done by the exercise of an appellate power,—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court. This does not conflict with the principles laid down in *Marbury* v. *Madison*, 1 Cranch, 137. In that case, the court refused to exercise an original jurisdiction by issuing a mandamus to the Secretary of State; and they held, that "Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution."

There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought *before the District or Circuit [*192
Court; consequently it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it.

Upon the whole, the motion for the writ of *habeas corpus* in this case is overruled.

ORDER.

Mr. Cove, of counsel for the petitioner, having filed and read in open court the petition of the aforesaid Nicholas Lucien Metzger, and moved the court for a writ of *habeas corpus*, as prayed for in the aforesaid petition, to be directed to the marshal of the United States for the Southern District of New York, commanding him forthwith to produce before this honorable court the body of the petitioner, with the cause of his detention, — on consideration whereof, and of the arguments of counsel thereupon had, as well against as in support of the said motion, and after mature deliberation thereupon had, it is now here ordered and adjudged by this court, that the prayer of the petition be denied, and that the said motion be and the same is hereby overruled.

ALBERT G. CREATH'S ADMINISTRATOR, COMPLAINANT AND APPELLANT, *v.* WILLIAM D. SIMS.

The following principles of equity jurisprudence may be affirmed to be without exception; namely, that whosoever would seek admission into a court

of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence.[1]

Therefore, where a complainant prays to be relieved from the fulfilment of a contract, which was intentionally made in fraud of the law, the answer is, that however unworthy may have been the conduct of his opponent, the parties are *in pari delicto*. The complainant cannot be admitted to plead his own demerits.[2]

Nor is it any ground of interference when a complainant applies to be relieved from the payment of a promissory note given under the above circumstances, upon which judgment had been recovered at law. The consideration upon which the note was given was then open to inquiry, and it is a sufficient indulgence to have been permitted once to set up such a defence.

The cases examined, showing how far and under what circumstances the liability of a surety becomes fixed upon him as a principal debtor.

Where the plaintiff in a suit voluntarily abstains from pressing the principal debtor, but receives no consideration for such indulgence, nor puts any limitation upon his right to proceed upon his execution, whenever it may be his pleasure to do so, this conduct furnishes no reason for the exemption of the surety from liability, and especially where the surety had united with his principal in a forthcoming bond.[3]

The authorities upon this point examined.

THE reporter finds the following statement of the case prefixed to the opinion of the court, as delivered by Mr. Justice Daniel.

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[1] CITED. *Hendrickson* v. *Hinckley*, 17 How., 445, *Brown* v. *County of Buena Vista*, 5 Otto, 161. See *Connecticut Mut. Life Ins. Co.* v. *Athon*, 78 Ind., 17; *Tufts* v. *Tufts*, 3 Woodb. & M., 456, 506.

[2] DISTINGUISHED. *Bateman* v. *Fargason*, 2 Flipp., 663.

[3] A surety is not discharged by the plaintiff's giving time to the principal debtor, or even by his discontinuing of the suit commenced against the principal, without the privity and concert of the surety, unless the surety has explicitly required him to proceed against the principal, or the plaintiff has, by some agreement with the principal, precluded himself from suing him. *Fulton* v. *Mathews*, 15 Johns. (N.Y.), 433; *Pain* v. *Packard*, 13 Id., 174; *Orme* v. *Yonge*, Holt. N. P., 34; *King* v. *Baldwin*, 2 Johns. (N. Y.) Ch., 554; *Cope* v. *Smith*, 8 Serg. & R. (Pa.), 110; *Thursby* v. *Gray*, 4 Yeates (Pa.), 518; *Butler* v. *Hamilton*, 2 Desaus (S. C.), 226; *Belfort Banking Co.* v. *Stanley*, Ir. Rep., 1 Com. Law, 693; *Perfect* v. *Musgrove*, 6 Price, 111. A loss from indulgence by a creditor to a principal, which is purely permissive, will not discharge a surety. If the creditor has disabled himself to proceed, the surety is *ipso facto* discharged; if he has not, no eventual loss from mere delay will produce that effect. *United States* v. *Simpson*, 3 Pa., 433; *Hunt* v. *United States*, 1 Gall., 34; *Warfield* v. *Ludewig*, 9 Rob. (La.), 240; *Moore* v. *Broussard*, 20 Mart. (La.), 18; *Force* v. *Craig*, 2 Halst. (N. J.), 272.

Mere delay in calling on the maker of a note for payment will not release an indorser who has waived demand and notice. *Johnston* v. *Searcy*, 4 Yerg. (Tenn.), 81; *Deberry* v. *Adams*, 9 Id., 54; *Thompson* v. *Watson*, 10 Id., 369; *Buchanan* v. *Bordley*, 4 Har. & M. (Md.), 41; *Strong* v. *Foster*, 17 Com. B., 201; *Humphreys* v. *Crane*, 5 Cal., 173; *King* v. *State Bank*, 9 Ark., 185. "The holder of a bill may forbear to sue the acceptor as long as he pleases, and will not thereby discharge the other parties from their liability, provided he does not agree to give time to the acceptor, without their concurrence." *Martin* v. *Mechanics' Bank*, 6 Har. & J. (Md.), 235, 247.

*This is an appeal from a decree of the Circuit Court of the United States for the 9th Circuit and Southern District of Mississippi. [*193 The facts of this case, so far as it is necessary to set them forth, are as follows:—On the 25th of June, 1838, A. G. Creath, together with William N. Pinkard (who signed himself as principal), John I. Guion, and Samuel Mason, executed their promissory note to the appellee, as administrator of John C. Ridley, for the sum of $\$10{,}392\frac{25}{100}$ payable on the 1st day of October following, at the branch of the Planters' Bank at Vicksburg in Mississippi. Upon failure to pay this note, an action was instituted thereupon, in the Circuit Court above mentioned; a judgment was recovered for the amount at the May term of the court, 1839; and upon a *fieri facias* sued out upon this judgment, the marshal having returned, on the 2d of October, that he had levied upon certain slaves enumerated in his return, the parties to the promissory note, the defendants in the judgment, together with a certain T. L. Arnold, on the 2d day of October, 1839, executed to the plaintiff in the action a forthcoming or delivery bond, which has the force of a judgment, by virtue of which the property levied upon was released. The condition of this forthcoming bond not having been complied with, a *fieri facias* was, on the 16th of December, 1839, sued out thereupon, and on this process the marshal, on the 24th of March, made a return that it had been levied on several lots and parts of lots in the town of Vicksburg, which were not sold by order of the plaintiff's attorney. A copy of the order referred to by the marshal is made a part of the record, and is in the following words:—"The marshal is authorized to levy on property enough of the defendants to pay the plaintiff's execution, and return the levy to court without selling or advertising for sale, unless other judgments younger than this are pressed to an amount to endanger this debt; if so, the property will have to be sold, March 24th, 1840." On the 21st of May, 1840, a *venditioni exponas* was sued out, ordering the sale of the property which had been levied upon, and on that process there was a return that there had been no sale for the want of bidders. A second *venditioni exponas* was next sued in November, 1840, and on this the marshal returned that the property had been sold on the 2d of March, 1841, and the proceeds applied to the execution. The amount made by this sale does not appear by the return of the officer, but it is stated, in the answer of the respondent, to have been $101 only. In consequence of the insufficiency of the sale, under the last *venditioni exponas*, to satisfy the judgment, process of *fieri facias*, *alias fieri facias*, *pluries* and *alias plu-*

ries fieri facias was sued out, until the autumn of the year 1842, when the marshal, having levied upon certain real and personal estate of the said A. G. Creath, as set forth in the return of that officer, and in his advertisement for the sale thereof, the complainant, on the 25th day of November, 1842, *194] obtained from the district judge *of the Southern District of Mississippi an injunction to stay all proceedings upon the judgment recovered against him and others at law. The grounds set forth in the bill, and on which relief is prayed, are the following:—1st. That the complainant was a mere surety in the note on which the action was instituted, and that the indulgence granted by the direction to the marshal after judgment obtained was in fraud of defendant's rights as a surety; was in its operation, in fact, injurious to him, from the deterioration of the property of Pinkard the principal during the interval of that indulgence; was an infraction of the undertaking of the surety, and therefore absolved him from all responsibility. 2dly. That the instrument on which the judgment was obtained was one of several notes given for the purchase of a number of slaves sold by the intestate of the plaintiff to Pinkard, several of whom were unsound, although, as the plaintiff charges, they were (as he believes) warranted to be sound and healthy. 3dly. That although the slaves for which the notes were given were delivered in the State of Tennessee, yet the contract for them was in fact made at Vicksburg, in Mississippi, and was designed to be, and was in reality, a fraud upon the constitution and laws of Mississippi, forbidding the introduction of slaves, as merchandise, within that State.

The respondent denies that the complainant, Creath, could properly be regarded as a surety, either in the note on which the action at law was instituted, or in the forthcoming bond executed posterior to the judgment; but insists that in both the complainant must, with respect to the respondent, be considered as a principal, equally with the other makers of the note, or obligors in the forthcoming bond. But even could Creath be viewed as a surety, it is further insisted that he could have no just cause of complaint, because, in the short space of five weeks, during which the execution was held up, there could be no material depreciation in property of any intrinsic value; and because, moreover, the forbearance was merely voluntary on the part of counsel of the respondent, was wholly without consideration, and without any agreement for delay with either of the parties, and might have been terminated at any moment, at the will of the respondent, or at the request of either of the defendants, had

this been desired by them. The allegations in the bill of a warranty of the soundness of the said slaves, and of the making of the contract of sale within the State of Mississippi, and in fraud of the constitution and laws of that State, are, in the first instance, directly denied; and it is next insisted by the respondent, that these are objections which, if they ever had any validity, should have been urged as grounds of defence to the action at law. A copy of the bill of sale from Ridley to Pinkard and others, conveying the slaves, is made an exhibit in the cause, and upon the face of that instrument there is no warranty of any thing except of the title to the property conveyed. Several depositions were taken on *behalf of the complainant, and some exhibits filed by the respondent, but as these are deemed immaterial to [*195 the questions on which the decision of this cause properly depends, they will not be made subjects of comment. Upon a final hearing before the circuit judge, on the 15th of May, 1844, it was decreed, that the injunction awarded by the district judge on the 25th of October, 1842, should be dissolved, and the bill of the complainant dismissed with costs.

From this decree, an appeal was taken to this court.

The cause was argued by *Mr. Crittenden*, for the appellant, and by *Mr. Coxe* and *Mr. Chalmers*, for the appellee.

Mr. Crittenden, after stating the case, proceeded with the argument.

The question arising upon the case thus presented is, whether the complainant, as the surety of Pinkard, is discharged, in equity, from his liability as such?

The proof in the cause leaves no room to doubt that he was a surety. Being such, it is contended that the successive suspensions of the executions of the 16th of December, 1839, and of the 15th of March, 1841, discharge the plaintiff as a surety. The former execution was levied on the 24th of March, 1840, and the real estate levied on was not sold until the 2d of March, 1841, being an interval of eleven months and a few days. Contemporaneously with the date of the execution, the marshal was directed by the plaintiff's attorney "to return the levy to court without selling or advertising for sale," unless other judgments were pressed to an amount endangering the debt. The marshal returned on the execution,—"Levied this *fieri facias* on lots No. 93, &c., and not sold by order of attorney."

Another execution did not issue on the judgment until

the 21st of May, 1840, that being the date of the *venditioni exponas.*

It is clear that the stay of the execution was produced by an agreement between Pinkard, the principal, and the attorney of the plaintiff. The answer of the defendant does not deny this. On the contrary, it would seem to be admitted. For it says,—"This respondent is informed, and believes, that the only reason which influenced the attorney of record to consent to one day's time in the sale, and the only reason assigned to him by Pinkard when asking such time, was to enable Pinkard, if possible, to complete some negotiations that he had then going on, to relieve his property," &c. "And this respondent believes he (the complainant) well knew that said Pinkard and the attorneys of record in this and other cases were trying to aid him, Pinkard, to get through his difficulties," &c.

Proof to the same point is contained in the deposition of Pinkard. *He says,—"The stay of execution was granted at my request, and the only consideration that I knew for granting it was, that the attorney, F. Norcom, who granted it believed I would be able to pay it in a short time, as he knew it was the first levy that had ever been made on my property, and that he considered it ample to pay every dollar against me under any circumstances."

*196]

If, however, it should be supposed that the evidence does not establish an agreement for the delay, the foregoing statement of the witness, together with other proof to which the attention of the court will be called, sufficiently maintains a position, that, by the postponement of the sale, the risk of the surety was materially increased, and the property levied on, which he had a right to rely on for his indemnity, was greatly depreciated in value.

The bill charges, that "the property on which the execution was levied, together with other property of Pinkard's not levied on, was, at the time of the levy, and until after the return term of the execution, amply sufficient to pay, not only this judgment, but all other judgments and liens of prior date to the time when the lien of this judgment took effect; and had said sale been made, said judgment would have been satisfied out of the property of said Pinkard."

It also charges, "that after the return term of the execution by which said property was levied on, it became (as indeed all real property had) greatly depreciated in value, in consequence of commercial embarrassments and other causes, and there being other judgments, of younger date,

against said Pinkard, the effect of the suspension of said sale was thought by many to give those younger judgments the preference,—at least the doubt which this suspension created on this point caused said property, which was sufficient at the time of the levy to have twice paid the judgment, to sell for little or nothing."

In support of these allegations of the bill, the undersigned refer the court to the deposition of Pinkard. The deponent states,—"There were two stays given on the execution by F. Norcom, attorney for W. D. Sims, administrator of John C. Ridley's estate, at my request, without the knowledge or consent of Creath, and the sureties in the case. The first was given in writing on the execution at the marshal's office, in Vicksburg, on the 4th of March, 1840, erased,"—"the second was given between the 15th of March and the first Monday of May, 1841." "I had sufficient property at the time the stay was given to pay five times the amount of judgments then against me; and I could, if the execution had been pressed, at any time within two weeks of the time the suspension was granted, have raised the money to pay it, as the counsel granting the stay was perfectly satisfied at the time."

"The effect of the stay was to cloud the title to the property levied on in this case, and cause doubts in the minds of the best *attorneys, whether the executions which had [*197 taken their regular course had not a preference lien in every instance where they had not been paid, which would not have been the case if the suspension had never taken place. These doubts in the minds of purchasers operated seriously against the sale of the property when it was finally offered."

Again, the same deponent says,—"If said stay had not been granted, I would and could have paid the money rather than the property should have been sold, but the stay operated so seriously against me, that when the property was sold it was impossible for me to protect it."

"At the time the sale was made, Major Milkie was anxious to purchase the property" (one half at $16,000, and General Vick was in treaty for lots 93 and 94 at $32,000, one half in Planters' Bank money, the balance in good funds); "and was deterred from doing so owing to the advice of Mr. Yerger, who gave as his opinion that he could not get a title, owing to the stay given on said execution."

This evidence, connected with the additional statement of the deponent, that, "at the time the stay was granted, the amount of liens older than this judgment was comparatively

small, not exceeding $20,000," shows very clearly that the interests of the complainant were materially affected by the suspension of the execution; and that if the property had been regularly sold, it would have brought much more than it produced on the final sale. The court will not inquire into the degree of the injury received by the surety, for that would lead, in the language of Lord Loughborough (*Rees* v. *Berrington*, 2 Ves., 543), "into a vast variety of speculation, upon which no sound principle could be built." Nor will the court, it is contended, look into the encumbrances upon the property, alluded to in the defendant's answer, with a view of determining the liability of this surety. Pinkard's testimony is ample to show, that at all events, if the sale had taken place, the debt for which the complainant was bound could have been made; not only was the property itself sufficient, but Pinkard asserts he would have paid the money rather than it should have been then sold. The complainant was entitled to the benefit of these chances. The creditor, with an execution levied, was a trustee for all the parties interested in the subject-matter concerning which such execution was taken out. Pitman, Pr., 177; *Mayhew* v. *Crickett*, 2 Swanst., 185.

Upon the proof in the cause, therefore, it is contended, that the complainant is released from his obligation as surety. The authorities are fully to the point.

The rule was distinctly recognized in *Rees* v. *Berrington*, 2 Ves., 440. Lord Loughborough said in that case,—"It is the clearest and most evident equity, not to carry on any *198] transaction *without the privity of him (meaning the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own), without consulting him." "The authorities fully warrant me in this; though I should have granted the injunction, even without that strong authority before Lord Thurlow." "There the creditor," "thinking that by leaving the debtor at large, and taking a judgment against him, which affected all his property, he pursued a better mode, using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit, and holding him in prison. But he did it without consulting the surety; and therefore Lord Thurlow held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous; after circumstances of communication, that showed great embarrassment, great difficulty, and

great distress, indulgence was from time to time given, under circumstances apparently very hazardous, without any communication with this man who had so great an interest."

A question, similar in principle, arose in the case of *Mayhew* v. *Crickett*, 2 Swanst., 193, in which the Lord Chancellor said,—"I always understood that, if a creditor takes out execution against the principal debtor, and waives it, he destroys the surety, on an obvious principle which prevails both in courts of law and in courts of equity," for "the principle is," he observed in another place, "that he is a trustee of his execution for all the parties interested."

In the case of *Bullitt's Executors* v. *Winstons*, 1 Munf. (Va.), 269, the Court of Appeals of Virginia had occasion to allude to the question now before us; and Judge Tucker held, that a plaintiff, by directing the sheriff to put off the sale of property taken in execution to a day after the return day, and to suffer it to remain in the possession of the principal, releases the sureties altogether from that or any subsequent executions, such direction being given without their concurrence.

The case of *Jones* v. *Bullock*, 3 Bibb (Ky.), 467, is directly to the same effect. There the party interested in an execution directed it to be stayed after it had been levied. The court say,—"The execution which was levied upon the property of the principal debtors was postponed by the creditor without the privity or consent of the complainants. This course of proceeding evidently tends to their prejudice as securities; and it is a principle recognized by courts of chancery, and perfectly consonant to the dictates of natural justice, that any arrangement between the creditor and principal debtor, for the easement of the latter, and to the prejudice of the securities, will, if the securities are not privy to or approve of such arrangement, operate in equity to release them from their responsibility." And the court directed a decree, making the injunction of the surety to the judgment perpetual.

*In the *Bank of Steubenville* v. *Carroll*, 5 Ohio, 207; *S. P. Bank of Steubenville* v. *Hoge*, 6 Id., 17, the court held, that if the principal at the instance of the creditor confess a judgment with a stay of execution, the sureties are discharged. [*199

I will merely direct the attention of the court, without comment, to the question presented by the record as to the consideration of the note on which the judgment was rendered.

On the whole, it is submitted that the decree of the Circuit Court is erroneous, and ought to be reversed.

Mr. Coxe and *Mr. Chalmers*, for the appellee.

The errors alleged in the decree, so far as we can learn them from the record, are supposed to be three.

1. That complainant Creath was exonerated from his responsibility by the postponement of the sale of Pinkard's property, which had been levied upon under the execution issued upon the judgment obtained upon the forthcoming bond.

2. That the original contract for the sale of the negroes made by Colonel Ridley, and for part of the purchase money of which the note in which this suit originated was given, was null and void, on the ground of fraud in the vendor in making the sale, either because of his false representation as to the soundness of the slaves when sold, or because of his having made an actual warranty of such soundness, which was broken.

3. That the original contract as aforesaid was void, because of the violation of the provision of the constitution of Mississippi, prohibiting the importation of slaves.

The decree of the Circuit Court does not show upon its face whether these grounds were overruled, because not supported in point of fact, or because under the circumstances they were not deemed to constitute a legal defence to the action. In vindicating the correctness of this decree, the counsel for the appellee feel themselves fully authorized to sustain it as well upon the law as the facts. They therefore insist, that neither of these grounds of defence is established by the proof in the cause; and, secondly, not under circumstances which justify the interposition of a court of equity to prevent a party who has obtained a judgment at law from having the full benefit and effect of such judgment.

I. The alleged suspension of the execution which had been levied upon the property of Pinkard.

1. It appears from the record, that Sims brought his action in the Circuit Court at the May term, 1838, against sundry defendants upon the same promissory note. The declaration in this case sets forth a joint promise by Pinkard, as principal, Creath, Guion, and Mason, as sureties, on the 25th June, 1838, to pay on the 1st October, 1838, to the plaintiff, or order, the sum of $10,392.57, and it avers a joint responsibility on all the parties defendants. *The defendants all united in the plea of the general issue, and upon the trial the

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jury found a general verdict against all, upon which judgment was entered.

Upon this judgment a writ of *fieri facias* issued against all the defendants jointly. Upon this writ the marshal returned a levy upon sundry slaves, and that he had taken a forthcoming bond, with Thomas L. Arnold as surety, which bond is set forth in the record.

This bond having been forfeited, another *fieri facias* issued against all the parties, including all the defendants in the original suit, together with Arnold, the security, but without designating him as such. The marshal returned, that he had levied upon certain real estate, designated, "not sold by order of attorney." The levy does not indicate to which of the defendants the property levied on belonged, and the order of plaintiff's attorney, set forth in the bill, and in the transcript of record, does not name any one of the defendants to whom indulgence was to be granted. Whatever favor was granted would seem to have been extended equally to all. This order, as well as the levy, bears date 24th March, 1840. May 21, 1840, a *venditioni exponas* issued in like manner, without distinction of parties, which was returned,—"Not sold for want of bidders." An *alias* issued on the 3d December, 1841, which was returned,—"Sold to S. S. Prentiss, and proceeds applied." March 15th, 1841, a *pluries* issued, which was stayed as against the other defendants. June 8, 1841, an *alias pluries* issued, to which the marshal returned a levy on certain specified property of Pinkard. Subsequent process was issued, but the *fieri facias* which was enjoined does not appear in the record.

The only act complained of as an undue act of forbearance, or giving of time, is that of March 22d, 1840; *quære*, if not March 24, 1840. This obviously was in no respect detrimental to complainant. It was an indulgence, if any, equally extended to all the defendants; and if any contract of forbearance is to be inferred from it, all were parties; neither has cause of complaint. But what was then the position of the parties? A judgment at law had been obtained against all jointly. The responsibility of each was then fixed. The plaintiff was at perfect liberty to issue an execution, or to withhold it, to issue against all or any, to compel payment of his debt from any or either.

Even if the engagement of Creath was a subsidiary one at any time, which is denied, it had become absolute and primary by the rendition of the first judgment against him. The right of the plaintiff was perfected. He might now pursue his remedy against either or all, and the omission to proceed

against one, or even a positive indulgence granted to one, would in no decree impair his rights as against any other.

But the strength of the appellee's case does not rest here. He did take out execution; he caused a levy to be made; *201] and *complainant again, with his associates, enters into a new and solemn instrument, under hand and seal, in the shape of a forthcoming bond. This bond created a new and substantive contract; and, being forfeited, gave rise to another judgment, comprehending all the parties to it. Again, plaintiff had a perfect right to proceed against one or all; to direct the marshal to levy upon any property of any one of the defendants. He did issue execution, a levy was made, a sale advertised, when complainant resorted to equity, and obtained an injunction. The first question arising in the case is, whether the original direction given to the marshal, prior to the forthcoming bond, to the forfeiture of that bond, the judgment upon it, and the issue of the *fieri facias*, invalidate all these subsequent proceedings, and discharge complainant's liability.

For the appellee it is contended, that no such legal or equitable consequences result.

1. Because, by the terms of the original note, all the parties were equally bound, jointly and severally. There was no primary responsibility in one, or a contingent and subordinate responsibility in the other.

2. Because, even had such been the case, by the judgment all became principals. Even in the case of indorsers, whose contract is confessedly conditional and contingent, such is the law. *Lenox* v. *Pavert*, 3 Wheat., 525, is express upon this point. It was there held, that, when judgment has been obtained against the drawer and indorser, both become principals; and the creditor ought not to be restrained by any fear of exonerating the indorser from countermanding the service of any execution he may have issued, and proceeding immediately, if he chooses, on the judgment against the indorser. But it is obvious, that in this case the designation in the original note of one of the parties does not have this effect. 5 Johns. (N. Y.) Ch., 315. In the case of *Bay* v. *Tallmadge*, which was, in many particulars, analogous to the present, but in which bail, who are always especially favored, sought to be exonerated in consequence of the postponement of proceedings against their principal, Chancellor Kent says, "that even an express dissent by the bail will not discharge them from their obligation to pay the judgment against them. Their privileges as bail were lost, and they had become fixed as principal debtors." I am not aware of any case that has ever

imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, after judgment and execution against the bail or surety. It becomes, then, too late to inquire into the antecedent relations of the parties. Those relations become merged in the judgment.

The case of *Rees* v. *Berrington*, 2 Ves., 540, is a leading case upon this point, and the cases cited in the note to that case (Phil. ed.) fully illustrate the distinctions which exist.

*3. The act complained of was not one which, in any case, and with the most rigid application of the most favorable decisions in favor of sureties, would operate a discharge. No peculiar benefit is granted to the so-called principal. No especial forbearance as regards him. The order is general as to all the defendants in the execution. [*202

Nor was there any agreement obligatory on the parties to grant indulgence to the principal debtor. In *Reynolds* v. *Ward*, 5 Wend. (N. Y.), 501, it was held that an agreement, without consideration, by a creditor with a principal debtor, enlarging the time for the payment of a note, does not discharge the surety.

Bank of Utica v. *Ives*, 17 Wend. (N. Y.), 501. Indulgence to the maker of a note, on receipt of security from him, does not discharge the indorser, where there is no valid agreement extending the time for payment for a definite period. Nelson, C. J., in this case, distinctly says,—"Mere indulgence at the will of the creditor, extended to the debtor, in no way impairs the obligation of the surety. If it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is well settled, there must be a valid common law agreement to give time, founded of course upon a good consideration, to have this effect."

In *M'Lemore* v. *Powell*, 12 Wheat., 554, this court, after a review of the authorities in the case of an indorser while holding merely that character, held that a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is no discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawer and due notice to himself.

If such be the law, as thus laid down by the unanimous voice of this court, and the authority of this decision has never been questioned, *a fortiori* the complainant in this case was not discharged by the facts which he avers in his bill; as between himself and the creditor he never occupied the posi-

tion of a surety. The designation of the relative characters of the parties to the note was simply to indicate their relative rights and obligations as among themselves, to confer upon the sureties the right of complete indemnification as against their principal, and of contribution among themselves. The order of the attorney to the marshal, upon which complainant relies, is destitute of every feature and character which has hitherto been regarded by courts as requisite to operate the results sought to be deduced from it.

If further answer be required upon this point, it will be found in the fact that the objection comes too late. If ever available, it should have been urged before the issue of the execution upon which the forthcoming bond was given, before judgment had upon that bond,—the forfeiture of which was *203] a satisfaction and *extinguishment of the original judgment; *King* v. *Terry*, 6 How. (Miss.), 513; *The United States Bank* v. *Patton*, 5 Id., 200,—before the execution against which the injunction was prayed. With full knowledge, complainant omitted to avail himself of a defence, which was equally effective at law as in equity, and he is concluded. 2 Story, Eq., 179; 1 Johns. (N. Y.) Ch., 465; 9 Wheat., 552.

II. The next ground is, that Redley, Sim's intestate, perpetrated a fraud in the sale of the negroes, for whose payment this debt was originally incurred.

The particular point of this objection is not very apparent. The bill says that Redley represented fraudulently, as complainant has been informed and believes, all said slaves to be perfectly sound and healthy, and warranted them, as he has been informed, to be sound and healthy. Whether the sale is sought to be avoided on account of the alleged false and fraudulent representation, or on the ground of the breach of an express warranty of soundness, is not made distinctly to appear.

It is manifest that the purchaser never rescinded, or sought to rescind, the sale, on any pretence that it was vitiated by fraud; he holds on to the property purchased, pays through the enforcement of the law a part of the purchase money, and now, after six years of acquiescence, this ground is brought forward in a court of equity. The bill of sale of the negroes contains no covenant of warranty, and completely falsifies the pretence that one was given; nor was the appropriate remedy, by action for breach of such covenant, ever resorted to.

2. It is wholly unsupported by any evidence in the cause.

3. It appears by the record of the suit, that the then defendants, in an action at law upon one of these notes, endeavoured to avail themselves of the same defence, but wholly

failed, and a verdict and judgment were rendered against them. See *Groves* v. *Slaughter*, 15 Pet., 449, which has been again affirmed during the present term.

4. In regard to this particular note, the parties when sued at law omitted to avail themselves of this defence, and are now precluded from making this the ground of invoking the aid of chancery. See authorities before cited, and see the case of *Green* v. *Robinson*, 5 How. (Miss.), 80, on the exact point, and *Cowen* v. *Boyce*, Id., 769.

III. The last objection is, that Redley made this contract in violation or evasion of the provision in the constitution of Mississippi.

This ground of appeal to chancery comes with a bad grace from parties who have continued to hold the property purchased for a period of six years, without their title being questioned on the ground of an illegal importation. But this point admits of the same answer which has just been given to the former point. It has been once *tried at [*204 law and overruled. It was not urged in this case on the trial at law, and it is now too late to make it a ground for equitable relief.

In brief, the whole of these objections involve a palpable mistake of the grounds of equitable relief. Chancery will relieve from the effect of a judgment at law which has been obtained by fraud; but it is believed no case can be found in which, after judgment has been obtained at law, which judgment is unimpeachable for fraud, a court of equity has gone behind the judgment, and looked into the character of the contract in which that suit originated.

Upon the whole, and on every ground upon which equitable relief is sought, it is confidently submitted that the decree of the Circuit Court ought to be affirmed, with ten per cent. damages.

Mr. Justice DANIEL, after having read the statement of the case prefixed to this report, proceeded to deliver the opinion of the court.

In reviewing the grounds relied on by the complainant as the foundation of his claim to relief, the second and third, being coincident with the order and progress of the transactions between the parties as stated in the bill, and evincing especially the circumstances and the attitude under which this approach to a court of equity has been made, will be first considered, and this examination will be premised by stating the following principles of equity jurisprudence, which may be affirmed to be without exception;—that whosoever would

seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defence shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice. The effect of these principles upon the statements of the complainant is obvious upon the slightest inspection. The complainant alleges, that the obligation to which he had voluntarily become a party was intentionally made in fraud of the law, and for this reason he prays to be relieved from its fulfilment. This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this;—that, however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto;* you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you.[1] And so with respect to the omission by
*205] the *complainant to set up at law either the failure or the illegality of the consideration for which the note was given; no reason is perceived why such a defence should not have been made or attempted. The action at law was founded upon a simple promissory note, a *parol* contract in legal intendment, and not upon a speciality; the consideration was fully open to investigation, and it was surely a sufficient indulgence to the payees of that note to have been permitted *once* to set up a defence by which payment may have been resisted, whilst the whole consideration received by them for their undertaking would have been withheld, and absolutely possessed and enjoyed by them. But these payees of the note did not stop even here. After the first judgment recovered against them, and after the levy of an execution sued out on that judgment, they voluntarily go forward, the complainant amongst them, execute to the respondent their forthcoming bond, equivalent in effect to a confession of a second judgment, and after these repeated and conclusive

[1] Followed. *Sample* v. *Barnes*, 14 How., 74; *Walker* v. *Robbins*, Id., 586; *Crim* v. *Handley*, 4 Otto, 658. And see *Thomas* v. *Brownsville &c. R'y Co.*, 1 McCrary, 395; *West. Union Tel. Co.* v. *Union Pacific R'y Co.*, Id., 428.

recognitions of their liability, they invoke the aid of a court which repels whatever is unfair, or even illiberal, to declare that these proceedings, thus solemnly had and evidenced of record, shall be utterly null; that the respondent shall be stripped of his property without the promised equivalent, and that property be secured, if not to the complainant, to one with whom he was associated in effecting its relinquishment by the owner.

Recurring now to the first ground for relief set up in the bill, being that on which greatest stress is laid,—viz., the suretyship of the complainant, and the wrong alleged to have been done him by a change of his position and responsibility, by the indulgence extended to his codefendant Pinkard,—let us test this ground, first, by the proofs upon the record, and next, by trying the accuracy of the deductions attempted to be drawn from them. The promissory note, on which the action at law was founded, is made an exhibit, and it appears that to the name of Pinkard, the first signer of that note, there is added the word "principal," and to the name of each of the other makers is added the word "surety." It is insisted by the respondent, that these designations upon the note had no effect upon the obligations of these parties to him, however it might be supposed to operate upon their relations with each other; that with respect to the respondent all the makers of the note were from the beginning principals, but that at any rate, after their liability was fixed by judgment upon the note, and still more after their uniting in the forthcoming bond, in the nature of a second judgment, their equal responsibility as principals was irrevocably settled. In connection with this view of the case it may not be irrelevant here to remark, that by the statute of the State of Mississippi, promissory notes, though it be not so expressed upon the face of them, are declared in their legal effect to be joint and several. See How. & H. Stat. of Miss., 578. The proposition contended *for by the respondent, were it necessary here to pass upon it, [*206 would not be found without support from decided cases. Thus, for instance, it was ruled by Chancellor Kent in *Bay and others* v. *Tallmadge*, 5 Johns. (N. Y.) Ch., 305, that where bail become fixed with the payment of the debt of the defendant, their character of bail ceases; that after judgment and execution against bail and sureties, there is an end of the relation of principal and surety, and the bail cannot claim any advantage against the creditor on the ground of want of diligence in prosecuting the principal debtor. In *Prout* v. *Lennox*, 3 Wheat., 520, it is laid down by Livingston, Justice, in

delivering the opinion of the court, that "the indorser of a note, who has been charged by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety. But without pushing further an investigation which is unnecessary to the decision of the case before us, let it be conceded that the complainant was strictly a surety in the note on which the judgment was obtained at law; have any of his rights been impaired, or have any new rights grown up to him, springing from the conduct of the respondent or his agents in reference to that judgment and the proceedings had thereupon? The directions given by the attorney for the plaintiff in the judgment have been set out *in extenso*. These directions express upon their face no consideration received or promised for the forbearance, — no limitation upon the right of the plaintiff at law to proceed upon his execution, —no condition or stipulation of any kind; nor is there a tittle of proof as to the existence of any such consideration, limitation, or agreement, expressed or understood. We see nothing in the case but a voluntary forbearance, which the plaintiff was at perfect liberty to terminate at his pleasure. What say the authorities in relation to a proceeding of this character? In the case of *Rees* v. *Berrington*, 2 Ves., cited and pressed in the argument, the interposition of the chancellor was founded upon the ground of *an actual and substantive change* of the relation and responsibility of the surety, and in such a case his lordship very justly observed, that he would not undertake to calculate the degree of injury which might have flowed from it; that if the situation had in fact been changed, that was sufficient to release the surety altogether, for it was an attempt to impose on him a responsibility he had never assumed; but in the case before us was there any such change wrought by a mere voluntary forbearance, creating no obligation anywhere,—contracting with nothing, nor with any person? A few of the numerous cases, both at law and in equity, which are applicable to this question will be adduced.

Reynolds v. *Ward*, 5 Wend. (N. Y.), 501. It was ruled, that an agreement *without consideration*, enlarging the time of payment, was not a discharge of the surety to the note. So held on demurrer to a plea by surety, averring that at the time when the note became due the principal was able to pay, and would have paid had not the *time been extended, *207] and that after the note fell due the principal became insolvent. Held also, in that case, that a promise to pay interest during the time of forbearance was no consideration for such agreement.

Bank of Utica v. *Ives*, 17 Wend. (N. Y.), 501. Indulgence to the maker of a note, on *receiving securities* from him, does not discharge the indorser, where there is no valid agreement for giving time of payment for a definite period; and *per* Nelson, Chief Justice, in this case,—"Mere indulgence at the will of the creditor, extended to the debtor, in no way discharges the obligation of the surety; if it did, it would be a most inconvenient and oppressive rule, as then suits must immediately follow the maturity of paper. It is a settled rule, that there must be a valid common law agreement to give time, founded of course on a good consideration, to have this effect."

Norris v. *Crummie*, 2 Rand. (Va.), 328. It is ruled, that indulgence granted by a creditor to the principal debtor will not discharge the surities of such debtor, unless the creditor shall have bound himself in law or in equity not to pursue his remedy against the principal for a definite length of time.

Hunter's Administrators v. *Jett*, 4 Rand. (Va.), 104. A surety will not be discharged by indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law; nor will the surety be discharged even then, if the indulgence shall have been given with his knowledge and assent.

McKinney's Executors v. *Waller*, 1 Leigh (Va.), 434. A mere indulgence to a principal debtor by a creditor, not binding him to suspend his proceedings for any time, though such indulgence be given at the very time the sheriff is about to levy execution on the property of the principal, and although in consequence of that indulgence the principal debtor has been enabled to remove his property out of the reach of future process, was not, even in equity, a discharge of the surety.

Alcock v. *Hill*, 4 Leigh (Va.), 622. A creditor suspends execution on a forthcoming bond for several years, but he does so without consideration, and he no wise binds himself to suspend execution for any definite time; the principal and all the surities but one become insolvent; and then the creditor sues out execution against the solvent surety. Held that the surety is not entitled to relief in equity. The requisites in that case stated as indispensable for absolving the surety are, first, a consideration; second, a promise to indulge; third, the definite nature of such a promise; and, fourth, the absence of assent by the surety.

The last case which will be cited on this point is that of

M'Lemore v. *Powell et al*, 13 Wheat., 554, in which it was ruled by this court, that an agreement between a creditor and the principal *debtor for delay, or otherwise changing the nature of the contract, in order to discharge the surety, must be an agreement having a sufficient consideration to support it and be binding upon the parties. There is not one of the authorities above cited which does not more than cover the predicament presented by the case under consideration. Those authorities furnish examples of agreements,—arrangements between creditor and debtor,—situations from which something like hardship might possibly spring. In the present case, there is neither contract, arrangement, nor even a scintilla of right, on which either law or equity can lay hold. The complainant, after permitting a judgment on the note, without attempting a defence at law, and after execution was levied upon the judgment, voluntarily united in withdrawing the effects of his associate from the operation of that process, and by this very act bound himself with the force of a second judgment for the validity and for the satisfaction of the demand. After this course of conduct, he addresses himself to a court of equity, praying that court to undo all that he has voluntarily and deliberately performed, and in order to accomplish this end, he seeks to stamp his own acts with illegality from their very inception. For such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles. We hold the decree, therefore, of the Circuit Court, dissolving the injunction awarded the complainant below, and dismissing his bill with costs, to be correct; and that decree is accordingly affirmed.

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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 Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs.