served with process and a copy of the complainant's bill, and they not having answered said bill according to law, the said bill is taken as confessed against the state. Whereupon the said bill, being read and heard, together with argument of counsel on both sides, on consideration whereof, it is the opinion of the court that the complainants are entitled to receive from the state the actual amount of rents collected and received by the state for the tract of school land in the bill mentioned during the time the state has possession thereof, and rented the same out according to the provisions of the act of 1838, ch. 158, and not to the value of the rents as provided by the act of 1835, it being competent for the legislature, in the opinion of the court, to repeal or modify the act of 1835, by a subsequent legislative provision, as to the amount or mode of compensation. It is, therefore, decreed and ordered by the court that the clerk of this court take and state an account between the parties, showing the amount of rents received by the state for the said tract of school land during the time the state had possession thereof, and report the same to the next court; all other matters being reserved until the coming of said report."

[115] The complainants having failed to introduce proof of the amount of their claim, the bill was dismissed.

The complainants appealed.

Taul, for complainants.

Attorney General, for the State.

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

This is a suit on behalf of the school commissioners of the Bean's creek tract of land, in Franklin county, against the state. The act of 1835, ch. 80, gives the action for the rents and profits of the school lands, which the legislature, in violation of the trust reposed in it by the general government, had diverted from the purposes for which they had been given; that it was right and proper that the state should pay for this, the amount of damages sustained by the school districts, no one doubts. But the legislature thought proper in 1838 to modify the provisions of the acts of 1835 by a statute, ch. 158, which directs that the state shall be responsible only for the amount of rents and profits actually received from said school lands, and not for what might have been received, and under this statute the complainants lost their rent, because they declined an investigation of their case under the act of 1838, and they now prosecute an appeal to this court.

The question for our consideration is whether the state is responsible for the rents and profits which might have been received for the tract of land which forms the subject of this controversy, or only for the amount that was actually received; and we can have no doubt but that it is what might have been received, because the state having thought proper, in violation of a trust, to take these lands out of the hands of those who were entitled to them, upon every principle of justice it ought to pay what they would have rented for.

The act of 1835 gives the action; and so far it is not repealed by the act of 1838, and the suit was brought before the passage of the act of 1838. The commissioners, then, having the right [116] to sue, this court will give them the appropriate damages against the state, which will be what the land would have rented for under proper management. This the circuit judge refused to do, and the case will, therefore, be reversed and remanded for further proceedings according to the principles of this opinion.

ISLER, *Administrator, v.* TURNER.

Nashville, December, 1846.

Remedy in Equity After Summary Judgment by Motion Without Notice. Where the surety of a firm, upon the recovery of a judgment against him, and before payment, obtained by motion, under 1809, 69, 1 (Code, § 3620, subsec. 1), a judgment over against the administrator of a person as a member of the firm, such person not being in fact a member of the firm at the time of the creation of the paper, nor liable to the surety by reason of having previously been a member, the equitable jurisdiction to relieve against the judgment is free from doubt, although the writ of error, **coram nobis** might have availed to revoke the judgment, the latter remedy, under the facts of this case, not being free, unembarrassed, and adequate.

Cited in: 1 Bax., 37.

This bill was filed in the chancery court at Franklin, by Isler, administrator of Bryan, against Turner. It was heard by Chancellor Cahal, on bill, answers, replication, and proof, and the bill dismissed. Complainant appealed.

Washington, for complainant.

Fogg and *A. Ewing,* for defendant.

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

In March, 1835, Joseph H. Bryan, the complainant's testator, then of the state of North Carolina, entered into a mercantile

copartnership with his nephew, Henry H. Bryan, furnishing to the firm all the money capital; the latter, at the time, resided in Clarksville, where the firm was to do business. The style of the firm was H. H. Bryan & Co. A few weeks after the establishment of the copartnership Joseph H. Bryan removed to Clarksville, and resided there for about six months, when he removed to Nashville, and shortly afterwards to the Western District, Fayette county; and, after he left Clarksville, he never returned there again. In August, 1837, Henry H. Bryan went to the Western District and dissolved the partnership [117] with said Joseph H. Bryan, and on the 5th of September, 1837, formed a new partnership with his brother, Jesse A. Bryan, under the same style of H. H. Bryan & Co. There was no newspaper publication of the dissolution, or of the formation of this new partnership. The new partners gave their note to Joseph H. Bryan for upwards of $6,000 for his capital and supposed profit. On the 5th of February, 1838, a new firm was entered into between H. H. Bryan, Jesse A. Bryan, and James C. Johnson, under the style of Bryan, Johnson & Co., and a publication was made, in the Clarksville *Chronicle*, of the formation of this firm. This continued to exist and do business at the old stand for three months, when a dissolution took place. Of this dissolution a publication was made in the same newspaper, and also that business would be continued by H. H. Bryan & Co. This last firm consisted of H. H. and J. A. Bryan, and continued until the 8th of July, 1838, when they sold their stock of goods to a third person. Of the formation and of the dissolution of these two last partnerships Joseph H. Bryan had no knowledge. Mr. Johnson, the partner in one of the firms, says that he had no contract with, and knew nothing of, Joseph H. Bryan.

Joseph H. Bryan, in August, 1838, was found by inquisition to be, and to have been, for several months past, lunatic and of unsound mind; and a committee or guardian was appointed to take charge of his property. On the 2d of July, 1838, Henry H. Bryan borrowed of one Upton Organ the sum of $1,000, and gave his note therefor in the firm name of H. H. Bryan & Co., and the defendant, by his signature and seal on the face of said note, became surety of said H. H. Bryan & Co., without, however, the fact of such suretyship appearing upon said instrument. Upton Organ sued H. H. Bryan and the defendant Turner, and them only, upon said instrument, and obtained a judgment for debt and interest in May, 1840. At the September term following, in the same court, the circuit court for the county of Montgomery, defendant Turner moved for and obtained judgment against the complainant, as the administrator of Joseph

H. Bryan, deceased, and against Henry H. Bryan and Jesse A. Bryan, without notice, not upon the 1st section [118] of the act of 1801, ch. 10, as being surety, and as having paid such judgment, but upon the 1st section of the act of 1809, ch. 69, as being a surety, and having had a judgment rendered against him, after having the fact of suretyship found by a jury, agreeable to the statute. This judgment was for the amount of the other judgment, interest, and costs.

This bill is filed to enjoin the last-named judgment, upon the ground that the relation of principal and surety did not exist between the complainant's testator and the defendant. The bill alleges that the defendant was the nephew of Joseph H. Bryan, and the cousin of H. H. Bryan, was on intimate and confidential footing with the latter, and knew, or was informed, of the dissolution of the first firm, and knew of the mental capacity of Joseph H. Bryan at the time the note was made.

The answer states that there was no publication of the dissolution; and states, further, not that defendant had no knowledge of the dissolution, but that he does not recollect whether he was informed of it. And the defendant relies upon his judgment at law being conclusive; and that complainant has an unembarrassed and adequate remedy at law, and, therefore, no remedy in equity. The proof is that, at the time of the dissolution of the first firm, and the formation and dissolution of the other firms, the defendant lived in the town of Clarksville; that H. H. Bryan, and other members of his family boarded with him during all that time, and one of the clerks for some time; that he was a relation, confidential friend, and professional counsel of the said H. H. Bryan, and of the firm; that he habitually took the newspaper in which the formation and dissolution of the partnership of Johnson with the Bryans was published. That on all the changes of the firms, inventories were made out, which took much time, during which the front doors of the storehouse were closed. When, to all this, it is added that the defendant does not deny knowledge of the dissolution, nor of the existence of facts from which he ought to have inferred it, but only his recollections of having been informed of it. We are satisfied that, when defendant executed the note, not only that Joseph H. Bryan was not in fact a partner, but that, from all the facts shown, the defendant has no right to hold him [119] to the liability of a partner. Defendant must have known that Johnson was brought into the firm, and he must have known, from the distance, absence, and mental condition of his uncle Joseph H. Bryan, that he made no contract, had no agency or even knowledge that he was brought in; and that would have dissolved the first firm if it had then ex-

isted. There are other facts from which, we think, he could not but have inferred the same thing.

The only remaining question is as to the effect of the judgment at law, and is there a remedy in equity? The judgment at law in this cause is not a summary remedy given by statute, as a substitute for a common-law action, as in the case where the surety has paid the debt provided for by the act of 1801, ch. 15, or in the case of summary judgments against sheriffs, constables, etc., and sureties, when debt or covenant would be brought at common law; but this judgment, by motion, in relation to the basis on which it rests, the mere rendition of a judgment against a surety, is an isolated and anomalous remedy, existing nowhere else that we are aware of; it is a sort of substitute for the equitable remedy which the security has by bill *quia timet* against the principal debtor and the creditor to compel, for his indemnity, the former to pay the latter. But the remedy is a very crude one, and, if much enforced, bills of equity will have to spring up around it on every hand. If the action at law, resulting in a judgment against the surety, were likewise brought against the principal by the creditor of both, then the liability and indebtedness of the principal would be judicially ascertained, and the case so far simplified; and that may have been the state of things in the contemplation of the legislature of 1809, when this particular and dangerous remedy was given. But, even in that case, what is the situation of the plaintiff in this summary judgment? It is a mere judgment for his indemnity; he is not beneficiall, interested, as owner of it, to the amount of $1, until he has paid that $1. The very judgment constitutes him a trustee for the creditor, for the principal, for all parties.

This summary judgment for indemnity is liable to much abuse; the surety against whom the judgment has been rendered, [120] and with regard to which he is to be indemnified by a judgment over, may be insolvent, and therefore in no danger from judgment against him, and, if he collect on his judgment, the principal may be compelled to pay twice. But if the liability and indebtedness of the supposed principal have not been judicially ascertained by a suit of the creditor against him before the surety obtains his judgment by motion, shall he not be permitted in chancery, or somewhere, to show, by way of throwing off the burthen of the surety's judgment, that he is not liable, is not indebted, has paid, or has a set-off? So far, therefore, is this peculiar judgment of indemnity, which constitutes the plaintiff in it a trustee, from closing the equitable forum that itself makes and calls into exercise chancery jurisdiction, in order to limit and restrain its operation and prevent it from doing mischief.

In the case before us the name even of Joseph H. Bryan was not upon the paper, or expressed in the firm signature; he was not a partner, therefore not contracted with by either Organ or Turner. Organ did not sue him at law, and ascertain his liability and indebtedness. But he sued H. H. Bryan and Turner only; and, on the foot of such judgment merely, Turner obtains, on motion, his judgment of indemnity against the complainant, H. H. Bryan, and Jesse A. Bryan, as principals, persons never associated in the same firm. Shall a judgment of this nature, a judgment of indemnity, and thus obtained, exclude the complainant from setting it aside in equity by showing the entire transaction set forth in the record before us?

We do not wish to limit or question the remedy of writ of error *coram nobis*, as far as it has been adopted and applied in this state, nor do we hold that the bill of equity is a concurrent remedy with it in those cases. But we hold that, in the case of such a judgment as this, as we have described it, upon its grounds and its facts, the equitable jurisdiction is free from doubt, although it may be possible that the writ of error *coram nobis* might have availed to revoke the judgment; yet, in this case, that remedy is not free, unembarrassed, and adequate.

Let the decree of the chancellor be reversed, and the judgment at law of defendant be perpetually enjoined.

McGAN v. MARSHALL.

Nashville, December, 1846.

Mortgage—Deed to Secure Future Indebtedness with Liberty in the Mortgagee to Purchase. A conveyance of land to secure the grantor's liability for goods to be afterwards advanced, conditioned to be void if the grantor should pay for the goods within two years, is a mortgage, and a subsequent stipulation that the grantee might, at the end of the two years, purchase the lot at a given price, will not interfere with the right of redemption.

Mortgage of Infant for Goods to be Furnished Voidable not Void. A mortgage of land executed by an infant to secure payment for goods to be purchased, and which were to be paid for in two years, is not, on its face, prejudicial to the infant, and is, consequently, voidable and not void, and proof of the subsequent injudicious application by the infant of the consideration received, cannot render it void. [Citing Wheaton v. East, 5 Yerg. 59, and cited in Scott v. Buchanan, 11 Humph. 471.]

Disaffirmance of Voidable Deed by an Infant. An infant may disaffirm his voidable deed by an act equally solemn after he becomes of age, as by the execution of another deed for the same property to a third person; but a subsequent mortgage or deed of trust, being consistent with a former mortgage or trust, will not have this effect.

Lis Pendens and Receiver. Where, during the pendency of a bill by a creditor of the mortgagee to foreclose a mortgage on land, and during the pendency of another bill by the wife of the mort-