was a bar, the judge adds, "unless the jury should find that Susan Madison was a *feme covert*, when her father, the patentee, died; or was so at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham." The words, "at the time the defendants acquired their titles by contract or deed from the patentee, John Grayham," can apply to those defendants only who did so acquire their title. The language of the judge cannot be construed to indicate, that the conveyance to Ratliffe and Owings could avail those who did not claim under them. The defendants might all claim under them. Some confusion, undoubtedly, exists in the statement of the fact, both in the motion and in the instruction; but we think both may be fairly understood as applying only to defendants claiming under John Grayham. We cannot say, that this instruction is erroneous.

The judgment is reversed, for error in the entire exclusion of the testimony of Mrs. Eppes; and the cause is to be remanded, with instructions to award a *venire facias de novo.*

*89] This cause came on to be heard, on the transcript of the *record, from the circuit court of the United States for the seventh circuit and district of Kentucky, and was argued by counsel: On consideration whereof, this court is of opinion, that there is error in the proceedings and judgment of the said circuit court in this, that the testimony of Mrs. Eppes, a witness in the said cause, was totally excluded; whereas, the same ought to have been admitted, so far as it conduced to prove the death of James Madison, the ancestor of the plaintiffs: Therefore, it is considered, ordered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled; and that the cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*90] *John R. Livingston, Plaintiff in error, *v.* Moses Smith, Defendant in error.

Pleading.—Attachment.

Insufficient and defective pleading.

A sheriff, having a writ of foreign attachment, issued according to the laws of New Jersey, proceeded to levy the same on the property of the defendant in the attachment; after the attachment was issued, the plaintiff took the promissory notes of the defendant for his debt, payable at a future time, but no notice of this adjustment of the claim of the plaintiff was given to the sheriff, nor was the suit on which the attachment issued discontinued; the defendant brought replevin for the property attached, the sheriff having refused to redeliver it: *Held*, that the sheriff was not responsible for levying the attachment for the debt so satisfied, or for refusing to redeliver the property attached.

A previous attachment, issued under the law of New Jersey, of property, as the right of another, could not divest the interest of the actual owner of the property in the same; so as to prevent sheriff attaching the same property, under a writ of attachment issued for a debt of the same actual owner.

Error to the Circuit Court of New Jersey. In the court below, John R. Livingston instituted an action of replevin against Moses Smith, the defendant in error, "for that he, Moses Smith, on the 2d of November 1826, at the township of Newark, in the county of Essex, and state of New Jersey, took the goods and chattels of the plaintiff in the replevin, to

wit, the steamboat Sandusky, her engines, &c.," and unjustly detained them, &c.

To the declaration, the defendant, Smith, pleaded property in Robert Montgomery Livingston, at the time of the taking; and also made cognisance or avowry as follows:

1. That the goods and chattels mentioned in the declaration, were taken by him, on the 4th November 1826, as sheriff of the county of Essex, under a writ of attachment issued out of the court of common pleas of the county, at the suit of James W. Higgins against John R. Livingston; and that the goods were detained by him, until they were replevied by the plaintiff in this suit, on the 13th of November 1826, before the return of the writ.

2. That, as sheriff, he took the same goods and chattels, on the 2d November 1826, under a like writ of *attachment at the suit of James W. Higgins against Robert M. Livingston; in whose possession they then were. [*91

To the first cognisance, the plaintiff, John R. Livingston, pleaded, that after the taking of the goods, and before the commencement of this suit, on the 29th November 1826, on accounting with Higgins, he was found indebted to him in the sum of $896, the debt for which the attachment had issued; and on the 1st of April 1827, he tendered to Higgins the said sum of money, which he received in full satisfaction of the same; and upon the return of the attachment, there were no further proceedings thereon by Higgins or by any other person; and by means thereof, according to the practice of the court, the writ of attachment was ended, &c. The 2d plea stated, that before the commencement of this suit, and before the return of the attachment, on the 29th of November 1826, he, John R. Livingston, delivered to Higgins, the plaintiff in the attachment, two promissory notes for the whole amount of the debt due to him, payable at three and four months, which were paid by him according to the tenor thereof. The 3d plea set forth, that before the appointment of any auditors under the attachment, on the 9th of January 1828, the plaintiff, Higgins, voluntarily discontinued the same of record. 4th plea: That the goods, at the time they are supposed to be attached as the property of John R. Livingston, at the suit of Higgins, and until they were replevied, were in the possession of the defendant as sheriff, under an attachment against Robert M. Livingston, at the suit of the same Higgins.

To the second cognisance, the plaintiff, John R. Livingston, pleaded:

1. That the property, when attached, was not in the possession of the said Robert M. Livingston, as is alleged by the said second cognisance. 2. That the property, when attached, was in John R. Livingston; and traversed the property being in Robert M. Livingston.

To the first plea to the first cognisance, the defendant, Smith, demurred, and showed for cause: *1. That the tender to, and acceptance by Higgins, of the money, in satisfaction of the debt, was after the commencement of the action of replevin, and before the attachment was discontinued, 2. That the plea was argumentative. [*92

To the 2d plea to the first cognisance, the defendant, Smith, also demurred, and showed for cause: 1. That the notes stated in the plea were to be in satisfaction of the debt; yet was it not shown by the plea, that the notes

were paid off, before the commencement of the suit. 2. That it did not appear by the plea, that the plaintiff was entitled to a return or redelivery of the goods. 3. That the matters in the plea were immaterial.

To the 3d plea to the first cognisance, the defendant demurred, and showed for cause: 1. Because it appeared that when the replevin was sued out, the attachment was in full force. 2. That the matters set forth therein did not maintain the count. To the 4th plea, there was a general demurrer.

To the first plea to the second cognisance, the defendant demurred, and showed for cause, that the matters were unintelligible, uncertain, insufficient, irrelative and informal; and he put in a general demurrer. The plaintiff joined in each demurrer.

The case was argued by *Frelinghuysen*, for the plaintiff in error; and by *Coxe*, for the defendant.

Frelinghuysen said, the principal question in the case was, whether the creditors of Robert Montgomery Livingston could set up the attachment against John R. Livingston which has been discontinued; the debt for which it issued having been paid. The defence of the sheriff, Moses Smith, presents two writs of attachment, one against John R. Livingston, the other against Robert M. Livingston; and if he does not justify under one of these writs, the judgment of the circuit court must be reversed.

The attachment against Robert M. Livingston was the first. It was issued on the 2d of November; and that against John R. Livingston on the 4th of November. This constitutes the first ground of exception. The
*93] first *attachment was a proceeding against the steamboat Sandusky, alleging her to belong to Robert M. Livingston. The property was then in the custody of the law, to answer to James W. Higgins, and all the other creditors of the defendant in the attachment, according to the provisions of the attachment law of New Jersey. James W. Higgins could not, afterwards, on the 4th of November, proceed by attachment against the same property, under the allegation that it belonged to another person. There would be an inconsistency in the two proceedings which could not be reconciled. Two sets of auditors would have the distribution of the proceeds of the attachment. (Revised Laws of New Jersey, 355.) In this view of the law, the attachment against the Sandusky, as the property of John R. Livingston, was invalid. 3 Mass. 289; 5 Ibid. 319; 7 Ibid. 271; 8 Ibid. 246; 1 Show. 174.; 4 T. R. 651; 3 Mass. 295.

2. As to the matters set up under the second attachment, they cannot avail, as that proceeding was at an end, by the adjustment of the claim of the plaintiff in the same. On the 29th day of November, Mr. Livingston accounted with James W. Higgins, and gave him two notes for the balance due to him on a final settlement. All this was done, before the replevin issued, and it is a full and sufficient answer to the defence set up by the sheriff. The law of New Jersey requires, that the debt for which the attachment issues, shall be due and payable at the time of the issuing af the writ. The taking of the notes, payable at a future and distant date, was an extinguishment of the right to continue the attachment. It was a withdrawal of the suit. It is not necessary that there should have been a formal discontinuance. 2 Chit. Pl. 246. Arch. Pract. 123, 329, 330. It was not

in the power of Mr. Livingston to discontinue, or compel the plaintiff to do so. All that was in his power he did, by taking away the right of the plaintiff to prosecute the suit.

3. What is the operation of the writ of attachment against Robert Montgomery Livingston? It is said, this attachment put the property in the custody of the law; and that it must remain so. This principle applies to the defendant in the attachment, but not to third persons.

*4. As to the objection, that replevin will only apply where there is a tortious taking. It is admitted, that this is the law in some of the states, but not in all. In Massachusetts, replevin is a remedy for a lawful taking, where the detainer is contrary to law. 15 Mass. 359; 16 Ibid. 147; 17 Ibid. 606; 14 Johns. 84; Kirby 275. This is also the law in Pennsylvania. 1 Dall. 156. If the sheriff in an attachment against A., takes the property of B., he is a tortious taker. 14 Johns. 84. And these cases are in accordance with terms of the law of New Jersey, which authorizes replevin for a wrongful detainer. (1 Revised Laws of New Jersey, 212.) In Virginia, replevin would be the appropriate remedy. 1 Wash. 92; also 3 Bl. Com. 145, 151; 1 Paine 620; 20 Johns. 465. The writ of attachment being irregular against John R. Livingston, the execution of it was a tortious taking by the sheriff, no authority being lawfully delegated to him for the purpose. The sheriff's jury, which, by the attachment law, may be called by the sheriff, on a question of property, is for the protection of the officer. If the property is found to belong to the defendant in the attachment, it does not preclude the claimants from disputing the right of the defendants; but the sheriff is protected from vindictive damages. This has been the uniform decision of the state courts of New Jersey. The law of New Jersey corresponds with the principles of the English decisions. (Rev. Laws of N. Jersey, 357, § 14.) 2 H. Bl. 437; 3 Maule & Selw. 175; 6 T. R. 88. [*94

Coxe, for the defendant in error, made the following points: 1. The matters contained in the several pleas, pleaded to the first cognisance, do not constitute any bar to the same. 2. A defendant whose goods have been taken in execution, or under an attachment against him, can never have replevin against the sheriff for the goods so taken. 3. Replevin will not lie, except in cases of tortious or wrongful taking; whereas, in this case, the goods were taken under the authority of a court of competent jurisdiction, and were at the time in custody of the law. 4. Admitting, however, that an officer, who has lawfully seized goods, may, by a subsequent abuse of them, or by unlawfully detaining them, become a trespasser *ab initio*, and so liable *to trespass or replevin, yet in this case, the plaintiff has no such ground of action. 5. Payment and satisfaction to Higgins, the plaintiff in attachment, either before or after the return of the writ, would not, under the statute of New Jersey, authorize the sheriff to deliver up the goods, unless the suit was discontinued of record; and consequently, until then, at least, replevin could not be brought. 6. Admitting, however, that after payment and satisfaction to the plaintiff in attachment, the defendant in attachment might bring replevin against the sheriff, yet it does not appear by the pleadings in this case, that any such previous payment was made; but, on the contrary, it does appear, that the writ of replevin was served on the 30th of November 1826, and the payment to Higgins was [*95

not made till the 1st of April 1827. 8. Admitting that, after a regular discontinuance of the attachment, the defendant in attachment may have replevin against the sheriff for his goods, yet in this case, the replevin was sued out on or before the 30th of April 1826, and the attachment was not discontinued of record until the 7th of January 1828.

As to the pleas to the second cognisance: 1. Under the attachment law of New Jersey, goods may be attached, though not in the possession of the defendant in attachment at the time. 2. If a stranger claims property in the goods attached, he has a remedy under the 14th section of the statute of New Jersey, for the relief of creditors against absent and absconding debtors. 3. A proceeding by attachment in New Jersey is a proceeding *in rem.* In such cases, it is the possession and control of the property that gives jurisdiction to the court; and it cannot be deprived of its jurisdiction, by a co-ordinate or concurrent tribunal proceeding collaterally and taking the property out of its possession.

Mr. Coxe cited Pet. C. C. 245; 1 Paine 620, 625; *Gelston* v. *Hoyt*, 3 Wheat. 312; 3 Dall. 188; Holt 643; 1 Show. 174; Gilbert on Replevin 166; 1 Mason 322; 5 Mass. 283; 6 Binn. 2; 2 Wheat. Selw. 896; 10 Johns. 373; 7 Ibid. 143; 14 Ibid. 84; Bro. Abr., Replevin, pl. 15, 36, 39; Rolle's Abr. Replevin, B. 2.

*96] *Johnson, Justice, delivered the opinion of the court.—The facts and merits of this case lie in a very narrow compass. The action is replevin, sued out of the circuit court of the United States for the district of New Jersey. The case presented by the pleadings is this: In the year 1827, one Higgins sued out several attachments in the state court, both against this plaintiff and one R. M. Livingston. Smith is sheriff of the state, and, as such, on the 2d of November, he arrested a steamboat, as the property of R. M. Livingston; and again, on the 4th of the same month, he seized the same boat, as the property of this plaintiff, J. R. Livingston. J. R. Livingston, being a citizen of New York, brings this suit in a court of the United States, and counts in the ordinary form of the declaration in replevin. Smith avows and justifies under the two attachments; and Livingston, in a variety of replications, seeks to repel this justification:

1. On the plea of payment to the plaintiff in attachment, subsequent to the attachment, but without notice to the sheriff Smith, or any averment of discontinuance, other than what may be gathered from facts stated, from which a discontinuance might have been matter of deduction or inference. This plea is certainly insufficient in matter, and defective in form.

2. On the plea of an accord made prior to the suit; by which it was agreed by Higgins to receive certain promissory notes, which, when paid, should be in full satisfaction of the debt, which notes were duly paid at maturity. On this plea, there has been some difference of opinion: but besides that it does not aver an agreement to discontinue, admitting that, as against the plaintiff in the attachment, it would have been a good defence; the question still recurs, can a sheriff, without notice, be responsible for levying an attachment on a satisfied debt, or for not redelivering the property attached, without a discontinuance, or, at least, notice of the satisfaction? We say nothing of the rights or remedies of the defendant in attachment against the plaintiff: the question here is, whether the sheriff, under

such circumstances, is not *warranted by his writ in proceeding to act. How can he undertake to decide the question of liability between the parties; or what security has he against the plaintiff, should he act erroneously in not pursuing the exigencies of his writ? No question of property is here raised between him and the defendant; for the levy and detention and plea, all affirm the property to be in the defendant in attachment. This plea, therefore, makes out no cause of action.

3. On the plea of discontinuance of record; but this is obviously and radically insufficient, since the date of the discontinuance is expressly subsequent to the institution of the suit. This is admitting that there was no cause of action at the time of its institution. It does not raise the question, whether a subsequent unlawful act may not make the sheriff a trespasser *ab initio;* nor whether replevin nay not be brought for unlawful detention as well as unlawful taking; since, in either case, the cause of action must precede its institution.

4. On the plea that the goods, when attached as the property of this plaintiff, were in fact in posession of the sheriff under the attachment against R. M. Livingston, and the levy made thereon two days previously. But what cause of action does this make out for this plaintiff? If they were the property of another, he has nothing to complain of; and if they were his, there was the attachment against himself to justify the taking. A previous attachment, as the right of another, could not divest his interest; and the property being in the hands of the sheriff, as his bailee, or to his use, could not divest the sheriff of the right to seize or detain it under a writ against him.

These remarks dispose of the pleas to the first cognisance. To the second, the plaintiff relies on the pleas:

1. That the property was not, at the time of the attachment levied, in the possession of R. M. Livingston. But this is certainly tendering an immaterial issue; since it matters not in whose possession the property is found, if the taking be otherwise rightful.

2. That the property was his own, at the time it was attached as the property of R. M. Livingston, and not the property of R. M. Livingston. And this plea probably presents the only question intended by the suit: but unfortunately, it comes *embarrassed with circumstances which render it impossible to consider the merits in this suit. Had this plaintiff [*98 taken measures to disembarrass his case of the attachment against himself, before he brought suit, the defendant must have met him upon the question of property. But this plea does not go to the whole justification, since, admitting the truth of it, it still leaves the property liable to the attachment against himself. To this must be added, a defect in conforming the language of the traverse to the interest of R. M. Livingston; since the right of the plaintiff generally, and not as against R. M. Livingston alone, was necessary to maintain his action.

These views of the subject render it unnecessary to examine the more general question made upon the relation in which these two courts stand to each other; and we only notice it, to avoid any misapprehension that might possibly occur from passing it over unnoticed. Upon the whole, the majority of the court are of opinion, that the demurrers were rightly sustained; and the judgment below is affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of New Jersey, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*99] THE UNION BANK of GEORGETOWN, Appellant, *v.* ANNA GEARY, Appellee.

Equity.—Responsive answer.—Consideration.—Authority of attorney.

It is a well-settled rule, that in a bill praying relief, when the facts charged in the bill as the ground for the decree, are clearly and positively denied by the answer, and proved only by a single witness, the court will not decree against the defendant; and it is equally well settled that when the witness on the part of the complainant is supported and corroborated by circumstances sufficient to outweigh the denial in the answer, the rule does not apply.

An injunction bill was filed, upon the oath of the complainant, against a corporation, and the answer was put in, under their common seal, unaccompanied by an oath. The weight of such answer is very much lessened, if not entirely destroyed, as it is not sworn to.

The court is inclined to adopt it, as a general rule, that an answer, not under oath, is to be considered merely as a denial of the allegation in the bill; analogous to the general issue at law, so as to put the complainant to the proof of such allegation.[1]

The attorney of the plaintiffs, in an action on a promissory note, agreed with the defendant whose intestate was indorser of the note, that if she would confess judgment, and not dispute, her liability upon the note, he, the attorney, would immediately proceed by execution to make the amount from the maker of the note, the principal debtor; who, he assured her, had sufficient property to satisfy the same; upon the faith of this promise, she did confess the judgment: *Held*, that this agreement fell within the scope of the general authority of the attorney, and was binding on the plaintiffs in the suit. The plaintiffs in the suit having failed to proceed by execution against the maker of the note, and having suffered him to remove, with his property, out of the reach of process of execution, the circuit court, on a bill filed, perpetually enjoined proceedings on the judgment confessed by the administratrix of the indorser, and the decree of the circuit court was, on appeal, affirmed by the supreme court.

The consideration alleged in the bill for the promise of the attorney, to proceed by execution against the maker of the note, and make the amount of the same, was the relinquishment of a defence which the defendant at the time considered legal and valid; by a subsequent judicial decision, it was determined, that the defence would not have been sustained. To permit this decision to have a retrospective effect, so as to annul a settlement or agreement made under a different state of things, would be sanctioning a most mischievous principle.

The general authority of an attorney does not cease with the entry of a judgment; he has, at least, a right to issue an execution; although he may not have the right to discharge such execution, without receiving satisfaction.

The suit does not terminate with the judgment; proceedings in the execution are proceedings in the suit.

Garey *v.* Union Bank, 3 Cr. C. C. 233, affirmed.

APPEAL from the Circuit Court of the district of Columbia, for the county of Washington.

*100] *Anna Geary, as administratrix of her husband, Everard Geary, filed her bill in the circuit court, in which she set forth, that her intestate, some time before his death, became surety on a note which was discounted for the accommodation of J. Merrill, at the Union Bank of Georgetown, for a large sum of money, which was continued, from time

[1] The answer of a corporation, under its corporate seal, is not evidence in its own favor, though responsive to the bill. Lovett *v.* Steam Saw-mill Association, 6 Paige 54. And see Patterson *v.* Gaines, 6 How. 588.