parties were not described as citizens of different states, the decree, dismissing the bill, was affirmed.

DECREE.—On motion of the appellants, by their counsel, and on inspection of the transcript of the record of the circuit court of the southern district of New York, it is decreed and ordered, that the decree of the said circuit court, in this case, be and the same is hereby affirmed, it not appearing from the record, that the said circuit court had jurisdiction *in said cause. The said affirmance to be without prejudice to the complainants on the merits of the case.

*452]

The JONQUILLE.

Dismissal of appeal.

An admiralty suit, where an appeal has been taken from the circuit court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken, and not prosecuted.

March 8th, 1821. *Wheaton,* for the respondents, moved to docket and dismiss the appeal in the case, which was a prize cause, commenced in the circuit court of North Carolina, in which a decree for costs and damages had been entered against the captors, from which they appealed, but had not prosecuted their appeal. He produced a certificate from the court below to that effect.

THE COURT stated, that the case was within the spirit of the 20th rule of court, although that rule applied, in terms, only to writs of error.

Motion granted. (*a*)

*453]

*HUGHES *v.* BLAKE.

Equity pleading.

A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the defendant, of any matter directly charged by the bill, in the defendant's answer, or answer in support of his plea.[1]

A replication to a plea, is an admission of the sufficiency of the plea, as much as if it had been set down for argument and allowed; and all that the defendant has to do, is to prove it in point of fact, and a dismissal of the bill, on the hearing, is then a matter of course.[2]

Under what circumstances, a plea of a former judgment at law, for the same cause of action, is a good bar in equity.

Hughes *v.* Blake, 1 Mason 515, affirmed.

APPEAL from the Circuit Court of Massachusetts.

The object of the bill in equity filed in this case, was, to recover from the defendant, Blake, a sum of money arising from the sale of a tract of land, called Yazoo lands, alleged to have been made in 1795, by the defendant, as

(*a*) See new rule of court of the present term, *ante*, Rule 32.

[1] Union Bank *v.* Geary, 5 Pet. 99; Carpenter *v.* Providence Washington Ins. Co. 4 How. 185; Parker *v.* Phetteplace, 1 Wall. 684; Tobey *v.* Leonards, 2 Id. 423; and see Godden *v.* Kimmell, 99 U. S. 206-7.

[2] Rhode Island *v.* Massachusetts, 14 Pet. 210.

agent of certain persons named in the bill, in which lands the plaintiff, Hughes, claimed an equitable interest, in common with the immediate principals of the defendants, and therefore, to be entitled to a proportion of the proceeds resulting from the sale. The bill also charged, that the defendant had rendered himself distinctly liable for a specific sum of money, in virtue of a certain order, having reference to the plaintiff's interest in the lands, drawn by one Gibson, in September 1796, in favor of the plaintiff, and accepted by the defendant, with certain modifications and conditions, as particularly expressed in the acceptance.

*The defendant pleaded in bar, both to the relief and the discovery sought by the bill, a former verdict and judgment at law, rendered in [*454] his favor, in the supreme court of Massachusetts, in the year 1810, upon a suit commenced against him by the present plaintiffs, in 1804, being long before the exhibition of the present bill, for the same cause of action. The plea averred, that the judgment at law was still in force; that the matters in controversy, and the parties in both suits, were the same; that the whole merits of the case, as stated by the bill, were fully heard, tried and determined in the action at law, and in a court of competent jurisdiction; and that the judgment was obtained fairly, and without fraud, covin or misrepresentation, or the taking any undue advantage. It was also averred by the plea, that no evidence had come to the plaintiff's knowledge, since the trial at law, respecting any of the facts alleged in the bill, and which he did not, or might not have produced on such trial: and further, that the defendant had, at no time, as alleged in the bill, obtained of a certain E. Williams, any allowance or payment, for, or on account of, his, the defendant's, being liable as bail for Gibson, in the plaintiff's bill mentioned, and for which liability he had claimed in the action at law an indemnity out of a fund, on the credit of which he had accepted the order in favor of the plaintiff. The defendant, then, without waiving his plea, proceeded to answer and deny the matters alleged in the bill, as circumstances of equity to avoid the effect of the proceedings at law, and which he had already denied by the averment in his plea.

*To this plea and answer, the plantiff filed a general replication, in the usual form, and witnesses were examined by both parties. [*455]

At the hearing, the indentity of the causes of action were sought to be established, without the aid of collateral proof, from a comparison of the matters set forth in the bill, with the averments contained in the several counts of the plaintiff's declaration; it appearing, moreover, that, in the trial at law, the plaintiff had submitted to the jury, in support of these counts, the depositions of the same witnesses, on whose evidence he relied, in support of his bill. The principal other question of fact related to the subject of the negotiation respecting the lands before mentioned, alleged in the plaintiff's bill to have taken place in 1814, between the defendant and E. Williams, whose testimony respecting it, was insisted by the plaintiff, not to be sufficient to outweigh the effect of the positive denials contained in his plea and answer.

The cause being heard on the issue joined, and the proofs taken in it, the court below decreed that the plea was sufficiently proved, and therefore, dismissed the bill with costs, and the cause was brought by appeal to this court.

February 19th. *Pinkney*, for the appellant, stated three questions for the consideration of the court: 1. Whether the plea was in itself sufficient, supposing its sufficiency to be now an open qnestion? 2. Whether it has been proved? 3. Whether its sufficiency, supposing it is proved, is now open for *inquiry? The first of these questions being answered nega- *456] tively, and the the third affirmatively, would produce a reversal of the decree: and let them be answered as they might, if the second be answered negatively, a reversal would equally follow.

1. The plaintiff's allegations must be taken to be true, except so far as the averments in the plea, snd the answer in support of the plea, deny them. Coop. Eq. Pl. 231; 2 Atk. 155; Gilb. Ch. 158. And if the plea does not deny whatever is alleged, and if true, would make the plea no bar, it is no plea. Coop. Eq. Pl. 226, 266. The result of an examination of the allegations in the bill will be found to be, that the defendant was the legal owner of the notes taken for the sale of the lands, by taking and holding them in his own name; that the plaintiff, and the other persons interested, were *cestuis que trust*, according to their respective interests, explained and known to the defendant; that the defendant's conditional acceptance of the order in the plaintiff's favor, so far as it affected to authorize him to apply the plaintiff's interest as an indemnity for his liability as Gibson's bail, being without the plaintiff's consent, did not destroy the defendant's character of trustee. That when he afterwards sold the plaintiff's interest (it being still a merely equitable one, in the view of chancery, the conditional acceptance being of no force in equity), in order to apply the money to the wrongful purpose of the conditional acceptance, the defendant still remained answerable, in equity, upon the foundation *of the original trust. That the *457] defendant knew all the material facts charged in the bill, out of which arose the trust, and breach of trust, and his alleged continuing accountability. That the defendant insisting upon thus misapplying the money, the plaintiff, mistaking the proper *forum*, sued the defendant at law, and a verdict and judgment passed against him; and the bill charges the defendant's breaches of trust, and abuse of his power as legal owner, in taking advantage of the plaintiff, and the impossibility of his obtaining a full and fair trial of the whole merits law, as reasons why the verdict and judgment should not be suffered to prevent relief in equity. The defendant, notwithstanding all this, pleads the verdict and judgment in bar of the relief and discovery. The plea leaves uncontradicted whatever in the bill showed a mere equitable trust, and undue advantage taken of the defendant's character of legal owner and holder of the fund. Since, then, the plaintiff could obtain relief nowhere, but upon the mere trust, which was properly cognisable in chancery; and even if it were barely possible, that a court of law could relieve, and that great difficulties only stood in the way, arising out of the nature of the subject, this miscarriage at law ought not to oust a court of equity of its power of relief, in a matter appertaining to its jurisdiction.

It cannot be denied, on the other side, that a judgment at law may be relieved against in equity, upon equitable inducements of various kinds. Cases of this sort furnish the familiar and ordinary business of the court of *458] *chancery. Coop. Eq. Pl. 141; Tothill 231; 1 Ch. Cas. 56. The only question, therefore, is, upon what grounds will it relieve? I admit, with Lord Chancellors ELDON and REDESDALE, that mere inattention,

omission or neglect, however fatal the consequences may be, shall not, of itself, be a ground of equitable relief against a judgment at law. *Ware* v. *Harwood*, 14 Ves. 31 ; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201. But where the matter is cognisable in equity, although also cognisable at law, and effectual cognisance has not, and cannot be taken at law, chancery will relieve against a judgment at law ; especially, if the matter is better adapted to equitable cognisance, and forms a fovorite subject of that jurisdiction. The instances put by Lord Redesdale, of cases in which equity will interfere, although a verdict and judgment have been obtained at law, are only put by way of example. 1 Sch. & Lef. 204. They are not all the excepted cases : and the case actually before him, where he refused to interfere, was a case of *crassa negligentia* on the part of the defendant at law. If there has been no such gross negligence, and if the court of law be not only of competent jurisdiction, but competent to do justice in the case, from the nature of the subject, and its mode of proceeding, doubtless, its judgment is conclusive. But this does not exclude the right of equity to control the judgment of a court of law, for equitable purposes. It is no just reproach to a court of law, that it cannot do complete justice, in all cases where it may have jurisdiction. The *question is, whether it has adequate [*459 jurisdiction : and if it has not, equity will and ought to interfere : as in the case of a bond given for the purchase-money of lands, and a suit at law brought upon it ; and after judgment, a fatal defect discovered in the title ; a court of equity will enjoin and relieve against the judgment, although it has no natural jurisdiction over a suit brought for a specialty or simple-contract debt. In the view of a court of equity, a party who elects an incompetent *forum*, is not concluded by its judgment. The question still recurs, had he, and could he have, justice there?

The terms of the averment of the present plea, are also important tc be considered. The plea alleges, that the merits were fully and fairly tried. But if it appears that, in the nature of things, there were inherent difficulties in opposition to a full trial of the real merits, the plea cannot be true. The general rule, that whatsoever might have been, and was, litigated at law, is concluded, need not be denied, if taken with this qualification, that it be fully and fairly litigated, and there be no equitable reason why the judgment should be set aside. But if there be new evidence discovered, or fraud, or an unconscientious advantage taken by the opposite party, or matters of equity which a court of law could not effectually investigate and decide, then the judgment at law is not conclusive.

Let us now see, whether this case, as it appears on the bill, and the record pleaded as a bar, was properly and effectually relievable at law. And in order to do this, it is necessary to examine the counts of *the plaintiff's declaration in the suit at law, which a court of equity will do [*460 with a hypercritical eye, when it becomes necessary to inquire whether a judgment of a court of law is fit to bar its own jurisdiction. It does not act on such an occasion, as an appellate court : but it looks to the case with a view to see whether justice could be effectually done by the court of law. Lord Redesdale, in the case before alluded to, inquired what was *open* before the jury (1 Sch. & Lef. 204); and an examination of the counts in this declaration has the same object, and the further object, to ascertain whether any judgment could have been recovered upon them.

The learned counsel here entered into a minute analysis of the counts, in order to show that complete justice could not be done in the action at law upon the equitable merits of the case, considered as a case of trust, complicated accounts, and fraud.

The original trust was never tried, and could not be tried. A declaration could not be framed to try it fully and effectually. A complicated account may, indeed, be examined at law. There is no defect of jurisdiction; but there is an insurmountable difficulty in doing justice. A court of law is not adapted, although it has jurisdiction, to arrive at a just result on such a subject; and as matters of account are a proper subject of equitable jurisdiction, equity will interpose, on the mere ground of that difficulty, notwithstanding there has been a trial at law. The want of the defendant's oath, *461] which this bill, in seeking *relief, calls for, was alone an insurmountable obstacle. This is not a bill for discovery merely; if it was, it could not be maintained; for then it would not be a case for equitable cognisance, and the plaintiff should have come here for a discovery, during the *lis pendens* at law. But although it is a bill for relief, discovery is most important to that relief. The relief was always in the power of a court of equity, and one of the reasons why this court ought not to be satisfied with what has been done at law, is, that at law, there could be no discovery. The examination into the trust, and its abuses, could not be complete, without the defendant's oath. If the plaintiff had come into equity, seeking discovery and relief, while the suit was depending at law, the court of equity would have taken the whole cause under its care, and would have determined it, as now required to do; and the principle is not altered, by the suit at law having proceeded to judgment, since the cause has not yet been decided upon the defendant's oath. Where a bill alleges that a verdict has been obtained, on a matter of equitable cognisance, against the defendant's knowledge of the merits, a reliance upon such verdict is as much against conscience as to that defendant, as the alleged breach of trust itself. In this case, the plea is no bar to the relief, if the defendant's knowledge makes the verdict unconscientious. A judgment may, indeed, be pleaded in bar, where the matter has been fully tried, and where the judgment is not impeached through the conscience of the defendant. If the bill alleges nothing, that if *462] true, convicts the defendant of knowledge that his *verdict is against conscience, the plea is good. But a court of equity ought not to relinquish its jurisdiction, until the defendant has maintained the verdict, on a matter of equitable cognisance, by his oath.

2. It has already been shown, that the merits of the cause could not have been fully and fairly tried at law, and the judge's charge shows that they were not. But it is said, that the plaintiff ought then to have moved for a new trial: and certainly, upon a matter which a court of law only had a right to dispose of, this would have been the proper course: but this is a matter of equity, and if the party will set up a trial at law, as a bar to equitable relief, he must show it, as he alleges it to be, a full and fair trial, and that the equitable merits were really left open to the jury.

3. But supposing the plea to be proved, is its sufficiency now open for inquiry? And certainly, the general rule would exclude that inquiry: pleas are not usually forestalled by the bill; but if the bill shows what, if true, would invalidate the plea, taking issue on it does not cure the defect. Coop.

Eq. Pl. 227. But it has been before shown, that this bill does allege such matter, and the plea admits the whole of it, by not denying it. It is true, that the defendant cannot amend his plea, but he may be ordered to answer, reserving him the benefit of his plea at the hearing, and in that mode justice will be done.

* *Webster* and *Jones*, contrà, insisted, that no question could arise on the sufficiency of the plea in point of law, for by going to issue on [*463 the facts alleged in the plea, the parties have waived all objections of that nature: or, in the words of GILBERT, "if a party replies to a plea, before it comes on to be argued, this is as full an admission of the plea, as if it had been argued and allowed; for the plea, by this replication, is allowed to be good; only the defendant is put to the proof thereof; and so he may be, when it is argued and allowed. But if he proves his plea, the bill must be dismissed at the hearing." Gilb. For. Rom. 98. (Mitf. Eq. Pl. 244; Beames' Eq. Pl. 317; 2 Eq. Cas. Abr. 79; Wyatt's Pr. Reg. 376; 1 Sch. & Lef. 725.) Thus, if the defendant, in pleading a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all that the defendant has to do, is to prove his purchase; and even if the plaintiff proves notice, it is immaterial; for it is the plaintiff's own fault, if he does not set down the plea to be argued, in which case it would be overruled. *Harris* v. *Ingleden*, 3 P. Wms. 95. So here, if the plea had been bad, the plaintiff should have set it down for argument. The plea consists of two material parts; it alleges a judgment at law, for the same cause of action, in a court of competent jurisdiction; and it avers that there is no ground to impeach that judgment, and no new evidence discovered to enable the plaintiff to go behind it. There is the same strictness of pleading in equity, as at law (2 Atk. 632); but if the rule were not so, this plea is *sufficient. The general prin- [*464 ciple is clear, that a judgment in a competent court, is a bar to a proceeding for the same cause of action in any other court. It is conclusive as to every matter which might have been litigated and decided in the first suit. The rule in equity is the same in this respect as at law. 3 Atk. 626. Nor does it make any difference, that the case is proper, in itself, for equity jurisdiction. If so, a judgment at law could never be pleaded in bar of a suit in equity. Questions of fraud and trust are not the peculiar and exclusive subjects of equity jurisdiction. Whenever courts of common law can reach these subjects, they dispose of them effectually and conclusively. 1 Burr. 396; Mitf. Eq. Pl. 90; 3 Bl. Com. 431; 2 P. Wms. 156; 1 Ibid. 154. If a particular subject is common to the two jurisdictions, the judgment of that tribunal which first appropriates it to itself, must necessarily be conclusive, otherwise, the party might speculate upon his chances of recovery in both: and as the courts of the Union are now constituted, we should be presented with the novel spectacle of a party suing on both sides of the circuit court for the same cause of action. Here, the judgment is as good a bar to the discovery as to the relief. Mitf. Eq. Pl. 193. So, a plea of the statute of limitations, or the statute or frauds, is a bar to discovery as well as relief. Coop. Eq. Pl. 251, 255, 257; 1 Bro. C. C. 305. And it is now the settled course of proceeding, that if a bill is filed for discovery and relief, *and the plea is sufficient to bar the relief; it is held snfficient to bar the discovery. 9 Ves. 75. It is the general rule, that a plea confesses [*465

and avoids; but that principle does not apply in this case, where the defendant denies every allegation of the bill, and supports his denial by the former trial and verdict. Had it been a plea of payment, or release, or of the statute of frauds, or limitations, the rule might be applicable. The real defence is, that this matter has been before tried, and found against the plaintiff. If the defendant had answered more, he would have overruled his own plea.

Where is the authority for asserting, that it is no objection to the present bill, that a discovery was not sought *pendente lite?* What use could now be made of a discovery? It could not aid any proceeding elsewhere: and could only be used as a ground for relief in the present suit. The whole of the argument on the other side, on this point, rests on the notion, that the plaintiff may sue at law, and being defeated there, may, of course, file a bill in equity for the same matter. The unavoidable consequence of that doctrine would be, that in no case could the judgment of a court of law be pleaded in bar to a suit in equity. Here, the cause of action is equally within the jurisdiction of a court of law, which has pronounced upon it, and whose judgment must, therefore, be conclusive in all other courts; and the argument against its conclusiveness, in this case, goes on the supposition, that *466] the defendant cannot set up *the judgment, without undertaking to prove, that it was a correct judgment on the merits, or, in other words, without going through the whole process of trial again. The plaintiff had to choose between three different courses. He might sue in equity; he might sue at law, and file a bill for discovery, *lite pendente;* or he might bring an action at law, and go to trial, without the aid of a discovery. He elected the latter course, and must be bound by it. The verdict and judgment constitute a flat bar. The plaintiff is not now entitled to a discovery, unless he is entitled to relief; he is not entitled to relief, because it is a *res judicata.* A court of equity cannot try over again, the merits which were fully tried in the former cause. To revise the merits of a cause, which has been once tried between the same parties, and in a competent court, is the province of an appellate court, and not of a co-ordinate tribunal, or one of a different jurisdiction. Parties must prosecute their rights in due time, and before the proper *forum;* and having once elected their *forum*, the decision is conclusive, not only as to the matter actually adjudged, but as to every matter which might have been litigated and decided. *La Guen* v. *Gouverneur*, 1 Johns. Cas. 436, *per* KENT, C. J.; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201. In the action at law, the judge's charge might have been excepted to, if erroneous, and a new trial granted, which is, in itself, a sort of equitable right; but if the charge was correct, no injustice has been done. The present bill avows it to be for the same cause of action, and does not allege any *467] *incompetency in the jurisdiction of the court of law. It sets up no new right, but merely contends, that the plaintiff had a right then, on matter discovered since, but existing at the time. The question now is, not as to the goodness of the counts in the plaintiff's declaration, but whether the merits have been substantially tried upon them: not intending, however, to admit, that the counts were not sufficient. The regular course of the court of chancery, in such a case, is to refer them to the master, to report whether the cause of action be substantially the same. 1 Vern. 310, note (Raithby's Ed.).

As to the principles which govern courts of equity in setting aside verdicts as against equity, it must be shown, that at the time of the trial at law, some material fact existed, within the defendant's own knowledge, different from the finding of the jury. *Williams* v. *Lee*, 3 Atk. 224. Here, there is no such fact: and even if there had been, if it was also within the plaintiff's knowledge, he should have filed a bill of discovery, *lite pendente*, to obtain the defendant's answer on oath. Supposing the testimony of E. Williams to be true, it establishes no fact, existing at the time, which is essential to entitle the plaintiff to relief in equity. *Standish* v. *Radley*, 2 Atk. 178. But his testimony is explicitly contradicted by the defendant's answer: and the plea must, therefore, stand, being supported by the answer, and contradicted by the testimony of a single witness only, unsupported *by [*468] circumstances to strengthen its credibility. *Walton* v. *Hobbes*, 1 Atk. 19, and the cases there cited; 2 Ves. jr. 243; 1 Bro. C. C. 52; 1 Johns. Ch. 459; 3 Ves. jr. 170. The transactions between the parties took place more than twenty years ago. The plaintiff had an opportunity of establishing his pretended claim, in the tribunal which he had elected, and in which he failed; and the defendant has a just right to avail himself of that failure as a bar to any further proceedings, in a case where, besides the solemn trial which has already been had at law, he has now purged his conscience of the allegations of fraud, which have been made against him, without the slightest foundation in the facts and circumstances of the case.

March 10th, 1821. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the pleadings, proceeded as follows:—In examining whether there be any error in the decree of the court below, we shall have to inquire, whether the plea of the respondent is proved; and if so, whether any other decree, except that of dismissing the bill, could have been made by the court below.

In examining the question of fact, that is, whether the plea were proved or not, it will be borne in mind, that no decree can be made against a positive denial of the defendant, of any matter directly charged in the bill, on the testimony of a single witness, unaccompanied by some corroborating circumstance. *There is no pretence, that there is anything untrue in [*469] any of the averments which the plea contains, on the subject of the proceedings at law—such as, that a judgment was obtained by the respondent; that the same is in full force, &c. The first averment in the plea, which will require a more particular consideration, is the one denying that the respondent had at any time obtained from E. Williams, any allowance or payment, for or on account of his being bail for Gibson, in an action brought against him by one Evans. The respondent had been permitted, as appears by the facts of the case, to retain out of a fund, on which the appellant had a claim, a considerable sum, to save him harmless against this responsibility, and which was, in all probability, allowed to him, on the trial at law. If, therefore, it could have been shown, that Blake had been fully indemnified, or paid, for this liability, from any other quarter, and that this fact had come to the appellant's knowledge, since the judgment at law, it would seem no more than equitable, notwithstanding these proceedings, thus far to open the account between them. But has this been done? The allegation of the bill, in substance, is, that Blake has been twice indemnified for

the same loss, or in other words, that he had been twice reimbursed the moneys which he paid as the bail of Gibson. This fraud, which is so unhesitatingly charged upon the respondent, is not made out by any testimony in the cause. Independent of Blake's positive and absolute denial, which is equivalent to the testimony of one witness, there is nothing in the deposition *470] of Williams, who is the only *witness to this point, to establish the fact, as stated in the bill. This gentleman has been twice examined, once in the year 1805, as a witness in the trial at law ; and again, as a witness in this cause. On his first examination, he stated, that he was informed by Blake, that he held in his hand about $6300, which had been received of Henry Newman, as an indemnity for his having become bail for Gibson, in an action for some person whose name he did not recollect, on which pretence, Blake refused to pay him this sum. In his second deposition, which was taken in this cause, he swears that he was informed by Blake, that he had received from Newman about $6000, which he should retain, in consequence of his liability to Evans, as the bail of Gibson ; and that he, Williams, allowed the respondent to apply this money for that purpose. Now, admitting that Blake retained these moneys, and with the consent of Williams, who, it appears however, had no interest in, or control over, them, with intent to apply them in this way, where is there any proof whatever, in contradiction of Blake's answer, that he ever did make that use of them. He might have securities of Gibson, of various kinds, the avails of which he might have a right to retain for the same object, but if he actually made only one appropriation for such object, no one could complain. That the fund spoken of by Williams, which arose out of Newman's note, was not applied to the indemnity which has so often been mentioned, appears not only by an averment in Blake's plea to that effect, but by the testimony of *471] Gibson *himself, a witness of the appellant, who declares, that the note of Newman was subject to his order ; that no privity existed between Williams and Blake respecting the same ; and that it had not been placed in Blake's hands, as an indemnity for becoming his bail. It follows, therefore, that Blake could not have obtained from Williams any allowance or payment on account of this responsibility ; and we accordingly find, from the bill itself, that on a settlement which took place between Blake and Gibson, in November 1796, about two months after the acceptance in favor of the appellant, the former fell in debt to the latter a sum exceeding $2000, the payment of which, by Blake, is one subject of complaint in the appellant's bill. Now, it is more than probable, that in this settlement, Gibson received a credit for the very money of which Williams speaks, as Gibson acknowledges it to have been a final settlement of all the accounts between him and Blake.

The court, therefore, is entirely satisfied, that the averment in the respondent's plea, which it has just been considering, is fully established, and that the proof is such as to leave no room whatever to believe, that Baker was ever repaid the moneys he advanced as the bail of Gibson, from any other fund than that which the appellant had consented should stand pledged for that purpose. As little truth is there in the allegation, that what Williams could testify on this subject, was unknown to Hughes, during *472] the pendency of the action at law ; for Williams, who is examined as a witness for the *plaintiff in this suit, swears to the very fact,

which he had been been produced to prove in the action at law, respecting the declarations of Blake concerning Newman's note ; and this he does, without any variation from his former testimony, materially affecting the present suit. The other averment, therefore, in the plea, that no new evidence has come to the appellant's knowledge respecting the matters in litigation, is fully and satisfactorily established.

The truth of the plea being thus made out, what is to be the consequence? If the rule of courts of equity, in England, is to be applied, there can be no doubt. If a plea, in the apprehension of the complainant, be good in matter, but not true in fact, he may reply to it, as has been done here, and proceed to examine witnesses, in the same way as in case of a replication to an answer ; but such a proceeding is always an admission of the sufficiency of the plea itself, as much so, as if it had been set down for argument and allowed ; and if the facts relied on by the plea are proved, a dismissal of the bill, on the hearing, is a matter of course. Whatever objection there may be, to adhering strictly to this course of proceeding, in every description of cases, it is considered as the long and established practice of a court of equity, which ought not lightly to be departed from. It is not perceived, that any serious mischief can arise from it. Counsel will generally be able to decide on the merits of any defence which may be spread on a plea, and if insufficient, it is not probable, they will not do otherwise than set it down for argument. *Nor will they ever take issue on it, but in a case which presents a very clear and sufficient defence, if the facts be [*473] proved. If a replication should be filed, inadvertently, the court would have no difficulty in permitting it to be withdrawn. But if the plaintiff will persevere in putting the defendant to the trouble and expense of proving his plea, it must be from an entire conviction, that it contains a substantial defence, and in such case, there is no hardship in a court's considering it in the same light. But without applying the rule which has been mentioned, to the present case, the court has no difficulty in saying, that the matters set forth in this plea, which has been drawn with great care and judgment, constitute a complete defence to the present action, and that the appellant has failed to in showing any good cause why the judgment at law should not be conclusive on all the matters stated in the bill. Whatever claim he may, at one time, have had on Blake, for one-fourth of $75,000, secured by Barrel's notes, if Blake knew, at the time of taking them, of his interest to that extent, or for not taking a note for that amount in the name of Hughes himself, it is very certain, that with a full knowledge on his part, that Blake utterly denied a liability to account with any one but Gibson, he came to a settlement with him, by allowing him to accept of Gibson's draft, in his favor, in such way as to charge the fund on which it was drawn, with so many deductions as entirely to exhaust it. And when he is apprised of this conditional acceptance by his agent, or the person who *presented the draft, instead of returning it, or making any complaint, he acquiesces [*474] in it for seven or eight years, and then brings an action to enforce this very contract of acceptance, which, he must have known, put it in the power of the acceptor to make all the deductions from the fund in his hands, which were designed in the act of acceptance. After six years' litigation in a court of law, it is now attempted to revive the same controversy, at least, in part, on an allegation that Blake received a compensation, in some other way than

out of the fund on which the bill in his favor was drawn, for one of the liabilities mentioned in the acceptance. That this was not the case, is abundantly proved. But if Blake had other funds of Gibson, beside the note of Barrel, which he also considered as under Gibson's exclusive control, out of which his indemnity as bail might have been obtained, what right has Hughes now to complain, that such other funds were not applied in that way, after he had agreed or consented, that this indemnity should come out of those funds of Gibson, in the hands of Blake, out of which he was to be paid. Having come into the arrangement, Blake might well think himself at liberty, as it seems he did, to apply the other funds of Gibson in any other way which he and Gibson might think proper. Whether Gibson be liable to the appellant for the subtraction of any part of his fund for the payment of his debt, is a question not before the court; but we cannot see that an application of them in express conformity with the agreement of *475] *the parties to this suit, can give the appellant any claim on the respondent. At any rate, the plea having denied all the allegations which were relied on as grounds for removing the bar which it was anticipated would be interposed to the appellant's bill, and all the matters stated in the plea, on which issue was taken, having been fully proved, the court is of opinion, that the decree of the circuit court must be affirmed, with costs.

Decree affirmed.

Bartle *v.* Coleman.

Bail.

Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit, at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail.

If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear, and consent to a reference, the report and judgment on which is to bind the appearance bail, as well as himself. Such a joint judgment is erroneous, and will be reversed as to both.

Error to the Circuit Court for the District of Columbia.

*476] March 8th, 1821. This cause was argued by *Swann*, for the *plaintiff in error, citing *Dunlops* v. *Laporte*, 1 Hen. & Munf. 22; *Grays* v. *Hines*, 4 Ibid. 437; *Fisher* v. *Riddle*, 1 Ibid. 329: and by *Jones* and *Taylor*, for the defendant in error, citing *Holdip* v. *Otway*, 2 Wms. Saund. 106, and the cases there cited; *Gould* v. *Hammersley*, 4 Taunt. 148.

March 10th. Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the circuit court for the district of Columbia and county of Alexandria, against Andrew Bartle and Samuel Bartle, on a writ issued by George Coleman against Andrew Bartle, on the service of which, Samuel Bartle became bail for his appearance. The defendant in the court below, not having entered its appearance, a conditional judgment was entered, at the rules held in the clerk's office, against the defendant and his appearance bail. This being an action on the case, the