

ROYSTER, *Ex Parte*.—SECOND CASE.*Petition for Habeas Corpus.*

The fact that A. and P. are the securities of R. on a note due the State Bank, and that in the event of his failure to pay it, they will become liable, will not of itself afford sufficient ground for the issuance of the writ of *ne exeat*, R. being about to leave the State, and remove his effects without any intention of returning, for the debt being *due*, the remedy of the securities, at law, is complete.

But the additional facts appearing, that R. conveyed to A. and P. by trust deed, slaves and other property, conditioned that in the event the note should not be paid by R., they might take possession of the property, sell it, and apply the proceeds to the payment of the note, their right to resort to chancery to enforce their rights, under the deed, is clear, and in such a case the writ may well issue.

The writ having issued, and R. being in custody under it, he is not entitled to the writ of *Habeas Corpus* to discharge him, by showing that the sheriff has taken what he deems a sufficient amount of his property to pay the debt, this not amounting to a satisfaction of the debt, nor such a final determination of the matter as the law requires before he is released.

PETITION to this court, by David Royster, for *Habeas Corpus*.

Petition states, that on the 14th Jan., 1845, James C. Anthony and John Percifield presented a bill of complaint to the judge of the Pulaski circuit court, as chancellor, in vacation, representing

that on the 3d of February, 1841, they had become the securities of the petitioner on a note of that date for \$800, payable to the State Bank at six months. That on the same day the note was executed, petitioner had conveyed to them, by deed of trust, two slaves and other personal property, to secure them against loss, as his securities; conditioned that if petitioner should pay, or cause to be paid, such curtailments and interest as might be required upon the debt, and finally discharge the whole amount thereof, and release them from liability, the deed was to be void. But upon his failure to make such payments, A. and P. were empowered to take possession of the property, mentioned in the deed; after giving notice, &c., sell it at public sale, and apply the proceeds to the payment of the debt.

That they further represented in their bill, that petitioner had wholly failed to pay the debt to the Bank, or the curtailments and interest thereon, or to release them from liability therefor.

Petition further stated that the judge, upon hearing the bill of A. and P. made an order directing the property therein mentioned to be taken from the possession of petitioner, and placed in the hands of Mr. Curran, who was appointed a receiver for the purpose. That on the 18th day of January, 1845, Anthony and Percifield presented a supplemental bill to the judge, "averring that petitioner was about to leave this State and remove his effects, without any intention of returning." That the judge thereupon made an order requiring the clerk of the Pulaski circuit court to issue a writ of *ne exeat* against petitioner. That the clerk issued the writ to the sheriff of Pulaski county, who by virtue thereof arrested and imprisoned him in the common jail of the county. Copies of the Trust Deed, Bill, Supplemental Bill, affidavits and orders thereon, and of the writ of *ne exeat* were exhibited, and accompanied the petition.

Petition further stated that since petitioner was arrested, the sheriff had seized and placed in the hands of Mr. Curran, as receiver, a sufficiency of the property mentioned in the bill, to pay the full amount of the note, interest and costs.

Petitioner further represented that he was advised and believed his imprisonment to be illegal:

1st, Because no writ of *ne exeat* can issue on the application of a security to prevent the removal of his principal, except in case where the obligation or *debt is not due*.

2d, If Anthony and Percifield showed any cause of action against him, it was cognizable in a court of law.

3d, Because the writ of *ne exeat* issued in a case and under circumstances not authorized by law.

4th, Because since the arrest of petitioner, the sheriff has seized and placed in the hands of the receiver a sufficiency of said property to pay the full amount of the debt for which A. and P. are bound as securities.

The petition prayed that a writ of *Habeas Corpus* might issue, directed to the sheriff, &c. And was sworn to.

WATKINS & CURRAN, for the Petitioner.

HEMPSTEAD & JOHNSON, contra.

JOHNSON, C. J., delivered the opinion of the court.

The first question is, whether the writ of *ne exeat* properly issued, and secondly, in case it did, whether the defendant has made such a showing as to entitle him to a discharge. It is contended by the petitioner that the complainants have not made out such a case as would authorize the issuance of the writ.

The statute provides that "whenever any complainant shall set forth in his bill, that he has an equitable cause of action against the defendant named in the bill, and that a remedy at law cannot be afforded him, and that the defendant is about to leave the State and remove his effects, without any intention of returning, and that he has failed to make satisfaction for the same, a writ of *ne exeat* may be granted to stay the defendant in the State until he makes satisfaction or the matter is determined, notwithstanding the cause of action may have accrued previous to the application for such writ. The fact that complainants are the securities of

defendant on a note due the State Bank, and that in the event of his failure to pay it, they will become liable, would not, of itself, afford a sufficient ground for the issuance of the writ. For in that case, the debt being due, their remedy at law is ample and complete. If this were the only ground set out in the bill, it would be clear that the writ improvidently issued, and this court would set it aside and discharge the defendant. But the application in this case is based upon the ground that the defendant executed to the complainants a deed of trust for certain negroes and other property, conditioned that in the event said note should fall due and not be paid by defendant, that the complainants might take possession of the property therein mentioned, make sale of the same and apply the proceeds to the payment of the note. It cannot be controverted that they had the right to resort to chancery to enforce their rights which accrued to them under and by virtue of the deed. It is therefore clear that if the facts charged in the bill are true, and they are not denied, the complainants are entitled to the benefit of the writ.

We will now inquire whether he has made such a showing as to entitle him to a discharge. The law requires him to be stayed until he makes satisfaction, or the matter is determined. The law requires that the debt shall have been paid, or that the matter shall have been brought to such a determination as to afford the complainant full and adequate redress at law. The sheriff testifies that he has taken certain property of the defendant's, and that he considered it sufficient to pay the debt. This does not amount to a satisfaction of the debt, nor a final determination of the matter. The application is refused.