COMMENT.

In *Austin et al.* v. *Goodbar Shoe Co.*, the Supreme Court of Arkansas holds that the failure to file an attachment bond is a personal right of the defendant which cannot be asserted by a stranger to the suit. This decision follows *Banta* v. *Reynolds*, which reverses the former decisions in Kentucky. There is a statute in that State similar to one in Mississippi, which declares judgments in attachment, where no attachment bond has been filed, void. Previous to *Banta* v. *Reynolds* the statute had been strictly applied and such judgments set aside upon the motion of strangers to the suit. But in this case the court held that the expression in the statute making such judgments void was incautiously inserted, and the word "void" should be understood synonymously with "voidable"—that is "to be rendered void on pleading." Two supplementary decisions in South Carolina supporting *Banta* v. *Reynolds* may be noted. *Wagner* v. *Bookey* held that such failure to file bond was a jurisdictional error, and upon the motion of the defendant the judgment was set aside. While *Camberford* v. *Hall* held that a garnishee could not take advantage of any error or irregularities in the proceeding against the absent debtor. The filing of a bond is for the protection of the debtor. If it is not filed, the debtor may take advantage of the error or irregularity or he may waive it. A judgment made by a court of competent jurisdiction may be erroneous where such irregularity exists, but it is not void, and remains until arrested or reversed. It cannot be set aside except at the instance of the defendant.

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In *Seeley* v. *Hicks et al.*; Executors (65 Conn.), the testator in a codicil to his will provided that should his grandson render such services to his estate as to satisfy a committee of three, the executors should pay him a certain sum. At the decease of the testator the grandson notified both the committee and the executors that he was ready to do whatever he could, and demanded an opportunity to render services. The executors refused to employ him, and as he had rendered no actual services the committee refused to give the executors a certificate of satisfaction. There were two conditions attached to the benefit conferred—one to faithfully devote his personal attention and services to the

estate, the other that such attention and services should sufficiently satisfy the committee. Quoting from Redfield on Wills, Vol. II., page 283, the Court said: "Where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent." The plaintiff, therefore, could take nothing until the conditions were fulfilled, or that done which in law, or within the expressed intent of the testator, was equivalent thereto. The general rule concerning conditions precedent is, "that conditions precedent must be fulfilled before the legacy vests, and the fact that the beneficiary is not at fault makes no difference." Redfield on Wills, Vol. II., page 284; *Johnson* v. *Warren*, 74 Mich. 491. To this rule there is this exception: "Where a testator confers a benefit upon a condition to be performed to or for the benefit of his estate, or to, or in favor of some third party and in his will manifests an intent to dispense with its performance when it is prevented by those having charge of his estate, or by such third party." *Page* v. *Frazier's Executors*, 14 Bush. 205. In such a case the benefit takes effect though the condition is not performed, because it is the intent of the testator. If, then, it was the duty of the executors to employ the plaintiff their conduct in refusing so to do prevented the fulfillment of the conditions. It was the intent of the testator that the executors give the plaintiff an opportunity to fulfill the conditions attached, for he left the power to defeat the gift in the plaintiff and the committee, and in no one else. The court rendered judgment that the committee perform the duty imposed upon it by the codicil just as if the plaintiff had actually rendered services to the estate.

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The difference in effect of an absolute divorce and dissolution of a marriage upon the status of the parties has been illustrated in the interesting case of *State* v. *Duket*, 63 N. W. Rep. 83, decided by the Supreme Court of Wisconsin, which contains several complications. A statute of that State provides that sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, and that no pardon shall restore the person to his conjugal rights. The constitution forbids the granting of any divorce by the legislature. One French had been sentenced to jail for life, and his wife took advantage of the statute and married again, while proceedings for a new trial were pending. The new trial was

granted, and the validity of the wife's marriage came in question. The lower court held it void, on the ground that the sentence had been illegal, and could not operate to change the status of the accused. The case was appealed, and the Supreme Court first considered the intent of the constitutional provision. They decided that the words must be construed with reference to the mischiefs at which they were aimed—the promiscuous granting of divorces by special acts—and that they did not limit the power of the legislature to enact just and proper laws affecting all persons alike in the matrimonial state. The law merely provided a general consequence attendant upon the life sentence of any married person, and did not authorize the granting of any divorce. The court held further that "the law was self-executing, and did not suspend the marriage relation, but extinguished it; so that the reversal of the sentence could not operate to restore the parties to their former relations, as in the case of reversal of a valid judgment of divorce." This case suggests several questions which might arise under such a law. Suppose French to be acquitted on his second trial, and released. Would the injury caused him by the operation of the statute enable him to recover damages from the State for the loss of his wife's services? Or, in case his wife had preferred that the matrimonial relation between herself and her husband should continue after his imprisonment for life, it would appear unjust to dissolve it absolutely, against her will. The fault is plainly not with the court, but with the law, which is too sweeping. If a life sentence were merely made ground for an absolute divorce, it would be more consonant with justice and public policy.

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The case of *Gwin* v. *Barton*, 6 How. 7, held that the Process Act of 1828, which required that the modes of procedure in the courts of the United States should conform as near as possible to the State law, did not adopt a State law inflicting penalties upon ministerial officers for failure to perform their duty. In *Leak Glove Mfg. Co.* v. *Needles*, 69 Fed. Rep. 68, the circuit court has decided that this doctrine has no effect where a State law has been adopted by act of Congress, for the government of the Indian Territory. The law has the same force in the Territory as an original act of Congress, without reference to its origin. It seems that in adopting the law for the Territory, the construction previously placed upon it by the State courts is to be followed, just as though it were the Federal courts which had passed upon it.