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that the parties or the court have acted in direct contravention of the facts apparent upon, and standing prominently out upon, the record, operating by such presumption a false feature of the record itself. In this case the defendant has tendered an issue in law to the replication to the third plea; the record discloses the fact, that this issue has never been tried; it is therefore undeniable that there is a chasm in the proceedings, and that the court has not passed upon the whole case. If presumption can be admitted to warrant the conclusion that this demurrer was withdrawn, where shall such presumption end? Would it not be equally regular to presume that any other plea or issue on the record had been withdrawn? Then, if any other source than the record itself can be resorted to in order to ascertain what was in truth involved in the trial, conjecture or evidence *aliunde* must be introduced to determine; and that which, by legal intendment, is the only evidence or proof of the proceedings, the record, becomes the weakest of all proof, or rather becomes no proof at all. I think the judgment should be reversed, and the cause remanded for a trial on all the issues of law and of fact.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per cent. per annum.

*WILLIAM HARDEMAN AND HENRY R. W. HILL, [*726
COMPLAINANTS, v. BENJAMIN D. HARRIS.

If an exception be taken to an answer in chancery upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled.¹

Therefore, when a bill charged that certain notes were given for the purchase of slaves introduced into the State of Mississippi, as merchandise and for

¹ See *Brown v. Pierce*, 7 Wall., 212.

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sale, after the first day of May, 1833, and the answer omitted to notice the allegation, such omission was not a good ground for an exception. This court has repeatedly decided that the fact stated is no defence to a suit at law. Still less can it be a defence in equity, after a judgment at law.

Where an allegation in the bill was, that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants.

THIS case came up from the Circuit Court of the United States for the Southern District of the State of Mississippi, on a certificate of division in opinion between the judges thereof.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Nelson*, on behalf of the respondent, Harris; no counsel appearing for the complainants.

Mr. Nelson contended that neither of the exceptions was well taken.

The first, because the allegation to which it refers was wholly immaterial, and not therefore required to be answered.

The second, because the allegations therein referred to, contained in said bill, if at all material, which is denied, have been substantially responded to by said answer.

In support of the first proposition it is submitted,—

That to justify an exception to an answer in chancery upon the ground of insufficiency, it is necessary to show that the omission alleged is material to the purpose and object of the complainant's bill. 2 Dan. Ch. Pr., 261; Welford, Eq. Pl., 368; Hare on Disc., 160; 1 McClel. & Y., 334. In *Hirst v. Peirce*, 4 Price, 136, (2 Exch.,) Chief Baron Richardson says:—"There is a great mistake in general in this court as to what is a material exception. The true way of arguing and considering such an exception is by ascertaining whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff. If it would, it must be answered; if not, it is not material."

And in *Bally v. Kenrick*, 13 Price, 294, (6 Exch., 99,) Sir *727] William Alexander, Chief Baron, says:—The *materiality of the exception will depend on this,—whether the interrogatory be of such a nature, without reference to the objectionable part of the answer, as that the answer to it might, if it were answered simply as it is put, so far contribute to support the equity of the plaintiff's case as to con-

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tribute to induce the court to give him the relief sought by the bill."

This being the clear and well-settled rule, it remains to inquire, whether the omission referred to in this exception be material to the object of the complainants' bill.

That it is not is unquestionably clear. *Groves v. Slaughter*, 15 Pet., 449; *Harris v. Runnels*, 5 How., 135; *Truly v. Wanzer et al.*, 5 How., 141; *Sims v. Hundley*, 6 How., 1.

In support of the second proposition in the defendant's brief, it is insisted,—

That the omission alleged in the complainants' second exception does not in fact exist to the extent therein stated, and if it did, it is wholly immaterial.

That Hardeman, one of the complainants, was a mere surety in the note sued upon at law, is substantially admitted by the defendant, and will be apparent upon the examination of the answer, wherein he states the sale of slaves, for which the note was given, to have been originally made to James M. Smith, on credit, and that he "received in payment therefor the notes or bonds of said James M. Smith and of the said William Hardeman." That upon one of said bonds or notes a judgment was obtained, as stated in the bill, and that the note or bond sued on, upon which the judgment enjoined was recovered, was given in satisfaction of the first-mentioned bond or note and judgment.

Now all that is necessary for a defendant to do, in a case like the present, is to answer substantially the allegations of the bill. *Welford*, Eq. Pl., 261.

As to the objection, that the allegation of the insolvency of James M. Smith's estate is not answered by the defendant, it is sufficient to say that the fact is nowhere so alleged in the bill as to require any answer. There is no such averment in the bill, the only suggestion being that "it seems that nothing can be found," &c.

But if it were otherwise, it is indisputably clear that the allegations are wholly immaterial; that, however answered, the complainants could not be aided in the purpose of their bill; and that therefore, upon the authority of the cases already referred to, the omissions furnish no sufficient grounds for an exception.

Mr. Chief Justice TANEY delivered the opinion of the court.

In this case, the complainants filed a bill in the Circuit Court *for the Southern District of Mississippi, praying a perpetual injunction against a judgment at law [*728

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which had been obtained against them. The bill, among other things, states that the note upon which the judgment was awarded was given for the purchase-money of certain slaves brought by the defendant into the State of Mississippi, as merchandise and for sale, after the first day of May in the year 1833, and sold in the State to a certain James M. Smith, in violation of the constitution and laws of the State; that the complainant Hardeman was surety for Smith; that a judgment was afterwards obtained against him, and an execution issued and levied upon his property, and that, to prevent it from being sold, he executed a forthcoming bond with the other complainant, Hill, as his security, which bond had become forfeited, and therefore had the form and effect of a judgment against the complainants; and that Smith, for whom he was security, was dead, and his estate insolvent.

The defendant answered; and upon the coming in of the answer, the following exceptions were taken to it by the complainants:—

“1st. The bill charges that the slaves mentioned in complainants’ bill, sold by the defendant, Harris, to James M. Smith, and which constitute the consideration of the note upon which the judgment at law enjoined in this cause was rendered, were introduced into the State of Mississippi by the said defendant, Harris, for sale and as merchandise, after the first day of May, 1833. This allegation has not been answered, admitted, or denied.

“2d. It is alleged in the bill, that complainant Hardeman was only surety in the note sued upon at law, and that C. P. Smith, executor of James M. Smith, was principal, and that the estate of James M. Smith is insolvent, &c. These allegations are neither answered, admitted, nor denied.”

And upon the hearing of these exceptions, the judges were divided in opinion upon the point whether they were well taken and should be sustained, or not, and therefore ordered the question to be certified for decision to this court.

It is very clear that neither of these exceptions can be maintained. It has been repeatedly decided in this court, that the fact stated in the first is no defence at law, and still less can it be a ground of relief in equity after a judgment at law.

And as regards the second, certainly the insolvency of the principal debtor is no defence to the surety, either at law or in equity.

If, therefore, the defendant had admitted in the most explicit terms the allegations mentioned in the exceptions, they would not have contributed in any degree to support the

 Cutler v. Rae.

claim of the *complainants to the relief they ask. [*729 And consequently, the omission to answer (if the answer be open to that objection) furnishes no ground of exception. It is not a sufficient foundation for an exception, that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to give the relief sought by the bill.

The exceptions ought, therefore, to have been overruled, and we shall direct it to be so certified to the Circuit Court.

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 on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court, for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the exceptions by the complainants were not well taken, and ought to have been overruled. Whereupon, it is now here ordered and decreed, that it be so certified to the said Circuit Court.

 PLINY CUTLER, APPELLANT, v. WILLIAM A. RAE.

Where a vessel was run on shore by the captain in order to save the lives of those on board, and for the preservation of the cargo, by which act the vessel was totally lost, but the cargo saved and delivered to the consignee, a libel *in personam*, filed by the owner of the vessel against the consignee of the cargo, (and the result would be the same if filed against the owner of the cargo,) for a contribution by way of general average, cannot be sustained in the admiralty courts of the United States.

Those courts have jurisdiction wherever the vessel or cargo is subject to an absolute lien, created by the maritime law; and will follow property subject to such a lien into the hands of assignees. The lien, in such cases, does not depend upon possession. But in cases of general average, the lien is a qualified one, depends upon the possession of the goods, and ceases when they are delivered to the owner or consignee.¹

Whatever may be the liability of the owner after he has received his cargo, it is founded upon an implied promise to contribute to the reimbursement of

¹ COMMENTED ON. *Dike et al. v. & Co. v. Vance et al.*, 19 How., 171 *Propeller St. Joseph*, 6 McLean, 574. FOLLOWED. *Id.*, 178; *Bags of Linseed*, 1 Black, 113.