sonal representatives are entitled to a judgment for the entire proceeds of the cotton held in trust for the owner.

JUDGMENT REVERSED, and the record is remitted with instructions to dismiss the petitions of Woodruff & Co., and Mrs. Nutt, executrix, and to enter a judgment in favor of the personal representatives of Elgee, for the sum found in the treasury, the net proceeds of the sale of cotton.

Dissenting, Justices BRADLEY and HUNT.

FRETZ *v.* STOVER.

1. The point cannot be first made in this court that no replication has been made to an answer in chancery, and, therefore, that the answer is to be taken as conclusively true in all points. If such a point is meant to be insisted on here, it should have been made in the court below.
2. New defences, *i. e.*, defences not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but the character of the new party brought in.
3. After the late rebellion broke out, debtors in the rebellious States had no right to pay to the agents or trustees of their creditors in the loyal States, debts due to these last in any currency other than legal currency of the United States. Payment in Confederate notes or in Virginia bank notes (security for whose payment was Confederate bonds, and which notes like the bonds themselves never, after the rebellion broke out, were safe, and before it closed had become worthless), *held* to have been no payment, and the debtor charged *de novo*.

APPEAL from the District Court for the Eastern District of Virginia; the case being thus:

For several years prior to February 25th, 1861, a litigation had been waged by Fretz and wife, residents of Pennsylvania, against Stover, a resident of Fauquier County, Virginia; a certain Chilton, a lawyer in embarrassed circumstances, and resident in the same county, being the counsel of the former. The suit was for property claimed by the wife. On the said 25th of February, 1861, a com-

promise was effected between the parties, and it was agreed that Stover should give his bond to Fretz and wife, secured by a deed of trust to Chilton, as trustee, of a valuable farm, specified, for $2366, payable on or before the 1st of March, 1863. Fretz and his wife now returned to their home in Pennsylvania, leaving their attorney, Chilton, to see that the compromise was properly carried out, and that all details necessary for its completion were attended to. Chilton did thus accomplish matters; and Stover having, on the 8th of April, 1861, executed his bond, payable on or before March 1st, 1863, to Fretz and his wife, and transferred to Chilton by deed of trust for Fretz and his wife the farm to secure it, both instruments were delivered in form to Chilton. Of all this Fretz was informed. At the time when the compromise was made the country was in a disturbed condition with the Southern issues; but intercourse between all parts of it was still common, and as yet no war existed. On the 12th of April, 1861, Sumter was fired on by rebels, and civil war became flagrant. All communication ceased between Pennsylvania and that part of Virginia in which Chilton and Stover lived.

In 1864, intercourse being restored between Fauquier County, Virginia, and Pennsylvania, Chilton wrote Fretz saying "that the papers were all safe, and that he would keep them safe, as he could collect nothing but Confederate money." In the autumn of 1865 Fretz went to Fauquier County, where he saw Chilton, and Chilton then told him that he had received nothing on account of the bond; showed him a letter from Stover offering to pay it in Confederate money, which money Chilton said that he had not taken because it would have been of little use to him, Fretz. In 1866, that is to say, after the war was ended, Fretz learned accidentally that the bond had been paid in December, 1862, not wholly in notes of the Confederate States, but partly in them and partly in notes of Virginia banks; the security for the payment of which latter was bonds of the Confederacy; and the bonds and all the notes, of course, becoming worthless alike with the fall of the Confederacy itself.

Chilton was alive at this time, but soon after (1867) died in solvent, and Fretz now (August 9th, 1869) filed a bill in the court below (his wife not being a party) against Stover to set up and have enforced the deed of trust; the ground of the bill being that Chilton had no authority to receive payment in paper such as he did receive it in, nor Stover the right to make it. The bill set forth the general history of the transaction, alleged "that the said bond and the deed of trust securing the sum of money specified in the bond were left with the said Chilton as the attorney at law of the complainant, the deed of trust for record and *the bond for collection at its maturity.*" It charged actual fraud between Chilton and Stover in this, that Stover, taking advantage of Chilton's great pecuniary necessities, induced him to receive the Confederate and Virginia paper money at par in payment and discharge of the bond.

After the filing of the bill, Mrs. Fretz, the wife, was by consent of counsel made a party to it.

Stover filed his answer, admitting the settlement and execution of the bond and deed of trust, and the payment in Virginia bank notes and Confederate treasury notes as charged, but denied that these payments were the result of an unlawful and fraudulent combination between the respondent and Chilton. He insisted, however, that they were in law a full discharge and satisfaction of the debt and trust deed, but if this were not so, that to the extent of the compensation due by Fretz to Chilton for professional services, he should not be compelled to pay a second time.

After this answer was filed, the deposition of Fretz, the husband, was taken by the complainants, which was the only evidence in the cause. Fretz swore that Chilton had no authority over the bond and deed of trust, except to take charge of them and keep them safely, and to have the deed recorded, all which he promised to do; and that he, Fretz, had never given any authority to Chilton to receive payment in any kind of currency; that the subject of payment of the instruments had never been spoken of between the parties.

Argument for the Pennsylvania creditor.

Fretz further testified that at the time of Chilton's death, Chilton was indebted to him on another account, over and above any fees due for professional services; and that these had been paid.

Subsequently Stover died, and a bill of revivor was filed to make his brother, who was his sole devisee and legatee, as also the executor of his will, a party defendant. The brother appeared and answered, admitting the character imputed to him by this bill, but setting up new defences founded on alleged ratification of Chilton's acts by silence and acquiescence after they came to the complainant's knowledge; defences not made in the answer of Stover to the original bill. The record did not show any replication made either to the original answer or to the answer of the executor.

On the hearing the bill was dismissed, and this appeal was brought to revise that decree.

Mr. John Sergeant Wise, *for the appellants*, contended that the decree was erroneous; because,

1st. Chilton never was, by express appointment or implication, the attorney at law or in fact of Fretz to collect said bond at all.

2d. If he was authorized at the time he received the bond to collect it when due, his appointment was made in ignorance of and without reference to the contingency of war, and in its very nature revoked by its breaking out.

3d. If he was agent or attorney with power to collect, and the breaking out of war did not revoke and terminate his agency, he had no right or power to take, and Stover had no power to pay anything but gold and silver.

4th. Granting to Chilton every power which Stover contends he had, the power he did exercise, in view of the mode in which and time it was exercised, was in collusion with Stover, to the destruction of his principal's debt, without possibility of benefit to any one but Stover and himself.

Mr. W. Willoughby, contra:

I. *We raise a preliminary point.*

There being no replication either to the original answer of Stover or to that of his executor answering the bill of revivor, both are by settled chancery practice to be taken as conclusively true "in all points," whether responsive to the bill or not;* the reason of this being that the plaintiff, by not replying, has excluded the defendant from the opportunity of proving his averments.

II. *Passing to the main case.*

1. The bill was filed August 9th, 1869, for the purpose of setting up a deed of trust that had been paid and satisfied in December, 1862, nearly seven years before, on the ground that payment had been made in Virginia bank notes and Confederate money, to an agent, without authority. It admits that the deed of trust was left with Chilton, as the attorney at law of the complainant, for record, and the bond, which it was given to secure, "*for collection at its maturity.*" Chilton died in 1867. The complainant did not disavow, or object to such payment, before the death of Chilton; nor did he do so at all before the commencement of the suit, at least two years after he had full knowledge of the fact and manner of payment.

2. Chilton, who received the payments and satisfied the deed of trust, had authority to receive payment. The whole case shows this. The bill itself states so. He was the trustee in the deed of trust.

3. It is contended that if there was an agency, it was put an end to by the fact of Chilton's being in an enemy's country during the war. But this is not true. "A person may have an agent in the enemy's country to collect debts due to him, and to preserve his property there." The fact that it may have been illegal to remit, did not make it so to receive. In addition, Chilton was trustee as well as agent. He was not only the proper person to satisfy the deed of trust, but he was the only one who could do so.

* Brinkerhoff *v.* Brown, 7 Johnson's Chancery, 222; Dale *v.* McEvers, 2 Cowen, 118.

4. But, it is denied that Chilton had authority to receive in payment Virginia bank notes or Confederate currency.

In *Hale* v. *Wall*,* payment of bonds in Confederate currency and Virginia State bank notes, to an agent, under circumstances similar to those of this case, was held to be a good payment, "*in the absence of instructions from the principal, not to receive such money.*"

The peculiar circumstances of this case have an important bearing upon the rule of law as to such payments. In Fauquier County, Virginia, such currency was, at that time, the only currency in circulation. It was in constant use; and by that standard contracts were made, and all the business of society carried on. Payments were constantly made in such currency; and, in this respect, it was like the notes of banks, with which all business had been carried on, and which were always regarded as good payments, unless objected to *at the time.*

The bill of complaint is framed upon the theory that the payment, made as it was, was the result of conspiracy between Stover and Chilton to defraud Fretz. This is denied by the answer, and there is no proof in support of the charge. The circumstances under which such payment was made show entire good faith. Mr. Chilton was an upright lawyer, as is shown, primarily by the fact that implicit confidence had been placed in him by Fretz himself.

The only testimony in the case is that of Fretz, the husband, a party to the case, and a party embittered by long-waged litigation. Such testimony is really of little value. If Chilton were alive, and we could have the benefit of *his* testimony, a very different state of facts might appear from that attempted to be made by Fretz, and on his making of which his only hope of recovery depends.

Mr. Justice DAVIS delivered the opinion of the court.

At the outset of this case we are met with the objection that there is no replication in the record; but this objection,

* 22 Grattan, 424.

on the authority of *Clements* v. *Moore*,* should have been made in the court below. Not having been made there, it will be considered as having been waived. It would work great injustice in this case to allow it to be taken here for the first time, for manifestly the submission was not on bill and answer, for proofs were taken, and it is to be presumed, in the absence of anything in the record to the contrary, that they were considered by the court in the disposition of the cause.

So far as the answer to the bill of revivor was concerned, no formal replication was required to avoid its effect as evidence in the cause. Nothing could be brought into the litigation by the bill of revivor besides the mere question whether the brother, brought in on the bill of revivor, was the executor of the will of Stover, and his legatee and devisee, for Catharine Fretz had been made a party to the original suit before answer was made to it.† The new defences, therefore, set up in the answer to the bill of revivor, were not pertinent to it, and cannot be considered in the case.‡

We are brought, therefore, directly to the question whether the payments by Stover to Chilton were, under the circumstances surrounding the parties, of any validity.

It is argued by the appellants that the bond was not left with Chilton for collection at all, but only for safe keeping until it matured; but the bill avers the fact to be otherwise, and, naturally, it must have been so. Chilton had been the attorney of Fretz and wife through a protracted and angry litigation, and, as the evidence shows, assisted at the compromise of it. This compromise was effected in February, 1861, and contemplated several transactions which could not be completed until after Fretz's return to Pennsylvania. Among these was the execution of the bond and deed of trust in question. As Fretz could not in person see that the papers were properly drawn, he intrusted that duty to Chil-

* 6 Wallace, 310. † Story's Equity Pleadings, § 377.

‡ Gunnell *v.* Bird, 10 Wallace, 308.

ton, and the additional duty of having the deed recorded. It was undoubtedly expected at the time that before the bond matured Fretz would hold frequent communications with Chilton, and this may account for nothing being said on the subject of collecting the bond. There was no necessity for it, as the bond had a long time to run, and, besides, no trouble was anticipated about the collection of it. It is, however, fairly to be inferred from the relation between the parties that Chilton had authority to collect and transmit, in the absence of any specific directions on the subject. And if war had not intervened, and he had not been told to collect the bond in legal currency alone, he would have been authorized to receive payment in current bank bills which passed at their par value in business transactions at the place where the contract was to be performed. But if this rule holds good when the country is at peace and undisturbed by civil commotion, it has no application in a state of war like that of the late rebellion. That rebellion effected a change in the status of the parties to this contract, and in the relations between the appellants and Chilton. Although the country was unquiet when these parties, in February, 1861, settled their differences, yet it would be a violent presumption to suppose that they anticipated the changed condition of things which soon after occurred. They doubtless acted on the belief that the difficulties which threatened the peace of society would be adjusted, and the monetary affairs of the country remain as they were. On this theory they concluded their agreement, and Fretz repaired to his home in Pennsylvania, leaving Chilton to see that Stover performed his part of it. It may be that it was not expected that the bond which Chilton obtained from Stover would be paid in specie, but at least it was expected that it would be paid in current bank notes, redeemable on presentation at the counter of the banks issuing them. At any rate, it was executed with reference to the standard of value then existing in the United States.

The war occurred, and Fretz was prohibited by the law of the government under which he lived from holding com-

munication with Virginia. If some persons did take the risk and cross the line in order to save their property, certainly Fretz, who did not choose to break the law and encounter the danger, cannot be held responsible for not going to Virginia and withdrawing the bond and deed of trust from the hands of Chilton. When, in 1864, he first heard from Chilton, he was told his papers were safe and would be kept so, as nothing but Confederate money could be collected, which was valueless. And not until 1866 did he learn the truth, although after the war closed he had frequent personal interviews with Chilton. This conduct of Chilton's shows his consciousness that he had attempted to wrong his principals and his unwillingness to disclose his culpability. But it is of no importance what he attempted to do, for his principals are not bound by his wrongful acts. If he was authorized when he received the bond to collect it when due, in bank bills which were current in Virginia at the time, this authority was conferred in ignorance of, and without reference to, the contingency of war, and in the nature of things was revoked when war broke out. The authority to collect was based on the power to remit, and this it was impracticable, as well as unlawful, to do. Besides this, the authority to receive bank bills at all, in the collection of debts, only rests on the theory that they pass as money at their par value by the common consent of the community, and can be used by the principal where he lives in the common transactions of life. But when this is not the case, and war has disturbed the country to that extent that the paper used in Virginia to pay debts is of no value in Pennsylvania, there is no longer any authority to take it by an agent living in Virginia in discharge of a debt due a citizen of Pennsylvania. If it were otherwise, then, as long as the war lasted, every Northern creditor of Southern men was at the mercy of the agent he had employed before the war commenced. And his condition was a hard one. Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by

the acts of his agent in the collection of his debts the same as if peace prevailed. It would be a reproach to the law if creditors, without fault of their own, could be subjected to such ruinous consequences.

If Chilton could not receive payment of the bond in Confederate paper and Virginia bank notes, neither had Stover the right to pay them. It was a void act on his part to attempt to discharge his debt in this way, as well as a fraud in Chilton to suffer him to do so. His obligation when the bond fell due was to pay it in the legal currency of the United States, and yet he tries to discharge it in paper worthless to Fretz, and with knowledge that, worthless as it was, it could not be sent to him. If it be true that he did not represent Fretz, still he had no right to do an act of gain to himself, but of no benefit to Fretz. Besides, what ground had he for supposing that Fretz gave authority to Chilton to make such a sacrifice? As a sensible man he must have known that this could not be so, especially as the debt was secured by a deed of trust on a valuable farm. It is impossible to escape the conviction that there was collusion between Chilton and Stover in the transaction, but whether this be so or not, the transaction itself was invalid.

In recognition that this might be the judgment of the court, Stover asks that his payments may be applied towards the debt for professional services due Chilton from the appellants. Without stopping to inquire whether this could be done, if the appellants owed Chilton anything, it is enough to say that the evidence shows that the indebtedness is the other way.

It is claimed that the Virginia bank notes at least should be treated as payment pro tanto, but, as we are advised, the difference between their market value and that of Confederate bonds and notes was merely nominal during the war, and when it ended the bank notes were worthless, being only secured by Confederate bonds.* Apart from this, the

* See the ordinances adopted by the Convention of Virginia in June and July, 1861, after the State had seceded.

evidence shows they were, when paid, equally with Confederate paper valueless in Pennsylvania.

The views taken of this case accord with *Ward* v. *Smith*,* and are supported by the Court of Appeals of Virginia in *Alley et al.* v. *Rogers*.† It follows, from what has been said, that the bond given by Charles Stover to Isaac Fretz and Catharine his wife has not been paid, or any part of it, and that the deed of trust to secure it is still a subsisting security in full force and effect.

DECREE REVERSED AND THE CAUSE REMANDED, with instructions to enter a decree for Catharine Fretz, survivor of her husband, in conformity with this opinion.

REVERSAL AND REMAND ACCORDINGLY.

SWEENEY ET AL. *v.* LOMME.

1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that Territory on the question; that being a question on the construction of their own code.
2. In a suit on a replevin bond the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value; even if that were an error for which that judgment might be reversed.
3. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability.
4. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond.
5. When it appears for the first time in the argument of a cause that the

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* 7 Wallace, 451. † 19 Grattan, 381.