HEMPSTEAD & CONWAY *vs.* WATKINS, ADM'R OF BYRD.

It is a general rule that if a creditor does any act injurious to the surety, or omits to do any act when required by the surety, which his duty injoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and may set up such conduct as a defence to any suit brought against him, if not in law, at least in equity.

The jurisdicton of this class of cases originally and intrinsically belonged to equity.

Since the case of *Rees vs. Berrington,* 2 *Ves.* 540, the giving of time by the creditor to the principal, upon a new contract, without the consent of the surety, has been considered and held as a settled subject of defence in equity.

This principle having been firmly engrafted in the system of equity jurisprudence, courts of law, acting upon the liberal principles of equity, have adopted the same rule as the subject of legal remedy, except in cases where the surety was estopped by his bond from averring his suretyship at law.

But the jurisdiction now assumed in courts of law upon this subject, in no manner affects that originally and intrinsically belonging to equity.

Several courts of the United States, acting upon the same liberal principles of equity, have extended the defence of the surety further.

It was held in *Pain vs. Packard,* 13 *John. R.* 174, confirmed in *King vs. Baldwin,* 17 *John. R.* 384, approved by the Supreme Court of Tenn., &c., and is approved by this court, that if an obligee or holder of a note, who is required by a surety to proceed against the principal without delay, and collect the money of him, who is then solvent, neglects to do so, and the principal afterwards becomes insolvent, the surety will be discharged both in law and equity.

Our statute (*Rev. Stat., chap.* 137, *sec.* 1, 2, *p.* 722) providing that unless the holder bring suit within thirty days after notice, &c., the surety shall be exonerated from liability, declares a legal right, but it is based upon equitable principles.

The act is almost a re-affirmation of the rights which the Supreme Court, and Court of Errors in New York, and the Supreme Court of Tenn., had declared in the cases above cited, that a court of equity would observe and enforce.

It is but declaratory, and an extension of an existing and originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance.

It extends the original remedy, or so qualifies it that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal, to entitle him to a discharge.

Where the sureties to a bond (it appearing upon the face of the obligation that they are such) have given the holder notice, under the above statute, to sue the principal debtor, and he fails to bring a valid suit within thirty days the sureties may plead their exoneration at law, in bar of an action on the bond. *State Bank vs. Watkins, ante* 123, *cited.*

The defence in such case is available either in law or equity.

The 1st sec. of chap. 23, and the 3d sec. of chap. 43, of the Revised Statutes of Arkansas, providing that the circuit court shall exercise chancery jurisdiction, in all cases where adequate relief cannot be had at law, &c., are subject to the same construction, given by the Supreme Court of the U. S. to the 16th sec., chap. 20 of the judiciary act of Congress, of the 24th of Sept., 1789: these acts introduce no new rule, but are only declaratory of the jurisdiction of courts of chancery, as it stood before their enactment, and our circuit courts have jurisdiction over the same subjects as are common to a court of chancery, to be exercised according to the known rules of chancery as understood at the time of the passage of the acts.

Sec. 6, article 6, constitution of Ark., provides that the circuit courts shall have jurisdiction in matters of equity until the General Assembly shall deem it expedient to establish courts of chancery; by which is meant such jurisdiction as a court of chancery could properly exercise at the time of the adoption of the constitution .

The Legislature possesses no power to limit and abridge the circuit courts, as courts of chancery, in the exercise of a general jurisdiction thus conferred by the constitution: acts attempting it would be nugatory.

The case of *Bentley's ex'r vs. Dillard, ante* 79, reviewed and approved.

Where a defence is purely legal, and exclusively cognizable in a court of law, the party is bound to defend at law, and cannot have relief in chancery, unless he was deprived of his defence by surprise, accident, or mistake, or fraud of the opposite party, unmixed with negligence on his part, or unless he was ignorant of important facts material to his defence upon the trial at law, and which he could not have discovered and availed himself of by due diligence at the time of his trial.

Where the jurisdiction of courts of chancery and courts of common law is concurrent, in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the Legislature without prohibitory words, the party may make his election as to the tribunal to which he will make his defence, and once having made that election, he is bound by the decision; and his right to submit the matter to a court of chancery is in no degree impaired by the power of courts of law, at this time, to take cognizance of the subject.

If a party resists a recovery against him, in a court of law, upon a portion of his defence, where he had full knowledge of the whole of the defence, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is considered as having waived or abandoned the grounds of defence so omitted to be made.

In a case of concurrent jurisdiction, if a party defends at law, chancery will not take cognizance of the cause, and rehear it upon the same state of facts upon which it was tried at law, without the addition of any equitable circumstances to give jurisdiction, but will respect the judgment of a court of competent jurisdiction, already pronounced upon the facts.

Where in such case the sureties make no defence at law, but waive their objec- under the above statute, and he fails to bring a valid suit within thirty days, though it appear upon the face of the bond that the sureties are such, they

are not bound to plead their exoneration at law, to a suit against them upon the obligation, but may elect to suffer judgment to go against them without defence, and apply to a court of chancery for relief.

Where in such case the sureties make no defence at law, but waive their objections to the constitutional incompetency of the circuit judge to sit in the case, they are not thereby precluded from resortng to a court of equity for relief.

Where, in pursuance of such notice, the holder brings suit upon the bond, a demurrer to the declaration is interposed, sustained, and the judgment of the court affirmed by the Supreme Court, on error, it is conclusive upon the parties, and the holder of the bond stands in the same attitude, as though he had instituted no suit at all.

The judgment in such case can never be collaterally reviewed by another tribunal.

Every court must respect the judgments of other courts of competent jurisdiction, and if a judgment is pronounced in chancery, a court of law will never attempt to review it, or pronounce it erroneous.

So if a court of law pronounces an opinion in a case, a court of chancery will never take cognizance of it upon the same state of facts upon which it was tried at law.

The correctness of the decision of this court in the case of *Watkins' adm'r vs. McDonald et al.*, 3 *Ark. Rep.* 266, questioned: but the question there decided held not to be an open one.

Appeal from the chancery side of the circuit court of Pulaski county.

THIS was a bill in chancery, to enjoin a judgment at law, by Samuel H. Hempstead and Elias N. Conway against Robert A. Watkins, administrator of Ann L. B. Byrd, determined in the circuit court of Pulaski county, chancery side, at the May term, 1844, before the HON. J. C. P. TOLLISON, special judge.

The bill was filed September 26th, 1842, and contained, substantially, the following allegations:

That on the 16th March, 1839, Daniel McDonald as principal, and complainants as his securities, executed to Ann L. B. Byrd a writing obligatory, of that date, for $500, due at twelve months from its date, with interest, payable quarterly, at ten per cent. per annum. That the consideration of the bond was $500, loaned to McDonald by Mrs. Byrd, and that complainants were only securities, as expressed upon the face of the instrument, and received no part of the consideration.

That Mrs. Byrd departed this life on the 30th November, 1839, leaving the bond as part of her assets: that Robert A. Watkins (made defendant) was appointed her administrator by the probate court

of Pulaski county, on the 13th December, 1839; and that the bond came into his hands for collection as such. (The letters of administration were exhibited.)

That complainants, being desirous of coercing McDonald to pay the debt, and release themselves from liability as sureties, gave notice in writing to Watkins, after the bond became due, that unless suit should be brought thereon within the time prescribed by law, that is to say, within 30 days from the service of the notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, they, as such securities, would claim to be, and consider themselves exonerated from all liability to him, as such administrator, upon the bond. That the notice was served upon him, by the sheriff of Pulaski county, on the 13th April, 1840, and the time and manner of service endorsed thereon. (A copy of the notice was exhibited.)

That on the 24th April, 1840, instead of commencing a suit in his representative character *as* administrator, &c., as he was bound by law to do, Watkins commenced a suit, in the Pulaski circuit court, in his *individual capacity and right*, against McDonald and complainants upon the bond, returnable to the September term of said court, 1840, notwithstanding it was payable to his intestate, and came into his hands as part of her estate, and was held by him in *auter droit* only: in which suit all the defendants were duly served with process 30 days before the return day thereof. That on the 9th of November, 1840, in continuance of said term of said court, McDonald, by Trapnall & Cocke, his attornies, craved oyer of the bond, which being granted by filing the original, a demurrer was interposed to the declaration, on the grounds "that the bond sued on was drawn and due to plaintiff's intestate in her life time, and due to plaintiff as her administrator, yet the declaration averred that it was due to him individually: in which demurrer there was a joinder." That on the 18th November, 1840, the court sustained the demurrer, and adjudged the declaration insufficient; and on the 24th of the same month, the plaintiff failing to file a sufficient declaration, dismissed the suit, and rendered judgment against him, individually, for costs.

That although the record states that oyer was craved, and demurrer filed by all the defendants in the suit, yet that in fact McDonald only appeared and took such steps; that Trapnall & Cocke had no authority to appear for complainants, and that as far as they were made actors in the prayer of oyer and demurrer, it was a mistake and misprison of said counsel. who intended to appear for McDonald only.

That the case was taken to the Supreme Court by Watkins. and on the 22d January, 1841, the judgment of the court below was affirmed. (A certified copy of the transcript in the case was exhibited. *See Watkins, adm'r of Byrd vs. McDonald et al.* 3 *Ark. Rep.* 266.)

Complainants further alleged that by reason of the fact that the above suit was improperly brought, and that no valid judgment was or could be rendered against the defendant therein, their risk as securities upon the bond was greatly increased, and they placed in a worse situation, contrary to equity, &c. They further averred that no such suit as is contemplated by the first and second sections of chap. 137, Revised Statutes of Ark., was brought in the Pulaski circuit court, or any other court, by Watkins *as* administrator of Byrd against McDonald and complainants, or any or either of them, within 30 days after the service of the above notice: that the only suit which was instituted, within that time, was the suit aforesaid brought by Watkins in his individual capacity and not in his character as administrator: which suit was a mere nullity, and was never proceeded in with due diligence, in the ordinary course of law, to judgment and execution, &c.: that on the contrary, judgment was never obtained therein, &c. Complainants further alleged that they made no defence to the above suit, and they believed if it had been rightly brought the debt could have been made of McDonald.

Complainants further represented that on the 25th January, 1841, nearly a year after the service of the above notice, Watkins brought a suit upon the same bond, in his representative character *as* administrator, &c., against McDonald and complainants, to the March term of the Pulaski circuit court, 1841. And on the 18th day of March, 1841, obtained judgment for $500 debt, $87.77¼ damages,

&c., which remained in full force. That to satisfy the judgment a levy had been made upon the real property of complainants, by virtue of an execution issued thereon, and that such property was bound for the judgment, and would be sold thereafter to satisfy the same, unless relief could be had in equity, &c. (A certified copy of the record of the proceedings in the second suit was exhibited.)

Complainants further represented that the record of the latter suit states that all the defendants moved to quash the writ therein, when in fact McDonald appeared, by Trapnall & Cocke, his attornies, and complainants did not appear, and that the motion and record, so far as they embraced complainants as actors, were mistakes and misprisons: That Trapnall & Cocke had no authority to appear for them, and in fact did not mean or intend so to do. That the Hon. J. J. CLENDENIN, then judge of the circuit court of Pulaski county, who rendered the judgment in the case, being connected to Watkins within the fourth decree of affinity, was disqualified under the constitution from sitting in the case; and that the record, so far as it expressed that all the defendants entered a waiver of exceptions to him as such judge, was erroneous, untrue, a clerical mistake and misprison as to complainant Conway: that he did not, by himself or any attorney of the court, waive such exceptions —which mistakes and misprisons were fit to be relieved against in equity, &c.

Complainants further alleged that McDonald had become a non-resident of the State; was utterly insolvent; had applied for the benefit of the bankrupt act, in the city of New Orleans, and if they were compelled to pay said judgment, it would be a total loss to them, and contrary to equity.

That they made no defence to the last mentioned suit; and that the failure of Watkins to bring a legal, effectual, and valid suit, in his representative character, upon the bond against McDonald and complainants, within thirty days after the service of the above notice, and in obedience thereto, constituted a full and complete ground for equity relief against said last mentioned judgment; and that a court of equity was the proper forum to investigate the relations of principal and surety, especially when created by a bond.

Complainants further alleged, that if there was a remedy at law concurrently with a court of chancery, they could not, as they believed, safely have attempted such defence, on account of the fact that the above notice in writing, after the service thereof, was mislaid by the sheriff, and could not be found. That complainant, Hempstead, had frequently applied to the sheriff for it, both before and after the judgment at law, but that it could not be found. That complainants never had the notice in their possession, or under their control, after it was handed to the sheriff for service: that it was important and material to their defence: that its place could not be supplied safely and completely in a court of law, as they believed, and that parol proof would have been doubtful and uncertain in regard thereto. That complainants were advised and believed that they had surrendered none of their rights by failing to make a defence at law.

Complainants further alleged, that they had frequently requested Watkins, in view of the premises and manifest injustice of collecting the judgment of and from complainants, to give them a release and acquittance therefrom, and to desist from all further proceedings as to them upon the judgment: also to permit the record to be amended according to the facts of the case, but he had refused, contrary to equity, &c.

The bill prayed, that the mistakes and misprisons above charged might be amended according to the facts; for an injunction of the judgment at law, as to complainants, and for relief generally.

The bill was verified by the affidavit of complainants. On its being filed, the regular judge (Hon. J. J. CLENDENIN) certified that he was incompetent to sit in the case; the Governor appointed a special judge, and on the 30th September, 1842, a temporary injunction was granted.

At the May term, 1843, the defendant filed his answer, which was, substantially, as follows:

He admitted it to be true, as stated in the bill, that McDonald as principal, and complainants, as his securities, executed their obligation to Mrs. Byrd for $500, for that much specie loaned by her to McDonald, which obligation was dated, bore interest, and fell

due as stated in the bill; and averred, that she loaned that amount of money to McDonald, chiefly upon the personal security, and responsibility of complainants.

He admitted that Mrs. Byrd departed this life on the 30th November, 1839, and that administration of her estate was granted to him, on the 13th of December, 1839, as stated in the bill.

That on the 13th April, 1840, a paper purporting to be a copy of a notice signed by complainants, was handed to defendant, by the sheriff of Pulaski county, by which he was requested, as such administrator, to bring suit against McDonald, the principal debtor in the obligation, within the time prescribed by the statute in such case made and provided, and prosecute the same against him with due diligence to judgment and execution, otherwise they, as securities, would claim to be exonerated. That that paper from henceforward continued to be, and still was, in possession of defendant, or his counsel, and when called upon by complainants, he furnished them with it, from which they made a copy, and appended it to their bill as an exhibit. That defendant had no knowledge or recollection of the original notice, but that he believed the complainants knew, or ought to have known, that the copy served upon him was in his possession, and at their service at any time when called for.

That in all good faith, defendant, on the 24th April, 1840, commenced suit, in the Pulaski circuit court, (in which county all the parties resided,) upon the obligation against McDonald and complainants: that they were all duly served with process, and at the return term, in November, 1840, appeared, by counsel, and demurred to the declaration, upon the technical ground that the suit had not been brought by defendant in his capacity of administrator. That the demurrer was interposed on the 9th, sustained on the 14th, and final judgment rendered against defendant on the 24th November, 1840—he took the case to the supreme court by writ of error, and the judgment was affirmed 22d January, 1841.

Defendant stated that he did not know whether the counsel who appeared, and interposed the demurrer, had any authority so to have appeared for complainants, but he averred it to be true, as

shown by the record, that said counsel did so appear for all the defendants, and enter the demurrer.

Defendant further states, that complainant utterly failed and omitted to interpose and defence, whatever, to the above suit, upon the ground that he had failed to bring such a suit as the law required, or as was contemplated by their alleged notice to him; or that they were thereby in any manner exonerated from liability as securities in the obligation. (All of which, he averred, would more fully appear by a transcript of the record of the case in the supreme court, containing a record of the proceedings and judgment therein in the court below, which he exhibited. (*See Watkins, adm'r of Byrd vs. McDonald et al.*, 3 *Ark. Rep.* 266.)

Defendant further answered, that, in all convenient season, on the 25th January, 1841, he, as such administrator, commenced another suit against McDonald and complainants upon the obligation, in the Pulaski circuit court, returnable to the March term, 1841—that on the 18th March, 1841, the plaintiff and defendants, in that suit, appeared by their attornies, and entered their waiver of all exceptions to the regular judge (Hon. J. J. CLENDENIN) sitting in the case, it appearing that he was related to one of the parties. And that McDonald and complainants then saying nothing further in bar or preclusion of the action, judgment was rendered against them for the amount of the obligation, interest and costs. That an execution issued upon the judgment returnable to the September term, 1841, which was levied on the property of McDonald and complainants, and a delivery bond executed therefor, and forfeited.

That on the 9th December, 1841, an alias execution issued upon the judgment, returnable to the March term, 1842, which was levied upon the property of complainants—they caused it to be valued under the appraisement act, and when offered for sale on the first Monday of March, 1842, it did not sell for two-thirds of its appraised value.

That on the 12th March, 1842, complainants filed in the said circuit court, a motion, or application in the nature of a bill in equity, to be released of said judgment, by causing to be made a correction of an alleged error in the record, by which correction the judgment

would have been rendered null and void; that on the 10th May, 1842, the court upon the hearing thereof, and the evidence adduced in support of the motion, overruled it, with costs—which judgment, upon the motion to amend, complainants carried to the supreme court, upon error, and on the 19th August, 1842, it was affirmed. (*See McDonald et al vs. Watkins, adm'r,* 4 *Ark. Rep.* 624.)

(A transcript of the record and proceedings of the second suit at law, of the motion to amend the record thereof, and of the proceedings thereon in the supreme court, were exhibited.)

Defendant further stated, that he did not know whether the counsel who appeared for complainants in the second suit, and entered their waiver of exceptions to the judge, as shown by the record, had authority from them to do so, but that in truth and in fact complainants, either in person or by attorney, did so appear, and solemnly enter their waiver in the manner as shown by the record thereof. That complainants did not at any time during the progress of the suit, or of the motion to amend the record thereof, interpose any defence, or claim any exoneration from liability as the securities of McDonald in the obligation, upon the ground of any supposed failure or neglect of defendant to bring suit thereon within the time prescribed by the statute, after the service of the alleged notice.

Defendant admitted that the judgment remained wholly unsatisfied, and he believed it to be true that McDonald had become a non-resident of the State, and had applied in the State of Louisiana, to be discharged from his debts, under the bankrupt law. Defendant stated that he did not *deny* that the money could have been made on the obligation, out of McDonald by due legal diligence, after the service of the alleged notice to sue, but expressly averred his *belief* to be that it could not have been made—that at the September term of the Pulaski circuit court, 1840, no causes were adjudicated, owing to the sickness of the judge, until the special adjourned term in November following; and that prior to the 18th November, 1840, divers judgments had been recovered in said court, against McDonald for upwards of $1900—that these judgments had been pressed with strict legal diligence, by execution, and greater amount of them remained unsatisfied, and would never be fully

satisfied out of the property of McDonald. That at no time since the service of the alleged notice, had McDonald been considered solvent by the community.

Defendant concluded his answer by denying that there was any equity disclosed upon the face of the bill; prayed that the injunction might be dissolved, and he discharged with costs, &c. The answer was verified by affidavit.

Complainants replied, generally, and the case was determined at the May term, 1844, upon the bill and exhibits, answer and exhibits, the replication thereto, and evidence.

The court dissolved the injunction, and decreed damages and costs against complainants, upon the ground "that they might have interposed their defence at law, had been guilty of laches and neglect, and upon the whole record were not entitled to the relief prayed by the bill." Complainants appealed.

The evidence in the case, had reference mainly to the solvency of McDonald, and the view which this court have taken of that question renders it unnecessary to report it.

Owing to the importance of the principles involved in the case, the court made a special order, directing the arguments of counsel, as condensed by them, to be reported.

PIKE & BALDWIN, for the appellants. Originally a neglect of the creditor to sue the principal debtor after notice by the surety, would not discharge the surety. And it has been so held even in recent cases. The rule was, that if the surety wished to coerce the creditor to sue the principal, he could do it only by bill in chancery, which must contain an offer to guarantee the creditor against the costs of the suit. *Nesbit vs. Smith,* 2 *Bro. C. C.* 570. *Burn vs. Poang's adm'r* 3 *Desaus.* 604. *Wright vs. Simpson,* 6 *Ves.* 734. *Bellows vs. Lovel,* 5 *Pick.* 310. *Sasseer vs. Young,* 6 *Gill & John.* 243.

Nor indeed was it originally held that an extension of time to the principal made by the creditor, obligatory on him, on a good and valid consideration, would discharge the surety. This principle was first established in equity, and denied to prevail at law; but af-

terwards adopted by the law courts on equitable principles. The oldest case in which the principle is definitely settled, is *Rees vs. Berrington,* 2 *Ves. J.* 540. Older cases had settled similar principles from which this resulted. *Sheffield vs. Lord Castleton & wife,* 2 *Vern* 393. *Parsons et al. vs. Briddock, id.* 608. *Nesbit vs. Smith,* 2 *Bro. C. C.* 579. *Rees vs. Berrington* was followed by *Ex parte Gifford,* 6 *Ves.* 807. *Samuel vs. Howarth,* 3 *Meriv.* 278. *Eyre vs. Bastrop,* 3 *Mod.* 225. *Prendergrast vs. Devey,* 6 *Mod.* 126. *Mayhew vs. Crickett,* 2 *Swans.* 191. *Bowmaker vs. Moore,* 7 *Price* 223. *Gov., &c., of Bk. of Ireland vs. Beresford,* (in the House of Lords,) 6 *Dow* 233. *Boultbee vs. Stubbs,* 18 *Ves.* 20, and other cases in chancery in England, all establishing the same principle.

But the principle was not at once recognized in courts of law. *Trent, Nav. Co. vs. Haily,* 10 *East* 38.

Afterwards, courts of law adopted, and acted on the same principle: See *Samuel vs. Howarth,* 3 *Meriv.* 278, and from that time it has been held that whatever discharges the surety in equity, discharges him at law. *Boston Hat Man. vs. Messinger,* 2 *Pick.* 233. *Baker vs. Briggs,* 8 *id.* 128.

But this has been held, not on the ground that it was so originally, but upon the ground of the adoption by courts of law, of the principles acted on by courts of equity in such cases. "The liabilities of sureties are governed by principles which have been long settled in equity, and are now adopted in courts of law. We say now, because the court of common pleas formerly held a different doctrine. But at present it is firmly established that the same principles which have been held to discharge the surety in equity will operate to discharge him also at law." Lord ELDON, in *Samuel vs. Howarth.* So, in *King vs. Baldwin,* 17 *J. R.* 384, it is said that the principle is of modern growth, even in a court of equity, and though now admissible at law, is borrowed from a court of equity. *Per* SPENCER, C. J. So, also laid down in *Melvill vs .Glendenning,* 7 *Taunt.* 126.

As we remarked, the oldest English case asserting the principle, is *Rees vs. Berrington.* No common law court adopted it until a later period. It is laid down in *Moore vs. Bowmaker,* 6 *Taunt.* 381, to have been first adopted in chancery, and acted on "in late days"

by courts of law. And in *Bowmaker vs. Moore,* in the exchequer chamber, 7 *Price* 223, it is said by RICHARDS, chief Baron, that the rule was originally adopted from courts of equity, but now considered to be established law, as it must be held to be in every court in Westminster Hall;" and though the court of common pleas, in that case, which was one where sureties in a replevin bond claimed to have been discharged by an arbitration entered into between plaintiffs and defendant in replevin, and time for award afterwards enlarged by them without the concurrence of the surety, in 6 *Taunt.* 379, and 7 *Taunt.* 97, had held that the surety was not discharged, yet the court of exchequer perpetually injoined the suit against him. In this case, it was admitted by both courts that the defence could be made either at law or in equity. The court of common pleas overruled it as not good anywhere, on the ground that the surety had suffered no injury; and no one hinted that although the surety could defend at law, he could not, if he chose, appeal to equity. *Prendergrast vs. Devey,* 6 *Mod.* 124.

After the principle was once acted on at law, it became one of familiar use; but equity never imagined its jurisdiction to be ousted, because courts of law had adopted the principle. For other common law cases in England, see *Archer vs. Hall,* 1 *Moo. & P.* 385. 4 *Bing.* 464. *Orme vs. Young, Holt* 84. And in equity, *Heath vs. Key,* 1 *Younge & Jerv.* 434. *Clarke vs. Henty,* 3 *Younge & Cr.* 187.

In America, it is now well settled that, both at law and in equity, giving time by the creditor to the principal by an obligatory contract made on valid considerations discharges the surety. *Huffman vs. Hulburt,* 13 *Wend.* 375. *Hall et al. vs. Constant,* 2 *Hall* 185. *Reynolds vs. Ward,* 5 *Wend.* 501. *Sailby vs. Elmore,* 2 *Paige* 497. *Ellis vs. Bibb,* 2 *Stewart* 63. *Farm. & Mech. Bank vs. Cosby,* 499 *Marsh.* 366. *Reid vs. Watts, id.* 442. *Robinson vs. Offult,* 7 *Mon.* 541. *Morton vs. Roberts,* 4 *id.* 492. *Hill vs. Burr, Gilm.* 149. *Baird & Rice,* 1 *Call* 18. *Galphin vs. McKinney,* 1 *McCord Ch.* 297. *King vs. Baldwin,* 2 *J. C. R.* 357. *Hampton vs. Levy,* 1 *McCord Ch.* 112. *Buchannan vs. Bordley,* 4 *Har. & McHen.* 41. *Neimcewicz vs. Gahn,* 3 *Paige* 614. *Sneed vs. White,* 3

J. J. Marsh. 526. *Butler vs. Hamilton,* 2 *Desaus.* 226. *Ludlow vs. Simond,* 2 *Caines* 1. *Jones vs. Bullock,* 2 *Bibb* 467. *Com. vs. Vanderslice,* 8 *Sergt. & Rawle,* 452. *G. Bank vs. Woodward,* 5 *N. Hamp.* 99. *Bank of Steubensville vs. Hoge,* 6 *Ohio* 17. *Hunt vs. Bridgeman,* 2 *Pick.* 583. *Greely vs. Dow,* 2 *Metc.* 176. *Gifford vs. Allen,* 3 *Metc.* 255

But as to sealed instruments, it is doubtful whether courts of law ever adopted these principles. There are stubborn rules of the old law which prevented it. A sealed instrument can only be discharged by an instrument of equal validity, and therefore at law, an agreement to give time, not under seal, discharges neither principal or surety. The remedy still is in equity alone. *Davy vs. Pendergrass,* 5 *B. & Ald.* 187. *Locke vs. United States,* 3 *Mason* 454. *Bulteel vs. Jarrold,* 8 *Price* 467.

It has always been held that mere delay to sue the principal without more, would not discharge the security. And it was not until a late day that the questions to delay, *after notice,* arose. It had always been held in Pennsylvania, where there is no court of equity, that such delay discharged the surety. *DeKuff vs. Turbett,* 3 *Yeates* 157. *Cope vs. Smith,* 8 *Sergt. & Rawle* 110. *Gardner vs. Ferree,* 15 *id.* 28. *Erie Bank vs. Gibson,* 1 *Watts* 143. *Treasurers vs. Johnson,* 4 *McCord* 458, established the same doctrine in South Carolina.

In other courts the contrary doctrine was held. *Crane vs. Newell,* 2 *Pick.* 613. *Frye vs. Barker.* 4 *Pick.* 382. *Bellows vs. Lovel,* 5 *id.* 307. *Sasseer vs. Younge et al.,* 6 *Gill & John.* 243.

The question first arose in New York in the Supreme Court in *Pain vs. Packard,* 13 *J. R.* 174, where the surety was held to be discharged, and that he could make this defence at law. In *King vs. Baldwin,* 2 *J. C. R.* 554, Chancellor KENT declared his dissent from that opinion; declaring also that there was nothing in the nature of a defence by a surety to make it peculiarly the subject of equity jurisdiction, and that whatever would exonerate the surety in one court ought to do so in the other.

This decision was reversed in the court of errors, 17 *J. R.* 384, and it was there settled that where the court of chancery once had

jurisdiction, it will retain it, though the original ground of jurisdiction no longer exists: and that if there be a doubt whether a defence be available at law, and no doubt of the jurisdiction of a court of equity, and the defendant at law omits to make his defence there, a court of equity may afford relief. SPENCER, C. J., expressly assented to the principle established in *Pain vs. Packard.*

The principle so settled in New York, has since been established in many other cases, there and elsewhere; upon the ground that such neglect to sue, after notice, is equivalent to giving time by a valid agreement for a valid consideration and amounts to a release, which may be pleaded at law: that to make the defence available, it must be shown that the principal was solvent at the time of notice, and that the debt was then collectable by due course of law out of his property: that by such neglect to sue, the means of recovering the debt from the principal have been lost by intervening insolvency or from some other cause. *Valentine vs. Farrington,* 2 *Edw.* 53. *Hancock vs. Bryant,* 2 *Yerg.* 476. *Huffman vs. Hulbert,* 13 *Wend.* 375. *Manchester Iron Man. Co. vs. Sweeting,* 10 *Wend.* 162. *Warner vs. Beardsley,* 8 *Wend.* 194. *Kennebec Bank vs. Tuckerman,* 5 *Greenl.* 132. *Hancock et. al. vs. Hunt,* 2 *Yerg.* 476.

Our statute removes all difficulty as to the right of the surety to use this defence, and leaves, as the only question to be settled, whether this defence must be made at law, or may be omitted at law, and made in equity.

This was originally an equitable defence. The court of equity relieved the surety, because it was held that "the conscience of the creditor was affected" by his having pursued a course injurious to the surety.

Now it is a settled principle that if originally the jurisdiction had attached in equity, on account of any supposed defect of remedy at law, the jurisdiction is not changed or obliterated by the courts of law now entertaining suits or defences in cases where they formerly rejected them. This has been repeatedly asserted by courts of equity, and constitutes in some sort the pole star of portions of its jurisdiction. Being once vested legitimately in the court, there

can be no ebb or flow thereof dependant upon external changes; but it must remain there until the Legislature shall abolish or limit it. For without some positive act, the just inference is, that it is the legislative pleasure for the jurisdiction to remain upon its old foundation. 1 *Story's Eq.* 80. *Atkinson vs. Leonard,* 3 *Bro. C. R.* 218. *Ex parte Greenway,* 6 *Ves.* 812. *East Ind. Co. vs. Boddam,* 9 *Ves.* 468. *Brownley vs. Holland,* 7 *Ves.* 19. *Kemp vs. Pryor,* 7 *Ves.* 249. *Bellow vs. Muhell,* 1 *Atk.* 126. *King vs. Baldwin,* 17 *J. R.* 388. *Rathbone vs. Warner,* 10 *J. R.* 587. *Statart vs. Burnett, Cook* 418. *Howard vs. Warfield,* 4 *Hav. & McHen.* 21. *Hawley vs. Cramer,* 4 *Cowen* 717.

Where courts of law and equity have concurrent jurisdiction, equity will relieve after judgment at law, notwithstanding the defence might have been made there. *Clay vs. Fry,* 3 *Bibb* 248.

Statutes giving sureties contribution against co-securities on motion at law, do not take away the former jurisdiction of chancery, unless by positive enactment to that effect. *House vs. Cocke,* 1 *Tenn.* 296. To the same point are *Hancocke et al. vs. Hunt,* 2 *Yerg.* 476. See also, *Shepperd vs. Monroe* 2 *Car. Law Reports* 624.

Equity had originally the exclusive jurisdiction of cases of sureties against their principals. The jurisdiction is now concurrent. *January vs. January,* 7 *Mon.* 544.

And however the law may be as to these points there is another in which the case is clear. The defendant below answered generally. After answering and submitting himself to the jurisdiction of the court without objection, it is too late to insist that the complainants had a perfect remedy at law; unless this had been a case where the court of chancery was wholly incompetent to grant the relief prayed by the bill. *Grandin vs. Leroy,* 2 *Paige* 509. *Underhill vs. Van Cortlandt,* 2 *J. C. R.* 369. *Livingston vs. Livingston,* 4 *id.* 290. *Dickens vs. Ashe,* 2 *Hayw.* 176. *Hawley vs. Cramer,* 4 *Cowen* 717. *Wiswall vs. Hall,* 3 *Paige* 313. *Bank of Utica vs. City of Utica,* 4 *Paige* 399. *Howard vs. Warfield,* 4 *Har. & McH.* 21.

WATKINS & CURRAN, contra. It will be conceded that where

matter of defence is properly cognizable at law, it is the duty of the party to make it there. He cannot afterwards obtain relief in chancery, unless on account of some circumstances of fraud or accident, which prevented him from defending at law, or some newly discovered defence, which he could not have known in time by the exercise of due diligence. In all such cases the relief granted him is in the nature of a bill for a new trial; and the rule is the same whether he had attempted any defence at law or not. But such relief will never be granted to revise the errors of a court of law, or where the party might have obtained relief by application to the court of law, or in the proper appellate tribunal. *Fenter vs. Andrews,* 1 *Ark. Rep.* 186, *and authorities there cited.*

The defence of the surety against the creditor, is the same at law as in equity. The sole ground of chancery jurisdiction, was the ancient rule of law, that where the contract was under seal the surety was estopped by his bond to aver at law that he was only security; but this rule of law is now changed, and especially would it be so in a case like the present, where the instrument sued on shows upon its face that the relation of the principal and security existed, and in this state where the distinction between sealed and unsealed instruments is done away, and both are of the same grade of dignity. *King vs. Baldwin,* 17 *J. Rep.* 384. *S. C.* 2 *John. Chy. Rep.* 554. *Payne vs. Packard,* 13 *J. R.* 174. *Manchester Co. vs. Sweeting,* 10 *Wendall* 162. *People vs. Jansen,* 7 *John. Rep.* 332. *Everett et al vs. U. S.,* 6 *Porter,* 166. *Inge vs. Br. Bnk. Mobile,* 8 *Porter,* 108. *Sprigg vs. The Bank of Mount Pleasant,* 10. *Peters,* 263 *Strader vs. Houghton,* 9. *Porter,* 334. *Davis vs. Micheel,* 1. *Freeman* 569. *Goodman vs. Griffin,* 3. *Stewart,* 160. *Grafton Bank vs. Kent,* 4 *New Hamp. Rep.* 21. *Bank of Steubenville vs. Hodge et al.* 6 *Ohio Rep.* 18. *Bank of Steubenville vs. Carrall's adm.* 5. *Ohio Rep.* 218.

Where courts of law and Chancery have concurrent jurisdiction there are many conflicting adjudications, attributable in part to the jealousy of courts of Chancery of the encroachments of the courts of law, upon the ancient boundaries of their jurisdiction, in part to the cases of hardship, which have induced courts of chancery

to relax the rule, or to some provision of statutory law. Kentucky is the only State in the Union where the rule prevails, that in case of concurrent jurisdiction, the defendant is not bound to defend at law, but after judgment against him in a court of law, may go into chancery for relief. It will be perceived even in that State, the decisions on this point are to some extent conflicting, and the rule of practice in that State had its origin in the earlier decisions in Virginia since overruled, or in the Statutes of Kentucky, which declared gaming and usurious contracts absolutely void, and expressly made it the duty of courts of chancery to set them aside. And the same rule might hold good everywhere in regard to contracts unconstitutional, illegal, or against public policy, and therefore void. But the weight of authority in this country, sanctioned by the opinions of some of the ablest judges, tends to the conclusion that after a party has suffered a judgment at law, he cannot obtain relief in chancery, upon any matter of defence of which he might have availed himself at law. *Le Guen vs. Governor & Kemble,* 1 *Johns. Cas.* 496. *Green vs. Robison* 5 *Howard* 80. *Glidewell vs. Hilt et al.* 5 *How.* 110. *Lansing vs. Eddy,* 1 *John. Chy.* 49. *Brown vs. Swan* 10 *Peters* 479. *Bartholomew vs. Yew,* 9 *Paige* 165. *Herbert et al vs. Hobbs et al.* 3 *Stewart* 9. *Foster et al. vs. Wood,* 6 *John. Chy.* 87. *Hamilton vs. Cummings,* 1 *John. Chy.* 523. *Batchelder vs. Elliott's Adm.* 1 *Hen. & Mun.* 10. *Yancy vs. Fenwick* 4 *Hen. & Mun.* 423. *Wingfield vs. Crenshaw, Hen. & Mun.* 474. *Nicholson et al. vs. Hancock et al,* 4 *Hen. & Mun.* 494, 502. *Alderson vs. Biggars et al.* 4 *Hen. & Mun.* 470. *Yeague vs. Russell et al.* 2 *Stewart Rep.* 420, 423. *Thomas & Harris vs. Hearn et al.* 2 *Porter Rep. Hauches vs. Strong,* 2 *Porter Rep.* 182. *Reaves et al. vs. Hogan et al. Tenn. Rep.* 513. *Prather vs. Prather,* 11 *Gill. & John.* 113.. *Elston vs. Blanchard.* 2 *Scammon* 420. *Abrams vs. Camp* 3 *Scammon* 270. *Dilly et al. vs. Bernard,* 8 *Gill. & John.* 189. *Ferriday et al. vs. Slicer,* 1 *Freeman* 260. *Russell vs. Clark's Exr.* 2 *Cond. Rep.* 422. (7 *Cranch* 69.) *Marine Ins. Co. vs. Hodgden.* 2 *Cond. Rep.* 578. (7 *Cranch* 332.) *Raburn vs. Shortridge,* 2 *Blackford* 480. *Smith vs. McIver,* 9 *Wheaton* 532. (5 *Cond.* 664.) *Glasgon vs. Flowers,* 1 *Haywood* 233. *Perkins vs. Bullinger, id.* 367. *Martin vs. Shier & Montgomery*

id. 371. *Brickell et al. vs. Jones,* 2 *Haywood* 357. *Cadwalader vs. Atchison,* 1 *Mo. Rep.* 660.

There can be no concurrent jurisdiction in this State common to courts of law and chancery. The Constitution, Article 6, ordains that "The General Assembly may vest such jurisdiction as may be deemed necessary in corporation courts, and, when they deem it expedient, may establish courts of chancery. And until the general assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court in such manner as may be prescribed by law." The General Assembly, having this plenary power over the whole subject, by *Sec.* 1 of *Chap.* 23 of the Revised Statutes organizing our chancery system, have provided that "The Circuit Courts shall exercise chancery jurisdiction in this State, in all cases where adequate relief cannot be had at law, and shall in all things have power to proceed therein according to the rules, usages and practice of Courts of Chancery, except where it may be otherwise provided by law." And *Sec.* 3 of *Chap.* 43, concerning courts of record, by excluding every contrary conclusion, limits the jurisdiction of the circuit courts, as courts of equity, to "all cases where adequate relief cannot be had by ordinary course of proceedings at law." The jealousy manifested in our constitution to preserve the trial by jury, the power conferred upon the circuit courts, *sitting as courts of law,* of enforcing discovery in aid of suits at law, (*Rev. Stat. p.* 632, *sec.* 95,) and the production of papers, &c. as evidence, (*ib. p.* 631, *sec.* 87,) and their jurisdiction in respect of "lost bonds" (*ib. p.* 628, *sec.* 65,) "failure of consideration, (*ib. p.* 629, *sec.* 74,) "Account" (*ib. p.* 61, *sec.* 1,) "Mortgages" (*ib. p.* 578, *sec.* 4 ,5, 6, 14,) "Insolvency" (*ib. p.* 463, *sec.* 3,) "Mechanic's Liens" (*ib. p.* 541, *sec.* 5,) "Partition" (*ib. p.* 392, *sec.* 1,) "Set off" (*ib. p.* 726, *sec.* 1,) "Securities" (*ib. p.* 722, *sec.* 1 and 2,) all further indications that it is the policy of our judicial system to confine parties to their remedies at law, where they are plain and adequate, and, at the same time, more cheap and expeditious than in chancery, without depriving chancery of any jurisdiction in cases wholesome and proper for its exercise. There can be no

doubt that the whole power to create and modify the jurisdiction of chancery, is vested in the General Assembly. This court has always guarded its own jurisdiction with peculiar jealousy; and yet in the case of *The State vs. Graham,* 1 *Ark. Rep.* 430, this court say "that the legislature may at any time change or modify the different subject matters to which the appellate power of this court shall extend, making it cover more or less space, as they shall think proper." And that the General Assembly have excluded all concurrent jurisdiction, is equally manifest.

There is a perfect similarity in the organization and jurisdiction of the courts of chancery in this State and those of the United States. The able and elaborate opinion of the court in the case of *Baker vs. Biddle,* 1 *Baldwin,* 405, places it beyond all question, that, in the federal courts, there can be no concurrency of jurisdiction, in any case where a plain, adequate, and complete remedy may be had at law. The case of *Boyce's Executors vs. Grundy,* 3 *Peters* 215. *Robinson vs. Campbell,* 3 *Wheaton* 212. *Bean vs. Smith,* 2 *Mason* 252, and *Harrison and others vs. Rowan and wife,* 4 *Washington* 202, have been cited as maintaining a contrary doctrine. We understand the court to decide in those cases simply this, that, in cases where the courts of the United States have jurisdiction as courts of equity, they will exercise it according to the principles of chancery in England, from whence we derive our system of jurisprudence. This rule is founded in obvious policy and propriety, even in cases where the title to land is in controversy, because in a portion of the Union the civil law prevails, in some of the States there are no courts of chancery, and in others the remedies afforded and grounds of chancery jurisdiction are not uniform, *United States vs. Howland,* 4 *Wheaton* 108. We claim that those very cases go to establish the great doctrine contended for by us, in *Boyce's Executors vs. Grundy, p.* 215, that "the 16th section of the Judiciary act of 1789 is merely declaratory, making no alteration whatever in the rules of equity, on the subject of legal remedy." In other words, according to the universal and well understood theory of chancery, it ought not to afford relief where there is a plain, adequate, and complete remedy at law. And this after

all the attempts that have been made to define chancery and the subjects of its jurisdiction, will be found to be its only true and unfailing criterion.

The cases in 3 *Peters* 205, 2 *Mason* 252, and 4 *Washington* 202, are obviously cases, in which a plain, adequate, and complete remedy could not be had at law; and so expressly decided by the courts upon a review of the facts, and the case in 4 *Washington,* was held to be one of exclusive equity cognizance. This point settled, in the two cases in 4 Washington and 2 Mason, the whole question of jurisdiction was decided. It is true, the Judges in those cases, WASHINGTON and STORY, go further, and recognize a concurrency of jurisdiction of courts of law and equity in some cases. It is remarkable that the very reason given by those Judges, substantially the same, is wholly inconsistent and repugnant to the doctrine of concurrent jurisdiction. "In such cases," says Judge STORY, speaking of concurrent jurisdiction, "it is supposed that the remedy at law is not adequate and complete, for all the purposes for which the plaintiff may claim relief."

The defence or ground of relief against the judgment at law, set up in this case, never was a defence in chancery. Anciently, courts of chancery entertained jurisdiction in cases of contribution among securities, of relief of securities against their principal, and against the creditor, where, by violation or extension of the contract with the principal, the security had become discharged; and the groundwork of this jurisdiction, was, as we have seen, that at law the surety was estopped by his obligation to aver that he was only security. The cases of *The People vs. Janson, King vs. Baldwin,* and *Payne vs. Packard,* were the first to establish the defence at law or chancery, that the request by the surety to the creditor to sue and his failure to do so exonerated the security; and this always depended upon the further fact that the principal was solvent and had become insolvent, whereby the debt was lost as against him by the indulgence of the creditor. Those adjudications are based upon the theory that the indulgence of the creditor, if prejudicial to the security, implied a new contract, and although much doubted, have become settled law. But our statute concerning

securities introduced an entirely new rule. The mere fact of giving the notice exonerates the security. It substitutes presumption for proof of actual damage. We challenge the production of one case, *out of the statute,* either at law or equity, where the surety was discharged by the mere fact of giving notice, without proof of actual damage. This statute, with some modifications, is peculiar to the States of Alabama, Tennessee, Missouri, Ohio, Indiana, and Arkansas. In every one of these States, the remedy given by the statute has been treated as a legal remedy. In Indiana it was decided in the case of *Braham vs. Howk,* 1 *Blackford* 392, that a party could have no relief in chancery, because by the statute he had the right to give the notice and exonerate himself at law. In no one of these States has a surety, who gives the statutory notice, ever been discharged in chancery. In the case of *Hancock vs. Bryant and Hunt, in* 2 *Yerger,* the surety did not give the statutory notice, and a court of equity took cognizance of it upon proof of actual damage, and the reason assigned by the court was, the difficulty of making proof under the statute, which released the surety or assignor, provided (Laws of Tennessee, 1801, ch. 18, sec. 4,) "he or they prove in open court by two witnesses a copy of the notice aforesaid to have been served upon the person or persons bringing such actions." Wherever this defence—of notice under the statute—is allowed, it is the creation of the statute, and, in every State where such a statute has been passed, has been treated as a purely legal remedy. *Kelly vs. Matthews,* 5 *Ark.* 223. *Ellis et al. vs. Adm'r Taylor,* 1 *Howard (U. S.)* 197. 3 *Stewart* 9, 160. 1 *Stewart* 11. 4 *Porter* 232. 9 *Porter* 334. *Starling vs. Buttles, Ohio Con. Rep.* 370. *Bolton vs. Lundy,* 6 *Mo. Rep.* 46. *Hancock vs. Bryant and Hunt,* 2 *Yerger* 476. *Braham vs. Howk,* 1 *Blackford* 394. *Bruce vs. Edwards,* 1 *Stewart's Rep.* 12.

As to the question whether the objection to the jurisdiction of the court of chancery, should be made by demurrer or plea, or whether it can be relied upon if set out in the answer. See *Wiswall vs. Hall,* 3 *Paige* 316. *Hawley vs. Cramer,* 4 *Cowen* 717. *Sharp vs. Carlyle,* 5 *Dana* 487. *McLin vs. McNamara,* 1 *Dev. & Bat.* 407. *Atkinson vs. Marks,* 1 *Cowen* 691. *Herbert et al vs.*

Hobbs et al. 3 *Stewart* 9. *Baker vs. Biddle,* 1 *Baldwin's Rep.* 411. *Burroughs vs. McNeill,* 2 *Dev & Bat.* 217.

The original suit at law was rightly brought. The declaration is in exact conformity with the most approved precedents, sanctioned by usage, and never before questioned. See precedent. *Moore vs. Rome, Lilly's Entries, p.* 164, *and* 165. 1 *Harris' Entries, p.* 553. 1 *Saunders on Pleading* 499, 500. See precedent, "Declaration by Executor of Obligee vs. Obligor." 1 *Saunders' Pleading* 502, marginal page. The distinction is, that where the promise is made to the administrator, it should appear on the declaration that he sues as administrator, but where he sues on a promise or contract to the intestate, it necessarily appears from the statement of the cause of action that he sues in his representative capacity. 2 *Chitty's Pleading.* 7 *Amer. Ed.* 1837, *p.* 140, 141; *ib. p.* 466, 467. It was decided by this court in *Sabin, adm'r of Belding vs. Hamilton,* 2 *Ark. Rep.* 490, that it is immaterial in what part of the declaration the averment occurs, showing that plaintiff sues in his representative capacity. In *Saunders' Rep., Vol.* 1, *p.* 112, *n.* 1, the criterion is, that the administrator or executor must sue in the *detinet.*

The first opinion of the Supreme Court was delivered on the 22d January, 1841; on the 25th January, 1841, the suit was renewed, and judgment obtained at the succeeding March term. If the first suit was wrongly brought, then all the best authorities on pleading are wrong also. There is no pretence that there was that *crassa negligentia* or ignorance of law, which would enable the administrator to recover against his attorney who brought the suit. 1 *Leigh's Nisee Prius* 196, and authorities there quoted. And the administrator cannot be liable in any greater degree than his attorney would be.

The complainants, as shown by the record and testimony, defended the first suit upon technical grounds. They appeared to the second suit and waived all objections to the Judge sitting in the cause, after having moved to quash the writ, and suffered judgment by *nil dicit.* Hempstead, being personally present in court, desired the judgment to be rendered. During all this time there is

no pretence that they had any defence on account of the alleged failure of the administrator to bring the suit in the time required by law, or that they were not apprised of this defence at that time, or were prevented from making it by any unavoidable accident.

At the March term, 1842, one year after the judgment, the complainants filed their motion and affidavit to amend the record in the court below, which was overruled, and upon a writ of error brought by the complainants to this court, that judgment was affirmed at the July term, 1842. The only conceivable effect of this proceeding was to vacate the judgment of the court below, and let in their defence at law. If these acts do not constitute a defence we are at a loss to conceive what would: and the complainants are precluded from saying that they suffered judgment by default in the court below, and have the right to defend in chancery, because they did not attempt any defence at law.

The complainants cannot allege that counsel, who appeared for them, had no authority to do so. They are bound by his acts; and if the party is injured by the acts of the attorney, he must look to him for redress. *Denton vs. Hays,* 6 *John. Rep.* 296. *Jackson vs. Stewart,* 6 *J. R.* 34. *Tally vs. Reynolds,* 1 *Ark. Rep.* 99. The record shows that the parties knew that the judgment had been entered against them at the term, and the manner in which it was entered, and did not question the power of the attorney to appear for them, or move to set it aside during the term. Another allegation in the bill is, that the original notice was mislaid. The proof shows that the complainants never applied for the original notice till some time in the year 1842. If the original was lost, they could have compelled the defendant to produce the copy: if both were lost, they could have proved their contents by parol: if all the witnesses were dead, they could have had a discovery at law in aid of their defence at law. Another allegation is, that they could not apply sooner than they did for an injunction, because the Judge of the Pulaski circuit court was related by affinity to the administrator. The granting of an injunction is a mere ministerial act, which the judge or master in chancery could perform. As soon as they filed their motion to amend the record, a special judge

was appointed—as soon as they filed their bill for an injunction, a special judge was appointed to determine it. A special judge could not be appointed until the cause was presented.

It does not satisfactorily appear from the evidence that the debt could have been made out of McDonald at law. According to all the authorities, if the complainants waive their defence at law, under the notice, where presumption is substituted for proof of actual damage, they must show in this proceeding "that the principal at the time of the request was solvent, and subsequently became insolvent; and in proof of the solvency at the time of the request to sue, it must satisfactorily appear that the debt was then collectable by due course of law, out of the property of the principal, and not merely that if hard pressed the principal might have paid, had he chosen to do so." *Huffman vs. Hulbert,* 13 *Wendall* 375. Because "generally, the surety has his election to pay the money and take his remedy against the principal into his own hands, or to come into a court of equity to compel the principal to pay, and the creditor to receive, and deliver him from his obligation." At common law, the obligation of the surety is not that of an assignor, nor, as in the civil law, that of a mere guarantor with right of discussion, or accessional and consequential upon the failure of the principal. He is equally bound, and it is his duty, as well as that of the principal, to discharge the obligation when due.

Simple forbearance by the creditor from mere passiveness, or in consequence of a void promise, does not interfere with any of the rights of the surety, and will not operate his exoneration. *Tudor vs. Goodlae,* 1 *Ben. Monroe* 322. 1 *Story's Equity* 320, 321. *Fletcher vs. Gamble,* 3 *Ala. Rep.* 337. *Powell vs. Waters,* 17 *John.* 179. *Davis vs. Higgins et al.,* 3 *New Hamp.* 232. *Locke vs. United States,* 3 *Mason* 457.

The appellants by their *laches* have not only forfeited all claim, if they ever had any, to relief in chancery, but their acts have been greatly prejudicial to the estate of Mrs. Byrd. If McDonald had property, they might have paid, or assumed the debt, and secured themselves: they do not pretend that they even pointed out any property of his on execution to the sheriff, the administra-

tor, or his attorney. After giving a delivery bond it was too late for them to come into chancery for relief. *Chishalm vs. Anthony,* 2 *Henning & Munford* 12. *Stonnard vs. Rogers,* 4 *Hen. & Mun.* 439. *Carter vs. Cockrill.* 2 *Munford* 450. By surrendering property upon the alias execution of a value sufficient to satisfy the judgment and availing themselves of the appraisement law, they put it out of the power of the plaintiff to pursue any other property until the levy was exhausted. *Cummins vs. Webb,* 4 *Ark. Rep.* 229. *Humphries vs. McCraw,* (supersedeas by RINGO, C. J.) Nor pending the forthcoming bond on the first execution, could they have pursued the property of McDonald, if he had any. Eighteen months after the rendition of the judgment, after prosecuting a writ of error to reverse that judgment, after surrendering property upon two executions, and costs had greatly accumulated, the complainants filed their bill in chancery for relief. Until the filing of that bill, it is not pretended that they ever gave the administrator the slightest intimation that they intended to interpose a defence of this nature.

Under all circumstances, Conway, one of the appellants, is not entitled to relief. In January, 1841, he obtained from McDonald a conveyance to himself and Hempstead, of property, proved to have been worth five hundred dollars over and above all incumbrances, to secure them in the payment of this debt, whether available or lost by their negligence, is wholly immaterial.

Upon the whole record, we submit that the court will not discharge the complainants from the obligation of their contract, unless they have shown a clear case of exoneration. It is not claimed by them, that, in the whole course of this proceeding, the administrator has done any unconscionable act, to the prejudice of the sureties, or at any time ceased in the diligent prosecution of the suit, according to the best of his skill and ability; and if this debt shall be lost to the estate of Mrs. Byrd, it will be sacrificing the substance to the forms of law.

S. H. HEMPSTEAD, in reply A court of equity is always ready to lay hold of any circumstance that will relieve a surety, where

there has been a want of good faith towards him, in the transactions between the creditor and principal debtor. A surety is a favorite of that court, and the law will always be construed liberally to protect his rights. In the complicated transactions of life, persons become security and bail, from motives of sympathy or friendship, without any expectation of benefit to themselves, and it is unquestionably important on principles of public justice and policy, that a surety should never be implicated beyond the scope of his engagement, and that the creditor should never be permitted to increase his risk without his consent. This has become a settled rule both in courts of law and equity.

The whole scope of the bill is, that the complainants, being sureties, requested the creditor to bring suit on the bond, and prosecute it to judgment and execution, in the time and mode prescribed by law, and that the creditor failed to do so. The law at the time the contract was made, must determine the nature, and obligation of it, as well as the respective rights and duties of payor and payee, and that law explicitly declares, that a surety may give notice in writing to the creditor, after the contract has matured, to bring suit upon it, and that if the creditor fails to *commence such suit in thirty days after the service of notice, and proceed therein with due diligence in the ordinary course of law, to judgment and execution, the surety shall be exonerated from liability. Steele and McCamp. Digest* 414. *Rev. Stat.* 722. This became a *condition,* as much so, as if it had been *actually incorporated in the bond,* and imposed upon the creditor the necessity of performing it, in good faith, if he wished to hold the sureties liable. *That it was not performed is alleged in the bill, admitted in the answer, proved by the very records of this court, and on this omission of duty we base our claim to relief.* If a creditor *neglects* to perform, or performs *defectively,* any of the express or implied *conditions,* which are incumbent upon him, or any of the terms which collectively form the consideration, either of the surety's contract, or of the contract to which the surety acceded, the surety will be discharged, or rather his liability never attaches. *Theobald on Principal and Surety* 154. 1 *Law Lib.* 91. 1 *Story's Eq.* 321. 2 *Story's Ep.* 171. *Cooper's*

Justinian 462, *and note* 41 *and cases there cited. Thompson vs. Watson.* 10 *Yerger* 362. *Hancock vs. Bryant,* 2 *Yerger* 476. *King vs. Baldwin,* 17 *J. R.* 384. *Pain vs. Packard,* 13 *J. R.* 174. *Rathbone vs. Warren,* 10 *J R.* 587. *People vs. Jansen,* 7 *J. R.* 336. *Rees vs. Berrington,* 2 *Ves. Jr.* 542. *Livingston vs. Bartles,* 4 *J. R.* 478. *Law vs. East Ind. Co.* 4 *Ves. Jr.* 824, 833. *Nesbit vs. Smith,* 2 *Brown's Ch. Cases,* 597. *Smith vs. Lewis,* 3 *Bro. Ch. Cases* 1. *King vs. Baldwin,* 2 *J. C. R.* 554. *Commonwealth vs. Baynton,* 4 *Dallas* 282. *State Bank vs. Watkins, ante* 123.

Whatever may be the form of the instrument, the surety is only regarded in equity as a mere guarantor, that the principal debtor will pay, if proper steps are taken and *good faith* observed. Without a statutory provision, *if the creditor is explicitly requested by the surety to proceed to recover the debt of the principal, and refuses, neglects, or fails to do so, or performs the duty in a defective manner, so that the means of recovering from the principal are lost, the surety is exonerated, because one of the conditions of the contract has been violated by the creditor, and his conduct is considered to be a fraud on the surety, and operating to his prejudice. Steele & McCampbell's Digest,* 544. *Fulton vs. Matthews,* 15 *J. R.* 433. *Valentine vs. Farrington,* 2 *Edw. Ch. Rep.* 53. *Huffman vs. Hulbert,* 13 *Wend.* 162. *Manchester Iron Manufacturing Company vs. Sweeting,* 10 *Wend.* 162. *Warner vs. Beardsley,* 8 *Wend.* 194. *Cope vs. Smith,* 8 *Serg. & R.* 112. *Geddis vs. Hawk,* 10 *Serg. & R.* 33. *Gardner vs. Ferre,* 15 *Serg. & R.* 29. *Erie Bank vs. Gibson,* 1 *Watts* 143. *Hunt vs. The United States,* 1 *Gallison* 32. 3 *Haywood's Rep.* 16. *Ship vs. Huey,* 3 *Atk.* 91. *Boultbee vs. Stubbs,* 18 *Ves. Jr.* 20. *Ludlow vs. Simond,* 2 *Cain's Cas. Er.* 1. *Ex parte Gifford,* 6 *Ves. Jr.* 805. *Mayhew vs. Crickett,* 2 *Swanst.* 185. *Rev. Stat.* 722. *Buchanan vs. Bordley,* 4 *Har. & McHen.* 41. *Hill vs. Bull, Gilmer's Rep.* 149. *Butler vs. Hamilton,* 2 *Des.* 226. *Addower vs. Neill,* 4 *Dallas* 133. 2 *Stark. Ev.* 777. *Dehuff vs. Turbott's Exrs.* 3 *Yeates* 158. *King vs. Baldwin,* 17 *J. R.* 384. *Sailby vs. Elmore,* 2 *Paige* 497. *Pain vs. Packard,* 13 *J. R.* 174. *Thompson vs. Watson,* 10 *Yerg.* 362. *Hancock vs. Bryant,* 2 *Yerg.* 476. *The People vs. Jansen,* 7 *J. R.* 332.

In cases where the time of payment has been extended to the principal debtor, by the creditor, on a valid agreement, without the consent of the surety, the latter is discharged, not because he has been *actually damaged,* (for into that matter the courts do not inquire,) but on the ground that he has a right to stand on his contract, and demand entire good faith at the hands of the creditor. The surety will be discharged, although it be proved that time was given in consequence of the inability of the principal to pay; or that no injury accrued, or even that it was manifestly for the advantage of the surety, for he alone has the right to determine what is or is not for his benefit. *Samuel vs. Howarh,* 3 *Merivale* 272. *Whitaker vs. Hall,* 8 *Dow. & Ry.* 22. *Bowmaker vs. Moore,* 7 *Price* 223.

In *Ex parte Gifford,* 6 *Ves.* 805, LORD ELDON said: "Where it is stated in some cases that it is for the interest of the surety that the compromise should be made, the answer is, those for whose benefit it is alleged to be made, are the proper judges, whether it is for their benefit, and it is not to be forced upon them." *Ex parte Glendinning, Buck.* 517. 1 *Story's Eq.* 171. *Rees vs. Berrington,* 2 *Ves.* 540. *Nesbit vs. Smith,* 2 *Bro. Ch. R.* 579. 1 *Stewart* 11. *Rathbone vs. Warren,* 10 *J. R.* 592. *Harberton vs. Bennett,* 1 *Beat.* 386.

So the surety will be discharged, where the creditor takes out execution against the principal and waives it. *Mayhew vs. Crickett,* 2 *Swanst.* 185. *S. C.* 1 *Wils. C. C.* 418. *Smith vs. Knox,* 3 *Esp.* 47. *Williams vs. Price,* 1 *Sim. & S.* 581.

The equity of the bill is not disputed, but it is said, that the *remedy was adequate and complete at law, and that the failure to urge it there, deprives this court of jurisdiction.* The defendant by answering instead of demurring, has waived all right to make this technical objection at the hearing, and has in fact admitted the authority of the court to grant relief, if a proper case is made out by the bill. *Billon vs. Hyde,* 1 *Atk.* 128. 1 *Ves.* 331. 3 *Bro. P. C.* 535. *Underhill vs. Van Cortland,* 2 *J. C.* 369. *Ludlow vs. Simond,* 2 *Caine's Cas. Er.* 40-56. *Grandin vs. Levvy,* 2 *Paige* 309. *Gallagher vs. Roberts,* 1 *Wash. C. C. Rep.* 320. *Story's Eq.*

Pl. 381-649. 2 *Vern.* 484. *Cooper's Eq. Pl.* 160. *Penn vs. Lord Baltimore,* 1 *Vez.* 447. *Gilb. Hist. Chy.* 51-219.

But renouncing any advantage which might be derived from this obvious principle, and *admitting that the defence might have been successfully made in a court of law,* still it does not shake our right to relief, and I place that right on the *broad and sole ground, that this is one of that class of cases, in which we could select the tribunal, in our judgment, most appropriate for making our defence, and that too, without assigning any reason for the choice.*

The gentlemen refer to two isolated expressions of the statute book, (*Rev. Stat. sec.* 1, *page* 158; *Sec.* 3, *page* 230,) to show that courts of chancery have jurisdiction only where adequate relief cannot be had at law. The power of a court of equity, is derived from usage and principles permanently established, by a long series of adjudications; not from the statute; nor was the statute designed to limit its jurisdiction. In the JUDICIARY act of Congress of 1789, there is a much stronger expression, than any in our statute, which is, that "*suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law.*" *Gordon's Digest, Art.* 485, *page* 108. This has been repeatedly held to be merely declaratory; making no alterations in the rules of equity on the subject of legal remedy. *Boyce's Executors vs. Grundy,* 3 *Peters* 215. *New York vs. Connecticut,* 4 *Dall.* 1. *Bean vs. Smith,* 2 *Mason* 252-270. *Harrison vs. Rowan,* 4 *Wash. C. C.* 204. *Robinson vs. Campbell,* 3 *Wheat* 212. *The United States vs. Myers,* 2 *Brock. Rep.* 524-525.

There being no defence made at law, the great point upon which I confidently rely is, that our remedy is available in equity, because *this defence is of an equitable nature, originally belonging exclusively to a court of chancery,* and as there is no statutory provision, professing to impair or destroy that jurisdiction, it still subsists, although a court of law may be capable of affording redress. The remedy given by the statute to *courts of law,* is merely *cumulative and concurrent,* leaving the original jurisdiction of equity, on its old foundation. Courts of equity do not lose their jurisdiction, be-

cause there is a remedy at law, and it is only by *express and unequivocal legislative enactment that such jurisdiction can either be crippled or abolished. Rees vs. Berrington,* 2 *Ves.* 540. *Pain vs. Packard,* 13 *J. R.* 174. *King vs. Baldwin,* 2 *J. C. R.* 555. *S. C.* 17 *J. R.* 384. *Wright vs. Simpson,* 6 *Vez.* 734. *Hayes vs. Ward,* 4 *J. C. R.* 131. 1 *Story's Eq.* 80, 81, 96, 97. *Ex parte Greenway,* 6 *Vez.* 812. *Melville vs. Glendenning,* 7 *Taunt.* 126. *Cooper's Eq. Pl.* 126, 129. *Fonbl. Eq. book* 1, *p.* 22 *and note.* 1 *Madd. Chy.* 25. *Codd vs. Woden,* 3 *Bro. Ch. Cas.* 73. *Hawley vs. Cramer,* 4 *Cow.* 717. *Sheperd vs. Monroe,* 2 *N. C. Law Rep.* 624. *East Ind. Co. vs. Boddam,* 9 *Vez.* 468. *January vs. January,* 7 *Monroe* 544. *Power vs. Reeder,* 9 *Dana* 10. *Cummings vs. Latham,* 4 *Mon.* 103. *Thompson vs. Watson,* 10 *Yerg.* 362. *Hancock vs. Bryant,* 2 *Yerg.* 476. *White vs. Medary,* 2 *Edw. Chy. Rep.* 486.

In *Sailby vs. Elmore,* 2 *Paige's Chy. Rep.* 497, it is said, that as a court of equity had *originally the exclusive cognizance of the cases of sureties,* it will not relinquish its jurisdiction, because there may be an adequate remedy at law, and that the most that can be done, is to deny the complainant costs. *State Bank vs. Watkins,* 1 *ante* 127. *Mitchell vs. Oakley,* 7 *Paige* 68.

In *White vs. Medary,* 2 *Edw. Chy. Rep.* 486, the VICE CHANCELLOR said: "No part of the ancient and well established jurisdiction of the court of chancery, can be destroyed by the assumption or grant of new powers, by statute, to the courts of law, and it cannot be taken away, except by the express enactment of the legislature. Although by the Revised Statutes of New York the *courts of law can take cognizance, and do complete and ample justice in cases of lost notes,* yet the jurisdiction of chancery in like cases is not gone or effected."

In *The United States vs. Myers,* 2 *Brock.* 525, BARBOUR, J., held, that where *the only remedy is at law,* a party comes into equity on the ground that by reason of some impedement in the way, or some unfair legal advantage acquired by his adversary, justice cannot be done him; but that this rule did not apply to those cases in which courts of equity and law have *concurrent* jurisdiction, and that it

is no objection to relief, that *there is a complete and perfect remedy at law.*

Fraud, Account, Mortgages, Usury, Set-off, Lien;—the cases of Principal and Agent, Creditor and Surety, Assignment of Dower, Contribution between Sureties; the cases of lost bonds, and many other matters, *originally* cognizable on equity, are now cognizable at law; but can it be contended on reason or authority, that this circumstance at all effects the original jurisdiction of equity over these subjects? 1 *Story's Eq. Pl.* 81. *Kemp vs. Pryor,* 7 *Ves.* 249. *Atkinson vs. Leonard,* 3 *Bro. Ch. R.* 218.

Whatever equitable powers, the legislature may have vested in our courts of law, to enable them to administer justice, it can only be construed as furnishing an *additional* and perhaps a more expeditious remedy. The only effect of it is that there are now *two* tribunals which can afford redress, whereas before there was but *one.*

The statute requiring the creditor to institute suit within a specified time, on the request of the surety, was, as the court declared in the case of *Hancock vs. Bryant,* 2 *Yerg.* 477, on a similar law, "*designed to turn an equitable remedy into a legal one, but was never designed to destroy the equitable remedy.*" It introduces no *new* rule, but is declaratory of a great equitable principle that before existed. It points out a duty already binding on the conscience of the creditor, and which he ought to perform without admonition. It visits the omission of the creditor with the exoneration of the sureties, leaving them to claim it, either at law or equity.

This point I consider established beyond a shadow of a doubt, and I proceed to demonstrate in what cases a court of equity may interfere with a judgment at law. An attentive examination will show that the lines of demarcation are distinctly traced, in a host of solemnly adjudged cases, and cannot be mistaken.

1. *A defence purely legal and which exclusively belongs to a court of law,* such as the statute of limitations: the direct payment of money on a bond, or other defences of that character, *must* be made in that forum, because there is no *concurrent* jurisdiction belonging to equity. If a party in this class of cases submits to a judgment, either *with or without bringing forward his defence,* he can

only be relieved on the ground of fraud, surprise, accident, or some unfair advantage gained by his adversary, unmixed with fault or negligence on his part. *Andrews vs. Fenter,* 1 *Ark. Rep.* 186. *Foster vs. Wood,* 6 *J. C. R.* 87. *Mauping vs. Whiting,* 1 *Call* 224. *Penny vs. Martin,* 4 *J. C. R.* 566. *Barker vs. Elkins, id.* 465. *Cowan vs. Price,* 1 *Bibb.* 173. *Lemon vs. Cherry, id.* 252. *Roots vs. Brown, id.* 354. 2 *Bibb.* 5, 192. 3 *Monroe* 299. *Fonbl. Eq.* 30. *Barrett vs. Floyd,* 3 *Call* 531. *Floyd vs. Jayne,* 6 *J. C. R.* 479. *Shottenkirk vs. Wheeler,* 3 *J. C. R.* 275. *De Reemer vs. Cantillon,* 4 *J. C. R.* 85. *Duncan vs. Lyon,* 3 *J. C. R.* 351. *Stothart vs. Burnet, Cooke* 318. *Bently vs. Dillard, ante* 192. *Davidson vs. Givens,* 2 *Bibb.* 200.

2. *If the defence is of such a character that either court can take cognizance and afford redress, and the party elects to submit his defence to the court of law,* he is bound by that election, and cannot be relieved from the judgment, except on the same grounds that would entitle him to relief in case the defence were purely legal and exclusively cognizable at law. Having made his election he must abide the consequences, and cannot afterwards resort to a court of equity to re-try and reinvestigate a matter that has been discussed and adjudicated at law.

3. *But if he attempts no defence on the merits, he is not precluded from relief,* for the obvious reason that he has an *absolute right* to select the tribunal where he will make that defence. In all cases, where the two courts have concurrent jurisdiction, and the party resorts to chancery, the inquiry must be, not whether he was without remedy at law, but whether he defended in that forum and if he did, the judgment is a matter *res judicata,* on principles of public justice and policy. *Bateman vs. Willoe,* 1 *Sch. & Lef.* 201. *Power vs. Reeder,* 9 *Dana* 110. *Harrison vs. Rowan,* 4 *Wash. C. C.* 202 *Conway Ex parte,* 4 *Ark. Rep.* 340. *King vs. Baldwin,* 17 *J. R.* 384. *Clay vs. Fry,* 3 *Bibb* 284. *Grandin vs. Leroy,* 2 *Paige* 509. *Sailly vs. Elmore,* 2 *Paige* 497. *The United States vs. Myers,* 2 *Brock.* 525. *White vs. Medray,* 2 *Edw. Chy. Rep.* 486. *Smith vs. McIver,* 9 *Wheat.* 532. *Marine Ins. Co. vs. Hodgson,* 7 *Cranch* 332. *Varret vs. New York Ins. Co.* 7

Paige 560. *LeGuen vs. Gouvernor,* 1 *J. C.* 436. *Simpson vs. Hart,* 1 *J. C. R.* 91. *S. C.* 14 *J. R.* 63. *Rathbone vs. Warren,* 10 *J. R.* 595. *Hawley vs. Cramer,* 4 *Cow.* 717. *Post vs. Kimberly,* 9 *J. R.* 470. *Green vs. Robinson,* 5 *Howard's Miss. Rep.* 80. *Glidewell vs. Hite, id.* 110. *Morrison vs. Hart,* 2 *Bibb.* 4. *Davidson vs. Givens, id.* 200. *Hughes vs. McCoun's admr.* 3 *Bibb.* 254. *Stotart vs. Burnet, Cooke* 418. *Overton vs. Searcy. id.* 36. *Winchester vs. Evans, id.* 420. *Hancock vs. Bryant,* 2 *Yerg.* 476. *Thompson vs. Watson,* 10 *Yerg.* 362. *Gridley vs. Garrison,* 4 *Paige* 647. *January vs. January,* 7 *Monroe* 544. *Gregg vs. The Lessee of Sayre,* 8 *Peters,* 244. *Boyce's Exrs. vs. Grundy,* 3 *Peters* 210. *Spencer vs. Wilson,* 1 *Munf.* 130. *Ambler vs. Wyld,* 2 *Wash.* 36. *Picket vs. Morris, id.* 255. *McKim vs. Oden,* 3 *Fairfield* 107. *Haughty vs. Strong,* 2 *Porter* 177. *French vs. Garner,* 7 *Port.* 549. *Abrams vs. Camp,* 3 *Scammon's Rep.* 290. *Harlan vs. Wingate's admr.,* 2 *J. J. Marsh.* 139. *Hardin's Rep.* 123. *Saunders vs. Jennings,* 2 *J. J. Marsh.* 513. *Bently vs. Dillard, ante* 85. *State Bank vs. Watkins, ante* 127.

4. The principle for which I contend has been carried far beyond the boundaries of the case before the court. It has been held that if a defence is of *equitable* nature, a court of chancery will grant relief although there has been *a trial at law. Appleton vs. Harwell, Cooke's Rep.* 242. *Couchman's heirs vs. Slaughter,* 1 *Marsh.* 383. *Bromley vs. Holland,* 5 *Ves.* 610. *S. C.* 7 *Ves.* c. 1 *Ves.* 327. *Hughes vs. McCoun's admr.* 3 *Bibb.* 254. 1 *Atk.* 126. *Hawkins vs. Depriest,* 4 *Munf.* 469. *Saunders vs. Marshall,* 4 *Hen. & Munf.* 459. *Spencer vs. Wilson,* 4 *Munf.* 130. *Fish vs. Lane,* 2 *Hayw. Rep.* 342. *Graham vs. Stamper,* 2 *Vern.* 146. *Robinson vs. Bell, id.* 146. *Kent vs. Bridgman, Prec. in Chy.* 233.

In the case of *King vs. Baldwin,* 17 *J. R.* 384, and *Simpson vs. Hart,* 14 *J. R.* 63, relief was granted on the same state of facts urged as a defence at law, on account of the equitable nature of the defence. So in the case of *Ambler vs. Wyld,* 2 *Marsh.* 36, the party was relieved in the chancery, although he had defended at law The court said, "it was truly observed at the bar that the issue in the suit at law left the matter of controversy open to a full and fair inquiry

on the merits, and if on the trial all the testimony offered by the parties had been admitted, and after hearing it the jury had decided as they did, no good reason could have been urged for a new trial. But this is not the case; evidence was freely admitted on one side, and without a color of reason was rejected on the other. *The trial then was not fair and equal, nor such as ought to conclude the parties.*

In *Picket vs. Morris,* 2 *Wash.* 272, it was held that, wherever a case is *fully and fairly tried in a court of law,* the decision is binding on the parties, and a re-examination of the case in a court of equity, improper. The parties by submitting to the decision of that tribunal must be governed by it whether it be right or wrong. But this principle, the court say will extend to no case where there *has not been a fair trial as well as a full discussion of the cause.*

5. It is urged that the right to relief is forfeited, by availing ourselves of the means of preventing the collection of the debt, and by delay in asking the early intervention of a court of chancery. In answer to this extraordinary argument, I ask, by what right did the defendant institute the second suit, and on what liability on our part was it predicted? He had not commenced a valid suit, within thirty days, after the service of the notice, and prosecuted the same to judgment and execution, and he knew therefore that we were exonerated, and that not a shadow of liability rested upon us. Was it equitable to institute the second suit against us? Will he be permitted to complain of our resisting a judgment unqualifiedly unjust? If we are too late, in asking relief, let the statute of limitations be pointed out, which bars it, or let it be shown that we have so long slept upon our rights, that this is a stale matter, not befitting investigation in a court of equity. Neither can be shown, because they do not exist.

If the debt has been lost, the fault is with the creditor: he failed to perform a condition, incumbent upon him, and from that moment our liability as sureties ceased forever, and could not become afterwards fixed by any suit or proceeding he could institute. There is ample equity in the bill, and which is admitted in the answer. If this defence was cognizable at law, still we were not bound to

make it in that tribunal, and as it was not attempted, there is no obstacle to a court of equity entertaining the case, and granting that relief, to which we have shown ourselves clearly entitled.

OLDHAM, J. delivered the opinion of the court.

We do not conceive it to be necessary in this case, to determine at what time a defendant should regularly object to a bill for want of equity, or whether the defendant in this case has sufficiently reserved the point in his answer, so as to enable him to question the sufficiency of the bill upon the final hearing; but will proceed, at once, to the consideration of the question, whether the bill discloses a defence cognizable in a court of equity.

It is laid down as a general rule, that "if a creditor does any act injurious to the surety, or if he omits to do any act when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at least in equity." 1 *Story's Eq. Ju.* 321. The jurisdiction of this class of cases originally and intrinsically belonged to equity, *id.* 475, and rests upon the principles of good faith between the parties, and to prevent either party from taking an undue advantage of the other. It is said that the conscience of the party is affected by the relationship of creditor, principal and surety, and that the creditor is bound to a faithful observance of the rights of the surety, and to a performance of every duty necessary to the protection of those rights.

The leading case upon this subject is *Rees vs. Berrington,* 2 *Ves.* 540, in which it was definitely settled that, if the obligee in a bond with a surety, without communication with the surety, takes notes from the principal, and gives further time, the surety is discharged. Since that case, the giving of time has been considered and held as a settled subject of defence in equity, and has never been doubted. This principle having become firmly engrafted in the system of equity jurisprudence, courts of law acting upon the same broad and liberal principles of equity, have adopted the same rule as the subject of legal remedy, except in cases where the surety was estopped, as for in-

stance by his bond, from averring his suretyship in a court of law: but Mr. Justice STORY remarks, "but still the jurisdiction now assumed in courts of law upon this subject in no manner affects that originally and intrinsically belonging to equity." *Com. on Eq. Ju.* 475.

Several of the courts of the United States acting upon, and guided by those same liberal and enlightened principles of equity, have extended the defence of the surety still further. In *Pain vs. Packard,* 13 *J. R.* 174 it was held, "that if an obligee or holder of a note, who is requested by a surety to proceed against the principal without delay and collect the money of him, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be discharged. That in law and equity the holder was bound to use due diligence against the principal." This question was again raised in *King vs. Baldwin,* 2 *J. C. R.,* when Chancellor KENT dissented from the doctrine of the Supreme Court in *Pain vs. Packard;* but an appeal was taken from his decree to the court of errors, where his decision was reversed, and the rule, as laid down by the Supreme Court, was held to govern both in law and equity. 17 *J. R.* 384. Although the authority of this last mentioned case has been called in question upon the argument of this cause, as well as upon various other occasions, yet we conceive that the reasons given by Chief Justice SPENCER, in the opinion which he delivered, have never been met, and refuted. In truth, they are unanswerable. He based his decision upon the solid ground "that the creditor is under an equitable obligation, and such is the essence of the contract, to obtain payment of the principal debtor and not from the surety, unless the principal is unable to pay the debt." This case was received and approved of, as authority, by the Supreme Court of Tennessee in *Thompson vs. Watson & Gibson,* 10 *Yer.* 362. In that State is a statute similar to ours, requiring the holder to bring suit against the principal upon notice from the security, but differing as to the proof of notice. Yet in the case last cited, and in the case of *Hancock vs. Bryant & Hunt,* 2 *Yer. R.* 476, the court held the sureties discharged, although the notice in the first case was verbal, and in the last could

not be proved by two witnesses, as required by the statute. In neither of these cases did the complainants come within the provisions of the statute, and could not have availed themselves of their defence at law; yet they were held to be exonerated in equity. See *Herbert et al. vs. Hobb et al.*, 3 *Stew. Ala.* 9.

The complainants in the case, in their bill, allege as strong a case as either of those cited, and like the case of *Hancock vs. Bryant & Hunt,* and *Thompson vs. Watson & Gibson,* they also allege the additional ground for equitable relief, that the notice in writing, which was served upon the holder of the bond, requiring him to sue, was mislaid, and complainants were fearful that they could not establish the contents of the notice by proof; and is, so far, a stronger case for the jurisdiction of the chancellor than *King vs. Baldwin.*

Our statute declares that, unless the holder brings his suit within a specified time after service of notice, and prosecute the same to judgment and execution with due diligence, in the ordinary course of law, the surety shall be exonerated from liability. It is true that this statute declares a legal right, but it is based upon equitable principles, those same principles which first induced courts of equity to take cognizance of this class of cases, and to determine that if the obligee should give time to the principal upon a new contract, it discharged the surety. The act is almost a reaffirmation of the rights, which the Supreme Court, and court of errors in New York, and the Supreme Court of Tennessee had declared in the cases already cited, that a court of equity would observe and enforce. Courts of equity originally took cognizance of this class of cases, not because of the particular state of facts existing, but in consequence of the relationship existing between the parties as creditor, principal and surety, and because, in the language of Chief Justice SPENCER, already quoted, "the creditor is under an equitable obligation and such is the essence of the contract, to obtain payment of the principal debtor and not from the surety, unless the principal is unable to pay the debt." An additional reason why chancery took jurisdiction in such cases, when the contract was by a bond, and all appeared to be principals, was that

the surety was estopped by his bond from averring in a court of law that he executed the instrument as surety, but in chancery might aver and establish the character of his undertaking. The statute is but declaratory, and an extension of an existing and originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance. The statute extends the original remedy, or so qualifies it that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal to entitle himself to a discharge from his suretyship.

From this examination into the authority, as well as principles which induced courts of equity originally to take jurisdiction of this interesting class of cases, and by which they are still governed in the exercise of that jurisdiction, we conclude, that the defence set up by the bill belongs properly to the original jurisdiction of equity, and that the statute introduces no new rule upon the subject, but is only declaratory of an existing recognized principle under the modification above suggested. Inasmuch as the character of the complainant's undertaking is apparent upon the face of the bond, there is no doubt but that they might have pleaded the facts set up by the bill, in the action at law against them, and, by proof, entitled themselves to a discharge upon the trial in that action: as in the case of the *State Bank vs. Watkins, ante* 123, decided at the present term of this court. In such a case the party is not estopped by his deed from averring and proving the nature of his undertaking, but is sustained by the instrument itself.

The defence being thus available either in law or equity, the next question for our consideration is, whether the complainants were bound to make their defence in the action at law, and having failed to do so, whether they are precluded from coming into equity for relief? In *Bently's Exr. vs. Dillard, ante* 79, decided at the present term, this court held that "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 make no defence at law, he may ask relief of the Chancellor." And it was further held that, where "the defence set up is purely legal and is exclusively cognizable in a court of law," as the alleged payment in that case, the party cannot resort to chancery for relief "unless he was ignorant of the facts pending the suit at law, or that they could not have been 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 industry and research evinced by the counsel in the investigation of this cause, as well as the ability displayed in the argument at the bar, demand of the court a reconsideration of the principle thus enumerated.

It is contended for the appellee, that in this State there is no concurrent jurisdiction common to courts of law and chancery, because it is provided by the Constitution, Art. 6, sec. 6, "until the General Assembly shall deem it expedient to establish courts of chancery the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law;" and that the General Assembly has enacted that "the circuit courts shall exercise chancery jurisdiction in this State in all cases where adequate relief cannot be had at law, and shall, in all things, have power to proceed therein according to the rules, usages and practice of courts of chancery, except when it may be otherwise provided by law, and to enforce their decrees by execution, or in any other manner proper for a court of chancery," *Rev. Stat. ch.* 23, *sec.* 1, and because further, it is contended, the *Rev. Stat. ch.* 43, *sec.* 3, concerning "courts of record" by excluding every conclusion. limits the jurisdiction of the circuit courts "as courts of equity, to all cases where adequate relief cannot be had by the ordinary course of proceedings at law," and that, that conclusion is sustained by other enactments of the legislature conferring upon the circuit courts, as courts of law, subjects which were formerly of equity jurisdiction. The language of these stat-

utes is precisely similar to that of the judiciary Act of Congress of Sept. 24, 1789, *ch.* 20, *sec.* 16, yet the Supreme Court of the United States has held that, that section of the act, by defining the jurisdiction of the circuit courts of the United States in equity, to extend only to cases where plain, adequate and complete remedy cannot be had at law, introduces no new principle, that the rule was so before, independent of the Act of Congress. *New York vs. Connecticut,* 4 *Dal.* 11, and that the remedies in the courts of the United States are to be at common law and equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country, from which we derive our knowledge of those principles. *Robinson vs. Campbell,* 3 *Wheat.* 212: that the section of the act is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. *Boyce's Exr. vs. Grundy,* 3 *Pet. R.* 210.

These decisions are not confined, in their application, as it is contended by the appellee, to the mode in which the jurisdiction shall be exercised, but extend to the remedy itself, and to the subjects over which the courts of the United States will take cognizance as properly belonging to chancery jurisdiction, and are conclusive as to the construction which must be put upon the acts of the General Assembly above cited; that they introduce no new rule, but are only declaratory of the jurisdiction of courts of chancery, as it stood before their enactment, and that therefore, our circuit courts have jurisdiction over the same subjects as are common to a court of chancery, and to be exercised according to the known rules of chancery as understood at the time of the passage of those acts. The circuit courts, however, are not dependant upon those acts of the legislature for their jurisdiction in matters of equity. The Constitution specially provides that "the circuit courts shall have jurisdiction in matters of equity until the General Assembly shall deem it expedient to establish courts of chancery," by which it meant such jurisdiction as a court of chancery could properly exercise at the time of the adoption of the constitution. "The right of appeal to the Supreme Court" is also

given, to be prosecuted "in such manner as may be prescribed by law." The jurisdiction with the right of appeal is conferred by the Constitution itself, but the manner in which appeals shall be prosecuted to the Supreme Court is left to the General Assembly to prescribe and define. If the acts of the legislature under consideration were subject to no other construction than that contended for by the appellee, they would become nugatory, as their provisions would be nothing more than a legislative attempt to limit and abridge the circuit courts, as courts of chancery, in the exercise of a general jurisdiction conferred by the Constitution itself.

Judge STORY, in his commentaries on equity jurisprudence, says that "one rule is that if jurisdiction has properly attached in equity, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases, when they formerly rejected it. This has been repeatedly asserted by courts of equity, and constitutes in some sort, the pole star of portions of its jurisdiction. The reason is, that it cannot be left to courts of law to enlarge or restrain the powers of equity, at their pleasure. The jurisdiction of equity, like that of law, must be of a permanent and fixed character. There must be no ebb or flow of jurisdiction dependant upon external changes. Being once vested legitimately in the court it must remain there until the legislature shall abolish or limit it; for without some positive act, the just inference is, that the jurisdiction shall remain upon its old foundation." 1 *Eq. Com.* 80. At page 96, he further says, "The first consideration then is, whether there is an adequate remedy at law, not merely whether there is some remedy at law. And here a most material distinction is to be attended to. In modern times, courts of law frequently interfere and grant a remedy under circumstances, in which it would certainly have been denied in earlier periods; and sometimes the legislature, by express enactment, has conferred upon courts of law, the same remedial faculty which belongs to courts of equity. Now (as we have seen) in neither case, if courts of equity originally obtained and exercised jurisdiction, is that jurisdiction overturned or impaired by this change of authority at law, in regard

to legislative enactments, unless there are prohibitory or restrictive words used, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority. And it would still be more difficult to maintain that a court of law, by its own act, could oust or repeal a jurisdiction already rightfully attached in equity." The doctrine thus laid down is fully established and sustained in *Brownley vs. Holland,* 7 *Ves.* 19. *Kemp vs. Pryor, ib.* 248, 249, *and* 250. *Ex parte Greenaway,* 6 *Ves.* 812. *Atkinson vs. Leonard,* 3 *Broc. Ch. Rep.* 218. *East India Company vs. Brodham,* 9 *Ves.* 466. *King vs. Baldwin,* 17 *J. R.* 384. *Post vs. Kimberly,* 9 *J. R.* 470.

The Supreme Court of Kentucky has laid down the rule, in a number of cases, as it was declared by this court in *Bentley's Exr. vs. Dillard.* In *Moffit vs. White,* 1 *Littell's R.* 324, the court held that, "if no defence had been made at law, there could have been no question of the propriety of Moffit's applying for relief to a court of equity. * * * But as the defence is admissable in both courts, after an attempt at defence in either, the loser ought not to be permitted to bring the same defence again in litigation in another court." In *Harlin vs. Wyngate,* 2 *J. J. Marsh. Rep.* 138, the rule is again repeated and laid down in the following language: that the complainant "might have made his defence at law, but his failure to do so did not deprive him of his right to appeal to the chancellor for relief. When the common law judge and the chancellor have concurrent jurisdiction, a party who makes defence at law, cannot afterwards seek redress in chancery, but if he makes no defence at law, he may ask relief of the chancellor. And in *Clay vs. Fry,* 3 *Bibb* 248, the same court held this opinion: "where matter of defence is purely legal and exclusively cognizable in a court of law, it is clear if a party fails or neglects to avail himself of it at law, he cannot be permitted to resort to a court of equity. But if the defence be (as it is apparent it is in this instance,) of such a nature that the party may avail himself of it either at law or in chancery, although he should fail to take advantage of it at law, he may nevertheless, according to the repeated decisions of this court, resort to a court of equity for relief in the same manner, and for the same reason that a party, having a claim of which a court of law and a

court of equity have concurrent jurisdiction may elect to which tribunal he will apply to enforce his claim." And so they held in *Saunders vs. Jennings,* 2 *J. J. Marsh.* 513. *Timberlake vs. Cobbs, ib.* 136. *Yetton vs. Hawkins, ib.* 2. *Power vs. Reeder,* 9 *Dana* 10. *Carlyle vs. Long,* 5 *Littell* 167. *Morrison vs. Hart,* 2 *Bibb.* 4. *Davidson & Co. vs. Givens, ib.* 200. *Hughes vs. McCoun's adm'r,* 3 *Bibb* 254.

These cases show an unbroken current of decisions running through a series of years by the highest tribunal of a sister State, sustaining the doctrine as laid down by this court.

In Tennessee, the current of decisions of her supreme court has been equally uniform, establishing the same rule. *Reeves vs. Hogan & Henderson, Cooke's R.* 175. *Stothart vs. Burnet & Raymond, ib.* 417. *Turney's ex'r vs. Young & Arnold,* 2 *Tenn. Rep.* 267. *Peyton vs. Rawlins,* 4 *Haywood R.* 77. *Appleton vs. Harwell and others, Cooke's R.* 242. *Russell vs. Stinson and others,* 3 *Hay.* 1. *Winchester vs. Gleaves' devisee,* 3 *Hay. R.* 213. *Winchester vs. Jackson and others, ib.* 305.

In the case of *The United States vs. Myers et al.,* 2 *Brock.* 516, upon motion to dismiss the bill for want of jurisdiction because there was a perfect remedy at law, Judge DANIEL said "the principle that wherever there exists a right or remedy exclusively *legal,* and perfect in its character and operation, a court of chancery cannot take cognizance, is fully recognized." Judge BARBOUR said "the principle which we are now considering, applies to those cases in which, ordinarily, the only remedy is at law; but the party comes into equity upon the ground that, by reason of some impediment in the way, or some unfair legal advantage acquired by his adversary, justice cannot be done him at law. The court inquires whether such impediment or legal advantage exists, and accordingly as it does or does not, grants or withholds relief. But it does not apply to those cases in which the courts of equity and law have a concurrent jurisdiction. In those cases, although the concurrent jurisdiction of the court of equity most probably originated from the consideration that there was not, or might not be an adequate remedy at law, yet where the concurrent jurisdiction has been es-

tablished, if the party elect to come into a court of equity, it is no objection to the jurisdiction in the given case, that the party might have a remedy at law, even although in that particular case, the remedy might be adequate. Thus, if one man, appoint another his bailiff or receiver, I suppose there is no doubt if money be received and not accounted for, the party may bring a suit in equity for an account, or an action at law of account or assumpsit; and the equity jurisdiction will not be ousted, because these concurrent remedies lie at law. Again, a party may now have a remedy upon a lost bond, but that does not oust the ancient equity jurisdiction. But what is more in point, is the case put by Mr. JOHNSON, which is admitted in all the books, that if a party have a mortgage and bond for the same debt, he may even pursue both simultaneously, until he gets satisfaction."

In the case of *Rathbone vs. Warren,* 10 *J. R.* 595, the defence set up by the bill might have been made in the action at law, but the court took jurisdiction and decreed the relief sought. The defence belonged to the original jurisdiction of equity, and consisted in the fact that time had been given to the principal, upon a new contract, to the prejudice of the surety. And so in *King vs. Baldwin,* 17 *J. R.* 384, the court entertained jurisdiction of the matter, and enjoined the judgment at law, upon a state of facts which had previously been decided in *Pain vs. Packard* to constitute a good defence at law.

The case of *Boyce's ex'r. vs. Grundy,* 3 *Peters' Rep.* 212, is also directly in point upon this question. That was a bill filed by Grundy to be relieved against a judgment at law, obtained against him by default, alleging fraud and misrepresentation upon the part of the defendant in procuring the execution of the contract.— Fraud is one of the acknowledged subjects of concurrent jurisdiction, and vitiates all contracts which are tainted with it, both in law and equity. Grundy could have established the fraudulent misrepresentation in the action at law against him. This he did not do, but elected to suffer judgment to go against him, and he appealed to a court of equity for relief. The judgment was perpetually enjoined, and the contract was rescinded. Upon appeal to

the Supreme Court of the United States, objections were made to the jurisdiction, because the defence might have been made at law, but the objections were overruled and the decree was affirmed. The court remarked, in the opinion delivered by Mr. Justice JOHNSON, that, "the defence of fraud might have been resorted to, and ought to have been sustained in that particular suit, and would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate relief, because it was a partial one."— Yet, we will remark, that it was an adequate remedy against the demand set up at law, but it is true that it was not adequate to procure the rescision of the whole contract in that action. The party, in the action at law, attempted to enforce but a portion of the contract, to which the defendant could have made a complete and successful defence, which he did not do; therefore, according to the principle contended for by the respondents, the court should not have enjoined the judgment.

The case of *Smith vs. McIver,* 9 *Wheat R.* 532, does not at all conflict with, or in any respect contravene the doctrine as settled in the cases cited. In that case the bill set up the same defence which had been made in the action at law, and which had been decided against the party, which judgment he was unable to have reviewed in the Supreme Court of the United States, because the amount in controversy was not sufficient to give jurisdiction. The bill sought a hearing in chancery upon the same state of facts, which had been adjudged against the party in the action at law.

There are several cases, in which the language of the judges imply a different doctrine to that laid down by this court in *Bentley's ex'r. vs. Dillard.* Many of the cases are based upon a peculiar state of facts, which clearly warrant the judgment pronounced upon them. But the facts of the cases, as well as the questions really involved in them and decided by the courts, prove that they do not form exceptions to the rule as laid down by this court.— Several of these cases we will examine.

Le Guen vs. Gouverneur & Kemble, 1 *John. Cas.* 436, was a bill filed to enjoin a judgment at law where the plea of *non-assumpsit* had been filed, and the right of recovery in the action at law had

been resisted in every stage of the proceedings. Upon the first trial in the circuit court, there was a verdict for the defendants; a new trial was granted by the Supreme Court, and upon the new trial, a special verdict was returned by the jury, and upon that verdict judgment was entered for the plaintiff, and the case was finally taken to the court of errors, where the judgment was affirmed. The defendants in the action at law filed their bill in chancery to be relieved of the judgment upon grounds of fraud, of which they had full knowledge at the time of the trial at law, and of which they could have availed themselves upon that trial, but having elected to place their defence upon a different ground, they were bound by the election. Having selected the grounds of their defence, submitted it to a court of law, contested and litigated the demand against them upon that ground, from the circuit court to the highest tribunal known to the laws of the State, it was certainly unreasonable, that the defendants should have been permitted to resort to chancery, upon wholly different grounds than those assumed upon the trial at law, and which were known to them in time to have been available upon that trial. And so KENT, J. seems to have regarded the case. In his opinion he says "the respondents had sufficient knowledge of the charge of fraud, and had they made, as they were bound to do, due inquiry and ordinary efforts, they would have obtained the proofs. But they have chosen to abide by one species of defence, and to waive another, and like other litigants, in similar cases, they must be concluded by their election."

In Virginia, although the chancellor seems to have laid down as an inflexible rule, for his own observance while sitting as chancellor, "that in all cases where relief can be had at law, it shall not be had in equity, unless there be some impediment at law," 4 *Hen. & Mun.*, yet upon a careful examination of the cases cited, they were all such as strictly come within the reason of that rule, according to the known rules of chancery. *Batcheldor vs. Elliot's adm'r.* 1 *Hen. & Mun.* 10, was a bill filed, among other things to establish a demand for work done for the intestate in his life time, and for other purposes; *Yancy vs. Fenwich,* 4 *Hen. & Mun.,* was

to enjoin a judgment on account of payments, without even stating a reason why the defendant did not defend himself at law. *Alderson vs. Biggers et al. ib.* 470, was a bill filed to set aside a sale made by the defendant, to avoid a *distringas* issued under a judgment in detinue for certain negroes. *Winfield vs. Crenshaw, ib.* 474, was to abate a nuisance, for which an action at law was then pending between the parties. And the other cases, cited by the counsel for the defendant in this case, are of similar character, and go to establish the rule that, where the defence is purely legal, the party must defend in the action at law, and cannot have relief in equity, unless he was ignorant of the facts, and could not by due diligence have availed himself of them upon the trial, or was prevented from making his defence by fraud of the opposite party, accident or mistake unmixed with negligence on his part.

And such seems to be the result of the decisions in Alabama. *Moore vs. Dial,* 3 *Stew.* 157. *Hill vs. McNeill,* 8 *Porter* 432—*French vs. Garner et al.* 7 *Porter* 549. *Haughy vs. Strong,* 2 *Porter* 177. *Thomas & Harris vs. Hearn, ib.* 262. *Teague vs. Russell & Moore,* 2 *Stew.* 420, were all cases in which the matters set up by the bills were purely legal, or on which the parties had defended or attempted to defend at law. In *Herbert & Kyle vs. Hobbs & Fennell,* 3 *Stew.,* the court admits the matter set up by the bill as a defence, and which was the same as in this case, was "available as a defence in law or equity," but held "that as the securities did not insist on its benefit, in their defence to the action at law, they were now precluded from relying upon it as a ground of equitable jurisdiction." The reported case does not state that the complainants made any defence to the action at law, but from the above remark of the court, it is presumed that they did, and that it was upon that ground that jurisdiction in equity was refused. In *Ellis vs. Bibb.* 2 *Stew.* 63, was a clear case of concurrent jurisdiction—the giving of time to the principal upon a new contract. The court took jurisdiction of the case, and granted relief by injunction.

The case of *Abram et al. vs. Camp,* 3 *Scammon* 290, and *Elston vs. Blanchard,* 2 *Scammon* 420, are to the same effect as the cases in Alabama. In the first case the court said "A party electing to

make his defence at law and failing, is precluded from going into chancery to litigate anew the same matters:" And in the last case the question did not necessarily arise as the bill was radically defective, and also the defence was a want of consideration of a promissory note.

The cases cited by the respondent from the decisions of the court of Appeals of Maryland do not sustain him. The substance of the bill in the case of *Dilly & Heckrotte vs. Branard,* 8 *Gill & John.* 170, the court remarked, "was properly and generally speaking, exclusively cognizable at law:" the court further stated that "Barnard made a full defence to the action at law," and "that the defence was a complete one, and that the cause was fully tried upon its merits." The case of *Prather vs. Prather adm'r.* 11 *Gill & John.* 110, was a bill praying to be relieved against a judgment at law upon the ground of payment before judgment. In the cases of *Green vs. Robinson,* 5 *How.* (Miss.) *R.* 80, and *Glidwell et al. vs. Hite et al. ib.* 110, the language employed by TROTTER, J., is certainly strong in support of the position that in cases of concurrent jurisdiction if party is sued at law, he must make his defence there, and cannot resort to equity. But do the facts of those cases authorize the opinion in the form in which it is expressed? In the first case an attempt was made to defend, and in the last, two pleas were filed impeaching the consideration of the note, and upon a fair trial a verdict was found against complainants, and judgment rendered accordingly. These cases were like *Le Guen vs. Gouverneur & Kemble;* the parties elected to defend at law, and were bound by their election, and if they did not submit their whole defence, the omission was a waiver or abandonment of the grounds of defence not submitted. Upon the argument, the counsel for the respondents, Anderson, who had himself presided in chancery with great credit in Tennessee, admitted that, "where the matter is of original equity jurisdiction, and the party does not submit it to a trial at law, is an exception to the rule that where courts of law and equity have concurrent jurisdiction, the party which first has possession of the subject must decide it." Again, to relieve against a promissory note upon grounds of want, failure or illegality of consideration

never constituted, as in the case of sealed instruments, a portion of the exclusive original jurisdiction of chancery; but it has been at all times competent for a court of law to administer relief.

Upon first looking into the cases, from the language employed by the judges in delivering their opinions, we were led to believe that there was a greater conflict in the authorities upon this question, than will be found to exist, when the cases are strictly scrutinized, and the facts and the points really involved are elicited. Many of the Judges, we admit, employ language fully sustaining the position of the respondent in this case, but as the cases show that the question was not fairly before them, the language employed is but *obiter,* entitled to high respect, it is true, as the opinions of men deeply read in the science of the law, but not entitled to the weight, or sufficient to overthrow the solemn judgments and opinions of those courts, where the question was really involved, and where the opinions, as has been shown, are so conformably to first principles. It may be also observed that many eminent jurists, like those of former times, entertain great jealousy against courts of chancery, and generally use all exertions to limit and restrict them in the exercise of their ancient jurisdiction. But we feel ourselves constrained to regard the ancient land marks of the jurisdistion of chancery, and will endeavor to uphold, so far as in us lies, that magnificent fabric of judicial ethics, which has been reared in resplendent majesty by the most profound geniuses that ever erected a superstructure of human wisdom, or fashioned a system for the administration of human justice. We feel no disposition to display a Vandal barbarism by lending a helping hand to demolish and destroy so splendid an edifice, replete with every thing calculated to demand our admiration and reverence; nor would we remove a single stone or efface a single feature by which the harmony of the superstructure might be endangered, or which might mar the beauty of its fair proportions. For the purpose of fully ascertaining and clearly expounding the rule upon the question now before us, we have looked into the recorded wisdom of the sages, by whom the system of equity jurisprudence was brought into order out of confusion; and also, into the decisions of those

courts in America, which have, with a jealous eye, watched all encroachments upon its boundaries, while they have resisted the exercise of jurisdiction properly legal by courts of equity, and have, on all occasions, marked out the limits of chancery, and asserted its undoubted prerogatives. While we do not oppose the action of the legislature in conferring upon courts of law, jurisdiction in matters originally equitable; or courts of law, by their own acts in disregard of the unmeaning trammels of technical absurdity, for the administration of strict and comprehensive justice upon the enlarged and ennobling principles of equity, in granting a remedy demanded by the clearest principles of right and wrong, in cases where they would, formerly, by adhering to the rigid rules of the common law, have denied it, we will defend and sustain courts of chancery in the exercise of their undoubted jurisdiction, and withstand its being taken from them by force, by the grasping and expansive arms of common law tribunals.

If because the legislature has conferred upon courts of law, power to grant relief in cases where they would formerly have denied it, or if because courts of law now, by their own acts, grant relief in such cases upon equitable principles, a party is compelled to submit his case to a court of law, the rule, as laid down by Judge STORY, is no longer law, "the jurisdiction" does not remain upon its old foundations, but it is "overturned and impaired by this change of authority at law." So far as defendants are concerned, courts of chancery would be completely ousted of portions of their ancient and intrinsically original jurisdiction. Defendants would be compelled to submit their defence to whatever tribunal their opponents might select, if they should be entitled to select a tribunal and if the plaintiff's cause of action should be purely legal, the defendant would be compelled to submit his defence to a court of law, however much better a court of equity might be qualified to grant him relief; and that too notwithstanding his defence belonged intrinsically to the original jurisdiction of chancery. Such we do not conceive to be the law, but that it is as it has already been declared by this court.

Where the defence is purely legal, and exclusively cognizable in

a court of law, as in the cases of *Dugan vs. Cureton,* 1 *Ark. Rep.* 31. *Andrews vs. Fenter,* 1 *Ark. Rep.* 186. *Cummins vs. Bentley,* 5 *Ark. Rep.* 9. *Watson vs. Palmer,* 5 *Ark. Rep.* 501, and a variety of other cases already cited, the party is bound to defend at law and cannot have relief in chancery, unless he was deprived of his defence by surprise, accident or mistake, or fraud of the opposite party, unmixed with negligence on his part, or unless he was ignorant of important facts material to his defence upon the trial at law, and which he could not have discovered and availed himself of by due diligence at the time of the trial.

Upon this careful review of the authorities, the court is confirmed in the correctness of the rule laid down in *Bentley's ex'r. vs. Dillard,* that where the jurisdiction of courts of chancery and courts of common law is concurrent, in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the legislature without prohibitory words, the party may make his election as to the tribunal to which he will make his defence, and once having made that election, he is bound by the decision whatever it may be, and that his right to submit the matter to a court of chancery is in no degree impaired by the power of courts of law, at this time, to take cognizance of the subject. And we may further add that if a party resists a recovery against him in a court of law, as in the case of *Le Guen vs. Gouverneur & Kemble,* upon a portion of his defence, where he had full knowledge of the whole of the defence, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is considered as having waived or abandoned the grounds of defence so omitted to be made. And further, as in the case of *Smith vs. McIver,* in a case of concurrent jurisdiction, if a party defends at law, chancery will not take cognizance of the cause, and rehear it upon the same state of facts, upon which it was tried at law without the addition of any equitable circumstances to give jurisdiction, but will respect the judgment of a court of competent jurisdiction already pronounced upon those facts.

The complainants in this case are sureties upon a bond for the

payment of money, by the form of which they might have been enabled, as has already been shown, to aver the fact of their suretyship without contradicting their deed; yet, we do not conceive that, for that reason, they were necessarily driven to make their defence at law, any more than did the form of the recognizance in *Rathbone vs. Warren,* compel the plaintiff, who was surety in a recognizance of bail, to submit his defence in the action at law in that case.

It thus appearing upon the face of the bill, that it contains sufficient equity to entitle the complainants to come into chancery, it will be next considered whether the plaintiffs did make such a defence in the suit at law against them as will preclude a hearing in equity. Neither the pleadings nor the evidence show that they made any defence whatever to that action. The respondent cannot complain that they waived objections to the circuit judge trying the cause, nor should they be prejudiced by that waiver, as it removed a constitutional impediment in the complainant's way for a speedy recovery of his judgment.

It is contended by the respondent that he did bring a proper suit within the time specified in the notice and required by law, but that the judgment and opinion of the Supreme Court upon that suit, as brought in *Watkins vs. McDonald et al.,* 3 *Ark's* 266, were erroneous. The decision in that case was not only by a court of competent but of exclusive jurisdiction, and was affirmed on appeal by the highest appellate tribunal known to our laws, and is final and conclusive upon the parties. The judgment rendered in such a case can never be collaterally reviewed by another tribunal. If the circuit courts, in the exercise of their chancery jurisdiction, could review questions thus solemnly decided, they would become appellate tribunals for the correction of the errors of the Supreme Court. Without citing other authorities (and they are numerous) *Smith vs. McIver,* already quoted, is conclusive upon this point. Every court must respect the judgments of other courts of competent jurisdiction, and if a judgment is pronounced in chancery, a court of law will never attempt to review it, or pronounce it erroneous; and so, as many of the cases examined and quoted by us in this opinion prove, if a court of law pronounces an opinion, a court of chan-

cery will never take cognizance of it upon the same state of facts upon which it was tried at law: but in all cases the questions so decided are considered as finally adjudicated. If the question involved in that case were now openly before the court for the first time, we are not prepared to say that our decision would not be different. The respondent did not, therefore, institute a valid action and prosecute the same to judgment and execution, as was required of him, and the case stands in the same attitude, as though he had instituted no action at all. His effort to do so, in connection with the fact that the appellants did not make their defence in the action at law against them, gives a reason why he should be exonerated from the costs of this suit.

We do not perceive that the appellants were guilty of delay in making their application for an injunction. If they waived, as is contended by the appellee, the constitutional disability resting upon the circuit judge to try the cause the judgment was obtained against them sooner than it would otherwise have been, and to injoin which they were compelled to make their application for an injunction to a special judge; and for aught that appears upon the record, they made their application for an injunction the moment there was a special judge competent to grant the same.

The facts of the solvency of McDonald at the time of the notice and subsequent insolvency, are not necessary to be enquired into, as has already been shown. If it were, it is doubtful whether the debt could have been made of him if the suit had been brought according to law within the time specified in the notice. A portion, however, and perhaps the whole might have been made, and so far, the failure to bring a proper action and prosecute the same to judgment and execution operated as a prejudice to the sureties.

The court, then, being of opinion that, from the facts of the bill and the admission contained in the answer and testimony taken in the cause, the sureties are discharged both in law and equity from liability, the decree of circuit court exercising chancery jurisdiction must be reversed, this cause remanded to said court, with directions to reinstate the injunction and to decree the same perpetual, and to decree the costs of this suit in that court against the complainants.