brought by him, in the court below." It cites 3 Johns. 536; 3 Munf. 191. It does not appear, what was the state of facts in the court below, nor whether this was an action, in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted, that the acknowledgment of a debt by one partner, after a dissolution, is not evidence against the other. Whether the court meant to say, in no case whatever, or only when the debt itself was proved *aliunde*, does not appear. Its language is general and would seem to include all cases; and if any qualification were intended, it would have been natural for the court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt, arises from the citations of 3 Johns. and 3 Munf. The former has been already adverted to; and the latter, *Shelton* v. *Cocke and others*, 3 Munf. 191, recognised the distinction asserted in 3 Johns. as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view, it leads us to the most serious doubts, whether the state courts of Kentucky would ever adopt the doctrine of *Whitcomb* v. *Whiting*, in Douglas, especially so, as the early case in 2 Vent. 151, carries an almost irresistible presumption, that the courts, at that time, held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment, that there is no error in the decision of the circuit court, and it ought to be affirmed. *It is, however, to be understood, that this opinion thus expressed, is not unanimous, but of the majority of the court; and as it is apparent, from the preceding reasoning, it has been, principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

*375]

Judgment affirmed, with costs.

---

*376] *Mechanics' Bank of Alexandria, Appellants, *v.* Adam Lynn.

Specific performance.—Answer in chancery.—Relief.

A court of equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do; the court may so modify the agreement, as to do justice so far as circumstances will permit, and refuse specific execution, unless the party seeking it, will comply with such modifications as justice requires. p. 382.

If a bill charges a defendant with notice of a particular fact, an answer must be given, without a special interrogatory to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. p. 383.

When a judgment-debtor comes into the court, asking protection on the ground that he has satisfied the judgment, the door is fully opened for the court to modify or grant the prayer, upon such conditions as justice demands.[1] p. 384.

Appeal from the Circuit Court of the District of Columbia, for the county of Alexandria. The appellee filed his bill on the chancery side of the circuit court for the county of Alexandria, against the Mechanics' Bank of Alexandria, to enjoin the bank from proceeding upon a judgment at law, which had it obtained against him, and upon which an execution had issued, and he had been taken and confined.

---

[1] See Virginia *v.* Williams, 8 How. 161.

The bill stated, that the judgment which had been obtained against the complainant was for what is called, according to the bank phrase, "an overdraw," amounting to $1573.85; that after this judgment had been obtained, he had made a deed of trust to Thomas F. Mason, to secure the payment of his debts; that this judgment against him was among the first to be paid; and that the security provided in the deed was ample for that object. The bill then stated, that the complainant, after this deed had been made, entered into a settlement with the bank of the various claims which they had against him, and agreed with them upon certain modes of payment of his debts, and among others of the judgment of $1573.85, for the overdraw. That this $1573.85 was to be paid out of the trust fund conveyed to Mr. Mason; and as an evidence of it, the bill referred to the account stated in the written settlement, in which the defendant Lynn was charged with the judgment for the overdraw, and credited by "the security in deed to Mason for overdraw." The bill alleged also, that in pursuance of this settlement, the complainant carried into effect the terms of the said settlement, and that everything due from him to the bank was satisfied, *except the sum of $3700, which was to be secured to the satisfaction of the bank; and [*377 that, so far as respected this $3700, he had offered security, such as the committee of the bank had considered ample, and such as the bank ought to have accepted, but which they refused to accept. The bill then alleged, that notwithstanding this settlement and the fulfilment of it, on the part of the complainant, the bank had issued an execution against him upon the judgment for "the overdraw," and had confined him in the bounds of the jail, under the execution, and prayed he might be relieved from his imprisonment, and that the bank should look to the security provided in the deed of trust to Mason, and to that fund only. Upon this bill, an injunction was granted, and the complainant was released from his confinement under the execution.

The appellants filed an answer to this bill, and, among other things, stated, that they had agreed upon a settlement with the complainant, of various claims which the bank had upon him; that they were very desirous of securing the payment of these claims, and in order to effect the said settlement, they had given up to the complainant $784.04; and had agreed to take his bank-stock and property at prices above their value: and had also agreed to take their payment for "the overdraw" out of the trust fund in Mason's hands, provided they could have had the full benefit thereof. They admitted, that, in pursuance of this agreement, the defendant Lynn did transfer to the bank his stock and lands, leaving nothing unpaid, but the judgment for "the overdraw," and the sum of $3700, which was to have been secured to the satisfaction of the bank. They referred to the articles of agreement to show, that the security to be given for this $3700 was to be such as was satisfactory to the board of directors; and the answer stated, that it never was secured to their satisfaction, and that no tender of offer of security was ever made, that ought to have been acceded to by the bank; and that the bank was right in refusing the security offered. The answer also stated, that as to the judgment for the overdraw, it never was satisfied, and that the deed of trust to Mason was entirely inoperative, as to this debt, and was made upon such terms that the bank could not accede to them. That their cashier, immediately after the agreement had been entered into between Lynn and the

bank, had called upon the trustee, Mr. Mason, to know whether the bank might expect payment from that fund; and was informed by him, that one of the conditions of the deed was, that the creditors accepting the benefit of the deed, should, within six months of the date of it, release to Lynn all claims and demands which they had upon him; that this deed had been executed on the
*378] 16th November 1820, and *that the agreement of Lynn with the bank had been executed on the 19th May 1821, so that the six months had, in fact, expired before the said agreement had been made. The trustee, therefore, informed the cashier, that the bank was not entitled to any benefit under that deed, and that they could not reckon upon that fund for the payment of their said judgment. The answer then stated, that the bank, finding they were not entitled to any benefit from the trust funds, and seeing no other means of payment from Lynn, had resorted to an execution upon their judgment, and he was accordingly taken in execution, and remained in excution nearly a year, until it became necessary for him to take the oath of insolvency, and under these circumstances, he obtained the injunction; and they prayed that it might be dissolved.

The deed of trust to Mason, bearing date the 16th of November 1820, was filed as an exhibit with the bill of Lynn, the complainant. This deed contained the following proviso, viz: "Provided always, however, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatsoever against the said Adam Lynn; and the period of six months shall be, and is hereby, allowed them, from the date of this instrument, to come in, and elect and sign such discharge; and the dividend or share to which each and all of those who may refuse or neglect for the space of six months as above allowed, for that purpose, to sign and execute such discharge as aforesaid, shall go and be disposed of for the benefit of such of the aforesaid creditors as shall accept of the terms of this deed, and in the order above directed."

The agreement entered into between the defendant Lynn and the bank, was also made an exhibit with the bill. It bore date on the 29th of May 1821, and so far as respects the matter in dispute was as follows, viz:—

Article 1st. That the account of A. Lynn, with the Mechanics' Bank be stated as follows—

To A. Lynn's stock-note,	$15,360 00	By A. Lynn's stock,	$21,114 50
Mrs. Buckland and Mrs. Coryton's,	125 00	Discount 10 per cent.	2,101 45
A. Lynn's note, indorsed R. Young,	11,100 00		18,913 05
Interest on do. to 4th May 1821,	1,356 00	By Mrs. B. & Mrs. C. do.	357 50
A. Lynn's note, indorsed J. Gird,	320 00	Discount 10 per cent.	35 75
Interest on do.	36 54		321 75
Overdraw,	1,573 85	Interest on $3553, difference between stock and stock note,	434 00
Five protests	8 75	123 acres of land at $25,	3,087 50
		House and lot,	1,500 00
		Security in deed to Mason for overdraw,	1,573 85
		Balance,	4,049 98
	$29,880 19		$29,880 19

*Article 2d. The above balance, except $349.98, say $3700, to be secured by A. Lynn to the satisfaction of the board, and to be paid in one, two or three years.

Depositions were taken on the part of the bank, to prove that the committee of the bank, who entered into the settlement with the defendant Lynn, were not authorized to decide upon the security which he had offered for the balance of $3700; and that they did not, in fact, agree to accept the security.

Upon the final hearing of the case in the circuit court, on the bill, answer, exhibits and depositions, the court ordered a perpetual injunction; and to this decretal order, an appeal was entered to this court, by the Mechanics' Bank.

The case was argued by *Wirt*, attorney-general, and *Swan*, district-attorney, for the appellants; and by *Jones* and *Taylor*, for the appellees.

For the *appellants*, it was contended:—The deed from Adam Lynn to J. F. Mason does not appear to be recorded; no notice of its contents was given to the bank, nor does it appear that the bank knew of its terms, at the time of settlement. As soon as the settlement informed the bank of the deed, application was made for the benefit of its provisions; and it was found, that by its terms, the bank was excluded therefrom. 1. Because the period of executing a release had passed; and 2. Because the bank could not give a general release, as the debt of $3700 had not been secured. Equity will not enforce an agreement, when, from circumstances subsequently discovered, it appears, that the party who made the agreement was misled, or cannot receive under it, what according to its terms he expected to receive. 2 Sch. & Lef. 341. If the appellee meant to make use of the deed to Mason, he should have shown in his bill, that the bank agreed to abide by it. This is not done, nor is it said by the appellee, that the bank was knowing of its nature.

The debt of the appellee for "the overdraw," has never been paid; although the judgment for $3700 may, by the result of the proceeding upon the judgment, be satisfied; the overdraw remains due, unless the statement in the agreement as to it, shall release the claim of the bank on Adam Lynn, and oblige them to look to the deed of Mason for payment. The bank cannot place itself within the terms of the provisions of that deed. There is no evidence before the court, that none of the creditors of Adam Lynn came in under the deed, and thus the fund to arise from that deed is closed against the bank for ever. The effect of the perpetual injunction will be, to prevent any of the debt for the overdraw being collected, and give to the *appellee the benefit of the concealment he practised towards the appellants. [*380

Upon the nature, effects and power, of interrogatories in courts of chancery, cited, Mitford's Pleadings 44; Cooper's Equity 12; The decisions of the courts of Virginia, 4 Munf. 273, &c.

Jones and *Taylor*, for the appellee.—The contract of the bank is not one between a creditor and a solvent debtor, having for its object, on the one hand, the security of the debt, and on the other, an extension of time for payment. But it is a compromise with an insolvent, of a debt, in part

at least, disputed. It may, therefore, be well supposed, that the bank was willing to have sacrificed a part of its claim, or to have taken, as to part, an inadequate security, to save the rest. The contract with Mason, approved by the board on the 29th of May, is, in all its articles, executory, except as to the provision for the overdraw, the only one now in dispute. As to that, if the bank is to be considered as having agreed to receive the deed to Mason, as a payment of this claim, nothing further on the part of Lynn remained to be done; the deed was beyond his control.

The appellee has carried into effect all the executory part of the contract, he has transferred his stock, conveyed his land, and moreover executed his deed of trust from Young. The bank has obtained payment of the balance of the account of $3700, so that everything required of him by the bank has been done; they now reject the only stipulation which was particularly favorable to Lynn and onerous to them. In deciding on the security to be offered for the $3700, the bank did not possess an arbitrary power; it was bound to act with good faith. If the security offered was sufficient, they were bound to have received it as satisfactory. Sufficient security was offered, and was approved of by the committee of the bank, and by the committee recommended to the board of directors of the bank. This affords, at least, *primâ facie* evidence that the security was adequate, and ought to have been received; it has been opposed by no evidence to negative this presumption. But this inquiry is now unnecessary; the bank has, by execution, not only enforced payment of the $3700; but they have enforced it with interest, with which, by the contract, Lynn was not chargeable.

The deed was received as an absolute payment. This may be inferred, from the suspension of proceedings on their judgment from the 29th of May 1821, the date of compromise, to July 1823, and from other circumstances.

*381] And more especially *from the terms of the deed, which annex the condition of a release to Lynn. If the bank accepted "the security in the deed to Mason," it must be in the terms of the deed. No fraud or concealment is charged on the complainant in the answer; the defendant must be presumed to be informed of the subject on which they were treating; they nowhere pretend, that they were ignorant of the contents of the deed to Mason; and it may be fairly presumed, that to secure nearly $29,000, they would be willing to take a doubtful or even inadequate security for $1500. It does not appear, that any creditors had accepted of the terms of the deed of trust to Mason, and if so, it was open to all, particularly, by the very contract of 29th of May, to the bank. Their own admissions in their answer, show that they considered the arrangement still open; they say, they require nothing but the complainant's order to his trustee. This order, so far as the complainant could give it, is given by the contract of 29th of May; so far as he is concerned, the prosecution of this suit, affirms the right of the bank, under the deed of trust. But although the release may be a condition precedent, the time is not a part of the condition, but a qualification of it, from which the court of chancery, with the consent of the debtor for whose benefit it was introduced, may relieve. Francis's Maxims, p. 61, Max. xxii. (Richmond ed.); 1 Vern. 260, 319.

Thompson, Justice, delivered the opinion of the court.—Adam Lynn, the complainant in the court below, filed his bill for an injunction to restrain the

Mechanics' Bank of Alexandria from proceeding upon a judgment which it had recovered against him at law for $1573.85. A perpetual injunction was decreed, to reverse which, the present appeal is brought.

The bill and answer contain many matters not necessary now to be noticed. The grounds upon which the application for an injunction was placed, were, that on the 29th of May 1821, a settlement was made between the parties, of various matters which had been for a long time in dispute between them, among which was the judgment now in question. In the account stated, which formed the basis of that settlement, Lynn is charged with that judgment, which is there called "the overdraw," and credited by security in deed to Mason for the same. Upon this statement of the account, there was a balance of $3700 found in favor of the bank, for which security was to be given. This may, however, be now laid out of view ; for although it appears, that some difficulty arose with respect to the security for this balance, yet it is alleged in the bill, that *it was afterwards paid to the bank ; and this is not denied, but substantially admitted in the answer. And the whole arrangement upon that settlement was carried into execution, except that which related to the judgment now in question. [*382

It is contended on the part of Lynn, that the security in the deed to Mason was a complete discharge by the bank of this debt. And whether it is so to be considered, is the only question necessary now to be noticed. The deed of trust given by Lynn to Mason, bears date the 16th of November 1820 ; and provides, in the first place, for the payment of judgment-creditors ; then, for certain enumerated creditors ; and finally, the surplus to be paid to the Mechanics' Bank of Alexandria in discharge of notes discounted for Lynn. This deed contains the following proviso : "Provided always, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatever, against the said Adam Lynn : and the period of six months shall be, and is hereby allowed them, from the date of this instrument, to come in, and elect and sign such discharge."

It will be seen, from comparing the dates of this deed, and the settlement made between the parties, that the six months limited for the creditors to come in, and accept of the provision thereby made, had expired when the settlement took place ; and the bank, therefore, according to the terms of the deed was precluded from taking any benefit under it. The bill alleges that the provision made by the trust deed for the payment of this debt, was amply sufficient. The bank denies that the judgment has ever been satisfied, and alleges, that on application to the trustee, Mason, for the benefit of the provision thereby made, it was refused, because the time had expired within which the creditors were to come in and accept of the benefit of it. Was it then such a settlement and discharge of this judgment, as, under the circumstances, will conclusively bind the bank ; and turn it over to this trust fund alone for satisfaction of the debt ?

The complainant in the court below, asks the aid of a court of chancery to restrain the bank from enforcing a judgment at law ; and if this is an unconscientious request, it would be inconsistent with the course of a court of equity to grant it. The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept

in satisfaction of this judgment, the provisions made by Lynn for his creditors in the deed of trust. *But the court ought not to decree performance, according to the letter, when, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement, as to do justice so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires.

*383]

It cannot be presumed, that the bank, in point of fact, knew that the time had expired within which creditors were allowed to come in and accept of the trust fund. Nor ought it to be presumed, that this circumstance was adverted to by Lynn; as it would be charging him with a fraudulent design of imposing upon the bank an unavailable security. Whether it was available or not, is a proper subject of inquiry, under the pleadings. The bill alleges, that the provision made by the deed for payment of this debt, was abundantly sufficient. This, the answer denies; because the complainant, by the limitation of the time within which the creditors were to come in, had debarred the bank of availing itself of that security, and that the trustee had excluded this debt on that account. And all that the bank requires is, that the complainant should order his trustee, Mason, to pay this debt out of the trust fund.

It is said, however, that the bank is chargeable with notice of this deed, and all its provisions; and has, therefore, accepted the fund, at its own risk; and particularly, as notice is not denied in the answer. There is nothing in the pleadings or proofs showing notice in fact, and the deed was not recorded, so as to charge the bank with constructive notice. There may be reasonable grounds to conclude, that the bank had information with respect to the trust fund, before it agreed to accept it as a substitute for the judgment. But actual knowledge of this limitation cannot reasonably be presumed, as it was a fund from which no benefit could be derived; and the bill contains no charge calling upon the bank for an admission or denial of notice. This was not required, by reason of the special interrogatory put in the bill. If the bill had charged the bank with notice, an answer must have been given, without such interrogatory. But a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill (Mitford 44); and if the bank was called upon by this interrogatory to admit or deny notice, no answer having been given, exception should have been taken to the answer for insufficiency.

Nothing, therefore, appears, which would have precluded the *bank from the aid of a court of chancery; even was it complainant, seeking relief against the conclusive operation of this settlement, when the consideration for which the judgment was to be discharged has entirely failed, and that by the act of Lynn himself. But when the judgment-debtor comes into the court, asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer, upon such conditions as justice demands. The arrangement between the parties was executory; no release or discharge of the judgment was given. The account stated was the basis only on which the settlement was made, and to be carried into execution. And it must have been the intention of both parties, that the bank should be let in to take the benefit of the trust fund. And justice requires that this should still be done, so far

*384]

forth as it can be, consistently with the safety of the trustee, and the rights of other creditors entitled to the benefit of that fund.

The situation of that fund, however, and what has been done under the trust deed, could not be properly inquired into, under the pleadings in this cause; and without other parties before the court. The proper course for the bank would have been, to have filed a cross-bill against the complainants, and such other parties, as were necessary to bring that subject completely before the court and enable it to make a final determination of the matter in dispute. If the assent of Lynn is all that is necessary to enable the bank to avail itself of the trust fund, justice requires that this should be given, before the bank is entirely restrained from proceeding on its judgment at law. And it is, no doubt, within the legitimate powers of a court of chancery, under circumstances like the present, to require such assent, and modification of the settlement, before granting a perpetual injunction. But the rights of other creditors, which may have attached upon this fund, must not be lost sight of; with respect to which, however, we have not before us the means of judging.

We are, accordingly, of opinion, that the decree of the court below granting a perpetual injunction be reversed. And that the cause be sent back, with directions to the court to continue the injunction, until the bank has a reasonable time to file a cross-bill. And that the continuance of the injunction be subject to such further order of the court, as equity and justice may require.

This cause came on, &c.: On consideration whereof, it is decreed and ordered by this court, that the decree of said circuit *court in this [*385
cause, granting a perpetual injunction, be and the same is hereby reversed and annulled; and it is further ordered by this court, that the cause be remanded to the said circuit court, with directions to continue the injunction, until the bank has a reasonable time to file a cross-bill, and that the continuance of such injunction be subject to such further orders of the court, as equity and justice may require.