PENNINGTON'S EXRS. *vs.* YELL.

Reasonable diligence and skill constitute the measure of an attorney's engagement with his client.

He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with, and skilled in the same kind of business.

An attorney is entitled to the benefit of the rule, that every one shall be presumed to have discharged his legal and moral obligations until the contrary shall be made to appear.

And when made to appear, the extent of the damages that have resulted, must also be affirmatively shown; as in the case where the amount of a note is alleged to have been lost by his negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent.

And unless the latter be shown, he would be liable only for nominal damages;

and under no circumstances would he be liable for more than the actual damages that the client has sustained by reason of negligence.

It seems to be generally conceded in this country, that the authority of an attorney, over his client's cause, continues not only until the judgment, and a year and a day afterwards, as is said in the old books,—but if the judgment be not satisfied, and is continued in force, that his authority will be prolonged accordingly.

It follows, that when an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently that he must not only sue out the first process of execution, but all such that may become necessary.

But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits without special instructions to do so—as actions against the sheriff or clerk for the failure of their duty in the issuance or service of process.

He should pursue bail, however, and those who may have become bound with the defendant, either before or after the judgment, in the progress of the suit.

He is not bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt: this is the business of the sheriff, nor is he liable for any of the short comings of that officer.

But in reference to all such professional duties, it is well settled that the attorney will always be justified in ceasing to proceed with his client's cause (unless specially instructed to go on) whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client.

And an attorney may cease to send out execution, whenever he, in good faith, may deem it to the interest of his client so to do, without first giving notice to his client, and asking instructions.

In this case the attorney sent out an execution against his client's debtor, it was levied upon a negro, delivery bond taken, and forfeited: he obtained judgment by motion, on the delivery bond, sent out an execution thereon, and the sheriff levied upon and sold the same negro for part of the debt: the attorney took no further steps against the security in the delivery bond: HELD, that the fact that the sheriff had taken him upon the delivery bond was *prima facie* evidence of his solvency, and there being no evidence to the contrary, the attorney was guilty of culpable negligence in not sending out further process against him.

Where an execution is returned before the return day, by the sheriff, it may be sent out again or another issued immediately, and plaintiff is not bound to wait until after the return day before further process can issue.

At common law the verdict of a jury summoned by the sheriff to try the right of property levied on, did not protect him in selling, against the claim of the true owner, but it is otherwise under our statute, (*Digest* 499, *sec.* 33.)

Legal presumptions must be based upon facts, and not upon presumptions.

While dower remains unascertained, and until there has been an actual admeasurement by metes and bounds, it is a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law.

Writ of Error to Pulaski Circuit Court.

Catharine Pennington, as executrix, and John Irwin, as executor of John E. Pennington, deceased, brought an action of assumpsit against James Yell, Esq., to the May term of the Pulaski circuit court, 1845.

There are four counts in the declaration: The first alleges that on the 16th day of September, 1839, plaintiffs' testator placed in the hands of the defendant as an attorney, for collection, a note on J. F. Pullen and E. G. Smith for $227.84, then due; and also a note on E. G. Smith for $84, due in January, 1840, which might have been collected by proper diligence, &c., but that by the negligence, want of proper skill and diligence, &c., of defendant the claims were wholly lost.

2d, Count for failure to collect the claim on Pullen and Smith, describing it as a writing obligatory.

3d, Count for failure to collect a note on one James C. Groce, placed in defendant's hands for collection by plaintiffs' testator.

4th, Count for money had and received &c., &c.

Defendant pleaded non-assumpsit to the counts generally, and set-off to the fourth count, to which issues were made up.

At the May term, 1846, there was a trial, verdict for plaintiffs, and a new trial granted.

The cause was again submitted to a jury at the April term, 1847, and they failed to agree on a verdict.

At the October term, 1847, the cause was again tried, and verdict for defendant.

Plaintiffs moved for a new trial, on the grounds:

1. That the verdict was contrary to, and against the evidence.
2. The court erred in refusing to instruct the jury as requested by the plaintiffs, and gave erroneous instructions.

3. The court admitted illegal evidence on the part of defendant.

4. That the jury in making up their verdict acted upon other facts than those proven on the trial.

5. The verdict was contrary to law and evidence.

The court overruled the motion, and plaintiffs excepted, and put the evidence &c., upon record by bill of exceptions.

From the bill of exceptions, it appears that, on the trial, plaintiffs read to the jury a receipt given by defendant to their testator for the note on Pullen and Smith, and also the separate note of Smith, mentioned in the declaration, which receipt is dated 16th September, 1839.

Plaintiffs stated to the jury that they did not claim any recovery as to the separate note on Smith, or the note on Groce, and admitted that said J. F. Pullen was dead and insolvent at the date of said receipt.

Plaintiffs next proved a demand upon defendant, before suit brought, for all moneys collected by him upon the claims in question, and for a final settlement of all matters connected therewith.

They then introduced a transcript of the records of the Jefferson circuit court, which was admitted by the parties to be the proceedings had therein on the note against J. F. Pullen and E. G. Smith. This transcript shows that on the 17th day of September, 1839, defendant commenced suit against said E. G. Smith upon said note, in the Jefferson circuit court, returnable to the term to commence on the 14th October, thereafter, and the sheriff returned the writ served 27th September. At the following April term, he obtained a judgment against Smith for $227.84 debt, and $11.39 damages, in favor of plaintiffs' testator. On the 26th day of May, 1840, a *fi. fa.* was issued upon the judgment, with a *ca. sa.* clause, to the sheriff of Arkansas county, returnable to the October term following. The sheriff, John W. Pullen, returned upon the execution "that the said *Elizabeth* G. Smith, was not to be found in Arkansas county," which return bears date July 1st, 1840.

On the 9th day of July, 1841, an *alias fi. fa.* was issued to the sheriff of Arkansas county upon said judgment, returnable to

the October term following. The sheriff, John L. Jones, returned upon the execution that he had levied upon a negro boy named Dick, about seven years old, and had taken a bond for his delivery on the day of sale, which was forfeited. The delivery bond made part of the return, was executed by the defendant in the execution, as principal, (who in the meantime it appears had become Elizabeth G. Ruffin) and John W. Pullen as security. The return is dated 4th October, 1841.

At the October term of the Jefferson circuit court, 1841, the defendant, Yell, moved for, and obtained a judgment upon said forfeited delivery bond against said "Elizabeth G. Smith, *alias* Ruffin," and John W. Pullen, for the amount of the original judgment, interest and costs. On the 10th day of November following an execution was issued thereon to the sheriff of Arkansas county, returnable to April term, 1842. The sheriff, John L. Jones, returned thereon, that on the 18th November, 1841, he levied on a negro boy by the name of Dick, about seven years old, and sold him on the 4th of April, 1842, for $180. He also endorsed his costs as amounting to $78.25, of which there is a charge of $67.50 for keeping said boy Dick 135 days, at 50 cents per day. Here the transcript closes.

Plaintiffs then introduced the depositions of John W. Irwin, M. A. Dorris and R. A. Anderson, taken by consent of parties, on behalf of plaintiffs and defendant.

Irwin testified that defendant paid him $25 or $26, of the money collected on execution against said Elizabeth G. Smith: that it was paid to him as agent of plaintiffs' testator about a year before his death.

He also testified that about a month after John E. Pennington's death, plaintiffs told defendant that if any thing could be made out of said Elizabeth, execution should be run against her, by him as soon as letters testamentary were taken out upon the estate of Pennington; and in the same conversation one of the plaintiffs expressed surprise that out of $180 collected of said Elizabeth, on execution, by the sale of the negro, only $25 was coming to Pennington; and that defendant explained, by saying

that the amount was consumed in payment of costs and his own fees.

Dorris testified that said E. G. Smith resided in the county of Jefferson in 1839, and in the beginning of the year 1840; and that she had in her possession negroes and other personal property, but to what amount he did not then recollect. That she removed to Arkansas county some time in 1840, taking her effects with her, and continued to have negroes and other personal property in her possession; and that several debts, and some judgments, were collected out of her property after she removed to Arkansas county. Witness did not know in what right she held said property, but, to the best of his knowledge, a great part of it was taken and sold and applied to the payment of her debts, or debts for which she became liable. That she left Jefferson county prior to the time said judgment of Pennington was rendered against her. That J. W. Pullen, the security in said delivery bond, left Arkansas county, as he believed, after the October term of the Arkansas circuit court, 1842, and that he had in his possession, prior to leaving, and when he left, a good deal of property and negroes. That, at the term of the court when the negroes of said E. G. Smith were sold, one John Lennox was, as he believed, the purchaser thereof; and that said Lennox was her husband, he believed.

Anderson testified that he had been spoken to by Mrs. Smith to bring suit for some negroes, which were sold, as he understood, out of her possession in Arkansas county.

Plaintiffs next read the depositions of Richmond Peeler and John L. Jones, taken by consent, and on behalf of both parties.

Peeler testified that he was acquainted with Elizabeth G. Smith when she removed to Arkansas county, which, as he recollected, was in the latter part of the year 1839; and that she was then considered to be in good circumstances, and had several slaves. Some time afterwards she intermarried with B. B. Ruffin, but the precise date witness did not recollect. After her intermarriage with Ruffin, "there were debts come against her, and, through his bad management, she became destitute of pro-

perty." She married Ruffin in less than two years after she removed to Arkansas county. Her property consisted of slaves and household furniture.

Jones testified that he was not acquainted with Mrs. Smith when she first came to Arkansas county. He had no recollection of seeing her until some time between 1840 and 1842, when he visited her for the purpose of levying an execution in favor of Pennington against her. About that time she had several slaves, and was reputed to be solvent. He levied the execution on a boy named Dick; a delivery bond was given, and sometime afterwards he sold the boy, and defendant Yell, being the highest bidder, purchased him for about $180. Sometime between the time he levied on the boy Dick, and the succeeding term of the Arkansas circuit court, Mrs. Smith married Ruffin. She did not hold said slaves long after her marriage with Ruffin—between one and two years. Witness sold the balance of the slaves under execution.

On cross-examination, witness stated that Mrs. Smith claimed the property as belonging to her children; that he required a bond of indemnity before selling the boy Dick, and defendant, Yell, gave his own bond. Defendant sold the boy Dick, a day or two after he purchased him, to one Stokes, for $5 less than he gave for him, in order to pay costs—the costs paid him by Yell amounted to between $60 and $80, for levying upon, keeping, and selling said boy.

Plaintiffs next introduced a second deposition of John L. Jones, and the depositions of T. Farrelley and Stanislaus Dardenne, taken by consent, and on behalf of the parties.

Jones, in this deposition, states that he recollected of taking a delivery bond for property levied on by him as sheriff of Arkansas county, under an execution from Jefferson circuit court, in favor of Pennington, against Mrs. Smith *alias* Ruffin. That the property was levied upon as the property of Mrs. Smith, and she gave a delivery bond with John W. Pullen security. Pullen left the State in April, 1843. The immediate cause of his leaving was that some one was about getting out a writ of *ne exeat*

to prevent his leaving, or detaining his property. Mrs. Smith, *alias* Ruffin, had lived in said county for some time before said delivery bond was taken, and she left for the lower county in the spring of 1846. When witness first knew her, she had five or six negroes in her possession in Arkansas county; they were likely negroes, worth more than $1,000. Defendant, Yell, practised law in Arkansas county, and was almost always present at the circuit courts held therein. In the year 1842, he was frequently in the county, and had a general acquaintance there. Mrs. Smith was pretty generally known in the county, and her residence and circumstances might have been easily learned on inquiry. Witness had been sheriff of the county ever since 1840, and defendant had practised law in said county ever since and before that time; but witness did not know how long. Mrs. Smith came to the county in 1841, witness thought, and resided there until the spring of 1846. He sold the last of her negroes in the fall of 1843. At the time Pullen went on said delivery bond, witness considered him very good, but when he left the country his solvency was doubtful. He had conveyed all his property to one Guise, who sold all that had since been disposed of in the country. Pullen left the country at the time aforesaid, soon after the delivery bond was given. Before selling the boy Dick, witness required a bond of indemnity, which he still held, and which defendant, Yell, executed to him. He required the bond because there was some dispute about the title to the property. Defendant paid him costs for keeping the negro boy levied on, and other expenses, amounting to some $75 or $85, as would appear by his receipt in the hands of Messrs. Watkins & Curran.

Farrelly testified that John W. Pullen left the State in April, 1843. A few days before he left, he transferred all his property to Guise. Witness did not know of Mrs. Smith having any property but negroes, and he learned, from a certified copy of the records of the Pope and Johnson probate courts, that they were inventoried as a part of the estate of John Smith, deceased, her former husband. [To the legality of this last statement, plain-

tiffs objected, and it was agreed to refer its competency to the court.] Mrs. Smith moved from Jefferson to Arkansas county in 1840 or 1841. Up to the fall of 1843, she had negroes in her possession of the value of $300 or $400. Pullen, up to within a few days of his leaving the State, always had plenty of property in his possession.

Dardenne testifies that he knew Mrs. Smith whilst she lived in Jefferson and Arkansas counties: That the negroes which she had in her possession were conveyed to her and her heirs by her father. She married, in Arkansas county, in the latter part of 1840, or forepart of 1841. She had said negroes in her possession in Jefferson and Arkansas counties until they were sold out of her possession. Her removal from Jefferson to Arkansas county was notorious, and the community generally knew it.

Appended to the foregoing deposition was an admission by plaintiffs' attorney that the smaller notes referred to in the declaration had been settled by defendant, his fees remaining unpaid.

Defendant then offered to read to the jury a second deposition of Stanislaus Dardenne, and the deposition of Mary Jane Dardenne, with exhibit therein referred to, to which plaintiffs objected, but the court overruled the objection.

Stanislaus Dardenne testifies that he knew said Elizabeth G. Smith in the fall or winter of 1838, when she moved to Jefferson county, and brought with her seven negroes and three horses, and if she had any other personal property in her possession, he did not know it. Said negroes and horses were, as witness understood, the property of the estate of John J. Smith, deceased. After she moved to Jefferson county, witness went to Pope county, and brought one other negro, the property of said estate, and delivered the same to Mrs. Smith. In the winter of 1840, she removed to Arkansas county, and took said negroes with her. Witness married the daughter of John J. Smith, and stepdaughter of said Elizabeth G., and had good opportunity of knowing "the concerns of the family," and he had good reason to believe that the said negroes were given to said Elizabeth G.

before her intermarriage with said John J. Smith. Witness had seen the deed of gift of the slaves to her, made before her said marriage, which was properly authenticated. Said negroes were the same named in an appraisement list, exhibited and marked A. They were all the negroes said Elizabeth G. had in her possession from the time he knew her until she left Arkansas county.

Witness knew John W. Pullen, and always looked upon him as a poor man. Pennington, plaintiffs' testator, lived near the line dividing the counties of Jefferson and Pulaski, and was frequently in Pine Bluffs, and could have seen defendant, Yell, at any time.

Mary Jane Dardenne deposed that she had known said Elizabeth G. Smith all her life—was her step-daughter. Had often heard her say that some of said negroes were given to her by her father, Pullen, before her intermarriage with John J. Smith. That the negroes which she had before said marriage, were the same named in the appraisement list exhibited and marked A. Said Elizabeth G. brought eight slaves with her to Jefferson; one of them, named George, the father of witness owned before he married her. She brought no property to Jefferson but said slaves, three horses, and some household furniture. She had no other slaves than the above in her possession from the time she came to Jefferson until she left Arkansas county.

Exhibit A., referred to in the foregoing depositions, is a certified copy, from the records of the probate court of Pope county, of the inventory and appraisement of the personal estate of John J. Smith, deceased, returned by his administrators in January, 1838. There are eight slaves in the inventory, and among them one named *Dick*. The entire personal property is appraised at $4,976.73, of which $3,020.00 is the aggregate value of the slaves—Dick is valued at $200.

Defendant next read to the jury, by consent of plaintiffs, the affidavit of John L. Jones, in substance as follows:

"There came into my hands an alias execution, from the Jefferson circuit court in favor of Pennington against E. G. Smith. I levied the same on a small boy named *Dick,* and took a bond

for his delivery, which was forfeited. I then returned the execution. A pluries execution was issued in said case, and placed in my hands; I levied the same upon the said boy Dick, and sold him for $180, by Yell executing to me his bond of indemnity. This negro, with all the rest of the property then held by E. G. Smith was in dispute, and I did not feel bound to sell unless I was indemnified. I have Yell's bond of indemnity yet, signed by him only. My costs for keeping and clothing said boy amounted to $70, which fees I retained, as I considered I had a right to do by law.

Defendant then proved that he had paid costs in the case in the transcript aforesaid mentioned, to the clerk of Jefferson circuit court, $4.25; to the sheriff of Arkansas county, $78.25, and that, out of the moneys collected on said execution, he had paid over to Pennington $26.12½, being the same sum referred to in the deposition of Irwin.

That for services rendered to Pennington in his lifetime in respect to the two smaller notes mentioned in the declaration, he was entitled to $20. For prosecuting the case against E. G. Smith $25.20; for writing bond of indemnity in said case $5. Plaintiffs also admitted that if defendant was entitled to make an extra charge for going to the Post of Arkansas to attend to execution, and if he performed that service, his charge therefor of $20 was reasonable—also a charge of $10 for advising plaintiffs in reference to the mode of proceeding with the will of their testator.

The above being all the evidence, the court proceeded to instruct the jury as follows:

"GENTLEMEN: 1. The declaration in this case presents two aspects: Under the count for money had and received, if the jury believe from the evidence that said defendant received any money belonging to said Pennington in his lifetime, or collected any moneys on the claims placed in his hands by Pennington, the plaintiffs are entitled to recover so much money as was so received, after demand made therefor and refusal to pay, after deducting therefrom all costs paid out by said Yell in the suit

and proceedings, and all offsets, and fees due Yell as attorney, from said Pennington in his lifetime; the balance only, after these deductions could be recovered against said defendant.

"2. The other counts for negligence as an attorney, will require your attention. An attorney who undertakes to collect a debt for another is bound to use due and reasonable diligence to collect the debt: is bound to use the same degree of diligence and attention that any ordinary person would in the prosecution of his own debt. In the absence of such reasonable attention, and diligence, and the debt were lost thereby, the attorney would be responsible for the debt; and if the entire debt were not lost, but some damage accrued by reason of such negligence, then the attorney is responsible for the amount of such damage; the amount of which must be established by the evidence, and ascertained therefrom by the jury.

"3. If the jury believe in this case that the period of time between the return day of the first execution issued on the judgment in favor of Pennington by Yell, and the issuance of the second execution, was occupied by Yell, *bona fide,* in ascertaining the residence of said E. G. Smith, and he did not know where to send a new execution, this lapse of time and delay to issue process could not be imputed to him as negligence.

"4. That although the said first execution may have been returned by the sheriff on the first of July, 1840, and before the return day of said writ, yet the attorney could not, and was not bound, under any circumstances to sue out other process until the return day of said writ.

"5. The return of the sheriff on said execution is defective in not showing that no property of defendant was in his county at the time whereon it could be levied; and his returning the same before the return day, subjected him to damages for non-execution thereof; and if there was property in his county at any time between the receipt and return day of said writ, subject to said execution, the said sheriff and his securities would have been liable for the debt, interest and costs; but said defendant would not in any event be responsible for the neglect of the sheriff; nor

would he be under any obligation to sue said sheriff and sureties for such neglect of duty by the sheriff."

Plaintiffs objected to each of said instructions, and moved the court to modify the last instruction thus: "That if the evidence has shown that the said sheriff rendered himself and sureties liable for said debt, interest and costs, said Yell was bound to prosecute said sheriff and securities therefor, or advise his client of the facts, and his rights therein, and ask instructions as to what he should do; and if he failed to do so, and the money could have been made from said sheriff and his securities, and the debt or any part thereof was ultimately lost, the said Yell is by law responsible for such loss; and the same is recoverable on the counts for negligence." But the court refused so to modify said instruction, and proceeded to charge the jury:

"6. That if the jury believe from the evidence that the title to the property in the hands of Mrs. E. G. Smith was in dispute, and this was generally known where the property was, the sheriff was not bound to sell such property under Pennington's execution without being indemnified, and he had a right to refuse to sell without indemnity given him."

To the giving of which instructions plaintiffs excepted.

The court further charged the jury:

"7. That if they believe from the evidence that Pennington knew what Yell had done in the case, and approved what he had done as the facts transpired, or afterwards, and knowing the facts settled with Yell, and the latter paid over what was agreed on such settlement, they should find for defendant."

To which plaintiffs excepted.

Plaintiffs then moved the court to instruct the jury:

"That if the jury believe from the evidence that after the issuance of the last execution as mentioned in the evidence, and after the sale of the negro thereunder, and the return of said writ, the said Pullen, security in the delivery bond therein, and defendant in the judgment theron, and E. G. Smith, or either of them, had sufficient property in Arkansas county, or elsewhere in this State, to pay said debt and costs, to the knowledge of

said Yell, or of which he might have had knowledge at, and after said sale, by the use of due diligence, and said Yell neglected to sue out further process, up to the running away of said Pullen, and the death of said Pennington, as shown by the evidence, and the residue of said debt was thereby lost, this would be such negligence on the part of Yell as would render him liable for the residue of said judgment, interest and costs."

Which instruction the court refused to give, and plaintiffs excepted.

The court then charged the jury:

"8. That the return on said execution, levied on one negro which was sold thereunder, could be taken by the jury as a circumstance, in connection with the other evidence, from which to form their conclusion as to whether the parties had any other property at the time—and it devolves upon the plaintiffs to prove there was other property; said levy and return conducing to show that no other property existed at the time; and if they believed there was no other property, they should find for Yell."

To which plaintiffs excepted.

The court further charged the jury:

"9. That it was the duty of Yell, as Pennington's attorney, to use reasonable diligence in ascertaining and searching whether the parties liable had property, at any time, out of which the judgment could be made; and it is not necessary, in order to make him liable, that the knowledge of the existence of the property should be brought directly home to him, it being sufficient, to render him liable, that he could have found property by the use of due and reasonable diligence."

Plaintiffs then moved the court to instruct the jury:

"That, if the jury believe, from the evidence, that the negroes mentioned by the witness in this case were given by her father to Mrs. E. G. Smith before marriage, and they were reduced to possession by her husband after and during marriage, the title thereto vested in the husband; but, on the husband's death, the wife surviving him, and she remaining in peaceable possession for several years after his death, the dower interest of the wife

therein, whether assigned and set apart to her or not, was, at any time, subject to levy and sale under execution against her."

Which instruction the court refused to give, and plaintiffs excepted.

The cause was determined before the Hon. WILLIAM H. FEILD, Judge.

Plaintiffs brought error.

CUMMINS, for the plaintiff. It is well established that an attorney is bound, in the discharge of his duties, to use reasonable care and diligence; that he must be possessed of competent knowledge and skill to conduct the business he undertakes; and that he is responsible for any damages consequent upon his failure to use such skill and diligence. *Varnum vs. Martin,* 15 *Pick.* 440. *Dearborn vs. Dearborn,* 15 *Mass.* 315. *Gilbert vs. Williams,* 8 *Mass.* 58. *Huntington vs. Rummill,* 3 *Day* 396. *Cummins vs. McLain, et al.,* 2 *Ark.* 412. *Russell vs. Palmer,* 2 *Wils.* 328. *Wilson vs. Tucker,* 3 *Stark.* 154. *Godfrey vs. Jay,* 7 *Bing.* 405. *Bonne vs. Diggles,* 2 *Ch.* 311. *Swannell vs. Ellis et al.,* 1 *Bing.* 347. *Moutrion vs. Jeffreys,* 2 *Car. & P.* 113. *Smedes' ex. vs. Elmondorf,* 3 *J. R.* 188.

The attorney in this case was bound to continue process of execution until the debt was made,—the proof showing possession of property by the defendant in the judgment: he was bound to make the delivery bond available, unless he shows that the security was insolvent; he was bound to sue the sheriff upon his bond for the false return to the first execution, or notify his client and ask further instructions, and the law requires him to use all the means placed in his power by the law to collect. The court, therefore, erred in the instructions given and refused.

WATKINS & CURRAN, contra, contended that the attorney had discharged his duty when he issued execution upon the judgment of his client, and was not bound to seek for, or point out property; that if the sheriff failed to levy and there was property upon which to make the levy, he was not required by law to sue

the sheriff, under the original retainer; that he was not bound to continue the process of execution, when a sale of property could be effected only by giving his own indemnity bond; that having taken judgment on the delivery bond and issued execution, he was discharged from further proceedings, unless it could be shown that he knew of property out of which the money could be made; that an attorney is liable only where he is guilty of *lata culpa* or *crassa negligentia,* and is justified in not proceeding (unless specially directed) in cases where he is influenced by a prudent regard to the interest of the creditor. *Evans vs. Watrons,* 2 *Port.* 205. *Mardis ad. vs. Shackleford,* 4 *Ala.* 493. *Palmer & Southmayd vs. Ashley & Ringo,* 3 *Ark.* 75. *Pitt vs. Yalden,* 4 *Burr.* 2061. *Williams vs. Reed,* 3 *Mason* 405. 2 *Stark.* 82. *Barker vs. Chandless,* 3 *Camp.* 17. *Lynch vs. Comm., use, &c.,* 16 *Serg. & R.* 368. *Jackson vs. Bartlett,* 8 *J. R.* 161. *Kellogg vs. Gilbert,* 10 *J. R.* 220. *Gorham vs. Gale,* 7 *Cond. R.* 789. 1 *Sm. & Mar. Rep.* 248. *Dearborn vs. Dearborn,* 15 *Mass. Rep.* 315. *Crooker vs. Hutchinson & Cushman,* 2 *Chip.* (*Vt.*) *Rep.* 117.

Mr. Justice SCOTT delivered the opinion of the Court.

This case is presented on bill of exceptions to the overruling of a motion for a new trial. It as an action against an attorney at law for negligence, alleging that thereby a claim placed in his hands for collection was lost. The jury found for the defendant and there was judgment accordingly.

Reasonable diligence and skill constitute the measure of an attorneys engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of business, (as the cases of *Russell vs. Palmer,* 2 *Wil.* 325, and of *Godfrey vs. Dalton,* 6 *Bing.* 460.) These doctrines are sustained by all the authorities with unanimity and distinctness. 4 *Burr.*

2060. 3 *Camp.* 17, 19. 2 *Bos. & Pul.* 357. 4 *Ala.* 594. 2 *Porter* 210. 2 *How.* (*Miss.*) 317. 2 *Greenl. Ev., sec.* 144, *p.* 137.

Lord Brougham said, in a late case, "It is of the very essence of this action that there should be negligence of a *crasse* description," and "therefore the record must bring before the court a case of that kind, either by stating such facts as no man, who reads it, will not at once perceive, although without its being alleged in terms, to be a case *crassa negligentia*—something so clear that no man can doubt it; or if that should not be the case, then he must use the very averment that it was *crassa negligentia.*" And Lord Campbell, the present Chief Justice of England, said, in a still more recent case, when speaking of the identity of the law of Scotland and England in this particular, that, as to this point, "The law must be the same in all countries where law has been considered as a science."

As, in the very nature of things, a charge of this nature, if well founded, must seriously affect the professional character of the attorney, he is entitled, to the fullest extent, to the benefit of that rule of universal application extending to all the relations of society, that every one shall be presumed to have discharged his legal and moral obligations until the contrary shall be made to appear. (12 *Wheaton* 60, 70. 4 *Ohio* 354. 3 *Gill & John. R.* 103. 8 *Conn. R.* 134. 2 *Car. & P.* 557.) And, when made to appear, the extent of the damages that have resulted, must also be affirmatively shown, as in the case where the amount of a note is alleged to have been lost by his negligence, it must be shown that it is a subsisting debt against the maker, and also that he was solvent. And, unless the latter be shown, he would be liable only for nominal damages, and, under no circumstances, would he be liable for more than the actual damage that the client has sustained by reason of the negligence. 2 *Stark. Ev.* 135. 1 *Saund. Pl. & Ev.* 196. *Mardis ad. vs. Shackleford,* 4 *Ala.* 505. *Bank of Mobile vs. Huggins,* 3 *Ala.* 213. 2 *Greenl. Ev., sec.* 144, *p.* 141. *Dearborn vs. Dearborn,* 15 *Mass.* 316. *Crooker*

vs. Hutcherson, 2 *Chipm.* 117. *Huntington vs. Rumnill,* 3 *Day R.* 390.

It seems to be now generally conceded in this country that the authority of an attorney at law over his client's cause continues not only until the judgment and a year and a day afterwards, as is said in the old books; but if the judgment be not satisfied and is continued in force, that his authority will be prolonged accordingly. How this change in the law has been wrought, it is not important to inquire; doubtless, however, by a gradual process, not unlike that by which the custom of merchants was interwoven into the law. (*Tucker Lec., B.* 3, *p.* 46. 2 *Greenl. Ev.,* 2 *ed., sec.* 141, *p.* 134, *and* 145, *p.* 144.) When first brought into court, these customs were matters of fact, and merchants were examined to prove them: afterwards, when legal decisions had been made upon them, parties and courts took notice of them without being specially stated; and thus they became a part of the law of the land, and doubtless it was in reference to this process that Lord Mansfield remarked, in *Edie et al. vs. East India Comp.,* (2 *Burr.* 1222,) that "he was wrong in having permitted merchants to give evidence of a custom on which there had been such legal decision."

As authority and duty, in the relation of client and attorney, are correlative terms, in the same sense that right and obligation are so, in a general sense, it results from the law, as it now stands, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently that he must not only sue out the first process of execution, but all such that may become necessary. This undoubtedly is the true general doctrine on this subject qualified however, as will be presently seen by a pervading principle that fairly grows out of the peculiar character of the attorney's functions. But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits without special instructions to do so,—as actions against the sheriff or clerk for the

failure of their duty in the issuance or service of process. He should pursue bail, however, and those who may have become bound with the defendant, either before or after judgment, in the progress of the suit. Nor is he bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt: this is the business of the sheriff. Nor is he liable for any of the short comings of that officer.

But, in reference to all these professional duties, the courts have recognized a principle to which we have already alluded, that does not, by any means, move the line between reasonable diligence and *crassa negligentia,* and thus in fact place the attorney further from responsibility to his client; but so far as its operation is, in any sort to his protection, it is so only by its influence upon the determination of the question of fact whether or not the act or omission complained of, did really amount to that degree of crassitude for which the law holds him liable. This principle is that the attorney will always be justified in ceasing to proceed with his client's cause (unless specially instructed to go on) whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client. (*J. & Z. Crooker vs. Hutchinson & Cushman,* 2 *Chip.* (*Vt.*) *R.* 117. 2 *Greenl. Ev.,* 2 *ed., sec.* 145, *p.* 140.) This principle would seem to grow directly out of the peculiar character of the functions of an attorney at law and to be founded on sound public policy. For, in the nature of things, these duties cannot in general be performed in a manner to subserve the true interest of the client, if limited to that strict line of routine conduct which is chalked out by the law as the pathway for ordinary agents, and it is therefore inevitable that in the discharge of these duties they must be entrusted with a large and liberal share of discretion.

Hence the extreme difficulty of defining with accuracy that exact limit by which the skill and diligence are bounded, which an attorney undertakes to furnish in the conduct of the cause, or to trace precisely the dividing line between that reasonable skill

and diligence which satisfy his undertaking and that *crassa negligentia* or *lata culpa,* for which he is undoubtedly responsible. "Such discretionary powers," says Judge HUSTON, in delivering the opinion of the court in *Lynch et al. vs. The Commonwealth, use, &c.,* (16 *Serg. & Rawle* 368,) "are necessary for the plaintiff's interest: without the exercise of them, many times and under many circumstances, property sufficient to pay the debt would not sell for enough to pay the cost." Again, he says: "Although extensive authority has been exercised by the attorneys, we have had but few cases of complaint, and the courts have been seldom called on to state the limits of their authority or of their responsibility to their clients; a circumstance highly honorable to the profession." "As between the client and attorney, I would say, however, the responsibility of the latter is as great and as strict here as in any country. I mean where want of good faith or attention to the cause is alleged: but, in the exercise of the discretionary power usually exercised, I would not hold an attorney liable when he acted honestly and in a way he thought was for the interest of his client." And if the rule was otherwise, the practice of the profession would be, in a high degree, hazardous, especially in this country, where the pecuniary condition of men frequently change through vicissitude of apparent prosperity and adversity in rapid succession; as it would exclude all discretion about continuing the prosecution of doubtful claims and give safety to the attorney only in a continuous suing out of successive process of execution, or in express leave from his client to suspend operations, which it would often be exceedingly inconvenient to obtain, (8 *Mass.* 51,) and, when obtained, not less inconvenient to preserve the evidence by which his safety was secured. And hence, although it was laid down in *Dearborn vs. Dearborn,* (15 *Mass.* 319,) in substance, that the attorney could not excuse himself for neglecting seasonably to sue out process in continuation of regular steps in the collection of a demand, unless he gave notice to his client and requested specific instructions, this rule was modified in the

subsequent case that we have cited from 2 *Chip.*, where the case of *Dearborn vs. Dearborn* was before the court and its doctrine so qualified by laying down, as we have done, that in cases where the course of the attorney was superinduced, *bona fide,* by a prudent regard to the interest of his client, he might be justified in ceasing to send out process of execution without having first given notice to his client and requested further instructions.

And it was upon the same foundation, doubtless, that Lord Mansfield said, in *Pitt vs. Yaldon,* (4 *Burr.* 2060,) when speaking of *crassa negligentia* for want of skill and knowledge, "That part of the profession, which is carried on by attorneys, is liberal and reputable as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debts which he was employed to recover for his client. Not only counsel but Judges may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." So, when the *crassa negligentia* is alleged for want of prudence and diligence, the attorney should not be held liable in a case of reasonable doubt, especially when the ground of that reasonable doubt may be evidence tending to show that the act or omission complained of was *bona fide* superinduced by the exercise of an honest judgment as to what was the true interest of his client.

In the case before us, the first ground of the motion for a new trial is the allegation that the verdict was not authorized, and is not sustained by the evidence; and this question we will first examine. Before proceeding to do so, however, we will take the occasion to remark, inasmuch as considerations, touching the honor and integrity of the party defendant in the particular conduct complained of, are in case of this kind always regarded by the jury in making up their verdict, that in the whole mass of testimony in this record there is nothing from which an unfavorable

inference in this aspect can be drawn against the defendant. On the contrary, it is clear, from the whole evidence, that he has demeaned himself throughout, in this respect, in a manner altogether unexceptionable.

The first writ of execution (being a *fi. fa.* with an alternate *ca. sa.* clause) was issued with promptitude, and although there was subsequently a hiatus of near nine months between the return day of this writ of execution and the issuance of the alias, the return of the sheriff on the first, that the defendant "was not to be found in his county," was, under the state of the case, as to this point, as shown by the testimony, amply sufficient, in our opinion, to exonerate the defendant from gross negligence in this delay. There was also, we think, sufficient legal testimony to authorize the jury to find that, in failing to sue out further process of execution against the defendant, Smith, after the sale of the negro, the defendant in this action was influenced *bona fide* by a prudent regard for the interest of his client, and to exonerate him as to this conduct from gross negligence.

But we are unable to find any testimony in the record going to exonerate him from the duty of taking further steps against Pullen, the security in the forthcoming bond. This bond had been taken by the sheriff of Arkansas county in discharge of his official duty, and a part of this duty in the premises was to take sufficient security. This, of itself, in the absence of testimony to the contrary, would have authorized a prudent man to infer that Pullen was solvent. And although there was no direct evidence that the defendant knew Pullen's place of residence, reasonable diligence would have induced him to make enquiry as to the fact from the sheriff of Arkansas county, who had taken the forthcoming bond, if indeed he was uninformed as to this fact. No such exonerating proof was adduced, nor are there any facts or circumstances proven as to Pullen's pecuniary condition or other collateral facts that authorized a finding that in failing to pursue him with other process the defendant was superinduced *bona fide* by a prudent regard for the interest of his client.

Nor is it shown that, in this failure to proceed further, the defendant was controlled in the performance of his duties by any instructions either express or implied from his client.

If the judgment upon the forthcoming bond was void, he might have disregarded it and taken other proceedings: if erroneous and not void, he might have taken steps for its reversal. And although it may be void or erroneous, it will not, by any means, follow that for this reason the defendant was necessarily guilty of gross negligence for want of knowledge and skill. (*Godfrey vs. Dalton,* 6 *Bing.* 460. 19 *Com. Law R.* 132. *Russell vs. Palmer,* 2 *Wilson* 325. 6 *Munford R.* 557.) But the defendant took no steps at all, and has failed to develope by his testimony any fact or circumstance by way of excuse, and but for those touching the doubtful pecuniary condition of Mrs. Smith, he would not have excused himself for not taking further steps against her.

The fact that process of execution was issued against both Smith and Pullen, and levied upon a negro boy, who was sold for less than the debt, seems to be relied upon for this purpose. Had the sheriff returned upon this execution that besides this negro there was no other property in his county subject to this execution, this position would have been tenable. But there was no such return, or any intimation whatsoever, that there was no other such property.

The fact that this negro sold for less than the debt, is sufficiently accounted for by the circumstance shown in evidence that the property was "in dispute," and in consequence the sheriff was indemnified before its sale. And, besides, it seems to have been the same negro that was originally levied upon as the property of Smith, and thus shows nothing as to Pullen's solvency. As to Pullen's actual. pecuniary condition, one witness testified that he "had always looked upon Pullen as a poor man;" but three others testify to his solvency for a period of near twelve months after the defendant had ceased to sue out process against him.

After looking, then, at all the testimony, we are of the opinion

that the verdict is not fully authorized, and that the verdict falls short of this in failing to show for the defendant any excuse for his failure to take further steps against Pullen.

With regard to the instructions given by the court to the jury there was no error in the first and second. The third ought not to have been given because there was no evidence upon which to predicate it, and it was therefore abstract. The fourth was erroneous. After the actual return of the first execution there would have been no irregularity, much less any invincible legal obstacle in issuing again the same or another execution. The fifth was not erroneous; nor did the court err in refusing to give the modification asked.

The sixth was irrelevant to the issue and ought not to have been given: and besides it did not state the law correctly. By the common law a sheriff could summon a jury to try the right of property taken by him in execution when the title was doubtful or it was claimed by a third person; and if the verdict was that the property belonged to a third person he was justified in delivering it up. The contrary verdict, however, did not protect him against the suit of the true owner. Yet he was not without relief for the court of law perhaps might interfere if he were still reasonably doubtful about the right, (1 *Burr.*) or he might file his bill in chancery against the several parties concerned in interest and compel them to interplead and litigate the right in order to ascertain to whom the property belonged. Such was the common law. Our statute (*Dig. p.* 499, *sec.* 33,) however, has provided that a verdict against the claimant of the property shall be a full indemnity to the sheriff in proceeding to sell and if the verdict be for the claimant he shall sell if sufficiently indemnified by the plaintiff in execution.

The seventh instruction was abstract. There was no testimony to authorize it. In giving it there was error.

The eighth instruction was also erroneous, and was mischievous, because it had a direct tendency to mislead the jury. We have already made some observations touching this point when noticing the testimony; but will add here by way of showing that

this instruction was without warrant in the law, that this was an effort to rest a presumption upon a presumption. The presumption that there was no more property is based upon the presumption that the sheriff did his duty. That is to say, as it was his duty to levy the whole debt if there was sufficient property in his county, as he did not levy the whole debt, *ergo,* then there was no more property in his county. Now the law will not presume upon such a basis as this. Legal presumptions must be based upon facts, not upon presumptions.

The ninth instruction was clearly erroneous as the duty to search for property did not rest upon the defendant, as we have already seen; but as this error was not against the plaintiff but the defendant in error, it cuts no figure in the question before us.

The court below did not err in refusing the first instruction asked by the plaintiffs and refused, because in its phraseology it imposed the duty upon the defendant of searching for property, otherwise than by the process of the court: and also because it was not so qualified as to allow him the benefit of the testimony in the record going to show that as to Mrs. Smith, he might have been induced to cease to send out process of execution by a *bona fide* prudent regard for the interest of his client. Nor was there any error in the refusal of the court to give the second instruction asked by the plaintiffs. Because, while dower remains unascertained and until there has been an actual admeasurement by metes and bounds, it is a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law. 1 *Smedes & Mar. Ch. Rep.* 489. 4 *Paige* 448. 13 *Wend.* 526.

In view then of the whole case we are of opinion that the court erred in refusing the motion for a new trial. The judgment must therefore be reversed, a new trial awarded and the cause remanded to be proceeded with.