Ammidon *v.* Smith *et al.*

Insolvent discharge.

Under the laws of Rhode Island, a discharge, according to the act for the relief of poor prisoners for debt, although obtained by fraud and perjury, is a lawful discharge, and not an escape; and upon such a discharge, no action can be maintained upon a bond for the liberty of the prison-yard.

This was an action of debt, brought by the plaintiff against the defend-
*448] ant, in the Circuit Court of *Rhode Island, on a bond dated the 31st day of August 1810, with a condition, that if Simon Smith, a prisoner in jail, at the suit of the said Philip Ammidon, shall "continue and be a true prisoner in the custody, guard and safe-keeping of Roger Allenton, keeper of the said prison, &c., within the limits of the said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes, during the term of his restraint, then this obligation to be void," &c.

The defendants pleaded, severally, two several pleas—1. That said Simon did remain a true prisoner, until lawfully discharged, and made no escape.

2. That, after notifying his creditors, he did take the oath provided by the law of the state of Rhode Island, for the relief of poor prisoners confined for debt, before proper authority, which oath is as follows: "that he had not any estate, real or personal, in possession, remainder or reversion, over ten dollars, and that he had not, since the commencement of the said suits against him, or at any other time, directly or indirectly, sold, leased, or otherwise conveyed or disposed of, to, or intrusted any person or persons whomsoever with, all, or any part, of the estate, real or personal, whereof he hath been the lawful owner or possessor, with any intent or design to secure the same, or to receive, or to expect any profit or advantage therefrom, for himself or any of his family, nor had he caused, or suffered to be done anything whatsoever whereby any of his creditors may be defrauded."

*To the first plea, the plaintiff replied, that he did not remain a
*449] true prisoner, until lawfully discharged, &c. To the second, he replied, that, after the commencement of the action, on which he was imprisoned, and after the contracting of the debt on which the action was brought, the said Simon was seised and possessed of real estate to the value of $40,000, and that, fraudulently contriving with his sons, Darius and Simon, jun., his sureties in said bond, to defraud him of his said debt, did lease, sell and convey to said Darius and Simon, jun., and his other children, all his said real estate, and did intrust them with it, for his and their benefit, with intent to defraud the plaintiff, and that he might be admitted to the benefit of the oath mentioned in said plea; that said Simon did intrust with said Darius and Simon, jun., and his other children, all his estate, both real and personal, of the value of $50,000, with the advice, counsel and assistance, and under the direction of said Darius and Simon, jun., and his other children, with an intent and design to secure the same to the said Darius and Simon, jun., and his family, to defraud the plaintiff of his said debt; and he avers, that the said Simon did falsely and fraudulently take said oath, with intent wilfully, falsely and fraudulently to hinder, delay and defraud the plaintiff of his just debt aforesaid, and avoid the payment thereof, and thereby hinder, delay and defraud the other creditors of the said Simon of

their just debts. And this he is ready to verify, wherefore, he prays judgment, &c. In his replication to *the pleas of the two sureties, the plaintiff added an averment, that the said Simon took the said oath, they, the defendants, well knowing that the same was false and fraudulent; and that the said Simon did wilfully, falsely and fraudulently take the said oath, with intent thereby to hinder, delay and defraud the plaintiff of his just debt aforesaid, and avoid the payment thereof, and thereby hinder and defraud the other creditors of the said Simon of their just debts. To this replication, the defendants demurred, and the plaintiff joined. [*450

On the argument of this demurrer, the judges of the circuit court were divided in opinion, whether the replication was sufficient to avoid the plea, which division of opinion was certified to this court.

Pitkin, for the plaintiff.—The question is, whether the fraudulent conduct of the defendants, as stated in the pleadings, can be taken advantage of in a suit on the bond? The laws of Rhode Island allow persons imprisoned for debt on mesne process, or execution, the limits of the prison, on giving a bond to the creditor, to remain true prisoners, until lawfully discharged. Debtors, having no estate, who take an oath that they have not any estate over $10, and that they have not disposed of any part of the estate of which they were possessed, for their own benefit, or that of their families, or with intent to defraud their creditors, may be discharged from jail; but if confined on execution, the debtor must leave with the keeper, to be delivered to his creditor, his *promissory note, payable to such creditor, for the amount of the debt, in two years, with interest. [*451 (Digest, p. 227; Supplement, p. 73.) In this case, the debtor was released from prison by the forms of law; but this discharge being obtained by fraud and perjury, is wholly inoperative, and a departure from the limits, under color of such a discharge, is, in law, an escape, and a breach of the condition of the bond. Fraud vitiates every act; and this axiom of jurisprudence is consecrated by the laws of Rhode Island, which provide, "That if any such prisoner aforesaid shall be convicted of having sold, leased or otherwise disposed of, or intrusted his or her estate, or any part thereof, directly or indirectly, contrary to his or her aforegoing oath or affirmation, he or she shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation." (Digest, p. 231.) The word "convicted," could not have been used here technically, but merely to declare, that if any person should swear falsely as to the disposition of his property, he should not only be liable for perjury, but should receive no benefit from such false swearing. Any other construction would defeat the object of the statute. The laws of the state contain a similar provision respecting debtors obtaining the benefit of the insolvent act; yet it has never been held, that the fraudulent debtor must be first criminally convicted, in order to give effect to this provision.

Hunter, contrà.—1. The discharge was obtained *by a court of competent jurisdiction, and is, therefore, of complete obligation. [*452 The decision in the present case was not only that of a court of competent jurisdiction, and therefore, conclusive, but it was, in terms and effect, a decision upon the very point now in controversy, and between the same parties. The statute is solicitous to prevent fraud, and for that purpose

allows to the party creditors a right to show the probability that a perjury is intended, and by that means a fraud may be perpetrated, and applying to the conscience of the debtor, imposes on him an oath of detailed, explicit and unequivocal purgation. The present plaintiff has no right to complain; though duly summoned, he did not appear, and his contumacy has forfeited his right of action. There is no principle of our jurisprudence more firmly settled, more reasonable and salutary, than that a party shall not be permitted to turn his own omissions into a charge upon another. Even a court of chancery will refuse relief against fraud, if it be obvious, that it might have been urged by the complainant, as matter of defence in a previous suit at law. *Le Guen* v. *Governeur*, 1 Johns. Cas. 392; 2 Burr. 1009; 7 T. R. 269; 2 H. Black. 414.

The discharge of the defendant is said to be invalidated by conveyances previously made by him. But of these conveyances the plaintiff had notice; the law requiring them to be recorded, and the plaintiff admitting that he had actual notice. If, then, these deeds constituted the fraud, the defendant
*453] had notice of the fraud, and ought to have appeared *to oppose the discharge. Knowing the defendant not to be entitled to it, he stands by, and permits him to obtain it, with an intention to convert a bond, meant as a substitution for the prison walls, into a pecuniary security for his debt, and thirty per cent. in addition. The plaintiff's conduct is thus analogous to a permissive escape at common law, where neither the creditor nor the sheriff can retake the prisoner, even in a fresh suit.

2. Considering this as a question upon the construction of the bond, no breach of its condition can be inferred. Such a breach imports an actual wrongful escape; such as, at common law, would give the sheriff a right of recaption—such as would subject him to an action, and the prisoner to an indictment. The phraseology of the bond is that of the common law, and the definition of the correlative phrases "escape" and "true prisoner," are exact, invariable and immemorial. That can never be an escape, where the prison-doors are opened by the hand of the law. He must have remained a true prisoner, whose remaining a single moment longer, by restraint, would have subjected his keeper to an action for false imprisonment. Escape, according to the definition as ancient as Rastel, in his *Termes de la Ley*, and adopted by Staundf. P. C. cap. 26, and all the subsequent writers, means a violent or privy evasion of some lawful restraint. It is a solecism in language, to say, that a discharge and enlargement by a court, is an escape; for, if the court has jurisdiction, the sheriff cannot judge of the validity of
*454] the process and other proceedings of such *court, but must obey. Moor 274; 1 Dyer 66. By the ancient common law, prison-breaking, either in a criminal or civil suit, was felony, and it is still an indictable offence. 2 Inst. 509; Cro. Car. 210. Can it be pretended, that the prisoner could be convicted of this offence? or that our jurisprudence is so inconsistent, as to present a different result on the same question, merely because the forms are conducted by a civil and not a criminal procedure?

3. The plaintiff has mistaken his remedy, and the mistake proceeds upon a violent attempt to convert a contract that a man shall not escape, into a guarantee for the payment of money. Undoubtedly, the general policy of the law is, to compel payment from the debtor, by the imprisonment of his body; but its rigor has been mitigated by statute, which permits him to

see the light of heaven, and breathe its genial air, upon giving security that he will not abuse this privilege, by a forcible or privy escape. This is all the sureties engage for; their contract is prospective only; and if the prisoner has previously made himself poor, by voluntary conveyances, it has no relation with their obligation. In this case, the creditor's remedy is not upon the bond, for the original debt remains; the contract is unimpaired. There is a renewal—a novation, as the civil law terms it, of the debt. The prisoner is obliged to give his promissory note for the amount of the execution, with interest; and his enlargement may, even then, be prevented by the creditor, by paying one dollar a week for his support in prison. In order *to extinguish the original debt, and create a remedy upon the bond, the prisoner must be convicted of the fraud, by a criminal process. [*455 Until that is done, his oath is taken for truth; it is the medium of proof, and its substitute, as in cases of usury, or in the action of book-account, or book debt, which prevails in the eastern states, where the oath of the party to his original entries is *primâ facie* evidence to enable him to recover. If the prisoner be convicted of perjury, the sentence would proceed to vacate all the proceedings consequent upon the fraud. *Hubert's Case*, Cro. Eliz. 531; 12 Co. 123.

All the cases under the stat. 27 Eliz. c. 4, § 7, and other like statutes, from *Twyne's Case*, soon after the enactment of the statute, down to the case of *Meux* v. *Howell*, 4 East 1, exhibit the same combination of civil and criminal procedure. The insolvent law of Rhode Island of 1756, and the statute under which this bond was taken, are alike. That law is mostly a transcript of an English statute passed the year before, which act was one of those temporary insolvent laws which have been passed, from time to time, since the original act of Charles II., made, principally, in consequence of the great fire of London. It is not probable, then, that the word "conviction," in this law, was used in any other than its technical and correct signification of a conviction in a court of criminal judicature. Such a conviction would be conclusive evidence of the fact, if it afterwards came in question in a court of civil jurisdiction. The plaintiff may pursue his remedy in a court of common *law, or in chancery; or he may resort to the legislature of [*456 Rhode Island, which, by the peculiar institutions and usages of that state, possesses the power of nullifying the proceedings of the ordinary courts of justice. There being no written constitution, its sovereignty is limited by nothing but its federal compact with the United States; and in the exercise of its residuary sovereignty, it is like the British parliament, in a legal sense, omnipotent.(*a*)

4. But this case is settled by that of *Simms & Wise* v. *Slacum*, 3 Cranch 307, which is undistinguishable in point of principle, and the minute differences between the law of Virginia and that of Rhode Island strengthen and illustrate the main principle of decision.

Pitkin, in reply.—The discharge cannot be conclusive, because the proceedings are summary, and founded entirely on the debtor's oath; from the determination of the magistrates, no appeal lies, nor can they grant a new

(*a*) As to the power of parliament, see Lords' Journals, vol. 1, p. 191; Commons' Journals, vol. 8, p. 344, Sir Edward Powell's case.

trial. The prison-doors were not opened by the hand of the law, but by a fraud upon the law. In the case of *Simms* v. *Slaeum*, the court held, that if the surety had combined with the magistrate, in order to procure the discharge, he could not set it up by way of defence, to an action on the bond. By the laws of the state, perjury is punishable by three years' imprison-
*457] ment; but this punishment could not be inflicted, if a civil sentence *is at the same time, to be pronounced, that the party shall return to the debtor's prison. Neither an action at law, nor a suit in chancery, can enforce the plaintiff's just rights upon the lands conveyed, in the hands of *bonâ fide* purchasers. Nor can the case of *Simms* v. *Slacum* be considered as decisive of the present, since the provisions of the two statutes are so different, and the point did not come up directly in that case; but when it was again brought before the court, upon a special verdict, the principles settled were favorable to the present plaintiff. (5 Cranch 363.)

March 21st, 1816. Marshall, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows:—The act of the legislature of Rhode Island, on which this case depends, enacts, "That it shall and may be lawful for the sheriffs of the several counties to grant to any person imprisoned for debt, a chamber in any of the houses or apartments belonging to such prison, and liberty of the yard within the limits thereof, on his giving bond to the creditor, with two sufficient sureties, in double the amount of the debt, with condition to remain a true prisoner, until lawfully discharged, and not to escape. And in case the creditor shall put the bond in suit, and recover judgment thereon, for breach of the condition, he is to recover his debt, with thirty *per centum* on the principal sum, for his damages;" and the
*458] principal and his sureties shall be committed to close *jail until the judgment be paid. The law then prescribes the manner in which a poor prisoner may obtain his discharge. On application to any judge of the court of common pleas, or justice of the peace in the county, notice is to be given to the creditor, to appear at such time and place as the judge or justice shall appoint, to show cause why the prisoner should not have the benefit of the act. Any one judge of the court of common pleas, and any one disinterested justice, are then authorized to administer the oath prescribed in the law; "if, after fully examining and hearing the parties, the said justices shall think proper so to do." A certificate being given to the jailer, the prisoner is to be discharged, on leaving with the jail-keeper, to be delivered to his creditor, his note, payable to the creditor, in two years, with interest, for the amount of the execution. It is then enacted, that if any such prisoner shall be convicted of having sold, leased or otherwise concealed or disposed of, or intrusted, his or her estate, or any part thereof, directly or indirectly, contrary to his or her oath or affirmation, he or she shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation.

The question to be decided by this court is, whether a prisoner obtaining a discharge according to the forms of law, by means of fraud and falsehood, has broken the condition of this bond? There is so much turpitude in the act confessed by the demurrer, such reluctance to allow any man
*459] to avail himself of so flagitious a defence, that it is *not without some difficulty, this question can be considered as a naked point of law.

It is, however, the duty of the court so to consider it; and this has been attempted.

The object for which this bond was given is of decisive importance, in the inquiry respecting the extent of the obligation it imposes. It is certainly, not given for the purpose of improving the security of the creditor, but simply for the purpose of allowing the debtor the benefit of the prison-yard, without impairing the right of the creditor to the custody of his person. The yard, and a comfortable chamber, are substituted for the walls of a jail; but as this substitution would facilitate an escape, it was deemed reasonable, to secure the creditor against the abuse of an indulgence which the humanity of the law afforded. This consideration would suggest the propriety of provisions against an actual escape, the means for making which were furnished by allowing the use of the prison-yard; but not againt the employment of fraud or artifice to obtain a discharge, in the manner prescribed by law, which may be employed in jail, as well as in the yard, and the means of employing which are not in any degree facilitated by substituting the yard for the walls of the jail. The condition of the bond is, to remain "a true prisoner, until lawfully discharged, without committing any escape or escapes, during the term of his restraint," and the certificate is a mode of discharge prescribed by law, which terminates "his restraint." If, as is conceived, this bond was intended to guard against the dangers created *by allowing the prisoner the liberty of the prison-yard, not against [*460
a fraud already committed, which is entirely unconnected with the bond, and the enlargement of his limits; then it is not broken by the practice of such fraud. The persons perpetrating it are, in a high degree, criminal, and ought not to be permitted to avail themselves of such conveyances. The jurisprudence of Rhode Island must be defective, indeed, if it does not furnish a remedy for such a mischief. The replication charges these conveyances to have been executed by the defendant, pending the suit, for the purpose of defrauding the plaintiff, of defrauding his creditors generally, and of enabling himself to take the oath of an insolvent debtor. It further charges, that after the execution of the bond, the false oath was taken, with the knowledge of the sureties. However criminal this act may be, it cannot be punished, by extending the obligation of the bond, on which this suit was instituted. The judgment rendered by the magistrates was obtained by perjury, but the discharge of the prisoner, which was the consequence of that judgment, was in the course of law, and is not deemed an escape.

This question appears to have been considered by the court in the case of *Simms et al.* v. *Slacum;* and although the question was not there decided, because in that case the sureties alone were sued, and did not appear to be concerned in the fraud of their principal, yet the reasoning of the court certainly applies to this case. The decision in the case of *Simms et al.* v. *Slacum* has been revised, and the court feels no *disposition to depart [*461
from it. The reasoning it contains need not be repeated, but is considered as applicable to this case.

There is some difference in the provisions of the two statutes, but not enough to induce a different construction as to the extent of the obligation of the bond for keeping the prison-rules. The law of Rhode Island enacts, that if any prisoner shall be convicted of having disposed of any part of his

estate, contrary to his oath or affirmation, "he shall not only be liable to the pains and penalties of wilful perjury, but shall receive no benefit from said oath or affirmation." Conviction is a technical term, applicable to a judgment on a criminal prosecution, not to a proceeding on this bond. The act contemplates a prosecution on which the party may be adjudged to suffer the penalties of perjury, in addition to which he is to be deprived of all benefit from the oath or affirmation. If this section has any influence, it would be to show that, in the contemplation of the legislature, such conviction is necessary, previous to the establishment of the absolute nullity of the oath or affirmation. The court, however, does not mean to indicate that the effect of the oath and of the discharge granted by the magistrates might not be controverted, in any proceeding against the parties, either in law or equity, other than in a suit on the bond for keeping the prison-rules.

CERTIFICATE.—This cause came on to be heard on the transcript of the record from the circuit court for the district of Rhode Island, containing the
*462] points *on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, that the replication of the plaintiff is insufficient to avoid the plea of the defendant. All which is ordered to be certified to the said circuit court.

Certificate for the defendant.

JONES *et al. v.* SHORE'S Executor *et al.*

UNITED STATES *v.* JONES *et al.*

Distribution of penalties.

A bond was given to T. S., the collector of the district of Petersburg, under the 2d section of the embargo act of the 22d of December 1807, and a suit was afterwards brought by him, on the same bond, in the district court, and pending the proceedings, to wit, on the 30th of October 1811, J. S., the collector, died; and judgment was recovered in favor of the United States, on the 30th of November 1811. On the 26th of the same November, J. J. was appointed collector of the same district, and entered on the duties of his office, on the 14th of December 1811; until which time T. S., who was deputy-collector under J. S., at his decease, continued, as such, to discharge the duties of the office. The judgment of the district court was subsequently affirmed by the circuit court. When the bond was taken, A. T. was surveyor of the district, and continued in that office, until his death, which was after the commencement of the suit on the bond, and before judgment thereon, and was succeeded by J. H. P., who was appointed on
*463] the 30th of March 1811, and entered on the duties of his office, on the 16th of the same *month. It was *held*, that the personal representatives of the deceased collector and surveyor, and not their successors in office, were entitled to that portion of the penalty which is, by law, to be distributed among the revenue-officers of the district where it was incurred. There being no naval officer in the district, the division was adjudged to be made in equal proportions between the collector and surveyor.

United States *v.* Jones, 1 Brock. 285, affirmed.

THE material facts of these cases are as follows:—On the 23d of November 1808, a bond was executed at the custom-house of Petersburg, in Virginia, to the United States, by Thomas Pearse, master of the ship Sally, of Philadelphia, and Robert McAdam, Daniel Filton and George Pegram, jun., in the penal sum of $46,300, upon condition, that if the cargo of said vessel, consisting of 830 hogsheads of tobacco, intended to be transported in said vessel from the port of Petersburg to the port of Boston, in Massachusetts,