WRIGHT *vs.* YELL ET AL.

A judgment on a forfeited delivery bond is not void for want of actual notice to the securities therein.

A judgment on a forfeited delivery bond is a satisfaction and discharge of the original judgment so long as the judgment on the delivery bond remain in force, and an execution cannot legally issue upon the original julgment, and if improperly issued, the securities in the delivery bond cannot complain that the plaintiff in the execution ordered it to be returned without sale of property. Such execution being void, imposes no obligation upon the sheriff to execute it.

A party may purchase such judgment, take an assignment of it, and collect for his benefit, and mere delay in issuing execution thereon, after the purchase and assignment, is no such giving of day to the principal as will discharge the securities.

A judgment may be assigned as a chose in action, so as to enable the assignee to control the execution for his benefit. *Clarke's ad. vs. Moss et al.*, 6 *Eng.* 736.

Appeal from the Chancery side of Jefferson Circuit Court.

Bill for injunction, filed by James Yell, Robert W. Johnson, Valentine Sevier, and William Pelham, against William Wright and others, on the chancery side of Jefferson circuit court. Final decree for complainants, and appeal by Wright.

The material facts are stated in the opinion of this court.

FOWLER, for the appellant. The judgment on the delivery bond

is clearly not void; and if erroneous, the parties could not correct it in chancery, but should have sought a reversal of it by writ of error or appeal.

The issuing of a *venditioni exponas* on the original judgment, after judgment on the delivery bond, was a mere nullity—the latter judgment being in law an extinguishment of the former, and being in itself a nullity, it could not in equity operate as an abandonment of the subsequent valid judgment, or prejudice the rights of any body. *Brown vs. Clarke,* 4 *How. U. S. R.* 12. *U. S. Bank vs. Patton et al.,* 5 *How. Miss. R.* 236. *King vs. Terry,* 6 *ib.* 514. *Davis vs. Dixon's Ad.,* 1 *ib.* 67. *Clark vs. Anderson,* 2 *ib.* 853. *Chilton vs. Cox,* 7 *Sm. & Marsh. R.* 797. 8 *ib.* 518. *Camp vs. Laird,* 6 *Yerg.* 248. 2 *Munf.* 432.

All the material allegations of the bill, if there be any which are material, are denied by the answer, and being wholly unsustained by proof, can avail nothing.

The doctrine of a release of parties by an extension of time to the principal, does not apply in this case, because, by the judgment against the complainants, they became principals. See 2 *McLean's Rep.* 53, *Finlay's exs. vs. U. S. Bank et al.* 1 *Freem. Ch. Rep.* 118, *McNutt vs. Wilcox et al.*

Mr. Justice WALKER delivered the opinion of the Court.

Stewart, for the use of Chapman, recovered judgment against Ambrose H. Sevier, in the circuit court of Jefferson county; on which judgment a writ of fi. fa. issued, and was levied on the slaves of Sevier, who gave bond to the sheriff for the delivery of the slaves on the day appointed for their sale, with the complainants as his securities. Sevier failed to deliver the slaves, the bond was returned by the sheriff as forfeited, and, on motion of the plaintiff in execution, judgment was rendered against Sevier and his securities for the damages sustained by reason of the breach of covenant to deliver the property in execution on the day of sale.

After the judgment on the delivery bond, a writ of venditioni exponas issued on the original judgment, reciting the levy on the

slaves, and directing the sheriff to expose them to sale. This writ was, however, recalled without action on the part of the sheriff. And after an assignment of the judgment to the appellant, a writ of fi. fa. issued on the judgment rendered upon the delivery bond; to enjoin which, this suit is brought.

The first ground for equitable relief seems to have been taken under a misapprehension of the legal effect of the judgment on the delivery bond. The judgment was not void because actual notice had not been given to the securities. (*Ruddell v. McGuire,* 6 *Eng.* 584. *Borden et al. vs. State, use, &c.,* 6 *Eng.* 519.) And the legal effect of the judgment was to satisfy and discharge the original judgment. (*Whiting & Slark vs. Beebe et al.,* 7 *Eng. R.* 548.) And in the case of *Withenspoon vs. Spring,* (3 *How. Rep.* 60,) it was held that a second execution and levy on the original judgment are void; and Chief Justice Sharkey, in the case of *McNutt vs. Wilcox and Farne,* (3 *How.* 419,) gives, as a reason for the rule, that the plaintiff is not entitled to two subsisting judgments on the same cause of action against the same parties.

When, therefore, judgment was taken upon the delivery bond, its legal effect was to supersede the original judgment, and to satisfy and discharge it whilst the second judgment remained in force. The writ of venditioni exponas, which issued on the original judgment, after the judgment on the delivery bond, imposed no obligation on the sheriff to execute it, created and imposed no liability or restriction upon Sevier's property; and as none was created, none was discharged by the order to return the writ, which was properly made to prevent a trespass upon property of Sevier. Of this, the surety had no right to complain, as his liability as such was neither increased nor diminished by the proceeding upon the first judgment.

The second ground of equity relied upon is, that the judgment upon the delivery bond was in fact paid by Sevier, although part of the sum was paid by Wright for Sevier. The answer positively denies the truth of this allegation; but, on the contrary, asserts that the judgment was purchased by Wright for himself. He admits, however, that Sevier wrote to him requesting him to

purchase the judgment, or take other steps to prevent his (Secier's) property from being sold; and when we see that he paid the full amount of the residue of the judgment for it, and delayed process for several months, we cannot doubt that Wright made the purchase not for speculation, but to oblige Sevier. He could do this consistently with a purchase for himself, which his answer positively states, and against which there is no evidence, except the inference to be drawn from the letter written by Sevier, to him, and the price given for the judgment.

The assignment of the judgment was sufficient.(*a*) (*Clark's ad. vs. Moss et al.,* 6 *Eng.* 736.) And mere delay to sue out process after the assignment, will not discharge the surety, (*King v. Baldwin,* 2 *John. C. R.* 558;) unless the delay is by contract upon sufficient consideration without the assent of the surety. (*Stone & McDonald vs. State Bank,* 2 *Eng.* 141. *Caldwell vs. McVicar, id.* 422.) In this case, it is not pretended that any contract for delay was made, in fact, a purchase by Sevier, (which we have seen is not done;) and even then it could only by inference be made a contract for further time.

Wherefore, in consideration of the whole case, we think the circuit court erred in decreeing a perpetual injunction of the judgment at law. Let the decree be set aside and reversed, the injunction dissolved, and the bill dismissed with costs.

NOTE (*a*)—The attorneys of the plaintiff in the judgment assigned it to Wright, expressing, as the consideration, the payment, by Wright, to them, of the balance due on the judgment. REPORTER.