consent of the sureties; and this court held, that the bond was thereby rendered invalid against the sureties. Principle of these decisions is, that the alteration varies the terms of the obligation, and that the contract thereby ceases to be the contract for the due performance of which the party became surety, and wherever that appears to be the fact, and the surety is without fault, he is discharged.

Correct rule, we think, is stated by Lord Brougham in *Bonar* v. *Macdonald*,* and which is substantially the same as that adopted by Mr. Burge in his treatise on surety. Substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hæc in fœdera veni.* Intentional error cannot be imputed to the district judge, but the undisputed facts show that the erasure was made after the defendant signed the instrument, and before its approval, and without the knowledge or consent of the defendant.

For these reasons, we are of the opinion that the first prayer for instruction, presented by the defendant, should have been given.

JUDGMENT of the Circuit Court, therefore, is REVERSED, and the cause remanded, with direction to issue a new *venire.*

MILLER *v.* SHERRY.

1. A creditor's bill, to be a *lis pendens*, and to operate as a notice against real estate, must be so definite in the description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation. If it is not so, it will be postponed to a junior bill, which is.
2. A party entitled to a homestead reservation under the laws of Illinois,—

* 1 English Law & Equity, 1.

whose property, in which it is, a court of chancery has ordered in general terms to be sold, to satisfy a creditor whom he had attempted to defraud by a secret conveyance of it,—must set up his right, if at all, before the property is thus sold. He cannot set it up collaterally after the sale, and so defeat an ejectment brought by a purchaser to put him out of possession.

3. When chancery has full jurisdiction as to both persons and property, and decrees that a *master* of the court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree, is as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at law. The defendant whose property is sold need not join in the deed.

SHERRY had obtained a judgment in ejectment for some lots and a house on them, in Illinois, against Miller, in the Circuit Court for the Northern District of that State, and this was a writ of error to reverse it.

It appeared, on the trial below, that W. & W. Lyon had obtained a judgment against Miller in October, 1858, and sued out a *fi. fa.;* on which *nulla bona* was returned. In February, 1859, they filed a *creditor's* bill against the same Miller, his wife, and one Williams (son-in-law of Miller), charging that Miller had, on the 6th of April, 1857, conveyed the premises now in controversy—describing them, and describing them, moreover, as lots, which at the time of the conveyance, and at the time of the bill filed, *Miller occupied, and, with his family, resided* on—to this Williams, to defraud creditors; and praying that the deed should be set aside, the premises sold, and his debt paid out of the proceeds. Miller and Williams answered the bill. In June, 1860, the cause was heard, the deed set aside as fraudulent, and the *master in chancery* for the court ordered to sell the premises, and to execute to the purchaser *good and sufficient* deeds of conveyance, and that the sale *so* made shall bar and divest *all, and all manner of interest or right*, which the said Miller or any of the defendants might have in the property, or in any part of it. The master accordingly did sell, for $1867, and by deed convey, in September, 1860, the premises to one Bushnell, who conveyed to Sherry, plaintiff below.

It further appeared that a firm named Mills & Bliss had

also obtained a judgment against Miller in the same court, in October, 1857,—that is to say, a year before the judgment of W. & W. Lyon, — and that on a *fi. fa.* issued upon it, *nulla bona* was also returned. In April, 1858, Mills & Bliss filed a *creditor's bill* against Miller and a certain Richardson; Williams, the son-in-law of Miller, and person to whom, by deed of 6th of April, 1857, he had conveyed the house and lots in controversy, *not* being made a party. This bill—which, it will be noted, was filed several months before the bill of W. & W. Lyon,—charged a variety of frauds in *general terms*, against Miller, and particularly, that he had "made a sale of his stock of goods and merchandise, notes and accounts, at Ottawa aforesaid, and of great value, to this defendant, Richardson." It also charged that Miller was, at the time when the judgment was obtained, "and now is, the owner, or in some way or manner beneficially interested *in some real estate in this, or some other State or Territory*, or some chattels real of some name or kind, or some contract or agreement relating to some real estate, or the rents, issues, and profits of *some* real estate." But the bill, unlike that of W. & W. Lyon, contained no reference to the specific property, the subject of the ejectment. And there was no *reference to real estate* in the charging part of the bill, other than the general one of "some real estate," &c., as above given. There was a special prayer that the sale to Richardson should be declared void, and that the property or its avails should be applied to the payment of the judgment of Mills & Bliss.

The matter being referred to a master, Miller was examined before him. *He, Miller, then disclosed* the fact of the conveyance of the house and lots to Williams, his son-in-law, by the deed of April, 1857. In March, 1860, the master filed his report containing the evidence just stated. Upon this, Mills & Bliss (December, 1860), filed an amendment to their original bill, making Williams a party; process being issued against him, but the process not being served. This amendment charged that the deed of Miller to Williams, of April, 1857, was fraudulent and void. Williams did not

answer, and the bill as to him was dismissed. A receiver was appointed July 13th, 1861, and *Miller* was ordered to convey *to him*, which he did on the 26th of that same month. The deed embraced, by description, the premises in controversy, but they were conveyed, *subject to the rights which Miller might have in them "under the homestead law of Illinois."*

Pursuant to an order of court, the receiver, on the 23d of August, 1861, sold and conveyed the property for $500 to one Benedict; the deed, like Miller's own to the receiver, being subject to the reservation of the "homestead right."

In reference to this reservation, it is necessary here to state, that a statute of Illinois enacts that "the lot of ground and the buildings thereon, occupied as a residence, and owned by a debtor being a householder, and having a family," to the value of one thousand dollars, "shall be exempt from levy and forced sale, under any process or *order* from any court of law or *equity* in this State;" and it further declares, that "no release or waiver of such exemption shall be valid, unless the same shall be in writing, subscribed by such householder, and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged, it being the object of this act to require, in all cases, the signature and acknowledgment of the wife as conditions to the alienation of the homestead."

At the time of the ejectment below, Miller was living with his wife and children in a house on the premises sold; which were worth about $2700.

Upon these facts, the counsel of the plaintiff below asked the court to charge the jury:

1. That Mills & Bliss, by filing their bill against Miller, and service of process, obtained a lien upon all the property and effects of Miller; which lien had, by the decree and sale of the receiver, passed into a title in Benedict, which title related back to the service of process, and had become paramount to the title of the plaintiff.

2. That the defendant was entitled to a homestead right under the laws of the State of Illinois, in such cases made

and provided, which he could set up as a defence in this case.

The court gave neither instruction, but gave instructions in substance the reverse of them. Its action herein was the question before this court.

Mr. E. S. Smith, for the plaintiff in error:

1. A plaintiff in ejectment recovers, of course, on the strength of his own title, and that title, in the Federal court, must be a legal one. Now was the legal title in Sherry, assignee of Bushnell, under the proceeding of the Lyons?

The sale by the master, under the bill of the Lyons, did not convey the legal title to Bushnell. *Miller* did not join in that deed. He was not even ordered or asked to. It is a deed by the *master*. Now, a court of equity can only compel the *party* to convey the legal title, and upon a sale thereby give it to the purchaser. The power of such a court to set aside a legal title for fraud, does not confer power to decree the legal title in another by operation of the decree. The title must be conveyed, and if the party refuse, the court can order that a commissioner convey the legal title for the obstinate party, so that the title will be perfected on the sale by the receiver or master. In the great case of *Penn* v. *Lord Baltimore*,* it is said, that courts of equity act upon the parties by decrees, and not upon the property, except through the party; that is, in all suits in equity the primary decree is *in personam*, and not *in rem*. In our own country we have often declared the same thing. In a Mississippi case,† the court says: "The chancery court cannot, by its decree, divest the legal title to land out of one party and vest it in another. It is necessary, in such cases, to appoint a commissioner to convey." So in Kentucky,‡ the court held that "the chancellor may decide on the equitable right to have a transfer of the legal right of entry, and may enforce a compliance with the decree by compelling a conveyance; but until the

* 1 Vesey, 444.

† Willis *v.* Wilson, 34 Miss. 357.

‡ Mummy *v.* Johnson, 3 Kentucky, 220.

conveyance is actually made, the right of entry remains as it was before the decree."* So in North Carolina, the court says, that a decree in equity cannot, of itself, divest a title at law to land, but can only compel the person who has the title and who is mentioned in the decree, to convey. So in Ohio,† it was held that a decree does not, of itself, pass a title, but that a deed has to be actually made conveying the title, so that a sale, by order of the court, would convey the legal title. The same principle is enunciated in a New York case,‡ where Gardner, J., says: "In all cases of fraudulent trusts, the court may, in its discretion, direct a sale by a master, and *compel the debtor and trustee to unite* in the conveyance to the purchaser, or it may order an *assignment to a receiver*, as was done in this case, to the end that the property may be disposed of under the special instructions of the chancellor; *or the fraudulent conveyance may be annulled*, and the creditor permitted to proceed to a sale upon his execution." We need not cite additional authorities. Independently of merits, therefore, there is an outstanding legal title, which technically barred the right to sue in ejectment below.

But, on merits, the plaintiff in the ejectment had no case. Benedict was actual owner. The bill of Mills & Bliss, under which he claims, was filed in April, 1858; that of the Lyons some months afterwards, to wit, in the month of February, 1859. Both bills were what are called *creditors'* bills; that is to say, bills in equity after judgment for a sum certain had been obtained at law, after execution had issued on such judgment, and after a return of *nulla bona* had been made on that judgment. Now, of *such* bills in chancery,—though, of course, not of ordinary chancery bills,—it is a property that on service of process they operate as liens from the time of their being filed. And well they may. They rest on and recite a prior solemn judgment

* Proctor *v.* Ferebec, 1 Iredell Eq. 143.

† Shepherd *v.* Ross Co. Com., 7 Ohio, 271.

‡ Chatauque Co. Bank *v.* White, 2 Selden, 252.

Argument for the plaintiff in error.

at law unsatisfied. They declare a previous debt, of which the party stands "convict" of public record. They are, in fact, but a prolongation and extension of the judgment, making it apply, *by* the bill, to equitable rights, as without them it will to legal. In *Chittenden* v. *Brewster*, at this term,* Nelson, J., speaking for this court, and referring to a contract upon "creditors' bills," says: "The bill in the Circuit Court . . . . was first filed, and, consequently, operated as the first lien." The fact that such bills will operate as liens, and in the order of their being filed, is here assumed as of course. Now a creditor's bill will operate on every species of property. *Le Roy* v. *Rogers*, in the Chancery of New York,† thus declares. That was a creditor's bill, filed on the return of an execution unsatisfied. The bill stated the judgment and return of execution, and charged that the defendant was entitled, or interested in, or possessed of, personal property, money, bank stock, insurance stock, choses in action, &c. The bill further charged that the defendant, since making the covenant on which the judgment was recovered, had made some assignment, or transfer of his property, upon some secret trust, or other trust, for the benefit of himself, &c.; and it prayed a discovery of the property and effects of the defendant, &c. The case was heard on demurrer to the bill, and the chancellor says: "The complainant was entitled to a discovery of all the real estate of the defendant which he had within the city of New York at the time of the docketing of the judgment, although such property may have been fairly disposed of since that time."

It may be said that because the bill in the case of the Lyons contained the description of the real estate conveyed more definitely than the bill of Mills & Bliss, therefore that such a description gave the bill and proceedings greater efficacy. But the case of Mills & Bliss being, like that of the Lyons, what is called a creditor's bill,—a bill filed upon the return of an execution unsatisfied,—praying for discovery

* *Supra*, p. 196.

† 3 Paige, 236.

and relief—there was no necessity of describing the land asserted to have been fraudulently conveyed. If, indeed, the creditor levies his execution upon the real estate fraudulently conveyed, and then asks the aid of a court of chancery to give to his execution levy full form and effect, to enable him to sell the legal title, and give the purchaser a title free from obstruction, then the property must be described, and the facts of the levy and fraudulent obstruction must be stated, as it is that which gives the court jurisdiction of the case. But that is not this case. The court, here, had jurisdiction because of the allegations in the bill that the property was beyond the reach of an execution at law; that the defendant had an interest in real estate fraudulently disposed of, and that the complainant had no definite knowledge as to the property and its condition and the interest of Miller in it. When discovery was obtained, and the description of the property and condition of the title ascertained, then the court had power to subject the property to the payment of the debts in the manner best calculated to reach the object at the least expense. If a creditor had all the knowledge as to the situation of the property and title which discovery would give them, there would be no need of asking discovery, and he could proceed to effect a specific lien at once upon the property.

In *Conrad* v. *Atlantic Insurance Company*,* in this court, Story, J., says: "Now, it is not understood that a general lien, by judgment on lands, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to judgment; and when the levy is actually made on the same, *the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances.*" We submit that the title or right acquired by the filing of the bill and service of process, is as perfect and absolute as the right of a judgment lien given by statute; and when the title is obtained, under the decree, it relates

* 1 Peters, 443

back to the time of filing the bill, the same as a levy and execution does to the date of the lien of the judgment. Under the rule, thus interpreted, all parties can obtain their rights, when fixed, without conflict, and in a manner least expensive, and according to sound principles of equity.

2. *As respects the homestead reservation.* The law which thus protects a man and his wife and children from a *cruel and remorseless* creditor, and gives to them at least a humble home,—one peaceful shelter from the misfortunes of the world,—is a law which does infinite honor to the refinement of America. Such a law was quite above the civilization of our British ancestors; they have never yet reached it; though they have before them in ancient Rome record of the honor that was given to the "*domus in quâ pater decessit; in quâ minores creverunt.*" It is a law worthy of honest support from every court in the land. It will receive it from this, the highest of them all.

This statute prohibits a forced sale of the homestead upon any process or order from any court of law or equity. Now, Miller was a householder, and had a family, and resided upon the property. The act states that no release or waiver of the exemption shall be valid, unless the same shall be in writing, subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged. Without this requirement of law being complied with, the conveyance is invalid, and cannot become a valid conveyance of the property even after the homestead right ceases to exist. The legislature put the same construction upon the law, in declaring the intention to be to require, in all cases, the signature of the wife as a condition to the alienation of the homestead. If the homestead exemption given by law has direct reference to the land and building thereon, then the householder can control the fee of the property, and no lien can attach, unless made as provided by law; nor can any sale by the debtor, or by order of court, be made, except as provided by law. A forced sale would be as invalid as a sale by the debtor. The law gives the right and bestows

the benefit, and no act of the parties, either voluntary or otherwise, can have the effect to defeat the right, except in the manner prescribed by law. In cases where the householder and his wife are made parties to suits, as in the Lyons case, and they make default, a decree cannot divest them of the rights conferred by the law. It follows, as a matter of law, that the conveyance by Miller to Williams was invalid, and conveyed nothing; and, also, the decree and sale, in the case. On the other hand, the conveyance by Miller to the receiver is not invalid, nor is the deed of the receiver to Benedict, as the homestead right was reserved in both deeds.* The receiver's deed to Benedict, under the proceeding of Mills & Bliss, differs from that made by the master in the Lyons case, which did not convey subject to this right; although, on the bill being filed by the Lyons, they state that the place which they sought to get was the home of Miller and his family; a statement which proves as well a knowledge of the law which secured it to them.

Messrs. Browning and Ewing, contra:

1. Under the bill filed by the Lyons,—a true "*creditor's* bill,"—the conveyance to Williams was found to be fraudulent, and the master in chancery of the court was directed to sell the lots in question, and to execute deeds to the purchasers, "which shall bar and divest all, and all manner of interest or right, or right of redemption, which the said Miller, or any of said defendants, may have in and to the said property, or any part thereof."

The master sold, pursuant to decree, and conveyed to Bushnell, the purchaser, whose title Sherry holds. Under *such* an order, we submit that a legal title did pass.

The lien of the elder judgment, the one in favor of Mills & Bliss, if still subsisting, does not affect the transfer of title by the master's sale in the Lyons case. The bill in equity of Mills & Bliss is not a general creditor's bill. Its end is the satisfaction of their own judgment. They ask to

* Patterson *v.* Kreig, 29 Illinois, 514.

set aside transfers which they allege to be fraudulent as to *them* and *their judgment*, not as to any other judgment creditors. They designate such property as they choose to go against to satisfy their judgment, and they bring in such fraudulent assignees as they choose to charge. Their original bill could have no effect on persons and property not named in it. For example: the lots in controversy might have been conveyed by Williams to an innocent third person for a full and fair consideration, without *actual notice*, and the *lis pendens*, such as it was, would have been no notice. The averment in the bill that Miller was, at the time of the judgment entered, and is now the owner of or in some way or manner beneficially interested in *some real estate* in this or some other State or Territory, amounts to nothing; it is notice to *nobody* and of no *thing*. Neither Williams nor the lots were parties to the bill of Mills & Bliss. The principle of *lis pendens* is, that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril.*

3. *As to the homestead.* Proof of a homestead in a large property, many times the value of the homestead reservation, cannot, in ejectment, bar the recovery of the whole property. The lots here were worth about $2700. The exemption is for $1000. Some judicial mode must be resorted to of determining the extent of the reservation, and he who sets up the special and indefinite defence ought to define it. Perhaps, if the homestead be worth no more than is reserved, the presentation by evidence of the fact were enough, but if worth more, it should be set up by some appropriate form of motion or petition, so that the issue could be tried, and the value of the homestead set out, so that the jury could find defendant *not guilty* of the homestead, and guilty of the excess. But with this the court could do nothing of their own mere motion. The defendant, who relied upon the defence, should by some kind of petition or plea, or special

* Lewis *v.* Mew, 1 Strobhart's Equity, 180; Griffith *v.* Griffith, 1 Hoffman's Chancery R. 153; Price *v.* White, Bailey's Equity, 244.

motion for instructions, have placed the case in such position that the court could give its charge without making pleading or representations for him, or otherwise shaping his case.

If the homestead exemption had been set up in the chancery proceeding by the Lyons, as it should have been, if intended to be relied upon at all, it would not have been a full defence to the action, but a defence *pro tanto* only. It would not have prevented a decree, but have produced a modification of it only,—either that the property be divided, and the excess sold, or all sold, and the excess over $1000 applied on the judgment. But here it is insisted upon as a defence to the entire action. It would be a fraud upon judicial proceedings for a party to withhold what would be only a partial defence, if presented at the proper time, in a direct proceeding, and set it up collaterally to defeat the entire action.

Mr. Justice SWAYNE delivered the opinion of the court.

The proceedings under the bill filed by the Lyons appear to have been, in all respects, regular. W. & W. Lyons had obtained a judgment at law and issued an execution, upon which the return of *nulla bona* was made. This laid the foundation for a creditor's bill, and such a bill was filed. The necessary parties were brought before the court and answered.

The court had full jurisdiction, both as to the parties and the property. The decree was regularly entered, and the sale and conveyance by the master to Bushnell were made in pursuance of it. The only objection taken to the proceedings is, that Williams, in whom was vested the legal title, was not ordered to convey, and did not convey. A conveyance by him was not necessary.

Where a court of equity has jurisdiction, as in this case, a sale and conveyance in obedience to a decree is as effectual to convey the title as the deed of a sheriff, made pursuant to a sale under an execution issued upon a judgment at law. When the object of the suit is to compel the conveyance of the

legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed,—unless it be provided, as has been done in some of the States, by statute, that the decree itself shall operate as a conveyance. In all such cases, the court has power to compel the defendant to convey. When the property is beyond the local jurisdiction of the court, and the defendant is before it, the court can compel him to convey, as it may direct, for any purpose within the sphere of its authority. This is an ordinary exercise of the remedial jurisdiction of those courts, and the power is one of the most valuable attributes of the equity system. The principle of those cases has no application here. The title derived by Bushnell from these proceedings must be deemed perfect, unless it be invalidated by that derived to Benedict from the sale and conveyance under the bill of Mills & Bliss.

The judgment obtained by Mills & Bliss, was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law. The questions to be considered arise wholly out of the chancery proceedings.

The filing of a creditor's bill and the service of process creates a lien in equity upon the effects of the judgment debtor.* It has been aptly termed an "equitable levy."†

The original bill was in the form of a creditor's bill, as found in the appendix to Barbour's Chancery Practice. It contained nothing specific, except as to the transactions between Miller and Richardson. There was no other part of the bill upon which issue could have been taken as to any particular property. It was effectual for the purpose of creating a general lien upon the assets of Miller,—as the

* Bayard *v.* Hoffman, 4 Johnson's Chancery, 450; Beck *v.* Burdett, 1 Paige, 308; Slorm *v.* Waddel, 2 Johnson's Chancery, 494; Corning *v.* White, 2 Paige, 567; Edgell *v.* Haywood, 3 Atkyns, 352; 1 Kent, 263.

† Tilford et al. *v.* Burnham et al., 7 Dana, 110.

means of discovery, and as the foundation for an injunction,—and for an order that he should convey to a receiver. If it became necessary to litigate as to any specific claim, other than that against Richardson, an amendment to the bill would have been indispensable. It did not create a *lis pendens*, operating as notice, as to any real estate. To have that effect, a bill must be so definite in the description, that any one reading it can learn thereby what property is intended to be made the subject of litigation. In *Griffith* v. *Griffith*,* it is said:

"To have made such a bill constructive notice to a purchaser from the defendant therein, it would have been necessary to allege therein that these particular lots, or that all the real estate of the defendant in the city of New York, had been purchased and paid for, either wholly or in part, with the funds of the infant complainant. Or some other charge of a similar nature should have been inserted in the bill, to enable purchasers, by an examination of the bill itself, to see that the complainant claimed the right to, or some equitable interest in, or lien on, the premises."

It is evident that the premises in controversy were not in the mind of the pleader when this bill was drawn.

There is another reason why the bill could not operate as constructive notice. Williams, who held the legal title, was not a party. "We apprehend that to affect a party as a purchaser *pendente lite*, it is necessary to show that the holder of the legal title was impleaded before the purchase which is to be set aside."† The principle applies only to those who acquire an interest from a defendant *pendente lite*.‡ The title passed from Williams to Bushnell.

The amended bill was undoubtedly sufficient, and it made Williams a party. But he was not served with process, and if he had been, this bill could have operated only from the time of the service. Where the question of *lis pendens* arises

* 9 Paige, 317.

† Carr *v.* Callaghan, 3 Littell, 371.

‡ Stuyvesant *v.* Hall, 2 Barbour's Chancery Rep. 151; Fenwick's Admr. *v.* Macey, 2 B. Monroe, 470; Parks *v.* Jackson, 11 Wendell, 442.

upon an amended bill, it is regarded as an original bill for that purpose.* It was a gross irregularity to take a decree against Miller without Williams being before the court, and if the attention of the court had been called to the subject, the amended bill must have been dismissed. The decree against Miller as to the premises in controversy is a legal anomaly. But it is unnecessary to consider this subject, because before the amended bill was filed, the proceedings under the bill of the Lyons had been brought to a close, and the title of Bushnell consummated. His rights could not be affected by anything that occurred subsequently. He had no *constructive notice* of the proceedings in the case of Mills & Bliss. Had he and his alienee actual notice? This, also, is a material inquiry.† We have looked carefully through the record and find no evidence on the subject. Had the suit below been in equity, it would have been necessary for the defendant in error to deny notice to himself or to his grantor. The want of notice to either would have been sufficient. The form of the action rendered a denial unnecessary. The plaintiff having exhibited a title, apparently perfect, the burden was cast upon the defendant of proving everything upon which he relied to defeat it. As the case was developed on the trial in the court below, the title of the defendant in error properly prevailed.

2. In regard to the homestead right claimed by the plaintiff in error, there is no difficulty. The decree under which the sale was made to Bushnell expressly divested the defendant of all right and interest in the premises. It cannot be collaterally questioned. Until reversed, it is conclusive upon the parties, and the reversal would not affect a title acquired under it while it was in force.

We think that the learned judge who tried the case below, was correct in refusing to give the instructions submitted by the plaintiff in error, and in giving those to which exception was taken.

JUDGMENT AFFIRMED WITH COSTS.

* Clarkson et al. *v.* Morgan's devisees and others, 6 B. Monroe, 441.

† Parks *v.* Jackson, 11 Wendell, 442; Roberts *v.* Jackson, 1 Id. 478.