Statement of the case.

Defences in avoidance of the claim made in the declaration must be proved in the court of original jurisdiction, and if not proved there they cannot be successfully set up in the appellate court to support an assignment of error.

Other matters were discussed at the bar, but it is not necessary to examine any other of the propositions submitted, as these suggestions are sufficient to dispose of the case.

JUDGMENT AFFIRMED.

ROACH *v.* SUMMERS.

1. A surety is not discharged by a contract between his principal and their common obligee, which does not place him in a different position from that which he occupied before the contract was made.
2. Answers in chancery not responsive to a bill, and not sustained by other proof, are of no avail as evidence.

APPEAL from the Circuit Court for the Southern District of Mississippi.

Summers & Co. filed a bill in the court below against Eugene and Naylor Roach (the last a representative of I. W. Roach, deceased), and R. B. and B. M. Butler, for an account and for the foreclosure of a mortgage. The bill averred that in the year 1867, the said E. and I. W. Roach, demised a plantation in the State of Mississippi to R. B. and B. M. Butler for the business of cotton planting; that to enable the Butlers to obtain supplies for the plantation from the complainants, Summers & Co., the Messrs. Roach, together with the Butlers, executed two promissory notes, each in the sum of $2500, payable to the complainants, dated February 1st, 1867, and falling due in October and November of that year; that payment of the notes was secured by a mortgage given by the Messrs. Roach, and that it was agreed the cotton raised on the demised plantation *should be shipped to the complainants;* nothing being alleged in the bill as to what was then to be done with it or its proceeds. The bill

further averred that in pursuance of this arrangement the complainants made advances to the Butlers, a part of which was repaid out of the proceeds of the cotton crop of 1867, but that $4774.69 remained unpaid after credit had been given for the cotton shipped in that year; that the Butlers, being desirous to continue planting cotton on the plantation during the year 1868, and being without the necessary money and supplies for that purpose, applied to the complainants to make additional advances, to secure which, as well as the balance then due, they executed a deed of trust of all the crops of corn and cotton they might raise on the plantation, stipulating that the net proceeds should be applied—first, to the payment of the supplies furnished for 1868; and secondly, to the payment of the balance due for the supplies furnished in 1867. It is then averred that after giving credit for all the cotton received there remained a balance due to the complainants of about $3600, the proceeds of the crop of 1868 having more than paid the advances made during that year, and having reduced the balance due at the close of 1867.

The defence set up in the answers was that the Messrs. Roach were only sureties for the repayment of the advances made to the Butlers in 1867, not exceeding $5000; that the notes and mortgage were given as securities for such repayment; that it was agreed that *all the crops of cotton raised on the demised plantation should be applied to the payment of the notes, and that the cotton should be shipped to the complainants by the Butlers for that purpose as rapidly as it could be prepared for market*, but that in fraud of the agreement the complainants subsequently, on the 19th day of February, 1867, entered into an arrangement with the Butlers, without the knowledge of the sureties, by which it was stipulated they should have an interest in the crop of 1867, that the Butlers should pay 2½ per cent. commissions on the advances made, 10 per cent. interest, and the usual commissions for selling the cotton. It was further answered that in their account the complainants did charge 10 per cent. interest on money advanced, and 2½ per cent. commissions; that instead of ad-

vancing supplies for the plantation, as they had agreed to do, they advanced chiefly money, and that by their usurious charges they made up the balance of $4774 as due at the close of the year 1867. The answers then asserted that the agreement of February 19th, 1867, and the subsequent dealings of the complainants with the Butlers, as exhibited by their accounts, in which they charged 10 per cent. interest and commissions, was an abandonment of the original contract and inconsistent with it, and that it operated as a release of the notes and mortgage.

The matter in issue was, therefore, a question of fact. Was the original agreement (a verbal agreement confessedly) which the bill set forth — the agreement that the cotton raised on the demised plantation should *be shipped to the complainants*—accompanied with the further stipulation which the answer alleged that it was accompanied with, to wit, that all the crops of cotton raised on the demised plantation should be applied to the payment of the notes, and that the cotton should be shipped to the complainants by the Butlers for that purpose as rapidly as it could be prepared for market.?

If this further stipulation was not contemporary with the original agreement, then the defence had no merit.

The language of the answer of Eugene Roach was thus:

"This respondent answering, says, that it was agreed and understood by and between said complainants and said Butlers that all the crops of cotton raised on said plantation, *should be applied to the payment of the aforesaid promissory notes, and that the same should be shipped by said Butlers, for that purpose, as rapidly as it could be prepared for market.*"

That of the Butlers (a joint answer), thus:

"They now state and aver that the sole and only consideration for the said notes, as understood and agreed upon by the said Roachs, these respondents and complainants, was plantation supplies to be furnished to these respondents by complainants for the leased plantation for the year 1867, and in no event were the said Roachs to be liable for a greater amount of sup-

plies than the face of said notes. The said Roachs were to be liable only for the supplies for the year 1867, not exceeding $5000. The notes were simply given as security for said advances. It was further agreed between the said parties that the crop of 1867 was to be shipped to said complainants, and the succeeding crops to be also shipped, and that all shipments were to be first applied as credits on the said notes."

Eugene Roach and R. B. Butler were examined as witnesses. The former said:

"The agreement between the parties to the notes mentioned in the bill, in regard to the payment thereof, was that the cotton raised by the Butlers should be shipped to Summers and Brannins, and *proceeds first applied to the payment of the notes.* I was not present when the agreement alluded to was made, but was subsequently informed by my brother, I. W. Roach, that such agreement was made when the notes were executed by the other parties; and at my brother's solicitation, and on account of his statement of such agreement, I also signed the notes."*

The testimony of B. M. Butler as appearing on examination in chief and on cross-examination, was thus:

Examined in chief.

"*Question.* State whether or not, *at the time said notes were made*, there was any agreement that all the cotton shipped and to be shipped by you and your co-defendant, B. M. Butler, for the year 1867, as well as for subsequent years, was to be sold, and the proceeds thereof applied by complainants to the payment of said notes in preference to any other debts against you?

"*Answer.* There was such an agreement."

Cross-examined.

"*Question.* State when the agreement referred to in the interrogatory-in-chief was made, the particular date and year; whether before or after the notes and mortgage referred to in this case were made; with whom and by whom said agreement was made.

"*Answer.* The agreement was made in New Orleans, the 19th day of February, 1867, *after* the notes and mortgage were exe-

* The brother here mentioned was now dead.

cuted, with a member of the firm of Summers & Co., by me, acting for B. M. and R. B. Butler."

Upon the bill, answer, and proofs the Circuit Court decreed in favor of the complainants, but in the settlement of the account and ascertainment of the debt due they were credited with only 8 per cent. interest and 2½ per cent. commissions, while they were charged with the proceeds of all the cotton received by them from the plantation for both the years 1867 and 1868, and no exception was taken to this mode of stating the account.

This appeal was taken by the defendants Roach.

Mr. P. Phillips, for the appellants; Mr. Montgomery Blair (with whom was Mr. J. B. Beck), contra.

Mr. Justice STRONG delivered the opinion of the court.

No exception was taken in the Circuit Court to the mode in which the account was stated. Of course no exception can now be taken.

The only question, therefore, which can be considered in this court is whether the agreement of February 19th, 1867, by which it was stipulated between the complainants and the Butlers that the former should have an interest in the crop of 1867, as well as 10 per cent. interest and 2½ per cent. commissions for advances, operated as a release of the notes and mortgage given by the sureties. The answer to the question depends upon what took place when the Messrs. Roach became sureties.

Waiving attention to the fact that no particular or defined interest was given to the complainants by their arrangement with the Butlers, it is plain it could not work a discharge of the sureties, unless it placed them in a different position from that which they occupied before it was made. If it took away any security they had in virtue of their contract with the complainants, it was doubtless a fraud upon them, and they are not holden by their notes and mortgage. If, when they became sureties, it was agreed by all the parties themselves, the complainants and the Butlers, that all the

cotton crops raised on the demised plantation should be shipped to the complainants and credited against the advances to be made, it was bad faith to the sureties for the creditors to enter into an arrangement with the Butlers that a portion of the crops should be devoted to another use. On the other hand, if there was no such agreement respecting the crops made when the Messrs. Roach assumed their suretyship and gave their notes and mortgage, the subsequent arrangement with the Butlers was no alteration of the original contract, and had no effect upon it.

It is vital, then, to a correct decision of the case, to ascertain whether there was such an agreement made at the time the suretyship was undertaken, an agreement to which the Messrs. Roach were parties. It was averred in the answer of Eugene Roach that such an agreement was made between the complainants and the Butlers, but when it was made, whether at the time when the notes were given or afterwards, is not stated. Nor is it alleged that the sureties were parties to it, or that they executed their notes and mortgage in reliance upon it. The answer of the Butlers is substantially the same, though, perhaps, it may reasonably be construed as averring that such an agreement was made between all the parties when the notes were given. But assuming that the averment is sufficiently made in both answers, since it is new matter not responsive to anything in the bill, it must be sustained by proof to be of any avail as a defence.

And we do not find in the record any proof to sustain it. The only testimony upon the subject is that of Eugene Roach and R. B. Butler, two of the defendants. Roach testifies that it was agreed that the cotton crop raised by the Butlers should be shipped to Summers & Co., and that the proceeds should be first applied to the payment of the notes. But he does not state when or between whom this agreement was made. That he is not speaking from his own knowledge of what took place when the notes were given is certain, for he says he was not present, and that all his knowledge was derived from his brother. And the testimony of B. M. Butler also utterly fails to establish such an agree-

ment. In answer to an interrogatory whether at the time the notes were made there was any agreement that all the cotton shipped or to be shipped by him and R. B. Butler for the year 1867, as well as for subsequent years, was to be sold and the proceeds thereof applied by the complainants to the payment of the notes in preference to any other debts due by him and R. B. Butler, he said there was such an agreement. But in his cross-examination he said the agreement of which he spoke was made in New Orleans on the 19th of February, 1867, after the notes and mortgage were executed. The evidence, then, wholly fails to prove the existence of the agreement made at the time when the suretyship was undertaken, and consequently the subsequent arrangement of February 19th, 1867, as well as the deed of trust for the crop of 1868, had no effect upon the liability of the mortgagors.

DECREE AFFIRMED.

BANK v. COOPER.

After an assignee in bankruptcy, aided by a creditor, has twice contested before the District Court or its referee the claim of a person who has been allowed to prove his claim, and, after all the evidence which could then or afterwards be produced, it has been twice decided that the claim was a valid one, no bill lies in the Circuit Court (either under the general provisions of the Bankrupt Act or under the second section of it, giving to the Circuit Court a general superintendence and jurisdiction of all cases and questions arising under the act) against either the assignee or the person who has been allowed to prove his claim, to have the order allowing it reversed. Such a bill may be demurred to for want of equity.

APPEAL from the Circuit Court for the Northern District of New York; the case being thus:

On the 4th of February, 1870, the Troy Woollen Company was adjudged a bankrupt by the District Court for the Northern District of New York, and on the 11th of March, 1870, one Tappan became the assignee. Soon afterwards Cooper,