STATE BANK *vs.* BOZEMAN & BOZEMAN *vs.* STATE BANK.

Buckner executed a mortgage to Reardon, upon a large property, to secure the payment of notes made by him to the Real Estate and State Banks, upon all of which notes Reardon, with others, was security. Among the notes, was one for $3,500, upon which *Bozeman* and Reardon were securities, and one for $6,000, on which Bozeman was not security—both due the State Bank. In consideration of $4,000, paid to the State Bank afterwards, by Reardon, to be applied to both, or either of said notes, as she might choose, the Bank executed a covenant to Reardon not to sue him on either of said notes, and to indemnify him against suits for contribution by his co-securities. The Bank applied the $4,000 as a payment upon the $6,000 note, and afterwards sued Bozeman for the full amount of the $3,500 note; he pleaded in bar the release of Reardon, but the court held it not be a release, but a covenant not to sue, and the Bank obtained judgment against Bozeman. (See *Bozeman vs. State Bank*, 2 *Eng. Rep.* 328.) Bozeman afterwards filed a bill against the Bank to injoin her from the collection of one-half of the judgment at law, &c.—making Reardon a party: HELD, That, Buckner being insolvent, the effect of the payment of the $4,000 by Reardon to the Bank, and her covenant not to sue him, &c., was to liquidate one-half of each of said notes, and to discharge him from all liability as co-security therefor; that the Bank had no right to apply the payment exclusively to the $6,000 note, and that, in equity, she could only recover of Bozeman the remaining half of the note on which he was Reardon's co-security, having discharged Reardon from liability for the other half—WALKER, J., dissenting.

HELD, further that Bozeman was not entitled to an injunction of the judgment at law, without paying, or offering to pay, the one-half of it, admitted to be due and not sought to be injoined, but having moved for no injunction in the cause, and having interposed no impediment to the execution of the judgment by the Bank, his failure to pay, or offer to pay, the one-half of the judgment not sought to be injoined, did not prejudice his claim to relief on the final hearing.

HELD, further, that Bozeman's defense not being available at law, the unsuccessful attempt made by him to interpose it, did not preclude him from resorting to equity for relief.

HELD, further, that Reardon held the proceeds of the property mortgaged to him by Buckner, as trustee, for the benefit of all his co-securities, as well as himself, and that any co-security had the right, by bill in equity, to have an account taken against him, and charge him with the proceeds received, or which ought to have been received by him, in the exercise of reasonable diligence; to have the assets marshaled and applied to the discharge of the different debts, *pro rata*, and that to such a bill all the persons interested would be necessary parties. That either of the Banks might have filed a bill for the same purpose, but was not bound to do so.

HELD, further, that the scope of Bozeman's bill being to injoin the Bank from the collection of one-half of the judgment at law, and he praying no specific relief as against Reardon, the court could not, under the general prayer for relief, render a decree against Reardon for account, as such trustee, &c.; and such decree could not be made against him for the further reason that Bozeman had not made the Real Estate Bank, and the other co-securities and Reardon, parties to his bill.

Appeal from the Chancery side of Pulaski Circuit Court.

S. H. HEMPSTEAD, for the Bank. A complainant cannot pass over the specific prayer he has made in his bill, and take another decree; (1 *Daniel Ch. Pl.* 435, *and notes and cases there cited.* 1 *Bibb* 469. 5 *Yerger* 420. 2 *Paige* 396;) and as Bozeman prayed for an injunction of one-half of the judgment, he cannot, under the general prayer, claim an injunction as to the whole.

Where a party elects to submit his defence to a court of law, he must abide the consequences, and cannot afterwards resort to a court of equity; and so Bozeman having pleaded at law, the covenant between the Bank and Reardon, cannot present the same matter for relief in equity. *Hempstead vs. Watkins,* 1 *Eng.* 355. *Bentley vs. Dillard,* 1 *Eng.* 79.

The covenant was not a release, (*Bozeman vs. State Bank,* 2

Eng. 333,) and being merely a covenant, not to sue one of the joint obligors, it cannot afford the slightest ground for the discharge of Bozeman. 2 *Eng.* 333. 8 *T. R.* 168. 2 *J. R.* 186, 448. 1 *Ld. Raym.* 688.

As Bozeman had paid nothing on the debt, he could not call on Reardon to account for the property placed in his hands by way of indemnity, or to be subrogated to the securities which Reardon held for his own benefit. He might have paid the whole debt, and then have sued Reardon for contribution. 3 *Dana R.* 68.

F. W. & P. TRAPNALL, for Bozeman. The covenant of the Bank with Reardon materially affected the interest of Bozeman; as before the covenant, the Bank could have satisfied her debts out of the trust property, and Bozeman, upon the payment of the debt, could have been subrogated to the rights and equities of the Bank, but by the covenant, the trust property was released.

That a security who pays a debt, is entitled to stand in the place of the creditor as to all the securities on account of said debt. (1 *Pothier's Ob.* 427, 520. 3 *Sum.* 410. 2 *J. C. R.* 554. 17 *John.* 584. 3 *Paige* 117, 614. 2 *Call* 125. 2 *Yerg.* 346. 2 *Har. & Gill* 305. 1 *Story's Eq.* 637. 1 *McCord Ch. R.* 112. 4 *Har. & John.* 522. 5 *ib.* 234.) The same principle applies between co-securities. *Lidderdale vs. Robinson,* 2 *Brock. C. C. R.* 252.

The right of subrogation being clear, if the creditor deprive the surety and equity, security or lien he might have against the principal, or another surety, or their property, the surety will be to that extent released. 1 *Pothier* 406, 521. 1 *J. C. R.* 430, 413. 2 *ib.* 559. 1 *Story's Eq., secs.* 325, 326. 4 *J. C. R.* 130. 17 *J. R.* 390. 9 *Watts* 36. *Payne vs. Com. Bank of Natchez,* 6 *Sm. & Mar. R.* 24. 1 *McCord Ch. R.* 443. 2 *Rand. R.* 514. 10 *Ohio R.* 543.

The claim to relief set up in the bill, is not the same relied on as a defence in the suit at law—the complainant does not allege that the covenant was a release, but that being a covenant not

to sue, he was deprived by the Bank of an equity which, in case he had to pay this debt, he might have enforced. Of this, he could not have availed himself as a defence at law. 6 *Mon. R.* 107. 5 *B. Mon.* 574. 10 *Ohio* 543.

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

This was a suit in chancery, brought by Bozeman against the State Bank and Lambert J. Reardon. It appears to have been conducted by both parties throughout with but little regard to the rules of chancery practice, and hence it becomes necessary to state the pleadings and facts more in detail than would otherwise be required for a correct understanding of the questions presented.

On the 2d April, 1842, Simeon Buckner executed a deed of mortgage to Lambert J. Reardon, of a large amount of property, consisting of lands, negroes and chattels, conditioned to secure the payment of certain notes made by Buckner to the Real Estate Bank and the Bank of the State of Arkansas, amounting in all to about $20,000, and nearly equally divided between the two Banks. Reardon was security for Buckner on all of the notes, but on the different notes various other persons were co-securities with him. Among the notes specified in the mortgage was one for $3,500, due to the State Bank, upon which Bozeman and Reardon were the securities, and one for $6,000, due to the same Bank, for which Reardon was not security.

In August, 1842, Reardon proposed to pay to the State Bank $4,000, on condition of being released from all his liabilities for Buckner in that Bank. The directors acceded to this proposition, being moved thereto, as appears from an extract of their minutes, because Reardon was embarrassed in respect of his other indebtedness to the Bank due on his own account: the attorney for the Bank was directed to prepare the necessary papers to carry the resolution into effect, and the cashier was directed to apply the money when received towards the extinguishment of Buckner's note for $6,000, on which Reardon was security.

On the 9th of September, 1842, the instrument referred to was

executed by the President of the Bank on her behalf,—not being in form a release, but a covenant not to sue. After reciting the two notes referred to, and the payment to her, by Reardon, of $4,000, in Arkansas money, to be applied on either or both of said notes, as she might choose, the Bank covenanted with him in consideration of the amount paid, that he should not be sued or moved against on or in respect of either of said notes by her or by any of his co-securities thereon, and if he should be sued or moved against by any or either of such co-securities on said notes, the Bank bound herself to indemnify and save him harmless in respect thereof.

Bozeman, being sued by the Bank, pleaded this instrument as a release, in bar of the action. Judgment went against him, and on error it was affirmed in this court. (See *Bozeman vs. The State Bank,* 2 *Eng.* 328.) The decision there was, that the agreement referred to was not a release, but a covenant not to sue Reardon, which did not amount to a release, and could not be pleaded as such by any co-obligor of his.

Bozeman then exhibited his bill in chancery against the Bank and Reardon, setting out the execution of the mortgage, and alleging that, since then, Buckner had departed this life wholly insolvent; that Reardon had sold a large amount of the mortgaged property, and realized large sums of money from it; also the proposition of Reardon, its acceptance, and the covenant of the Bank not to sue him. The bill then proceeds on the ground that the complainant, if forced to pay the entire debt, would have to sue Reardon for contribution of his half of it, who, in turn, would recover it of the Bank on her covenant of indemnity; that the Bank in equity and good conscience had no right to enforce the complainant to pay but one-half of the debt for which she had recovered judgment at law against him, being the same result which would be attained by that circuity of action. The prayer of the bill was that the Bank might be perpetually injoined from collecting the one-half of the judgment at law and interest thereon and for general relief.

The Bank and Reardon answered, not denying any of the alle-

gations of the bill, but resisting his equity on the ground that the Bank, as she had the right to do, had applied the payment made by Reardon upon the $6,000 note, and that the covenant not to sue Reardon was not a release of Bozeman on the other debt for which judgment had been obtained against him.

The complainant then filed an amendment, reciting the bill and further alleging that the property embraced in the mortgage to Reardon, was worth at least $15,000 of lawful money, and that Reardon had in fact sold a large amount of the property, and realized enough money from it to have paid both of the debts due to the State Bank in full. That, out of the proceeds received, Reardon had paid the $4,000 referred to in Bank paper, and at the time this arrangement was made, it was well known to the Bank that Buckner was hopelessly insolvent; that, by the combination between the Bank and Reardon, the complainant had been deprived of the means of indemnity by resorting to the mortgaged property and securities held by Reardon, (but how or why he was so deprived, is not stated and does not appear,) and that the Bank had refused to apply any part of the $4,000 on the note for which he was security. The only prayer of the amended bill was for general relief. Reardon and the Bank answered as before, and that the payment of $4,000 made by Reardon was Arkansas bank notes, then passing current at 50 cents on the dollar: they denied that the property mortgaged to Reardon was worth $15,000 of lawful money; but on the contrary, it was encumbered with prior liens, specified to the amount of $55,000, and that in fact Reardon did not realize over $6,000 of proceeds from the sale of the mortgaged property.

The defendants subsequently filed an amendment to their answer, in which they set up the proceedings and judgment in the action at law of the Bank against Bozeman, and relied on the same by way of answer, as a conclusive adjudication of the same matters, and a bar to any relief being sought by Bozeman in chancery.

The cause was heard on bill, answer, replication and exhibits, no other evidence being adduced: and the court below decreed that

Bozeman should pay to the Bank the one-half of the judgment at law and interest and the costs of that suit; that the Bank be perpetually injoined from having any execution against Bozeman for the other half of the judgment at law and interest, and that she pay the costs of the suit in chancery. From this decree, the Bank and Bozeman prosecute their cross appeals.

The equitable rights of the parties arising upon the facts stated. are exceedingly plain. Without any reference to the mortgage executed by Buckner to Reardon, the covenant of the Bank not to sue Reardon, in consideration of the $4,000 paid by him, upon the two debts due in that Bank, was in effect a receipt in full for his due proportion of the debts, supposing the principal debtor to be insolvent and the co-securities to be solvent. The solvent securities on each note were bound to contribute as between themselves the amount necessary to discharge it. No arrangement or agreement between the creditor and one of the securities, without the concurrence of the other, could change the rights of the securities so as to impose the burthen of paying the debt wholly upon one, or upon either beyond his due proportion. It is not material what Reardon paid, or whether he paid any thing, or on what particular note the Bank applied the payment. She had a perfect right to forgive any one of the securities the due proportion of any or all of the debts falling upon him to pay, and of this no co-security would have any just cause to complain. As on the one hand, no receipt which the Bank could give Reardon, nor any agreement made with him, could give him a recourse on the principal debtor, or a right to a ratable contribution from the co-securities for any thing more than the actual amount or value of what was paid by him; so, on the other hand, no such agreement between the creditor and a security, could exempt him from contribution to a co-security, without exonerating the co-security to a corresponding extent. Here, for instance, the only conceivable motive the Bank could have in applying the $4,000 paid by Reardon wholly towards the extinguishment of the $6,000 note, was that Reardon's co-securities on that note were insolvent or of doubtful ability, and that Bozeman, the co-security on the note

for $3,500, now in question, was solvent. The covenant to indemnify Reardon against any suit for contribution by any co-security, is not material, only so far as it may go to show the true character of the transaction, and the extraordinary notions of equity which the parties to it appear to have entertained. Because, if Reardon paid his due proportion, or if the Bank accepted less and in lieu of his due proportion, he was not liable to any suit for contribution, and no such covenant of indemnity was necessary. In equity, the covenant not to sue Reardon, was a release to him from both of the debts, and the idea that the money, he paid as the consideration for that release, could, for any reason, be applied on one of the debts alone, so as to compel a co-security for the other debt to pay the whole of it, is not to be tolerated. The most favorable construction for the Bank, that can be put upon the covenant is, that, stripped of he disguise thrown around it by the technical rules of law, the Bank, upon a consideration, or without a consideration, had acknowledged to have received of Reardon his ratable proportion of both debts, she thereby agreeing to look to the other co-securities for their proportions of the common loss which had fallen upon them by reason of their securityship for an insolvent principal.

It is urged, on behalf of the Bank, that Bozeman has never been required to pay the debt, and without having paid any thing, he has not been damnified, and is not entitled to relief, and further, that having elected to make his defence in the suit at law, chancery has no jurisdiction to afford him relief in respect of any matter tried and determined at law.

According to what we conceive to be the scope of Bozeman's bill, it is true he was not entitled to any injunction of the judgment at law, without paying, or offering to pay, the one-half of it, admitted to be due and not sought to be injoined: but no injunction was ever moved for or granted in the cause, and there was no impediment why the Bank should not have proceeded to execution of the judgment. As to the objection for want of jurisdiction, it is not tenable, unless we deny that Bozeman is entitled to any relief at all, either at law or in chancery. The de-

cision in 2 *Eng.* 328, which is the law of the case, is conclusive that the defence was not available to him at law, because technically he could not plead as a release the covenant of the Bank not to sue Reardon. That a defence, or ground of relief is not available, or not adequate at law, is the true theory of chancery jurisdiction; and if the party attempted in good faith to make the defence at law, the decision of the court of last resort that it was not there available to him, is the best evidence of his right to seek relief in a court of equity.

On the appeal of the Bank, we find no error in the decree of the chancellor.

The only question in the case on this record, upon the appeal of Bozeman, is, whether he is entitled to any, and what relief beyond that awarded to him by the decree.

Considering the case now with reference to the mortgage executed by Buckner, the rights of the parties in equity were these: As it does not appear that Reardon stipulated for any separate indemnity, or by consent of the other securities acquired any right to be indemnified in preference to them, upon the execution of the mortgage to him by Buckner, he became trustee of the property and the fund arising from it, for the common benefit or himself and his co-securities upon the several debts specified in the mortgage, and intended to be secured by it, and he would be holden to the due execution of this trust in good faith and with ordinary diligence. He was bound to have applied the proceeds of the mortgaged property to the discharge of those debts, and (if not sufficient to pay them in full) *pro rata,* according to their respective amounts; and in such case, the residue unpaid on each would be the amount for which all the securities on that debt would be jointly liable, and for the payment of which Reardon, as well as any co-security, would have to contribute his due proportion. Any co-security thus interested in the due execution of the trust, had the right, by bill in equity, to have an account taken against the trustee to charge him with the proceeds received, or which ought to have been received by him, in the exercise of a reasonable diligence; to have the assets marshaled and applied to the

discharge of the different debts; and to such a bill all the persons interested would be necessary parties. So, either of the two Banks, as the ultimate beneficiaries of the trust, had the right to proceed in chancery to have the mortgaged property subjected to the payment of the debts specified and intended to be secured, because equity would rather encourage than restrain the creditor in seeking to obtain satisfaction in the first instance out of the fund set apart by the principal debtor for that purpose, instead of coercing payment of the various securities, who, in turn, would have to resort to the fund for indemnity. But no obligation rested upon the Bank to do this, and it does not appear, upon this record, that by any act of hers, she in any manner interfered or prevented Bozeman from resorting to equity for an account against the trustee, and to have the assets marshaled and distributed. On this branch of the case, the remedy of Bozeman was not against the Bank, but against the trustee.

Clearly we think the whole scope of the original bill is to be released from one-half of the debt on which he was security, on the ground that the contract between the Bank and Reardon operated as a payment or extinguishment of one-half of it. The allegations of the amended bill manifest an intention on the part of the pleader to charge Reardon with the amount received on the mortgage. Except this allegation, there is nothing on which to base any decree against him; nor is any specific relief asked for against him, as is proper in all cases, unless it be supposed that the court understands what relief the complainant wants, better than he does himself, or that the omission could not occasion any surprise to the defendant. The rule is that, where upon the case made and put in issue by the allegations of the bill and sustained by the evidence, if it appears upon the hearing that the complainant is entitled to some relief, though not to the specific relief asked for, he may, under the general prayer, obtain such relief as he ought to have, if not inconsistent with the specific relief asked for.

But even if we could apply this rule to the case now under consideration, the complainant, for another reason, could not

have taken any decree against Reardon. For aught that the court know, the Real Estate Bank, and the other co-securities interested in the due execution of the trust by Reardon, were necessary parties, and no decree undertaking to ascertain or distribute the fund received by him, could affect their rights unless they were before the court. As the complainant could have had no relief against Reardon in respect of the proceeds of the mortgaged property, his right to such relief is not affected by the decree, which is to be regarded as a dismissal of that part of the bill, without prejudice to any rights the complainant may show himself to be entitled to in another suit.

The decree of the court below will be affirmed, each party paying the costs of his appeal in this court.

Mr. Justice WALKER dissenting:

The only ground for equitable relief, as between Bozeman and the Bank, rests upon the contract made by the Bank with Reardon, the co-security of Bozeman, in regard to the note executed to the Bank by Simeon Buckner, as principal, and Reardon and Bozeman as his securities. The Bank sued Buckner and Bozeman on this note, in the common law court, and Bozeman pleaded the agreement between the Bank and Reardon as a release in bar of a recovery against him. Upon demurrer, this plea was held bad, and the decision of the circuit court was, upon a writ of error to this court, affirmed. We held that agreement to be a mere covenant between Reardon and the Bank, in which Bozeman had nothing whatever to do. See 2 *Eng.* 328.

It has been definitely settled there, that Bozeman was neither released nor discharged from his liability to the Bank by this contract; and whether this decision is right or wrong, it is the law of the case, and we are bound by the judicial interpretation there given. But even if we were not, and could re-investigate this question, Bozeman's claim to equitable relief is swept off by holding the agreement a valid release, for then his defence was complete at law, and when made, he must abide his election. His whole ground for equitable relief is therefore predicated upon the

fact that the agreement was not a release to him at law, and if not at law, surely not in a court of equity, where the chancellor would disregard all legal technicalities, and look to the real injury or wrong done.

Bozeman, then, was not released or discharged from his liability to the Bank by reason of this agreement, and it is shown clearly that no part of the note, for the payment of which he was security, was in fact paid. The contract then, between the Bank and Reardon, could only affect his rights by impairing his remedy over against Buckner, the principal, or Reardon, his co-security. Was such the effect of this contract?

The Bank held two notes to which Reardon was security, and agreed with him that if he would pay $4,000 Arkansas paper, "in respect to his securityship, to be applied to either or both of the notes, as the bank might think fit and proper," that it would not sue him on the note, and that if sued or moved against by his co-security, the Bank would save him harmless. Under this agreement, the Bank had a right, at her discretion, to apply the money so paid to either of the notes, and did in fact apply the whole of it to that debt to which Bozeman was not security. Bozeman had no right to complain of this. Reardon could have applied the payment to either debt; he expressly conferred upon the Bank power to do so, and if the payment had been made to the Bank without any instructions and in the absence of any contract, the law, under the circumstances of the case, would have permitted the Bank to do precisely what it did do—apply the money to either debt at its discretion. There is nothing unfair in this. The Bank, no doubt, credited the note which she thought the most doubtful, as any prudent business man would have done, and had a right to do, under or in the absence of such agreement as made in this case.

It is true that if Bozeman, as security for Buckner, should pay this whole debt to the Bank, he could recover one-half the sum so paid from his co-security, Reardon. But his right to recover even this, depends upon his actual payment of the whole debt, for until this is done, he has no right of action against Reardon,

and until such right exists, it cannot be said to be impaired. But to place this case in a still stronger light, suppose that Bozeman had paid the whole debt to the Bank, and was now seeking a recovery over against his co-security for one-half of the money so paid, I cannot conceive how his rights are affected by the covenant entered into between the Bank and Reardon. The covenant was not that Bozeman should not sue, or that Reardon should not pay; but it was to indemnify and save Reardon harmless, if sued or moved against. Suppose, however, that the Bank had even covenanted with Reardon that Bozeman should not sue him, such covenant would have been a mere nullity, so far as Bozeman was concerned. The truth is that Bozeman is left as free to sue and recover against his co-security as if no such contract had been made. It is true that Reardon may have his action on the covenant against the Bank for any damages he may actually sustain; as, for instance, if Bozeman, after paying the debt, should sue Reardon, and recover half the sum so paid, Reardon could recover such sum with costs from the Bank. But, suppose when sued, Reardon should prove insolvent, having in fact sustained no damages, he could recover nothing from the Bank. So that, in every point of view in which this subject presents itself to my mind, the transaction between the Bank and Reardon has, in no respect, changed the liabilities or affected the right of Bozeman, and consequently that he is not entitled to relief against the Bank.

Dissenting from the opinion of the court upon this point, in view of the whole case, I am of opinion that the decree of the court below should be reversed with costs.