of their knowledge; but they say, they have been informed there was usury. In swearing to the bill, therefore, they only swear that they have received this information.

The answer expressly denies the usury. It is proved by one witness only, the principal debtor. This is not sufficient. If where a bill is sworn to, the rule, that two witnesses are required to over-turn the denial of an answer, does not apply, still, this is not a case for dispensing with the rule. Here, the complainants are informed of a fact, by the principal debtor; swear they were so informed; and prove the fact by him. This the defendant denies. There is, therefore, only oath against oath.

Reverse the decree and dismiss the bill.

TALIAFERRO v. HERRING.

Nashville, December, 1849.

Justice's Judgment—Stayor Cannot Contest its Validity, if Principal Submit to It. The stayor of a justice's judgment by confession, cannot contest the validity of the judgment because of the want of sufficient legal authority to sustain the confession, if the principal submit to it, as he does by procuring the stay, without attempting to set it aside by an appeal.

Stay by Consent—Presumption. Under 1842, 136, 4 (Code, § 3060), a justice's judgment may be stayed, by consent of the plaintiff, after the usual time allowed for the stay as of right, and the consent of the plaintiff will be presumed in the absence of proof to the contrary. [See Winchester v. Beardin, 10 Humph. 247, and Cannon v. Trail, 1 Head, 286, the last citing this case.]

Cited in: 3 Lea, 273, 274; 7 Lea, 623; 14 Lea, 422.

[272] In this case, a judgment was rendered by a justice of the peace, for the county of Montgomery, in favor of Taliaferro, against Williamson, on the 24th January, 1849, which was stayed by Herring on the 28th of the same month. Herring, at the expiration of the stay, removed the case to the circuit court by petition. A motion to quash the execution, which had been issued, was made. The presiding judge, Martin, overruled this motion, and gave judgment for the plaintiff. The defendant appealed.

Munford and *Dudley*, for the plaintiff in error; *Harrell*, for the defendant in error.

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

It appears from the record in this case, that one B. F. Williamson executed his bill single, to S. Allen, by which he bound him-

self to pay $125.16, six months after date, viz., December 14, 1846. And this bill single was afterwards assigned to S. W. Taliaferro, by said Allen. It further appears that on the 24th day of January, 1848, B. F. Williamson wrote on the bill single, the words and figures following:

[273] *"A. D. Witherspoon, Esquire*: I confess judgment on this note, January 25th, 1848. B. F. WILLIAMSON."

Upon this A. D. Witherspoon, a justice of the peace for Montgomery county, to whom the above endorsement on the bill single, by B. F. Williamson, was directed, gave judgment in the words following:

"SAML. W. TALIAFERRO,
v.
"B. F. WILLIAMSON. } On note.

"By authority of defendant's order, directed to me, dated this day, I give judgment for plaintiff, against defendant, for amount of note and interest; one hundred and twenty-nine dollars and thirty-eight cents and costs. 24th January, 1848. Stayed by O. W. Herring, Jan. 28th."

Upon this judgment execution was issued against the stayor, O. W. Herring, who removed the same upon petition to the circuit court of Montgomery county; this petition, upon hearing, was dismissed by the circuit judge, and thereupon the petitioner appealed to this court.

Two questions are now presented for our consideration.

1. It is contended that the judgment rendered by the justice, Witherspoon, against Williamson, the defendant is void, because it purports to be made upon confession, when the writing, by Williamson, upon the bill single, is no authority to confess judgment, and is no confession of judgment in fact, because not made in person to the justice.

If this were a question directly upon the judgment, made by Williamson in an attempt to vacate it, it must be admitted not to be without difficulty. But being as it is, collateral to the judgment, and by one [274] (to wit, the stayor) not authorized to question its validity, if the principal submit to it, we think it is free from difficulty. Because, we think the judgment is not void, but voidable, at Williamson's election. If the judgment purporting to be upon confession, were given without sufficient legal authority, certainly if Williamson thinks proper to submit to it, no one else has a right to complain; and that he did think proper to submit to it, is evidenced not only by his not attempting to set it aside by appeal, or otherwise, but by his procuring the petitioner, O. W. Herring, to stay it for him.

2. It is contended that, in as much as the judgment was rendered on the 24th of January, 1848, and stayed on the 28th, the stay was given without legal authority; the time having elapsed during which the justice was authorized to receive the same; and that, therefore, O. W. Herring, the stayor, is not responsible for the judgment.

This would be unquestionably true, if it were not for the provisions of the act of 1842, ch. 136, sec. 4, which, in our opinion, allowed the stay notwithstanding the lapse of the time before it was given, viz., two days, as previously fixed by law.

This statute allows a stay, by the consent of the plaintiff, as well after as before the time previously fixed; and we think the plaintiff's consent to this stay is sufficiently proven; indeed, in the absence of proof to the contrary, we think it would always be presumed.

Let the judgment be affirmed.

MANN, *Administrator, v.* McDONALD *et al.*

Nashville, December, 1849.

Guardian ad Litem—Purchase of Property in Which the Ward has an Interest. One standing in the relation of guardian ad litem will not be permitted to place himself in an attitude of hostility to the interests of his wards, nor to derive any benefit to himself at their loss, by purchasing property, in which the ward has an interest, at an undervalue, and the biddings will be opened for that reason alone. [Cited in Houston v. Aycock, 5 Sneed, 414.]

Chancery Sale—Opening Biddings. Before confirmation of a chancery sale, mere advance of price is sufficient to open the biddings, and where the advance was fifty per cent on the bid after confirmation, but, at the same time, the court were not prepared to hold the chancellor erred in the exercise of his discretion by opening the biddings. [Acc. Childress v. Hunt, 2 Swan, 491, citing this case. See, now, Click v. Burris, 6 Heisk. 539, and Atkison v. Meurfree, 1 Tenn. Ch. 51.]

Cited in: 3 Tenn. Chy., 236.

[275] This is a bill, which was filed in the chancery court, at Carthage, for the purpose of procuring a sale of real estate, under the act of 1827, ch. 54, for the purpose of dividing the proceeds amongst those entitled. The chancellor presiding (Ridley), decreed in conformity with the prayer of the bill. The estate was sold, and an appeal was taken by one of the defendants. The facts are fully stated by the court.

Stokes, for affirmance; *McDonald*, contra.

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