found in my county," with that required by the statute: The defendant is not to be found within his county;" and it is apparent that everything of substance made necessary by the statute, is wanting in the sheriff's return.

The language of the statute clearly imports that, after diligent inquiry and search, by the sheriff, at the usual residence of the defendant and elsewhere, he is not to be found, being either actually absent from the county, or having concealed himself so as to evade the service of process. The sheriff's return upon the summons in this case imports no such state of facts. It may be literally true, and yet the sheriff not have gone out of his office to seek the defendant, notwithstanding he may have been in the county, and subject to be served with [267] process by the exercise of proper diligence. It follows that the attachment and subsequent proceedings in this case were irregular and void; and the judgment will be reversed and arrested.

LUNSFORD AND DAVIE *v.* BAYNHAM.

Nashville, December, 1849.

Hirer of Slave—Duty. The law rigidly exacts from the hirer of a slave an observance of the duties of humanity, and that measure of care and attention to the comfort and welfare of the slave, that a master, of a just and humane sense of duty, would feel it incumbent upon him to exercise in the treatment of his own servant.

This is an action on the case in the circuit court of Montgomery county, by Baynham against Lunsford and Davie. The plaintiff hired defendant, a slave, for a year to work on a farm. The slave was employed in driving a wagon and team from defendant's mills and farm, to a landing on Cumberland river, and during the time he was so engaged he was taken sick and died. The facts are more particularly detailed in the opinion of the court. The plaintiff declared in trover for the conversion of the slave, and in case for neglect of the slave in sickness, whereby he died. It was submitted to a jury, under the direction of Judge Martin, and a verdict and judgment rendered for the plaintiff for the sum of five hundred dollars. The defendants appealed.

Hornberger, for the plaintiff in error; *Shackleford* and *Baily,* for the defendants in error.

[268] McKINNEY, J., delivered the opinion of the court.

On the first count of the declaration in this case, which is in trover, the verdict cannot be maintained. The employment of the slave as wagoner, was not, we think, without the scope of the service for which he was hired; and consequently there was no conversion.

But on the second count, which is in case for negligence and want of due care and attention, on the part of the plaintiffs in error, in the treatment of said slave, by reason whereof he was lost to the owner, we think the recovery well warranted.

It appears from the proof that, on the first of January, 1847, the slave in question was hired to the plaintiffs in error "to work on the farm," for one year. Some six or seven days prior to the 25th of February, of the same year, the slave was taken ill. The disease was bronchitis, accompanied with fever, of which he lingered, gradually becoming worse, until his death, which happened on the 21st of March ensuing. Shortly before this attack, the slave was seen driving a wagon and team; the day was extremely wet and cold, and he was clad in some old clothes, so far worn that his arms and legs, up to his knees, were wholly uncovered; he had neither overcoat, blanket, or other covering to protect him from the severe inclemency of the weather. On the 25th of February, a week after the illness of the slave, a physician, who chanced to be passing, was requested by an agent of the plaintiffs in error, to call and see said slave; he did so, and found him lying on the floor on a blanket. The physician was not called again until the first of March, when he was sent for by Mr. Davie, one of the plaintiffs in error, to visit [269] said slave, and continued to visit him until his death. On this visit he found the slave much worse, and informed Mr. Davie that if he were not particularly attended to, he would die. But there was no one, at any time, to wait upon him, capable of nursing or attending to him; and whenever the physician visited him he found him unattended to. The physician thinks that, with proper attention, the slave would have recovered.

No exception has been taken to the charge of the court, and the case rests solely upon the facts.

If it were allowable for us, under the rule of this court, to scrutinize and weigh the evidence in any case, in order to ascertain whether the preponderance of proof was in favor, of, or against, the verdict, the present is not a case in which it would be expected of us to do so with the most scrupulous exactitude. Putting aside all considerations of what was due to the slave himself as a rational being, shutting out all the sympathies of our nature on the score of his privations and sufferings, and looking only to the legal rights of the owner, in the property of the slave, we think

no jury could have hesitated for a moment to find the verdict rendered in this cause. The necessary protection of the rights of the master, all other considerations out of view, demands that the hirer of a slave should be taught to understand that more is required of him than to exact from the slave the greatest amount of service, with the least degree of attention to his comfort, health or even life. The law, as administered at this day, in most of the slave States, rigidly exacts from the hirer an observance of the duties of humanity, and that measure of care and attention to the comfort and welfare of the slave, that a master, of a just and humane sense [270] of duty, would feel it incumbent upon him to exercise in the treatment of his own servant. If the hirer fall short of this, his application to mitigate, or set aside, the finding of a jury, visiting upon him the penalty of his neglect, as it merits no favor, will find but little in view of the court.

Judgment affirmed.

CARRICK AND OTHERS *v.* PRATER.

Nashville, December, 1849.

Chancery Practice—Evidence to Overturn a Sworn Answer—Oath to Bill on Information. Upon a bill filed by sureties to enjoin part of the judgment against them as usurious, the oath to the bill being upon information, the evidence of the principal debtor alone is not sufficient to prove the usury against the express denial of the answer.

This bill was filed in the chancery court, at Sparta, by Carrick and others, against Prater, praying relief against an alleged usurious transaction. There was a decree for the complainant. Defendant appealed.

S. Turney, for complainants; *J. S. Goodall,* for defendant.

GREEN, J., delivered the opinion of the court.

We find it impossible to sustain the decree of his honor, the chancellor, in this case.

This bill is filed to enjoin part of the judgment at law as usurious. The former bill between the parties, also set up the usury in this transaction, as one of the grounds for relief. The decree in that suit was a bar to the relief now sought.

[271] But in this case, the complainants, who are sureties, do not allege that there was any usury in the original transaction, as