BENTLY, EX'R OF BENTLY, *vs.* DILLARD.

To entitle a party to a relief in chancery against a judgment at law, it must conclusively appear that the judgment was obtained by fraud, accident or mistake, unmixed with any negligence on his part.

The defendant at law cannot come into chancery for a new trial or relief, where there is no special ground of surprise or ignorance of important facts suggested, or where no equitable circumstance has arisen since the trial at law, and where he has neglected to defend himself with due diligence in the proper place.

This rule, however, is confined to cases where the defence is purely legal, and of exclusive common law jurisdiction.

If a court of law and a court of equity have concurrent jurisdiction over the subject matter, the party may make his election as to the tribunal which shall determine the controversy, and cannot be compelled to submit to an adjudication at law, when he prefers going into chancery, but if he makes his defence at law he cannot afterwards resort to chancery: the court which first acquires jurisdiction, determines the matter conclusively between the parties, but if he makes no defence at law, he may ask relief of the chancellor.

Appeal from the chancery side of the circuit court of Crawford.

THIS was a bill in chancery, filed in the circuit court of Crawford county, by John Dillard against Eli Bently as executor of George Bently, to enjoin a judgment at law, determined before the Hon. R. C. S. BROWN, one of the circuit judges, at a special term in October, 1844.

The bill alleged that, on the 29th September, 1832, complainant executed his note to George Bently for $250, for money loaned him by Bently. That at the time the note was made, Bently handed him a memorandum for nails, bale rope, bagging, &c., and requested complainant to purchase them for him on his return from Kentucky, agreeing to receive them in payment of the note. That complainant purchased the articles so ordered by Bently at Louisville, Ky., and delivered them to him, at his landing on the Arkansas river, in December, 1832, and that the bill of goods, including freight and charges of transportation, exceeded the amount of the note. That the goods were delivered to Bently in the night, and that in the haste attendant upon steamboat travelling, it was not possible for him to make a settlement with Bently; and he never after saw him to procure his note for cancelling; and further that he considered Bently his debtor in the transaction.

That complainant was one of the owners of the steamer Spy, aboard of which the goods were taken to Bently, that she was snagged, and sunk, in April or May, 1833, and that with the boat, so sunk, all her bills, books, papers and evidences of debt, including the bill of goods purchased for Bently, passed into the hands of the captain of the boat, and since that time had not been accessible to the complainant.

That after the note was liquidated, as above, Bently, in his lifetime, never pretended that any further sum was due him upon it, and that complainant had believed that no proceedings would be taken against him, upon the note, by his executor, &c., he well knowing, &c.

But that Eli Bently, as executor of George Bently, deceased, "refused to allow said sum of money, as offset, expended by complainant at the request of defendant's testator for his use and benefit," and had obtained a judgment against complainant on the note for $250, debt, and $275.69 damages, in the circuit court of Crawford county, at the September term, 1843, and that execution had issued.

The bill prayed for an injunction, a restraining order, and relief generally; and an injunction and restraining order were granted by the judge, in vacation, on the 16th March, 1844.

At the special term of the court in October following, the defendant demurred to the bill for want of equity on its face; the court overruled the demurrer, and decreed a perpetual injunction of the judgment at law, &c.

The defendant appealed to this court.

FOWLER, for the appellant. There is no equity in the bill and the demurrer ought to have been sustained. Dillard, if his bill be true, had an undoubted defence at law, and has made out no case for a court of equity. He does not show whether he made any defence at law or not, but he shows clearly that he knew of what his defence was, and he was bound to interpose it at law. He does not even rely upon the last resort of a discovery from the other party; as he neither shows that Bently's ex'r knew the facts, or that they could not be proved *aliunde*. Bently, the payee in the note, being dead, Dillard's proof could have been as easily made in one court as the other, by witnesses. And by testing the bill by the rules laid down in the authorities referred to below, it will clearly appear that the demurrer ought to have been sustained, and the bill dismissed.

The demand against Dillard, resting on a promissory note, as

shown by the bill, he had a clear legal right to interpose his defence at law, under the general issue—if in debt, *nil debit,* if in assumpsit, *non assumpsit*—of which there can be no question. See 1 *Saund. Pl. & Ev.* 138, 406. 1 *Ld. Raym.* 566, 217. 1 *Salk. R.* 394. 2 *Ark. R.* 477, *McDonald vs. Faulkner.*

Or under the plea of payment. 1 *Salk. R.* 349. 2 *Saund. Pl. & Ev.* 712, 713. 1 *Ld. Raym.* 787. 2 *Saund. Pl. & Ev.* 717. 2 *Ark. R.* 477.

Or *set-off, Rev. St. p.* 726. 2 *Saund. Pl. & Ev.* 789, *et seq.*

Thus having an undoubted right to defend at law under the general issue, payment or set-off, Dillard was bound to make his defence there or show a sufficient excuse for not doing so.

The nearest that Dillard could come towards bringing himself within the pale of equity would be to show that his defence at law was *doubtful,* which he has not done nor can do. 2 *Caines Cases in Ev.* 1. *Ludlow vs. Simond,* 9 *John. R.* 470. *Post vs. Kimberly,* 10 *John R.* 587. *Rathbone vs. Warren,* 7 *Cranch,* 332.

Where a party had notice of a defence at law in time to avail himself of it, but neglected to do so (as Dillard did) he will not be allowed to litigate the matter in chancery but is forever concluded by the judgment. See 1 *John. Cases,* 436, *Le Guen vs. Gouverneur and Kemble.*

By our statute chancery can only take jurisdiction "where adequate relief cannot be had at law." *Rev. St. p.* 158, *sec.* 1. See also 2 *Tenn. R.* 316.

It is *very rare* that chancery will interpose where a party neglects to defend at law, when he might have done so; and never unless the equity of the applicant is free from doubt. 7 *Cranch R.* 332, *Marine Ins. Co. of Alexandria vs. Hodgson.*

After a fair trial at law, a court of equity will not relieve. *Cooke's (Tenn.) R.* 36, *Overton vs. Searcy et al.* 6 *Yerg. R.* 31, *Stone vs. Moody & Perry, and* 167, *Lewis ex'r vs. Brookes.*

Where the defence is purely legal it must be made at law, unless prevented by some cause, beyond the control of the party. *Cooke's R.* 175, *Reeves vs. Hogan et al.* 417, *Stothart vs. Burnett et al.* 2 *Tenn. R.* 267, *et seq., Turney's ex'r vs. Young et al.* 4 *Haywood*

R. 77, *Peyton vs. Rawlens.* 1 *Bibb* 175, *Cowan vs. Price;* 252, *Lemen vs. Cherry;* 354 *Roots vs. Brown.* 2 *Bibb,* 5, *Morrison's ex'r vs. Hart,* 192. 3 *Monroe,* 299.

Where the remedy at law is very difficult or inadequate, equity will relieve, (Dillard's was not difficult.) See 2 *Tenn. R.* 316, *Gwathmey vs. Stemp.*

A court of equity will not grant relief if payment or set-off could have been pleaded at law, and no satisfactory reason shown for not doing so. 3 *Hayw. R.* 192, *Ragsdale vs. Buford's ex'r.*

It is a well settled principle that equity will not aid a party after a trial at law, unless he can impeach the justice of the verdict by facts, or on grounds of which he could not avail himself, or was prevented from doing so by fraud or accident, or the act of the other party, unmixed with fault or negligence on his own part. 1 *Ark. R.* 43, 44, *Dugan vs. Curetons.* 3 *Yerg. R.* 99, *Thurmond vs. Durham & White;* 127, *Kearney & Moore vs. Smith & Jackson;* 167, *Thompson vs. Hill.* 2 *Bibb,* 326, *Veech vs. Pennabacher;* 200, *Davidson vs. Givens.* 2 *J. J. Marsh,* 139, *Harlan vs. Wingate's adm'r;* 513, *Sanders vs. Jennings.* 3 *Bibb,* 248, *Clay vs. Fry;* 255, *Hughes vs. McCam's adm'r.* 1 *Lit, R.* 325, *Moffitt vs. White.* 1 *Bibb,* 174, *Cowen vs. Price;* 252, *Lemon vs. Cherry. Hardin R.* 123, *Cunningham vs. Caldwell;* 3 *Monroe,* 299. 1 *Tenn. R.* 513, *Reaus et al. vs. Hogan et al.* 2 *Tenn. R.* 229, *Williams et al. vs. Patterson.* 1 *Monroe,* 267. 3 *Monroe,* 371.

If complainant's remedy is complete at law his bill should be dismissed. 2 *Cranch R.* 419, *Grimes et al. vs. Boston Marine Ins. Co.* 4 *Yerg. R.* 84, *Loftin vs. Espy et al.;* 98, *Shenault vs. Eaton et al.*

Where a court of law and a court of equity have concurrent jurisdiction of the matter in dispute the court which first takes jurisdiction settles the matter conclusively. 3 *Yerg. R.* 167, *Thompson vs. Hill.*

OLDHAM, J., delivered the opinion of the court.

Dillard filed his bill in chancery to enjoin a judgment at law obtained against him by Bently, as executor of George Bently, de-

ceased. The *gravamen* of the charge is, that the note upon which judgment was obtained, had been paid to the testator in his lifetime by the delivery of nails, bale rope and bagging, in value beyond the amount of the note. The bill does not disclose the fact that any defence whatever was made in the suit at law, or that any effort was made to defend, nor is any excuse rendered why defence was not so made.

Upon the facts presented by the bill, there is not the semblance of authority which would authorize a court of equity to decree the relief prayed for by the complainant. The defence set up is purely legal and is exclusively cognizable in a court of law, and cannot be heard in a court of equity unless Dillard was ignorant of the facts pending the suit at law, or that they could not be received as a defence, or unless he was prevented from availing himself of their benefit by fraud, accident or the act of the opposite party, unmixed with negligence on his part.

The case of *Foster vs. Wood,* 6 *John. Ch. R.* 87, was similar to this. The bill charged that the defendant had recovered a judgment at law against the plaintiffs and another, that the latter paid seventy-six dollars in part satisfaction of the judgment, and that in a subsequent suit upon that judgment no credit was given or allowance made for that payment, and prayed an injunction. Chancellor Kent refused the application for an injunction and dismissed the bill, upon the ground that the complainants should have pleaded the payment and given it in evidence in the action at law, and that no excuse was shown for the omission. And so in the case of *Andrews vs. Fenter,* 1 *Ark. R.* 186, which was a bill filed for an injunction to enjoin the collection of a judgment at law, upon the ground that the writings obligatory upon which the judgment was obtained, were fully paid by the delivery of oil stones, before the institution of the suit at law. This court, in the opinion delivered by Judge LACY, held that "to authorize a party to be relieved against a judgment at law, it must appear conclusively that the judgment was obtained by fraud, accident or mistake, unmixed with any negligence or fault on his part. The defendant cannot come into a court of chancery for a new trial or relief, when there

is no special ground of surprise, or ignorance of important facts suggested, or where no equitable circumstances have arisen since the trial, and when he has neglected to defend himself with due diligence in the proper place." We may ask, in this case, the questions asked by the court in that; "has the party shown that he was taken by surprise? Or has he suggested that he was ignorant of any important fact which has since come to his knowledge, and which he could have discovered before, by due diligence? Or has he alleged that the judgment was obtained by fraud? The bill contains no such allegations.

The rule as above laid down by which courts of equity are governed in granting relief against judgments at law, has been recognized in a variety of cases. *Dugan vs. Cureton,* 1 *Ark. R.* 31. *Lansing vs. Eddy,* 1 *John. Ch. R.* 49. *Duncan vs. Lyon,* 3 *John. C. R.* 351. *Saunders vs. Jennings,* 2 *J. J. Marsh.* 513. *Stark's' adm'r vs. Thompson's ex'r,* 3 *Mon.* 296. *Cummins vs. Bently,* 5 *Ark. R.* 9. *Watson vs. Palmer,* 5 *id.* 501.

This rule, however, is confined to cases of the same character as the one before the court, where the defence is purely legal, and is of exclusive common law jurisdiction. But if a court of law and a court of equity have concurrent jurisdiction over the subject matter, the party may make his election as to the tribunal, which shall determine the controversy, and cannot be compelled to submit to an adjudication at law when he prefers going into chancery, but if he makes his defence at law, he cannot afterwards resort to chancery; the court, which first acquires jurisdiction, determines the matter conclusively between the parties. But if he makes no defence at law, he may ask relief of the chancellor. *Harlan vs. Wingate's adm'r,* 2 *J. J. Marsh.* 138. *Saunders vs. Jennings,* 2 *J. J. Marsh.* 513.

The defence set up by the bill, being, as before remarked, exclusively cognizable at law and not the subject of concurrent jurisdiction, affords no reason for impeaching the judgment at law, or for depriving the appellant of the benefits thereof. No reason is assigned why Dillard did not make his defence at law. If he had rights, he slumbered upon them and lost them by his own neg-

ligence, and it is contrary to the reason and policy of the law, as well as beyond the power of any tribunal, to restore them to him. The circuit court therefore erred in overruling the appellant's demurrer to the complainant's bill, and also in decreeing the injunction perpetual. The decree must therefore be reversed with costs, the cause remanded to the circuit court with instructions that the injunction be dissolved, the bill dismissed for want of jurisdiction, and that the appellant have the full benefit of his judgment.