clusions in reference to the course of the schooner, and under that mistaken impression went to the eastern side, and thus encountered her. No orders were given by the pilot in respect to the management of the steamer till the instant of the collision.

This court has decided that neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned, and furnished, and conducted with caution, will excuse the steamer for coming in collision with the barge or sailing vessel, where the barge or sailing vessel is at anchor, or sailing in a thoroughfare, out of the usual track of the steam vessel. In the present instance, the steamer had notice that a vessel was before her, and was near her track, and, under the circumstances, she was bound to take efficient measures to avoid the schooner.

The only facts we notice in the management of the schooner, which have occasioned a hesitation to affirm the decree, are the absence of a licensed pilot, and that the schooner did not exhibit an efficient light. The proofs in the case do not allow us to charge these omissions as indications of negligence; but, that the case may not be misunderstood, we assert that the ruling principle of the court is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions, and that no inference can be drawn from the fact, that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description.

The decree of the Circuit Court is affirmed.

WESLEY WILLIAMS, GARNISHEE OF EDWARD F. MAHONE, PLAINTIFF IN ERROR, *v.* HILL, MCLANE, & CO.

The laws of Alabama provide, that where there is a judgment against a debtor who is unable to pay, a process of garnishment (which is called in some of the States an attachment upon final process) may be issued and laid in the hands of a garnishee, who may owe money to the judgment debtor, or have any effects within the control of the garnishee.

The garnishee, having real property under his control by virtue of a deed of trust, cannot retain it for the purpose of reimbursing himself for advances made to the judgment debtor after the execution of the deed in execution of a parol contract between them.

Where the garnishee sets up a claim to the funds in his hands, he must prove the bona fides of his claim, if it is derived from the judgment debtor after the origin of the creditor's demand.

Therefore, where the garnishee produced notes signed by the judgment debtor, bearing date prior to the judgment, but did not prove their existence before the judgment in consideration, it was properly left to the jury to say whether there was fraud or collusion between the garnishee and the judgment debtor.

THIS case was brought up, by writ of error, from the District Court of the United States for the middle district of Alabama.

The case is stated in the opinion of the court.

It was argued by *Mr. Phillips* for the plaintiff in error, and *Mr. Hilliard* for the defendant.

Mr. Phillips made the following points:

The answer of garnishee is required by the statute to be under oath, and when not disproved, must be taken as true. (Code, sec. 2,540; Davis *v.* Knapp & Shew, 8 Mo., 657; Kergen *v.* Dawson, 1 Gilman, 89; Muson *v.* Campbel, 2 Pike, 511.)

The plaintiff by the statute is allowed to "controvert" the answer; that is, he may show it to be untrue. The present code of Alabama does not point out the particular mode of proceeding; but when the issue is made up, it is evident the trial must proceed as in other cases. The statute, as it existed before the adoption of the "code" in express terms requires that "an issue shall be formed and *tried as in other cases.* (Clay's D., p. 60, sec. 25; Code, sec. 2,546; Thomas *v.* Hopper, 5 Al. Rep., 442.)

Not only the answer denies any indebtedness, but the promissory notes produced and proved, import a consideration. This by the law merchant and by the statute of Alabama. (Code, p. 424, sec. 2,278.)

By the well-established judicial construction of the attachment law, "no demand can be recovered by writ of garnishment, on which the defendant in the judgment, who is also the creditor of the garnishee, could not maintain debt or indebitatus assumpsit." (Self *v.* Kirkland, 24 A. R., 277.)

It follows that the proof required by the present plaintiff is the same as would have been required of the defendant in the judgment, if he had brought the suit. Could he have recovered on the evidence in this record?

There being no evidence disproving or tending to disprove the answer which denied any indebtedness, and nothing impeaching the consideration of the notes, there was no predicate for the charge as to "fraud and collusion." The bill of exceptions sets out all the evidence in the cause. Where the facts are not disputed, fraud is a question of law. (Swift *v.* Fitzhugh, 9 Port, 66, 67; Gillespie *v.* Battle, 15 A. R., 285.)

The points made by Mr. Hilliard were the following:

The answer of garnishee is not taken as true, when controverted by the plaintiff, his agent, or attorney. (Code, sec. 2,546.)

The code provides, that the answer of a garnishee being controverted by the oath of the plaintiff, his agent, or attorney, an issue must be made up *under the direction of the court;* and if required by either party, a jury must be empanelled to try the facts. (Code, sec. 2,546.)

The answer of garnishee is not evidence for himself upon the trial of this issue; the onus of disproving the facts of the answer of garnishee does not rest on the plaintiff. (Travis *v.* Taritt, 8 Ala., 574; Myatt *v.* Lockhart, 9 Ala., 94, 95.)

The only proof offered by garnishee to the court and jury, going to show that he was not indebted to defendant in execution, was that certain promissory notes had been made by said defendant, but the date of said notes, or rather the *actual time of their* execution, did not appear from any testimony. They were merely offered by garnishee as a set-off against the plaintiff's suit for the excess of money remaining in garnishee's hands after satisfying the debts provided for in the mortgages; and the consideration of said notes was not in proof.

The charge of the court, if erroneous, is in favor of the garnishee, and he cannot revise it in this court.

The counsel for plaintiffs requested the court to charge the jury, that their judgment against the defendant was a lien on his house and lot; and that they were entitled to the proceeds arising from the sale of said property, after the notes named in the mortgages were satisfied. This charge the court refused.

If the court erred in this, then garnishee cannot complain of it, nor can he of the remaining part of the charge; for if the judgment of plaintiffs be a *lien*, then they can recover, irrespective of the question of fraud.

The charge should have been given by the court. (19 Ala., 195, 196; 19 Ala., 753; 21 Ala., 504; Hazard *v.* Franklin, 2 Ala., 349.)

The charge of the court on the second point, as to fraud, was clearly correct.

It was a question for the jury; the facts were disputed; the very existence of the notes denied; the silence of garnishee respecting them, in his interview with plaintiff's counsel on the day of sale; his offer to relinquish his claim to the house and lot, upon being paid the remainder of the sum due on the notes named in the mortgages; the good faith of the entire transactions between garnishee and defendant in execution being contested—all this, and other facts appearing in evidence, presented a case which a jury alone could decide. The very pro-

ceeding, being an issue made up under the code, was a question of fraud or no fraud, and either party was entitled to a jury. (Code, sec. 2,546.)

The general principle, that no demand can be recovered by writ of garnishment, on which the defendant in the judgment could not recover, is conceded; but this principle does not affect this case.

The court, if it erred, was in error in instructing the jury, that if fraud existed between defendant and garnishee, then defendant (Mahone) could not recover, in action against garnishee, (Williams,) the excess in the hands of garnishee arising out of the sale of the house and lot.

Why could he not recover? Because of certain fictitious notes, fraudulently executed by said defendant to said garnishee, for the very purpose of defrauding creditors.

This is obviously incorrect; it ignores the very principle that it seems to sustain, viz: that a party to a fraudulent contract cannot invoke the aid of a court to sustain it.

Williams holds in his hands a fund arising out of a *bona fide* transaction; and yet Mahone, to whom the fund belongs, cannot recover it, because Williams sets up these fictitious notes, executed by Mahone, with a fraudulent intent. A set-off is in the nature of a cross-action, and, by the ruling of the court, Williams could recover upon fictitious and fraudulent notes.

But if the charge of the court be correct upon that point, and if it be true that Mahone could not recover from Williams, because of fraud, yet plaintiffs may subject the fund in the hands of garnishee to their debt. A garnishee is called into court to answer, not only as to his *indebtedness* to defendant, but as to his having in his possession the property, money, or effects, of defendant. (See Record, p. 2.)

The jury, by their verdict, found, after reviewing all the testimony, that garnishee was indebted to defendant in execution, and the judgment was correctly entered in favor of plaintiffs against garnishee, for the amount remaining in his hands, after satisfying the debts secured by mortgage.

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants recovered a judgment in the District Court, in a plea of debt against one Mahone. The latter having no property in possession liable to an execution, the defendants, in consequence, served a garnishment on the plaintiff, (Williams,) to attach any debt he might owe their debtor, or secure any effects of theirs he might have.

The garnishee answered to the process, that on the day the writ of garnishment issued, he had sold some personal property

of the debtor, under the authority of two deeds of trust, for the satisfaction of the debts described in them; and there remaining a balance due, he sold a house and lot, described in one of the deeds, for a sum sufficient to extinguish those debts and to leave a surplus. He further answered that Mahone, prior to the judgment, was indebted to him upon another account, and had so continued a debtor till the sale; that before the judgment, and afterwards, before the sale, Mahone had instructed him to apply any surplus that might arise from the sale to the payment of that account; and he had done so, in accordance with the instructions.

There was an issue formed upon the answer of the garnishee, and the subject of the controversy was the claim of the respective parties to the surplus above described.

The garnishee produced on the trial a number of promissory notes, dated prior to the judgment, and proved the signature of Mahone to them; he also proved that Mahone had admitted the authority of the garnishee to apply the surplus to the payment of his demands, not described in the deeds, shortly after the sale, and at that time disclaimed any power to control it. No evidence was given of the existence of the notes of a day prior to the answer, nor of their consideration. The defendants proved a conversation between their attorney and the garnishee, on the day of the sale, relative to the amount of the debt from Mahone to him, and that the notes were not mentioned by him in that conversation. The court instructed the jury that the inquiry for them was, whether there was fraud or collusion between the garnishee and the debtor. That if they found that the notes were made in fraud or collusion, they would render a verdict in favor of the attaching creditors, for the amount of the surplus in the hands of the garnishee. This charge includes the substance of all the questions presented to the court or jury.

We think the case was submitted as favorably for the garnishee as the facts warranted, and that he has no reason to complain in consequence of the instructions given or refused.

The plaintiff is not entitled to hold the surplus in his hands arising from the sale of the trust property, for the payment of the notes, under any stipulation in the deeds. *Those* provide for a return of the surplus to the grantor, after the payment of the debts described. Nor can the real property conveyed in the deed be retained as a security for advances, or debts subsequently made on the strength of a parol engagement. Such a contract would be avoided by the statute of frauds. Nor is the deed of trust such a conveyance or title-paper as to afford a security, as a deposit, for subsequent engagements.

In *Ex parte* Hooper, (1 Meri. Ch. R., 7,) Lord Eldon said: "The doctrine of equitable mortgage by deposit of title-deed has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted, of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, the doctrine is not to be enlarged. In the present case, the legal estate has been assigned, by way of mortgage. The mortgagee is not entitled to say this conveyance is a deposit, because the contract under which he holds it is a contract for conveyance only, and not for deposit."

The only other title that the garnishee has interposed against the claim of the attaching creditor is, that the debtor made a valid appropriation of the surplus arising from the sale, to the satisfaction of a *bona fide* demand of the garnishee against him, prior to the service of the garnishment. The principle adopted by the courts of Alabama for such cases is, that the adverse claimant for property or effects seized at the suit of a creditor by attachment or execution, must prove the *bona fides* of his claim, if it is derived from the debtor after the origin of the creditor's demand; and the declarations or acknowledgments of the debtor will not be received to support the title. The recitals in a deed or mortgage executed by him, or admissions made at the time of its execution, will not be received. (Goodgame *v.* Cole, 12 Ala., 77; Nolen & Thompson *v.* Gwinn, 16 Ala., 725.) Nor is the consideration of a note in favor of the claimant shown by the production of the note itself. (De Vendell *v.* Malone, 25 Ala., 272.) The objection to such evidence is said to be, that it can be manufactured by one indebted, and by that means a creditor might be defeated; for, in most cases, it would not be practicable for him to prove a negative, or disprove the statement made by his debtor. In the present case, the consideration of the notes was not proved; nor was their existence before the service of the garnishment shown otherwise than by their date—that is, by an assertion of the debtor. Nor was the order to appropriate the surplus to their payment proved, except by an acknowledgment to a stranger, after the writ of garnishment had been issued.

The *bona fides* of the title of the garnishee to the surplus in his hands was not supported by competent proof, and therefore the lien of the garnishment was properly maintained.

The plaintiff contends that the proceeding by garnishment is a statutory proceeding, by which a creditor is enabled to reach a demand in favor of his debtor against a third person;

and that the remedy can only be resorted to when the debtor himself could maintain debt or indebitatus assumpsit; and that the only issue which can be made upon an answer of the garnishee is, indebitatus vel non. The Supreme Court of Alabama have decided, in the cases cited, that merely equitable demands or rights of action, not involving a debt or assumpsit, are not the subject of the garnishee process. But the same court has determined that money or effects in the hands of the garnishee, which are fraudulently withdrawn from the creditors of a defendant, may be reached, in an attachment or judgment, by that process. Hazard *v.* Franklin, 2 Ala., 349; Lovely *v.* Caldwell, 4 Ala., 684, and the civil code of Alabama, sec. 2,523, provides explicitly for the attachment of a demand similar to that existing in this case.

Judgment affirmed.

JOHN BELL, PLAINTIFF IN ERROR, *v.* COLUMBUS C. HEARNE, SAMUEL R. HEARNE, AND SAMUEL H. DOCKERY.

The act of Congress of 1820 and regulations of the General Land Office of 1831 direct the manner in which purchases of public land shall be authenticated by the registers and receivers of the land offices.

Where the receiver gave a receipt in the name of John Bell, and the register made two certificates of purchase, one in the name of John Bell and the other in the name of James Bell, the circumstances of the case show that the latter was an error which was properly corrected by the Commissioner of the General Land Office in the exercise of his supervisory authority; and he had a right to do this, although a patent had been issued to James Bell, which had been reclaimed from the register's office, and returned to the General Land Office to be cancelled.

The Supreme Court of Louisiana having decided against the validity of the patent issued to John Bell, this court has jurisdiction under the twenty-fifth section of the judiciary act to review that judgment; and the ground of the decision of the State court sufficiently appears upon the record.

THIS case was brought up from the Supreme Court of the State of Louisiana, by a writ of error issued under the twenty-fifth section of the judiciary act.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Baxter* and *Mr. Johnson* for the plaintiff in error, and by *Mr. Lawrence* and *Mr. Taylor* for the defendants.

The following notice of the points for the plaintiff in error is taken from the brief of *Mr. Baxter:*

I. John Bell was the purchaser of the land from the United States, and James Bell had no right or interest in it.