, irrespective of intervening equities which may have arisen between the creditors themselves during the suspension of the lien? or shall we so construe the act as to protect those rights?

That the Legislature intended to connect the revived with the former lien, so as to continue its existence is very evident; but there is no language used by which to determine the extent of the revival. If they meant to restore the lien as fully as it at first existed, it must evidently have been with reference also to the rights as between creditors which accrue to the junior creditor by extinguishment, by acts of the parties, or otherwise, for these might have accrued under the first lien. There are two distinct features in a statute judgment lien. The first and paramount object of the lien is, to prevent the debtor from alienating or encumbering his property to the prejudice of the rights of his creditors: The second object is, to discriminate in priority of right

between the creditors themselves. And this latter is an equitable distinction founded on the rule that, equities being otherwise equal, he, who is first in time, is prior in right. In the first instance, the rights are as between the debtor and his creditors: in the second, as between the creditors themselves, which latter provision has no reference whatever to the debtor, but relates solely as between the creditors themselves, and are purely equitable, giving preference, as between the creditors whose equities are in other respects equal, according to priority of time. And the same principles of equity are applied to, and govern the rights of creditors in every contest for satisfaction. Thus, when the senior creditor, by contracting for other security, by fraud or other act, forfeits his right of lien, it is so considered upon the ground that he thereby sinks his equity in degree, so that it ceases to be equal to that of the junior lien and therefore time does not give prior right. For the rule as to time only applies where equities are equal.

It is also worthy of remark that this rule of discharge of lien by the act of the party has no application as between debtor and creditor. As respects the debtor the lien is only discharged by limitation or satisfaction of the judgment. When therefore the Legislature declared that the judgment lien when revived, should relate back to the date of the *sci. fa.,* we may well suppose that it intended the lien when revived to act upon the whole estate of the debtor, to the same extent that it did prior to its suspension by limitation, in an unqualified sense, as related to the debtor; and that it also revived all the secondary rights of the senior creditor as between himself and the junior creditor, subject however to such intervening equities as might have arisen between the time of the suspension and the revival of the judgment, for these rights might have accrued to him even under the first lien. Any other construction than this would place the creditor under the junior judgment liens, in a worse condition than he was, under the lien before it expired and would defeat the principles of equity which have universal application in such cases.

We must not presume therefore that the Legislature intended

to cut the creditor off from the benefit of intervening equities which might constitute his the better equity. There he had no opportunity to protect them. The issue upon the *sci. fa.* was between the senior creditor and the debtor, and as to him, even though the debt may have been paid (as was the fact in the cases before us) if he failed to plead such payment, the judgment is good against him. But shall we say that it is also good against the junior creditor, who could not be heard in that suit? And yet, if the lien when revived, is to act alike upon the rights of the debtor and the creditor as they existed at the time when the *sci. fa.* issued, the result must be that even though the senior judgment be fully paid and discharged, this revived judgment lien would override and defeat the equities of the junior creditor arising therefrom. Such never could have been the intention of the Legislature; nor have they in this instance used language which necessarily implies that such should be the case. We therefore hold the true construction of the act to be that the revived judgment-lien is held subject to such intervening equities as may have arisen between the creditors themselves, between the date of the *sci fa.* and the rendition of the judgment reviving such lien.

In the case before us, at the time the levy and sale were made the lien had expired by limitation. The plaintiffs' rights under it were, if existing to any extent, dormant or suspended, dependent upon a contingency which might or not happen at an indefinite time. Suppose such to have been the case at the outset, would the plaintiffs' have been held a better equity than one whose claim, though junior in time, was in full force and ready for execution? We should say not. And if not, then is there any good reason for holding it to be a superior equity, if such should become the case at a future time? If so, it would be upon the ground that an equity once acquired could not thereafter be lost.

In this case the sale was not made under a junior judgment lien; but the senior judgment creditor, during the suspension of his lien, sells the property and becomes himself the purchaser, or rather Beebe, who succeeded him in interest, did so. Under

this state of case, the question is, did he acquire a title as senior lien creditor? At that time the lien ceased to attach to the judgment. The purchaser therefore under such judgment acquired no title with such qualities superadded. But it may be said that when the lien was revived, it related back and gave effect to the purchase by way of affirmance of an imperfect title, as one who sells an imperfect title and subsequently acquires a perfect title affirms the first title. The application of this rule must depend upon the fact as to whether Gray & Bouton by the act of revival acquired a title to the property. We apprehend not. A lien is neither *jus in re* nor a *jus in rem.* It conferred no right of property, but a right to sell De Baun's property. If this was not De Baun's property, then the lien did not attach to it. If it was, then it must be sold before he can be divested of title to it. No subsequent sale has been made, and of course no valid lien sale can exist in the purchaser.

Such are the conclusions at which we have arrived; in the correctness of which, we are sustained by the decisions of other courts, not only with regard to the distinction which we have taken, between the relative position of the debtor and his creditors, and between the creditors themselves; but also with regard to the effect of a sale made between the time of the issuance of the *sci. fa.* and the revival of the judgment lien. And although these decisions were made in several instances where the statutes were different from ours, yet the general principles apply with full force.

In the case of *Norton v. Beaver,* 5 *Ohio Rep.* 180, it is said, "When the judgment becomes dormant, the means of enforcing the lien are suspended because they necessarily slumber with the judgment, but when the judgment is revived, it is revived with all its incidents. There is no new judgment recovered on the *scire facias,* but the old one is called into action. The form of execution adopted in practice requires the sheriff to make the money, for want of goods and chattels, from lands owned by the debtor at the date of the judgment. The statute declares that the sale shall vest as good a title in the purchaser as the debtor

had, whilst the land was liable to satisfaction by the judgment. So far as the debtor is concerned the lien of the revived judgment exists in all its original force. But it does not follow that the rights of others acquired or subsisting under the dormancy of the judgment are subordinate to the revived lien. In a country where land is one of the most familiar and ordinary subjects of trade, the policy of the law does not favor liens which impose embarrassment on their transfer. The purchaser who acquires title to land, at a time when no lien exists, or at a time when by the creditor's delay a once existing lien becomes dormant, appears to us to have an equity preferable to him who has indulged in delay. In treating with the debtor he has a right to rely upon the presumption that a dormant judgment is satisfied. The lien of the creditor at this time is indefinite and contingent. It is not a subsisting interest in the lands, but a power to set up an interest that may never be exercised." The case of *Epps & others v. Randolph,* 2 *Call* 103, sustains this opinion.

In the case of *The Bank of Missouri v. Wills & Bates,* 12 *Missouri Rep.* 364, the question came up under a statute like ours, and under very similar circumstances to those in this case, in which it was said, "The judgment, reviving the lien of the junior judgment, was not rendered until after the sale of the premises in dispute. The party thus by his own act having disposed of the property on which he wished to impose or continue his lien, it is obvious that the judgment of revival could not relate back and give the purchaser at sheriff's sale a right which did not exist at the time of the purchase. The party suing out the *scire facias* to recover the judgment was under no obligations to continue the proceedings after the sale. He might have discontinued it at his pleasure. The purchaser therefore could not have been influenced in his conduct by any assurance of the revival of the lien. If the sale of the property did not satisfy the judgment, the revival would have had the effect of revivi[illegible] real estate owned by the defendant in the [illegible] which he had disposed of whilst subject to it, but s[illegible]y a creditor could not thereby entitle himself to a lien on property of the defen-

ant, which had been disposed of by his own act." These authorities will sustain the views which we have already expressed.

We are next called to consider the claims of Beebe as derived through his purchase from Ringo; in considering which under the rule we have laid down in regard to Beebe's position as purchaser *pendente lite,* we will enquire what prior legal or equitable interest Ringo had at the time of Beebe's purchase. Ringo was called to answer, and says that he held a subsisting debt against De Baun and Thorn, which was one of the partnership debts, from which De Baun agreed with Thorn to save him harmless and absolve him from the payment of, which is the same debt on which judgment was recovered. That he sold the judgment to Beebe, and has no interest in the matter. Beebe is also called to answer, and so far as it is responsive to the issue between the claim of Ringo and Whiting & Slark for priority will be held as in effect part of the defence to the original cause of action, and although Ringo disclaims any present interest, his answer, so far as it tends to sustain the equity of his case, will enure to the benefit of Beebe. The interest claimed under this sale arises out of the claim which Thorn has reserved to himself in transferring his undivided half title to De Baun, and in any event only extended to such half interest. Ringo's equity then must be derived through Thorn's equity. In order to establish this it becomes necessary on the part of Ringo or Beebe as his representative to show that the debt sued on was a partnership debt provided for in the transfer, and to predicate the subsequent proceedings upon it. To establish this point, Beebe, in behalf of Ringo, shows a declaration filed on 27th September, 1842, by Ringo against De Baun and Thorn, as partners, trading under the firm name of J. De Baun & Co. The suit was in debt on promissory note executed by the firm on the 29th of March, 1837, due six months after date for the sum of fifteen hundred dollars with ten per cent. interest from date. Upon which declaration such proceedings were had that on the 23d of June, 1843, judgment was rendered for the plaintiff, Ringo, and thereafter under this judgment a sale was made to Beebe. There is also a note executed by J. De Baun & Co., to

Ringo copied into the record, corresponding with that sued upon, but it was not brought there by oyer or otherwise: no notice is taken of it upon the record, therefore, as we have repeatedly held, it is no part of the record and consequently was not an exhibit in the cause. At this point an issue is raised between Whiting & Slark and Beebe, who for the purpose of proving that the note sued on was one of the debts embraced in the agreement between Thorn and De Baun and was the foundation of the judgment exhibited in Beebe's answer introduced on the trial of the cause the original note (as they allege) upon which Ringo had obtained his judgment; and against the objections of Whiting & Slark, the Court permitted Beebe to prove, first, the execution of the note; 2d, that it was marked and filed among the papers in the case of *Ringo v. De Baun & Thorn;* and lastly, to read it as evidence in the case; to all of which exceptions were regularly taken and filed at the time.

It cannot be said that the original note was an exhibit in the cause. It was produced for the first time by the defendants on the final hearing of the cause. It has been decided, and we think correctly, that unless made an exhibit, *viva voce* evidence is not admissible to prove its execution. *Crist et al. v. Brashier,* 3 *A. K. Marsh.* 170. And even where exhibits are thus proven on the trial the evidence is, in most instances, limited to the mere execution of the instrument. 2 *Daniel's Ch. Pl. & Pr.* 1,026; or where the instrument comes from the hands of a public officer its custody may be thus proven, but nothing beyond this. And for this reason it is that the execution of a will cannot be proven *viva voce,* because, besides the mere execution of the will, the sanity of the testator must be established, *id.* 1,027: and so where any additional fact is to be established in order to make the exhibit evidence, as in this case, the identifying it as the note sued on, the proof is inadmissible. And even when such evidence, offered to prove an exhibit, is admitted it must be regularly upon application to the Court, and an order for that purpose or notice to the adverse party specifying the exhibit intended to be proven. *Parde v. Deca,* 7 *Paige* 134. *Chandler's Exrs. v. Real,* 2 *Hen.*

& Munf. 129. 2 *Dan. Pl. & Pr.* 1,028. The time given we apprehend, would be rather a matter of discretion with the chancellor.

But in this case where the instrument was not an exhibit and where it required not only proof of its execution but also proof to connect it with the judgment, we are satisfied that *viva voce* testimony was inadmissible.

There was no evidence then connecting any subsisting debt referred to, or embraced in the agreement between Thorn & De Baun, with the judgment under which the sale to Beebe was made, and of course no prior lien existed to that of the judgment itself, which was junior to the claim of Whiting & Slark.

Whether the interest of Thorn was a trust or a mortgage interest (and we apprehend it could not extend beyond that) it is very questionable whether it is or not subject to sale under execution, even under the provisions of our statute, which subjects the real estate of the defendant, whether held by patent, or by a third person for his use, of which he was seized either in law or equity, to sale. How far a lien or security may be considered an equitable estate, or what class of equitable estates the legislature designed to embrace (if there is any distinction or reservation to be made) it is not necessary to determine in order to dispose of the rights of the parties in this case, as by our determination of a preliminary point, this question does not necessarily arise, we will therefore express no opinion with regard to it further than to remark that in several of our sister States, where these statutes are as broad as ours, such interests have been held not subject to sale.

In an equitable point of view there can be no doubt but that the security afforded in a deed of trust or mortgage can only extend to those debts set forth and recorded in the deed, or perhaps where notice is brought home to the purchaser of the estate thus pledged. The authorities upon this point are clear and conclusive. *St. Andrew's Church v. Tompkins,* 7 *John. Ch. Rep.* 16. 4 *Kent Com.* 176. *Day v. Dunham,* 2 *John. Ch. Rep.* 189. *Frost v. Bukman,* 1 *John. Ch. Rep.* 229. In the last case Chancellor KENT says, "The only question with us is, when, and to

what extent, is the registry notice? Is it notice of a mortgage duly registered? or is it notice beyond the contents of the registry? The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry." And in 4 *Kent* it is said, "It is necessary that the agreement contained in the record of the lien should, however, give all the requisite information as to the extent and certainty of the contract. So that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance."

The case in 2 *John. Ch. Rep.*, above cited, is still more in point. The Chancellor, in delivering his opinion said, "All the notice in the case is contained in the schedule to the assignment, stating that the title to the fifty lots is, in the name of the defendant, given as collateral security to pay certain notes." And in regard to the effect of this as notice, says: "In this case the notice arising from the schedule is lame and defective. There was no notice as to the amount of the notes, or how many, or when payable. The plaintiff in this case might not have inferred from the schedule that the defendant held any thing more than a nominal title, and perhaps as a mere trustee upon some extinguished debt."

These cases go clearly to show that, in order to affect the rights of Whiting & Slark as junior lien creditors it was necessary to have brought notice home to them, not alone of the existence of the transfer and reservation in favor of creditors, of that, the registry of the conveyance may afford ample constructive notice, but it was necessary to have set forth the identical debt upon which this prior equity is to be founded, so that the junior purchaser might take notice at his peril what he purchased. Such not being the case, upon this ground also the prior equity of Beebe, who holds under Ringo, must fail.

In regard to the tax titles, which Beebe also relies upon, as giving him prior equitable and legal right in the contest for this property, it will be perceived that they were acquired after both

the original and amended bill had been filed and whilst he was in possession as tenant under the contested titles at issue in the suit, to which he had, by the amended bill, been made a party. Under these circumstances he bought them as outstanding adverse titles, not to sustain the claims of the parties litigant to the matter in dispute, but to assert an independent title superior to theirs. The principle which we have recognized in regard to his position as purchaser *pendente lite* denies to him all aid from adverse claims for the purpose of strengthening their title or his through them: or, if placed upon the ground of an independent title and properly established and presented, the purchase was for a charge upon the land if unoccupied, or upon the tenant if occupied. Beebe entered under the claims then in litigation and held subject to the final disposition of those cases. In that position his purchase was necessarily in trust and enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. *Burr v. McEwin et al.* 1 *Baldwin Rep.* 162.

Taxes are a lien on property which is unoccupied, for which it may be sold. 9 *Sergeant & Rawle* 112; or, if occupied, the payment is enforced by a distress upon the tenants, 10 *Serg. & Rawle* 255, and if paid by the tenant it would be a charge upon the rents, and the purchase would enure to the benefit of the true owner of the property under whom he held, which was the very subject of contest in the suit under which he entered. So, when Beebe accounted for rents in his settlement of them with the master, he credited himself with taxes and repairs, and might also have presented the amount of taxes due on the lands for the years for which he had purchased. Upon either of these grounds then, independent of the consideration as to whether these are or not valid tax titles, there can be but little doubt that the defendant acquired no superior equity over the complainants from these purchases.

We have now closed our examination of the several claims of the defendants intended to assert a superior equity to that of the complainants. In the investigation of which we have derived much advantage from the research and industry of the counsel on

both sides. And if in reference to the several interesting questions discussed, we have not adverted in this opinion to all of the grounds assumed or by them deemed material, it has not been because they were not duly considered, or the authorities to which reference was made, examined when accessible. It only remains for us now to take a glance at the relative position of the parties and the probable motives which influenced the principal actors, and determine their rights in view of the several conclusions to which we arrived in the progress of our investigation

In the development of the facts, in the outset, of the several transactions out of which the present contest arose, it is by no means improbable that De Baun, in view of the storm of bankruptcy which was thickening around him, was quite willing to take shelter under the judgments of Gray & Bouton and Beach, and shelter his property from the grasp of his other creditors; and for that purpose, and that it might be the more effectual, permitted judgment to be rendered *nil dicet* for $2,137.89 debt, and interest, when in fact he had previously paid the whole of it except the sum of $996.15. And the acquiescence in this is readily accounted for on the part of Trapnall & Cocke, when we consider the very ample security furnished by their judgment lien on so large an estate. If there had been no understanding upon this subject between the attorney and De Baun, it is scarcely to be presumed that De Baun would have appeared and suffered judgment to go for more than twice what was really due, or that the attorneys would not have entered all proper credits when they took their judgment. And this conclusion gains much strength from the subsequent conduct of the parties. Nearly a year expired before writs issued on either of the judgments and then only in time to save a revival by *sci. fa.* So we find a release given to Thorn, and, with the full written assent of De Baun, execution is to run for the whole amount of the debt against him. Why, if Thorn had paid the debt, not enter credit in full; if only part, for that much or otherwise to the extent of the satisfaction? A motive at once is found for this in accordance with the previous conduct of the parties, for it is also

shown that upwards of $1,100, on the Beach judgment was paid and yet no credit is entered on the judgment.

At this point, defendant Beebe's position may be defined. It is due to him and it is but fair to presume that at the outset he acted in good faith and bought the property under the trust sale in April, 1843, to save himself from loss as De Baun's security and with no wish to wrong any one. After this purchase, he found that there was a probability that he might lose the benefit of his purchase and be defeated in his first object. He, no doubt, bought the Gray & Bouton and Beach judgments from motives and considerations of this kind. This he had a right to do. As a prudent man, looking to his rights and interest, it was perhaps his duty to do so. But when he took shelter under this wide spread cover of De Baun's property, and saw that about half of each of those judgments had been paid, and one of them fully discharged, as to one of the creditors at least, he should have clipped the canvass to honest dimensions, have credited each of these judgments by what was paid, and openly asserted and pressed his rights to the balance. By this means, the junior lien creditors might, if they chose, have paid off the balance really due, and thereby disencumbered their rights, or have bought with a knowledge of the amount they would be liable to pay, in order to protect their title to the property so purchased. His failure to do this and his asserting a claim to the whole amount of the two judgments of about $6,000, which had only cost him some $2,400, and when in fact there was only due between $1,300 and $1,400, was in bad faith and oppressive towards the junior lien creditors if not a palpable fraud upon their rights.

If the purchase was limited, as stated by Trapnall, to the mortgaged property, it was a direct attack upon the rights of the complainants, theirs being a limited lien, and for that reason more flagrantly unjust. Of this, however, there is no positive proof, as Trapnall's answer, in this respect, is not responsive to the allegations of the complainant's bill. Still, all the circumstances tend strongly to show that such was the case. Beebe's object in making the purchase was to multiply claims upon that particular property;

and the subsequent conduct of the parties fully sustains this conclusion; for we see De Baun, at the sale in May, 1843, acting in concert with Trapnall and Beebe, using his statute rights in directing the sale in such a manner as to defeat the claims of Whiting & Slark. It was also in bad faith to force a sale of this property until the first levy was discharged, and to revive the judgment of Gray & Bouton after it was paid by the sales in November. Beyond this, the struggle on the part of Beebe to protect himself by the purchase of other senior claims, was what might well have been done in good faith.

The main points to be considered, in determining a question of fraud, are, the act done, the circumstances under which it is done, and the effect upon the rights of the opposite party.

In the case before us, Beebe succeeded to the rights of Gray & Bouton, and whether we consider the act as theirs, or theirs through their agent, is not material. The wrong consisted in the first instance in causing a second levy to be made before the first was disposed of; in asserting a claim for the whole amount of the judgments, when they knew that there was but a small amount comparatively due; in concealing from the junior creditors the true amount of their claims; in persisting in selling the property mortgaged, after the other property had sold for a sum sufficient to pay the whole amount really due; and in reviving a judgment which had really been paid, and extending an unjust claim of title over such other estate as might remain unsold—all of which, except the latter act, was clearly to the prejudice of the rights of the complainant; and for which, as well as for the reason that there was no subsisting lien at the time of the purchase by Beebe under the Gray & Bouton judgment, and the several other grounds with regard to the other claims, we are of opinion that the sales and the deeds under which Beebe sets up title to the property contained in the complainants' mortgage ought to be set aside.

We are moreover of opinion, that the complainants have the senior equitable lien on the property in dispute: and that next in order, Beirne & Burnside have the oldest equitable lien. De-

fendant Beebe, has, no doubt, acquired a valid legal title to the property under several junior judgment liens and under the statute holds title to the property subject to the prior equitable liens of the complainants, and of Beirne & Burnside, who are entitled to decrees of foreclosure and sale of the property to satisfy their respective claims according to priority in equity: and that defendants Brown and Beebe account to complainants for the rents and profits thereon arising, from the time they respectively entered into possession until the date of such accounting, unless the said Beebe shall elect to pay off and satisfy the prior claims of said Whiting & Slark, and Beirne & Burnside with costs; in which event we see no necessity for holding defendant Beebe to account for rents, but, on the contrary, he is entitled to the same.

Having closed the consideration of the case so far as relates to the issue between complainants and defendant Beebe, we will, before considering the cross-bill of De Baun, consider a collateral issue formed between the complainants and defendant Lawson. And, but for the connexion which the money in dispute has with the title of complainants, which we have decided against them, we would find no very good reason for entertaining the issue or rendering a decree thereon. The complainants have a clear legal right of action against the defendant if their allegations be true; but as equity has taken jurisdiction of the subject matter and the parties, and disposed of one branch of the subject connected with this, and out of which this liability arose, we may proceed to examine into the merits of the case and settle the issue between the parties.

The facts abundantly prove that Whiting & Slark, through Fowler, their agent and attorney, paid the defendant, as sheriff, the sum of $903.56, the amount bid for the property in dispute. Lawson, in his answer, admits the receipt of the money, but says that thereafter, on another day, he paid $756.14 of the money back to Fowler, and that he has $243.86 now in his hands, which he was prepared to pay, but that Fowler failed to call for it as he promised.

It seems that this and several other sales were set aside by the court, and that other moneys passed at that time between Fowler and the sheriff. Fowler's deposition is taken, and he states positively that no part of the $903.56 is paid; that the whole amount remains yet in Lawson's hands. He says that the $756 draft was paid, but on other and different accounts, and shows as an exhibit, the receipt of Lawson for the payment of several sums, which he states was the money so refunded by the payment of the draft. He states that the draft exceeded the amount of the sums he had paid (except that of $903, which he refused to accept,) by $156, which sum it was agreed between himself and Lawson, should be settled on the same evening at Lawson's office; that he attended with the money but Lawson was not there. The receipts, and the positive evidence of Fowler, leave but little doubt of the retention of the money by Lawson, notwithstanding his answer, in which he claims to have repaid part of it. The answer, however, is affirmative in this respect, and he should have made the proof himself to support it. Where an answer admits the receipt of money at one time and sets up that at another time, and in another adjustment it was repaid, the repayment is the affirmance of a new act, and must be proved. Deducting the $156 from the purchase money, there would remain in Lawson's hands $847.56, for which a decree should be rendered in favor of the complainants.

It now devolves upon us to consider the merits of the cross-bill of De Baun, the scope of which is to review the acts of the creditors, to set aside the sales made by them of his property, to re-sell the same and to have the proceeds of such sales appropriated according to their equitable right to the same. He says that, owing to impending circumstances and the acts of some of his creditors in their contest with each other for priority of right to the proceeds of the sale of his property, a most shameful sacrifice and waste of the property was made, alike prejudicial to the interest of other creditors and to himself, and that their acts he could not control. The Bill is drawn with much care, and the facts arranged with a distinctness and order highly creditable

to the counsel who prepared the case; nor do the authorities to which he referred, in the main, fall far short of sustaining the grounds of equity upon which the bill rests. They will not avail the complainant any thing however unless he comes before us as an honest debtor, who has surrendered up his property to his creditors and in good faith endeavored, as far as he could, to protect their rights and his own against the effects of a fraud or injury perpetrated by a portion of them to the injury of himself and others. This we think he has not done, but so far from it, we have much reason to suspect that, in the first instance, he not only acquiesced in the very acts of which he now complains, but was an active agent in producing them. Thus, at the outset he suffers judgment to be rendered in the case of Gray & Bouton for double what was due, took no discharge as to the Beach judgment, but expressly estopped himself from doing so by his written assent to the act, identified himself fully with Beebe and Trapnall in their course at the May term, and at the November term directed the sale of the property which he now says was sacrificed. With what show of equity can he call on the purchasers at that sale to give up the property which they purchased at his direction or otherwise, if made in good faith and without a knowledge of the fraudulent conduct of others? Before he can complain that injustice has been done to his creditors as between themselves, he must do justice to them himself; so far from this, he ran off his whole estate in slaves, although conveyed in trust for the benefit of part of them. When he comes therefore to ask for an equitable account between his creditors, or himself and them, he should at least have come with that property in his hand or tendered an equivalent for it. This he has not done. Under the circumstances of the case the only claims to equity which he may assert must be between himself and Woodruff and others, trustees, and that is a matter which may be inquired into apart from any equities in this case. He brings it here only by cross-bill; that bill we think should be dismissed with costs but without prejudice to such rights as he may have as between himself and the trustees.

Upon consideration of the whole case, let the decree of the Pulaski Circuit Court be reversed and set aside with costs; and a decree rendered in this court upon the equities of the several parties, upon the following points:

First, That the cross-bill of De Baun be dismissed at his costs, but without prejudice to his rights as between himself and others in regard to the deed of trust executed to Woodruff, Watkins and Reardon.

Second, That all of the defendants except De Baun, Beebe, Brown and Lawson be discharged with costs.

Third, That the complainants' mortgage be foreclosed, and a decree rendered in their favor for the full amount of their debt in the mortgages set forth with interest thereon from the time the debts became due until the present time, and that defendant Beebe pay the costs in this behalf expended, so far as relates to his own defence, and also all the costs in behalf of all those defendants under whom he sets up title in defence of his claim against the complainants: and that complainants pay the costs of all other defendants who disclaim an interest, or were not connected with the defence of defendant Beebe. And that the mortgaged property be sold for cash in hand to pay the amount of said decree; the sale to be made at the court-house door in the city of Little Rock, after giving 90 days notice in some newspaper published in said city; the proceeds of sale after paying the expenses of sale to be applied, 1st, to the satisfaction of the decree in this behalf; 2d, the decree of Beirne & Burnside; and lastly, any overplus, after paying each of these demands and costs, to be paid to defendant Beebe.

Fourth, A decree in favor of Beirne & Burnside upon their deed of mortgage for the debt therein set forth with the interest from due until the present time, with costs against the defendant Beebe; and that the estate therein mentioned be sold to pay the same upon the like terms (as regards the sale) as above prescribed: and the overplus, after paying the same with costs to be paid to defendant Beebe.

Fifth, That the several sales made to defendant Beebe, asser-

ting prior equitable liens upon the property in dispute, be set aside and the deeds and conveyances thereof to him, held for nought. But that holding a valid legal title subject to the prior equitable liens of the complainants, Whiting & Slark and Beirne & Burnside, he may, if he will, elect to pay the amount of their decrees with costs, and retain his title to the estate under such junior judgment liens as he claims to hold, and to afford time for doing so, he is allowed until the first Monday in June next, to make such payment, which when made and the evidences thereof shown to the satisfaction of the Chancellor in court sitting, he shall cause full satisfaction thereof to be entered of record in each of said decrees; and thereupon and in that event said defendant Beebe shall be entitled to all the rents and profits arising from the mortgaged premises from the date of his purchase at the November term, 1843; a decree shall be rendered in his favor according to the practice of said court against his co-defendant Brown. But should said Beebe fail to make such payment and cause such entry of satisfaction to be made within the time prescribed, that Beebe and Brown as tenants be held to account to Whiting & Slark, as mortgagees, for rents and profits, and for the purpose of ascertaining fully what may be due, said Circuit Court in chancery may cause proof to be taken in addition to that already taken, and ascertain the amount due for rents and profits (less taxes and necessary repairs to protect the property from waste or make it tenantable,) and render a decree for the same: and the money arising therefrom when received, shall be applied first, to the payment of the costs against complainants Whiting & Slark; secondly, to the payment of the interest and principal of their debt; thirdly, if an overplus, to the payment of Beirne & Burnsides' decree, and if enough to pay one, and not both, then the one paid to be entered satisfied, and a sale to be had on the unsatisfied decree for the amount due thereon; or if not enough to satisfy either, then the sale will be made under both decrees, the overplus in any event, after paying both the prior claims and costs to be paid to Beebe.

Sixth, That a decree be rendered in this court against defend-

ant Lawson in favor of Whiting & Slark for the sum of eight hundred and forty-seven dollars and fifty-six cents, with costs.

And that this decree be certified to the Circuit Court, to be executed according to the several directions herein contained according to equity.

NOTE—F. W. TRAPNALL, Esq., having complained, in open court, that unjust and unfounded imputations had been made against him, and his deceased partner, John W. Cocke, Esq., in the foregoing opinion, Mr. Justice WALKER handed the Reporter the following note:

In alluding to the probable motives which may have influenced the parties (attorneys and defendant) in withholding certain credits, which should have been entered on the judgments at law, in favor of Gray & Bouton, and Beach, against De Baun, I failed to express, as fully as should have been done, the opinion of Court in regard to that subject. It is due as well to the attorneys as to Mr. De Baun, to say that the omissions referred to, might have been the result of inattention, or of confidence reposed by the defendant in the integrity of the attorneys, or of other cause, not apparent upon the record. It was certainly not the intention of the Court to impugn the motives of the parties, indeed it was wholly immaterial so far as the other creditors of De Baun were concerned, whether the omissions were the result of accident or design. The effect was the same to them. It presented a larger outstanding incumbrance, than was really due, which it was contrary to equity and good conscience, to assert against their junior liens.

The Reporter will append this as a note to this opinion.