still leave the matter in dispute open to another suit; and might result in another writ of error to remove it to the Circuit Court, and then again to this court. The act of Congress certainly never intended to sanction such fruitless and inconclusive litigation; and therefore directed that the Circuit Court should give such judgment as the District Court ought to have given, that is to say, a final judgment upon the matter in dispute. Instead of suing out a writ of error upon the judgment of reversal, the plaintiff should have taken the necessary steps to bring his case to a final decision in the Circuit Court, in the same manner as if the suit had been originally brought there. And if he supposed any of the rulings or instructions of the court at the trial to be erroneous, he would have been entitled to his exception, and this court could then by writ of error have reëxamined the judgment of the Circuit Court, and finally decided upon the matter in controversy in the suit.

But upon the judgment of reversal only, which leaves the dispute between the parties still open, no writ of error will lie, and the writ issued in this case must therefore be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that this cause be and the same is hereby dismissed for the want of jurisdiction.

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*John G. Nelson, Charles G. Carleton, William H. Stewart (Partners in Trade under the Name of Nelson, Carleton, & Co.), Henry Parish, Daniel Parish, John R. Marshall, John B. Seaman, Thomas Parish, Leroy M. Wiley (Partners in Trade under the Name of Parish, Marshall, & Co.), Appellants, *v.* John J. Hill, John P. Lipscomb, Absalom Hardin, Lorenzo I. Sexton and Ann R. Sexton (his Wife), and James Gray, Defendants. [*127

It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill.[1]

[1] If there is a common liability and a common interest,—a common liability in the defendants and a common interest in the plaintiffs, — different

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An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself.[2]

The creditor of a partnership may, at his option, proceed at law against the surviving partner or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased.[3]

Where there were two mercantile firms and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms and also against the surviving partner of one of the firms.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The suit originated in the District Court of the United States for the Middle District of Alabama, from which it was carried, by appeal, to the Circuit Court, and thence was brought to this court.

In 1834, the appellants, consisting of two mercantile houses in New York, became the creditors of two firms in the State of Alabama, namely, the firms of Whitsett, Gray, & Co. and of Whitsett & Gray; the former composed of William H. Whitsett, Thomas Gray, John J. Hill, the latter of William H. Whitsett and Thomas Gray.

The debts of these Alabama houses to their New York creditors set forth as follows:—

Whitsett, Gray, & Co. to Nelson, Carleton, & Co., a note dated May 17th, 1834, for $1,061.36, at 9 months; Whitsett, Gray, & Co. to Parish, Marshall, & Co., two notes, one dated May 10th, 1834, for $1,470.95, at 9 months, and one, same date, for $1,470.95, at 11 months; a bill of exchange drawn by Whitsett, Gray, & Co. on John C. Sims & Co. for $1,901.56,

claims to the property may be united in one suit, at least if the subjects are such as may be joined without inconvenience. *Campbell* v. *MacKay*, 1 Myl. & C., 623; *Attorney-General* v. *Cradock*, 3 Id., 85. If the interests of the plaintiffs are the same, although the defendants have not a co-extensive common interest, but their interests are derived under different instruments, if the general object of the bill will be promoted by their being united in one suit, the court will allow it. Ib.; *Attorney-General* v. *St. John's College*, 7 Sim., 241; see *Gaines* v. *Chew*, 2 How., 619.

[2] The objection to multifariousness cannot be raised at the hearing. *Ward* v. *Cooke*, 5 Madd., 122; *Wynne* v. *Calender*, 1 Russ., 293; *Whaley* v. *Dawson*, 2 Sch. & L., 370; *Benson* v. *Hadfield*, 4 Hare, 32.

But the court may, of its own motion, on the hearing, make the objection. *Greenwood* v. *Churchill*, 1 Myl. & K., 559; *Oliver* v. *Piatt*, 3 How., 333.

[3] APPLIED. *Lewis* v. *United States*, 2 Otto, 622. And see *Comins* v. *Culver*, 8 Stew. (N. J.), 96; *Thrope* v. *Jackson*, 2 Younge & Coll., 553; *Hamersley* v. *Lambert*, 2 Johns. (N. Y.) Ch., 508; *Belknap* v. *Abbott*, 11 Ohio, 411; *Ex parte Clegg*, 2 Cox's Cas., 372; *Camp* v. *Grant*, 21 Conn., 41; *Lewis* v. *United States*, 14 Bank. Reg., 64, 69; *United States* v. *Lewis*, 13 Id., 38.

at 4 months; and a note to White, Brothers, & Co., by Whitsett, Gray, & Co., for $331.46, at 12 months.

Of the individuals composing the two Alabama firms, William H. Whitsett died in October, 1835, and administration of his estate was committed to Lipscomb & Hardin. Thomas Gray died in 1835, and administration of his estate was granted to James Gray and Ann R. Gray, the widow of Thomas, who afterwards intermarried with Lorenzo Sexton.

*Upon three of the above notes, judgments were obtained in December, 1835, against Hill, as surviving [*128 partner of Whitsett, Gray, & Co. In January, 1840, a bill was filed on the equity side of the District Court of the United States for the Middle District of Alabama by the New York firms, which, in August, 1841, was amended. The amended bill included, as defendants, James Gray, Lorenzo Sexton and Ann R. Sexton (formerly Ann Gray), administrators of Thomas Gray, deceased, Absalom Hardin, John P. Lipscomb, and Joseph J. Hill, administrators of William H. Whitsett, deceased.

The bills recited the above fact; stated that execution had been sued out against Hill, but that no property could be found; that the estate of Whitsett had been reported to the County Court as insolvent, but that the estate of Gray was fully able to pay the debts of the partnerships; praying for a discovery and payment, &c.

Lipscomb and Hardin answered the bills, denying generally the merits of the claim.

Hill answered separately, and concluded his answer with denying the right of the complainants to unite their claims in one suit.

Gray filed a separate demurrer, assigning therefor the following causes:—

I. That the said complainants have not by their said bill and amended bill made such a case as entitles them in a court of equity to any discovery from this defendant or any relief against him as to matter contained in the said bill and amended bill, &c.

II. That the complainants have joined in their bill and amended bill distinct matters which, according to law and the practice of this court, ought not to be joined, &c.; that is to say, have joined matters against the late firm of Whitsett & Gray, composed of Wm. H. Whitsett, deceased, and Thomas Gray, deceased, with matters against the late firm of Whitsett, Gray, & Co., composed of the said Whitsett & Gray and one John J. Hill, the said John J. Hill having no interest in the matter against the said late firm of Whitsett & Gray.

They have joined matters of debt against said late firm, Whitsett & Gray, created by note, payable to certain persons using the name and style of White, Brothers, & Co., to which debt the said complainants, or either of them, have not any interest, as far as appears by their said bill or amended bill, and in which the said defendant, Hill, is in no wise interested, nor in any wise liable, &c.

III. The complainants' bill and amended bill do not show that complainants had exhausted their remedy at law before coming into this court in such manner as to entitle them to the aid of this honorable court as a court of chancery, &c. Wherefore, for the foregoing causes, and for divers other causes of demurrer appearing in the said bill and amended bill, this defendant doth demur thereto; and he prays the judgment *129] of this honorable court whether he shall *be compelled to make further and other answers to the said bill; and he humbly prays to be dismissed from hence with his reasonable cost in this behalf sustained.

In December, 1841, the cause came before the District Court, which sustained the dumurrer.

The complainants appealed to the Circuit Court, which in March, 1843, affirmed the decree of the District Court. From the decision of the Circuit Court the complainants appealed to this court.

The cause was argued by *Mr. Dargan*, for the appellants, and *Mr. Crittenden*, for the appellees.

Mr. Dargan.

The decree, rendered on the demurrer of James Gray, dismissed the bill as to all the defendants, and they were adjudged to recover their costs. This was the necessary result upon sustaining the demurrer of James Gray, for he being a joint administrator with Sexton and wife, the suit could not proceed without him. The appeal was taken against all the defendants, and the cause was pending properly in this court, when Gray died; his death did not abate the suit or render it defective, for his entire interest survived to Sexton and wife, and the administrator of James Gray has no interest in the suit. Therefore the cause is not out of court or abated by the death of James Gray, nor is it necessary to make his representatives parties. The only question that can be raised against the bill is, that it is multifarious.

The bill is not multifarious because it is filed in the name of Parish, Marshall, & Co. and Nelson, Carleton, & Co., two distinct firms.

It is well settled that when a creditor seeks the aid of a court of equity to subject the assets of a deceased debtor to the payment of his debt, he may sue for himself and all other creditors who will make themselves parties to the suit, unless his application to a court of equity be founded on a specific lien on a specific chattel, or on particular real estate, as a mortgagee. But in the absence of any specific lien, that would give him an exclusive right as against the thing bound by the lien, he may sue for himself and all other creditors. Story's Equity Pleadings, §§ 99, 100, and the cases cited.

Indeed, if the bill seeks to subject the real estate of the decedent, it is said the creditor must sue in behalf of all; here two firms sue for themselves and all other creditors who will join in the suit.

The bill is not multifarious because it seeks to obtain satisfaction of debts due Nelson, Carleton, & Co. and Parish, Marshall, & Co. by Whitsett, Gray, & Co., and also debts due Parish, Marshall, & Co. by Whitsett & Gray alone. The debts due the complainants by Whitsett, Gray, & Co. had been sued at law against Hill, the surviving partner, and executions have been returned,—"no property"; *of course the complainants can come into equity against [*130 the assets of the deceased partners on those debts, for they have done all at law they can do. Now, if it be true that, as to the two debts due by Whitsett & Gray alone to Parish, Marshall, & Co., they have a perfect remedy at law, or if they have as yet no equity, because they must proceed at law first against the administrators of Whitsett, the question will then be raised,—if complainants seek to enforce an equitable right, and in the same bill state a different and legal right, as to which equity will afford no relief, and this is apparent on the bill, will the statement of this legal right and prayer for relief, which by possibility cannot be granted, render the bill defective as to the equitable right? To hold that a bill thus framed would be defective, would be a rigid rule, not perhaps productive of benefit or convenience; would it not go to the full extent, that a complainant must recover on all causes of actions or suits stated in his bill, or he could not recover at all? I have not found a case that goes thus far, and I submit that no case can be found where a bill is held to be multifarious because it states and seeks relief as to a clear equitable right, and also states and seeks relief as to a different and distinct legal right; but relief would be granted as to the equitable right; and so far as it sought relief on a legal title the bill would be dismissed at the hearing. If I am right in this view, the demurrer should not have been

sustained, even if the debts due by Whitsett & Gray alone to Parish, Marshall, & Co. cannot be enforced in equity against the representatives of Gray, or if their remedy on these two debts is at law. As to the doctrine of multifariousness, see *Gaines* v. *Chew et al.*, 2 How., 619; Story on Eq. Pl., 515–517.

This view is submitted on the supposition, that the court may hold that Parish, Marshall, & Co. have a perfect right at law on the two debts not sued at law, and due by Whitsett & Gray alone to them. But I think the rule is now well established, that a creditor may file his bill in the first instance against the assets of a deceased partner, notwithstanding the surviving partner may even be solvent. See 1 Myl. & K., 582. This seems to be a well considered case, and maintains this position; also Story on Partnership, § 362, pp. 513, 514; also the case of *Devaynes* v. *Noble*, 1 Meriv., 589. I admit that formerly the reverse was held to be the law; but since the decision in the case of *Devaynes* v. *Noble*, the rule seems to be settled, that a creditor may go into equity in the first instance against the assets of a deceased partner, although the surviving partner may be solvent. The text writers have adopted this rule without objection. If the court should hold this to be the rule, then Parish, Marshall, & Co. would be entitled to relief against the administrators of Thomas Gray, although no suit was brought against Whitsett's representatives who had survived Gray; and in that aspect of the case, could Thomas Gray, administrator, demur, because *Parish, Marshall, & Co. sought to enforce debts chargeable on the estate, because the deceased was liable on them,—on one jointly with A., the other jointly with B. The estate is bound for both, they are both merely debts, and due to the same complainant. The same authorities show that when a bill is thus filed against tha representatives of the deceased partner, the surviving partner, whether solvent or insolvent, is a necessary party to the bill, although no decree can be rendered against him, for the remedy as against him is at law.

*131]

In conclusion, if the remedy on the bill and note to Parish, Marshall, & Co., due by Whitsett & Gray, is at law exclusively; or if, as yet, Parish, Marshall, & Co. are not entitled to equitable relief as to these two debts, then the demurrer is too broad, and should not have been sustained. But if they go into equity in the first instance against the assets of Gray, these two debts are merely debts due by Gray; and what inconvenience will result from uniting them with other

debts due the same complainant by Gray? For the reasons above stated, the court erred in sustaining the demurrer.

Mr. Crittenden referred to the complicated nature of the suit, brought by two firms against two other firms, and contended that it was objectionable on account of multifariousness, misjoinder of parties, and causes of action. That a judgment should have been obtained against the surviving partner at law, before resorting to equity. For these principles, he cited 2 Madd. Ch., 294; 2 Anstr., 447; Hardr., 337; 2 Ves., 323; 1 Story on Part., 512–514.

Mr. Justice DANIEL delivered the opinion of the court.

Amongst the causes assigned for the demurrer in this case no objection is urged as founded upon the joinder of the different complainants in the bill and amended bill, unless it be supposed that an objection may be implied in the general language of the first assignment, namely, that the complainants had not by their bills made such a case as entitled them to relief. From a statement thus vague and indefinite it would be difficult to deduce any one objection rather than another; but could this assignment be understood as pointing specifically to the structure of the bills as multifarious, from the number or relative position of the complainants, it is certain that no valid exception could on either of those grounds be sustained.

These bills are formally, as well as substantially, creditors' bills, by which the complainants are regularly and properly united in seeking satisfaction from subjects against which, as creditors of the defendants, they can properly claim. As to the nature and regularity of such a proceeding see Mit. Eq. Pl., 166, 167; Story, Eq. Pl., §§ 99, 100, and the authorities there cited.

*From a want of perspicuity in the statements contained in the bill and amended bill, in the former especially, there might seem at first view some plausibility in the second cause assigned for the demurrer, namely, the multifariousness of the bills from the joinder of parties as defendants, who are supposed to be unconnected in interest and in liability. The objection of multifariousness is one of which it is said by the authorities a defendant can avail himself by demurrer or exception taken to the pleading only. That being designed for his protection against the vexation and expense of answering to matters irrelevant to the true controversy existing between him and the complainant, if instead of arresting the irregularity at the commencement and claim- [*132

ing the exemption intended for him, he will go on and answer the bill, the reason for the exemption designed by the rule no longer exists; and although at the hearing the court may, *sponte sua*, make an objection for multifariousness, it is no longer in the power of a party, after answer, to do so. See *Whaley* v. *Dawson*, 2 Sch. & L., 370, and *Ward* v. *Cooke*, 5 Madd., 80. From the character of this objection, then, and from the established requisition as to the time and mode of making it by a defendant, it must of course be tested and determined by the structure of the bill alone, and cannot be enforced, explained, or removed by proceedings posterior to the bill and demurrer, nor by the evidence. From some obscurity in the bill and amended bill, as has already been observed, there might seem to be a want of connection in interest and in liability between the defendants, such as would not warrant their being joined in the same suit. This objection, however, will entirely vanish upon a closer examination of the relative positions of the parties.

The complainants consist of two sets of creditors. First, the firm of Nelson, Carleton, & Co.; secondly, the firm of Parish, Marshall, & Co. To each of these firms the copartnership of Whitsett, Gray, & Co. became indebted. The debt contracted to the former house was evidenced by the note of Whitsett, Gray, & Co. The debts (for there were several in the second instance) due to Parish, Marshall, & Co. were evidenced by two notes of Whitsett, Gray, & Co., by a bill drawn by Whitsett, Gray, & Co. on Sims & Co. (which it is alleged was not accepted), and by a note of Whitsett & Gray, payable to White, Brothers, & Co., and passed in some mode not distinctly set forth by Whitsett, Gray, & Co. to Parish, Marshall, & Co. The firm of Whitsett, Gray, & Co. was composed of William H. Whitsett, Thomas Gray, and John J. Hill; that of Whitsett & Gray was composed of William H. Whitsett and Thomas Gray. Thus it appears that Thomas Gray was a member of both firms. The complainants allege the deaths of both Whitsett & Gray, leaving Hill as surviving partner of the firm of Whitsett, Gray, & Co. They aver that Lipscomb & Hardin administered upon the estate of Whitsett, and had reported
*133] that estate *to the County Court to be insolvent; that Ann R. Gray, widow of Thomas Gray, and who had intermarried with L. Sexton, had, conjointly with James Gray, taken administration of the estate of Thomas; that upon judgments obtained on the notes of Whitsett, Gray, & Co., against Hill, the surviving partner, executions had been sued out and returned *nulla bona*. There is, in the next

place, charged a belief of frauds and concealment on the part of Hill, and the administrators of Whitsett, and also the perfect solvency of the estate of Thomas Gray; the whole concluding with a prayer for accounts of the effects of Whitsett, Gray, & Co., of William H. Whitsett, and of Thomas Gray, in the hands of their representatives, and for satisfaction.

It is now a rule of law too well settled to be shaken, that the creditor of a partnership may, at his option, proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner. See the several cases on this point collected in Story on Partnership, § 362, note 3. This being conceded, there can be no valid exception to the prosecution of this suit immediately against the representatives of Thomas Gray, and it is to the advantage of his estate, that the representatives of Whitsett, and the surviving partner, Hill, should both be called in, that they may be required to contribute from any appropriate means in their possession towards the discharge of their joint and several obligations. Here, then, will be perceived the answer to the third cause assigned for the demurrer, namely, that the complainants had not exhausted their remedy at law before going into a court of equity. It is the right also of the representatives of the deceased partner, Whitsett, and that of the surviving partner, Hill, to participate in settlements in which their interests are directly involved; and an omission in the bills to convene these joint parties in interest for this purpose, with the representatives of the other deceased partner, Gray, would have exhibited a palpable and material defect in the proceedings of the complainants.

According to the case made in the bill and amended bill, there are no visible partnership effects, and it may be the fact, that the surviving partner, Hill, and the estate of the deceased partner, Whitsett, are both insolvent. Should this turn out to be true, then the separate estate of the partner, Gray, said to be solvent, must be responsible to the creditors of each of the firms of which he was a member. In order to ascertain the precise extent of Gray's responsibility, accounts would be proper, not only between the two firms and their respective creditors, but also between these firms themselves. Accounts would likewise be proper of the separate effects of the deceased partners. This view of the case removes the ground set forth in the second assignment of causes of demurrer. We are of opinion that the court could, in equity, properly take cognizance of this cause without the necessity

*134] for further previous *proceedings at law; that the bill and amended bill of the complainants were not exceptionable for multifariousness; that the decree of the Circuit Court dismissing those bills for either of the causes assigned for the demurrer is erroneous. The decree is therefore reversed, and this cause is remanded to the Circuit Court, with directions to be there proceeded in, conformably with the principles here established.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is ordered and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to proceed therein conformably to the opinion of this court.

JOHN A. ROWAN AND JOHN L. HARRIS, COPARTNERS IN TRADE UNDER THE NAME AND STYLE OF ROWAN AND HARRIS, PLAINTIFFS IN ERROR, *v.* HIRAM G. RUNNELS, DEFENDANT IN ERROR.

SAME *v.* SAME.

In the case of *Groves* v. *Slaughter* (15 Pet., 449) this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale.

This constitution went into operation on the 1st of May, 1833, and on the 13th of May, 1837, a law was passed to provide for the case.

This court adheres to the construction of the constitution which was given in the case of *Groves* v. *Slaughter*, and enforces contracts made between the two days above mentioned, although the courts of the State of Mississippi have, since the decision in the case of *Groves* v. *Slaughter*, declared such contracts to be void.[1]

THESE cases were brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi. Rowan and Harris were citizens of Virginia, and Runnels was a citizen of Mississippi.

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[1] RE-AFFIRMED. *Truly* v. *Wanzer*, *post*, *141; *Sims* v. *Hundley*, 6 How., 1, 6. FOLLOWED. *Talcott* v. *Township of Pine Grove*, 1 Flipp., 126, 128, 176, 181. DISTINGUISHED. *Jessup* v. *Carnegie*, 80 N. Y., 448. See also *Moore* v. *Clopton*, 22 Ark., 125, 128; *Opinion of the Judges*, 58 N. H., 685.