interrogatory, these Conveyances having all been made subsequent to the Commencement of this Suit. Also to the sale by the Sheriff for the same reason

Wm Price
for Complainant.

And afterwards towit on the third day of October in the year last aforesaid the Defendant by its Solicitors Samuel M Semmes and George A Pearre Esquires files in the cause its exceptions to the testimony of the Complainants witness in the words following.

Philip Wingert
vs
The Md & New York Iron & Coal Company

The Defendant excepts to the answer of George McCulloh to the first interrogatory of Complainant upon the ground that he testifies therein to his belief, and also that he testifies to the acts of Benjamin B Howell and Lewis Howell and their declarations, unconnected, and as far as appears unknown to said defendant and also because said testimony is in contradiction to the deed from Wingert to Lewis Howell filed as Exhibit in this Cause, and also in contradiction to the agreement Complainants Exhibit C.

The defendant excepts to the answer of George McCulloh to the second interrogatory of the Complainant, because it speaks of transactions with which the defendant had no knowledge or connection whatever and which took place when the defendant was not in existence; and also because it speaks of the intentions of third parties not communicated or made known to defendant, or with which defendant had any thing to do.

The defendant excepts to the answer of George McCulloh to the third interrogatory of Complainant, because the same states the belief of the said Witness, and not facts = and also to so much of the answer to said interrogatory as states what the Messrs Howell told witness; because the same is hearsay testimony; and the defendant is not bound by the same.

The defendant excepts to the letter mentioned in the return of Mr Evans Esq Commissioner and marked "51" in red ink being a letter signed S M Semmes dated Aug 10th 1839 as evidence in this cause against defendant because the said Semmes had no authority whatever to write said letter, and because said letter was not written by the knowledge and consent of this defendant. And because there is no proof in the cause to show that said Semmes had any authority to write said letter or that said letter was written with the knowledge and consent of said defendant, and because there is no evidence in cause connecting said defendant with said letter in any manner.

S M Semmes
Geo A Pearre
Solicitors for Defendant.

And afterwards towit on the third day of November in the year last aforesaid the Court passed their Decree in the said cause which was duly enrolled in the words following towit=

Philip Wingert
vs
The Maryland & New York Iron & Coal Company

In the case of Glenn vs Smith 2 Gaud

John 512 the Court of Appeals, after an elaborate examination of the cases upon the subject of the extinguishment of antecedent debts by the acceptance of the promissory note of the debtor determined, "That to give to the acceptance of a note the effect of an absolute payment or extinguishment of a debt, a contract that it should be so, must be shown; an express agreement to receive it as payment, and to run the risk of its being paid"

The same doctrine was held by the Vice Chancellor, in the case of Teed vs Carruthers 2 Young & Collier 29. and in Lames vs Hackley 16 John 278. The rule on this subject was announced by the Supreme Court of New York in almost the terms used by the Court of Appeals, in Glenn vs Smith. The Court said= "The acceptance of a negociable note for an antecedent debt, will not extinguish such debt, unless it is expressly agreed that it is received as payment."

And in Tobey vs Barber 5th John Rep. 68. the Court say "That a note either of the debtor or of third person for a precexisting debt is no payment unless the creditor expressly agree to take it as payment, & to run the risk of its being paid, or unless he parts with the note, or is guilty of laches in not presenting it for payment in due time."

It is not to be denied that there is upon this subject great conflict of judicial opinion; and it has been held by very distinguished authority; that the acceptance of a note for an antecedent debt will operate as payment in the absence of any express agreement for that purpose when it can be clearly infered from the circumstances of the case, that such was the intention of the parties.

This is however not the principle established by the Court of Appeals. Whatever is the grade of the antecedent debt, it may certainly be extinguished by the acceptance of a promissory note; but to impart to the acceptance of a note the character of payment, must be shown, upon the authority of Glenn vs Smith, "that it was so expressly agreed and stipulated between the parties".

The surrender of the single bill of the 1st of April 1839 by the Complainant under the circumstances stated in the testimony in this cause is a strong fact to show that the promissory note of the 20th of June 1839 was accepted by him in extinguishment of the antecedent debt, and that he expected that it would be discharged at maturity, and assumed upon himself the risk of its collection. But there is no evidence in the record of any express stipulation or agreement between the parties that the note of the 20th of June 1839 should be accepted as payment of the balance due on the single bill of the 1st of April 1839; and upon this ground alone I shall pass a decree, in conformity with the prayer of the Complainants bill.

It is proper to state that I have been satisfied by an examination of the pleadings and evidence in this cause; that the original purchase of the property in question was made by Lewis Howell on his own account, and not as the agent of the defendant. But this cannot alter the aspect of the case. as the balance due on the single bill of the 1st of April 1839, was not paid by the acceptance of the promissory note of the 20th of June 1839 according to the view which I have taken of the question the mortgage remained of course in full force and the Complainant is entitled to a decree as prayed for by his bill.

I will therefore sign a decree directing a sale of the mortgage property upon the terms and in the mode asked for in the prayer of the