There is another case that was submitted at the same time, and I think on a little different principle, where under a writ of attachment the assignee was served with garnishee process, and required to answer. He moves to dismiss the case because of this assignment. I do not know that it is very material whether that question should be decided on the motion to dismiss, or whether he should be required to answer, setting up the assignment. I am inclined to think that the better course would be, when he comes into court to make this answer, to set up the assignment as a discharge, and if there is any defect in the assignment, set up what is called a disclosure: it can be there contested.

There is another question that comes up by the case before us: whether the circuit court of the United States should discharge this attachment, or whether it should go on and render a judgment. There is no question but that it has power to render a judgment, because the statute does not discharge a debt unless the party discharges it himself by means of releasing the debtor. As long as the plaintiff in the case chooses to stay out, and say, "I will not release," he has a right to take a judgment which may at some time be effectual against the defendant.

There may be another question in case no creditor, or only two or three of them, release under the assignment, and a fund is left in the hands of the assignee. The supreme court of this state have held that such a fund may be arrested when proper proceedings are had before it goes to the debtor. I don't know exactly what order should be appropriately made to keep this plaintiff in a condition to seize that fund. Certainly, he has a right to go as far as a judgment; but whether that court can make any other order, conditioned upon which it turns over the property to the assignee, or not, I am not prepared to say. That is a matter for future consideration.

The bill in this case is dismissed, and the motion to discharge the garnishee in the other case is overruled.

BREWER *v.* JACOBS and another.

(*Circuit Court, W. D. Tennessee.* March 15, 1884.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE—ADVICE OF COUNSEL.
In suits for malicious prosecution the advice of counsel is referable rather to the issue of malice than that of want of probable cause. If the jury can see, from all the facts, that the suit was malicious, notwithstanding the advice of counsel, that fact affords no protection to the plaintiff in attachment, and if the court can see that, notwithstanding the advice, it was unreasonable to believe that a ground of attachment existed, that fact of itself does not constitute probable cause.

2. SAME SUBJECT—MALICE DEFINED.
Where the action is for the malicious prosecution of an attachment suit without probable cause, malice does not necessarily mean alone that state of

mind which must proceed from a spiteful, malignant, or revengeful disposition, but includes as well that which proceeds from an ill-regulated mind, not sufficiently cautious, and recklessly bent on the attainment of some desired end, although it may inflict wanton injury upon another.

3. SAME SUBJECT—DAMAGES.
Where an attachment is levied upon a growing crop of cotton, whereby the tenants and laborers of the plaintiff were so demoralized that they abandoned their crops, from distrust of his ability to carry out his contracts with them for supplies, and the crops were thereby injured, the jury should find their verdict for the actual damages to the crop from this cause, but are not confined to this element, and may assess the damages so as to compensate the plaintiff for the injury; but in no case should this power of the jury operate to make the verdict excessive or oppressive.

4. SAME SUBJECT—EFFECT OF THE JUDGMENT IN ATTACHMENT—EVIDENCE.
Whether the judgment in the attachment suit, in favor of the defendant to that suit, is evidence tending to show want of probable cause, in an action for malicious prosecution, not decided; but it is the only competent proof of the fact that the attachment was ended in favor of the plaintiff in the suit for malicious prosecution, and in this case was confined to that use.

5. NEW TRIAL—OBJECTIONS TO JUROR AFTER VERDICT—NONAGE—NOT FREEHOLDER OR HOUSEHOLDER—SUBSTITUTED JUROR—TENNESSEE PRACTICE.
The objection that one of the jury was not of lawful age, and was not a freeholder or householder, comes too late after verdict, in Tennessee practice, which the federal court follows, unless something more is shown vitiating the verdict than that the juror was so disqualified. And if one appear who is not summoned to serve as a juror, in place of one drawn from the box, it is doubtful if the objection be good after verdict.

6. SAME SUBJECT—FEDERAL PRACTICE—WAIVER OF OBJECTIONS.
The practice of the federal court is to examine each juror as he is called, touching his statutory qualifications, upon his oath, and if he answers satisfactorily, to accept him for the term. But in effect the jury is tendered to the parties in each case as it is successively called for trial, and they must then challenge for cause that a juror is too young, or otherwise similarly disqualified, or the objection will not be entertained after verdict, although the defect was wholly unknown to the parties at the time the jury was sworn.

7. NEW TRIAL—AMENDMENT OF DECLARATION AFTER ARGUMENT BEGUN.
Where the proof had been closed and the argument was in progress, the court allowed the declaration to be amended so as to enlarge the averments in relation to the damages sustained by the plaintiff, and for this error a new trial was granted.

Motion for New Trial. Action for malicious prosecution of an attachment suit.

The plaintiff, in the year 1880 and before, was carrying on a cotton plantation in Arkansas, on the Mississippi river, below Memphis, Tennessee. As usual in that business, he had an arrangement with Richardson & May, of New Orleans, to furnish him money and supplies for the plantation, securing them by a mortgage on his interest in the crops, stock, farming implements, etc. A part of the plantation—about 90 acres—was known as the "Malone Place;" there being 600 acres in cultivation in the whole farm. With the consent of Richardson & May, the plaintiff made an arrangement with the defendants for supplies to be furnished at Memphis, on the security of the crops on the Malone place, and when the account was settled there was a balance due the defendants of about $400.

In the following year, 1881, the plaintiff made another arrange-

ment with Richardson & May for advances and supplies for that year, executing a mortgage as before. This mortgage was sent by Richardson & May to Brewer, to be by him executed and recorded in the county where the land was situated. He did not file it for record immediately, nor until sometime in May or June, when he sent it to the clerk of the county to be recorded, either unsigned or not properly acknowledged, and the clerk did not record it. During the spring the plaintiff desired to make an arrangement with defendants similar to the one he had made before, and, according to defendants' contention, promised to make to them a mortgage on the Malone place, which he told them was not included in the Richardson & May mortgage of that year, and to have the tenants of that place join in the mortgage, as he was to get the supplies for them. According to the plaintiff's contention, he only promised, with Richardson & May's consent, to ship to defendants the cotton grown on the Malone place. The defendants refused, as they contend, to advance on any other terms than security for the old balance as well as new advances, but, under pressure and a promise to send up the mortgage, advanced $75, and agreed to advance $125 additional when the mortgage was made.

The plaintiff drew some small orders, which were refused payment by defendants. The parties became involved in an acrimonious controversy as to the terms of the agreement, the details of which it is not necessary to report, except that the plaintiff tendered a check on Richardson & May for $75, for the money paid him, and offered to abandon the agreement, which was refused for some reason, and afterwards offered, as he contends, a mortgage on cotton-seed, if not included in Richardson & May's mortgage, but ultimately signed a mortgage drawn up by defendants before a notary, which they did not take because of some complaint of a want of Richardson & May's consent.

These negotiations for settlement and compromise, about which there was great conflict in the proof, as well as about the original agreement, all failed. The Richardson & May unexecuted mortgage fell into the hands of defendants, and observing that the Malone place was included in it, the defendants, as they contend, conceived this to be a fraud upon them, and applied to their lawyer, stating the facts and showing the unexecuted mortgage. There was a contention in the proof as to whether all the material facts were stated, but the lawyer advised an attachment. The defendants made the necessary affidavits under the attachment laws of Arkansas that the plaintiff was about to fraudulently convey his property, and on July 16, 1881, the attachment was levied on the growing crops of the plaintiff, cultivated by day labor, on his horses and mules and gin-stands, and by garnishment on the shares of crops due the plaintiff from the croppers on share. The horses and mules were left with the plaintiff by the sheriff, and an agent was appointed to watch the