Simms and Wise *v.* Slacum.

Insolvent discharge.—Fraud.

A discharge from the prison rules, under the insolvent act of Virginia, although obtained by fraud, is a discharge in due course of law; and upon such discharge, no action can be sustained upon the prison-bounds bond.[1]

Slacum *v.* Simms, 1 Cr. C. C. 242, reversed.

Error to the Circuit Court of the district of Columbia, in an action of debt, brought by Slacum, as assignee of Charles Turner, sergeant of the court of Hustings of Alexandria, upon a prison-bounds bond, in which Simms was the principal, and Wise, the surety.

The condition of the bond was as follows: "Whereas, Jesse Simms, in jail and custody, by virtue of a writ of *capias ad satisfaciendum*, sued out of the clerk's office of the court of Hustings, holden in Alexandria, dated the 12th day of August 1800, at the suit of George Slacum, assignee of Charles Turner, sergeant of the court of Hustings aforesaid, for the sum of $1285.45, *including all legal costs at the time of the caption aforesaid, having prayed the benefit of the prison rules, as laid out and bounded by [*301 order of the court of Hustings aforesaid, and having tendered the above-bound Peter Wise, junior, as surety for the same, agreeable to an act of the general assembly in that case made and provided. Now, if the said Jesse Simms do well and truly keep himself within the prison rules, as laid out and bounded by the court of Hustings aforesaid, and from thence not depart, until he shall be discharged by due course of law, or pay the aforesaid sum of $1285.45 to the aforesaid George Slacum, assignee of Charles Turner, sergeant aforesaid, then the above obligation to be void, or else to remain in full force," &c.

The pleadings were finally brought to this issue, whether Simms did depart from the prison rules, without being discharged by due course of law?

At the trial, three bills of exception were taken by the defendants; but the only question decided by this court arose upon the third; which stated, that after the execution of the bond, Simms was discharged by a warrant from two justices of the peace, under the authority of the insolvent act of Virginia; and that, being so discharged, and not before, he departed out of the rules. The plaintiff offered evidence to prove sundry acts of fraud committed by Simms, in order to procure the discharge; whereupon, the counsel for the defendants prayed the opinion of the court, and their instruction to the jury, that if they should be of opinion, from the evidence, that frauds were committed individually by Simms, in obtaining his discharge, but without the participation of the magistrates who granted it, and without the participation of Wise, the other defendant, such frauds, so committed by Simms, could not so far vitiate or avoid the said proceedings under the insolvent act, and the discharge so obtained by Simms, as to charge Wise, in this action, for a breach of the condition of the bond, by reason of Simm's having left the prison rules, by virtue of such discharge. Which instruction the court refused to give; but were of opinion, and directed the jury,

[1] S. P. Ammidon *v.* Smith, 1 Wheat. 447.

that if they should be of opinion, from the evidence, that any fraud was
*302] committed by Simms alone, in obtaining, or for the purpose of *obtaining, the said warrant of discharge, though without the concurrence of either of the magistrates, or of Wise, in such fraud, it did so avoid the discharge so obtained by Simms as to charge Wise in this action, for a breach of the said condition, by reason of Simms's having left the prison rules by virtue of such a void discharge. To which refusal and instruction, the defendants excepted.

The act of assembly of Virginia, 1792, c. 67, concerning the county courts, § 15, P. P. 86,(*a*) authorizes the county and corporation courts to lay out, and mark the "bounds and rules" of their respective prisons; and declares, that "every prisoner, not committed for treason or felony, giving good security to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his or her health, and keeping continually within the said bounds, shall be adjudged in law, a true prisoner."

The act of 1792, c. 79, concerning the escape of prisoners, § 2, P. P. 119, provides, that if a prisoner, having given security for, and obtained the liberty of, the prison rules, shall escape and go out of the same, the sheriff shall immediately apply to a justice of the peace for an escape-warrant, to retake the prisoner, and give notice thereof to the creditor, and assign over to the creditor the bond taken for the liberty of the rules, who shall be obliged to receive the same; and the creditor may proceed to take his debtor upon the escape-warrant; and if he be retaken and committed to jail, the sureties in the prison-rules bond shall be discharged; but if the debtor be not retaken on the warrant, and committed, the sureties are liable to the creditor. And the sheriff is not liable, unless the sureties were insufficient, when taken. By the 1st section of the act, the escape-warrant must be upon the oath of the sheriff, or some other credible person.

The act of 1793, c. 151, for the relief of insolvent debtors, P. P. 303, authorizes two justices of the peace to discharge insolvent debtors, and pro-
*303] vides, that notice *shall be given to the party at whose suit the prisoner is in execution. It declares also, that the warrant of discharge shall be sufficient to indemnify the sheriff against any action of escape. And that the prisoner shall not be again imprisoned upon any judgment obtained previous to his taking the oath, unless by virtue of a *ca. sa.* issued by order of the court in which the judgment shall have been rendered. The estate of the insolvent is vested in the sheriff. But the creditor may, on *scire facias*, have a new *fi. fa.* to seize any property which the debtor may afterwards acquire.

C. Lee, for the plaintiffs in error. A prisoner in the bounds is as much in jail as if within the walls of the prison. The oath of the insolvent debtor was provided as the guard against fraud; but the bond is only a substitute for walls to the prison-bounds. As to the surety, a discharge by a competent authority is conclusive. The warrant of discharge is an indemnity to the sheriff, whether obtained by fraud or not. The act of assembly does not

(*a*) P. P. is used in this book as a reference to Pleasant & Pace's edition of the laws of Virginia, published in 1803, 8vo.

expressly provide, that it shall indemnify the surety as well as the sheriff, but he is within the same reason. The body of the debtor cannot be retaken, unless by order of the court, on proof of fraud. In the case of fraud in the debtor alone, the remedy of the creditor is not by an escape-warrant, but by a new *ca. sa.* against his person, or a *fi. fa.* against his goods.

The sheriff is bound to discharge the prisoner upon receipt of the warrant; if he disobeys it, he is liable to an action of false imprisonment; and after obeying it, he cannot go before a justice of the peace, and swear it was an escape, so as to obtain an escape-warrant. If he cannot get an escape-warrant, he cannot assign the prison-rules bond; for he is, by the act, only authorized to assign it, when an escape has actually happened. The creditor is not bound to take an assignment; nor can he demand it. When, therefore, the debtor is discharged by a competent authority, the obligation of the bond ceases. It is *functus officio;* the surety is no longer liable for an escape, and is *as much discharged as if, after an escape, the debtor is retaken on an escape-warrant, and committed to jail. [*304

The act of assembly did not intend that the bond should give the creditor a new security for his debt, or to place him in a better situation than he would be, if his debtor were to remain within the stone walls of the jail. The bond was intended for the ease and benefit of the debtor. If the bond is a security against the fraud of the debtor, there are no bounds to the responsibility of the surety.

The words "in due course of law," mean by authority of law; that is, by a competent legal authority. The notice required by the act to be given to the creditor, is to enable him to attend and show fraud, if he can. But if the surety is answerable for fraud, it would be more for the interest of the creditor not to show the fraud at that time, but to wait until it has had the effect of obtaining a discharge. If a judgment at law is obtained by fraud, it is still a valid judgment, until reversed.

Swann, for the defendant in error. In England, it is settled, that a discharge under an insolvent act, must be free from fraud or collusion, and in every respect regular. It is true, that the warrant of discharge is *primâ facie* evidence of a due discharge, and throws the burden of proof of fraud upon the other party. Esp. N. P. 167, 245. But fraud, when proved, will "avoid every kind of act." *Bright* v. *Eynou*, 1 Burr. 395.

In order to guard a creditor against the risk of his debtor's escape, when allowed the liberty of the prison rules, the law requires that the debtor should bind himself in a penalty, and if he escapes, he is as much liable at law for the penalty as his surety is, and the surety is as much bound as the debtor. The one is bound exactly as the other is bound. If the penalty is forfeited as to one, it is forfeited as to the other. Whatever would make Simms liable upon the bond, would make Wise equally *liable. If, then, Simms had voluntarily escaped, he would have been liable to [*305 the penalty of his bond. But a discharge obtained by fraud and imposition is, as to him, at least, void; otherwise, you permit a man to take advantage of his own fraud; for if the discharge is valid, it puts an end to his obligation upon his bond. A discharge obtained by fraud is, in substance, as much an escape, as if the prisoner had merely gone off in disguise, or imposed upon his jailers by a borrowed dress. But it is a maxim of law, that no man

shall gain an advantage by his own fraud. If this fraudulent discharge dissolves the obligation of the bond, Simms gains an advantage by his own fraud ; therefore, the fraudulent discharge cannot dissolve the obligation of the bond. If the obligation of the bond be not dissolved as to Simms, it is not as to Wise, for both are equally bound.

But the words of the condition of the bond are, that Simms shall not depart therefrom "until he shall be discharged *by due course of law*." A discharge obtained by fraud and imposition is not a discharge in due course of law ; on the contrary, it is a perversion of the course of law ; the law is turned aside from its due course. Shall Simms be permitted to say, that his discharge, grounded on falsehood, fraud and imposition, is a discharge in due course of law ? If Simms cannot say it, Wise cannot say it. Wise can avail himself of no defence at law, which would not equally avail Simms.

There is a vast difference between the case of the sheriff and that of the surety. The sheriff is bound to obey the warrant : all he has to inquire is, whether the justices had jurisdiction : he is only the officer of the law, and bound to execute all lawful precepts. Not so, the surety : he is a volunteer: he undertakes for the good faith of the debtor : he substitutes himself in his place, to the extent of the penalty.

It is not necessary that the sheriff should swear an escape, before he can assign the bond. It is true, he cannot oblige the creditor to take the bond, unless an escape has been sworn to ; but there is nothing in the law which forbids the sheriff to assign the bond, or the creditor to receive it, without such an oath.

*306] *February 19th, 1806. Marshall, Ch. J., delivered the opinion of the majority of the court.—This case depends on the construction of an act of the legislature of Virginia, which allows the prison rules to a debtor whose body is in execution, on his giving bond, with sufficient security, not to go out of the rules or bounds of the prison ; that is, while a prisoner. The condition usually inserted is, not to depart therefrom until he shall be discharged by due course of law, or shall pay the debt. The act further provides, that the prisoner, on delivering a schedule of his property on oath, to a tribunal constituted for the purpose, and pursuing certain steps prescribed in the law, shall be discharged, and all his property shall be vested in the sheriff, for the benefit of the creditors at whose suit he is in execution.

In the case at bar, the forms of the law were observed, and a certificate of discharge obtained, after which the debtor departed from the rules. Conceiving this discharge to have been obtained by fraud, the creditor brought a suit upon the bond, and the court instructed the jury, that if a fraud had been practised by the debtor, although neither the justices who granted the certificate, nor the surety, partook thereof, yet it avoided the discharge, and left the surety liable in this action. To this opinion, the defendant's counsel excepted, and upon that exception, the cause is before this court.

The certificate of discharge may be granted either by the court, sitting in its ordinary character for the transaction of judicial business, or by two magistrates, who are constituted by law an extraordinary court for this particular purpose. Whether granted in the one mode or the other, it is of

equal validity. In either case, the judgment of discharge is the judgment of a court, and, as such, is of complete obligation.

The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and therefore, all acts performed under them are valid, so far as respects third persons. A *sheriff who levies an execution, under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale [*307 under such an execution, be compelled to relinquish the property he has purchased. All acts performed under such a judgment are valid acts; all the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud, as if it had been obtained fairly.

When the person who has committed the fraud attempts to avail himself of the act, so as to discharge himself from a previously existing obligation, or to acquire a benefit, the judgment thus obtained is declared void as to that purpose; but it may well be doubted, whether a penalty would be incurred, even by the person committing the fraud, for an act which the judgment would sanction. Thus, if a debtor, taken on mesne process, escapes, he may be retaken by the authority of the sheriff, and if not retaken, the sheriff may be liable for an escape; but if he fraudulently obtains a judgment in his favor, in consequence of which he goes at large, it has never been imagined, that the sheriff could retake him, on suspicion that the judgment was fraudulent, or be liable for an escape, on the proof of such fraud.

Thus, too, where, as in Virginia, an injunction has been adjudged to discharge the body from confinement, if a debtor in execution, by false allegations, obtains an injunction, whereby his body is discharged from prison, or from the rules, it has never been conjectured, that the injunction thus awarded was void, and the acts performed under it were to be considered as if the injunction had not existed. In that case, it would not be alleged that there was an escape, and that the security to the bond for keeping the rules was liable for the debt, because the discharge was fraudulently obtained; but the discharge would have all its legal effects, in like manner as if no imposition had been practised on the judge by whom it was granted. The judgment rendered in his favor may not shield the fraudulent debtor from an original claim, but it is believed, that no case can be adduced, where an act, which is the legal consequence of a judgment, has in itself created a new responsibility, even with respect to the party *himself, much less with [*308 respect to third persons, who do not participate in the fraud.

It would seem, then, upon general principles, that a debtor who has departed from the prison-rules under the authority of a judgment of discharge, granted in due form by a competent tribunal, has not committed an escape, even to charge himself, much less a third person. Such a discharge might not be permitted to protect him from the original debt, even if the case had not been particularly provided for by statute; but the act of departing from the rules, after being thus discharged, could not charge him with a new responsibility, to which he was not before liable, much less will it impose on his security, a liability for the debt. Departing from the rules, after being discharged in due course of law, is not a breach of the condition of his bond.

This opinion receives great additional strength from those arguments,

drawn from the objects and provisions of the act, which have been forcibly urged from the bar. The objects of the act unquestionably are, not to increase the security of the creditor, but to relieve the debtor from close imprisonment in the confined jails of the country, and to consult his health, by giving him the benefit of fresh air. But as this indulgence would furnish the means of escaping from the custody of the officer, and thereby deprive the creditor of his person, it was thought necessary to guard against the danger which the indulgence itself created, not to guard against dangers totally unconnected with this indulgence. Security, therefore, ought, in reason, to be required against a departure from the rules, without a lawful authority so to do, because the means of such departure were furnished by being allowed the use of the rules; but security against a fraud in obtaining such authority need not be required, because the means of practising that fraud are not facilitated by granting the rules. They may be used by a debtor in close jail, as successfully as by a debtor admitted to the rules.

It is also a material circumstance in the construction of the act, that
*309] ample provision is made for the very case. *A new *capias* may be awarded, to take the person of the debtor. This remedy is not allowed in the case of an escape; and it is strong evidence that the legislature did not contemplate a departure from the rules, under a certificate issued by proper authority, as an escape, that the remedy given the creditor is competent to a redress of the injury, replaces him in the situation in which he was before it was committed, and is not founded on the idea that there has been an escape.

The arguments founded on the provisions respecting the property of the debtor, also bear strongly on the case. They confirm the opinion, that a departure from the rules, under a certificate of discharge, granted by a proper tribunal, ought not to be considered as an escape. So, too, does that provision of the act, which requires notice to the creditor, and not to the security.

Without reviewing the various additional arguments which have been suggested at the bar, the court is of opinion, that upon general principles, strengthened by a particular consideration of the act itself, a departure from the rules, under such an authority as is stated in the proceedings, is not an escape which can charge the security in the bond for keeping the prison-rules, although that authority was obtained by a fraudulent representation on the part of the debtor, neither the magistrates nor the security having participated in that fraud. There is error, therefore, in the instruction given to the jury, as stated in the third bill of exceptions, for which the judgment is to be reversed, and the cause remanded for further trial.

Judgment reversed.

Paterson, J. (*dissenting.*)—As to the third exception, which embraces the main point in the cause, my opinion differs from the opinion of the majority of the court, and accords with the direction given by the court below. The condition of the bond is, "that Simms do well and truly keep himself within the prison-rules, and thence not to depart until he shall be discharged by due course of law, or pay the sum of $1285.45 to George
*310] Slacum, *assignee," &c. The act that will not exonerate the principal, will not exonerate the surety from the obligation which they

have entered into ; for the surety stands on the same floor as the principal, and assumes the like character of responsibility, in regard to the terms specified in the condition of the bond. The benefit of the act of insolvency, if obtained by fraud or perjury on the part of Simms, will be unavailing, and his going beyond the limits of the prison, in consequence or under color of a discharge, thus procured, will be an invalid and unwarrantable departure. Fraud infects the decision ; and the legal principle is, that the fraudulent person shall not be suffered to protect himself by his own fraudulent act. If he should, then a judgment, which is laid in fraud, will, as in the present case, operate to the extinction of a legal, pre-existing obligation or contract. But a discharge, fraudulently obtained, is of no virtue ; of no operation ; and is, in truth and in law, no discharge ; it has neither legal effect, nor even legal existence as to the party himself, and the surety who stands in his shoes. If the judgment be of no avail as to the principal, it will be of no avail as to the surety ; it cannot be ineffectual as to the one, and operative as to the other. The discharge must be legal, to be valid, and to exonerate the surety from the special condition of the bond. The judgment itself is a fraud on the law ; and I can discern no difference between the debtor's going beyond the prison-bounds voluntarily, or under color of a judgment so obtained ; except that the latter is a case of deeper die, and less excusable in a legal and moral view than the former.[1]

Although Simms is liable to be imprisoned by virtue of a new process, yet he may have gone out of the jurisdiction of the court ; or, if not, Slacum will be deprived of the benefit of the bond which Simms and Wise executed.

The sheriff stands on different ground ; for he is exonerated from all liability, by an express provision in the statute. Besides, if the justices have jurisdiction of the subject, and should not exceed their jurisdiction, it is not incumbent on the sheriff, to examine into the regularity, fairness and validity of their proceedings and judgment ; he looks at the instrument of discharge, which, emanating *from a competent authority, it is his duty to obey. But though the discharge may excuse the sheriff, as an officer of the court, it will not excuse the party, nor his surety. As to them, it is inoperative and of no legal efficacy. [*311

[1] See the remarks of Judge IREDELL, in Maxfield *v.* Levy, 4 Dall. 335.